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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

YEARBOOK

Volume XLVII: 2016

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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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Part Three. Annexes

INTRODUCTION

This is the forty-seventh 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-ninth session, which was held in New York, from 27 June-15 July 2016, 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-ninth 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-ninth session and a list of documents relating to the work of the Commission reproduced in the previous volumes of the *Yearbook.*

UNCITRAL secretariat
Vienna International Centre
P.O. Box 500, 1400 Vienna, Austria
Telephone: (+43-1) 26060-4060 Telefax: (+43-1) 26060-5813
Email: uncitral@un.org Internet: https://www.uncitral.un.org

[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:

Volume	*Years covered*	*United Nations publication Sales No. or document symbol*
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
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VII	1976	E.77.V.1
VIII	1977	E.78.V.7
IX	1978	E.80.V.8
X	1979	E.81.V.2
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XII	1981	E.82.V.6
XIII	1982	E.84.V.5
XIV	1983	E.85.V.3
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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

Volume	*Years covered*	*United Nations publication Sales No. or document symbol*
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
XLIV	2013	A/CN.9/SER.A/2013

Part One

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

THE FORTY-NINTH SESSION (2016)

A. Report of the United Nations Commission on International Trade Law, forty-ninth session (New York, 27 June-15 July 2016) (A/71/17)

[Original: English]

Contents

I. Introduction

1. The present report of the United Nations Commission on International Trade Law (UNCITRAL) covers the forty-ninth session of the Commission, held in New York from 27 June to 15 July 2016.

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-ninth session of the Commission was opened by the Under-Secretary-General for Legal Affairs and Legal Counsel of the United Nations, Mr. Serpa Soares, on 27 June 2016.

B. Membership and attendance

4. The General Assembly, in its resolution 2205 (XXI), established the Commission with a membership of 29 States, elected by the Assembly. By its resolution 3108 (XXVIII) of 12 December 1973, the Assembly increased the membership of the Commission from 29 to 36 States. By its resolution 57/20 of 19 November 2002, the General Assembly further increased the membership of the Commission from 36 States to 60 States. The current members of the Commission, elected on 14 November 2012, 14 December 2012, 9 November 2015, 15 April 2016 and 17 June 2016 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] Argentina (2022), Armenia (2019), Australia (2022), Austria (2022), Belarus (2022), Brazil (2022), Bulgaria (2019), Burundi (2022), Cameroon (2019), Canada (2019), Chile (2022), China (2019), Colombia (2022), Côte d'Ivoire (2019), Czech Republic (2022), Denmark (2019), Ecuador (2019), El Salvador (2019), France (2019), Germany (2019), Greece (2019), Honduras (2019), Hungary (2019), India (2022), Indonesia (2019), Iran (Islamic Republic of) (2022), Israel (2022), Italy (2022), Japan (2019), Kenya (2022), Kuwait (2019), Lebanon (2022), Lesotho (2022), Liberia (2019), Libya (2022), Malaysia (2019), Mauritania (2019), Mauritius (2022), Mexico (2019), Namibia (2019), Nigeria (2022), Pakistan (2022), Panama (2019), Philippines (2022), Poland (2022), Republic of Korea (2019), Romania (2022), Russian Federation (2019), Sierra Leone (2019), Singapore (2019), Spain (2022), Sri Lanka (2022), Switzerland (2019), Thailand (2022), Turkey (2022), Uganda (2022), United Kingdom of Great Britain and Northern Ireland (2019), United States of America (2022), Venezuela (Bolivarian Republic of) (2022) and Zambia (2019).

5. With the exception of Burundi, Colombia, Côte d'Ivoire, Iran (Islamic Republic of), Kenya, Kuwait, Lebanon, Liberia, Malaysia, Mauritania, Pakistan, the Philippines and Poland, all the members of the Commission were represented at the session.

6. The session was attended by observers from the following States: Algeria, Cyprus, Dominican Republic, Finland, Iraq, Netherlands, Peru and Swaziland.

7. The session was also attended by observers from the Holy See and the European Union.

[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, 29 were elected by the Assembly at its sixty-seventh session, on 14 November 2012, one was elected by the Assembly at its sixty-seventh session, on 14 December 2012, 23 were elected by the Assembly at its seventieth session, on 9 November 2015, five were elected by the Assembly at its seventieth session, on 15 April 2016, and two were elected by the Assembly at its seventieth session, on 17 June 2016. 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.

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

(a) *United Nations system*: European Center for Peace and Development (ECPD), International Centre for Settlement of Investment Disputes (ICSID), United Nations Environmental Programme (UNEP) and World Bank;

(b) *Intergovernmental organizations*: the Hague Conference on Private International Law, International Development Law Organization (IDLO), International Institute for the Unification of Private Law (Unidroit), Maritime Organization of West and Central Africa (MOWCA) and Organization for Economic Cooperation and Development (OECD);

(c) *Invited non-governmental organizations*: American Arbitration Association/International Centre for Dispute Resolution (AAA/ICDR), American Bar Association (ABA), American Society of International Law (ASIL), Asia-Pacific Regional Arbitration Group (APRAG), Association Suisse de l'Arbitrage (ASA), Center for International Dispute Settlement (CIDS), China Society of Private International Law (CSPIL), Commercial Finance Association (CFA), European Law Students' Association (ELSA), Factors Chain International and the EU Federation for Factoring and Commercial Finance (FCI+EUF), Forum for International Conciliation and Arbitration (FICACIC), Grupo Latinoamericano de Abogados para el Derecho del Comercio Inernational (GLULACI), Institute of Commercial Law/Penn State Dickinson School of Law, Inter-American Commercial Arbitration Commission (IACAC), Inter-Pacific Bar Association (IPBA), International Bar Association (IBA), International Chamber of Commerce (ICC), International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry (ICAC), International Council for Commercial Arbitration (ICCA), International Institute for Conflict Prevention and Resolution (CPR), International Road Transport Union (IRU), International Women's Insolvency and Restructuring Confideration (IWIRC), Jerusalem Arbitration Center (JAC), London Court of International Arbitration (LCIA), Moot Alumni Association (MAA), National Law Center for Inter-American Free Trade (NLCIFT), New York State Bar Association (NYSBA), Pace Institute of International Commercial Law (PIICL), Regional Centre for International Commercial Arbitration (Lagos, Nigeria) (RCICAL), Universitat de Les Illes Balears (CEDIB), World Association of Former United Nations Interns and Fellows (WAFUNIF) and Wuhan University Institute of International Law (WHU).

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:

Chair:	Mr. Gaston KENFACK DOUAJNI (Cameroon)
Vice-Chairs:	Mr. Rodrigo LABARDINI FLORES (Mexico) Mr. David MÜLLER (Czech Republic) Mr. Michael SCHNEIDER (Switzerland)
Rapporteur:	Mr. Jeffrey CHAN (Singapore)

D. Agenda

11. The agenda of the session, as adopted by the Commission at its 1024th meeting, on 27 June, 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 security interests:
   (a) Finalization and adoption of a draft Model Law on Secured Transactions;
   (b) Consideration of the draft Guide to Enactment of the draft Model Law on Secured Transactions;
   (c) Possible future work in the area of security interests;
   (d) Coordination and cooperation.
5. Consideration of issues in the area of arbitration and conciliation:
   (a) Finalization and adoption of the revised UNCITRAL Notes on Organizing Arbitral Proceedings;
   (b) Progress report of Working Group II;
   (c) Establishment and functioning of the transparency repository;
   (d) Possible future work in the area of arbitration and conciliation;
   (e) Secretariat Guide on the New York Convention;
   (f) International commercial arbitration and mediation moot competitions.
6. Consideration of issues in the area of online dispute resolution: finalization and adoption of Technical Notes on Online Dispute Resolution.
7. Micro-, small- and medium-sized enterprises: progress report of Working Group I.
8. Consideration of issues in the area of electronic commerce:
   (a) Progress report of Working Group IV;
   (b) Future work in the area of electronic commerce;
   (c) Cooperation with UN/ESCAP in the field of paperless trade.
9. Insolvency law: progress report of Working Group V.
10. Technical assistance to law reform:
    (a) General;
    (b) Consideration of a draft guidance note on strengthening United Nations support to States, upon their request, to implement sound commercial law reforms.
11. Promotion of ways and means of ensuring a uniform interpretation and application of UNCITRAL legal texts:
    (a) Case Law on UNCITRAL texts (CLOUT);
    (b) Digests of case law relating to 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. Work programme of the Commission.
17. Congress 2017.
18. Relevant General Assembly resolutions.

19. Other business.

20. Date and place of future meetings.

21. Adoption of the report of the Commission.

E. Adoption of the report

12. The Commission adopted the present report by consensus at its 1033rd meeting, on 1 July, at its 1039th meeting, on 8 July, and at its 1046th meeting, on 15 July 2016.

III. Consideration of issues in the area of security interests

A. Finalization and adoption of a draft Model Law on Secured Transactions

1. Introduction

13. The Commission recalled that, at its forty-sixth session, in 2013,[2] it had confirmed its decision taken at its forty-fifth session in 2012, that Working Group VI (Security Interests) should prepare a model law on secured transactions (the "draft Model Law") based on the recommendations of the *UNCITRAL Legislative Guide on Secured Transactions* (the "Secured Transactions Guide")[3] and consistent with all texts prepared by the Commission on secured transactions, including the *United Nations Convention on the Assignment of Receivables in International Trade* (New York, 2001) (the "Assignment Convention"),[4] the *Supplement on Security Rights in Intellectual Property* (the "Intellectual Property Supplement"),[5] and the *UNCITRAL Guide on the Implementation of a Security Rights Registry* (the "Registry Guide").[6]

14. In addition, the Commission recalled that, at its forty-seventh session, in 2014, it had acknowledged the importance of modern secured transactions law for the availability and cost of credit and the need for urgent guidance to States, in particular those with developing economies and economies in transition, and had requested the Working Group to expedite its work so as to complete the draft Model Law, including the definitions and provisions on non-intermediated securities, and to submit it to the Commission for adoption as soon as possible.[7]

15. Moreover, the Commission recalled that, at its forty-eighth session in 2015, it had approved the substance of article 26 of chapter IV of the draft Model Law and articles 1 to 29 of the draft Registry Act (see A/CN.9/852), and had requested the Working Group to expedite its work so as to submit the draft Model Law to the Commission for final consideration and adoption at its forty-ninth session in 2016.[8]

16. At its current session, the Commission had before it the reports of the twenty-eighth and twenty-ninth sessions of the Working Group (A/CN.9/865 and A/CN.9/871, respectively), as well as notes by the Secretariat entitled "Draft Model Law on Secured Transactions" (A/CN.9/884 and addenda 1-4, including the "draft Model Registry-related Provisions" contained in A/CN.9/884/Add.1), "Draft Guide to Enactment of the draft Model Law on Secured Transactions" (A/CN.9/885 and addenda 1-4) and "Draft Model Law on Secured Transactions: Compilation of comments by States" (A/CN.9/886, A/CN.9/887 and A/CN.9/887/Add.1). In addition, the Commission noted with appreciation that, at its twenty-eighth and twenty-ninth sessions, the Working Group adopted the draft Model Law

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[2] *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17* (A/68/17), paras. 194 and 332.

[3] United Nations publication, Sales No. E.09.V.12.

[4] General Assembly resolution 56/81, annex. Also available as United Nations publication, Sales No. E.04.V.14.

[5] United Nations publication, Sales No. E.11.V.6.

[6] United Nations publication, Sales No. E.14.V.6.

[7] *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 163.

[8] Ibid., *Seventieth Session, Supplement No. 17* (A/70/17), paras. 214 and 216.

(A/CN.9/865 and A/CN.9/871) and, at its twenty-ninth session, decided to submit it to the Commission for consideration and adoption at its forty-ninth session (A/CN.9/871, para. 91).

2. Consideration of the draft Model Law (A/CN.9/884 and Addenda 1-4)

Chapter I. Scope of application and general provisions

17. With respect to article 1, it was agreed that paragraph 2 should be revised to: (a) refer to articles 70-80 (see para. 80 below); (b) include the words "by agreement" after the word "receivables" to clarify that the draft Model Law only applied to outright transfers of receivables by agreement and not by law; and (c) delete the text in square brackets, since it referred to terminological issues that were left to article 2. It was also agreed that paragraph 4 should be retained outside square brackets.

18. With respect to article 2, it was agreed that: (a) in the definition of the term "bank account", reference should be made only to "authorized deposit-taking institution"; (b) in the definition of the term "competing claimant", the square bracketed words "[to be specified by the enacting State]" should be deleted, while the draft Guide to Enactment of the draft Model Law (the "draft Guide to Enactment") should give examples of other creditors of the grantor that could have a right in the same encumbered asset; (c) in the definition of the term "debtor of the receivable", the reference to a "transferor in an outright transfer" should be deleted; (d) in the definition of the term "default", the text that appeared within square brackets should be revised to read along the following lines: "and any other event that under the terms of an agreement between the grantor and the secured creditor constitutes default" and be retained outside square brackets; (e) at the end of the definition of the term "encumbered asset", the words "by agreement" should be added in line with the Commission's decision on article 1, paragraph 2 (see para. 17 above) and the text should be retained outside square brackets; (f) in subparagraph (ii) of the definition of the term "grantor", the words "lessee or licensee" should be deleted, and in subparagraph (iii) the word "in" should be replaced with the word "under" and the words "by agreement" should be included at the end (same changes should be made to the definitions of the terms "secured creditor" and "security right"); (g) the definition of the term "insolvency representative" should be deleted, since the term only appeared in the definition of the term "competing claimant", and that term together with other relevant insolvency terms could be briefly explained in the draft Guide to Enactment; (h) in the definition of the term "inventory", reference should be made to "raw materials and work-in-process", and not to "semi-processed materials"; (i) the term "movable asset" should be defined along the following lines: "'movable asset' means a tangible or intangible asset other than immovable property [as defined in the law of the enacting State]"; (j) in the definition of the term "possession", the words "directly or indirectly" should be deleted as they were redundant; (k) the term "registry" should be defined along the following lines: "'registry' means the registry established under article 27 of this Law"; (l) in the definition of the term "secured obligation", the second sentence should be deleted and the draft Guide to Enactment should explain that there was no secured obligation in an outright transfer of a receivable; (m) the bracketed text in the definitions of the term "security agreement" and "security right" should be retained outside square brackets; (n) in the definition of the term "tangible asset", reference should be made to subparagraph (l) instead of subparagraph (k) and, in addition, to article 31; and (o) the term "writing" should be defined along the lines of recommendation 11 of the Secured Transactions Guide.

19. After discussion, the Commission adopted articles 1 and 2 subject to the above-mentioned changes and articles 3-5 unchanged (for subsequent changes made to art. 3, see paras. 96-98, and for subsequent changes made to art. 2, subpara. (t), see para. 100 below).

Chapter II. Creation of a security right

20. With respect to the heading of section "A. General rules" of chapter II, it was agreed that, to address the relationship between the general and the asset-specific provisions in each chapter, a footnote should be added at the beginning of chapter II that would read along the following lines: "In this chapter and all other chapters, the general rules are subject to the asset-specific rules. The enacting State may wish to include in its law a provision reflecting

this principle or otherwise address the relationship between general and asset-specific provisions".

21. With respect to article 6, it was agreed that, to better reflect its content, its heading should be changed to read along the following lines: "Creation of a security right and requirements for a security agreement". (For an additional amendment made to art. 6, see para. 24 below).

22. With respect to article 7, it was agreed that it should be revised to read along the following lines: "A security right may secure one or more obligations of any type, …".

23. With respect to article 8, subparagraph (a), it was agreed that the reference to future assets should be deleted as article 6, paragraph 2, already provided that a security agreement might provide for the creation of a security right in a future asset, but the security right was created only when the grantor acquired rights in that future asset or the power to encumber it.

24. With respect to article 9, it was agreed that it should be revised to apply the same standard to the description of secured obligations, and thus to: (a) refer to secured obligations in the heading and in paragraph 1; and (b) include a third paragraph that would read along the following lines: "A description of secured obligations that indicates that the security right secures all obligations owed to the secured creditor at any time satisfies the standard in paragraph 1". In addition, it was agreed that it was sufficient to refer in paragraph 1 to encumbered assets, rather than "assets encumbered or to be encumbered". Moreover, it was agreed that in article 6, paragraph 3(b), a reference should be included to the description of a secured obligation "as provided in article 9".

25. With respect to article 10, it was agreed that reference should be made to "money or funds", rather than to "assets" or "proceeds", and to the "amount", rather than to the "value", of money or funds. While the Commission initially agreed to also cover in article 10 money or funds as original encumbered assets, and not just as proceeds, it ultimately decided not to do it because: (a) commingling of money or funds as an original encumbered asset was rare in practice; (b) if the matter was addressed in article 10, it would also have to be addressed in the chapter on third-party effectiveness and priority; and (c) the matter could be addressed in the draft Guide to Enactment (by explaining, for example, that the term "proceeds" as defined in art. 2, subpara. (bb), covered situations where funds in a bank account were moved to another bank account, even at the instigation of the deposit-taking institution, and thus art. 10, para. 2, applied to those situations, as the funds in the second bank account were "proceeds").

26. With respect to article 11, it was agreed that paragraph [3][4] should be deleted as the matter was better addressed in article 32, paragraphs 2 and 3. While support was expressed in favour of option A and option B, the concern was also expressed that they were difficult to administer as they presupposed an evaluation of tangible assets before commingling which was said to be rare in practice. In order to address that concern, a third option was proposed. After discussion, the Commission postponed consideration of article 11 until it had a proposal possibly combining the elements of all options into one rule (see para. 99 below).

27. With respect to article 12, it was agreed that it should be revised to provide that a security right would be extinguished when all secured obligations had been discharged and there were no outstanding commitments to extend credit secured by the security right.

28. With respect to article 13, it was agreed that: (a) for reasons of consistency with article 9 of the Assignment Convention and because they were unnecessary, the words "as between the grantor and the secured creditor and as against the debtor of the receivable" in paragraph 1 should be deleted; (b) as the meaning of the term "subsequent" was not clear (because, unlike the Assignment Convention which defined the term "subsequent assignment" in art. 2, subpara. (b), the draft Model Law did not contain a definition of the term "subsequent security right") and on the understanding that the meaning of paragraph 1 would not change, reference should be made to "any" secured creditor rather than to any "subsequent" secured creditor; and (c) also for reasons of consistency with article 9 of the Assignment Convention and to avoid giving the impression that paragraph 3 limited the

protection provided to secured creditors with the last part of paragraph 2, paragraph 3 should be merged into paragraph 2.

29. With respect to article 14, it was agreed that: (a) for reasons of consistency with article 10 of the Assignment Convention, paragraph 2 should be merged into paragraph 1; (b) for the same reason but also to avoid giving the impression that the draft Model Law dealt with the question of whether a right securing or supporting an encumbered receivable should be transferred with or without a new act of transfer, the words "under the law governing it" should be added in paragraph 2 to qualify the word "transferable".

30. After discussion, the Commission adopted articles 6 to 14 subject to the changes mentioned above (for changes made to art. 11 see also para. 99 below) and articles 15 to 17 unchanged.

Chapter III. Effectiveness of a security right against third parties

31. With respect to article 18, further to its decision to include in article 2 a definition of the term "registry" (see para. 18, subpara. (k) above), the Commission agreed that article 18 should be revised to refer to the "Registry", rather than to the "general security rights registry". It was also agreed that the footnote to article 18, paragraph 1, should be moved to the definition of the term "registry" and clarify that, if the enacting State implemented the UNCITRAL Model Law on Secured Transactions and the Model Registry-related Provisions contained therein in one law, it would need to include a definition of the term "registry" only once, rather than twice, as was currently the case in the draft Model Law and the draft Model Registry-related Provisions because of the assumption that they might be implemented in separate statutes or other types of instrument.

32. With respect to article 19, it was agreed that reference should be made in both paragraphs 1 and 2 to a security right in proceeds arising under article 10, so as to cover the point that the security right extended only to "identifiable" proceeds. As a result, it was agreed, the reference to the identifiability of the proceeds in paragraph 2 would be redundant and should thus be deleted.

33. The Commission noted that, while the draft Model Law dealt in article 11 with the creation of a security right in tangible assets commingled in a mass or product and in article 40 with the priority of such a security right, there was no article in the draft Model Law dealing with the third-party effectiveness of such a security right. Thus, the Commission agreed that a new article should be inserted in this part of the draft Model Law to implement recommendation 44 of the Secured Transactions Guide that should read along the following lines: "If a security right in a tangible asset is effective against third parties, a security right in a mass or product to which the security right extends under article 11 is effective against third parties without any further act".

34. With respect to article 22, it was agreed that the reference to a change of the applicable law as a result of a change in the location of the asset or the grantor should be deleted, since under chapter VIII of the draft Model Law the applicable law could change as a result, for example, of a change in the location of the depositary institution maintaining the relevant account. For that reason but also for reasons of clarity, it was agreed that paragraph 1 should be revised to read along the following lines: "If a security right is effective against third parties under the law of another State and this Law becomes applicable, the security right remains effective against third parties under this Law if it is made effective against third parties in accordance with this Law before the earlier of: (a) …; and (b) The expiry of [a short period of time to be specified by the enacting State] after this Law becomes applicable".

35. With respect to article 23, it was agreed that option A should be deleted and option B should be revised to read along the following lines: "An acquisition security right in consumer goods with an acquisition price below [an amount to be specified by the enacting State] is effective against third parties other than a buyer, lessee or licensee upon its creation without any further act" (see para. 102 below for subsequent changes to the agreed text). It was also agreed that, for that rule to make sense, the draft Guide to Enactment should clarify that States should specify a reasonably high price. It was also agreed that there was no need to refer to a transferee other than a buyer, as the term "transferee" could cover a donee to whom article 23 should not apply.

36. The concern was, however, expressed that qualifying the third-party effectiveness of a security right by a reference to certain third parties was in essence a priority rule providing that buyers acquired consumer goods free of acquisition security rights made effective against third parties under article 23. It was also stated that introducing a relative concept of third-party effectiveness would be inconsistent with the approach taken in the draft Model Law which referred to effectiveness against all third parties (without regard to who the third party was) and distinguished third-party effectiveness from priority. After discussion, the Commission postponed consideration of article 23 until it had the opportunity to consider a proposal with respect to a priority rule that would address that concern (see paras. 102-104 below).

37. With respect to article 25, it was agreed that paragraph 3 should be revised to also refer to the return of "the assets covered by the document", not only to "dealing with the assets", while the draft Guide to Enactment should explain that the words "dealing with the assets" covered not only transactions like sale and exchange but also physical actions like loading and unloading.

38. After discussion, the Commission adopted articles 18, 19, 22, 23 and 25 subject to the above-mentioned changes (for art. 23, see also paras. 102-104 below) and articles 20, 21, 24 and 26 unchanged. The Commission also adopted the new article on the third-party effectiveness of a security right in tangible assets commingled in a mass or product that would follow article 19 (see para. 33 above).

Chapter IV. The registry system

39. With respect to article 27, it was agreed that its heading should be revised to read along the following lines: "Establishment of the Registry". Subject to that change, the Commission adopted article 27.

Draft Model Registry-related Provisions

40. The Commission agreed that the draft Model Registry-related Provisions should be called "Model Registry Provisions".

41. With respect to article 1 of the draft Model Registry-related Provisions, it was agreed that the definition of the term "registered notice" and the numbers of all subsequent paragraphs should be retained outside square brackets.

42. With respect to article 5 of the draft Model Registry-related Provisions, it was agreed that reference should be made in paragraph 4 to access "to registry services". It was also agreed that the draft Guide to Enactment should explain that, with respect to initial notices, a registrant would normally meet any secured access requirements in the context of identifying itself (which could include setting up a user account; see the Registry Guide, para. 96), as provided in paragraph 1(b).

43. With respect to article 6 of the draft Model Registry-related Provisions, it was agreed that, for reasons of clarity and avoiding that the Registry would be obliged to accept a notice or a search request if some but not all information was legible, paragraphs 1(a) and 2 should be revised to read along the following lines respectively: "A notice if no information is entered in one of the mandatory designated fields or information entered in one of the mandatory designated fields is illegible" and "The Registry must reject a search request if no information is entered in one of the fields designated for entering a search criterion or information entered in one of the fields designated for entering a search criterion is illegible".

44. With respect to article 8 of the draft Model Registry-related Provisions, it was agreed that the reference to article 9 of the draft Model Registry-related Provisions should be placed before the reference to additional grantor information, as article 9 did not deal with such additional information.

45. With respect to article 11 of the draft Model Registry-related Provisions, it was agreed that, in view of the Commission's decisions with respect to article 9 of the draft Model Law (see para. 24 above): (a) in paragraph 1, reference should be made to "encumbered assets" rather than to "assets encumbered or to be encumbered"; and (b) in paragraph 2, reference should be made to a "generic" rather than to a "particular" category of assets.

46. With respect to article 15 of the draft Model Registry-related Provisions, it was agreed that, for reasons of clarity, paragraph 2(b) should be revised to read along the following lines: "if that person knows that the address has changed, at the most recent address if known or reasonably available to that person".

47. With respect to article 20 of the draft Model Registry-related Provisions, it was agreed that: (a) paragraphs 1(a), 2(a) and 3(a)(i) should be revised to refer to the secured creditor having been informed, rather than knowing, that the grantor would not authorize a registration, as the latter would be almost impossible; (b) a new paragraph 1(c) should be included to read along the following lines: "The grantor authorized the registration of a notice covering those assets but the authorization has been withdrawn and no security agreement covering those assets has been concluded"; and (c) paragraph 4 should also include a reference to the new paragraph 1(c).

48. With respect to article 24 of the draft Model Registry-related Provisions, it was agreed that the draft Guide to Enactment should explain the words "except to the extent it seriously misled third parties that relied on the erroneous information in the registered notice" in paragraph 6 along the lines they were explained in the Registry Guide (see paras. 215 and 217-220 of the Registry Guide). (For changes made to art. 24, paras. 6 and 7, see paras. 105-107 below.)

49. With respect to article 27 of the draft Model Registry-related Provisions, it was agreed that the draft Guide to Enactment should explain that the duties of the registrar would be determined by the relevant supervising authority in a law, regulation or other act implementing the Model Registry-related Provisions.

50. With respect to article 30, option A, paragraph 1, of the draft Model Registry-related Provisions it was agreed that reference should be made to "article 19, including any cancellation notice registered in accordance with article 20, paragraph 3 or 7", in order to avoid inadvertently creating the impression that, before removing any information from the public registry record, the Registry would need to check and ensure that a cancellation notice met the conditions of article 20, paragraph 3 or 7.

51. After discussion, the Commission adopted articles 1, 5, 6, 8, 11, 15, 20 and 30 of the draft Model Registry-related Provisions subject to the above-mentioned changes and articles 2-4, 7, 9, 10, 12-14, 16-19, 21-23, 27-29 and 31-33 of draft Model Registry-related Provisions unchanged (for changes made to arts. 24-26 of the draft Model Registry-related Provisions, see paras. 105-110 below).

Chapter V. Priority of a security right

52. The Commission considered and adopted with some modifications a proposal for revised versions of articles 28, 30, 31, 36 and 39.

53. With respect to article 28, it was agreed that paragraphs 1 and 3 should be revised along the following lines to track more closely recommendation 76 of the Secured Transactions Guide:

> "Subject to articles 31, 36, 37 and 39-41, priority between competing security rights created by the same grantor in the same encumbered asset is determined according to the following rules:
>
> "(a) As between security rights that were made effective against third parties by registration of a notice in the Registry, priority is determined by the order of registration, without regard to the order of creation of the security rights;
>
> "(b) As between security rights that were made effective against third parties otherwise than by registration of a notice in the Registry, 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 of a notice in the Registry, priority is determined by the order of registration or third-party effectiveness, whichever occurs first."

54. It was also agreed that the draft Guide to Enactment should explain the application of that rule in cases in which the secured creditor registered a notice and in addition took actions necessary to achieve third-party effectiveness of its security right by another means. It was further agreed that paragraph 2 of article 28, dealing with security rights created by different grantors, should be set out in a separate article.

55. With respect to article 29, it was agreed that it should refer to the "time when", rather the "time period during which" the security right was not effective against third parties.

56. With respect to article 30, it was agreed that it should be made subject to article 39 and revised along the lines proposed to refer to a security right in proceeds of an encumbered asset having the same priority over a competing security right as the security right in the encumbered asset from which the proceeds arose (see para. 61 below).

57. With respect to article 31, it was agreed that it should be revised along the lines proposed and coordinated with article 11 (see para. 101 below).

58. With respect to article 35, it was agreed that: (a) in paragraph 1, the words "the rights of acquisition secured creditors in accordance with" were unnecessary and should be thus deleted; (b) in paragraph 2, the words "or at the same time" should be retained outside square brackets to address the situation where the time when a security right became effective in future assets coincided with the time when a judgement creditor took the steps referred to in paragraph 1; and (c) paragraph 2(a) should be revised to read along the following lines: "Before the secured creditor received a notice from the judgement creditor that the judgement creditor has taken the steps referred to in paragraph 1, or within [a short period of time to be specified by the enacting State] thereafter".

59. With respect to article 36, it was agreed that it should be revised along the lines proposed to address: (a) in paragraph 1, the priority of an acquisition security right in equipment, or in intellectual property or rights of a licensee under a licence of intellectual property primarily used or intended to be used by the grantor in the operation of its business; (b) in paragraph 2, the priority of an acquisition security right in inventory, or in intellectual property or rights of a licensee under a licence of intellectual property held by the grantor for sale or licence in the ordinary course of the grantor's business; and (c) in paragraph 3, the priority of an acquisition security right in consumer goods, or in intellectual property or rights of a licensee under a licence of intellectual property used or intended to be used by the grantor primarily for personal, family or household purposes.

60. With respect to article 37, it was agreed that the words "of a secured creditor other than a seller or lessor, or a licensor of intellectual property" should be deleted, as they were either stating the obvious or were confusing to the extent that they could be read to suggest that there might be more than one seller, lessor or licensor. It was also agreed that the draft Guide to Enactment should explain that an acquisition security right of a seller, lessor or licensor would have priority over all competing security rights held by other types of creditor.

61. With respect to article 39, it was agreed that it should be revised to set out along the lines proposed: (a) in paragraph 1, the rule that a security right in proceeds of an asset that was the subject of an acquisition security right had the same priority over a competing security right that the acquisition security right in the asset from which the proceeds arose had under article 36; and (b) in paragraph 2, the special rules for proceeds of inventory (priority to be determined in accordance with art. 28, if the proceeds were in the form of receivables, etc., and otherwise in accordance with art. 36).

62. With respect to article 49, paragraph 5, it was agreed that the draft Guide to Enactment should explain that, unlike articles 44, paragraph 2, and 47, paragraph 3, which provided a substantive rule for transferees of encumbered negotiable instruments and negotiable documents to acquire their rights free of the security right, article 49, paragraph 5, essentially referred the matter to other law mainly because, with respect to non-intermediated securities, the matter was more complex, and legal systems diverged more widely than with respect to negotiable instruments and negotiable documents.

63. In line with the approach taken in the other chapters of the draft Model Law, it was agreed that the heading of chapter V ("priority") did not need to be repeated in the heading of each article.

64. After discussion, the Commission adopted articles 28-30, 35-37 and 39 subject to the above-mentioned changes and articles 33-34, 38 and 40, 41 and 43-49 unchanged (for changes made to art. 31, see para. 101 below; for changes made to art. 32, see para. 103 below; and for changes made to art. 42, see para. 107 below).

Chapter VI. Rights and obligations of the parties and third-party obligors

65. With regard to article 51 and article 53, paragraph 1(a), it was agreed that the reference to "value" should be deleted, since reasonable care to preserve an encumbered asset would also result in preserving its value; and where preserving the value of an asset would be beyond the control of the person in possession, such a duty would be impossible for the person in possession to perform. It was also agreed that the draft Guide to Enactment could explain that the obligation to preserve both the encumbered asset and its value could arise under article 4, according to which parties should act in good faith and in a commercially reasonable manner.

66. With respect to article 52, it was agreed that, upon extinguishment of a security right, the encumbered assets ought to be returned to the grantor "or a person designated by the grantor" (see also para. 111 below). It was also agreed that the draft Guide to Enactment should explain that: (a) in some jurisdictions, the return to a person designated by the grantor would be viewed as a "return to the grantor"; and (b) the return of encumbered assets to a person designated by the grantor should take place only with the agreement of the secured creditor and in a commercially reasonable manner, and the grantor should bear the costs of such a return.

67. With respect to article 54, it was agreed that, in paragraph 1, reference should be made to a "written" request, and to a transferee under an outright transfer of a receivable by agreement (see para. 17, subpara. (b), above).

68. With respect to article 57, it was agreed it should be aligned more closely with article 14 of the Assignment Convention, on which article 57 was based.

69. With respect to article 59, paragraphs 2(a) and (b), it was agreed that reference should be made to the "contract giving rise to the receivable", rather than to the "original contract", as the term "original contract" was not defined in the draft Model Law (the same change should be made in art. 61, para. 1, and in the heading of art. 64).

70. With respect to article 60, it was agreed that, in paragraph 4, reference should be made to "a security right in a receivable created in favour of a secured creditor by the initial or any other secured creditor" rather than to "a subsequent security right", which was a term that was not defined in the draft Model Law (the same change should be made in art. 61, paras. 5 and 8), and at the end the words "in that receivable" should be added for more clarity.

71. After discussion, the Commission adopted articles 51-54, 57, 59-61 and 64 subject to the above-mentioned changes (for subsequent changes to art. 52, see para. 111 below) and articles 50, 55, 56, 58, 62-63 and 65-69 unchanged.

Chapter VII. Enforcement of a security right

72. With respect to article 72, it was agreed that: (a) both options should be set out in full and retained for each enacting State to choose the option that best fit its legal system; (b) to also cover co-owners of encumbered assets who would not be covered by the term "competing claimant", option A should be revised to refer to "the grantor, any other person with a right in the encumbered asset or the debtor"; and (c) option B should cover people who did not have a right in the encumbered asset (e.g. the insolvency representative in some jurisdictions) and be qualified to somehow narrow the number of people that could be covered by being considered as "affected" by the non-compliance of another person with the provisions of chapter VII.

73. With respect to article 74, paragraph 2, it was agreed that it should be deleted, as it subjected the rights of a higher-ranking secured creditor to rights granted by a lower-ranking secured creditor and was thus inconsistent with article 79, paragraphs 2 and 4.

74. With respect to article 75, it was agreed that: (a) paragraph 1 should be revised to provide that the secured creditor could obtain possession "either by applying or without

applying" to a court or other authority; (b) paragraph 2 should be deleted as it did not refer to any specific conditions and the conditions of the civil procedure law of the enacting State would apply anyway; and (c) paragraph 4 should be retained but the words "or is of a kind sold on a recognized market" should be deleted, as they were unclear and not applicable in the context of the procedure for obtaining possession of the encumbered assets.

75. With respect to article 76, it was agreed that: (a) to align the chapeau of paragraph 4 with the wording of paragraphs 2 and 3, reference should be made to the decision of the secured creditor to "exercise the right provided in paragraph 1"; (b) to avoid confusion with the term "notice of the secured creditor's intention" used in the chapeau of paragraph 4, in paragraph 4(b), the word "notifies" should be replaced with the word "informs"; (c) for reasons of clarity, paragraphs 5-8 should refer to the notice referred to in paragraph 4. It was also agreed that the draft Guide to Enactment should explain that: (a) the period of time referred to in paragraphs 4(b) and 4(c) should be very brief; and (b) the fact that paragraph 8 did not require a notice for the out-of-court sale of an asset that was of a kind sold on a recognized market did not mean that a notice was not required for an out-of-court sale of a controlling stake in a company.

76. In that connection, the Commission considered a proposal that article 76, paragraph 7, should be amended to allow a notice to be sent to recipients other than the grantor in the language of the relevant Registry. That proposal was objected to. It was widely felt that such a safe harbour rule would apply only to some of the recipients of the notice of the secured creditor's intention to sell an encumbered asset out of court and would create uncertainty as the meaning of the term "relevant Registry" was not clear.

77. With respect to article 77, it was agreed that: (a) to better reflect its content, its heading should be revised to read along the following lines: "Distribution of the proceeds of a disposition of an encumbered asset and debtor's liability for any deficiency"; (b) in paragraph 2(a), the word "net" should be deleted as the remaining words clarified the meaning of "net proceeds"; and (c) in paragraph 3, the word "shortfall" should be replaced with the word "amount". It was also agreed that the draft Guide to Enactment should explain that: (a) the distribution of proceeds would require that the secured creditor report and provide an account to the grantor, the debtor and any subordinate competing claimant; and (b) any amount owing to the secured creditor after application of the net proceeds to the secured obligation would be an amount owing after deduction of any amount owing to the grantor by the secured creditor.

78. With respect to article 78, it was agreed that: (a) for reasons of consistency, the text of paragraph 3 should be coordinated with the equivalent text of article 76, paragraph 5(b); (b) for reasons of clarity, paragraph 4 should be revised and set out in two separate paragraphs; and (c) for reasons of clarity and precision, reference should be made in the new paragraph 5 to "consent in writing", rather than to "affirmative consent".

79. With respect to article 79, it was agreed that: (a) in paragraphs 1 and 2, the words "except rights that have priority over the right of the enforcing secured creditor" should be deleted and the remaining text in square brackets should be recast as a question for the enacting State (using words along the lines of the words "whether or not"); and (b) in paragraph 5, the words "provided that it had no knowledge of a violation of the provisions of this chapter that materially prejudiced the rights of the grantor or another person" should be retained outside square brackets.

80. With respect to article 81, it was agreed that: (a) in line with the Commission's decision with respect to article 1 (see para. 17, subpara. (b), above), in paragraph 1, reference should be made to an outright transfer "by agreement", and the words "before or after default of the transferor" that were not relevant in the case of an outright transfer should be replaced with words along the following lines: "at any time after payment becomes due"; and (b) in view of the Commission's decision that articles 70-80 should not apply to outright transfers (see, para. 17, subpara. (a), above), paragraphs 3 and 5 of article 80 should be reiterated in article 81 to ensure that they would apply to outright transfers.

81. After discussion, the Commission adopted articles 72, 74-79 and 81 subject to the above-mentioned changes and articles 70-71, 73 and 80 unchanged.

Chapter VIII. Conflict of laws

82. With respect to article 83, it was agreed that: (a) to cover priority conflicts with the rights of any competing claimant, in paragraph 2, reference should be made to "the right of a competing claimant", rather than to "a competing security right made effective against third parties by another method"; and (b) paragraph 4(a) should be deleted as it simply restated the *lex situs* rule of paragraph 1.

83. With respect to article 85, it was agreed that, for reasons of clarity, it should be revised to read along the following lines: "either arises from the sale or lease of immovable property or is secured by immovable property". In that connection, the Commission considered but did not adopt a proposal to limit the application of article 85 to receivables secured by immovable property identified or identifiable in the contract that gave rise to the receivable. It was stated that, with that revision, it would be easier for the secured creditor to find out that a receivable in which it had a security right was secured by immovable property and, as a result, a different law would apply to its security right in the receivable. It was widely felt, however, that the rule in article 85 was appropriate and should apply to all receivables secured by immovable property.

84. With respect to article 86, it was agreed that the law applicable to the enforcement of a security right in a tangible asset should be the law of the State in which the encumbered asset was located at the time of commencement of enforcement, and thus the reference to the law of the State in which enforcement took place should be deleted.

85. With respect to article 89, paragraph 1(b), it was agreed that the draft Guide to Enactment should explain the meaning of the words "the time the issue arises" with illustrations. It was stated, for example, that: (a) the issue of the priority of a security right over the rights of the grantor's insolvency representative would arise when the insolvency proceedings commenced; (b) the issue of the priority of a security right as against another security right would arise when the acts that gave rise to the priority conflict arose; and (c) an issue would arise in litigation upon commencement of the litigation proceedings.

86. With regard to article 93, it was agreed that it should be revised to conform more closely to recommendation 217 of the Secured Transactions Guide.

87. With respect to article 97, it was agreed that option C should be retained, while options A and B should be deleted. It was widely felt that option C stated a clear and simple rule that would apply to all issues, distinguishing only between debt and equity securities, and preventing the secured creditor from manipulating the applicable law by moving certificated securities from State to State.

88. With respect to article 98, it was agreed that it should be revised to read along the following lines: "If the law applicable to an issue is the law of a State that comprises one or more territorial units each of which has its own rules of law in respect of that issue: (a) any reference in the provisions of this chapter to the law of a State means the law in force in the relevant territorial unit; and (b) the internal conflict of laws rules of that State, or, in the absence of such rules, of that territorial unit determine the relevant territorial unit whose substantive law is to apply". It was also agreed that, as it was not an asset-specific rule, article 98 should be moved to the end of section A of chapter VIII that contained general rules.

89. With respect to the headings of the provisions in chapter VIII, in line with the Commission's decision not to include the chapter title in the title of each article (see para. 63 above), it was agreed that the words "Law applicable" should be deleted from the headings of the provisions in chapter VIII.

90. After discussion, the Commission adopted articles 83, 85, 86, 93, 97 and 98 subject to the above-mentioned changes and articles 82, 84, 87, 88-92 and 94-96 unchanged.

Chapter IX. Transition

91. With respect to article 100, paragraph 1(a), it was agreed that the reference to "the law applicable under the conflict-of-laws rules of the enacting State" should be retained outside square brackets.

92. With respect to article 103, it was agreed that a paragraph 5 should be added that would read along the following lines: "If a prior security right referred to in paragraph 2 was made effective against third parties by registration under prior law, the time of registration under prior law is the time to be used for the purposes of applying the priority rules of this Law that refer to the time of registration of a security right".

93. With respect to article 104, it was agreed that paragraph 1 should be deleted as it might be inconsistent with article 103, paragraph 2, its wording might be unclear, and article 103, as modified, already addressed comprehensively the transitional rules for determining the time of third-party effectiveness of prior security rights for the purposes of applying the priority provisions of the draft Model Law.

94. After discussion, the Commission adopted articles 100, 103 and 104 subject to the above-mentioned changes and articles 99, 101, 102 and 105 unchanged.

Miscellaneous provisions

95. The Commission resumed its discussion of article 2, subparagraph (t), and articles 3, 11, 23, 31, 32, 42 and 52 of the draft Model Law, as well as article 24, paragraph 6, and articles 25 and 26 of the draft Registry-related Provisions.

96. With respect to article 3, it was suggested that a new paragraph should be added to read along the following lines: "Nothing in this Law affects any agreement to the use of alternative dispute resolution, including arbitration, mediation, conciliation and online dispute resolution". Strongly held differing views were expressed.

97. One view was that the proposed text should not be included in article 3. It was stated that that text was either superfluous as it stated the obvious or harmful as it failed to address the issue of arbitrability of disputes arising with respect to security agreements or security rights and the need to protect the rights of third parties, but also inappropriately indicated a preference for alternative dispute resolution (ADR) over judicial proceedings. In addition, it was observed that arbitrability was a matter to be dealt with in arbitration law and thus a matter for Working Group II (Arbitration and Conciliation), on the agenda of which it was since 1999.[9] Moreover, it was said that the fact that a regional text or the national laws of some States in a region of the world included such a provision did not mean that a text prepared by an international body such as UNCITRAL and addressed to the whole world should or could follow the same approach. As a compromise, it was thus suggested that the matter ought to be discussed in the draft Guide to Enactment (see A/CN.9/885/Add.3, paras. 55 and 58) and placed on the future work agenda of the Commission (see para. 125 below).

98. The prevailing view, however, was that the proposed text should be included in article 3. It was stated that the use of ADR to resolve disputes arising with respect to security agreements or security rights was essential, in particular for developing countries, to attract investment. In that connection, it was observed that the often inefficient judicial enforcement mechanisms were bound to have a negative impact on the availability and the cost of credit. In addition, it was pointed out that the proposed text was of significant educational importance as it made a statement in support of ADR, without interfering with the way in which the various legal systems dealt with arbitrability, the protection of rights of third parties or access to justice. Moreover, it was said that the matter involved the relationship between the grantor and the secured creditor and thus it could also be addressed in the chapter on the rights and obligations of the parties. After discussion, it was agreed that the proposed text should be included in article 3 with appropriate explanations in the draft Guide to Enactment, on the understanding that it did not prejudice the discussion of arbitrability, the protection of the rights of third parties or access to justice.

[9] Ibid., *Fifty-fourth Session, Supplement No. 17* (A/54/17), paras. 351-353 and 380. At its forty-fourth session, in 2011, the Commission recalled that the issue of arbitrability should be maintained by the Working Group on its agenda (ibid., *Sixty-sixth Session, Supplement No. 17* (A/66/17), para. 203).

99. With respect to article 11, it was agreed that it should be revised to read along the following lines:

> "1. A security right in a tangible asset that is commingled in a mass extends to the mass. A security right in a tangible asset that is transformed into a product extends to the product.
>
> "2. A security right that extends to a mass is limited to the same proportion of the mass as the quantity of the encumbered asset bore to the quantity of the entire mass immediately after the commingling.
>
> "3. A security right that extends to a product is limited to the value of the encumbered asset immediately before it became part of the product."

100. It was also agreed that the definition of the term "mass or product" in article 2, subparagraph (t), should be revised to read along the following lines: "'Mass' means a tangible asset which results when tangible assets are so commingled with other tangible assets of the same kind that they have lost their separate identity"; and "'Product' means a tangible asset which results when tangible assets are so physically associated or united with other tangible assets of a different kind, or when one or more tangible assets are so manufactured, assembled or processed, that they have lost their separate identity".

101. To coordinate it with article 11 as revised, it was agreed that article 31, paragraph 3, should be revised to read along the following lines: "For the purposes of paragraph 2, the obligation secured by a security right that extends to the mass or product is subject to the limitation determined in accordance with article 11." It was also agreed that appropriate adjustments should be made to the headings of the relevant articles to refer to the "transformation", rather than to commingling, of assets into a product.

102. With respect to article 23, it was agreed that it should be revised to read along the following lines: "An acquisition security right in consumer goods with an acquisition price below [an amount to be specified by the enacting State] is effective against third parties upon its creation without any further act".

103. It was also agreed that, to complete the treatment of acquisition security rights in consumer goods, a priority rule should be added as a new paragraph at the end of article 32 that should read along the following lines: "A buyer acquires its rights free of, and the rights of a lessee are not affected by, an acquisition security right in consumer goods unless the security right is made effective against third parties otherwise than under article 23 before the buyer or lessee acquires its rights in the goods".

104. It was noted that: (a) in both article 23 and the new paragraph of article 32, the reference to a transferee was deleted to avoid covering a donee (see para. 35 above); and (b) the reference to a licensee was deleted because a licence in consumer goods either did not exist at all or might exist only in very rare cases.

105. With respect to article 24, paragraph 6, of the draft Model Registry-related Provisions, it was agreed that it should be revised to read along the following lines:

> "6. Notwithstanding paragraph 4, an error in the period of effectiveness of registration specified in an initial or amendment notice, does not render the registration of the notice ineffective, except to the extent that third parties relied on the erroneous information in the registered notice.
>
> "7. Notwithstanding paragraph 4, an error in the maximum amount for which the security right may be enforced entered in an initial or amendment notice, does not render the registration of the notice ineffective. However, its effectiveness against third parties who relied on the amount stated in the notice is limited to that amount or the maximum amount indicated in the security agreement, whichever is lower".

106. After further discussion, it was agreed that the above-proposed article 24, paragraph 7, should be revised to read along the following lines: "Notwithstanding paragraph 4, an error in the maximum amount specified in an initial or amendment notice does not render the registration ineffective, but the priority of the security right is limited to the maximum amount stated in the notice or in the security agreement, whichever is lower".

107. In addition, it was agreed that the above-proposed and agreed paragraphs 6 and 7 of article 24 should appear in the final text of the Model Registry-related Provisions within square brackets and be accompanied with the relevant footnotes drawing the attention of enacting States to the fact that those provisions would be necessary depending on whether they had decided to implement option B or C of article 14 and article 8, subparagraph (e), respectively, of the Model Registry-related Provisions. Moreover, it was agreed that references to the "maximum amount" throughout the draft Model Law should be coordinated. It was also agreed that article 42, paragraph 3, of the draft Model Law should be deleted as it addressed the same issue addressed in the above-proposed and agreed article 24, paragraph 7 (see para. 106 above).

108. With respect to article 25 of the draft Model Registry-related Provisions, it was agreed that it should be revised to read along the following lines:

"1. Subject to paragraphs 2 and 3, the third-party effectiveness and priority of a security right that was made effective against third parties by registration of a notice is not affected by a change in the identifier of the grantor after the notice is registered.

"2. If the identifier of the grantor changes after a notice is registered, a competing security right created by the grantor that was made effective against third parties after the change has priority over the security right to which the notice relates unless the security right to which the notice relates is made effective against third parties by a method other than registration of a notice, or an amendment notice disclosing the new identifier of the grantor is registered:

"(a) Before the expiry of [a short period of time to be specified by the enacting State] after the change; or

"(b) After the expiry of the period referred to in paragraph 2(a) but before the competing security right is made effective against third parties.

"3. If the identifier of the grantor changes after a notice is registered, a buyer to whom the encumbered asset is sold after the change acquires its rights free of the security right to which the notice relates unless it is made effective against third parties by a method other than registration of a notice, or an amendment notice disclosing the new identifier of the grantor is registered:

"(a) Before the expiry of the period referred to in paragraph 2(a); or

"(b) After the expiry of the period referred to in paragraph 2(a) but before the buyer acquires its rights in the asset.

"4. Paragraphs 2 and 3 do not apply if the information in the registered notice referred to in paragraph 1 would be retrieved by a search using the new identifier of the grantor as a search criterion".

109. It was also agreed that a footnote should be added to draw the attention of the enacting State to the fact that the above-proposed and agreed article 25, paragraph 4, would be necessary only for enacting States that would implement option B of article 23, paragraph 1, of the Model Registry-related Provisions.

110. It was also agreed that article 26 of the draft Model Registry-related Provisions should be revised to read along the following lines:

"**Option A**

"1. Subject to paragraphs 2 and 3, the third-party effectiveness and priority of a security right in an encumbered asset that was made effective against third parties by registration of a notice is not affected by a sale of the encumbered asset after the notice is registered to a buyer that acquires its rights subject to the security right under article 32 of the Law.

"2. If an encumbered asset covered by a registered notice is sold to a buyer that acquires its rights subject to the security right to which the notice relates under article 32 of the Law, a competing security right created by the buyer that is made effective against third parties after the sale has priority over the security right to which the notice relates unless the security right to which the notice relates is made effective against

third parties by a method other than registration of a notice, or an amendment notice is registered adding the buyer as a new grantor:

"(a) Before the expiry of [a short period of time to be specified by the enacting State] after the sale; or

"(b) After the expiry of the period referred to in paragraph 2(a) but before the competing security right is made effective against third parties.

"3. If an encumbered asset covered by a registered notice is sold to a buyer that acquires its rights subject to the security right to which the notice relates under article 32 of the Law, a subsequent buyer to whom the initial buyer sells the encumbered asset acquires its rights free of the security right to which the notice relates unless it is made effective against third parties by a method other than registration of a notice, or an amendment notice adding the initial buyer as a new grantor is registered:

"(a) Before the expiry of the period referred to in paragraph 2(a); or

"(b) After the expiry of the period referred to in paragraph 2(a) but before the subsequent buyer acquires its rights in the encumbered asset.

"4. The third-party effectiveness and priority of a security right in intellectual property that was made effective against third parties by registration of a notice is not affected by a sale of the intellectual property after the notice is registered to a buyer that acquires its rights subject to the security right under article 32 of the Law.

"**Option B**

"1. Subject to paragraphs 2 to 4, the third-party effectiveness and priority of a security right in an encumbered asset that was made effective against third parties by registration of a notice is not affected by a sale of the encumbered asset after the notice is registered to a buyer that acquires its rights subject to the security right under article 32 of the Law.

"2. If an encumbered asset covered by a registered notice is sold to a buyer that acquires its rights subject to the security right to which the notice relates under article 32 of the Law, a competing security right created by the buyer that is made effective against third parties after the secured creditor acquires knowledge of the sale and the identifier of the buyer has priority over the security right to which the notice relates unless the security right to which the notice relates is made effective against third parties by a method other than registration of a notice, or an amendment notice adding the buyer as a new grantor is registered:

"(a) Before the expiry of [a short period of time to be specified by the enacting State] after the secured creditor acquires the relevant knowledge; or

"(b) After the expiry of the period referred to in paragraph 2(a) but before the competing security right is made effective against third parties.

"3. If an encumbered asset covered by a registered notice is sold to a buyer that acquires its rights subject to the security right to which the notice relates under article 32 of the Law, a subsequent buyer to whom the encumbered asset is sold after the secured creditor acquires knowledge of the sale and the identifier of the buyer acquires its rights free of the security right to which the notice relates unless it is made effective against third parties by a method other than registration of a notice, or an amendment notice adding the identifier of the initial buyer as a new grantor is registered:

"(a) Before the expiry of the period referred to in paragraph 2(a); or

"(b) After the expiry of the period referred to in paragraph 2(a) but before the subsequent buyer acquires its rights in the encumbered asset.

"4. If there are one or more subsequent sales of the encumbered asset before the secured creditor acquires knowledge of the sale and the identifier of the buyer, the obligation to register an amendment notice under paragraphs 2 and 3 is satisfied if the secured creditor registers an amendment notice adding the identifier of the most recent buyer of which it has knowledge as a new grantor.

"5. The third-party effectiveness and priority of a security right in intellectual property that was made effective against third parties by registration of a notice is not affected by a sale of the intellectual property after the notice is registered to a buyer that acquires its rights subject to the security right under article 32 of the Law.

"**Option C**

"The third-party effectiveness and priority of a security right in an encumbered asset that is made effective against third parties by registration of a notice is not affected by a sale of the asset after the notice is registered to a buyer that acquires its rights subject to the security right under article 32 of the Law".

111. With respect to article 52 (see para. 66 above), it was agreed that it should be revised to read along the following lines: "Upon extinction of a security right in an encumbered asset, a secured creditor in possession must return the asset to the grantor or deliver the asset to a person designated by the grantor".

112. The Commission next considered a proposal for a new article that would follow article 79 and would read along the following lines: "If the maximum amount entered in an initial or amendment notice is lower than that indicated in the security agreement to which the notice relates, the security right to which the notice relates may be enforced only up to the amount entered in the notice, unless there are no other competing claimants that relied on the maximum amount entered in the notice".

113. While some support was expressed, the proposal was objected to. It was widely felt that the above-proposed and agreed article 24, paragraph 7 (see paras. 106-107 above), was sufficient to address situations in which the maximum amount stated in a registered notice was different from the maximum amount stated in the security agreement by providing that the priority of a security right was limited to the maximum amount stated in the notice or in the security agreement, whichever was lower.

114. After discussion, the Commission adopted article 2, subparagraph (t), and articles 3, 11, 23, 31, 32, 42 and 52 of the draft Model Law, as well as article 24, paragraphs 6 and 7, and articles 25 and 26 of the draft Model Registry-related Provisions subject to the above-mentioned changes.

115. At the close of its deliberations on the draft Model Law, the Commission agreed that the Secretariat should be given a mandate to make the changes approved by the Commission, as well as any consequential editorial changes, avoiding making changes where it was not clear whether a change was editorial or substantive. The Commission also agreed that the Secretariat should review the entire draft Model Law to ensure consistency in the terminology used.

3. Adoption of the UNCITRAL Model Law on Secured Transactions

116. Before adopting the UNCITRAL Model Law on Secured Transactions (the "Model Law"), the Commission considered its name in the official languages other than English. The suggestion was made that in Spanish the Model Law should be named as follows: "Ley Modelo sobre Garantías Mobiliarias". It was stated that that name was more correct in Spanish and more understandable for Spanish language readers. It was also said that that was the Spanish name of the "Model Inter-American Law on Secured Transactions". While initially diverging views were expressed as to whether the word "reales" should be added to qualify the word "garantías" and distinguish proprietary from personal security rights, it was ultimately agreed that that was not necessary as the word "mobiliarias", which could not refer to personal security rights, was sufficient to indicate that only proprietary security rights were meant.

117. The concern was expressed, however, that the suggested new Spanish name of the Model Law might cause confusion as the term "secured transactions" ("opérations garanties" in French, "operaciones garantizadas" in Spanish) had been used for several years in connection with the Secured Transactions Guide. To address that concern, it was agreed that a note should be added at the beginning of the Model Law to explain that, as explained in the Secured Transactions Guide, the term "secured transaction" meant a transaction that created a security right and thus there was no substantive difference in the terminology used.

The concern was also expressed that the suggested new Spanish name of the Model Law would affect the name of the Model Law in the language versions other than English and Spanish. In response, it was noted that the name of the Model Law in those other languages also should be correct and understandable for the readers of those languages.

118. After discussion, it was agreed that the Spanish name of the Model Law should be "Ley Modelo de la CNUDMI sobre Garantías Mobiliarias" and the French name should be "Loi type de la CNUDCI sur les sûretés mobilières" (for the same reason mentioned in para. 116 above for the Spanish version, the term "réelles" did not need to qualify the term "sûretés"). It was also agreed that the name of the Model Law in the language versions other than English, French and Spanish should be as consistent as possible with the name of the Model Law in the English, French and Spanish language versions and, at the same time, use terminology that would be as correct and easily understood as possible by the readers of that language.

119. At its 1032nd meeting on 1 July, 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 56/81 of 12 December 2001, 63/121 of 11 December 2008, 65/23 of 6 December 2010 and 68/108 of 16 December 2013 in which the General Assembly recommended that States consider or continue to consider becoming parties to the United Nations Convention on the Assignment of Receivables in International Trade (New York, 2001)[10] and giving favourable consideration to the UNCITRAL Legislative Guide on Secured Transactions (2007),[11] the Supplement on Security Rights in Intellectual Property[12] and the UNCITRAL Guide on the Implementation of a Security Rights Registry,[13] respectively,

"*Further recalling* that, at its forty-sixth session, in 2013, it entrusted Working Group VI (Security Interests) with the preparation of a model law on secured transactions based on the recommendations of the UNCITRAL Legislative Guide on Secured Transactions (2007) and consistent with all texts prepared by UNCITRAL on secured transactions,[14]

"*Noting* that the Working Group devoted six sessions, from 2013 to 2016, to the preparation of the draft model law on secured transactions (the 'draft Model Law'),[15]

"*Further noting* that, at its forty-eighth session, in 2015, the Commission approved the substance of the registry-related provisions of the draft Model Law,[16]

"*Further noting* with satisfaction that the draft Model Law is based on the recommendations of the UNCITRAL Legislative Guide on Secured Transactions and consistent with all texts prepared by UNCITRAL on secured transactions, and with those texts thus provides comprehensive guidance to States with respect to legal and practical issues that need to be addressed when implementing a modern secured transactions regime,

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[10] General Assembly resolution 56/81, annex. Also available as United Nations publication, Sales No. E.04.V.14.

[11] United Nations publication, Sales No. E.09.V.12.

[12] United Nations publication, Sales No. E.11.V.6.

[13] United Nations publication, Sales No. E.14.V.6.

[14] *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17* (A/68/17), paras. 194 and 332.

[15] For the reports of those sessions of the Working Group, see A/CN.9/796, A/CN.9/802, A/CN.9/830, A/CN.9/836, A/CN.9/865 and A/CN.9/871.

[16] *Official Records of the General Assembly, Seventieth Session, Supplement No. 17* (A/70/17), para. 214.

"*Recognizing* that an efficient secured transactions regime with a publicly accessible security rights registry of the kind provided for in the draft Model Law is likely to increase access to affordable secured credit and thus promote economic growth, sustainable development, the rule of law and financial inclusion, as well as assist in combating poverty,

"*Recognizing also* that the harmonization of national secured transactions regimes and registries on the basis of the draft Model Law is likely to increase the availability of secured 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,

"*Recognizing further* 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,

"*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 draft Model Law,

"*Having considered* the draft Model Law at its forty-ninth session, in 2016,

"*Drawing attention* to the fact that the text of the draft Model Law was circulated for comment before the forty-ninth session of the Commission to all Governments invited to attend sessions of the Commission and the Working Group as members and observers and that the comments received were before the Commission at its forty-ninth session,[17]

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

"1. *Adopts* the UNCITRAL Model Law on Secured Transactions, consisting of the text contained in documents A/CN.9/884 and addenda 1-4, with amendments adopted by the Commission at its forty-ninth session, and authorizes the Secretariat to edit and finalize the text of the UNCITRAL Model Law on Secured Transactions pursuant to the deliberations of the Commission at that session;

"2. *Requests* the Secretary-General to publish the UNCITRAL Model Law on Secured Transactions, including electronically and in the six official languages of the United Nations, and to disseminate it broadly to Governments and other interested bodies;

"3. *Recommends* that all States give favourable consideration to the UNCITRAL Model Law on Secured Transactions when revising or adopting legislation relevant to secured transactions, and invites States that have used the Model Law to advise the Commission accordingly;

"4. *Also recommends* that, where necessary, States continue giving 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 and the Supplement on Security Rights in Intellectual Property when revising or adopting legislation relevant to secured transactions, and invites States that have used the guides to advise the Commission accordingly;

"5. *Also recommends* that all States continue to consider becoming parties to the United Nations Convention on the Assignment of Receivables in International Trade, the principles of which are also reflected in the UNCITRAL Model Law on Secured Transactions, and the optional annex of which refers to the registration of notices with regard to assignments."

[17] A/CN.9/886, A/CN.9/887 and A/CN.9/887/Add.1.

B. Consideration of the draft Guide to Enactment of the draft Model Law on Secured Transactions

120. The Commission recalled that, at its forty-eighth session, in 2015, it had agreed that the draft Guide to Enactment should be prepared and referred that task to the Working Group.[18] The Commission noted that the Working Group, at its twenty-eighth session, had noted that, in order to complete the draft Guide to Enactment, it might need an additional one or two sessions, and, at its twenty-ninth session, decided to request the Commission one or two sessions for that purpose (A/CN.9/865, para. 104, and A/CN.9/871, para. 91, respectively).

121. At its current session, the Commission had before it the draft Guide to Enactment (A/CN.9/885 and addenda 1-4). The Commission noted that the draft Guide to Enactment provided background and explanatory information that could assist States in considering the Model Law for adoption. In addition, the Commission noted with appreciation that the draft Guide to Enactment was already at an advanced stage. Moreover, the Commission noted that a number of issues were referred to the draft Guide to Enactment even at its current session, and thus the draft Guide to Enactment was an extremely important text for the implementation and interpretation of the Model Law.

122. After discussion, the Commission agreed to give the Working Group up to two sessions to complete its work and submit the draft Guide to Enactment to the Commission for final consideration and adoption at its fiftieth session, in 2017. In addition, the Commission agreed that, if the Working Group completed its work in less than two sessions, it should use any time remaining to discuss its future work in a session or in a colloquium to be organized by the Secretariat. Moreover, the Commission agreed that, subject to further discussion of the overall future work of the Commission (see chapter XV below), a colloquium to discuss future work on security interests should be held even if the Working Group used the full time of the two sessions to complete its work on the draft Guide to Enactment.

123. Having mandated work on the draft Guide to Enactment, the Commission requested the Secretariat to reflect that decision in its publications programme and take any other measures to ensure future publication of any final text resulting from that work, including electronically and in the six official languages of the United Nations.

C. Possible future work in the area of security interests

124. The Commission recalled that, at its forty-eighth session, in 2015, it had noted that, at its forty-third session, in 2010, it had placed on its future work programme the preparation of a contractual guide on secured transactions and a uniform law text on intellectual property licensing.[19] At the current session, the Commission decided that those matters should be retained on its future work programme and considered at a future session on the basis of notes to be prepared by the Secretariat, after a colloquium or expert group meeting, to be held within existing resources (see para. 122 above).

125. In addition, the Commission decided that the following topics should also be placed on its future work programme and considered at a future session on the basis of notes to be prepared by the Secretariat, after a colloquium or expert group meeting, to be held within existing resources (see para. 122 above): (a) the question whether the Model Law and the draft Guide to Enactment might need to be expanded to address matters related to secured finance to micro, small and medium-sized enterprises (MSMEs); (b) the question whether any future work on a contractual guide on secured transactions should discuss contractual issues of concern to MSMEs (e.g. transparency issues); (c) any question that might not have already been addressed in the area of warehouse receipt financing (e.g. the negotiability of warehouse receipts); and (d) the question whether disputes arising from security agreements could be resolved through ADR mechanisms (see A/CN.9/871, paras. 83-86, and A.CN.9/885/Add.3, paras. 55 and 58; see also paras. 96 and 97 above).

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[18] *Official Records of the General Assembly, Seventieth Session, Supplement No. 17* (A/70/17), para. 216.

[19] Ibid., para. 217.

D. Coordination and cooperation

126. The Commission noted with appreciation the efforts of the Secretariat in coordinating and cooperating with a number of organizations active in the area of security interests. It was noted that the Secretariat had provided comments on the World Bank Principles contained in the World Bank Insolvency and Creditor Rights Standard (the "Standard") and was expecting to receive the comments of the World Bank on a revised draft of the Standard that contained the key recommendations of the Secured Transactions Guide. In addition, it was noted that the Secretariat had provided suggestions to the European Commission with a view to ensuring a coordinated approach to the law applicable to the third-party effects of assignments of receivables, taking into account the approach followed in the Assignment Convention, the Secured Transactions Guide and the Model Law, and noted that the European Commission was to issue a proposal on that topic for consultation. Moreover, the Commission noted that Unidroit had referred to an inter-governmental meeting the draft fourth protocol to the Convention on International Interests in Mobile Equipment on matters specific to agricultural, construction and mining equipment, and requested the Secretariat to attend that meeting with a view to ensuring the avoidance of duplication of efforts that could lead to overlap and conflict with the Commission's work on security interests. The Commission also noted with appreciation the Secretariat's coordination efforts with the World Bank Group, the Organization of American States (OAS) and the Asian Pacific Economic Cooperation (APEC) in providing technical assistance and assistance with respect to local capacity-building in the area of security interests.

127. After discussion, the Commission renewed the mandate given to the Secretariat to continue with those coordination and cooperation efforts. It was widely felt that cooperation should continue and expand, focusing on technical assistance and training activities, including with respect to security rights registries. It was also generally agreed that the joint publication *UNCITRAL, Hague Conference and Unidroit Texts on Security Interests*[20] should be updated to include texts adopted by those and other organizations on security interests after the publication was issued. It was further agreed that consideration should be given to including in the publication to be updated references to the Model Inter-American Law on Secured Transactions and, if possible, other regional texts on security interests.

128. Having mandated work on the joint publication on security interests, the Commission requested the Secretariat to reflect that decision in its publications programme and take any other measures to ensure future publication of any final text resulting from that work, including electronically and in the six official languages of the United Nations.

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

A. Finalization and adoption of the revised UNCITRAL Notes on Organizing Arbitral Proceedings

1. Introduction

129. The Commission recalled its decision at the forty-sixth session, in 2013, that Working Group II (Arbitration and Conciliation) should undertake work on the revision of the UNCITRAL Notes on Organizing Arbitral Proceedings[21] (referred to as the "Notes").[22] The Commission further recalled that, at its forty-seventh session, in 2014, it had agreed that the Working Group should commence work on the revision of the Notes and, in so doing, should focus on matters of substance, leaving drafting to the Secretariat.[23]

130. The Commission recalled that at its forty-eighth session, in 2015, the Commission had before it the draft version of the Notes (contained in document A/CN.9/844), as it resulted from the work of the Working Group at its sixty-first (Vienna, 15-19 September 2014) and

[20] United Nations publication V.12-51563.

[21] *UNCITRAL Yearbook*, vol. XXVII: 1996, part three, annex II.

[22] *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17* (A/68/17), para. 130.

[23] Ibid., *Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 128.

sixty-second (New York, 2-6 February 2015) sessions.[24] At that session, the Commission had approved that draft version of the Notes in principle and requested the Secretariat to prepare an updated text in accordance with the deliberations and decisions at that session for finalization and adoption at the forty-ninth session, in 2016.[25] The Commission had also agreed that the Secretariat could seek input from the Working Group on specific issues during its sixty-fourth session (New York, 1-5 February 2016).[26]

131. At its current session, the Commission had before it the report of the Working Group on the work of its sixty-fourth session (A/CN.9/867), during which specific issues in the draft version of the Notes (contained in document A/CN.9/WG.II/WP.194) were considered. The Commission had before it the text of the draft revised Notes as contained in document A/CN.9/879 (referred to below as the "draft revised Notes"), which reflected the deliberations of the Working Group at that session.

2. Consideration of the draft revised Notes

Title of the revised Notes

132. The Commission agreed that the revised Notes should be titled the "2016 UNCITRAL Notes on Organizing Arbitral Proceedings" and also referred to as the second edition of the Notes.

Preface

133. The Commission approved the preface without any modification.

Introduction

134. The Commission agreed to replace the word "needs" by the words "will need" in the last sentence of paragraph 5 of the draft revised Notes to clarify that the arbitral tribunal could raise a matter when appropriate, without having to wait until the matter actually came up. With respect to the last sentence of paragraph 8 of the draft revised Notes, a suggestion to include a reference to the legal tradition at the place of arbitration when choosing a set of arbitration rules for reference purposes did not receive support. Subject to the modification in paragraph 5 of the draft revised Notes, the Commission approved the introduction.

Annotations

135. The Commission approved draft revised Notes 1, 4, 6, 7, 10, 12, 15, 16, 18 and 20 without any modification.

Note 2 (Language or languages of the arbitral proceedings)

136. With respect to the second sentence in paragraph 25 of the draft revised Notes, it was agreed that the words "any of the" should replace the words "that" before the words "multiple languages" to avoid giving the impression that all languages must be used during the arbitral proceedings. Subject to that modification, the Commission approved draft revised Note 2.

Note 3 (Place of arbitration)

137. With respect to paragraph 29 of the draft revised Notes, the Commission agreed that the words "the nature and frequency of" in subparagraph (ii) should be deleted. Subject to that modification, the Commission approved draft revised Note 3.

Note 5 (Costs of arbitration)

138. The Commission noted that paragraph 40 had been included in the draft revised Notes following deliberations of the Working Group at its sixty-fourth session to indicate that in-house costs might also be an item of the arbitration costs. It was noted that a reference to in-house costs was important as the draft revised Notes should not mistakenly imply that only the legal fees of external counsel would be recoverable. It was further noted that the

[24] Ibid., *Seventieth Session, Supplement No. 17* (A/70/17), para. 15.
[25] Ibid., para. 133.
[26] Ibid.

treatment of in-house costs as part of arbitration costs was controversial and thereby paragraph 40 simply aimed at presenting the different approaches.

139. It was widely felt that paragraphs 40 and 41 appropriately addressed the relevant issues in a balanced manner, and contained references to possible criteria used by tribunals in awarding in-house costs. However, a number of suggestions were made in relation to paragraph 40.

140. It was suggested to delete references to "management and other costs" and "managing directors, experts and other staff members", as they indicated too wide and uncertain a category of costs and such costs should not be recoverable. In this regard, it was argued that paragraph 40 should be limited to costs relating to legal representation. That suggestion did not receive support on the ground that there was no basis on which to limit recoverable costs to legal representation.

141. A suggestion was made to highlight in paragraph 40 that "parties" included States and government agencies. It was explained that costs relating to internal counsel or representatives of States and government agencies in investor-State arbitration were usually not referred to as "in-house costs". However, it was agreed that the suggested clarification was not necessary as the draft revised Notes adopted a generic approach and such distinction with regard to the parties were not made in other parts of the draft revised Notes.

142. A suggestion was made that paragraph 40 should provide that some arbitral tribunals had awarded internal legal costs where a party had prepared its defence mainly through use of its own in-house counsel. That suggestion did not receive support as the last sentence of paragraph 40 sufficiently addressed that matter. Another suggestion to clearly define "in-house costs" and to make a clear distinction with other costs also did not receive support.

143. With respect to a further suggestion that the draft revised Notes should distinguish investment arbitration and deal with issues arising from such arbitration in a separate manner, the Commission recalled its decision that the Notes should keep their generic nature and that specific aspects of investment arbitration should only be dealt with separately with respect to transparency as presented in draft revised Note 6.

144. A suggestion was made to provide that when assessing the reasonableness of in-house costs, consideration should be given to the costs that would have been incurred had such services been provided by an external service provider, and that the amount recoverable should be limited thereto. That suggestion did not receive support.

145. After discussion, it was agreed that the first sentence of paragraph 40 should be revised to refer to legal representation generally. The Commission further agreed that draft revised Note 5 should highlight the importance of controlling costs as well as the need to preserve the cost-effectiveness of the arbitration process, possibly in paragraph 47.

146. With respect to paragraph 49 of the draft revised Notes, a suggestion to indicate that it would be more appropriate for decisions on costs to be made simultaneously with the final award did not receive support.

147. Subject to the modifications in paragraph 145 above, the Commission approved draft revised Note 5.

Note 8 (Interim measures)

148. In response to a question raised in connection with draft revised Note 8, it was confirmed that issues pertaining to emergency arbitrator were not dealt with despite their increasing significance, because those issues arose prior to the commencement of the arbitral proceedings and thus were outside the scope of the Notes.

149. The Commission agreed that the order of paragraphs 61 and 62 should be reversed, as paragraphs 60 and 62 dealt with interim measures in a general fashion while paragraph 61 dealt with ex parte interim measures. Subject to that modification, the Commission approved draft revised Note 8.

Note 9 (Written submissions, witness statements, expert reports and documentary evidence ("submissions"))

150. The Commission agreed that reference to the word "pleadings" should be avoided as that word was understood differently in various jurisdictions. Subject to that modification, the Commission approved draft revised Note 9.

Note 11 (Points at issue and relief or remedy sought)

151. The Commission agreed that the words "to ensure the enforceability of the arbitral award", in paragraph 71, should be replaced by the words "to ensure the enforceability of any arbitral award that might grant such relief or remedy". Subject to that modification, the Commission approved draft revised Note 11.

Note 13 (Documentary evidence)

152. The Commission agreed that wording along the following lines should be added at the end of the first sentence of paragraph 77 of the draft revised Notes: "and often as well, a statement as to why the requested documents are believed to be in the possession of the other party and are not otherwise available to the requesting party." With respect to the last sentence of paragraph 78, the Commission agreed that the words ", if necessary, may" should be replaced by the words "will often". Subject to those modifications, the Commission approved draft revised Note 13.

Note 14 (Witnesses of fact)

153. With respect to paragraph 92 of the draft revised Notes, a suggestion to delete the second sentence did not receive support. However, it was agreed that the words "securing the attendance of" could be replaced by the word "inviting". The Commission also agreed that paragraphs 91 and 92 would be better placed in draft revised Note 17, possibly with paragraph 125. Subject to those modifications, the Commission approved draft revised Note 14.

Note 17 (Hearings)

154. With respect to paragraph 125, a suggestion was made that the order of the fourth and fifth sentences should be reversed as a decision by the tribunal not to hear a witness would mean that the tribunal had indeed given weight to the witness statement. That suggestion did not receive support.

155. With respect to the fourth sentence of paragraph 125, the Commission agreed that the words "while this may raise concerns about the requesting party's opportunity to present its case" should be replaced by the words "if the arbitral tribunal deems the proposed testimony, for example, immaterial or purely cumulative, having regard to the requesting party's reasonable opportunity to present to its case." It was further agreed that this should not only apply to cross-examination but also to direct examination. Subject to that modification, the Commission approved draft revised Note 17.

Note 19 (Joinder and consolidation)

156. With respect to paragraph 140 of the draft revised Notes, it was agreed that the fourth sentence could be expanded to refer to the relevance of the new party to be joined as well as to the negative impact that joinder could have on the proceedings including possible delays. Subject to that modification, the Commission approved draft revised Note 19.

3. Approval of the draft revised Notes

157. Upon completion of its deliberation, the Commission approved the draft revised Notes and requested the Secretariat to prepare a final version in accordance with the deliberations and decisions (see section 2 above).

158. At its 1037th meeting on 7 July, 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 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* the value and increased use of arbitration as a method of settling disputes,

"*Recognizing* the need for revising the UNCITRAL Notes on Organizing Arbitral Proceedings,[27] initially adopted in 1996, to conform to current arbitral practices,

"*Noting* that the purpose of the UNCITRAL Notes on Organizing Arbitral Proceedings is to list and briefly describe matters relevant to the organization of arbitral proceedings and that the Notes, prepared with a focus on international arbitration, are intended to be used in a general and universal manner, regardless whether the arbitration is administered by an arbitral institution,

"*Noting* that the UNCITRAL Notes on Organizing Arbitral Proceedings do not seek to promote any practice as best practice given that procedural styles and practices in arbitration do vary and that each of them has its own merit,

"*Noting further* that the revision of the UNCITRAL Notes on Organizing Arbitral Proceedings benefited greatly from consultations with Governments, interested intergovernmental and international non-governmental organizations active in the field of arbitration, including arbitral institutions, as well as individual experts,

"1. *Adopts* the 2016 UNCITRAL Notes on Organizing Arbitral Proceedings consisting of the text contained in document A/CN.9/879, with amendments adopted by the Commission at its forty-ninth session, and authorizes the Secretariat to edit and finalize the text of the Notes pursuant to the deliberations of the Commission at that session;

"2. *Recommends* the use of the Notes including by parties to arbitration, arbitral tribunals, arbitral institutions as well as for academic and training purposes with respect to international commercial dispute settlement;

"3. *Requests* the Secretary-General to publish the 2016 UNCITRAL Notes on Organizing Arbitral Proceedings, including electronically, and in the six official languages of the United Nations, and to make all efforts to ensure that the Notes become generally known and available."

4. Promotion of the 2016 UNCITRAL Notes on Organizing Arbitral Proceedings

159. The Commission had before it a proposal by ASA with the aim of cooperating with UNCITRAL in promoting the 2016 UNCITRAL Notes on Organizing Arbitral Proceedings through the development of an online arbitration toolbox (referred to below as the "Toolbox") for users of arbitration (A/CN.9/893). The Commission heard an oral presentation by the president of ASA providing a brief introduction of the Toolbox, which addressed practical issues in commercial arbitration, highlighting the flexible nature of the arbitration proceeding and taking into account the diverse approaches. It was stated that the Toolbox could provide a useful platform for training purposes, which could support the technical assistance and capacity-building activities of UNCITRAL. It was explained that the Toolbox project would be funded entirely by ASA requiring no allocation of resources of UNCITRAL and that the Toolbox would not aim at revisiting issues in the 2016 UNCITRAL Notes on Organizing Arbitral Proceedings but rather complement them. While it was mentioned that a possible form of cooperation could be establishing a joint website presenting the Toolbox, it was clarified that at this stage, ASA would not be seeking the Commission's endorsement of the contents of the Toolbox, which was still being prepared. In concluding, the president of ASA sought the Commission's preliminary support for the project and suggested that the Secretariat be given the mandate to seek possible cooperation on the Toolbox project.

160. After discussion, the Commission expressed its appreciation to ASA for its efforts in preparing a very timely and useful tool, which would be available free of charge, for promotion of the 2016 UNCITRAL Notes on Organizing Arbitral Proceedings and arbitration in general. The Secretariat was requested to seek cooperation with ASA, and to report to the Commission, at its next session, on the concrete form of such cooperation, including the possible reliance on outside experts. It was agreed that, if the Commission

[27] *UNCITRAL Yearbook*, vol. XXVII: 1996, part three, annex II.

were eventually requested to endorse the Toolbox, its content would have to be considered by the Commission.

161. In the course of the deliberation, a general view was expressed that caution should be exercised in choosing organizations with which the Commission or the Secretariat would seek cooperation, and that, in that respect, objective criteria might need to be established. The vigilance of the Secretariat in making rigorous selections aimed at preserving neutrality and encompassing as many organizations as possible was acknowledged.

B. Progress report of Working Group II

162. The Commission recalled that, at its forty-seventh session, in 2014, it had agreed that the Working Group should consider at its sixty-second session the issue of enforcement of international settlement agreements resulting from conciliation proceedings and should report to the Commission on the feasibility and possible form of work in that area.[28] At that session, the Commission had also invited delegations to provide information to the Secretariat in respect of that subject matter.[29]

163. The Commission also recalled that at its forty-eighth session, in 2015, it had before it a compilation of responses received by the Secretariat (A/CN.9/846 and addenda).[30] At that session, it had agreed that the Working Group should commence work at its sixty-third session on the topic of enforcement of settlement agreements to identify relevant issues and develop possible solutions, including the preparation of a convention, model provisions or guidance texts. The Commission had also agreed that the mandate of the Working Group with respect to that topic should be broad to take into account the various approaches and concerns.[31]

164. At the current session, the Commission considered the reports of the Working Group on the work of its sixty-third session (A/CN.9/861), held in Vienna from 7 to 11 September 2015, and sixty-fourth session (A/CN.9/867), held in New York from 1 to 5 February 2016. The Commission was informed that the Working Group, at its sixty-fourth session, requested the Secretariat to prepare a document outlining the issues considered at the session and setting out draft provisions without prejudice to the final form of the instrument, grouping provisions into broad categories (A/CN.9/867, para. 15).

165. After discussion, the Commission commended the Working Group for its work on the preparation of an instrument dealing with enforcement of international commercial settlement agreements resulting from conciliation and confirmed that the Working Group should continue its work on the topic. Having reaffirmed the mandate, the Commission requested the Secretariat to reflect that decision in its publications programme and take any other measures to ensure future publication of any final text resulting from that work, including electronically and in the six official languages of the United Nations.

C. Establishment and functioning of the transparency repository

166. The Commission recalled that, under article 8 of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration[32] (the "Transparency Rules" or "Rules"), the repository of published information under the Rules (the "transparency repository") had to be established.

167. The Commission further recalled that, at its forty-sixth session, in 2013, it expressed its strong and unanimous opinion that the Secretariat should fulfil the role of the transparency repository.[33] The Commission also recalled that, at its forty-seventh session, in 2014, the Secretariat had reported on steps taken in respect of the repository function to be

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[28] *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 129.
[29] Ibid.
[30] Ibid., *Seventieth Session, Supplement No. 17* (A/70/17), para. 135.
[31] Ibid., para. 142.
[32] Ibid., *Sixty-eighth Session, Supplement No. 17* (A/68/17), annex I.
[33] Ibid., para. 80.

performed, including the preparation of a dedicated web page (www.uncitral.org/transparency-registry).[34]

168. The Commission further recalled that, at its forty-eighth session, in 2015, it had reiterated its strong and unanimous opinion that the secretariat of the Commission should fulfil the role of the transparency repository and that it should establish and operate the transparency repository, initially as a pilot project.[35] The General Assembly, in its resolution 70/115 of 14 December 2015, noted with approval "the view of the Commission that the repository of published information under the Rules on Transparency in Treaty-based Investor-State Arbitration[36] should be fully operational as soon as possible, as the repository constituted a central feature both of the Rules on Transparency and of the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (Mauritius Convention on Transparency) by providing a consolidated, transparent and easily accessible global case record database for all investor-State arbitrations conducted pursuant to the Rules on Transparency and the Convention. In this regard, the General Assembly "requested the Secretary-General to establish and operate through the secretariat of the Commission the repository of published information under the Rules on Transparency, in accordance with article 8 of the Rules, initially as a pilot project until the end of 2016, to be funded entirely by voluntary contributions".[37]

169. With respect to the budget situation, the Commission was informed that in early 2016, the Secretariat had received a grant from the Fund for International Development (OFID) of the Organization of the Petroleum Exporting Countries (OPEC) in the amount of 125,000 USD and funding by the European Union in the amount of 100,000 Euro, which allowed the secretariat of the Commission to operate the project on a temporary basis until end of 2016 and beyond. The Commission expressed its appreciation to both the European Union and OFID for their contributions.

170. The Commission noted with satisfaction that a legal officer had been hired in April 2016 to operate the transparency repository. Further, the Commission noted that, since its forty-eighth session, in 2015, information on two additional cases had been made available on the transparency repository where the Rules applied under article 1(2)(a) by agreement of the parties to the disputes, in arbitration arising under the ICSID Rules in one case, and under the UNCITRAL Arbitration Rules administered by the Permanent Court of Arbitration in the other case. Further, the Commission noted that the Secretariat had received an increasing number of inquiries on the Transparency Rules and performed a steadily increasing number of capacity-building activities on the UNCITRAL standards on transparency in treaty-based investor-State arbitration.

171. The Commission was informed that the Secretariat was currently in contact with the European Union and OFID to possibly obtain renewed funding. More generally, the Commission reiterated its appeal to all States, international organizations and other interested entities to consider making contributions to the funding of the transparency repository, preferably in the form of multi-year contributions, so as to facilitate its continued operation.

172. The Commission was informed that the Secretariat would be able to continue operating the transparency repository until the end of 2017 with the funds remaining from the contribution received from the European Union and OFID in early 2016 and taking into account possible new commitments.

173. After discussion, the Commission reiterated its strong and unanimous opinion that the secretariat of the Commission should fulfil the role of the transparency repository and that it should continue to operate the transparency repository. Accordingly, the Commission recommended to the General Assembly that it request the secretariat of the Commission to continue operating the repository of published information in accordance with article 8 of the Transparency Rules, as a pilot project until the end of 2017, to be funded entirely by voluntary contributions. The Commission also requested that the Commission and the General Assembly be informed of developments regarding the funding and budgetary situation of the transparency repository based on its pilot operation.

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[34] Ibid., *Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 108.
[35] Ibid., *Seventieth session, Supplement No. 17* (A/70/17), para. 161.
[36] Ibid., *Sixty-eighth Session, Supplement No. 17* (A/68/17), annex I.
[37] General Assembly resolution 70/115 of 14 December 2015, para. 2.

D. Possible future work in the area of arbitration and conciliation

174. The Commission held a preliminary discussion regarding future work in the area of international arbitration and conciliation. The conclusions reached during that preliminary discussion were reaffirmed by the Commission upon its consideration of agenda item 16 (Work programme of the Commission) (see chapter XV below).

1. Concurrent proceedings

175. On the issue of concurrent proceedings, the Commission recalled that, at its forty-seventh session, in 2014, it had agreed that the Secretariat should explore the matter further and that work should focus on treaty-based investor-State arbitration, without disregarding the issue in the context of international commercial arbitration.[38] The Commission further recalled that, at its forty-eighth session, in 2015, it had considered a note by the Secretariat in relation to concurrent proceedings in investment arbitration, which outlined the practical issues, the variety of situations that led to concurrent proceedings, the various options available to address those issues, and the possible form of any instrument to be developed in that area (A/CN.9/848).[39] There was general support for retaining the topic of concurrent proceedings on the agenda of the Commission. Accordingly, it was suggested that the Secretariat should keep abreast of developments in that area, provide further analysis and set out the issues and possible solutions in a neutral manner, which would assist the Commission making an informed decision at a later stage. It was suggested that work should also take into consideration concurrent proceedings in international commercial arbitration. At that session, the Commission requested the Secretariat to explore the topic further, in close cooperation with experts including those from other organizations working actively in that area and to report to the Commission at a future session with a detailed analysis of the topic including possible work that could be carried out.[40]

176. In accordance with that request, the Commission, at the current session, had before it a note by the Secretariat in relation to concurrent proceedings in international arbitration (A/CN.9/881). The Commission expressed its appreciation to the Secretariat for the note, which outlined the causes and impact of concurrent proceedings, existing principles and mechanisms to address concurrent proceedings and possible future work in that area.

177. A view was expressed that there was not much merit in retaining the topic of concurrent proceedings on the future work agenda of the Commission and that it would be preferable to utilize resources on other topics. In support of that view, it was stated that concurrent proceedings were rare and sporadic, and that any guidance provided to arbitral tribunals on the topic would be incomplete, as it would be limited to instances where the UNCITRAL Arbitral Rules were applicable. It was also mentioned that there were already existing mechanisms in investment treaties in which States could seek guidance. It was mentioned that, while the Commission might choose to address concurrent proceedings at a later stage, the topic did not warrant further work by the Secretariat at the current stage.

178. Nonetheless, there was general support that the topic of concurrent proceedings, despite the challenges posed, should be kept on the future work agenda of the Commission. It was mentioned that the note by the Secretariat clearly set out the issues that need to be addressed and exemplified that the existing legal framework and relevant rules did not address such circumstances. It was emphasized that concurrent proceedings posed a genuine problem and was of great significance as it could be harmful, particular to developing States, faced with such proceedings.

179. On the possible form of work, as discussed in section IV of document A/CN.9/881, support was expressed for providing guidance to arbitral tribunals faced with concurrent proceedings. It was suggested that such work could address how an arbitral tribunal should deal with concurrent proceedings and avoid contradictory decisions, possibly utilizing its inherent power provided in article 17 of the UNCITRAL Arbitration Rules and similar provisions in other arbitration rules. Support was also expressed for providing prudent guidance to States that might be faced with concurrent proceedings or wanted to avoid them. It was suggested that concrete examples of existing mechanisms or provisions in investment

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[38] *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 130.

[39] Ibid., *Seventieth Session, Supplement No. 17* (A/70/17), para. 144.

[40] Ibid., paras. 145-147.

treaties and possible models to be followed could be provided, supplementing the work already done by other organizations. However, some doubts were expressed about the possible preparation of a multilateral instrument to address concurrent proceedings.

180. As to whether the possible work should focus on investment and/or commercial arbitration, it was suggested that a distinction should be made if work were to be undertaken. It was generally felt that there was a more pressing need for work to focus on concurrent proceedings in investment arbitration. It was also mentioned that concurrent proceeding in commercial arbitration deserved a similar level of attention. In addition, it was suggested that possible work on the topic should also address successive proceedings, thus encompassing the full range of instances comprising multiple proceedings.

181. After discussion, the Commission agreed that the Secretariat should continue to explore the topic and further develop possible work that could be undertaken with regard to concurrent proceedings as mentioned in section IV of document A/CN.9/881, for consideration by the Commission at a future session.

2. Code of ethics/conduct for arbitrators

182. The Commission recalled that, at its forty-eighth session, in 2015, it had before it a proposal for future work on a code of ethics for arbitrators in investment arbitration (A/CN.9/855), which suggested that work on the topic could relate to conduct of arbitrators, their relationship with those involved in the arbitration process, and the values that they were expected to share and convey. It was further recalled that the Commission requested the Secretariat to explore the topic in a broad manner, including in the field of both commercial and investment arbitration, taking into account existing laws, rules and regulations as well as any standards established by other organizations. The Secretariat was requested to assess the feasibility of work in that area and report to the Commission at a future session.[41]

183. Pursuant to that request, the Commission had before it a note by the Secretariat in relation to ethics in international arbitration (A/CN.9/880). The Commission expressed its appreciation to the Secretariat for the note, which outlined the concept of ethics in international arbitration as well as existing legal frameworks on ethics and posed some questions to be considered before possibly engaging in future work in that area.

184. In support of retaining the topic of code of ethics on the future work agenda, it was said that there was currently a wide diversity and multiple layers of ethical norms and standards, and that therefore, it would be useful for the Commission to undertake work on the topic. It was underlined that different ethical norms and standards were applicable, and there were currently no clear criteria for determining how they interacted or which should prevail in a given situation. It was suggested that future work on the topic could take various approaches including (a) substantive work on harmonizing such norms or establishing minimum standards, yet taking into account considerations of cultural diversity, and (b) how to address the inter-relationship of multiple layers of norms and standards and providing guidance on which ethical standards would apply. In that respect, a question was raised regarding the scope of work, namely whether such work should focus on a code of ethics that applied to arbitrators only, or that also applied to other participants in the arbitration process, such as counsel and experts. In response, reservations were expressed regarding possible extension of the work to counsel and experts, as different sets of rules on ethics would usually be applicable, such as those governing the bar. It was further mentioned that issues relating to conflicts of interest of arbitrators could usefully be further elaborated.

185. Views were also expressed that the wide array of existing norms and standards on ethics would make it superfluous for the Commission to undertake work on the topic. It was said that notions such as independence and impartiality were already embedded in most domestic arbitration laws, arbitration rules, and institutions' codes of ethics. It was further pointed that in the field of treaty-based investor-State arbitration, codes of ethics were being developed as part of, or as an annex to, investment treaties and, therefore, the timeliness of undertaking work in that field was questioned.

186. After discussion, the Commission requested the Secretariat to continue exploring the topic further, in close cooperation with experts including those from other organizations

[41] Ibid., paras. 148-151.

working actively in that area, and to report to the Commission at a future session on the various possible approaches as outlined above.

3. Possible work on reform of investor-State dispute settlement system

187. The Commission recalled that at its forty-eighth session, in 2015, it had been informed that the Secretariat was conducting a study on whether the Mauritius Convention on Transparency could provide a useful model for possible reforms in the field of investor-State arbitration, in conjunction with the Center for International Dispute Settlement (CIDS) of the University of Geneva and the Graduate Institute of International and Development Studies. The Secretariat was requested to report to the Commission at a future session with an update on that matter.[42]

188. In accordance with that request, the Commission had before it a note providing an update on the study conducted within the framework of a research project of CIDS and a short overview of its outcome (A/CN.9/890). The Commission expressed its appreciation to the Secretariat and to CIDS for the research conducted. In particular, the Commission expressed its appreciation to Gabrielle Kaufmann-Kohler and Michele Potestà for the thorough analysis of the topic.

189. The Commission heard an oral presentation of the CIDS research study, which sought to provide a preliminary analysis of the issues that would need to be considered if a reform of the investor-State dispute settlement system were to be pursued at a multilateral level. It was explained that the research study analysed whether the Mauritius Convention on Transparency could serve as a model for further reforms, and sought to map the main options available in reforming investor-State dispute settlement. It was further explained that the research study borrowed from existing experience with various international courts and tribunals, including inter-state dispute settlement bodies (such as the International Court of Justice and the World Trade Organization (WTO)) as well as other dispute settlement mechanisms, such as the Iran-United States Claims Tribunal and regional courts. It was pointed out that two scenarios were considered in depth in the research study: the design of a permanent investment tribunal and of an appeal mechanism. It was further explained that the final part of the research study addressed how States might extend the proposed new dispute settlement system to their existing and future investment treaties. The research study suggested that, although not the only model that could be envisaged for those purposes, an opt-in convention modelled on the Mauritius Convention on Transparency with certain adaptations could effectively extend new dispute settlement options to existing investment treaties. However, it was pointed out that such a convention would raise treaty law issues, which the research study discussed.

190. Support was expressed for including the topic of reforms of the investor-State dispute settlement system in the future work agenda of the Commission. It was said that criticism had developed towards investor-State arbitration in general, which included the alleged lack of impartiality and accountability of the arbitrators, the lack of transparency of the procedure, and the absence of consistency of the jurisprudence, all of which had triggered a growing demand for changes from a number of States, international organizations and civil society groups. It was further said that reforms had been undertaken to address those criticisms, and it would therefore be timely to consider the matter at a multilateral level to avoid the development of a fragmented system.

191. It was suggested that the Commission would constitute an appropriate forum for considering and possibly coordinating work on the matter, because of its universal composition, and of its experience in the field of international dispute settlement. Some delegations also stated that the Commission should not do further work on investor-State arbitration as that topic was already being adequately addressed elsewhere. However, it was underlined that, if the Commission were to play such a role, close coordination and cooperation would be required with States and other stakeholders already involved in that matter.

192. Another view was that it would be difficult to define the scope of such work and that as currently presented, it might be too ambitious a project for the Commission to embark on. Therefore, it was suggested that preference be given to work relating to commercial arbitration.

[42] Ibid., para. 268.

193. In response to a concern that the Commission would not be an appropriate institution to host or to establish an investment court, it was said that the envisaged role of the Commission would be to lead the process of designing a new dispute settlement system, without necessarily hosting it.

194. After discussion, the Commission requested the Secretariat to review how the project described in document A/CN.9/890 might be best carried forward, if approved as a topic of future work at the forthcoming session of the Commission, taking into consideration the views of all States and other stakeholders, including how this project might interact with other initiatives in this area and which format and processes should be used. In so doing, the Secretariat was requested to conduct broad consultations.

4. Conclusion

195. After deliberation of the three possible topics for future work (see paras. 175-194 above), the Commission decided to retain those topics on its agenda for further consideration at its next session. It further requested that the Secretariat, within its existing resources, continue to update and conduct preparatory work on all the topics so that the Commission would be in a position to make an informed decision whether to mandate its Working Group II to undertake work in any of the topics, following the current work on the enforcement of settlement agreements resulting from conciliation. In that context, it was reaffirmed that priority should be given to the current work by Working Group II so that it could expeditiously complete its work on the preparation of an instrument on the topic.

E. Secretariat Guide on the New York Convention

196. The Commission recalled its discussion at its forty-seventh session, in 2014, regarding the preparation of a guide ("New York Convention Guide") on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on 10 June 1958[43] (the New York Convention).[44]

197. The Commission was informed that the New York Convention Guide had been finalized and published on the website (www.newyorkconvention1958.org) which was set up to make the information gathered in preparation of the New York Convention Guide publicly available. The Commission also heard an oral report on the developments on the website since the last Commission session.

198. The Commission expressed its appreciation for the completion of the New York Convention Guide and the work done by the Secretariat as well as the experts, E. Gaillard (Sciences Po Paris, École de Droit) and G. Bermann (Columbia University School of Law), including their research teams.

F. International commercial arbitration and mediation moot competitions

1. Willem C. Vis International Commercial Arbitration Moot

199. It was noted that the Association for the Organization and Promotion of the Willem C. Vis International Commercial Arbitration Moot had organized the Twenty-third Moot, the oral arguments phase of which had taken place in Vienna from 18 to 24 March 2016. As in previous years, the Moot had been co-sponsored by the Commission. Legal issues addressed by the teams in the Twenty-third Moot were based on the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980)[45] (the "United Nations Sales Convention"). A total of 311 teams from 67 countries participated and the best team in oral arguments was the University of Buenos Aires (Argentina). The oral arguments phase of the Twenty-fourth Willem C. Vis International Commercial Arbitration Moot would be held in Vienna from 7 to 13 April 2017.

200. It was also noted that the Vis East Moot Foundation had organized the Thirteenth Willem C. Vis (East) International Commercial Arbitration Moot, which had been

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[43] United Nations, *Treaty Series*, vol. 330, No. 4739.

[44] *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 17* (A/69/17), paras. 111-117.

[45] United Nations, *Treaty Series*, vol. 1489, No. 25567.

co-sponsored by the Commission, the East Asia Branch of the Chartered Institute of Arbitrators and many law firms based in Hong Kong, China. The final phase took place in Hong Kong, China, from 6 to 13 March 2016. A total of 115 teams from 29 jurisdictions participated in the Thirteenth (East) Moot and the best team in oral arguments was Singapore Management University (Singapore). The Fourteenth (East) Moot would be held in Hong Kong, China, from 26 March to 2 April 2017.

2. Madrid Commercial Arbitration Moot 2016

201. It was noted that Carlos III University of Madrid had organized the Eighth International Commercial Arbitration Competition in Madrid from 25 to 29 April 2016, which had been co-sponsored by the Commission. Legal issues addressed by the teams related to an international sale of goods, where the United Nations Sales Convention, the New York Convention, and the Rules of Arbitration of the Madrid Court of Arbitration were applicable. A total of 24 teams from 11 jurisdictions participated in the Madrid Moot 2016, which was held in Spanish. The best team in oral arguments was Universidad Peruana de Ciencias Aplicadas (Peru). The Ninth Madrid Moot would be held from 3 to 7 April 2017.

3. Mediation and negotiation competition

202. It was noted that the second mediation and negotiation competition organized jointly by IBA and the Vienna International Arbitral Centre with the support of the Commission had taken place in Vienna from 28 June to 2 July 2016. Legal issues addressed by the teams had been those addressed at the Twenty-third Willem C. Vis International Commercial Arbitration Moot (see para. 199 above). A total of 30 teams from 17 jurisdictions had participated.

V. Consideration of issues in the area of online dispute resolution: finalization and adoption of Technical Notes on Online Dispute Resolution

203. The Commission recalled its instruction to Working Group III (Online Dispute Resolution), made at its forty-eighth session, in 2015, to continue its work towards elaborating a non-binding descriptive document reflecting elements of an online dispute resolution (ODR) process, on which elements the Working Group had previously reached consensus, excluding the question of the nature of the final stage of the ODR process (arbitration/non-arbitration). It was also recalled that the Working Group had been given a time limit of one year or no more than two Working Group sessions to conclude its work.[46]

204. The Commission took note of the progress of the Working Group, reflected in its reports to the Commission from the two sessions since the instructions referred to above (A/CN.9/862 and A/CN.9/868). The Commission noted that the Working Group had completed its deliberations and submitted a draft document entitled "Technical Notes on Online Dispute Resolution" for the Commission's consideration and eventual adoption at the current session (A/CN.9/868, para. 87).

205. The Commission also heard that the concerns about ensuring language consistency in accurately reflecting the descriptive nature of the text in its title in certain official languages had been satisfactorily addressed (A/CN.9/868, paras. 79-81).

206. The Commission proceeded with the consideration of draft technical notes on online dispute resolution contained in document A/CN.9/888 (the draft Technical Notes). The Commission heard a proposal for an additional paragraph to be included in the draft Technical Notes to read as follows, "These Technical Notes are not intended to supplant or override applicable law", the purpose of which would be to facilitate a correct understanding of the nature of the Technical Notes and so to support their implementation.

207. In response, it was stated that the draft Technical Notes were expressly descriptive in nature, and so they could not override applicable law. In addition, it was observed that the suggested addition was unnecessary and could add confusion.

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[46] *Official Records of the General Assembly, Seventieth Session, Supplement No. 17* (A/70/17), para. 352.

208. Confirming its understanding that the Technical Notes did not supplant or override applicable law, the Commission decided to leave the text as proposed in document A/CN.9/888.

209. The Commission then heard the following proposals to amend the draft Technical Notes which, it was suggested, would remove a contradiction between paragraph 34 on the one hand and paragraphs 19 and 33 on the other hand in the draft Technical Notes regarding the commencement of ODR proceedings:

(a) To rephrase paragraph 19 as follows: "When a claimant submits a notice through the ODR platform to the ODR administrator (see section VI below), …"; and

(b) To amend the opening phrase of paragraph 33 to read "In order that an ODR proceeding may begin".

210. An alternative proposal was that no changes should be made to paragraphs 19 and 33, and the phrase after the comma in paragraph 34 should be deleted. Paragraph 34 could consequentially be amended to read "ODR proceedings may be deemed to have commenced when the claimant communicates a notice to the ODR administrator. It is desirable that the ODR administrator notify the parties that the notice is available at the ODR platform within a reasonable time." It was said that that view better reflected that both paragraphs 19 and 34 reflect consensus regarding how commencement should be measured; however, as there was a conflict in the approach taken in the two paragraphs, the approach taken in paragraph 19 was preferable because it was more efficient.

211. In response, it was stated that the existing paragraph 34 expressed the consensus in the Working Group that the proceedings "may be deemed to have commenced when, following a claimant's communication of a notice to the ODR administrator, the ODR administrator notifies the parties that the notice is available at the ODR platform."

212. After discussion, it was agreed that the amendments proposed to paragraphs 19 and 33 would be made. It was also confirmed that paragraph 34 would remain unchanged.

213. The Commission also agreed the following amendments to the draft Technical Notes:

(a) To delete the word "claimant's" from the phrase "the claimant's notice" in paragraphs 36 and 51; and

(b) To add the following phrase after the word "neutral" at the end of paragraph 42: "as described in paragraph 46 below".

214. A proposal to add the following sentence to paragraph 51, "The ODR administrator may utilize technical means to accommodate this selection", did not gain support.

215. The Commission also considered paragraph 53 of the draft Technical Notes, and agreed that the following formulation would more accurately reflect the intention of the Working Group (A/CN.9/868, paras. 74-75): "It is desirable that ODR proceedings be subject to the same confidentiality and due process standards that apply to dispute resolution proceedings in an offline context, in particular independence, neutrality and impartiality". It was decided that paragraph 53 of the draft Technical Notes would be amended accordingly.

216. The Commission approved the draft Technical Notes subject to the amendments agreed to be made at the current session.

217. The Commission, after consideration of the draft Technical Notes, adopted the following decision at its 1035th meeting, on 5 July 2016:

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

"*Recalling* its mandate under General Assembly resolution 2205 (XXI) of 17 December 1966 to further the progressive harmonization and unification of the law of international trade, and in that respect to bear in mind the interests of all peoples, and in particular those of developing countries, in the extensive development of international trade,

"*Noting* that the sharp increase of online cross-border transactions has raised a need for mechanisms for resolving disputes which arise from such transactions, and that one such mechanism is online dispute resolution ("ODR"),

"*Observing* that ODR can assist the parties in resolving the dispute in a simple, fast, flexible and secure manner, without the need for physical presence at a meeting or hearing,

"*Also observing* that ODR represents significant opportunities for access to dispute resolution by buyers and sellers concluding cross-border commercial transactions, both in developed and developing countries,

"*Recalling* that at its forty-third session, in 2010, the Commission agreed that a working group should be established to undertake work in the field of ODR,[47]

"*Expressing appreciation* to Working Group III (Online Dispute Resolution) for having prepared the draft Technical Notes on Online Dispute Resolution,

"*Noting further* that the Technical Notes on Online Dispute Resolution are non-binding, descriptive, and reflect principles of impartiality, independence, efficiency, effectiveness, due process, fairness, accountability and transparency,

"*Noting additionally* that the Technical Notes on Online Dispute Resolution are expected to contribute significantly to the development of systems to enable the settlement of disputes arising from cross-border low-value sales or service contracts concluded using electronic communications,

"*Being convinced* that the Technical Notes on Online Dispute Resolution will significantly assist all States, in particular developing countries and States whose economies are in transition, ODR administrators, ODR platforms, neutrals, and the parties to ODR proceedings in developing and using ODR systems,

"1. *Adopts* the Technical Notes on Online Dispute Resolution, as they appear in annex I to the report of UNCITRAL on its forty-ninth session;

"2. *Requests* the Secretary-General to publish the text of the Technical Notes on Online Dispute Resolution, including electronically, in the six official languages of the United Nations, and to disseminate that text broadly, including through electronic means, to Governments and other interested bodies;

"3. *Recommends* that all States and other stakeholders use the Technical Notes on Online Dispute Resolution in designing and implementing ODR systems for cross-border commercial transactions; and

"4. *Requests* all States to support the promotion and use of the Technical Notes on Online Dispute Resolution."

218. It was suggested that the Technical Notes could be endorsed by means of a dedicated draft resolution, which could be introduced to the General Assembly. The Secretariat was requested to bear this suggestion in mind when assisting States with the preparation of submissions to the Sixth Committee later in 2016.

VI. Micro-, small- and medium-sized enterprises: progress report of Working Group I

219. The Commission had before it the reports of Working Group I (MSMEs) on the work of its twenty-fifth and twenty-sixty sessions (A/CN.9/860 and A/CN.9/866, respectively) outlining progress on the two topics on its current work agenda, both of which "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":[48]

(a) Key principles in business registration; and

(b) Legal questions surrounding the creation of a simplified business entity.

220. With respect to the work on key principles in business registration, the Commission noted that the Working Group had considered texts prepared by the Secretariat in the form of draft commentary and draft recommendations for a possible legislative guide. The Commission further noted that on the basis of those draft texts, the Working Group had decided to prepare an instrument along the lines of a concise legislative guide, without prejudice to considering at a later time whether draft provisions or a model law might also

[47] Ibid., *Sixty-fifth Session, Supplement No. 17* (A/65/17), para. 257.

[48] Ibid., *Sixty-eighth Session, Supplement No. 17* (A/68/17), para. 321; reiterated ibid., *Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 134; and ibid., *Seventieth Session, Supplement No. 17* (A/70/17), paras. 220, 225, and 340.

be appropriate (A/CN.9/860, para. 73), and that the twenty-eighth session of the Working Group would be devoted in its entirety to consideration of a draft legislative guide on business registration to be prepared by the Secretariat (A/CN.9/866, para. 90).

221. On the second topic of the legal issues surrounding the creation of a simplified business entity, the Commission recalled that the Working Group had proceeded to examine those issues as illustrated by way of working papers and through the text of draft model laws. The Commission noted that at the conclusion of its examination of those issues at its twenty-sixth session, the Working Group decided that a legislative guide reflecting its policy considerations to date and consisting of recommendations and commentary should be prepared for further discussion in the Working Group (A/CN.9/866, paras. 48 to 50). The Commission further noted the Working Group's decision that its twenty-seventh session would be devoted in its entirety to consideration of a draft legislative guide on a simplified business entity (A/CN.9/866, para. 90).

222. The Commission noted that the Working Group had also considered how best to provide an overall context for end-users of current and possible future texts relating to MSMEs. The Working Group was of the view that an introductory document along the lines of A/CN.9/WG.I/WP.92 should preface the two legislative texts currently under preparation, and that such a text could also provide a link for possible future texts relating to MSMEs but that might, for example, be prepared by other Working Groups (A/CN.9/866, paras. 86 to 87).

223. It was observed that although work on the two topics being tackled by the Working Group aimed at reducing the legal obstacles faced by MSMEs, the issues addressed by the Working Group were of the general nature and not specific to MSMEs. Consideration could thus be given to whether the description of the Working Group as a working group on MSMEs reflected correctly the nature of its work. Reference was also made to work being pursued by the European Commission on the topic of single member private limited companies,[49] along with a request that the Secretariat continue to liaise with the secretariat of the European Commission in that regard. A view was also expressed that completion of the current work programme of the Working Group was urgent, and that other topics in relation to MSMEs might be pursued, possibly in coordination with other Working Groups. It was further noted with satisfaction that the Working Group had expressly allotted time at its next session to consider a legal business form that had proven successful in a State (A/CN.9/866, para. 90), and that the Working Group had tentatively agreed at an earlier session to include a discussion in its further work of alternative legislative models for micro and small businesses that provided for the segregation of business assets from personal assets without requiring the creation of an entity with legal personality (A/CN.9/831, para. 20).

224. After discussion, the Commission commended the Working Group for the progress that was being made on the two topics as reported above, and States were encouraged to ensure that their delegations included experts on business registration so as to facilitate work on that topic. It noted that, consistent with the principles contained in General Assembly resolutions on the work of UNCITRAL,[50] the legislative texts resulting from the current work of the Working Group on those two topics should be published, including electronically, and in the six official languages of the United Nations, and be disseminated broadly to Governments and other interested bodies.

VII. Consideration of issues in the area of electronic commerce

A. Progress report of Working Group IV

225. 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

[49] See a Proposal for a Directive of the European Parliament and of the Council on single-member private limited liability companies, European Commission, Brussels, 9.4.2014 (COM (2014) 212 final). The European Commission had previously considered the Proposal for a Council Regulation on the Statute for a European private company (COM (2008) 396)), but that proposal was officially withdrawn (Annex to the Communication on "Regulatory Fitness and Performance (REFIT): Results and Next Steps", COM (2013) 685, 2.10.2013).

[50] E.g. General Assembly resolution 70/115, paras. 16, 19 and 21.

transferable records[51] and that the work had progressed in the preparation of a draft Model Law on Electronic Transferable Records.[52]

226. At its current session, the Commission had before it reports of the Working Group on its fifty-second session (A/CN.9/863), held in Vienna from 9 to 13 November 2015, and fifty-third session (A/CN.9/869), held in New York from 9 to 13 May 2016. It was noted that the draft Model Law on Electronic Transferable Records focused on domestic aspects of the use of electronic transferable records equivalent to paper-based transferable documents or instruments, and that international aspects of the use of those records, as well as the use of transferable records existing only in electronic form, would be addressed at a later stage.[53] The Commission was informed that, given the advanced stage of preparation, it was expected that the draft Model Law with an explanatory note would be submitted for adoption at its fiftieth session, in 2017.

227. The Commission expressed its appreciation to the Working Group for the progress made and commended the Secretariat for its work. The Commission requested the Secretariat to reflect in its publication programme and take any other measures to ensure future publication of the final text of the UNCITRAL Model Law on Electronic Transferable Records with an explanatory note, expected to be adopted at the Commission's fiftieth session, including electronically and in the six official languages of the United Nations, and to disseminate it broadly to Governments and other interested bodies.

B. Future work in the area of electronic commerce

228. The Commission recalled that at its forty-eighth session, in 2015, it had instructed the Secretariat to conduct preparatory work on identity management and trust services, cloud computing and mobile commerce, including through the organization of colloquia and expert group meetings, for future discussion at the Working Group level following the current work on electronic transferable records.[54]

229. Accordingly, the Commission had before it a note by the Secretariat on legal issues related to identity management and trust services (A/CN.9/891) summarising the discussions during the UNCITRAL Colloquium on Legal Issues Related to Identity Management and Trust Services held in Vienna on 21 and 22 April 2016 and complemented by other material. The Commission was also informed that work on contractual aspects of cloud computing had started at the expert level on the basis of a proposal (A/CN.9/856) submitted at the forty-eighth session of the Commission, in 2015.[55]

230. In light of such progress, it was noted that the Working Group could commence consideration of legal issues relating to the use of identity management and trust services and of cloud computing upon completion of its work on the draft Model Law on Electronic Transferable Records, in line with the decision made by the Commission at its forty-eighth session, in 2015.[56]

231. In that context, preference was expressed for work to commence on legal issues relating to cloud computing based on preparatory work already conducted. However, the view was also expressed that additional preparatory work was necessary, which should aim at compiling relevant information. In response to a question about the possible means for conducting preparatory work, the Commission was informed that the Secretariat would undertake a wide range of informal consultations with experts and related organizations, including possibly through the organization of a meeting of experts. States and other concerned entities were invited to share with the Secretariat expertise and other resources useful for that initiative with a view to ensuring regional representation.

232. Preference was also expressed for work to commence on identity management and trust services, as that topic continuously arose during the preparation of the draft Model Law on Electronic Transferable Records, was of general significance in electronic transactions,

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[51] *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17* (A/66/17), para. 238.
[52] Ibid., *Seventieth Session, Supplement No. 17* (A/70/17), para. 228.
[53] Ibid.
[54] Ibid., para. 358.
[55] Ibid., para. 354.
[56] Ibid., para. 358.

and could build on the results of the Colloquium (see para. 229 above). It was mentioned that preparatory work on that topic should involve assessment of existing legal frameworks, which might eventually lead to the identification of a specific subtopic(s), which the Working Group might focus its work. In that context, a suggestion was made that the Secretariat might consider circulating a questionnaire to seek inputs from States on the existing domestic legislative framework on identity management and trust services.

233. During the discussion, a view was expressed that the topics of "identity management" and "trust services" should be distinguished and that focus of the work should be on the former, as it was the subject of legislative efforts by a number of States. Furthermore, it was mentioned that work on trust services should be deferred until further assessment was made.

234. While comments were made that work on the identity management and trust services could touch upon or take into account issues concerning privacy in electronic communications, it was generally felt that caution should be exercised in dealing with such issues, which did not necessarily fall within the overall mandate of the Commission.

235. After discussion, it was agreed that priority should be given to completing the preparation of the draft Model Law on Electronic Transferable Records and the accompanying explanatory note, so that they could be finalized and adopted by the Commission at its next session. It was generally felt that the topics of identity management and trust services as well as of cloud computing should be retained on the work agenda and that it would be premature to prioritize between the two topics. The Commission confirmed its decision that the Working Group could take up work on those topics upon completion of the work on the Model Law on Electronic Transferable Records. In that context, the Secretariat, within its existing resources, and the Working Group were asked to continue to update and conduct preparatory work on the two topics including their feasibility in parallel and in a flexible manner and report back to the Commission so that it could make an informed decision at a future session, including the priority to be given to each topic. In that context, it was mentioned that priority should be based on practical needs rather than on how interesting the topic was or the feasibility of work.

236. Having mandated work in the fields of identity management and trust services and of cloud computing, the Commission requested the Secretariat to reflect that decision in its publications programme and take any other measures to ensure future publication of any final text resulting from that work, including electronically and in the six official languages of the United Nations.

237. During its deliberation of future work, the Commission was informed of legislative developments based on UNCITRAL texts on electronic commerce, which could provide guidance to the current and future work of Working Group IV, especially with respect to certain aspects of interoperability. In addition, the importance of technical assistance and capacity-building activities in the field of electronic commerce was highlighted. The Secretariat was requested to make robust and tangible efforts to expand such assistance for law reforms in that field, especially for developing countries.

C. Cooperation with UN/ESCAP in the field of paperless trade

238. The Commission recalled that at its forty-fourth session, in 2011, it had welcomed the ongoing cooperation between the Secretariat and other organizations on legal issues relating to electronic single window facilities and had asked the Secretariat to contribute as appropriate.[57]

239. At the current session, the Commission was informed about ongoing work in the field of paperless trade, including legal aspects of electronic single window facilities, carried out in cooperation with the United Nations Economic and Social Commission for Asia and the Pacific (UN/ESCAP). In particular, the Commission was informed that on 19 May 2016, UN/ESCAP, during its seventy-second session, adopted the "Framework Agreement on Facilitation of Cross-Border Paperless Trade in Asia and the Pacific"[58] (the "Framework Agreement"). It was noted that the Secretariat had participated in the preparation of the

[57] Ibid., *Sixty-sixth Session, Supplement No. 17* (A/66/17), para. 240.

[58] Available at www.unescap.org/resources/framework-agreement-facilitation-cross-border-paperless-trade-asia-and-pacific.

Framework Agreement from an early stage to ensure consistency with the principles embodied in UNCITRAL texts on electronic commerce.

240. The Commission took note that the objective of the Framework Agreement was to promote and facilitate cross-border electronic exchange of trade data and documents in line with a set of general principles, thus bridging the gap between cross-border trade facilitation and electronic commerce. It was further explained that the Framework Agreement was intended to complement the WTO Trade Facilitation Agreement and might also facilitate the implementation and harmonization of a growing number of bilateral and multilateral cross-border paperless trade initiatives in the Asia and Pacific region, including those regarding regional and subregional single windows.

VIII. Insolvency law: progress report of Working Group V

241. The Commission had before it the reports of the Working Group on the work of its forty-eighth and forty-ninth sessions (A/CN.9/864 and A/CN.9/870, respectively) outlining progress on the three topics on its current work agenda:

(a) Facilitating the cross-border insolvency of multinational enterprise groups, pursuant to a mandate given by the Commission at its forty-third session;[59]

(b) Obligations of directors of enterprise group companies in the period approaching insolvency, pursuant to a mandate given by the Commission at its forty-third session;[60] and

(c) Recognition and enforcement of insolvency-related judgements, pursuant to a mandate given by the Commission at its forty-seventh session.[61]

242. With respect to the work on enterprise groups, the Commission noted that the Working Group had agreed on a set of key principles to underpin its work and a structure for the draft text to be developed. A first draft text consolidating the issues addressed by the key principles with articles on cooperation and coordination, facilitating the development and recognition of a group insolvency solution, and treatment of foreign claims in accordance with applicable law had been considered, enabling a more coherent and comprehensive draft text to be prepared for consideration at a future session.

243. On the second topic of the obligations of directors of enterprise group companies in the period approaching insolvency, the Commission recalled that while the work was already well developed, it would not be referred to the Commission for finalization and approval until the work on enterprise group insolvency was sufficiently advanced to be able to ensure consistency of approach between the two texts.

244. With respect to the work on recognition and enforcement of insolvency-related judgements, the Commission noted with satisfaction the progress that had been made towards the development of a draft model law, as well as the steps that had been taken to facilitate close coordination with the Hague Conference on Private International Law, including attendance by the Secretariat at the recent Special Commission of June 2016 on the Recognition and Enforcement of Foreign Judgements. That coordination has enabled progress on the Hague Conference's judgements project to be taken into consideration in the draft model law being developed by the Working Group. The Commission noted that the Hague Conference had prepared a document on UNCITRAL's work on judgements and settlement agreements for the information of the Special Commission. Stressing the importance of ensuring coordination with the work of the Hague Conference, the Commission encouraged the Secretariat to continue its efforts in that regard.

245. After discussion, the Commission commended the Working Group for the progress that was being made on the three topics on its current work agenda, as reported above (see para. 241). The Commission requested the Secretariat to reflect, in its publications programme, the decisions to mandate work on those topics and to take any other measures necessary to ensure future publication of final texts resulting from that work, including electronically and in the six official languages of the United Nations.

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

[60] Ibid.

[61] Ibid., *Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 155.

246. The Commission noted that the report of the Working Group's forty-ninth session recommended the Commission clarify the mandate given at its forty-seventh session[62] to Working Group V with respect to the insolvency of MSMEs. The Commission agreed that Working Group V is mandated to develop appropriate mechanisms and solutions, focusing on both natural and legal persons engaged in commercial activity, to resolve the insolvency of MSMEs. While the key insolvency principles and the guidance provided by the UNCITRAL Legislative Guide on Insolvency Law[63] should be the starting point for discussions, the Working Group should aim to tailor the mechanisms already provided in the Legislative Guide to specifically address MSMEs and develop new and simplified mechanisms as required, taking into account the need for those mechanisms to be equitable, fast, flexible and cost efficient. The form the work might take should be decided at a later time based on the nature of the various solutions that were being developed. It was mentioned that the definition of what constituted an MSME would be helpful.

247. The Commission noted that the feasibility of developing a convention on international insolvency issues might continue to be studied informally by an ad hoc, open-ended group of interested participants on the basis of a list of issues prepared and distributed by the Secretariat. However, noting that the agenda of Working Group V was already rather full and that the Secretariat might have little time and few resources with which to conduct this informal work, the Commission agreed that that work should only be undertaken as and when the Secretariat was able to do so.

IX. Technical assistance to law reform

A. General discussion

248. The Commission had before it a note by the Secretariat (A/CN.9/872) describing technical cooperation and assistance activities. The Commission stressed the importance of such activities and expressed its appreciation for the related work undertaken by the Secretariat.

249. 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. 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 and partnership 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.

250. The Commission welcomed the Secretariat's efforts to expand cooperation with the Government of the Republic of Korea on the APEC Ease of Doing Business project in the area of enforcing contracts, to other areas and with other APEC member economies. Support was expressed for the Secretariat's aim to cooperate more closely with APEC and its member economies to improve the business environment in the Asia-Pacific region and to promote UNCITRAL texts.

251. 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

[62] Ibid., para. 156.

[63] United Nations publication, Sales No. E.05.V.10.

appreciation to the Governments of the Republic of Korea, and Indonesia for their contributions to the Trust Fund since the Commission's forty-eighth session and to organizations that had contributed to the programme by providing funds or by hosting seminars.

252. 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 the Government of Austria for contributing to the UNCITRAL Trust Fund since the Commission's forty-eighth session, thereby enabling travel assistance to be granted to developing countries that were members of UNCITRAL.

253. With regard to the dissemination of information on UNCITRAL's work and texts, the Commission noted the important role played by the UNCITRAL website (www.uncitral.org) and the UNCITRAL Law Library.

254. The Commission welcomed the UNCITRAL Law Library's inclusion on the UNCITRAL website of a new feature highlighting UNCITRAL's role in supporting the Sustainable Development Goals.[64] The Commission recalled its request that the Secretariat continue to explore the development of new social media features on the UNCITRAL website as appropriate,[65] noting that the development of such features in accordance with the applicable guidelines was also welcomed by the General Assembly.[66] In this regard, the Commission noted with approval the continued development of the "What's new at UNCITRAL?" Tumblr microblog[67] and the establishment of an UNCITRAL presence on LinkedIn.[68] Finally, recalling the General Assembly resolutions commending the website's six-language interface,[69] the Commission requested the Secretariat to continue to provide, via the website, UNCITRAL texts, publications, and related information, in a timely manner and in the six official languages of the United Nations.

B. Consideration of a draft guidance note on strengthening United Nations support to States, upon their request, to implement sound commercial law reforms

255. The Commission recalled that, at its forty-eighth session, it considered a draft guidance note on strengthening United Nations support to States to implement sound commercial law reforms (A/CN.9/845).[70] After consideration, it requested States to provide to its secretariat any suggestion for revision of the text. It was agreed that the compilation of all comments received from States would be circulated by the Secretariat to all States together with a revised version of the text. It was understood that, if agreement of States on the revised text could be achieved before or during the consideration of the Commission's report in the Sixth Committee of the General Assembly in 2015, the Sixth Committee itself might wish to endorse the text, so as to avoid delay in issuing the document. Otherwise, the matter might need to be brought back to the Commission for consideration at its next session. The Secretariat was requested, in revising the text, to follow closely the wording of General Assembly resolution 2205 (XXI) on the establishment of UNCITRAL and avoid embarking into areas not directly linked to the UNCITRAL mandate.[71]

256. At its current session, the Commission took note of steps taken by the Secretariat to implement the above-referred decisions of the Commission. The Commission was also informed about statements made by States in the Sixth Committee on the subject and the results of informal consultations held in that body on the draft. The Commission also took

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[64] Available from www.uncitral.org/uncitral/about/SDGs/Sustainable_Development_Goals.html.

[65] *Official Records of the General Assembly, Seventieth Session, Supplement No. 17* (A/70/17), para. 247.

[66] General Assembly resolutions 69/115, para. 21; and 70/115, para. 21.

[67] Available from http://uncitral.tumblr.com.

[68] Available from www.linkedin.com/company/uncitral.

[69] General Assembly resolutions 61/32, para. 17; 62/64, para. 16; 63/120, para. 20; 69/115, para. 21; and 70/115, para. 21.

[70] *Official Records of the General Assembly, Seventieth Session, Supplement No. 17* (A/70/17), para. 248.

[71] Ibid., paras. 251-252.

note of paragraph 6 (e) of General Assembly resolution 70/115 on the report of UNCITRAL on the work of its forty-eighth session, by which the General Assembly recalled its resolutions stressing 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, welcomed the efforts of the Secretary-General to ensure greater coordination and coherence among United Nations entities and with donors and recipients, and took note of the ongoing discussion in the Commission of ways to strengthen support to Member States, upon their request, in the implementation of sound commercial law reforms. It was noted that the objective was to assist States but in no way to impose on States the adoption of the guidance note.

257. At the session, the Commission had before it: (a) the compilation of comments by States received by the Secretariat on document A/CN.9/845 in response to a note verbale circulated by the Secretariat to States on 21 July 2015 (A/CN.9/882, section II); (b) a comment by a State (transmitted to the Secretariat in a note verbale of 23 October 2015) on a version of the guidance note prepared pursuant to those comments and circulated to States by the Secretariat in a note verbale of 8 October 2015 (the 8 October 2015 version) (A/CN.9/882, section III); (c) a draft guidance note on strengthening United Nations support to States, upon their request, to implement sound commercial law reforms, prepared pursuant to consultations held in the Sixth Committee, and comments received from States, on the 8 October 2015 version (A/CN.9/883); and (d) a comment by a State (transmitted to the Secretariat in a note verbale of 20 June 2016) on the draft guidance note contained in document A/CN.9/883 (A/CN.9/882/Add.1).

258. The Commission considered the draft guidance note contained in document A/CN.9/883 together with the comment received from one State on that draft and the comments received from States on the earlier versions of the draft guidance note. As regards document A/CN.9/882/Add.1, the delegation author of the comment contained in that document requested the Secretariat to issue a corrigendum to the English and other language versions of that document containing the words "incl. the word 'rule-based'" to the effect that those words would be deleted. It also requested that, in the Russian version of document A/CN.9/883, the phrase "основанные на верховенстве права коммерческие отношения" in the first sentence of paragraph 9, the phrase "основанных на верховенстве права коммерческих отношений и международной торговли" in the first sentence of paragraph 19, and the phrase "коммерческих отношений, основанных на верховенстве права" in the first sentence of paragraph 22, be redrafted. References to the rule of law ("верховенство права") in those phrases were found inappropriate. A more appropriate term in Russian for the term "rule-based" used in the English version of document A/CN.9/883 in those instances would be "основанных на правилах". That other term should be used in the final text of the guidance note in all instances where the English text refers to the rule-based commercial relations and international trade.

259. Concerns were expressed about the proposal to remove the phrase "and respect for the rule of law" in the second sentence of paragraph 9. After discussion, the Commission agreed to replace the phrase "the respect for the rule of law" with the phrase "respect for legality/rule-based order" to make it closer to the French version of the text, with the consequential deletion of footnote 5. The Commission also emphasized the need to pay particular attention to consistency between the various linguistic versions of the guidance note when finalizing the text.

260. The Commission agreed that the footnotes should be removed from the final text of the guidance note except for those intended to guide users of the guidance note to UNCITRAL instruments, online resources and other essential information (footnotes 13 and 15 to 25).

261. As regards the annex and paragraph 12 referring to the checklist of illustrative indicators, the Commission heard a proposal that the annex should not be part of the guidance note and no references thereto should be made in the guidance note. The Commission agreed to that proposal on the understanding that, while not being appended to the guidance note as a policy document, the annex should be used at working level, as an internal document of the UNCITRAL secretariat, when needed in the negotiation of specific projects with relevant stakeholders, donors and possible partners of UNCITRAL in technical cooperation and assistance projects.

262. Subject to the above-mentioned changes, the Commission endorsed the text of the draft guidance note contained in document A/CN.9/883 and requested the Secretary-General to finalize it in the light of deliberations at the current session, and to circulate the final text as broadly as possible to its intended users.

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

263. The Commission considered document A/CN.9/873 "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 CLOUT system and of the digests of case law relating to the United Nations Sales Convention and the UNCITRAL Model Law on International Commercial Arbitration (the Model Law on Arbitration).

264. The Commission expressed its continuing belief that the system of CLOUT and the digests are an important tool for promoting uniform interpretation of the law relating to UNCITRAL texts and noted with appreciation the increasing number of UNCITRAL legal texts that are currently represented in CLOUT. As at 9 May 2016 (date of A/CN.9/873), 166 issues of compiled case-law abstracts had been prepared, dealing with 1,551 cases. The cases related to the following legislative texts:

- The New York Convention
- Convention on the Limitation Period in the International Sale of Goods (New York, 1974)[72] and Convention on the Limitation Period in the International Sale of Goods as amended by the Protocol of 11 April 1980 (Vienna)[73]
- United Nations Convention on the Carriage of Goods by Sea (Hamburg, 1978)[74]
- United Nations Sales Convention
- United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (New York, 1995)[75]
- United Nations Convention on the Use of Electronic Communications in International Contracts (New York, 2005)[76]
- Model Law on Arbitration
- UNCITRAL Model Law on International Credit Transfers (1992)[77]
- UNCITRAL Model Law on Electronic Commerce (1996)[78]
- UNCITRAL Model Law on Cross-Border Insolvency (1997)[79]
- UNCITRAL Model Law on Electronic Signatures (2001)[80]

265. The Commission took note that the majority of the abstracts published referred to Western European and other States, as indicated in a note by the Secretariat (A/CN.9/840) submitted to the Commission at its forty-eight session, in 2015.[81] When compared with the figures provided in that note, a small increase in case law from Eastern European States and a small decrease in case law from African States could be noted. As to the legislative texts reported in CLOUT, the United Nations Sales Convention and the Model Law on Arbitration were still the most represented in the system, although there was an increase of cases

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[72] United Nations, *Treaty Series*, vol. 1511, No. 26119.
[73] Ibid., vol. 1511, No. 26121.
[74] Ibid., vol. 1695, No. 29215.
[75] Ibid., vol. 2169, No. 38030, p. 163.
[76] General Assembly resolution 60/21, annex.
[77] *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 17* (A/47/17), annex I.
[78] General Assembly resolution 51/162, annex.
[79] General Assembly resolution 52/158, annex.
[80] General Assembly resolution 56/80, annex.
[81] *Official Records of the General Assembly, Seventieth Session, Supplement No. 17* (A/70/17), para. 253.

concerning the UNCITRAL Model Law on Cross-Border Insolvency and the New York Convention.

266. The Commission was informed that eleven new national correspondents had been appointed in the period under review, two of whom replaced previous correspondents, and that the network of national correspondents was composed of 74 experts representing 35 countries. The Commission was also informed that pursuant to a decision taken at its forty-second session, in 2009, [82] the mandate of the current network of national correspondents would expire in 2017 and that States would be requested to appoint and/or reappoint their national correspondents. The Commission noted that since the previous note of the Secretariat (A/CN.9/840), national correspondents had provided approximately 47 per cent of the abstracts published in CLOUT. This figure was consistent with the figure provided to the Commission at its forty-eighth session in 2015.

267. The Commission also heard a short account of the meeting of national correspondents, held in July 2015, at which participants encouraged the Secretariat to increase the UNCITRAL texts available in CLOUT and to initiate cooperation with organizations and institutions dealing with topics pertaining to those texts not yet included in the system so as to identify relevant case law.

268. The Commission commended the continued effort of its secretariat on the promotion of the digests and expressed its appreciation for the new round of updates of the digest of case law relating to the United Nations Sales Convention being finalized.

269. The Commission expressed its appreciation for the functioning of the upgraded CLOUT database and noted with particular interest the cooperation of its secretariat with the United Nations Volunteer programme to populate the database with the full text decisions of the abstracts published in previous years. The Commission also noted with appreciation the performance of the website www.newyorkconvention1958.org (see para. 197 above), and the successful coordination between that website and the CLOUT system.

270. As in previous sessions, the Commission commended the Secretariat for the work on CLOUT, once again taking note of the resource-intensive nature of the system and acknowledging the need for further resources to sustain it. The Commission thus appealed to all States to assist the Secretariat in its search for available funding at the national level to ensure sustained operability of the system.

XI. Status and promotion of UNCITRAL legal texts

271. 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.9/876). The Commission noted with appreciation the information on treaty actions and legislative enactments received since its forty-eighth session.

272. The Commission also noted the following actions and legislative enactments made known to the Secretariat subsequent to the submission of the Secretariat's note:

(a) the Mauritius Convention on Transparency[83] — signature by the Netherlands (one State party);

(b) the Model Law on Arbitration — enactment of the Model Law as amended in 2006 in Republic of Korea (2016);[84]

(c) UNCITRAL Model Law on International Commercial Conciliation (2002)[85] — enactment in Malaysia (2012).

273. Considering the broader impact of UNCITRAL's texts, the Commission also took note of the bibliography of recent writings related to the work of UNCITRAL (A/CN.9/874) and the influence of UNCITRAL legislative guides, practice guides and contractual texts as

[82] Ibid., *Sixty-fourth Session, Supplement No. 17* (A/64/17), para. 370.

[83] The Convention has not yet entered into force; it requires three States parties for entry into force.

[84] The legislation amends previous legislation based on the unamended Model Law.

[85] General Assembly resolution 57/18, annex. See also *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 17* (A/57/17), annex I.

described in academic and professional literature. The Commission noted the importance of facilitating a comprehensive approach to the creation of the bibliography and the need to remain informed of activities of non-governmental organizations (NGOs) active in the field of international trade law. In this regard, the Commission recalled and repeated its request that NGOs invited to the Commission's annual session donate copies of their journals, reports and other publications to the UNCITRAL Law Library for review. [86] The Commission expressed appreciation to all NGOs that donated materials. The Commission noted, in particular, the addition of current and forthcoming issues of the following journals to the UNCITRAL Law Library collection: *b-Arbitra* (Belgian Centre for Arbitration and Mediation), *Chinese Journal of Private International Law and Comparative Law* (CSPIL), *International Insolvency Review* (INSOL International), *Masaryk University Journal of Law and Technology* (Institute of Law and Technology, Faculty of Law, Masaryk University), *Ports & Harbors* (International Association of Ports and Harbors), *Revue de l'Arbitrage* (Comité Français de l'Arbitrage), *World SME News* (World Association for Small and Medium Enterprises), and *Wuhan University International Law Review* (CSPIL).

XII. Coordination and cooperation

A. General

274. The Commission had before it a note by the Secretariat (A/CN.9/875) providing information on the activities of international organizations active in the field of international trade law in which the Secretariat had participated since the last note to the Commission (A/CN.9/838). The Commission expressed appreciation for the Secretariat engaging with a high number of organizations both within and outside the United Nations system. Among others, the Secretariat had participated in the activities of the following organizations: United Nations Conference on Trade and Development, United Nations Department of Economic and Social Affairs, United Nations Economic Commission for Europe, UNEP, UN/ESCAP, United Nations Inter-Agency Cluster on Trade and Productive Capacity, World Bank, APEC, Hague Conference on Private International Law, OECD, Unidroit and WTO.

275. By way of example of current efforts, the Commission took note with satisfaction of the coordination activities involving the Hague Conference on Private International Law and Unidroit as well as the activities on the rule of law in those areas of work of the United Nations and other entities that were of relevance for the work of UNCITRAL.

276. The Commission also noted 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 in the resultant work products. The Commission further observed that coordination work often involved travel to meetings of those organizations and the expenditure of funds allocated for official travel. The Commission reiterated the importance of such 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.

277. As regards coordination activities with OECD, the Commission noted the importance of a joint project for the promotion of commercial arbitration and UNCITRAL transparency standards through the co-organization of an annual conference for a Euro-Mediterranean Community of International Arbitration followed by a publication of the conference proceedings. It therefore requested the Secretariat to publish the conference proceedings, including electronically and to disseminate it broadly to any interested bodies.

278. Reference was made to the "Joint proposal on cooperation in the area of international commercial contract law (with a focus on sales)" (A/CN.9/892). It was explained that in the last fifty years a number of international governmental and non-governmental organizations had made several significant contributions at the global and regional levels to the progressive unification and harmonization of contract law. It was added that those legislative efforts were largely complementary but that information on how they related to each other was not always readily available. As a result, different stakeholders interested in adopting, applying

[86] Ibid., *Seventieth Session, Supplement No. 17* (A/70/17), para. 264.

or using that vast legislative corpus could face challenges in identifying the relevant texts and placing them in context.

279. Hence, it was indicated that the proposal aimed at facilitating orientation in the field of uniform contract law, with a focus on sales law, by compiling relevant texts and providing a short illustration thereof, including with respect to their relationship to other texts. Thus, it was explained, the resulting guidance text could significantly contribute to the coherent adoption, interpretation and use of uniform texts, and to strengthen their underlying principles, such as freedom of contract. It was added that that exercise was intended to be carried out with the involvement of experts and within available resources and that work at the working group level was not envisaged in the near future.

280. It was recalled that the Council on General Affairs and Policy of the Hague Conference on Private International Law had welcomed the proposal[87] and that the Governing Council of Unidroit had recommended to the General Assembly of Unidroit inclusion of the project in its Work Programme for the triennium 2017-2019.[88]

281. After discussion, the Commission approved the "Joint proposal on cooperation in the area of international commercial contract law (with a focus on sales)" and asked the Secretariat to implement the Commission's decision in coordination with the Hague Conference on Private International Law and with Unidroit and to report periodically on the progress of that work.

282. Having mandated work in the area of international commercial contract law (with a focus on sales), the Commission requested the Secretariat to reflect that decision in its publications programme and take any other measures to ensure future publication of any final text resulting from that work, including electronically and in the six official languages of the United Nations.

B. Reports of other international organizations

283. The Commission took note of statements made on behalf of the following international intergovernmental organizations: a summary of which is reported below.

1. Unidroit

284. The Secretary-General of Unidroit reported on the main activities of Unidroit since the forty-eighth session of UNCITRAL, in 2015. The Commission was in particular informed about the following:

(a) Following the completion in 2015 of the UNIDROIT/FAO/IFAD Legal Guide on Contract Farming, developed in partnership with the Food and Agricultural Organization of the United Nations (FAO) and the International Fund for Agricultural Development (IFAD), Unidroit continued to cooperate with its partners in the promotion and implementation of that Guide;

(b) The Convention on International Interests in Mobile Equipment ("Cape Town Convention") continued to attract new accessions, as well as the Aircraft Protocol and the Rail Protocol. The fourth session of the Space Protocol Preparatory Commission was held in December 2015, which approved the regulations for the international registry, as well as the draft Rules of Procedure for the Commission of Experts of the Supervisory Authority (CESAIR) in relation to the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Space Assets. Significant progress was also made on the possible fourth Protocol on matters specific to agricultural, mining and construction equipment, for which two very productive Study Group meetings were held in October 2015 and March 2016, with valuable involvement of UNCITRAL. The preliminary draft Protocol had been submitted to the Governing Council;

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[87] See Conclusions and recommendations adopted by the Council of March 2016, para. 23, available from www.hcch.net/en/governance/council-on-general-affairs.

[88] See Unidroit Governing Council, Summary of the Conclusions, 95th Session, Rome, 18-20 May 2016, C.D. (95) Misc. 2, para. 18, available from www.unidroit.org/english/governments/councildocuments/2016session/cd-95-misc02-e.pdf.

(c) The Governing Council, at its ninety-fifth session, approved the proposed amendments to the Principles of International Commercial Contracts, which aimed at addressing the special needs of long-term contracts and authorized the publication of a new edition, to be known as the "2016 UNIDROIT Principles of International Commercial Contracts";

(d) Unidroit was continuing to work with the European Law Institute to adapt the American Law Institute (ALI)/Unidroit Principles of Transnational Civil Procedure (2004) with a view to drafting Europe-specific regional rules;

(e) The Committee on Emerging Markets Issues, Follow-up and Implementation, established to assist with the promotion and implementation of the Unidroit Convention on Substantive Rules for Intermediated Securities (Geneva Convention), was expected to submit the draft Legislative Guide on Principles and Rules capable of enhancing trading in securities in emerging markets in autumn 2016;

(f) The Governing Council of Unidroit, at its ninety-fifth session, considered the draft Triennial Work Programme for the 2017-2019 period. Among the projects that the Governing Council agreed to recommend for adoption by the Unidroit General Assembly at its seventy-fifth session were the preparation of a guidance document on existing texts in the area of international sales law in cooperation with the Commission and the Hague Conference on Private International Law (see also para. 280 above) and a new project to be carried out in cooperation with the Rome-based organizations relating to land investment contracts. It was noted that in considering the work programme, careful consideration was given to avoid any conflict or overlaps with the work of other organizations, in particular the Commission;

(g) A series of international conferences and lectures were being held to celebrate the ninetieth anniversary of Unidroit.

2. The Hague Conference on Private International Law

285. A representative of the Permanent Bureau expressed appreciation for the continuing cooperation between The Hague Conference, Unidroit and UNCITRAL on a number of different projects. It was noted that, in the context of such cooperation, The Hague Conference had on various occasions shared its expertise in projects of private international law of common interest to the three organizations, and that it was ready to further contribute to other similar projects in the future. It was also requested that the Secretariat also take part in projects being conducted by the Hague Conference to provide valuable input.

C. International governmental and non-governmental organizations invited to sessions of UNCITRAL

286. 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.[89] In paragraph 9 of the summary, the Commission had decided to draw up and update as necessary a list of international organizations and NGOs that had been invited to sessions of the Commission. The Commission also recalled that since that session the Secretariat had been reporting to the Commission annually about organizations added to the list. The Commission also recalled that, at its forty-eighth session, in 2015, it requested the Secretariat, when presenting its oral report on new organizations invited to sessions of UNCITRAL, to provide comments on the manner in which newly invited organizations fulfilled the criteria applied by the Secretariat in making its decision to invite new NGOs.[90]

287. The Commission took note that since its forty-eighth session, in 2015, the following organizations had been added in the list of NGOs invited to sessions of UNCITRAL: ArbitralWomen; European Commerce Registers' Forum; Florence International Mediation Chamber (FIMC); GSM Association (GSMA); International Academy of Mediators (IAM); and International Arbitration Court of the Belarusian Chamber of Commerce and

[89] *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17* (A/65/17), annex III.

[90] Ibid., *Seventieth Session, Supplement No. 17* (A/70/17), para. 280.

Industry (IAC). One organization, the Commonwealth Association of Law Reform Agencies (CALRAs), was removed from the list upon their request received by the Secretariat on 23 May 2016. The Commission noted reasons for the Secretariat's decision to invite those additional NGOs to sessions of UNCITRAL and its working groups. It also heard information about NGOs whose requests to be invited to sessions of UNCITRAL and its working groups were rejected and reasons for the rejection.

288. The Commission also took note that since its forty-eighth session, in 2015, the Caribbean Court of Justice (CCJ), upon its request to the Secretariat of 22 December 2015, was added in the list of intergovernmental organizations invited to sessions of UNCITRAL and its working groups. Other changes made by the Secretariat to the lists of intergovernmental and non-governmental organizations invited to sessions of UNCITRAL and its working groups were editorial, reflecting mainly amendments in the names of the organizations and their acronyms.

289. The Commission also took note that, pursuant to General Assembly resolutions 68/106 and 69/115 (para. 8 in both resolutions) and 70/115 (para. 7), all States and invited organizations were reminded, when they were invited to UNCITRAL sessions, about rules of procedure and work methods of UNCITRAL. Such a reminder is effectuated by inclusion in invitations issued to them of a reference to a dedicated web page of the UNCITRAL website where main official documents of UNCITRAL pertaining to its rules of procedure and work methods could be easily accessed.

290. The Commission welcomed the detailed and informative report of the Secretariat presented pursuant to its request at its forty-eighth session, in 2015 (see para. 286 above). It endorsed the decisions of the Secretariat as regards acceptance of new NGOs.

XIII. UNCITRAL regional presence

291. The Commission had before it a note by the Secretariat on the activities undertaken by its Regional Centre for Asia and the Pacific ("the Regional Centre") (A/CN.9/877) and heard an oral report by the head of the Regional Centre.

292. The Commission recognized the tangible progress made, as a result of the regional activities of the Secretariat, in the levels of awareness, adoption and implementation of harmonized and modern international trade law standards, in particular those elaborated by UNCITRAL, and emphasized the growing significance of the Regional Centre in increasing regional contributions to the work of UNCITRAL.

293. Strong support was expressed for the various activities undertaken by the Secretariat, which were aimed at: (a) providing capacity-building and technical assistance services to States in the Asia-Pacific region, including to international and regional organizations, and development banks; (b) supporting public, private and civil society initiatives to enhance international trade and development by promoting certainty in international commercial transactions through the dissemination of international trade norms and standards, in particular those elaborated by UNCITRAL; (c) building and participating in regionally-based international trade law partnerships and alliances, including with other appropriate United Nations funds, programmes and specialized agencies; (d) strengthening information, knowledge and statistics through briefings, workshops, seminars, publications, social media, and information and communications technologies, including in regional languages; and (e) functioning as a channel of communication between States and UNCITRAL for non-legislative activities of the Commission.

294. The Commission took note of the Secretariat's plans to participate in the United Nations Partnership Frameworks (Lao People's Democratic Republic in 2017) and to develop plurennial and systematized regional programmes around three core areas, namely: (a) integrated trade law reforms; (b) the Sustainable Development Goals; and (c) aid-for-trade, pursuing long-term tailor-made capacity-building, in particular in least developed countries, landlocked developing countries and small island developing States in Asia and the Pacific, so as to ensure legal uniformity and general economic stability, and in close cooperation and coordination with institutions active in trade law reform, in the region.

295. The Regional Centre was encouraged to dedicate more of its resources to promoting UNCITRAL texts in the context of regional economic integration and cooperation frameworks, including, but not limited to, the Association of Southeast Asian Nations (ASEAN) and APEC.

296. The Commission requested the Secretariat to actively engage in fundraising activities in order for the Regional Centre to carry out its activities and urged Member States to provide voluntary contributions to the project.

297. The Commission noted that this year marked the fifth year of operation of the Regional Centre. The Commission was informed that the Secretariat would engage with relevant stakeholders in the Asia-Pacific region to evaluate the achievements as well as the lessons learned during that period. Such assessment could also be expected to further define the role of the Regional Centre and to develop a regional priority framework for the implementation of strategies and programmes across the region, in order to respond to the specific needs of the region in terms of capacity-building and technical assistance services.

298. The Commission noted with appreciation the exchange of letters between the United Nations and China on 16 September 2015, and the subsequent signing on 26 October 2015 of a memorandum of understanding between the United Nations and the Government of the Hong Kong Special Administrative Region of China, for the contribution of a non-reimbursable loan of an expert to the Regional Centre, providing a legal expert to engage in technical cooperation and assistance activities of the Regional Centre. The Commission expressed its gratitude to the Government of China for its support to the operations of the Regional Centre.

299. The Government of the Republic of Korea stated its continued willingness to support the operation of the Regional Centre, extending its contribution beyond the initial five-year period agreed in 2011, for an additional five-year period covering 2017 to 2021, with an annual financial contribution of $450,000 to the UNCITRAL Trust Fund for Symposia, in addition to the office premises, equipment and furniture which it had already provided. The Republic of Korea has also extended its offer to provide a legal expert on a non-reimbursable loan basis to engage in technical cooperation and assistance activities for the coming years. The Commission was informed that the Secretariat was formalizing the necessary arrangements for this extension, including the necessary amendments to the Memorandum of Understanding signed on 18 November 2011 between the United Nations, and the Ministry of Justice and the Incheon Metropolitan City of the Republic of Korea.

300. The Commission expressed its gratitude to the Government of the Republic of Korea for its generous gesture to extend its contribution, allowing for the continued operation of the Regional Centre beyond the initial pilot-project, subject to the relevant rules and regulations of the United Nations and the internal approval process in the United Nations Office of Legal Affairs.

301. The Commission encouraged the Secretariat to continue seeking cooperation, including through formal agreements, with regional stakeholders, including development banks, to ensure coordination and funding for its technical assistance and capacity-building activities and services aimed at promoting the adoption of UNCITRAL texts in the region.

302. The Commission recalled the view expressed at previous sessions that, in light of the importance of regional presence for raising awareness of UNCITRAL's work, and especially for promoting the adoption and uniform interpretation of UNCITRAL texts, and in view of the successful activities of the Regional Centre, further efforts should be made to emulate its example in other regions. The Secretariat was requested to pursue consultations on the possible establishment of other UNCITRAL regional centres and/or capacity-building centres. While the Secretariat staff were expected to devote some of their time to operating or otherwise assisting regional centres, including through training of project personnel, a balanced approach was recommended by the Commission to ensure that the benefits resulting from the establishment of a regional centre continued to outweigh any cost associated with the time spent by Secretariat staff on such activities.

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

A. Introduction

303. 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,[91] 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.[92] The Commission further recalled that since that session, the Commission, in its annual 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.[93] That view had been endorsed by the General Assembly.[94]

304. At its forty-ninth session, the Commission heard an oral report by the Secretariat on the implementation of the relevant decisions taken by the Commission at its forty-eighth session.[95] A summary of the report and decisions of the Commission related thereto are contained in section B below.

305. The Commission 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 (RoLCRG) through the Rule of Law Assistance 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 Assistance Unit every other year, when sessions of the Commission were held in New York.[96] Consequently, briefings had taken place at the Commission's forty-fifth and forty-seventh sessions.[97] At the current session, the Commission had another rule of law briefing by the Rule of Law Assistance Unit. Its summary is contained in section C below.

306. The Commission took note of General Assembly resolution 70/118 on the rule of law at the national and international levels, by paragraph 20 of which the General Assembly invited the Commission to continue to comment, in its reports to the General Assembly, on its current role in promoting the rule of law. The Commission decided to focus its comments to the General Assembly on practices of States in the implementation of multilateral treaties emanated from the work of UNCITRAL and practical measures to facilitate access to justice in the commercial law context, in particular by MSMEs, in line with paragraph 23 of that resolution. The comments were formulated following a panel discussion with participation of invited experts. The comments and a summary of the panel discussion are contained in section D below.

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[91] 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.

[92] General Assembly resolutions 62/70, para. 3; 63/128, para. 7; 64/116, para. 9; 65/32, para. 10; 66/102, para. 12; 67/97, para. 14; 68/116, para. 14; and 69/123, para. 17.

[93] *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; ibid., *Sixty-seventh Session, Supplement No. 17* (A/67/17), paras. 195-227; ibid., *Sixty-eighth Session, Supplement No. 17* (A/68/17), paras. 267-291; ibid., *Sixty-ninth Session, Supplement No. 17* (A/69/17), paras. 215-240; and ibid., *Seventieth Session, Supplement No. 17* (A/70/17), paras. 318-324.

[94] Resolutions 63/120, para. 11; 64/111, para. 14; 65/21, paras. 12-14; 66/94, paras. 15-17; 67/89, paras. 16-18; 68/106, para. 12; 69/115, para. 12; and 70/115, para. 11.

[95] *Official Records of the General Assembly, Seventieth Session, Supplement No. 17* (A/70/17), paras. 300-301.

[96] Ibid., *Sixty-fifth Session, Supplement No. 17* (A/65/17), para. 335.

[97] Ibid., *Sixty-seventh Session, Supplement No. 17* (A/67/17), paras. 199-210; and ibid., *Sixty-ninth Session, Supplement No. 17* (A/69/17), paras. 229-233.

B. Implementation of the relevant decisions taken by the Commission at its forty-eighth session

307. The Commission recalled that at its forty-eighth session it requested States members of UNCITRAL, its Bureau at the current session and its secretariat to take appropriate steps to ensure that the positive developments related to UNCITRAL are retained and if possible reinforced, in subsequent stages of negotiation, adoption and implementation of the post-2015 development agenda, in particular in the outcome documents of the Addis Ababa Conference and the 2015 Summit and in the indicators that would accompany the Sustainable Development Goals and targets.[98]

308. The Commission noted with satisfaction that States, in paragraph 89 of the outcome document of the Third International Conference on Financing for Development, held in Addis Ababa on 13-16 July 2015 (the Addis Ababa Action Agenda),[99] endorsed the efforts and initiatives of UNCITRAL, 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 that field. The Commission took note that the Addis Ababa Action Agenda was an integral part of the 2030 Agenda for Sustainable Development adopted by States on 25 September 2015.[100]

309. The Commission also took note of its relevance to a number of targets in the 2030 Agenda for Sustainable Development and expressed its appreciation for the new web page of the UNCITRAL website that gave a general idea about the role of UNCITRAL in the 2030 Agenda for Sustainable Development, including as regards the promotion of the rule of law (see para. 254 above).

310. The Commission endorsed the participation of its secretariat in the work of the Inter-Agency Task Force (IATF) on Financing for Development (FfD), convened by the Secretary-General to: (a) review progress in implementing the Addis Ababa Action Agenda; and (b) advise the intergovernmental follow-up process thereon. The Commission welcomed the UNCITRAL-related section in the 2016 Inaugural Report of IATF, including the proposed framework for monitoring the progress with the implementation of paragraph 89 of the Addis Ababa Action Agenda.

311. Finally, the Commission was informed about efforts made by its secretariat towards reflecting international commercial law concerns in the global indicator framework being developed by the Inter-Agency and Expert Group on Sustainable Development Goal Indicators (IAEG-SDGs). The Commission called upon States members of the IAEG-SDGs to make sure that the global indicator framework did not overlook areas of work by UNCITRAL.

312. The Commission reiterated its call to its secretariat to continue exploring synergies and expanding outreach to delegations of States to various United Nations bodies with the view of increasing their awareness of the work of UNCITRAL and its relevance to other areas of work of the United Nations.[101] Support was expressed for outreach to various bodies of the United Nations system operating at a country level with the mandate to assist with local law reforms, be it in the promotion of the rule of law, development or other context, so that they appropriately factor in their work the promotion of the rule of law in commercial relations generally and UNCITRAL standards in particular.

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[98] Ibid., *Seventieth Session, Supplement No. 17* (A/70/17), para. 300.

[99] General Assembly resolution 69/313.

[100] General Assembly resolution 70/1, para. 40.

[101] *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 284.

C. Summary of the rule of law briefing

313. The Director of the Rule of Law Assistance Unit in the Executive Office of the Secretary-General briefed the Commission about developments related to the United Nations rule of law agenda that occurred since the 2014 rule of law briefing in UNCITRAL.

314. The Commission noted the integration of rule of law aspects in target 16.3 of the 2030 Agenda for Sustainable Development, the ongoing work on indicators to that target and the cross-cutting impact of the rule of law on the achievement of the Sustainable Development Goals. It noted that efforts of the Rule of Law Assistance Unit towards broadening a global indicator to target 16.3 to issues of civil justice were unsuccessful and that the indicator would most likely focus on criminal law issues. A more comprehensive and contextualized follow-up of progress in the achievement of the Sustainable Development Goals would require the development of additional indicators at the regional and national levels. The national-led processes would play the primary role, as complemented and supported by follow-up and review processes at the global level.

315. The Commission noted that different United Nations entities were implementing initiatives to enhance national capacities for data collection and analysis required to monitor progress with the implementation of the Sustainable Development Goals. The attention of the Commission was brought in particular to two of them:

(a) The Global Alliance, aimed at promoting effective reporting under Goal 16, comprised of representatives from Member States, civil society and the private sector, and facilitated by the United Nations Development Programme (UNDP), which will coordinate and liaise with other United Nations entities and agencies as required; and

(b) The initiative of the United Nations Development Group (UNDG) to support the United Nations County Teams (UNCTs) in the implementation of the new agenda, through their respective United Nations Development Assistance Frameworks (UNDAFs). The initiative is called MAPS — Mainstreaming, Acceleration and Policy Support: mainstreaming refers to the integration of the 2030 Agenda into national and local plans for development, as well as into budget allocations, and the subsequent crafting of UNDAFs around supporting the implementation of those plans; acceleration refers to the targeting of resources according to the priority areas identified in the mainstreaming process; and policy support refers to the timely assistance from the United Nations to national actors with skills and expertise. The MAPS provides a shared resource for the UNCT's substantive engagement with governments and partners on the Sustainable Development Goals, paying special attention to the cross-cutting elements of partnerships, data and accountability.

316. The Commission was informed that reports of the Secretary-General on United Nations rule of law activities continue illustrating examples of rule of law activities by various United Nations entities that are members of the RoLCRG, including by UNCITRAL in the field of international commercial law.

317. The Commission expressed appreciation to the Director of the Rule of Law Assistance Unit for the briefing and reiterated its conviction 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. The promotion of the rule of law in commercial relations should therefore be an integral part of the broader agenda of the United Nations to promote the rule of law at the national and international levels. The Commission encouraged the Secretary-General to devise effective practical mechanisms to achieve such integration. The Commission looked forward to hearing the progress achieved in that respect at the next rule of law briefing scheduled for the fifty-first session of UNCITRAL, in 2018.

D. UNCITRAL comments to the General Assembly

1. Summary of the panel discussion on practices of States in the implementation of multilateral treaties emanated from the work of UNCITRAL

318. The speakers considered the topic timely and important and requiring a further in-depth analysis and follow-ups. The undisputed role of UNCITRAL in promoting the rule of law in commercial relations, in particular by reconciling the views and approaches of countries at various levels of development and between different legal systems, was highlighted.

319. Speakers referred to various factors influencing the implementation by States of treaties emanating from the work of UNCITRAL, highlighting their distinct features compared to international treaties in other areas of law. In particular, the level and intensity of support by domestic non-State actors (industry and other interest groups), in view of the international landscape and changing economic and technological conditions and business practices, were highlighted. The need for a dynamic domestic political landscape that may result in a change of policies and priorities, and the competing need to deal with treaties from other branches of law, were also mentioned as factors to be taken into account. The need to reconcile views at federal and State levels was also to be considered in some countries.

320. The importance of local capacity to ratify and implement a treaty mattered since international commercial law treaties tend to be complex and to require expert knowledge for their understanding. The explanatory notes to treaties, the appropriate participation of a State in treaty-making processes, and the technical assistance provided to a State with treaty implementation were all considered helpful for building such capacity.

321. Nevertheless, practices of States of signing treaties without being committed to their ratification were noted. For an increase of the level of commitment of States to pursue ratification, it was suggested to expand the number of interested State constituencies beyond the foreign and justice ministries to include finance and trade ministries. The importance of regional efforts, such as those within APEC, towards achieving commercial law harmonization and unification within a particular region was also emphasized. The establishment of a dedicated forum at the international and regional levels where States can meet to share and discuss experiences regarding implementation of commercial law conventions was recommended. Such forums could be used for identifying obstacles to ratification and implementation of treaties, and solutions to overcome them, including through possible changes in treaty design and substance. Those processes could be informative, not only with respect to already concluded treaties but also to possible future ones.

322. The importance for effective implementation of treaties of achieving their uniform interpretation and application was noted. Speakers recognized the role of CLOUT and digests (see chapter X above) in that respect. Reference was made to the international commitment of States under international commercial law treaties to interpret them with due regard to their international character and the need to promote uniformity in their application and the observance of good faith in international trade. These commitments presuppose the autonomous interpretation of those treaties rather than their interpretation in light of domestic law and concepts, except when the latter would be acceptable or mandatory under the treaty itself.

323. It was noted that unjustified resort to domestic concepts or concepts of any other preferred law in order to resolve interpretative problems that might arise under the international commercial law treaties defeated the very purpose of these instruments, namely the creation of a uniform law aimed at the creation of legal certainty and the removal of legal barriers in international trade. They might lead to a battle of interpretation trends, and jeopardized the universal acceptability of international commercial law treaties (prompting parties to opt out from the application of a treaty to avoid giving the other party the competitive advantage of reliance on its domestic interpretation of that treaty). The notion of a treaty being a neutral law to which parties can resort when they wish to avoid the application of the domestic law of any of the contracting parties would thus be undermined.

Damage to the predictability and reliability of law which a treaty meant to create, and increased transaction costs would as a result be inevitable.

324. A solution to the disruptive effects of the homeward and outwards trends in interpretations of international commercial law instruments might be achieved by changing the background assumptions and conceptions that justified such trends. To that end, the study of international commercial law standards in law schools, as a distinct autonomous layer of rules that may be applicable to a particular commercial transaction, was considered necessary.

325. Finally, the debate emphasized the importance of coordination and cooperation among rule-formulating bodies in the field of international commercial law, to avoid conflicting rules and interpretations, and to benefit from comparative advantages of agencies involved by using their respective expertise more efficiently. It was noted that the pool of entities relevant to rule formulating in the field of international trade has increased and now includes multilateral development banks and other international financial institutions.

326. Suggestions were made for the coordination and cooperation among relevant entities to become more structured and institutionalized. The current modus operandi was based largely on the good will of secretariats of the respective entities, which was not sufficient to ensure a clear division of labour and strategic work planning in the long run. Examples were given of recent successful cooperation between UNCITRAL, the Hague Conference and Unidroit in the area of international contracts law (see paras. 278-282 above). A similar level of cooperation should be achieved in other areas. In particular an acute need seemed to exist in the area of security interests/secured transactions, which involved at least six organizations.

327. Suggestions were made for monitoring conventions emanated from the work of UNCITRAL, based on already existing examples under other treaties. Distinct features of international commercial law instruments (e.g. party autonomy provisions) would require particular attention, for example through reporting on the use of the texts by private parties, courts and other relevant stakeholders, in addition to reports by States on the status of ratification and implementation of their respective international obligations under those treaties.

328. In ensuing discussions, a point was made that another factor influencing ratification of treaties was the level of complexity of treaties: examples were given of treaties that failed because of their excessive ambition, despite subsequent efforts of States to rectify their scope, structure and substance. Improving coordination was considered important but the efforts should not be limited to inter-secretariat cooperation: the indispensable role of State members of various rule-formulating entities was not to be underestimated.

329. Support was expressed for the idea that the quality of the texts depended on the quality of delegations. However, it was recalled that it was not for international organizations to dictate how States should compose their delegations.

330. A question was raised as to whether case law referred to in CLOUT was intended to have any effect as precedent. In response, the speakers unanimously emphasized that CLOUT cases and digests could never displace the value of precedent under applicable domestic law. However, they were an important source of information for courts and arbitral tribunals, in particular because they could indicate prevailing trends and, for that reason, might be considered persuasive in interpreting international commercial law standards emanated from the work of UNCITRAL.

331. There was general support for holding rule of law panel discussions at future sessions. The Secretariat was requested in composing future rule of law panels to ensure a balanced representation of common and continental systems of law.

2. Summary of the panel discussion on practical measures to facilitate access to justice in the commercial law context, in particular by MSMEs

332. The Rule of Law Declaration,[102] in particular its UNCITRAL-related provisions,[103] was recalled in conjunction with the topic of the discussion. UNCITRAL was praised for removing legal obstacles to international trade by harmonizing international commercial law while carefully promoting the principle of party autonomy, without infringing on domestic systems and political or social values of States, and reconciling interests of various groups. It was also stated that the recent example of Working Group III (ODR) (see chapter V above) demonstrated how the working methods of UNCITRAL respected the rule of law.

333. The role of ODR in the electronic commerce environment was touched upon, with reference to the UNCITRAL Technical Notes on Online Dispute Resolution adopted by the Commission at the current session (see para. 217 above). The Technical Notes on Online Dispute Resolution, although not a normative text, were considered to provide an important reference to both ODR providers and users that currently operate under divergent rules. Being the first international document on the subject, they were expected to be widely used by practitioners and thus harmonize the field of ODR.

334. Speakers referred to the current practices of States to facilitate access to justice, often assisted by intergovernmental and non-governmental organizations active on such issues as mobile courts, electronic justice and informal justice mechanisms. Particular attention was paid to existing and emerging means to facilitate access to justice by MSMEs recognizing that they often carry the heavier burden in dysfunctional justice systems in the commercial law context. Higher transaction costs, problems with access to qualified affordable legal aid, imbalance of power and means in disputes involving larger economic operators and State officials, and corruption were cited as examples of particular issues faced by MSMEs in access to justice.

335. According to the representative of IDLO, a need existed to build increased judicial capacity to handle commercial disputes, especially those involving MSMEs, to increase judicial training generally, especially in least developed countries, and to assist MSMEs with drafting contracts and handling disputes. Examples were given of such activities in a number of countries in which IDLO operates.

336. The existence of various types of MSMEs (differing in size and structure) facing different issues was also recognized. MSMEs, depending on the legal and socioeconomic environment in which they operate, might face a variety of disputes and difficulties, and might thus require different tools to address them.

337. Attempts to create uniform solutions for resolving disputes involving MSMEs were questioned. It was also recalled that the many available dispute resolution mechanisms, each with its advantages and disadvantages, were more or less advisable, depending on the particular circumstances of a dispute and the parties involved. No such mechanism was therefore equally suitable for all disputes for all MSMEs. A dispute resolution method should be fit for the dispute and the parties involved; not the other way around. However the parties themselves, especially MSMEs are seldom in a position to assess their disputes and select the most suitable resolution technique on a case-by-case basis. Disputants are often pushed towards one method or another by various factors and actors (e.g. a legal counsel, court officer, development assistance entities).

338. It was suggested that neutral dispute profiling or an early case assessment tool might resolve that problem. The purpose of such an algorithm-based tool would be to assist private parties in commercial disputes in the choice of the method of dispute settlement most appropriate to the dispute, taking into account time, costs, location, language, applicable law and other considerations. Building such a tool would require extensive interdisciplinary and multicultural research that would also require an analysis of socioeconomic influences and sociocultural contexts. UNCITRAL, professional organizations and universities were invited to consider the desirability and feasibility of such a project, which might result in a tangible facilitation of access to justice, in particular by MSMEs.

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[102] General Assembly resolution 67/1.

[103] Ibid., para. 8.

3. Comments by the Commission

339. The Commission expressed its appreciation to the panellists for their statements and welcomed further discussion of the novel issues that they had raised at the 2017 Congress (see chapter XVI below).

340. The Commission recalled that, at its forty-seventh session, in 2014, it considered its role in promoting the rule of law by facilitating access to justice,[104] and at its forty-eighth session, in 2015, it considered the role of its multilateral treaty processes in promoting and advancing the rule of law.[105] The Commission noted that issues raised, and its comments conveyed to the General Assembly, in those years were relevant to the subtopics that were discussed during the rule of law panel discussion at the current session.

341. Specifically on the subtopic of practices of States in the implementation of multilateral treaties emanated from the work of UNCITRAL, the Commission noted with appreciation that its views as conveyed to the General Assembly at its previous session were again supported by empirical evidence presented by the panellists. In particular, the reported practices of States supported the view that the quality of implementation of treaties emanating from the work of UNCITRAL often depended on the quality of treaty-making processes, including the level and quality of participation by States and other interested stakeholders in UNCITRAL's rule-formulating work. The Commission reiterated, for consideration by the General Assembly, the conclusions reached at its previous session when discussing issues related to its treaty processes that required attention.[106]

342. On the subtopic of the panel discussion on practical measures to facilitate access to justice in the commercial law context, in particular by MSMEs, the Commission recalled the comments conveyed to the General Assembly in the report on the work of its forty-seventh session.[107] The Commission reiterated the view expressed at that session that its work was relevant to all dimensions of access to justice (normative protection, capacity to seek remedy, and capacity to provide effective remedies). It drew the attention of the General Assembly to the fact that, at the current session of the Commission, UNCITRAL had enlarged the spectrum of its standards in the area of commercial dispute settlement by adopting the UNCITRAL Technical Notes on Online Dispute Resolution (see para. 217 above), which were particularly useful for the resolution of low-value cross-border disputes in an electronic commerce environment, and thus to MSMEs.

XV. Work Programme of the Commission

343. The Commission recalled its agreement to reserve time for discussion of the Commission's overall work programme as a separate topic at each Commission session, as a tool to facilitate effective planning of its activities.[108]

344. The Commission took note of the documents prepared to assist its discussions on this topic (A/CN.9/878, further documents referred to therein and proposals submitted thereafter). It noted that those documents addressed UNCITRAL's main activities, i.e. legislative development and activities designed to support the effective implementation, use and understanding of UNCITRAL texts (collectively referred to as "support activities").

345. The Commission also took note of the progress of its Working Groups and regarding support activities reported earlier in the session (see chapters III to XIV of this report).

A. Legislative development

346. As regards current and future legislative activity, the Commission decided as follows.

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[104] *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 17* (A/69/17), paras. 234-240.
[105] Ibid., *Seventieth Session, Supplement No. 17* (A/70/17), paras. 318-324.
[106] Ibid., para. 324.
[107] Ibid., *Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 240.
[108] Ibid., *Sixty-eighth Session, Supplement No. 17* (A/68/17), para. 310.

1. MSMEs

347. The Commission recalled the summary of its discussion on planned and future work in the area of MSMEs (see paras. 219-224 above). After discussion, it reaffirmed the mandate given to Working Group I to work on (a) key principles in business registration, and (b) legal questions surrounding the creation of a simplified business entity, both of which aimed at reducing the legal obstacles faced by MSMEs throughout their life cycle and, in particular, those in developing economies.

2. Arbitration and conciliation

348. The Commission noted that it had finalized and adopted the 2016 UNCITRAL Notes on Organizing Arbitral Proceedings (see paras. 157 and 158 above). The Commission recalled the summary of its discussion of the ongoing and possible future work in the area of arbitration and conciliation (see paras. 162-165 and 174-195 above).

349. After discussion, the Commission reaffirmed the mandate given to Working Group II to work on the preparation of an instrument dealing with enforcement of international commercial settlement agreements resulting from conciliation (see para. 165 above).

350. The Commission, in its final debates on the work programme, also reaffirmed the decision to retain the topics of (a) concurrent proceedings, (b) code of ethics/conduct for arbitrators, and (c) possible work on reform of investor-State dispute settlement system, on its agenda for further consideration at its next session. It further requested that the Secretariat, within its existing resources, continue to update and conduct preparatory work on all the topics so that the Commission would be in a position to make an informed decision whether to mandate its Working Group II to undertake work in any of the topics, following the current work on the enforcement of settlement agreements resulting from conciliation (see para. 195 above).

351. In addition, it was agreed that the Working Group should be referred to as Working Group II (Dispute Settlement), as the scope of its work was not necessarily limited to arbitration and conciliation.

3. Online dispute resolution

352. In light of the finalization and adoption of the UNCITRAL Technical Notes on Online Dispute Resolution (see para. 217 above), the Commission agreed that no future legislative activity should be planned on the topic.

4. Electronic commerce

353. The Commission recalled the summary of its discussion of the ongoing and future work in the area of electronic commerce (see paras. 225 to 237 above). After discussion, it reaffirmed the mandate given to Working Group IV to complete the preparation of the draft Model Law on Electronic Transferable Records and the accompanying explanatory note, and to consider the topics of identity management and trust services as well as of cloud computing upon completion of work on the draft Model Law (see para. 235 above).

5. Insolvency

354. The Commission recalled the summary of its discussion of the ongoing and future work in the area of insolvency (see paras. 241-247 above). After discussion, it reaffirmed the mandate given to Working Group V to continue work on the following three topics: (a) facilitating the cross-border insolvency of multinational enterprise groups; (b) obligations of directors of enterprise group companies in the period approaching insolvency; and (c) recognition and enforcement of insolvency-related judgments (see para. 241 above). In addition, the Commission recalled the mandate given to Working Group V related to insolvency of MSMEs (see para. 246 above).

6. Security interests

355. The Commission noted that it had finalized and adopted the UNCITRAL Model Law on Secured Transactions (see para. 119 above) and recalled the summary of its discussion

on the ongoing, planned and possible future work in the area of security interests (see paras. 120-128 above).

356. After discussion, the Commission reaffirmed the mandate given to Working Group VI to complete its work on the preparation of the draft Guide to Enactment during its next two sessions and submit the draft Guide to Enactment for consideration and adoption by the Commission at its next session (see para. 122 above). It was reaffirmed that, if the Working Group completed its work in less than two sessions, it could use the time remaining to discuss its future work in a session or in a colloquium to be organized by the Secretariat. It was further agreed that the Secretariat could seek, within its existing resources, to hold a colloquium to discuss future work on security interests (see para. 122 above) in addition to the two sessions devoted to Working Group VI.

357. It also reaffirmed the decision to retain on its future work agenda the preparation of a contractual guide on secured transactions and a uniform law text on intellectual property licensing (see para. 124 above) and to also add to its future work agenda the following topics: (a) the question whether the Model Law and the draft Guide to Enactment might need to be expanded to address matters related to secured finance to MSMEs; (b) the question whether any future work on a contractual guide on secured transactions should discuss contractual issues of concern to MSMEs (e.g. transparency issues); (c) any question that might not have already been addressed in the area of warehouse receipt financing (e.g. the negotiability of warehouse receipts); and (d) the question whether disputes arising from security agreements could be resolved through ADR mechanisms (see para. 125 above).

7. Public procurement and infrastructure development

358. As regards possible work in the areas of public procurement and infrastructure development, the Commission took note of the proposals set out in document A/CN.9/889. As regards public-private partnerships (PPPs), the Commission recalled its instructions to the Secretariat at the forty-eighth session to continue to follow developments in PPPs to advance preparations should the topic eventually be taken up, and to report further to the Commission at the current session.[109]

359. The view was expressed that the proposed future work on public procurement as well as on PPPs as set out in document A/CN.9/889 did not deserve work at the working group level and that there was no longer the need to retain those topics on the agenda of the Commission. In support of that view, it was stated that issues relating to PPPs were dealt with by other organizations, the topics were not ripe enough for harmonization as relevant practices were still developing and that resources available should be allocated to more urgent ongoing work, including the preparation of the Congress (see chapter XVI below). Concerns were also expressed with regard to the feasibility of work. Accordingly, it was suggested that the topics could be set aside for the time being and revisited when concrete subjects of interest and feasible projects were identified.

360. On the other hand, it was argued that the topic of PPPs should be retained on the agenda of the Commission particularly due to its importance for developing countries. It was mentioned that quite a number of infrastructure development projects in those countries were conducted in the framework of PPPs and that work by UNCITRAL could provide ample guidance. It was suggested that work could focus on specific topics relating to PPPs including those mentioned in document A/CN.9/889 and that updating of the 2000 UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects[110] with the assistance of experts could be a starting point, and might offer an opportunity to better identify specific topics for possible future work. In that context, differing views were expressed on whether the work should be carried out at the working group level.

361. As regards the proposal for future work on the topic of suspension and debarment in public procurement, it was suggested that the Secretariat should continue to monitor developments in that field and should report periodically thereon to the Commission.

362. After discussions, it was generally felt that the topics relating to public procurement and infrastructure development were of continued importance, while it would be premature

[109] Ibid., *Seventieth Session, Supplement No. 17* (A/70/17), para. 363.
[110] United Nations publication, Sales No. E.01.V.4 (A/CN.9/SER.B/4).

to engage in any type of legislative work. It was agreed that the Secretariat should continue to monitor developments in those areas, particularly with regard to suspension and debarment in public procurement. With regard to PPPs, it was agreed that the Secretariat should consider updating where necessary all or parts of the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects, involving experts. Finally, it was agreed that the Secretariat should also continue to promote UNCITRAL texts in the area of public procurement, most importantly the Model Law on Public Procurement (2011).[111] In that context, it was highlighted that the above-mentioned activities should be undertaken taking into account the resources available to the Secretariat.

8. Possible colloquium on updating development on commercial fraud

363. The Commission considered a proposal by the Institute of International Banking Law & Practice and the International Law Institute to hold a two-day colloquium for updating developments on commercial fraud. It was suggested that the colloquium could provide the opportunity for experts to discuss developments and the successes and adequacy of efforts to combat commercial fraud. It was further suggested that areas for discussion could include revisiting the Secretariat informational note "Recognizing and Preventing Commercial Fraud: Indicators of Commercial Fraud". Lastly, it was suggested that the colloquium should be conducted in cooperation with the United Nations Office on Drugs and Crime (UNODC), if possible.

364. In response, it was questioned whether the topic of commercial fraud required additional consideration by the Commission, particularly as it dealt with criminal aspects and as the "Recognizing and Preventing Commercial Fraud: Indicators of Commercial Fraud" published by the Secretariat in 2013 was still relevant. After discussion, it was agreed that no resources should be allocated for that purpose. The Commission, however, requested the Secretariat to liaise with the Institute of International Banking Law & Practice and the International Law Institute, should those organizations consider holding a conference to address those topics, which might be reported to the Commission at a future session.

9. Allocation of conference resources

365. With regard to the two weeks of conference time that were available due to the conclusion of work in the area of ODR by Working Group III, the Commission agreed that the Secretariat should consider allocating the two weeks for additional work by Working Group II in the second half of 2016 and by Working Groups I and V in the first half of 2017. The Secretariat was requested to consider all possible options, including possibly sharing of the one-week session by two different Working Groups, which might facilitate discussion of the relevant topics and having back-to-back sessions. The Secretariat was further requested to explore the possibility of holding a colloquium to discuss future work on secured transactions. (For the dates agreed to be allocated to Working Groups I, II and V before the fiftieth session of the Commission, in 2017, see para. 394 below.)

B. Support activities

366. The Commission expressed its appreciation for the support activities described in documents A/CN.9/872, A/CN.9/873, A/CN.9/874, A/CN.9/875, A/CN.9/876, A/CN.9/877, A/CN.9/882 and A/CN.9/883, as considered earlier in the current session (see chapters X to XIV of this report).

367. The Commission recalled that it had emphasized the importance of support activities and the need to encourage such activities at the global and regional levels through the Secretariat, through the expertise available in the Working Groups and the Commission, through member States and through partnering arrangements with relevant international organizations, as well as promoting increased awareness of UNCITRAL's texts in these organizations and within the United Nations system.[112] After discussion, the Commission

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[111] *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17* (A/66/17), annex I.

[112] Ibid., *Sixty-ninth Session, Supplement No. 17* (A/69/17), paras. 263-265.

reaffirmed its request to the Secretariat to continue with those activities to the extent that its resources permitted.[113]

XVI. Congress 2017

368. The Commission recalled its instruction to the Secretariat to commence preparations for a Congress to commemorate UNCITRAL's fiftieth anniversary.[114] The Commission heard that the Secretariat had established a dedicated web page to publicise the event,[115] and that a Call for Papers had been issued and posted on the web page in June 2016.

369. It was noted that the Congress would be held during the first week of the Commission's fiftieth session in 2017, from 4-6 July, in Vienna.

370. The objectives of the Congress, it was recalled, were to discuss technical issues and to raise awareness of UNCITRAL and its potential to support cross-border commerce. The Commission noted that it had been proposed by consulted stakeholders that the Congress could seek to identify new areas of research and potential legislative activity for UNCITRAL, including (but not limited to): the development of the cross-border digital economy; finance in international trade; access to global supply chains and inputs (credit, transport, infrastructure); exploitation of global public goods; and dispute resolution in sectors such as climate disputes, and resource disputes.

371. The Commission heard that, in addition, consulted stakeholders suggested that the Congress would consider ways to enhance UNCITRAL's role in coordinating and cooperating in relevant work of other organizations, including in treaty-making and methods of legal harmonization. In that regard, the hope was expressed that participants would present ongoing commercial legal reform activities at the national and regional level, and discuss potential contributions to support trade law reform.

372. The Secretariat was urged to set a flexible and broad-ranging agenda, which would include an overview of UNCITRAL's existing and historical activities, and to take active steps to identify possible speakers and themes for discussion. The potential sensitivity of some possible topics, it was noted, indicated that a careful consideration of scope and manner of presentation would be necessary.

373. It was also noted that States would be consulted on the draft programme through the note verbale once the Call for Papers had closed, in the autumn of 2016.

XVII. Relevant General Assembly resolutions

374. The Commission took note of General Assembly resolution 70/115 of 14 December 2015 on the report of the United Nations Commission on International Trade Law on the work of its forty-eighth session, adopted on the recommendation of the Sixth Committee.

[113] Ibid., *Seventieth Session, Supplement No. 17* (A/70/17), para. 365.
[114] Ibid., para. 366.
[115] www.uncitral.org/uncitral/en/commission/colloquia/50th-anniversary.html.

XVIII. Other business

A. Entitlement to summary records

375. 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.[116] The Commission also recalled that, at its forty-seventh and forty-eighth sessions, in 2014 and 2015, respectively, the Commission assessed the experience of using digital recordings and on the basis of that assessment decided to prolong the practice of providing to UNCITRAL digital recordings in parallel with summary records.[117]

376. At the current session, the Commission again assessed its experience with the use of digital recordings in the United Nations generally and in UNCITRAL specifically, on the basis of an oral report by the Secretariat. The Commission's attention was brought to General Assembly resolution 70/9 on the pattern of conferences. In that resolution, the General Assembly noted the increased use of digital recordings by intergovernmental bodies, including UNCITRAL and the United Nations Industrial Development Organization, and requested the Secretary-General to continue to report to the General Assembly in that regard. At the same time, the Assembly reiterated that the further expansion of transition from verbatim and summary records to digital recordings of meetings in the six official languages of the Organization as a cost-saving 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.

377. In light of that resolution, in particular its paragraph 90 that stressed that verbatim and summary records remained the only official records of the meetings of United Nations bodies, the Commission was of the view that the transition from summary records to digital recordings of UNCITRAL meetings in the six official languages of the Organization was not currently possible. The Commission requested the Secretariat to prolong the practice of providing to UNCITRAL digital recordings in parallel with summary records and was assured that there were no technical obstacles for that. The Commission reiterated its view that summary records would have to be provided to the Commission until no obstacles existed to making the transition from summary records to digital recordings. The Commission requested the Secretariat to inform the Commission when developments as regards the use of digital recordings in the United Nations so warrant.

B. Internship programme

378. The Commission recalled the considerations taken by its secretariat in selecting candidates for internship and noted with satisfaction the continuing positive implications of changes introduced in 2013 and 2014 in the United Nations internship programme (selection procedures and eligibility requirements) on the pool of eligible and qualified candidates for internship from under-represented countries, regions and language groups.[118]

379. The Commission was informed that, since the Secretariat's oral report to the Commission at its forty-eighth session, in July 2015,[119] twelve new interns had undertaken an internship with the UNCITRAL secretariat in Vienna. Most interns were coming from developing countries and countries in transition.

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

[117] Ibid., *Sixty-ninth Session, Supplement No. 17* (A/69/17), paras. 271-276; and ibid., *Seventieth Session, Supplement No. 17* (A/70/17), paras. 368-370.

[118] Ibid., *Sixty-sixth Session, Supplement No. 17* (A/66/17), paras. 328-330; ibid., *Sixty-eighth Session, Supplement No. 17* (A/68/17), para. 344; and ibid., *Sixty-ninth Session, Supplement No. 17* (A/69/17), paras. 277 and 278.

[119] Ibid., *Seventieth Session, Supplement No. 17* (A/70/17), para. 372.

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

380. The Commission recalled that at its fortieth session, in 2007,[120] 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).[121] At that session, the Commission had agreed to provide feedback to the Secretariat.

381. From the fortieth session until the forty-fifth session of the Commission, in 2012, the feedback was provided by States attending the annual sessions of UNCITRAL in response to the questionnaire circulated by the Secretariat by the end of the session. That practice had changed since the Commission's forty-fifth session, in 2012, partly because of the need to solicit more responses: instead of an in-session questionnaire, the Secretariat started circulating to all States closer to the start of an annual session of the Commission a note verbale with the request to 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 during a given session. As regards the forty-eighth session of UNCITRAL such a note verbale was circulated to all Member States of the United Nations on 27 May 2016 and the period covered was indicated from the start of the forty-eighth session of UNCITRAL (29 June 2015).

382. The Commission was informed that the request by a note verbale and an additional request during the current session of UNCITRAL had elicited 17 responses and that the level of satisfaction with the services provided to UNCITRAL by the UNCITRAL secretariat, as indicated in those responses, remained high (10 States that responded gave 5 out of 5 and 7 States that responded gave 4 out of 5). The Commission heard that States in their statements to the Sixth Committee of the General Assembly on the report of the Commission often included their views on the work of the UNCITRAL secretariat in servicing the Commission. Such statements did not lend themselves to easy quantitative assessment.

383. The Commission took note of the concern that the level of responses to the request for evaluation remained low. There was general agreement that receiving feedback from more States about the UNCITRAL secretariat's performance would be necessary to allow for a more objective evaluation of the role of the Secretariat, as was required for budgetary and other purposes.

384. The Commission expressed appreciation to the Secretariat for its work in servicing UNCITRAL, highlighting in particular the quality of documents produced and responsiveness to requests of the Commission.

D. Methods of work

385. The Commission had before it proposals by delegations of Israel, Switzerland and the United States regarding its methods of work. When introducing their proposals, the proponents referred to the insufficient representation of States during the discussion of policy issues at annual sessions of UNCITRAL. They expressed their view that some adjustments in the planning and organization of annual sessions of UNCITRAL could facilitate the participation of States, especially from small States, not only during those parts of a session at which specific texts were reviewed for finalization and adoption, but also during more general policy discussions. Advance planning for more structured discussions, a clearer scheduling of agenda items, and the allotment of specific time periods for their consideration were brought forward as possible steps to be considered to that end.

386. Considering that the proposals were made available late in the session, a number of delegates reserved their position until they had had a chance to consult further. Concerns were expressed that the proposals failed to take into account various considerations that

[120] Ibid., *Sixty-second Session, Supplement No. 17* (A/62/17), part one, para. 243.
[121] A/62/6 (Sect. 8) and Corr.1, table 8.19 (d).

would impact their implementation, including the applicable rules on utilization of conference services, and on simultaneous distribution of documents in the six official languages of the United Nations. The implementation of some proposals, such as the earlier election of the bureau of the Commission and the earlier nomination of members of delegations to sessions of UNCITRAL, was considered to be within the exclusive prerogative of States, rather than practices that could be changed by the Secretariat or the Commission itself. Agreement on some of those issues necessitated consultations among States in regional groups. It was considered equally inappropriate or impractical to assume that the Secretariat should exercise much discretion as regards the removal, addition or prioritizing of agenda items and pre-allotting time for their consideration. Retaining flexibility was considered essential especially in the light of sovereign rights of States to speak and to make proposals at United Nations meetings.

387. Regarding the proposal that introduction of issues by the Secretariat during the sessions should be dispensed with to expedite deliberations by the Commission, at least in respect of issues already discussed in documents before the Commission, the proponents were urged to consider the point of view of various delegations, including those that did not work with the English version of documents (and therefore would appreciate a detailed introduction by the Secretariat, particularly in case of late issuance of documents), or that could not afford to participate in working groups, but still wished to have a say in the finalization of texts by the Commission. While the importance of taking those considerations into account was generally acknowledged, a widely shared view was also expressed that annual sessions of the Commission should not be used as substitutes for additional working group sessions. It was recalled that texts submitted by working groups for adoption by the Commission were expected to be sufficiently mature to avoid protracted discussion, especially at more than one annual session of the Commission.

388. Regarding the work programme of the Commission, the value of suggestions that might be made by experts on topics considered by working groups was acknowledged. However, the prevailing view was that the discussion of future work by the Commission should be scheduled for decisions to take place at the end of each session of the Commission. Such decisions should not be made within the working groups or during the finalization of texts submitted to the Commission. As to the duration of Commission sessions, preference was expressed for holding shorter sessions (i.e. to avoid three-week sessions). However, it was widely acknowledged that the workload of the Commission might justify flexibility, including the possibility of holding three-week sessions. It was recalled that the Commission usually had a chance to approve the timing and duration of its next session one year in advance.

389. About the use of online platforms by the Secretariat for intersessional consultations among States, a reservation was expressed, as States themselves should have a chance to consider how those platforms would work in compliance with various applicable rules of the United Nations. The scarcity of resources available to the UNCITRAL secretariat, including the lack of dedicated resources for IT specialists and IT services, was recalled.

390. Some support was expressed for continuing the discussion of the proposals at a future session. The prevailing view was that the issues raised in the proposals were more appropriate for informal discussion among States, and between States and the Secretariat.

391. After discussion, the Commission decided to take note of the proposals and invited States to consult informally, among themselves and with the Secretariat, on possible follow-up. Should any issue require a formal decision by the Commission, it could be brought to its attention at a future session. The Secretariat was invited to consider any technical adjustment to the provisional agenda and any other administrative measure within its control, to facilitate participation of all States during the entire duration of the session. The Secretariat was reminded of the desirability of avoiding United Nations official holidays, if possible, when scheduling sessions.

XIX. Date and place of future meetings

392. At its thirty-sixth session, in 2003, the Commission agreed that: (a) working groups should normally meet for a one-week session twice a year; (b) extra time, if required, could

be allocated from the unused entitlement of another working group provided that such arrangement would not result in the increase of the total number of 12 weeks of conference services per year currently allotted to sessions of all six working groups of the Commission; and (c) if any request by a working group for extra time would result in the increase of the 12-week allotment, it should be reviewed by the Commission, with proper justification being given by that working group regarding the reasons for which a change in the meeting pattern was needed.[122]

A. Fiftieth session of the Commission

393. The Commission approved the holding of its fiftieth session in Vienna from 3 to 21 July 2017. The Commission confirmed that UNCITRAL Congress 2017 would be held in conjunction with its fiftieth session from 4 to 6 July 2017 (see para. 369 above).

B. Sessions of working groups

1. Sessions of working groups between the forty-ninth and fiftieth sessions of the Commission

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

(a) Working Group I (MSMEs) would hold its twenty-seventh session in Vienna, from 3 to 7 October 2016, and the twenty-eighth session in New York, from 1 to 9 May 2017;

(b) Working Group II (Dispute Settlement) would hold its sixty-fifth session in Vienna, from 12 to 23 September 2016 (13 September is a United Nations official holiday in Vienna), and its sixty-sixth session in New York, from 6 to 10 February 2017;

(c) Working Group IV (Electronic Commerce) would hold its fifty-fourth session in Vienna, from 31 October to 4 November 2016, and its fifty-fifth session in New York, from 24 to 28 April 2017;

(d) Working Group V (Insolvency Law) would hold its fiftieth session in Vienna, from 12 to 16 December 2016, and its fifty-first session in New York, from 10 to 19 May 2017;

(e) Working Group VI (Security Interests) would hold its thirtieth session in Vienna, from 5 to 9 December 2016, and its thirty-first session in New York, from 13 to 17 February 2017.

2. Sessions of working groups in 2017 after the fiftieth session of the Commission

395. The Commission noted that tentative arrangements had been made for working group meetings in 2017 after its fiftieth session, subject to the approval by the Commission at that session:

(a) Working Group I (MSMEs) would hold its twenty-ninth session in Vienna from 2 to 6 October 2017;

(b) Working Group II (Dispute Settlement) would hold its sixty-seventh session in Vienna from 11 to 15 September 2017;

(c) Working Group IV (Electronic Commerce) would hold its fifty-sixth session in Vienna from 16 to 20 October 2017;

(d) Working Group V (Insolvency Law) would hold its fifty-second session in Vienna from 20 to 24 November 2017;

(e) Working Group VI (Security Interests) would hold its thirty-second session in Vienna from 11 to 15 December 2017.

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

396. The Secretariat has reserved conference services in Vienna during the week of 27 November to 1 December 2017 for a session of Working Group III or another working group or other conference needs of UNCITRAL.

Annex I

Technical Notes on Online Dispute Resolution

Section I — Introduction

Overview of online dispute resolution

1. In tandem with the sharp increase of online cross-border transactions, there has been a need for mechanisms for resolving disputes which arise from such transactions.

2. One such mechanism is online dispute resolution ("ODR"), which can assist the parties in resolving the dispute in a simple, fast, flexible and secure manner, without the need for physical presence at a meeting or hearing. ODR encompasses a broad range of approaches and forms (including but not limited to ombudsmen, complaints boards, negotiation, conciliation, mediation, facilitated settlement, arbitration and others),[123] and the potential for hybrid processes comprising both online and offline elements. As such, ODR represents significant opportunities for access to dispute resolution by buyers and sellers concluding cross-border commercial transactions, both in developed and developing countries.

Purpose of the Technical Notes

3. The purpose of the Technical Notes is to foster the development of ODR and to assist ODR administrators, ODR platforms, neutrals, and the parties to ODR proceedings.

4. The Technical Notes reflect approaches to ODR systems that embody principles of impartiality, independence, efficiency, effectiveness, due process, fairness, accountability and transparency.

5. The Technical Notes are intended for use in disputes arising from cross-border low-value sales or service contracts concluded using electronic communications. They do not promote any practice of ODR as best practice.

Non-binding nature of the Technical Notes

6. The Technical Notes are a descriptive document. They are not intended to be exhaustive or exclusive, nor are they suitable to be used as rules for any ODR proceeding. They do not impose any legal requirement binding on the parties or any persons and/or entities administering or enabling an ODR proceeding, and do not imply any modification to any ODR rules that the parties may have selected.

Section II — Principles

7. The principles that underpin any ODR process include fairness, transparency, due process and accountability.

8. ODR may assist in addressing a situation arising out of cross-border e-commerce transactions, namely the fact that traditional judicial mechanisms for legal recourse may not offer an adequate solution for cross-border e-commerce disputes.

9. ODR ought to be simple, fast and efficient, in order to be able to be used in a "real world setting", including that it should not impose costs, delays and burdens that are disproportionate to the economic value at stake.

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[123] The order of the list of approaches or forms in brackets is presented in increasing order of formality, reflecting the approach taken in the description of commonly-used, methods for settling disputes contained in UNCITRAL's Legislative Guide on Privately Financed Infrastructure Projects (2000), available at www.uncitral.org/uncitral/uncitral_texts/procurement_infrastructure.html. Furthermore, the terms are illustrative only, relative formality may vary from system to system, and relevant processes in some jurisdictions may be known by more than one of the terms contained in the list itself.

Transparency

10. It is desirable to disclose any relationship between the ODR administrator and a particular vendor, so that users of the service are informed of potential conflicts of interest.

11. The ODR administrator may wish to publish anonymized data or statistics on outcomes in ODR processes, in order to enable parties to assess its overall record, consistent with applicable principles of confidentiality.

12. All relevant information should be available on the ODR administrator's website in a user-friendly and accessible manner.

Independence

13. It is desirable for the ODR administrator to adopt a code of ethics for its neutrals, in order to guide neutrals as to conflicts of interest and other rules of conduct.

14. It is useful for the ODR administrator to adopt policies dealing with identifying and handling conflicts of interest.

Expertise

15. The ODR administrator may wish to implement comprehensive policies governing selection and training of neutrals.

16. An internal oversight/quality assurance process may help the ODR administrator to ensure that a neutral conforms with the standards it has set for itself.

Consent

17. The ODR process should be based on the explicit and informed consent of the parties.

Section III — Stages of an ODR proceeding

18. The process of an ODR proceeding may consist of stages including: negotiation; facilitated settlement; and a third (final) stage.

19. When a claimant submits a notice through the ODR platform to the ODR administrator (see section VI below), the ODR administrator informs the respondent of the existence of the claim and the claimant of the response. The first stage of proceedings — a technology-enabled negotiation — commences, in which the claimant and respondent negotiate directly with one another through the ODR platform.

20. If that negotiation process fails (i.e. does not result in a settlement of the claim), the process may move to a second, "facilitated settlement" stage (see paras. 40-44 below). In that stage of ODR proceedings, the ODR administrator appoints a neutral (see para. 25 below), who communicates with the parties in an attempt to reach a settlement.

21. If facilitated settlement fails, a third and final stage of ODR proceedings may commence, in which case the ODR administrator or neutral may inform the parties of the nature of such stage.

Section IV — Scope of ODR process

22. An ODR process may be particularly useful for disputes arising out of cross-border, low-value e-commerce transactions. An ODR process may apply to disputes arising out of both a business-to-business as well as business-to-consumer transactions.

23. An ODR process may apply to disputes arising out of both sales and service contracts.

Section V — ODR definitions, roles and responsibilities, and communications

24. Online dispute resolution, or "ODR", is a "mechanism for resolving disputes through the use of electronic communications and other information and communication technology". The process may be implemented differently by different administrators of the process, and may evolve over time.

25. As used herein a "claimant" is the party initiating ODR proceedings and the "respondent" the party to whom the claimant's notice is directed, in line with traditional, offline, alternative dispute resolution nomenclature. A neutral is an individual that assists the parties in settling or resolving the dispute.

26. ODR requires a technology-based intermediary. In other words, unlike offline alternative dispute resolution, an ODR proceeding cannot be conducted on an ad hoc basis involving only the parties to a dispute and a neutral (that is, without an administrator). Instead, to permit the use of technology to enable a dispute resolution process, an ODR process requires a system for generating, sending, receiving, storing, exchanging or otherwise processing communications in a manner that ensures data security. Such a system is referred to herein as an "ODR platform".

27. An ODR platform should be administered and coordinated. The entity that carries out such administration and coordination is referred to herein as the "ODR administrator". The ODR administrator may be separate from or part of the ODR platform.

28. In order to enable ODR communications, it is desirable that both the ODR administrator and the ODR platform be specified in the dispute resolution clause.

29. The communications that may take place during the course of proceedings have been defined as "any communication (including a statement, declaration, demand, notice, response, submission, notification or request) made by means of information generated, sent, received or stored by electronic, magnetic, optical or similar means."

30. It is desirable that all communications in ODR proceedings take place via the ODR platform. Consequently, both the parties to the dispute, and the ODR platform itself, should have a designated "electronic address". The term "electronic address" is defined in other UNCITRAL texts.

31. To enhance efficiency it is desirable that the ODR administrator promptly:

(a) Acknowledge receipt of any communication by the ODR platform;

(b) Notify parties of the availability of any communication received by the ODR platform; and

(c) Keep the parties informed of the commencement and conclusion of different stages of the proceedings.

32. In order to avoid loss of time, it is desirable that a communication be deemed to be received by a party when the administrator notifies that party of its availability on the platform; deadlines in the proceedings would run from the time the administrator has made that notification. At the same time, it is desirable that the ODR administrator be empowered to extend deadlines, in order to allow for some flexibility when appropriate.

Section VI — Commencement of ODR proceedings

33. In order that an ODR proceeding may begin, it is desirable that the claimant provide to the ODR administrator a notice containing the following information:

(a) The name and 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 address 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) The claimant's preferred language of proceedings; and

(f) The signature or other means of identification and authentication of the claimant and/or the claimant's representative.

34. ODR proceedings may be deemed to have commenced when, following a claimant's communication of a notice to the ODR administrator, the ODR administrator notifies the parties that the notice is available at the ODR platform.

35. It is desirable that the respondent communicate its response to the ODR administrator within a reasonable time of being notified of the availability of the claimant's notice on the ODR platform, and that the response include the following elements:

(a) The name and 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 grounds on which the claim is made;

(c) Any solutions proposed to resolve the dispute;

(d) The signature or other means of identification and authentication of the respondent and/or the respondent's representative; and

(e) Notice of any counterclaim containing the grounds on which the counterclaim is made.

36. As much as is possible, it is desirable that both the notice and response be accompanied by all documents and other evidence relied upon by each party, or contain references to them. In addition, to the extent that a claimant is pursuing any other legal remedies, it is desirable that such information also be provided with the notice.

Section VII — Negotiation

37. The first stage may be a negotiation, conducted between the parties via the ODR platform.

38. The first stage of proceedings may commence following the communication of the respondent's response to the ODR platform and:

(a) Notification thereof to the claimant; or

(b) Failing a response, the lapse of a reasonable period of time after the notice has been communicated to the respondent.

39. It is desirable that, if the negotiation does not result in a settlement within a reasonable period of time, the process proceed to the next stage.

Section VIII — Facilitated settlement

40. The second stage of ODR proceedings may be facilitated settlement, whereby a neutral is appointed and communicates with the parties to try to achieve a settlement.

41. That stage may commence if negotiation via the platform fails for any reason (including non-participation or failure to reach a settlement within a reasonable period of time), or where one or both parties to the dispute request to move directly to the next stage of proceedings.

42. Upon commencement of the facilitated settlement stage of proceedings, it is desirable that the ODR administrator appoint a neutral, and notify the parties of that appointment, and provide certain details about the identity of the neutral as described in paragraph 46 below.

43. In the facilitated settlement stage, it is desirable that the neutral communicate with the parties to try to achieve a settlement.

44. If a facilitated settlement cannot be achieved within a reasonable period of time, the process may move to a final stage.

Section IX — Final stage

45. If the neutral has not succeeded in facilitating the settlement, it is desirable that the ODR administrator or neutral informs the parties of the nature of the final stage, and of the form that it might take.

Section X — Appointment, powers and functions of the neutral

46. To enhance efficiency and reduce costs, it is preferable that the ODR administrator appoint a neutral only when a neutral is required for a dispute resolution process in accordance with any applicable ODR rules. At the point in an ODR proceeding at which a neutral is required for the dispute resolution process, it is desirable that the ODR administrator "promptly" appoint the neutral (i.e., generally at the commencement of the facilitated settlement stage of proceedings). Upon appointment, it is desirable that the ODR administrator promptly notify the parties of the name of the neutral and any other relevant or identifying information in relation to that neutral.

47. It is desirable that neutrals have the relevant professional experience as well as dispute resolution skills to enable them to deal with the dispute in question. However, subject to any professional regulation, ODR neutrals need not necessarily be qualified lawyers.

48. With regard to the appointment and functions of neutrals, it is desirable that:

(a) The neutral's acceptance of his or her appointment operates to confirm that he or she has the time necessary to devote to the process;

(b) The neutral be required to declare his or her impartiality and independence and disclose at any time any facts or circumstances that might give rise to likely doubts as to his or her impartiality or independence;

(c) The ODR system provides parties with a method for objecting to the appointment of a neutral;

(d) In the event of an objection to an appointment of a neutral, the ODR administrator be required to make a determination as to whether the neutral shall be replaced;

(e) There be only one neutral per dispute appointed at any time for reasons of cost efficiency;

(f) A party be entitled to object to the neutral receiving information generated during the negotiation period; and

(g) If the neutral resigns or has to be replaced during the course of the ODR proceedings, the ODR administrator be required to appoint a replacement, subject to the same safeguards as set out during the appointment of the initial neutral.

49. In respect of the powers of the neutral, it is desirable that:

(a) Subject to any applicable ODR rules, the neutral be enabled to conduct the ODR proceedings in such a manner as he or she considers appropriate;

(b) The neutral be required to avoid unnecessary delay or expense in the conduct of the proceedings;

(c) The neutral be required to provide a fair and efficient process for resolving disputes;

(d) The neutral be required to remain independent, impartial and treat both parties equally throughout the proceedings;

(e) The neutral be required to conduct proceedings based on such communications as are before the neutral during the proceedings;

(f) The neutral be enabled to allow the parties to provide additional information in relation to the proceedings; and

(g) The neutral be enabled to extend any deadlines set out in any applicable ODR rules for a reasonable time.

50. While the process for appointment of a neutral for an ODR proceeding is subject to the same due process standards that apply to that process in an offline context, it may be desirable to use streamlined appointment and challenge procedures in order to address the need for ODR to provide a simple, time-, and cost-effective alternative to traditional approaches to dispute resolution.

Section XI — Language

51. Technology tools available in ODR can offer a great deal of flexibility regarding the language used for the proceeding. Even where an ODR agreement or ODR rules specify a language to be used in proceedings, it is desirable that a party to the proceedings be able to indicate in the notice or response whether it wishes to proceed in a different language, so that the ODR administrator can identify other language options that the parties may select.

Section XII — Governance

52. It is desirable for guidelines (and/or minimum requirements) to exist in relation to the conduct of ODR platforms and administrators.

53. It is desirable that ODR proceedings be subject to the same confidentiality and due process standards that apply to dispute resolution proceedings in an offline context, in particular independence, neutrality and impartiality.

Annex II

Guidance Note on Strengthening United Nations Support to States, Upon Their Request, to Implement Sound Commercial Law Reforms

A. About this Guidance Note

1. This Guidance Note provides the guiding principles and framework for strengthening United Nations support to States, upon their request, to implement sound commercial law reforms on the basis of internationally accepted standards. It is framed within the United Nations mandate to promote higher standards of living, full employment, and conditions of economic and social progress and development, as well as solutions of international economic, social and related problems. It is a contribution to the implementation of the international development agenda and General Assembly resolutions calling for: (a) enhanced technical assistance and capacity-building in the international commercial law field; (b) better integration of the work in that field in the broader agenda of the United Nations; (c) greater coordination and coherence among the United Nations entities and with donors and recipients; (d) greater evaluation of the effectiveness of such activities; (e) measures to improve the effectiveness of capacity-building activities; and (f) placement of national perspectives at the centre of United Nations assistance programmes.

2. This Guidance Note is relevant to all United Nations departments, offices, funds, agencies and programmes as well as other donors that deal with: (a) mobilizing finance for sustainable development; (b) reducing or removing legal obstacles to the flow of international trade and achieving international and/or regional economic integration; (c) private sector development; (d) justice sector reforms; (e) increasing the resilience of economies to economic crisis; (f) good governance, including public procurement reforms and e-governance; (g) empowerment of the poor; (h) preventing and combating economic crimes through education (e.g. commercial fraud, forgery and falsification); (i) addressing the root causes of conflicts triggered by economic factors; (j) addressing post-conflict economic recovery problems; (k) addressing specific problems with access to international trade by landlocked countries; and (l) domestic implementation of international obligations in the field of international commercial law and related areas.

B. Guiding principles

1. The United Nations work in the field of international commercial law as an integral part of the broader agenda of the United Nations

3. The establishment of sound rules furthering commercial relations is an important factor in economic development. This is because commercial decisions are taken not in isolation but in the context of all relevant factors, including the applicable legal framework.

4. The modern and harmonized international commercial law framework is the basis for rule-based commercial relations and an indispensable part of international trade, bearing in mind the relevance of domestic law and domestic legal systems in this regard. In reducing or removing legal obstacles to the flow of international trade, especially those affecting developing countries, it also contributes significantly to universal economic cooperation among all States on a basis of equality, equity, common interest and respect for legality, to the elimination of discrimination in international trade and, thereby, to peace, stability and the well-being of all peoples. The implementation and effective use of such frameworks are also essential for advancing good governance, sustained economic development and the eradication of poverty and hunger. Accordingly, they may contribute to the achievement of the purposes of the United Nations Charter and those specified in the United Nations General Assembly resolution 2205 (XXI) of 17 December 1966 on the establishment of the United Nations Commission on International Trade Law (UNCITRAL).

5. For these reasons, the United Nations work in the field of international commercial law should be better integrated, where and as necessary, at the headquarters and country

levels in United Nations operations in development, conflict-prevention, post-conflict-reconstruction and other appropriate contexts.

2. United Nations assistance to States, upon their request, with the assessment of local needs for commercial law reforms and their implementation

6. Commercial law constantly evolves in response to new business practices and global challenges. This necessitates the implementation of commercial law reforms that keep pace with those developments. States often request assistance with the assessment of the need for commercial law reforms and their implementation.

7. To achieve better integration of the United Nations work in the field of international commercial law in the broader agenda of the United Nations, United Nations entities operating on the ground should be able to respond to such requests. For that, they should be aware of standards, tools and expertise readily available in the United Nations system in the field of international commercial law. Guiding principle 5 below provides sources of information about such standards, tools and expertise and section C of this Guidance Note illustrates steps that may need to be taken to assist States with the assessment and implementation of commercial law reforms.

8. United Nations entities should promote the harmonization of the local legal framework regulating commercial relations with internationally accepted commercial law standards, where appropriate. Such harmonization would: (a) facilitate recognition, protection and enforcement of contracts and other binding commitments; (b) make commercial law more easily understandable to commercial parties; (c) promote uniform interpretation and application of international commercial law frameworks; and (d) provide legal certainty and predictability in order to enable parties to commercial transactions to take commercially reasonable decisions.

9. States also often request assistance with the assessment of the effectiveness of their mechanisms for adjudicating disputes and enforcing binding commitments in the context of trade and investment, in particular commercial arbitration and alternative dispute resolution mechanisms (jointly referred to in this Guidance Note as ADR). In this context, United Nations entities should be aware of the applicable internationally accepted standards, compliance with which may help to ensure that such mechanisms operate on the basis of internationally recognized norms and are easily accessible, affordable, efficient and effective. Where ADR is promoted by a State as an option to seeking adjudication of commercial disputes in a neutral forum, United Nations entities should be aware that court reforms may be needed so as to equip the judiciary to efficiently and effectively support ADR.

3. United Nations role in assisting States, upon their request, to implement holistic and properly coordinated commercial law reforms

10. Laws and regulations governing commercial relations and the accompanying institutional framework are not purely technical matters. They embody particular policy preferences. They can produce political and social impacts, including gender-unbalanced impacts, in addition to the obvious, economic impacts.

11. Commercial law reforms should therefore involve close consultation and coordination among all relevant stakeholders, including non-governmental organizations (representing the general public), lawyers, legislators, judges, arbitrators and other legal practitioners, such as officials responsible for drafting legislation. In particular, the close link between policymaking and law-making and institutional reforms needs to be ensured.

12. Commercial law reform is strongly linked to international legal obligations. Involvement of international experts may be desirable to ensure consistency between domestic law and international obligations where risks of creating gaps or conflicts between the two exist. United Nations entities should also support and encourage cooperation and exchanges of good practices between States as an important means of promoting sound commercial law reform.

13. The proper coordination among United Nations entities themselves and between them and other donors, as well as domestic governmental departments, engaging in reform efforts should also be achieved. The results of coordination and cooperation gained at the country

level must be preserved at the headquarters level and vice versa. Such coordination is essential in order to avoid duplication of efforts and promote efficiency, consistency and coherence in the modernization and harmonization of international commercial law.

4. United Nations support to States, upon their request, with building local capacity to effectively implement sound commercial law reforms

14. Adequate local capacity to enact, enforce, implement, apply and interpret sound commercial law frameworks is necessary for the expected benefits of rule-based commercial relations and international trade to accrue. Often States request international assistance with building the required local capacity.

15. The effective way to provide such assistance is through technical cooperation, training and capacity-building sessions aimed at strengthening local expertise to draw on readily available international standards, tools and expertise for carrying out commercial law reforms at the country level. United Nations entities should support the organization of those and similar activities and facilitate participation of local experts therein.

16. In addition, active participation of domestic governmental and non-governmental stakeholders in international legislative forums such as UNCITRAL (see guiding principle 5) (at the level of both working groups and the Commission) can significantly contribute to the understanding of the benefits of using international legal instruments to facilitate commercial law reform. Such participation can allow stakeholders to gain familiarity with the drafting of international commercial law and the different modalities which can be later used domestically. It can also serve as a platform for exchange of best practices with counterparts from a wide and diverse professional and geographical background. Close coordination of a State position in various regional and international rule-formulating bodies active in the field of international commercial law helps to avoid the appearance of conflicting rules and interpretations in those bodies. All efforts should therefore be made by United Nations entities to support States in their endeavours to achieve representation of their position in a sustained and coordinated manner in UNCITRAL and other regional and international rule-formulating bodies active in the field of international commercial law.

17. Achieving transparent, consistent and predictable outcomes in jurisprudence on commercial law matters in compliance with the relevant international obligations of States[124] is important for rule-based commercial relations. Judges, arbitrators, law professors and other legal practitioners play primary roles in this regard. Their capacity to interpret international commercial law standards in a way that would promote uniformity in their application and the observance of good faith in international trade should also be a continuous concern. There are tools specifically designed by the United Nations for such purposes (see guiding principle 5). United Nations entities should promote their development and use.

5. UNCITRAL is the core legal body in the United Nations system in the field of international commercial law and as such should be relied upon by United Nations entities in their support to States, upon their request, to implement sound commercial law reforms

18. UNCITRAL is the law-making body of the United Nations system in the field of international commercial law. It is an intergovernmental forum composed of Member States elected by the General Assembly. Its composition is representative of the various geographic regions and the principal economic and legal systems. Additionally, intergovernmental organizations, professional associations and other non-governmental organizations with observer status participate in its work.

19. UNCITRAL standards represent what the international community considers at a given time to be the best international practice for regulating certain commercial transactions. They equip States with models and guidance to support sound commercial law reforms at

[124] E.g. the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980), article 7. United Nations, *Treaty Series*, vol. 1489, No. 25567. Also available at www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html.

lower costs. Reliance on such standards enhances the quality of enacted legislation in the long run and builds the confidence of the private sector, including foreign investors, in the ease of doing business in a country that adheres to them.

20. Most standards are adaptable to local circumstances and needs of commercial parties.[125] A particular feature of UNCITRAL model laws and similar instruments issued by other international organizations is that they can be used by States as a basis or inspiration for legislation that forms part of commercial law reform: they can be adapted to domestic circumstances, and States can select which provisions are most relevant to their legal systems.

21. In addition to internationally accepted commercial law standards, UNCITRAL provides readily available technical assistance, capacity-building and other tools, such as CLOUT,[126] digests of case law,[127] databases related to the implementation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, on 10 June 1958[128] (the New York Convention),[129] and other databases and publications,[130] that aim to facilitate the understanding and use of those standards and to disseminate information about modern legal developments, including case law, in the international commercial law field. Those tools are in particular indispensable in training judges, arbitrators, law professors and other legal practitioners on commercial law matters and to the legal empowerment of people in general.

22. The areas covered by UNCITRAL work are: (a) contracts (international sale of goods, international transport of goods, electronic commerce); (b) international commercial and investment dispute settlement (arbitration, conciliation, online dispute resolution (ODR) and investor-State dispute resolution); (c) public procurement and privately financed infrastructure projects; (d) international payments; (e) insolvency law; (f) security interests; (g) commercial fraud; and (h) developing an enabling legal environment for micro-, small and medium-sized enterprises.[131]

C. Operational framework

23. Sections below illustrate steps that may need to be taken by United Nations entities that are requested by States to assist with the assessment and implementation of commercial law reforms.

1. Legal framework

24. States may request technical assistance and capacity-building with their commercial law reform efforts, in particular with identification of local needs for commercial law reforms, with enactment of a law or with updating and modernizing existing rules on a particular commercial law subject. In response, the United Nations should endeavour to assist States with the following, bearing in mind that reform of the legal framework should remain a process which is country led, country owned and country managed:

(a) Preparing a structured workplan that would identify the goals and objectives of the different steps for commercial law reform (for both providing assistance and taking

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[125] For the up-to-date list of the UNCITRAL standards, see www.uncitral.org/uncitral/en/uncitral_texts.html.

[126] www.uncitral.org/uncitral/en/case_law.html.

[127] www.uncitral.org/uncitral/en/case_law/digests.html.

[128] United Nations, *Treaty Series*, vol. 330, No. 4739. Also available at www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html.

[129] www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html.

[130] E.g. the recurrent publication on the judicial perspective on cross-border insolvency cases (www.uncitral.org/uncitral/uncitral_texts/insolvency/2011Judicial_Perspective.html), the Practice Guide on Cross-Border Insolvency Cooperation (www.uncitral.org/uncitral/en/uncitral_texts/insolvency/2009PracticeGuide.html), and Promoting confidence in electronic commerce: legal issues on international use of electronic authentication and signature methods (www.uncitral.org/pdf/english/texts/electcom/08-55698_Ebook.pdf).

[131] New areas of work may be added. For the most updated list, please contact the UNCITRAL secretariat at the addresses indicated in the end of this Guidance Note or check the UNCITRAL website (www.uncitral.org).

reform measures), set up a schedule, develop strategies to address the weaknesses or inadequacies of the different legislative norms or practices, appoint appropriate focal points to coordinate a specific reform initiative and allocate resources;

(b) Assessing the general commercial law framework and the status of its implementation in the State, e.g.: (i) whether the State is party to fundamental conventions in the commercial law field (e.g. the New York Convention), which will be conducive to other commercial law reforms; (ii) if yes, the status of their implementation; (iii) if not, measures to be taken to consider becoming a party; and (iv) whether the local commercial law framework is otherwise compliant with internationally accepted commercial law standards;

(c) In the context of a particular commercial law reform:

(i) Identifying an applicable internationally accepted commercial law standard and related readily available tools and expertise designed to facilitate its enactment;

(ii) Identifying all stakeholders relevant to the commercial law reform, including domestic reform constituencies, international experts, various donors working in the same or related field, etc., and appropriate focal points in each entity to coordinate a specific reform, in order to facilitate proper consultations with them, where necessary;

(iii) Preparing a comprehensive legislative package to accompany the adoption of a new law (e.g. other necessary laws, regulations, guidance and/or codes of conduct) and ensuring the proper expert assessment of the legislative package before the law is adopted.

2. State institutions involved in commercial law reforms

25. States may request technical assistance and capacity-building, in particular as regards:

(a) Development of capacity in various State institutions (parliamentary committees, ministries of justice, trade and economic development, public procurement agencies, monitoring and oversight bodies) to handle commercial law reforms and implement commercial law framework. Technical assistance and capacity-building in such cases may take the form of: (i) raising awareness of readily available internationally accepted commercial law standards, and tools and expertise designed to facilitate understanding, enactment and implementation of those standards; (ii) circulating texts of the relevant standards; (iii) organizing briefings or training; (iv) supporting efforts to centralize local expertise on commercial law issues, for example through the establishment of a national centre of commercial law expertise or national research centre and national databases on commercial law issues; and (v) facilitating responsible and continuous representation of local experts in international and regional commercial law standard-setting activities;

(b) Building capacity of local judges, arbitrators and other legal practitioners to better understand internationally accepted commercial law standards, apply them in a uniform way and achieve a better quality of judgments and awards. Means of assistance may include: (i) raising awareness of readily available international tools designed to facilitate understanding and uniform interpretation and application of internationally accepted commercial law standards; (ii) supporting the establishment of a mechanism for collecting, analysing and monitoring national case law related to internationally accepted commercial law standards[132] and collecting relevant statistics, e.g. on the speed of adjudication and enforcement; (iii) supporting continuous learning courses for judges and inclusion in the curricula of such courses of the relevant readily available international tools referred to above; (iv) organizing local judicial training with the participation of experts; and (v) raising awareness about international judicial colloquiums and facilitating participation of local judges therein;

(c) The establishment and functioning of arbitration and conciliation centres. Means of assistance may include: (i) attracting readily available expertise for the establishment of,

[132] In this regard, please consult in particular the UNCITRAL CLOUT system that relies on a network of national correspondents designated by those States that are parties to a Convention, or have enacted legislation based on a Model Law, emanated from the work of UNCITRAL, or the New York Convention www.uncitral.org/uncitral/en/case_law/national_correspondents.html.

and support to, such centres; (ii) facilitating access to the ADR and ODR mechanisms in those centres, for example by raising public awareness about them; (iii) organizing training for separate groups of ADR practitioners with the involvement of relevant experts to assist these mechanisms to become more responsive to the rights and needs of intended end users (e.g. arbitrators on uniform application and interpretation of international commercial standards; mediators and conciliators on conflict resolution skills; and ODR providers on issues specific to e-environment); and (iv) addressing through court reforms and other measures the role of the judiciary in providing appropriate support to ADR and ODR mechanisms.

3. Private sector, academia and general public

26. States may request assistance with:

(a) Raising public awareness, in particular among micro-, small and medium-sized enterprises and individual entrepreneurs, about internationally accepted commercial law standards, the readily available tools designed to facilitate their understanding and use, and commercial opportunities linked thereto (e.g. e-commerce, cross-border trade, access to domestic and foreign public procurement markets, access to credit, viable options for recovery in case of financial difficulties). Assistance in such cases may take the form of: (i) translation of those standards into local languages; (ii) creation of readily available local databases of those standards with links to their international source and supporting tools; and (iii) dissemination of information about those standards by other means;

(b) Supporting community-based institutions that contribute to economic activity, empowerment of the poor, private sector development, access to justice, legal education and skills-building, such as chambers of commerce, bar associations, arbitration and conciliation centres, legal information centres and legal aid clinics;

(c) Maintaining regular dialogue with non-governmental organizations that represent various segments of society (e.g. consumers, local communities, end users of public services, individual entrepreneurs, micro-, small and medium-sized enterprises and academia) as regards their views on measures required to improve the commercial law framework in the State;

(d) Assisting members of academia with developing local legal doctrine on commercial law issues in line with internationally prevailing ones, in particular by facilitating establishment of, or participation in, existing regional and international exchange platforms, including electronic ones;

(e) Educating people on international commercial law issues and increasing their awareness of basic rights and obligations arising from commercial relations as directly relevant to entrepreneurship (e.g. start-up and management of business) and employment opportunities. Means of achieving that include assistance with: (i) including international commercial law subjects in curricula of schools, vocational and technical training courses and universities; (ii) organizing moot competitions and sponsoring participation of local student teams in relevant international moot competitions;[133] and (iii) raising awareness about international courses on international commercial law matters[134] and facilitating participation of interested individuals therein; and

(f) Building capacity of various actors in informal justice systems and ADR (e.g. village elders) to use mediation and conciliation skills in accordance with internationally accepted standards and to better understand international commercial law standards, apply them in a uniform way and achieve a better quality of decisions.

The UNCITRAL secretariat[135] is interested in learning about experience with the implementation of this Guidance Note. It can be contacted on all issues addressed in this

[133] See e.g. www.cisg.law.pace.edu/vis.html.

[134] See e.g. www.itcilo.org/en/training-offer/turin-school-of-development-1.

[135] Vienna International Centre, P.O. Box 500, 1400 Vienna, Austria (email: uncitral@uncitral.org, fax: (43-1-26060-5813)).

Guidance Note, including as regards provision of assistance with the identification of local needs for commercial law reforms, implementation of commercial law reforms and training on commercial law issues in countries in which the United Nations operates and across the United Nations system.

Annex III

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

Symbol	*Title or description*
A/CN.9/859	Provisional agenda, annotations thereto and scheduling of meetings of the forty-ninth session
A/CN.9/860	Report of Working Group I (MSMEs) on the work of its twenty-fifth session
A/CN.9/861	Report of Working Group II (Arbitration and Conciliation) on the work of its sixty-third session
A/CN.9/862	Report of Working Group III (Online Dispute Resolution) on the work of its thirty-second session
A/CN.9/863	Report of Working Group IV (Electronic Commerce) on the work of its fifty-second session
A/CN.9/864	Report of Working Group V (Insolvency Law) on the work of its forty-eighth session
A/CN.9/865	Report of Working Group VI (Security Interests) on the work of its twenty-eighth session
A/CN.9/866	Report of Working Group I (MSMEs) on the work of its twenty-sixth session
A/CN.9/867	Report of Working Group II (Arbitration and Conciliation) on the work of its sixty-fourth session
A/CN.9/868	Report of Working Group III (Online Dispute Resolution) on the work of its thirty-third session
A/CN.9/869	Report of Working Group IV (Electronic Commerce) on the work of is fifty-third session
A/CN.9/870	Report of Working Group V (Insolvency Law) on the work of its forty-ninth session
A/CN.9/871	Report of Working Group VI (Security Interests) on the work of its twenty-ninth session
A/CN.9/872	Technical cooperation and assistance
A/CN.9/873	Promotion of ways and means of ensuring a uniform interpretation and application of UNCITRAL legal texts
A/CN.9/874	Bibliography of recent writings related to the work of UNCITRAL
A/CN.9/875	Coordination activities
A/CN.9/876	Status of conventions and model laws
A/CN.9/877	UNCITRAL regional presence — Activities of the UNCITRAL Regional Centre for Asia and the Pacific
A/CN.9/878	Work programme of the Commission
A/CN.9/879	Settlement of commercial disputes: Revision of the UNCITRAL Notes on Organizing Arbitral Proceedings
A/CN.9/880	Settlement of commercial disputes: Possible future work on ethics in international arbitration
A/CN.9/881	Concurrent proceedings in international arbitration
A/CN.9/882 and Add.1	Technical assistance to law reform — Compilation of comments by States on a draft guidance note on strengthening United Nations support to States to implement sound commercial law reforms
A/CN.9/882/Add.1/Corr.1	Technical assistance to law reform — Compilation of comments by States on a draft guidance note on strengthening United Nations support to States to implement sound commercial law reforms — Corrigendum
A/CN.9/883	Technical assistance to law reform — Draft guidance note on strengthening United Nations support to States, upon their request, to implement sound commercial law reforms
A/CN.9/884 and Adds.1-4	Draft Model Law on Secured Transactions
A/CN.9/885 and Adds.1-4	Draft Guide to Enactment of the draft Model Law on Secured Transactions
A/CN.9/886	Draft Model Law on Secured Transactions — Compilation of comments
A/CN.9/887 and Add.1	Draft Model Law on Secured Transactions — Compilation of comments
A/CN.9/888	Online dispute resolution for cross-border electronic commerce transactions — Technical Notes on Online Dispute Resolution
A/CN.9/889	Possible future work in procurement and infrastructure development

Symbol	*Title or description*
A/CN.9/890	Settlement of commercial disputes: presentation of a research paper on the Mauritius Convention on Transparency in Treaty-based Investor-State Arbitration as a possible model for further reforms of investor-State dispute settlement
A/CN.9/891	Legal Issues Related to Identity Management and Trust Services
A/CN.9/892	Joint proposal on cooperation in the area of international commercial contract law (with a focus on sales)
A/CN.9/893	Settlement of commercial disputes: Proposal received from the Swiss Arbitration Association

B. United Nations Conference on Trade and Development (UNCTAD): extract from the report of the Trade and Development Board on its sixty-third session (TD/B/63/7)

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

At its 1147th plenary meeting, the Board took note of the annual report of the United Nations Commission on International Trade Law at its forty-ninth session (A/71/17), held in New York, the United States of America, from 27 June to 15 July 2016.

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-ninth session (A/71/507)

[Original: Spanish]

Rapporteur: Mr. Isaias **Medina** (Bolivarian Republic of Venezuela)

I. Introduction

1. At its 2nd plenary meeting, on 16 September 2016, the General Assembly, on the recommendation of the General Committee, decided to include in the agenda of its seventy-first session the item entitled "Report of the United Nations Commission on International Trade Law on the work of its forty-ninth session" and to allocate it to the Sixth Committee.

2. The Sixth Committee considered the item at its 11th, 12th, 19th and 24th meetings, on 10, 11, 20 and 27 October 2016. The views of the representatives who spoke during the Committee's consideration of the item are reflected in the relevant summary records.[1]

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-ninth session (A/71/17).

4. At the 11th meeting, on 10 October, the Chair of the United Nations Commission on International Trade Law at its forty-ninth session introduced the report of the Commission on the work of its forty-ninth session.

II. Consideration of proposals

A. Draft resolution A/C.6/71/L.10

5. At the 19th meeting, on 20 October, the representative of Austria, on behalf of Algeria, Argentina, Austria, Bulgaria, Canada, Chile, Croatia, Cyprus, Czechia, Denmark, El Salvador, Finland, France, Germany, Greece, Hungary, Iceland, India, Italy, Japan, Liechtenstein, Luxembourg, Madagascar, Mauritius, the Netherlands, the Philippines, Poland, Portugal, Romania, Serbia, Slovakia, Spain, Sweden, Thailand, Trinidad and Tobago, the United Kingdom of Great Britain and Northern Ireland and the United States of America, subsequently joined by Australia, Ireland, New Zealand, the Russian Federation, Singapore and Switzerland, introduced a draft resolution entitled "Report of the United Nations Commission on International Trade Law on the work of its forty-ninth session" (A/C.6/71/L.10).

6. At the 24th meeting, on 27 October, Belgium, Israel, the Republic of Moldova and Ukraine joined in sponsoring the draft resolution.

7. At the same meeting, the Committee adopted draft resolution A/C.6/71/L.10 without a vote (see para. 14, draft resolution I).

B. Draft resolution A/C.6/71/L.11

8. At the 19th meeting, on 20 October, the representative of Austria, on behalf of the Bureau, introduced a draft resolution entitled "Model Law on Secured Transactions of the United Nations Commission on International Trade Law" (A/C.6/71/L.11).

9. At its 24th meeting, on 27 October, the Committee adopted draft resolution A/C.6/71/L.11 without a vote (see para. 14, draft resolution II).

[1] A/C.6/71/SR.11, A/C.6/71/SR.12, A/C.6/71/SR.19 and A/C.6/71/SR.24.

C. Draft resolution A/C.6/71/L.12

10. At the 19th meeting, on 20 October, the representative of Austria, on behalf of the Bureau, introduced a draft resolution entitled "2016 Notes on Organizing Arbitral Proceedings of the United Nations Commission on International Trade Law" (A/C.6/71/L.12).

11. At its 24th meeting, on 27 October, the Committee adopted draft resolution A/C.6/71/L.12 without a vote (see para. 14, draft resolution III).

D. Draft resolution A/C.6/71/L.13

12. At the 19th meeting, on 20 October, the representative of Austria, on behalf of the Bureau, introduced a draft resolution entitled "Technical Notes on Online Dispute Resolution of the United Nations Commission on International Trade Law" (A/C.6/71/L.13).

13. At its 24th meeting, on 27 October, the Committee adopted draft resolution A/C.6/71/L.13 without a vote (see para. 14, draft resolution IV).

III. Recommendation 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-ninth 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 Model Law on Secured Transactions,[2] the 2016 Notes on Organizing Arbitral Proceedings[3] and the Technical Notes on Online Dispute Resolution;[4]

3. *Notes with satisfaction* that the Commission has instructed its secretariat to commence preparations for a Congress to commemorate the Commission's fiftieth anniversary during its fiftieth session, with the objectives to discuss technical issues and to raise awareness of the Commission and its potential to support cross-border commerce;[5]

4. *Also notes with satisfaction* the contributions from the Fund for International Development of the Organization of the Petroleum Exporting Countries and from the European

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[1] *Official Records of the General Assembly, Seventy-first Session, Supplement No. 17* (A/71/17).
[2] Ibid., chap. III, sect. A.
[3] Ibid., chap. IV, sect. A.
[4] Ibid., chap. V and annex I.
[5] Ibid., paras. 368-370.

Union, which allow the operation of the repository of published information under the Rules on Transparency in Treaty-based Investor-State Arbitration[6] until the end of 2016 and beyond, and that the Commission reiterated its strong and unanimous opinion that the secretariat of the Commission should continue to operate the transparency repository, which constitutes a central feature both of the Rules on Transparency and of the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (Mauritius Convention on Transparency);[7]

5. *Requests* the Secretary-General to continue to operate, through the secretariat of the Commission, the repository of published information in accordance with article 8 of the Rules on Transparency, as a pilot project until the end of 2017, to be funded entirely by voluntary contributions, and to keep the General Assembly informed of developments regarding the funding and budgetary situation of the transparency repository based on its pilot operation;

6. *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 dispute settlement,[8] electronic commerce, insolvency law, security interests[9] and international trade law aimed at reducing the legal obstacles faced by micro-, small- and medium-sized enterprises throughout their life cycle, and encourages the Commission to continue to move forward efficiently to achieve tangible work outcomes;

7. *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;

8. *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

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[6] Ibid., *Sixty-eighth Session, Supplement No. 17* (A/68/17), annex I.

[7] Resolution 69/116, annex.

[8] See *Official Records of the General Assembly, Seventy-first Session, Supplement No. 17* (A/71/17), chaps. IV and V.

[9] Ibid., chap. III.

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 2030 Agenda for Sustainable Development;[10]

(e) Recalls its resolutions stressing 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, welcomes the efforts of the Secretary-General to ensure greater coordination and coherence among United Nations entities and with donors and recipients, notes the endorsement by the Commission of the Guidance Note on Strengthening United Nations Support to States, Upon Their Request, to Implement Sound Commercial Law Reforms,[11] and requests the Secretary-General to circulate the Guidance Note as broadly as possible to its intended users;

9. *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,[12] 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;

10. *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 providing capacity-building and technical assistance services to States in the Asia-Pacific region, including to international and regional organizations, expresses its appreciation to the Republic of Korea and China, whose contributions enabled continuing operation of the Regional Centre, notes that the continuation of the regional presence relies entirely on extrabudgetary resources, including but not limited to voluntary contributions from States, welcomes 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;

11. *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;

12. *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 seventy-first 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. *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

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[10] Resolution 70/1.

[11] *Official Records of the General Assembly, Seventy-first Session, Supplement No. 17* (A/71/17), para. 262 and annex II.

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

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;

14. *Notes* the rule of law panel discussion held at the forty-ninth session of the Commission and the comments transmitted by the Commission pursuant to paragraph 20 of General Assembly resolution 70/118 of 14 December 2015, highlighting its role in promoting the rule of law, in particular the role of the multilateral treaty processes of the Commission in promoting and advancing the rule of law in the field of international trade law and the role of the Commission in promoting the rule of law by facilitating access to justice;[13]

15. *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;

16. *Also notes with satisfaction* that, in paragraph 89 of the Addis Ababa Action Agenda of the Third International Conference on Financing for Development, adopted by the General Assembly by consensus as resolution 69/313 of 27 July 2015, States endorsed 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;

17. *Reiterates its request* to the Secretary-General, in conformity with resolutions of the General Assembly on documentation-related matters,[14] 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;[15]

18. *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 the experience of using digital recordings and, on the basis of that assessment, taking a decision at a future session regarding the possible replacement of summary records by digital recordings;[16]

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

20. *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

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[13] Ibid., *Seventy-first Session, Supplement No. 17* (A/71/17), paras. 339-342.

[14] Resolutions 52/214, sect. B, 57/283 B, sect. III, and 58/250, sect. III.

[15] 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.

[16] *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 276.

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;

21. *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;

22. *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;

23. *Recalls* its resolutions affirming the importance of high-quality, user-friendly and cost-effective United Nations websites and the need for their multilingual development, maintenance and enrichment,[17] commends the fact that the website of the Commission is published in the six official languages of the United Nations, and welcomes the continuous efforts of the Commission to maintain and improve its website, including by developing new social media features, in accordance with the applicable guidelines.[18]

[17] Resolutions 52/214, sect. C, para. 3; 55/222, sect. III, para. 12; 56/64 B, sect. X; 57/130 B, sect. X; 58/101 B, sect. V, paras. 61-76; 59/126 B, sect. V, paras. 76-95; 60/109 B, sect. IV, paras. 66-80; and 61/121 B, sect. IV, paras. 65-77.

[18] Resolution 63/120, para. 20.

Draft resolution II
Model Law on Secured Transactions of the United Nations Commission on International Trade 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 56/81 of 12 December 2001, 63/121 of 11 December 2008, 65/23 of 6 December 2010 and 68/108 of 16 December 2013, in which it recommended that States consider or continue to consider becoming parties to the United Nations Convention on the Assignment of Receivables in International Trade[1] and giving favourable consideration to the *UNCITRAL Legislative Guide on Secured Transactions, the Supplement on Security Rights in Intellectual Property* and the *UNCITRAL Guide on the Implementation of a Security Rights Registry*, respectively,

Recalling further that, at its forty-sixth session, in 2013, the Commission entrusted Working Group VI (Security Interests) with the preparation of a model law on secured transactions based on the recommendations of the *UNCITRAL Legislative Guide on Secured Transactions* and consistent with all texts prepared by the Commission on secured transactions,[2]

Noting that Working Group VI devoted six sessions,[3] from 2013 to 2016, to the preparation of the Model Law on Secured Transactions,

Noting also that, at its forty-eighth session, in 2015, the Commission approved the substance of the registry-related provisions of the Model Law,[4]

Noting with satisfaction that the Model Law is based on the recommendations of the *UNCITRAL Legislative Guide on Secured Transactions* and consistent with all texts prepared by the Commission on secured transactions, and with those texts thus provides comprehensive guidance to States with respect to legal and practical issues that need to be addressed when implementing a modern secured transactions regime,

Recognizing that an efficient secured transactions regime with a publicly accessible security rights registry of the kind provided for in the Model Law is likely to increase access to affordable secured credit and thus promote economic growth, sustainable development, the rule of law and financial inclusion, as well as assist in combating poverty,

Recognizing also that the harmonization of national secured transactions regimes and registries on the basis of the Model Law is likely to increase the availability of secured 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,

Recognizing further 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,

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[1] General Assembly resolution 56/81, annex.

[2] *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17* (A/68/17), paras. 194 and 332.

[3] See A/CN.9/796, A/CN.9/802, A/CN.9/830, A/CN.9/836, A/CN.9/865 and A/CN.9/871.

[4] *Official Records of the General Assembly, Seventieth Session, Supplement No. 17* (A/70/17), para. 214.

Convinced that the Model Law will contribute to greater legal certainty in the exercise of international commercial activities for the benefit of all States, particularly developing countries and States with economies in transition,

Noting with appreciation that all States and interested international organizations were invited to participate in the preparation of the draft Model Law at all the sessions of the Working Group and at the forty-eighth and forty-ninth sessions of the Commission, either as members or as observers, and that comments received after circulation of the text of the Model Law to all Governments were before the Commission at its forty-ninth session,[5]

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 Model Law,

1. *Expresses its appreciation* to the United Nations Commission on International Trade Law for completing and adopting the Model Law on Secured Transactions;[6]

2. *Requests* the Secretary-General to publish the Model Law, including electronically, in the six official languages of the United Nations, and to disseminate it broadly to Governments and other interested bodies;

3. *Recommends* that all States give favourable consideration to the Model Law when revising or adopting legislation relevant to secured transactions, and invites States that have used the Model Law to advise the Commission accordingly;

4. *Also recommends* that, where necessary, States continue to 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* and the *Supplement on Security Rights in Intellectual Property* when revising or adopting legislation relevant to secured transactions, and invites States that have used the guides to advise the Commission accordingly;

5. *Further recommends* that all States continue to consider becoming parties to the United Nations Convention on the Assignment of Receivables in International Trade,[1] the principles of which are also reflected in the Model Law, and the optional annex to which refers to the registration of notices with regard to assignments.

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[5] See A/CN.9/886 and A/CN.9/887 and Add.1.

[6] See *Official Records of the General Assembly, Seventy-first Session, Supplement No. 17* (A/71/17), chap. III, sect. A.

Draft resolution III
2016 Notes on Organizing Arbitral Proceedings of the United Nations Commission on International Trade 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 resolution 51/161 of 16 December 1996, in which it commended the Commission for the finalization of the Notes on Organizing Arbitral Proceedings,

Reaffirming the value and increased use of arbitration as a method of settling disputes,

Recognizing the need for revising the Notes to conform to current arbitral practices,

Noting that the purpose of the Notes is to list and briefly describe matters relevant to the organization of arbitral proceedings and that the Notes, prepared with a focus on international arbitration, are intended to be used in a general and universal manner, regardless of whether the arbitration is administered by an arbitral institution,

Noting also that the Notes do not seek to promote any practice as best practice, given that procedural styles and practices in arbitration vary and each of them has its own merit,

Recognizing that the revision of the Notes was the subject of due deliberation in the Commission, which benefited greatly from consultations with Governments and interested intergovernmental and international non-governmental organizations active in the field of arbitration, including arbitral institutions, as well as individual experts,

1. *Expresses its appreciation* to the United Nations Commission on International Trade Law for preparing and adopting the 2016 Notes on Organizing Arbitral Proceedings;[1]

2. *Recommends* the use of the 2016 Notes, including by parties to arbitration, arbitral tribunals and arbitral institutions, as well as for academic and training purposes with respect to international commercial dispute settlement;

3. *Requests* the Secretary-General to publish the 2016 Notes, including electronically, in the six official languages of the United Nations, and to make all efforts to ensure that the Notes become generally known and available.

[1] See *Official Records of the General Assembly, Seventy-first Session, Supplement No. 17* (A/71/17), chap. IV, sect. A.

Draft resolution IV
Technical Notes on Online Dispute Resolution of the United Nations Commission on International Trade 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,

Recognizing that the sharp increase in online cross-border transactions has raised a need for mechanisms for resolving disputes that arise from such transactions, and recognizing also that one such mechanism is online dispute resolution,

Observing that online dispute resolution can assist the parties in resolving the dispute in a simple, fast, flexible and secure manner, without the need for physical presence at a meeting or hearing,

Observing also that online dispute resolution represents significant opportunities for access to dispute resolution by buyers and sellers concluding cross-border commercial transactions, both in developed and developing countries,

Recalling that, at its forty-third session, in 2010, the Commission agreed that a working group should be established to undertake work in the field of online dispute resolution,[1] and that, at its forty-eighth session, in 2015, the Commission decided that the work should take the form of a non-binding descriptive document reflecting elements of an online dispute resolution process,[2]

Noting that the Technical Notes on Online Dispute Resolution[3] are non-binding and descriptive and reflect the principles of impartiality, independence, efficiency, effectiveness, due process, fairness, accountability and transparency,

Noting also that the Technical Notes are expected to contribute significantly to the development of systems to enable the settlement of disputes arising from cross-border low-value sales or service contracts concluded using electronic communications,

Convinced that the Technical Notes will significantly assist all States, in particular developing countries and States whose economies are in transition, online dispute resolution administrators, online dispute resolution platforms, neutrals and the parties to online dispute resolution proceedings in developing and using online dispute resolution systems,

Noting with appreciation that all States and interested international organizations were invited to participate in the preparation of the Technical Notes either as members or as observers from the forty-fourth to the forty-ninth sessions of the Commission, including through circulation of the text of the draft Technical Notes for comment to all States as well as to international organizations invited to attend the meetings of the Commission as observers,

Noting that the preparation of the Technical Notes was the subject of due deliberation in the Commission and that the draft text 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 preparing and adopting the Technical Notes on Online Dispute Resolution as annexed to the report of the Commission on the work of its forty-ninth session;[4]

2. *Requests* the Secretary-General to publish the text of the Technical Notes through all appropriate means, including electronically, in the six official languages of the

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[1] *See Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17* (A/65/17), para. 257.
[2] Ibid., *Seventieth Session, Supplement No. 17* (A/70/17), para. 352.
[3] Ibid., *Seventy-first Session, Supplement No. 17* (A/71/17), annex I.
[4] Ibid., *Seventy-first Session, Supplement No. 17* (A/71/17).

United Nations, and to disseminate that text broadly to Governments and other interested bodies;

3. *Recommends* that all States and other stakeholders use the Technical Notes in designing and implementing online dispute resolution systems for cross-border commercial transactions;

4. *Requests* all States to support the promotion and use of the Technical Notes.

D. General Assembly resolutions 71/135, 71/136, 71/137, 71/138 and 71/148

71/135. Report of the United Nations Commission on International Trade Law on the work of its forty-ninth 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 Model Law on Secured Transactions,[2] the 2016 Notes on Organizing Arbitral Proceedings[3] and the Technical Notes on Online Dispute Resolution;[4]

3. *Notes with satisfaction* that the Commission has instructed its secretariat to commence preparations for a Congress to commemorate the Commission's fiftieth anniversary during its fiftieth session, with the objectives to discuss technical issues and to raise awareness of the Commission and its potential to support cross-border commerce;[5]

4. *Also notes with satisfaction* the contributions from the Fund for International Development of the Organization of the Petroleum Exporting Countries and from the European Union, which allow the operation of the repository of published information under the Rules on Transparency in Treaty-based Investor-State Arbitration[6] until the end of 2016 and beyond, and that the Commission reiterated its strong and unanimous opinion that the secretariat of the Commission should continue to operate the transparency repository, which constitutes a central feature both of the Rules on Transparency and of the United Nations

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[1] *Official Records of the General Assembly, Seventy-first Session, Supplement No. 17* (A/71/17).

[2] Ibid., chap. III, sect. A.

[3] Ibid., chap. IV, sect. A.

[4] Ibid., chap. V and annex I.

[5] Ibid., paras. 368-370.

[6] Ibid., *Sixty-eighth Session, Supplement No. 17* (A/68/17), annex I.

Convention on Transparency in Treaty-based Investor-State Arbitration (Mauritius Convention on Transparency);[7]

5. *Requests* the Secretary-General to continue to operate, through the secretariat of the Commission, the repository of published information in accordance with article 8 of the Rules on Transparency, as a pilot project until the end of 2017, to be funded entirely by voluntary contributions, and to keep the General Assembly informed of developments regarding the funding and budgetary situation of the transparency repository based on its pilot operation;

6. *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 dispute settlement,[8] electronic commerce, insolvency law, security interests[9] and international trade law aimed at reducing the legal obstacles faced by micro-, small- and medium-sized enterprises throughout their life cycle, and encourages the Commission to continue to move forward efficiently to achieve tangible work outcomes;

7. *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;

8. *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 2030 Agenda for Sustainable Development;[10]

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[7] Resolution 69/116, annex.

[8] See *Official Records of the General Assembly, Seventy-first Session, Supplement No. 17* (A/71/17), chaps. IV and V.

[9] Ibid., chap. III.

[10] Resolution 70/1.

(*e*) Recalls its resolutions stressing 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, welcomes the efforts of the Secretary-General to ensure greater coordination and coherence among United Nations entities and with donors and recipients, notes the endorsement by the Commission of the Guidance Note on Strengthening United Nations Support to States, Upon Their Request, to Implement Sound Commercial Law Reforms,[11] and requests the Secretary-General to circulate the Guidance Note as broadly as possible to its intended users;

9. *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,[12] 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;

10. *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 providing capacity-building and technical assistance services to States in the Asia-Pacific region, including to international and regional organizations, expresses its appreciation to the Republic of Korea and China, whose contributions enabled continuing operation of the Regional Centre, notes that the continuation of the regional presence relies entirely on extrabudgetary resources, including but not limited to voluntary contributions from States, welcomes 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;

11. *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;

12. *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 seventy-first 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. *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;

14. *Notes* the rule of law panel discussion held at the forty-ninth session of the Commission and the comments transmitted by the Commission pursuant to paragraph 20 of General Assembly resolution 70/118 of 14 December 2015, highlighting its role in promoting the rule of law, in particular the role of the multilateral treaty processes of the Commission in promoting and advancing the rule of law in the field of international trade

[11] *Official Records of the General Assembly, Seventy-first Session, Supplement No. 17* (A/71/17), para. 262 and annex II.

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

law and the role of the Commission in promoting the rule of law by facilitating access to justice;[13]

15. *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;

16. *Also notes with satisfaction* that, in paragraph 89 of the Addis Ababa Action Agenda of the Third International Conference on Financing for Development, adopted by the General Assembly by consensus as resolution 69/313 of 27 July 2015, States endorsed 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;

17. *Reiterates its request* to the Secretary-General, in conformity with resolutions of the General Assembly on documentation-related matters,[14] 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;[15]

18. *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 the experience of using digital recordings and, on the basis of that assessment, taking a decision at a future session regarding the possible replacement of summary records by digital recordings;[16]

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

20. *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;

21. *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

[13] Ibid., *Seventy-first Session, Supplement No. 17* (A/71/17), paras. 339-342.

[14] Resolutions 52/214, sect. B, 57/283 B, sect. III, and 58/250, sect. III.

[15] 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.

[16] *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 276.

focused on the promotion of ways and means of interpreting Commission texts in a uniform manner;

22. *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;

23. *Recalls* its resolutions affirming the importance of high-quality, user-friendly and cost-effective United Nations websites and the need for their multilingual development, maintenance and enrichment,[17] commends the fact that the website of the Commission is published in the six official languages of the United Nations, and welcomes the continuous efforts of the Commission to maintain and improve its website, including by developing new social media features, in accordance with the applicable guidelines.[18]

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[17] Resolutions 52/214, sect. C, para. 3; 55/222, sect. III, para. 12; 56/64 B, sect. X; 57/130 B, sect. X; 58/101 B, sect. V, paras. 61-76; 59/126 B, sect. V, paras. 76-95; 60/109 B, sect. IV, paras. 66-80; and 61/121 B, sect. IV, paras. 65-77.

[18] Resolution 63/120, para. 20.

71/136 Model Law on Secured Transactions of the United Nations Commission on International Trade 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 56/81 of 12 December 2001, 63/121 of 11 December 2008, 65/23 of 6 December 2010 and 68/108 of 16 December 2013, in which it recommended that States consider or continue to consider becoming parties to the United Nations Convention on the Assignment of Receivables in International Trade[1] and giving favourable consideration to the *UNCITRAL Legislative Guide on Secured Transactions*, the *Supplement on Security Rights in Intellectual Property* and the *UNCITRAL Guide on the Implementation of a Security Rights Registry*, respectively,

Recalling further that, at its forty-sixth session, in 2013, the Commission entrusted Working Group VI (Security Interests) with the preparation of a model law on secured transactions based on the recommendations of the *UNCITRAL Legislative Guide on Secured Transactions* and consistent with all texts prepared by the Commission on secured transactions,[2]

Noting that Working Group VI devoted six sessions,[3] from 2013 to 2016, to the preparation of the Model Law on Secured Transactions,

Noting also that, at its forty-eighth session, in 2015, the Commission approved the substance of the registry-related provisions of the Model Law,[4]

Noting with satisfaction that the Model Law is based on the recommendations of the *UNCITRAL Legislative Guide on Secured Transactions* and consistent with all texts prepared by the Commission on secured transactions, and with those texts thus provides comprehensive guidance to States with respect to legal and practical issues that need to be addressed when implementing a modern secured transactions regime,

Recognizing that an efficient secured transactions regime with a publicly accessible security rights registry of the kind provided for in the Model Law is likely to increase access to affordable secured credit and thus promote economic growth, sustainable development, the rule of law and financial inclusion, as well as assist in combating poverty,

Recognizing also that the harmonization of national secured transactions regimes and registries on the basis of the Model Law is likely to increase the availability of secured 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,

Recognizing further 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,

Convinced that the Model Law will contribute to greater legal certainty in the exercise of international commercial activities for the benefit of all States, particularly developing countries and States with economies in transition,

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[1] Resolution 56/81, annex.

[2] *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17* (A/68/17), paras. 194 and 332.

[3] See A/CN.9/796, A/CN.9/802, A/CN.9/830, A/CN.9/836, A/CN.9/865 and A/CN.9/871.

[4] *Official Records of the General Assembly, Seventieth Session, Supplement No. 17* (A/70/17), para. 214.

Noting with appreciation that all States and interested international organizations were invited to participate in the preparation of the draft Model Law at all the sessions of the Working Group and at the forty-eighth and forty-ninth sessions of the Commission, either as members or as observers, and that comments received after circulation of the text of the Model Law to all Governments were before the Commission at its forty-ninth session,[5]

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 Model Law,

1. *Expresses its appreciation* to the United Nations Commission on International Trade Law for completing and adopting the Model Law on Secured Transactions;[6]

2. *Requests* the Secretary-General to publish the Model Law, including electronically, in the six official languages of the United Nations, and to disseminate it broadly to Governments and other interested bodies;

3. *Recommends* that all States give favourable consideration to the Model Law when revising or adopting legislation relevant to secured transactions, and invites States that have used the Model Law to advise the Commission accordingly;

4. *Also recommends* that, where necessary, States continue to 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* and the *Supplement on Security Rights in Intellectual Property* when revising or adopting legislation relevant to secured transactions, and invites States that have used the guides to advise the Commission accordingly;

5. *Further recommends* that all States continue to consider becoming parties to the United Nations Convention on the Assignment of Receivables in International Trade,[1] the principles of which are also reflected in the Model Law, and the optional annex to which refers to the registration of notices with regard to assignments.

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[5] See A/CN.9/886 and A/CN.9/887 and Add.1.

[6] See *Official Records of the General Assembly, Seventy-first Session, Supplement No. 17* (A/71/17), chap. III, sect. A.

71/137 2016 Notes on Organizing Arbitral Proceedings of the United Nations Commission on International Trade Law

The General Assembly,

Recalling its resolution 2205 (XXI) of 17December 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 51/161 of 16 December 1996, in which it commended the Commission for the finalization of the Notes on Organizing Arbitral Proceedings,

Reaffirming the value and increased use of arbitration as a method of settling disputes,

Recognizing the need for revising the Notes to conform to current arbitral practices,

Noting that the purpose of the Notes is to list and briefly describe matters relevant to the organization of arbitral proceedings and that the Notes, prepared with a focus on international arbitration, are intended to be used in a general and universal manner, regardless of whether the arbitration is administered by an arbitral institution,

Noting also that the Notes do not seek to promote any practice as best practice, given that procedural styles and practices in arbitration vary and each of them has its own merit,

Recognizing that the revision of the Notes was the subject of due deliberation in the Commission, which benefited greatly from consultations with Governments and interested intergovernmental and international non-governmental organizations active in the field of arbitration, including arbitral institutions, as well as individual experts,

1. *Expresses its appreciation* to the United Nations Commission on International Trade Law for preparing and adopting the 2016 Notes on Organizing Arbitral Proceedings;[1]

2. *Recommends* the use of the 2016 Notes, including by parties to arbitration, arbitral tribunals and arbitral institutions, as well as for academic and training purposes with respect to international commercial dispute settlement;

3. *Requests* the Secretary-General to publish the 2016 Notes, including electronically, in the six official languages of the United Nations, and to make all efforts to ensure that the Notes become generally known and available.

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[1] See *Official Records of the General Assembly, Seventy-first Session, Supplement No. 17* (A/71/17), chap. IV, sect. A.

71/138 Technical Notes on Online Dispute Resolution of the United Nations Commission on International Trade 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,

Recognizing that the sharp increase in online cross-border transactions has raised a need for mechanisms for resolving disputes that arise from such transactions, and recognizing also that one such mechanism is online dispute resolution,

Observing that online dispute resolution can assist the parties in resolving the dispute in a simple, fast, flexible and secure manner, without the need for physical presence at a meeting or hearing,

Observing also that online dispute resolution represents significant opportunities for access to dispute resolution by buyers and sellers concluding cross-border commercial transactions, both in developed and developing countries,

Recalling that, at its forty-third session, in 2010, the Commission agreed that a working group should be established to undertake work in the field of online dispute resolution,[1] and that, at its forty-eighth session, in 2015, the Commission decided that the work should take the form of a non-binding descriptive document reflecting elements of an online dispute resolution process,[2]

Noting that the Technical Notes on Online Dispute Resolution[3] are non-binding and descriptive and reflect the principles of impartiality, independence, efficiency, effectiveness, due process, fairness, accountability and transparency,

Noting also that the Technical Notes are expected to contribute significantly to the development of systems to enable the settlement of disputes arising from cross-border low-value sales or service contracts concluded using electronic communications,

Convinced that the Technical Notes will significantly assist all States, in particular developing countries and States whose economies are in transition, online dispute resolution administrators, online dispute resolution platforms, neutrals and the parties to online dispute resolution proceedings in developing and using online dispute resolution systems,

Noting with appreciation that all States and interested international organizations were invited to participate in the preparation of the Technical Notes either as members or as observers from the forty-fourth to the forty-ninth sessions of the Commission, including through circulation of the text of the draft Technical Notes for comment to all States as well as to international organizations invited to attend the meetings of the Commission as observers,

Noting that the preparation of the Technical Notes was the subject of due deliberation in the Commission and that the draft text 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 preparing and adopting the Technical Notes on Online Dispute Resolution as annexed to the report of the Commission on the work of its forty-ninth session;[4]

2. *Requests* the Secretary-General to publish the text of the Technical Notes through all appropriate means, including electronically, in the six official languages of the

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[1] See *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17* (A/65/17), para. 257.

[2] Ibid., *Seventieth Session, Supplement No. 17* (A/70/17), para. 352.

[3] Ibid., *Seventy-first Session, Supplement No. 17* (A/71/17), annex I.

[4] Ibid., *Seventy-first Session, Supplement No. 17* (A/71/17).

United Nations, and to disseminate that text broadly to Governments and other interested bodies;

3. *Recommends* that all States and other stakeholders use the Technical Notes in designing and implementing online dispute resolution systems for cross-border commercial transactions;

4. *Requests* all States to support the promotion and use of the Technical Notes.

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71/148 The rule of law at the national and international levels

The General Assembly,

Recalling its resolution 70/118 of 14 December 2015,

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,

Bearing in mind that the activities of the United Nations carried out in support of efforts of Governments to promote and consolidate the rule of law are undertaken in accordance with the Charter, and stressing 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,

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] takes note of the report of the Secretary-General submitted pursuant to paragraph 41 of the declaration,[3] and requests the Sixth Committee to continue its consideration of ways and means of further developing the linkages between the rule of law and the three pillars of the United Nations;

2. *Acknowledges* the efforts to strengthen the rule of law through voluntary pledges, encourages all States to consider making pledges, individually or jointly, based on their national priorities, and also encourages those States that have made pledges to continue to exchange information, knowledge and best practices in this regard;

3. *Takes note* of the annual report of the Secretary-General on strengthening and coordinating United Nations rule of law activities;[4]

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[1] Resolution 60/1.

[2] Resolution 67/1.

[3] A/68/213/Add.1.

[4] A/71/169.

4. *Encourages* the Secretary-General and the United Nations system to accord high priority to rule of law activities;

5. *Reaffirms* the role of the General Assembly in encouraging the progressive development of international law and its codification, and further reaffirms that States shall abide by all of their obligations under international law;

6. *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;

7. *Further reaffirms* its commitment to work tirelessly for the full implementation of the 2030 Agenda for Sustainable Development,[5] and recalls that the Sustainable Development Goals and targets are integrated and indivisible and balance the three dimensions of sustainable development;

8. *Recognizes* the role of multilateral treaty processes in advancing the rule of law, recalls the constructive debate held on this subtopic in the Sixth Committee during the seventieth session of the General Assembly, and in this regard:

(*a*) Reaffirms its support for the annual treaty event organized by the Secretary-General, and welcomes the organization of workshops on treaty practice by the Treaty Section of the Office of Legal Affairs of the Secretariat, both at the regional level and at United Nations Headquarters, as an important capacity-building initiative, and invites States to continue to support this activity;

(*b*) Commends the Secretary-General for his review of the regulations giving effect to Article 102 of the Charter, and takes note of the recommendations for consideration by the Sixth Committee contained in his annual report;[6]

(*c*) Welcomes the efforts made to develop and enhance the United Nations electronic treaty database, providing online access to comprehensive information on the depositary functions of the Secretary-General and the registration and publication of treaties under Article 102 of the Charter, and encourages the continuation of such efforts in the future, while bearing in mind that many developing countries lack affordable access to information and communications technologies;

(*d*) Recognizes the importance of the legal publications prepared by the Treaty Section, takes note of the information provided by the Secretary-General in his annual report,[7] and stresses the need to update the *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties* in the light of these new developments and practices;

9. *Recalls* the constructive debate held on the subtopic "Sharing national practices of States in the implementation of multilateral treaties" in the Sixth Committee during the seventy-first session of the General Assembly, welcomes the technical assistance provided by the United Nations system to Member States, upon their request, in the implementation of multilateral treaties at the national level as a tangible contribution to strengthening the rule of law at both the national and international levels, and commends the efforts made by States in this regard;

10. *Also recalls* the constructive debate held on the subtopic "Practical measures to facilitate access to justice for all, including for the poorest and most vulnerable" in the Sixth Committee during the seventy-first session, which highlighted, inter alia, the importance of appropriate tools and measures to promote the legal empowerment of individuals, and recognizes the role of this subtopic in advancing the rule of law;

11. *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;

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[5] Resolution 70/1.

[6] A/71/169, sect. II.D.

[7] Ibid., sect. II.E.

12. *Recognizes* the importance of the United Nations Programme of Assistance in the Teaching, Study, Dissemination and Wider Appreciation of International Law to the furtherance of United Nations rule of law programmes and activities, emphasizes that further technical assistance and capacity-building initiatives, focused on increasing and improving the participation of Member States in the multilateral treaty process, should be examined, and invites States to support these activities;

13. *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 in order to develop, reinforce and maintain domestic institutions active in the promotion of rule of law at the national and international levels, subject to national ownership, strategies and priorities;

14. *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;

15. *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, while recognizing that rule of law activities must be anchored in a national context and that States have different national experiences in the development of their systems of the rule of law, taking into account their legal, political, socioeconomic, cultural, religious and other local specificities, while also recognizing that there are common features founded on international norms and standards;

16. *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;

17. *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 and under the leadership of the Deputy Secretary-General;

18. *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, addressing, in a balanced manner, the national and international dimensions of the rule of law;

19. *Recognizes* the importance of restoring confidence in the rule of law as a key element of transitional justice;

20. *Recalls* the commitment of Member States to take all necessary steps to provide fair, transparent, effective, non-discriminatory and accountable services that promote access to justice for all, including legal aid, encourages further dialogue and the sharing of national practices and expertise in strengthening the rule of law through access to justice, including with regard to the provision of birth registration for all, appropriate registration and documentation of refugees, migrants, asylum seekers and stateless persons, and legal aid, where appropriate, in both criminal and civil proceedings, and in this regard recognizes the role of knowledge and technology, including in judicial systems, and stresses the need to intensify the assistance extended to Governments upon their request;

21. *Stresses* the importance of promoting the sharing of national practices and of inclusive dialogue, welcomes the proposals made by the Secretary-General, inviting Member States to voluntarily exchange national best practices on the rule of law in informal meetings and on an electronic depository of best practices on the United Nations rule of law website, and invites Member States to do so;

22. *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;

23. *Invites* the Rule of Law Coordination and Resource Group and the Rule of Law Unit to continue their dialogue with all Member States by interacting with them in a regular, transparent and inclusive manner, in particular in informal briefings, and welcomes the informal briefings held during the seventieth session;

24. *Requests* the Secretary-General to further elaborate on a review of the regulations giving effect to Article 102 of the Charter, taking into account recent developments, and to prepare a report on the registration and publication of treaties and international agreements pursuant to Article 102 of the Charter, to be submitted well in advance of the seventy-second session of the General Assembly;

25. *Stresses* the need for the Rule of Law Unit to carry out its tasks in an effective and sustainable manner and the need to provide it with reasonable means required to that effect;

26. *Decides* to include in the provisional agenda of its seventy-second session the item entitled "The rule of law at the national and international levels", and invites Member States to focus their comments during the upcoming Sixth Committee debate on the subtopic "Ways and means to further disseminate international law to strengthen the rule of law".

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Part Two

STUDIES AND REPORTS ON SPECIFIC SUBJECTS

I. MICRO, SMALL AND MEDIUM-SIZED ENTERPRISES (MSMEs)

A. Report of the Working Group on MSMEs on the work of its twenty-fifth session (Vienna, 19-23 October 2015)

(A/CN.9/860)

[Original: English]

Contents

I. Introduction

1. At its forty-sixth session, in 2013, the Commission requested that a working group should commence work aimed at reducing the legal obstacles encountered by micro, small and medium-sized enterprises (MSMEs) throughout their life cycle.[1] At that same session, the Commission agreed that consideration of the issues pertaining to the creation of an enabling legal environment for MSMEs should begin with a focus on the legal questions surrounding the simplification of incorporation.[2]

2. At its twenty-second session (New York, 10 to 14 February 2014), Working Group I (MSMEs) commenced its work according to the mandate received from the Commission. The Working Group engaged in preliminary discussion in respect of a number of broad issues relating to the development of a legal text on simplified incorporation[3] as well as on what form that text might take,[4] and business registration was said to be of particular relevance in the future deliberations of the Working Group.[5]

3. At its forty-seventh session, in 2014, the Commission reaffirmed the mandate of Working Group I, as set out above in paragraph 1.[6]

4. At its twenty-third session (Vienna, 17 to 21 November 2014), Working Group I continued its work in accordance with the mandate received from the Commission. Following a discussion of the issues raised in Working Paper A/CN.9/WG.I/WP.85 in respect of best practices in business registration, the Working Group requested the Secretariat to prepare further materials based on parts IV and V of that Working Paper for discussion at a future session. In its discussion of the legal questions surrounding the simplification of incorporation, the Working Group explored the legal questions surrounding the simplification of incorporation by considering the issues outlined in the framework set

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[1] *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17* (A/68/17), para. 321.

[2] For a history of the evolution of this topic on the UNCITRAL agenda, see A/CN.9/WG.I/WP.91, paras. 5-17.

[3] A/CN.9/800, paras. 22-31, 39-46 and 51-64.

[4] Ibid., paras. 32-38.

[5] Ibid., paras. 47-50.

[6] *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 134.

out in Working Paper A/CN.9/WG.I/WP.86, and agreed that it would resume its deliberations at its twenty-fourth session beginning with paragraph 34 of that document.

5. At its twenty-fourth session (New York, 13 to 17 April 2015), the Working Group continued its discussion on the legal questions surrounding the simplification of incorporation. After initial consideration of the issues as set out in Working Paper A/CN.9/WG.I/WP.86, the Working Group decided that it should continue its work by considering the first six articles of the draft model law and commentary thereon contained in Working Paper A/CN.9/WG.I/WP.89, without prejudice to the final form of the legislative text, which had not yet been decided. Further to a proposal from several delegations, the Working Group agreed to continue its discussion of the issues included in A/CN.9/WG.I/WP.89, bearing in mind the general principles outlined in the proposal, including the "think small first" approach, and to prioritize those aspects of the draft text in A/CN.9/WG.I/WP.89 that were the most relevant for simplified business entities. The Working Group also agreed that it would discuss the alternative models introduced in A/CN.9/WG.I/WP.87 at a later stage.

6. At its forty-eighth session, in 2015, the Commission noted the progress made by the Working Group in the analysis of the legal issues surrounding the simplification of incorporation and to good practices in business registration, both of which aimed at reducing the legal obstacles encountered by MSMEs throughout their life cycle. After discussion, the Commission reaffirmed the mandate of the Working Group under the terms of reference established by the Commission at its forty-sixth session in 2013 and confirmed at its forty-seventh session in 2014.[7] In its discussion in respect of the future legislative activity, the Commission also agreed that document A/CN.9/WG.I/WP.83 should be included among the documents under consideration by Working Group I for the simplification of incorporation.[8]

II. Organization of the session

7. Working Group I, which was composed of all States Members of the Commission, held its twenty-fifth session in Vienna from 19 to 23 October 2015. The session was attended by representatives of the following States Members of the Working Group: Argentina, Brazil, Canada, China, Colombia, Croatia, Czech Republic, Ecuador, France, Germany, Indonesia, Italy, Japan, Kenya, Malaysia, Mauritania, Mexico, Pakistan, Panama, Poland, Republic of Korea, Russian Federation, Spain, Switzerland, Thailand, Turkey, Uganda, United Kingdom of Great Britain and Northern Ireland, United States of America and Venezuela.

8. The session was attended by observers from the following States: Bolivia, Chile, Cuba, Cyprus, Dominican Republic, Finland, Luxembourg, Peru, Portugal, Qatar, Romania, Saudi Arabia, Slovakia, Sudan and United Arab Emirates.

9. The session was also attended by observers from the European Union.

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

(a) *Organizations of the United Nations system*: United Nations Conference on Trade and Development (UNCTAD); World Bank (WB);

(b) *Invited international non-governmental organizations*: Association for the Promotion of Arbitration in Africa (APAA); Centro de Estudios de Derecho, Economía y Política (CEDEP); Commercial Finance Association (CFA); European Commerce Registers' Forum (ECRF); European Law Students' Association (ELSA); Fondation pour le droit continental; Inter-American Bar Association (IABA); International Bar Association (IBA); International Center for Promotion of Enterprises (ICPE); the Law Association for Asia and the Pacific (LAWASIA); and the National Law Center for Inter-American Free Trade (NLCIFT).

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[7] *Official Records of the General Assembly, Seventieth Session, Supplement No. 17* (A/70/17), paras. 220 and 225; *Sixty-eighth Session, Supplement No. 17* (A/68/17), para. 321, and *Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 134, respectively.

[8] Ibid., *Seventieth session, Supplement No. 17* (A/70/17), para. 340.

11. The Working Group elected the following officers:

Chair: Ms. Maria Chiara Malaguti (Italy)

Rapporteur: Ms. Ruenvadee Suwanmongkol (Thailand)

12. In addition to documents presented at its previous sessions (Legal questions surrounding the simplification of incorporation, A/CN.9/WG.I/WP.86; Draft model law on a simplified business entity, A/CN.9/WG.I/WP.89; Best practices in business registration, A/CN.9/WG.I/WP.85; and Observations by the Government of Colombia, A/CN.9/WG.I/WP.83), the Governments of Italy and France (A/CN.9/WG.I/WP.87), and the Government of Germany (A/CN.9/WG.I/WP.90), the Working Group had before it the following documents:

(a) Annotated provisional agenda (A/CN.9/WG.I/WP.91);

(b) A note by the Secretariat on reducing the legal obstacles faced by micro, small and medium-sized enterprises (MSMEs) (A/CN.9/WG.I/WP.92);

(c) Notes by the Secretariat concerning the key principles of business registration (A/CN.9/WG.I/WP.93, Add.1 and Add.2); and

(d) Observations by the Government of the French Republic (A/CN.9/WG.I/WP.94).

13. The Working Group adopted the following agenda:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda. After discussion in the Working Group, the agenda was adopted with a modification to paragraph 23 under "Scheduling of Meetings", in that the Working Group decided to devote the time from 19 to 21 October 2015 to a consideration of the materials prepared by the Secretariat further exploring key principles and good practices in business registration and to thereafter continue its discussion from its twenty-fourth session in respect of simplified business entities.
4. Preparation of legal standards in respect of micro, small and medium-sized enterprises.
5. Other business.
6. Adoption of the report.

III. Deliberations and decisions

14. The Working Group engaged in discussions in respect of the preparation of legal standards aimed at the creation of an enabling legal environment for MSMEs, in particular on the legal issues surrounding the simplification of incorporation and related matters on the basis of documents presented at its previous sessions and on Secretariat documents A/CN.9/WG.I/WP.92, A/CN.9/WG.I/WP.93, Add.1 and Add.2, as well as the observations of the Government of the French Republic contained in document A/CN.9/WG.I/WP.94. The deliberations and decisions of the Working Group on these topics are reflected below.

IV. Preparation of legal standards in respect of micro, small and medium-sized enterprises

15. The Secretariat drew the attention of the Working Group to Working Paper A/CN.9/WG.I/WP.92, which contained a general note by the Secretariat in respect of reducing the legal obstacles faced by MSMEs. The Secretariat explained that it had prepared the document with a view to providing context for the overall work of Working Group I, beginning with a general discussion of MSMEs in the global economy and describing the broad heterogeneous nature of MSMEs. The Working Paper also contained a discussion of the disadvantages of enterprises operating in the extralegal economy, and considered how to

make entry into the legally regulated economy simple and desirable for MSMEs, including a description of the advantages for the State and for the entrepreneur(s), and discussing possible incentives to enter into the legally regulated economy. The final section of the Working Paper considered ways to facilitate the entry of MSMEs into the legally regulated economy, including through providing flexible and simplified business forms (for example, as in the draft model law on a simplified business entity — A/CN.9/WG.I/WP.89 — or the forms described in A/CN.9/WG.I/WP.87) and through providing for simplified and streamlined business registration, both of which were being considered by the Working Group.

16. The Secretariat noted that the content of Working Paper A/CN.9/WG.I/WP.92 could be examined in detail later, and that the Working Group may wish to consider whether it, or portions of it, should be included as part of the legislative materials being prepared in respect of MSMEs. A preliminary suggestion was made that the Working Paper could include additional focus on the legal obstacles faced by MSMEs from a cross-border perspective. Some concerns were also raised in respect of the use of the terms "extralegal" business activity and commercial activity occurring within the legally regulated economy.

A. Key principles of business registration

1. Presentation of Working Papers A/CN.9/WG.I/WP.93, Add.1 and Add.2

17. The Working Group considered the issues contained in documents A/CN.9/WG.I/WP.93, A/CN.9/WG.I/WP.93/Add.1 and A/CN.9/WG.I/WP.93/Add.2 which were prepared in response to a request by the Working Group at its twenty-third session, in November 2014.[9] The Secretariat highlighted certain aspects of the Working Papers, which had been prepared in the form of a commentary for a legislative guide (leaving any recommendations for future discussion), but without prejudice to the final form of a future legislative text that the Working Group might decide to adopt on the topic of business registration. Reference was also made to the main sources used in the preparation of the Working Papers, which were indicated in paragraph 6 of A/CN.9/WG.I/WP.93.

18. The Secretariat explained that the documents noted key objectives of an effective business registration system, such as permitting the visibility of enterprises in the marketplace and enabling MSMEs to increase their business opportunities. In addition, an effective business registration system should ensure that: the registration process was time and cost effective, as well as user-friendly; the registered information was easily searchable and retrievable; and that the information was also current, reliable and secure.

19. In keeping with A/CN.9/WG.I/WP.85 (see, for example, para. 10), Working Paper A/CN.9/WG.I/WP.93 noted that while the organization and structure of a business registry could vary considerably among States, there were certain core functions which were common to all registries. These included, among others: recording the identity and disclosing the existence of the business; providing a commercial identity to the business; providing authority for the business to interact with other private and public entities; facilitating trade; and determining whether the enterprise continued to fulfil the conditions to operate in the business sector.

20. Working Paper A/CN.9/WG.I/WP.93 further considered issues of organization and structure of the registry as well as aspects of reform that States should address in streamlining their registration system. In particular, it was highlighted that the use of information technology and electronic services was particularly well-suited to improving registration services as it brought about several benefits, such as: reducing the time and cost of registration; facilitating access to registration for MSMEs; and permitting the handling of increasing demands for company information by other government authorities. However, it was observed that introducing information and communication technology (ICT)-based registration systems usually required an in-depth reengineering of the way the service was delivered, which might involve several aspects of the State's apparatus, such as financial capability, organization and human resources capacity, as well as its legislative framework.

[9] A/CN.9/825, paras. 43-46.

In addition, online registration systems would require careful consideration of several aspects, such as: the scalability of the system; its flexibility; interoperability; and costs.

21. The Working Papers further noted that recommended steps to streamline a business registration system were: determining the scope of the examination to be carried out by the registry; defining the commercial entities that were required to register under the applicable law; and establishing the requirements that businesses should meet in order to be registered. General requirements for the registration of all legal forms and sizes of enterprises were said to be the payment of any required fee, providing information in respect of the business and its founders (i.e. the name and address of the business and information on the person(s) registering the business), as well as indicating the legal form of the business being registered. In order to remain validly registered, businesses should also provide certain information throughout their lifecycle.

22. The Secretariat highlighted that in order to maintain high quality, current and reliable information, States should define in their legislative or regulatory framework the accountability and procedures of the registry system, as well as the requirements of the information and documentation submitted, including the language in which they should be submitted. Facilitating access to business registration services both to businesses that wished to register and to interested users who wanted to search registered information was also noted. In this regard, it was emphasized that information should not only be made available, but that it should also be valuable, meaning of good quality, reliable and accessible, and that States could achieve these goals through various actions.

23. The Secretariat also introduced Working Paper A/CN.9/WG.I/WP.93/Add.2, which provided greater detail on several best practices in the implementation of a business registry and relevant principles previously noted in A/CN.9/WG.I/WP.85. The relevance of one-stop shops, the use of information and ICT technology and unique identifiers were emphasized as important factors to facilitate business registration. In particular, the Secretariat stressed the importance of developing an appropriate legislative framework to support ICT-based registration and the role of unique identifiers in allowing interoperability between the business registry and other government authorities, as well as in furthering cross-border data exchange.

24. The Working Papers also contained a discussion of streamlining business registration, which could entail amending a State's legislative framework in order to reduce the number of steps required for registration and provide a transparent process with clear accountability. The documents further noted that legislative reform might involve changing laws that did not govern the registration system directly, but that affected the registration process in various ways.

25. Finally, the Secretariat observed that the payment of fees in order to ensure the provision of registration and related services was a common practice across jurisdictions and that such fees, although they generated revenue for the registries, could affect the business' decision whether or not to register. Therefore, fees, if any, should be set at a level that encouraged MSMEs to register.

2. General discussion of A/CN.9/WG.I/WP.93, Add.1 and Add.2

26. Following the presentation of the Working Papers by the Secretariat, the Working Group engaged in a general discussion of whether the documents could form an acceptable basis on which to continue its work in the area of business registration. Following a reiteration of certain perspectives on the advantages and disadvantages of a declaratory approach versus an approval system for business registration, the view was expressed that it would probably not be possible to recommend one approach or the other; however, as outlined in the Working Papers, the Working Group could, at this stage, remain neutral and nonetheless agree on principles common to both approaches. The Working Group was in agreement with that suggestion, although a large number of States continued to express a preference for the declaratory system in international instruments.

27. In addition, it was suggested that there appeared to be three important principles that ran through the Working Papers: efficiency, reliability, and transparency, and that these themes formed an appropriate foundation for continuation of the work. There was support in the Working Group for that view.

28. It was observed that enterprises in some States could engage in business through merely obtaining a tax registration number, and that registration was not generally necessary for commercial enterprises to operate legally (except in the case of those with limited liability). It was also noted that MSMEs should not be required to register with the business or commercial registry, but that such enterprises should be given incentives to register. However, it was explained that the Working Papers were prepared on the basis not that all businesses were required to register, but that while each State would decide for itself which businesses were required to register (and how much information they would have to provide), registration of all businesses regardless of size or legal form was thought to be the main conduit through which enterprises had contact with the State. Through the contact provided by registration, States could identify MSMEs to ensure they received appropriate incentives and assistance. There was support in the Working Group for that approach — also described as a "tiered" approach — which could be clarified in the materials.

29. The members of the Working Group were encouraged to use the experience in their respective States to inform the discussion, but urged to remain cognizant of the Working Group's task to prepare legal standards that would be recognized and acceptable in the world community generally.

3. Key objectives of an effective business registration system (para. 10, A/CN.9/WG.I/WP.93)

30. Without prejudice to the final form that the materials might take, the Working Group proceeded to a more detailed examination of the Working Papers, beginning with paragraph 10 of A/CN.9/WG.I/WP.93. Suggestions were made that in subparagraph (a), the term "business registration is the key …" could be made less definitive, possibly by replacing it with "business registration is a key …", and that in subparagraph (b) the term "particularly" could be deleted since paragraph 10 applies to enterprises of all sizes. The Working Group was in agreement with both suggestions.

31. A concern was expressed in respect of the use of the word "reliable" in subparagraph (c)(iii), in that the approach to ensuring the reliability of information in certain States differed from that in others depending upon their use of a declaratory or approval approach. However, it was observed that regardless of which registration system was in place, the information it contained should be reliable, current and secure. There was some support for that view and that it was for States to ensure those features.

32. In response to a question, it was observed by several delegations that the Working Group should not attempt to define in detail to which entities the business registration materials should apply, but that the term "commercial entities", in accordance with the phrase "legally regulated commercial environment" in subparagraph (a), would be a term broad enough to cover different types of enterprises. It would be for the domestic legislation to decide which business forms must be registered.

33. In response to a suggestion to delete the term "as possible" in subparagraph (c)(ii), it was noted that such term was related to the capacity of a State to ensure easy access to registration services. Because of the different level of development of their infrastructure not all States were said to be able to ensure continuous access to the business registry services. States whose registration systems were not based on the extended use of ICT might not be able to provide continuous access. It was further noted that, consistent with A/CN.9/WG.I/WP.93/Add.2, the term "as possible" could also refer to data protection, since in certain States national legislation might require that some types of registered information (for example, personal information) was not publicly disclosed.

4. Core functions of business registries (para. 12, A/CN.9/WG.I/WP.93)

34. A concern was raised regarding subparagraph 12(e), since the core function of determining "whether a business has fulfilled or continues to fulfil the conditions to operate in the commercial sector" could suggest that the business registry had the authority to subjectively delay the granting of registration and thereby delay the start of the business. In response to that concern, it was observed that such paragraph was not intended to refer to a State's consent to start a business, but rather concerned, for example, the authority of the business registry to request the business to file certain information throughout the course of

its lifetime. It was proposed that subparagraph (e) could be clarified in this regard. There was support for that suggestion as well as for the related suggestion to replace the term "authority" in subparagraph (c) with a more appropriate term, so as not to imply the exercise of State power. Additional drafting suggestions were made to commence the list of core functions with the more general statement in subparagraph (d), followed by the more specific functions in subparagraphs (a) to (c).

35. A concern was again expressed in respect of the term "reliable" in subparagraph (d); broad agreement was expressed that provision of reliable information was a core function of the business registry but that the meaning of the term "reliable" could better be understood in the context of the chosen approach of the State to registration.

36. It was suggested that aspects of the concepts in paragraphs 10 and 12 of A/CN.9/WG.I/WP.93 might overlap, and there was agreement in the Working Group that care should be taken to use consistent terminology. For example, it was proposed that the terms "publicly accessible" and "secure" should be used consistently throughout the paper.

5. Overview of standard registration procedures (paras. 14 to 22, A/CN.9/WG.I/WP.93)

37. The Working Group next considered section E of Working Paper A/CN.9/WG.I/WP.93 which provided an overview of the standard business registration procedures. There were no specific comments on draft paragraph 14.

Business name (paras. 15 to 16, A/CN.9/WG.I/WP.93)

38. The Working Group agreed that registration of a business name should be mandatory, and that entrepreneurs should be assisted in searching and registering their business name, a feature not offered in all States. In terms of the business name being sufficiently "distinguishable" from other business names in the jurisdiction (para. 15), it was noted that this feature was not required in all States. Further, it was suggested that businesses could be distinguished by indicating the type of businesses in which the entrepreneur was engaged. Alternatively, it was suggested that the issue of distinguishing between business names might best be left to domestic legislation. In this regard, a concern was raised that duplication of business names could be an issue in some States where registries had no mechanism for resolving the issue.

39. It was further observed that duplication of names could also be a problem in cross-border information exchanges, and that the use of unique identifiers could be important to ensure the identity of a business within and across jurisdictions. Support was expressed for this view, and it was further noted that in at least one jurisdiction, the role of the business registry was to allocate unique identifiers rather than to register commercial business names. It was further suggested that an optimal approach could be for a business registry to first ensure that the chosen business name was unique and then to allocate a unique identifier.

Business entry (paras. 17 to 19, A/CN.9/WG.I/WP.93)

40. In considering paragraphs 17 to 19, different issues were highlighted concerning the role of the business registry in performing a series of checks on the application for registration (para. 17); the payment of registration fees (para. 18); and the public availability of the registered information (paras. 18 to 19). It was suggested that paragraph 17 should also mention the "declaratory registration system" implemented in several States, which was fully automated and where no checks or control procedures were carried out by registry staff. It was further suggested that a distinction should be made between pre- and post-registration payment, as well as to consider the topic of fees at a later stage in relation to paragraphs 72 to 80 of A/CN.9/WG.I/WP.93/Add.2. In regard to registration fees, a view was expressed that while acknowledging the existence of different practices and systems where registration was subject to payment of a fee, the Working Group should consider promoting the adoption of no or low registration fee policies to encourage MSMEs to register. Furthermore, a question was raised regarding the impact of the registration fee on the process of registration.

41. With regard to the availability of information in paragraphs 18 and 19, the importance of public access to registered information at no charge was emphasized, and it was also suggested that information regarding the representative of the business entity and the

business name or the identification number of the entity (para. 19) should mandatorily be made public. It was suggested that paragraph 19 could be amended by replacing the term "sophisticated information" with "more specific information", and that "basic information", such as the names of directors and legal representatives, should be free, while a fee could be charged for "more specific information" such as the voting rights or assets of the business.

42. A concern was raised in regard to the last sentence of paragraph 19, that "in some jurisdictions, the registered information is legally binding upon third parties", which could suggest that third parties were bound by the registered information even if it was not correct. This was also said to be tied to the issue of reliability of the information addressed earlier in the session (see paras. 31 and 35 above). Future drafts of the text may need to be reformulated in this regard.

43. It was also observed that in one State, a special track for business entry was devoted to MSMEs, which permitted the State to monitor and incubate them.

Registration with other public authorities (para. 20, A/CN.9/WG.I/WP.93)

44. A concern was raised that the second sentence of paragraph 20 might suggest that in order to register with other public authorities, entrepreneurs should personally visit those agencies. It was agreed that the text should be consistent with the approach taken elsewhere in the materials that highlighted the importance of one-stop shops as a single interface for business registration and registration with other public authorities. There was broad agreement in the Working Group that establishment of one-stop shops was one of the best practices in business registration and that it should be recommended as a preferred approach to all States wishing to streamline their business registration system.

Life cycle of a business (para. 21, A/CN.9/WG.I/WP.93)

45. The Working Group considered which information businesses should be required to submit to the registry throughout their life cycle in order to keep the registry apprised of the changing circumstances of the business. It was noted that paragraph 21 did not specifically include the filing of annual returns, which were required in many jurisdictions, and should thus be added to the paragraph.

46. It was noted that in terms of financial information, three different aspects were of importance: whether a particular type of business should have to submit financial statements, what amount of detail those statements should contain, and whether that information should be made public. It was noted that while the submission and possible publication of detailed financial statements might be appropriate for public companies, it could not be considered good practice for MSMEs. It was observed that MSMEs in general were required to submit far less detailed financial statements, if at all, and that such statements were unlikely to be made public unless desired by the MSME. It was further noted that although MSMEs may not be required to submit and make public their financial statements, it may be desirable to encourage them to do so in order to improve transparency and accountability (see, for example, footnote 21 in A/CN.9/WG.I/WP.89). Public access to financial data of businesses was, in fact, said to foster competition among service providers, since it provided them with relevant economic information.

47. The Working Group agreed that these considerations could be reflected in the draft text as appropriate, but that further discussion in respect of the submission, required detail and disclosure of financial statements of MSMEs might be required in relation to the Working Group's continuing discussion on simplified business entities.

Deregistration: removal of a business from the registry (para. 22, A/CN.9/WG.I/WP.93)

48. The Working Group next considered paragraph 22 of A/CN.9/WG.I/WP.93, which was generally supported as drafted. It was observed that in some States, the business registry did not play a role in the protection of creditors in cases of insolvency, as that aspect was left to insolvency officials, who advised of business insolvencies in official publications. In addition, it was noted that in some States, there could be "sleeper" businesses, which had only temporarily, but not permanently, ceased to operate, and which were thus maintained on the business registry. It was further observed that, in some cases, the retention of such

businesses on the register could be problematic in the long run if the business register did not have a mechanism to eventually deregister them.

49. A question was raised in respect of whether business registries should retain the historical information on businesses that had been deregistered. There was support in the Working Group for the view that such information should be retained. It was observed that if the business had a unique identifier, the information would in any event remain linked to that identifier, even if the business were deregistered.

50. The Working Group reiterated its view that the business registrar's ability to deregister businesses should be limited to ensuring compliance with clear and objective legal requirements for the continued registration of a business. In addition, it was observed that this section of the paper was not intended to deal with the business law concepts of liquidation or winding-up of a business.

6. Organization of the registry (paras. 23 to 26, A/CN.9/WG.I/WP.93)

51. The Working Group next considered the paragraphs of A/CN.9/WG.I/WP.93 dealing generally with how a business registry could be organized and operated. It was agreed that the draft text should not recommend a specific approach in terms of whether a State should opt for a public, private or combined model, or for a centralized or decentralized approach, since those were policy decisions best left to the State, but that the materials might set out the advantages and disadvantages of the various options.

52. In terms of whether the draft text should recommend that a business registry should be supervised by the executive or by judicial State bodies, the Working Group reiterated a number of views that had been aired in previous sessions in relation to the perceived advantages and disadvantages of each system. A third type of system that consisted of a mixed approval-declaratory system was also identified. It was clarified that even in States where the judiciary had oversight of the business registry, business registrations could be processed and approved in as little as one to three days. In addition, it was noted that judicial supervision of business registration was strictly on an administrative basis, in which the registrar was an administrative entity, and that judicial supervision did not equate with a requirement for prior judicial approval of a business wishing to register. It was further observed that a State could decide to change its system of business registration over time, and that States had sometimes moved from court-based systems to non-court-based systems. Moreover, the Working Group was informed that both systems of business registration were evident in developing and developed States.

53. The Working Group discussed whether the draft text should recommend either the executive or the judicial approach to business registration, and was of the view that it should instead focus for the moment on the principles relevant to good practice (see paras. 26 and 27 above). It was further agreed that the drafting of paragraph 23 should be clarified or adjusted, as necessary, to ensure a balanced approach and a proper understanding of the administrative nature of the judicially supervised system, as well as taking into account that, of course, the judiciary is a branch of government.

54. It was further observed that the final phrase of paragraph 23 would be more accurate if it referred to "the applicable commercial code", which was more frequently the case, rather than the current reference to "the applicable law governing the judiciary."

7. International cooperation among business registries (paras. 27 and 28, A/CN.9/WG.I/WP.93)

55. The Working Group was generally in support of draft paragraphs 27 and 28. It was suggested that some current examples of cross-border information exchange could be added to the text to enhance it, including the cross-border exchange pilot project between Portugal and Estonia, that between Australia and New Zealand, or that established between various provinces in Canada. However, it was cautioned that full international cooperation and cross-border recognition of business registration would require States to make specific policy decisions, and that the most that these materials should do would be to recommend international cooperation.

56. It was further observed that a unique global identifier could assist in terms of international cooperation, but consideration of that issue was deferred until consideration of the issue of unique identifiers would be given in greater detail in paragraphs 28 to 58 of A/CN.9/WG.I/WP.93/Add.2.

8. Preliminary considerations on the use of information technology and electronic services (paras. 29 and 30, A/CN.9/WG.I/WP.93)

57. The Working Group reiterated its support for the use of ICT technology as a good practice in business registration. It was suggested that paragraph 30 might include reference to changes that could be required to the commercial code and company law of a State, provided that these concepts were not sufficiently clearly included in the current phrase "legislative framework".

58. Reference was made to the availability of relatively inexpensive software to establish fully electronic business registries, but caution was expressed in that the context of each State would dictate how expensive that process might be. Further, it was clarified that while the software might be broadly available and relatively inexpensive, the infrastructure and hardware necessary to successfully implement the software could still be very expensive, particularly in developing States.

9. Drafting considerations (para. 31, A/CN.9/WG.I/WP.93)

59. The Working Group was generally in support of paragraph 31 as drafted, observing that it was based on paragraph 72 of the UNCITRAL Guide on the Implementation of a Security Rights Registry. It was observed that additional work done in terms of the draft Model Law on Secured Transactions had suggested that, in that context, the preferred method of enactment was by way of a statutory act.

10. Establishing the business registry (paras. 32 to 55, A/CN.9/WG.I/WP.93)

60. The Working Group had no comment on paragraph 32 as drafted.

Foundations of the business registry (para. 33, A/CN.9/WG.I/WP.93)

61. A concern was expressed that the final three sentences of the paragraph, beginning with "Subject also to the legal systems …" suggested that the reliability of the information contained in the business registry was dependent on whether the State had adopted a declaratory or an approval approach in establishing its business registry system. The Working Group reiterated its support for the view expressed earlier in the session (see paras. 31 and 35 above) that information in the business registry should be reliable, but that it would be left to the State to determine how best to ensure its reliability, regardless of the particular approach adopted in the business registry. It was agreed that the drafting of paragraph 33 should be adjusted, if necessary, to bring it in line with that earlier view. It was further suggested that that approach could be more viable as it would also permit consideration of those systems that adopted a mixed approach, with features borrowed from both systems.

Appointment of the registrar (para. 34, A/CN.9/WG.I/WP.93)

62. With regard to the last sentence of paragraph 34, it was observed that care should be taken to not appear to dictate who the State might name as registrar by too restrictively specifying a registrar's attributes. After discussion, there was agreement in the Working Group on the principles expressed in the paragraph, with the understanding that additional insight might be gained from additional work undertaken by Working Group VI on similar provisions in the secured transactions materials.

Functions of the registry (para. 35, A/CN.9/WG.I/WP.93)

63. There was support in the Working Group for the suggestion that care should be taken in the drafting of paragraph 35 so that it was not seen to impose excessive limitations on the registry. Such a reading could make it more difficult to establish the registry's interoperability with other registries in the jurisdiction, and to access the information maintained in the registry.

Implementation considerations (paras. 36 to 44, A/CN.9/WG.I/WP.93)

64. The Working Group also agreed that, subject to its future deliberations, the entire section D (paras. 36 to 44) might be moved to a more prominent position in the text, such as to the introduction of A/CN.9/WG.I/WP.93 or to A/CN.9/WG.I/WP.92, since it contained key elements to guide the reform process of a business registration system. In addition, it was observed that efforts should be made to ensure that the text in paragraph 44 was consistent with what was previously decided by the Working Group in terms of paragraphs 23 to 26 of A/CN.9/WG.I/WP.93 (see paras. 51 to 54 above).

Registry terms and conditions of use (paras. 45 to 46, A/CN.9/WG.I/WP.93)

65. It was noted that paragraph 45 could address the issue of how to reduce the risk that changes be made in the registry without the authority of the registrant rather than simply advising users of the risk. In that respect, it was suggested that the paragraph might consider the issue of who would be held responsible in such a scenario.

66. The Working Group also heard a view that the services mentioned in subparagraphs (b) and (c) of paragraph 46 should be considered additional and not compulsory services that a registry might offer, since not every State might want to establish registries carrying out those functions. There was agreement in the Working Group for both proposals.

Electronic or paper-based registry (paras. 47 to 55, A/CN.9/WG.I/WP.93)

67. The Working Group agreed that an appropriately balanced presentation of paper-based and mixed paper and electronic registries should also be presented in paragraphs 47 to 55. It was suggested that, while achieving a completely electronic system might be the goal to which all registries could aspire, it would not be appropriate to suggest that a paper-based or mixed system was a less valid or valuable system of business registration, particularly since the chief goal of the materials was to provide guidance on good practice and encourage registration generally. It was observed that the draft should recognize that in several developing States, paper-based registries might be the only option available due to a lack of advanced technological infrastructure, possibly even pointing to positive aspects of a paper-based system. For example, it was noted that although more expensive and cumbersome than electronically-based registries, paper-based registries could allow for "face to face" communication between the registrant and the registry, which might offer an opportunity to clarify aspects of the requirements for registration. Although an increasing number of users in developing States had access to the Internet, it was noted that a digital divide still existed between the developed and the developing world, and the Working Group was encouraged to acknowledge that a mixed or paper-based system might be necessary in many developing States.

68. It was further noted that providing for the electronic filing of documents and applications for registration and providing electronic access to the registry were different aspects, and that each was subject to different technical standards. As such, it was suggested that paragraphs 47 to 55 could be adjusted in order to make a clearer distinction between the adoption of an electronic registry and the possibility of carrying out online registration, perhaps through focusing first on the features required to register, and secondly on the accessibility of the system. Another observation was made that some States might benefit from the implementation of a phased-in approach, starting with the adoption of more simple electronic solutions (like the creation of a searchable database) and then progressing to more sophisticated solutions, including the possibility of registering completely online. The view was expressed that developing States would need technical and capacity building assistance in order to move from paper-based to electronic registries.

11. Approach to additional work on key principles in business registration

69. Having concluded its consideration of A/CN.9/WG.I/WP.93, and prior to embarking on a discussion of the more detailed materials in A/CN.9/WG.I/WP.93/Add.1 and 2, which would take place at its next session, the Working Group took stock of how ongoing work on key principles in business registration should be conducted.

70. A proposal was made that based on the work completed to date, the Working Group should proceed by commencing the preparation of a draft model law on business registration of legal persons which could be structured using the following outline:

Chapter 1. General provisions

Article 1 Scope of application of the law

Article 2 Main definitions

Article 3 Main principles of registration of legal persons and of maintenance of registers

Chapter 2. Registration bodies

Article 4 Bodies responsible for the registration procedure and their powers

Article 5 Requirements applicable to registration bodies

Chapter 3. Registration of legal persons

Article 6 Types of legal person required to register

Article 7 Persons having the right to register a legal person

Article 8 List of documents to be submitted by legal persons for the purposes of registration

Article 9 Registration fee

Article 10 Reservation of the name of a legal person

Article 11 Limits of verification, by the body responsible for registration, of documents submitted by the legal person

Article 12 Legal consequences of registration of a legal person

Article 13 Grounds for refusal to register a legal person

Chapter 4. Rules governing the maintenance of a register

Article 14 Information included in the register

Article 15 Time limit for the storage of information concerning a legal person

Article 16 Language of the register

Article 17 Amendment of the register

Article 18 Exclusion of a legal person from the register and legal consequences thereof

Article 19 Use of information technologies in maintaining a register

Article 20 Furnishing information from a register to third parties

Article 21 Liability of the registrar

71. It was observed that the framework suggested in the paragraph above identified a series of important issues that were also considered in A/CN.9/WG.I/WP.93, Add.1 and Add.2, and that the main issue was for the Working Group to decide which type of legal instrument should be prepared in respect of business registration. There was support for a proposal that consideration of the three Working Papers, particularly paragraphs 5 to 13 of Add.1 on legal forms of the entity registered, should be linked to the alternative business forms described in Working Papers A/CN.9/WG.I/WP.87 and 94.

72. It was further noted that the Working Group had achieved a level of common understanding in respect of certain issues, including that it was positive for MSMEs to move from the informal to the formal economy, that incentives and a demonstration of the advantages of doing so should be provided to them, and that formalization often involved some sort of action along the lines of registration in a business or commercial register. It was proposed that, on that common basis, and taking into account the documents before the Working Group at this session (including A/CN.9/WG.I/WP.92), work could proceed on a legislative guide in which an opening section could consider why MSMEs should formalize

and a second section could set out how to formalize. Further assistance could be provided to MSMEs by adding to the legislative guide a consideration of the possible tools they could use to successfully operate their businesses, including a variety of tools and legal forms they might consider, such as: limited liability; separate legal personality; limited liability companies (LLCs); simplified LLCs; single member LLCs, corporations, sole proprietorships, individual entrepreneurs, partnerships, business network contracts, techniques of segregation of assets, and cooperatives. Additional guidance could be provided in terms of model provisions on those forms that appeared to be of particular utility and relevance to MSMEs. Support was expressed in the Working Group for proceeding with its mandate in general along the lines described in this paragraph.

73. In terms of specific work on key principles in business registration and how best that work could assist States in fostering MSMEs, the Working Group expressed strong support that it should first prepare an instrument along the lines of a concise legislative guide, without prejudice to considering at a later time whether draft provisions or a model law would be appropriate. To that end, the Secretariat was requested to prepare a set of draft recommendations to be read along with Working Papers A/CN.9/WG.I/WP.93, Add.1 and Add.2 when their consideration was resumed at the next session of the Working Group.

12. UNCTAD's work on business registration and facilitation

74. The Working Group heard a presentation[10] by the United Nations Conference on Trade and Development (UNCTAD) on their Business Facilitation Programme (see www.businessfacilitation.org), which aimed at supporting developing States and countries in transition to implement business facilitation through simplification and automation of rules and procedures relating to business creation and operation. Examples of obstacles to business start-up were mentioned and it was stressed that business registration was a complex process that usually required registering with several public authorities rather than only the business registry. Several factors were said to present obstacles to registration for MSMEs, including: a complex administrative apparatus in which multiple administrations were involved in setting up a business; biased and negative control over the applications filed for registration; predominance of form over substance where the information required was often not processed and "nominal" requirements were considered more important than substantial requirements. In addition, multiplicity and disparity of laws governing the registration process; differing interpretation and application of those laws according to the person, the office and administration were also said to negatively affect the decision of MSMEs to register. UNCTAD also maintained "ger.co" which provided links to online business registration websites throughout the world.

75. It was noted that in order to assist States in improving their business registration procedures, UNCTAD had developed various tools including electronic single windows, which could combine the procedures of multiple agencies (for example, the business registry, the tax office, and social security authorities) and allow easy and fast online registration for the user with a single form. Such single windows (eRegistrations) were currently in operation in four States and under construction in two additional States. Other tools developed by UNCTAD included assisting States to establish information portals and to make their regulations transparent (eRegulations), as well as establishing principles to simplify administration procedures (eSimplifications).

B. Draft model law on a simplified business entity

76. The Working Group recalled the work that it had undertaken at its last session in terms of having completed its consideration of the first six articles of the draft model law on a simplified business entity as contained in A/CN.9/WG.I/WP.89, and other relevant documents. Reference was made to the deliberations of the Commission at its forty-eighth session (2015) as noted in paragraph 6 above. In keeping with the working methods of the Working Group to date, delegates were invited to raise any principles included in the model law annexed to A/CN.9/WG.I/WP.83 which were thought to be relevant in the discussion on simplified business forms as it progressed.

[10] See www.businessfacilitation.org/vienna.

77. The Working Group recalled paragraph 6 of A/CN.9/WG.I/WP.89, which noted that while the draft model law had been prepared using a corporate approach, its provisions could be adjusted to accommodate a more flexible business form that might be more suited to MSMEs and would avoid seemingly heavier corporate-type structures. It was also recalled that the Working Group had decided at its twenty-fourth session to use in future texts the term "member" rather than "shareholder" (see para. 48, A/CN.9/831); to place the phrase "simplified business entity" in square brackets throughout the text (see para. 38, A/CN.9/831) pending agreement on the appropriate term; and to find an appropriate term to replace "formation document" and "operating document", but that those changes had not yet been reflected in existing texts such as A/CN.9/WG.I/WP.89. It was further recalled that the Working Group had previously agreed to prepare definitions (see para. 68, A/CN.9/825) and standard forms to assist MSMEs (see para. 63, A/CN.9/800, as well as para. 7, A/CN.9/WG.I/WP.89), but that the draft text would have to be more fully developed before that would be possible.

78. Finally, although some States were said to have a closed approach that did not permit MSMEs to transform into other legal forms, the Working Group referred to its earlier decision to focus on a single legal text that could accommodate the evolution of a business entity from a single member to a more complex multi-member entity (see para. 67, A/CN.9/825 and para. 19, A/CN.9/831). To that end, the Secretariat had been requested in its drafting of the model law to proceed in such a way so as to highlight the rules applicable to the simplest or single member business entity (in respect of which the concepts in A/CN.9/WG.I/WP.86/Add.1 might be useful), as distinct from the rules required for the more complex business forms.

79. It was further recalled that the Working Group had requested the Secretariat to recommend which provisions of the draft model law were considered key to the establishment of a simplified business entity, and might next be considered by the Working Group. In that regard, it was agreed that the next provisions to be taken up would be those in Chapter VI of the draft model law, commencing with draft articles 24 and 25.

1. Chapter VI — Organization of the simplified business entity

80. In commencing its deliberations on Chapter VI, the Working Group considered a number of issues relating to draft articles 24 and 25 of A/CN.9/WG.I/WP.89.

81. It was observed that while all States had some form of general company law, the Working Group was focusing on the creation of a special company law; there was support for the suggestion that the draft model law should clarify its intended interaction with the existing law on business forms in the enacting State. Another proposal was that for greater simplicity, draft article 24(1) should be retained in the text (with revisions), but that the concepts in paragraphs 2 to 8 could be moved to the commentary. While there was some support for that suggestion, it was not taken up by the Working Group due to the perceived dearth of detail that such an approach would provide to assist MSMEs.

82. Another issue raised for discussion was whether the Working Group should reconsider its view on freedom of contract, and opt for more prescriptive drafting in its text so as to provide even the smallest and least sophisticated MSMEs with a legal construct that was complete, stable and could be used immediately to run their business without resort to additional legal advice. There was some support for that view.

83. It was observed that draft article 25 raised certain issues in respect of disclosure of the formation (or operating) document, since the identity of the representative should be publicly available to third parties. The question was also raised whether a manager could be a legal person, particularly in the case where there was only one manager, but the Working Group agreed to defer consideration of that issue to a later discussion.

84. After discussion on each of the following aspects, the Working Group agreed that Chapter VI should be redrafted along the following lines:

(a) First, a general default rule should indicate that it was not necessary for the simplified business entity to have a board of directors unless it was required in the formation (or operating) document, taking into consideration draft section 25 of the annex to A/CN.9/WG.I/WP.83;

(b) Second, in the case of a single member business entity, that member would manage the entity and would represent it, unless otherwise provided in the formation documents;

(c) Third, a manager or board of directors could be named by the member(s) and should consist of one or more persons;

(d) Regardless of whether the simplified business entity was managed by a single member or by a board of directors, the text should include the appropriate procedure to appoint a manager or board of directors, the grounds for their removal, and for naming authorized representatives of the entity, as well as the decision-making procedures;

(e) Any manager or board of directors should be subject to any rules of procedure set out in the formation (or operating) document, as well as to the duties referred to in draft article 24(6) of A/CN.9/WG.I/WP.89; and

(f) In any event, it would not be necessary to include provisions on a supervisory board (draft article 26) at the current stage of development of the draft.

2. Chapter VIII — Dissolution and winding-up

85. In considering draft article 32, it was suggested that, while cognizant that each enacting State would be likely to have a bankruptcy regime, it might be useful to ensure that bankruptcy was included in the scheme established in the list in paragraph 1. Other aspects of bankruptcy were thought to be relevant in relation to this provision, including a requirement for appropriate public notice of any bankruptcy (see draft paragraph 32(2)).

86. A suggestion that voluntary dissolution be prohibited was not taken up. However, related questions were raised in respect of whether a rule on the distribution of remaining assets in the case of a voluntary dissolution was required, and more generally, whether the Model Law should recommend that some mechanism be included for providing notice to creditors in the case of dissolution or winding up. Such rules could be particularly important should the Working Group decide in its future discussion in respect of draft article 5 that a legal person would be entitled to be the sole member of a simplified business entity, and would thus receive transfer of all the assets of the dissolved company, potentially without notice to creditors. There was support for the suggestion that commentary might be included in the text along the lines of suggesting that States ensure that adequate means of protecting creditors were in place.

87. However, concern was raised in respect of the requirement in subparagraph 32(1)(d) that a majority member decision was required for voluntary dissolution of the entity. It was observed that some States required a two-thirds majority, rather than a simple majority, for such decisions. The Working Group embarked upon a general discussion of issues relating to the internal organization of the entity, in effect, on the rules which ought to govern the relationship between members, particularly in terms of the issue of the number of votes required for various actions such as amending the formation document. Other issues raised in the course of discussion concerned voluntary and forced exit rules, minority member rights, and the like (see, generally, the discussion in paras. 31 to 35 of the commentary in A/CN.9/WG.I/WP.89). It was agreed that succession in cases of dissolution and winding up should be carefully considered in terms of deciding on the appropriate decision-making number of votes required among members for various acts, and that efforts should be made to take a consistent approach to such matters in this and other chapters, including any chapter on the interrelationship of members.

88. The Working Group agreed that draft article 32 would generally not be amended, but for consequential adjustments required as a result of other decisions and efforts to render the text as consistent as possible.

89. The Working Group had no comment on draft articles 33 and 34, but for a concern raised in respect of the limit of one year for curing any event of dissolution in draft article 33.

3. Chapter VII — Restructuring

90. The Working Group next considered Chapter VII on restructuring the simplified business entity. In regard to draft articles 27 and 29 (as well as to the threshold for the operation of draft article 28), and in keeping with the previous discussion under Chapter VIII (see paras. 85 to 89 above), views were expressed that a "unanimous" decision might not be the most appropriate number of votes required for MSMEs in these cases. The Working Group agreed that the draft articles should be made consistent with the number of votes required for dissolution and winding up and that draft article 27 should be grouped with similar rules in the draft text, since those norms had a similar economic rationale and therefore should be treated in the same way. A further drafting suggestion was made that the draft provision should be adjusted to clearly cover single member entities as well as multiple member entities.

91. Similarly to the concerns raised above (see para. 83 above), a concern was expressed that draft articles 28 and 29 seemed to focus on the protection of shareholders without any consideration for the protection of third parties. In this regard, it was emphasized that structural changes in the business entity should not result in third parties losing their assets, since the net result of the change was that the same legal entity continued to exist in a different form, and should be liable for its past obligations. A suggestion was made that Chapter VII could deal with third party protection perhaps by way of adopting an ad hoc norm or by reference to national law of the enacting State, or, again, through the inclusion of commentary suggesting that States ensure that adequate means of protecting creditors were in place.

92. A further drafting suggestion was made to group the provisions in Chapter VII according to their increasing complexity, perhaps by grouping restructuring and conversion first, and then grouping split-offs and mergers. It was also observed that there might be inconsistency in terms of the references in the draft model law to existing legal frameworks in some provisions, and the establishment of a "free-standing" model in others. Finally, a suggestion was made that, in light of its purpose, a more appropriate title for this chapter might be "transition", and that special provisions for the transition of the simplified form into the more standard business form already provided for in each jurisdiction should be considered, thus leaving untouched existing restructuring regimes.

4. Chapter IX — Miscellaneous

Article 35 — Financial Statements

93. The Working Group next considered draft paragraph 35 on financial statements, during which the following issues were raised as a matter of importance:

(a) It was clarified that the Working Group had already agreed that in a future iteration of the text, rules in respect of auditing organs should be dealt with in conjunction with the rules applicable to the board of directors or managers;

(b) It was important for members of all sizes of simplified business entity to have regular access to the financial information in respect of the entity;

(c) It might be necessary to find terminology other than "financial statements and annual accounts" in order for the provision not to be confused with the rules in respect of public companies; the suggested term "financial information" was not thought to be sufficiently precise to be suitable, but it was observed that definitions included in the text might be of assistance;

(d) There might be no need for mandatory disclosure of financial statements in the case of MSMEs, particularly in terms of the smaller enterprises, but financial records should be kept by the entity and disclosure of them should be permitted if the entity so desired; and

(e) Simplified accounting was likely to be an important feature for MSMEs, and some examples were available in national law (for example, in A/CN.9/WG.I/WP.94), but other than recommending that an enacting State should permit and enable the use of simplified accounting for MSMEs, it might not be advisable to prepare detailed accounting or bookkeeping rules.

94. The Working Group agreed that the text in draft paragraph 35 was generally acceptable, but that some drafting adjustments should be made to it in order to differentiate it from the usual approach to financial statements of public companies. It was agreed that the phrase "financial statements and annual accounts" in draft paragraph 35(1) should be placed in square brackets to indicate that terminology more in keeping with the context of a simplified business entity (as opposed to a public company) might be identified in a future text. It was further agreed that draft paragraph 35(2) may need to be clarified in order to indicate that it referred to "internal" company books and records, and did not refer to public disclosure by way of a commercial or other registry. The Working Group also agreed that draft paragraph 35(3) should refer to legislation in the enabling State applicable to MSMEs, but that it should separate the concepts of accounting standards and disclosure requirements. Finally, agreement was also reached that more detailed guidance could be included in the commentary to assist enacting States in respect of the matters considered by the Working Group in respect of draft article 35.

95. In respect of A/CN.9/WG.I/WP.89, some States expressed a view that the terminology used in relevant domestic legislation should be maintained and that no changes should be made. Other States did not share that view. It was agreed that that issue would be revisited at a future session.

V. Next session of the Working Group

96. The Working Group recalled that its twenty-sixth session was scheduled to be held from 4 to 8 April 2016 in New York. After discussion in respect of work priorities, the Working Group agreed that in order to take note of all views expressed and to facilitate the planning of attendance by representatives of States and interested organizations, it would devote the time from 4 to 5 April 2016 to a continuation of its consideration of issues relating to a simplified business entity, and the time from 6 to 7 April 2016 to further exploring the topic of key principles and good practices in business registration.

B. Note by the Secretariat on reducing the legal obstacles faced by micro, small and medium-sized enterprises (MSMEs)

(A/CN.9/WG.I/WP.92)

[Original: English]

Contents

I. Micro, small and medium-sized enterprises (MSMEs)

1. At its forty-sixth session, in 2013, the United Nations Commission on International Trade Law (UNCITRAL) decided to commence work on reducing the legal obstacles faced by micro, small and medium-sized enterprises (MSMEs) throughout their life cycle, and in particular, specified that such work should focus on MSMEs in developing economies. This matter was placed on UNCITRAL's work programme for Working Group I, which was requested to begin its mandate with a focus on the legal questions surrounding the simplification of incorporation.[1]

2. In taking up this topic, UNCITRAL has decided to focus its attention, at least initially, on the reduction of legal obstacles that MSMEs face at the beginning of their life cycle. This Working Paper is intended to assist the Working Group in its deliberations on this topic by providing context for its discussions in this regard. Should the Working Group decide to do so, these materials could be adapted for inclusion in any legislative text on MSMEs that is prepared by the Working Group.

3. In light of the disadvantaged position in which many MSMEs are found globally, undertaking this work emphasizes the relevance and importance of UNCITRAL's work and programmes 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 and the preparation of sustainable development goals. The global community has recognized both 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, as well as UNCITRAL's contribution to the attainment of those goals through its efforts to modernize and harmonize international trade law.[2] Work aimed at supporting and fostering the establishment and growth of MSMEs further underpins UNCITRAL's contribution in

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[1] *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17* (A/68/17), para. 321.

[2] See, for example, "Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels", United Nations General Assembly resolution A/RES/67/1 (67th session, 2012), para. 8; and "Addis Ababa Action Agenda of the Third International Conference on Financing for Development (Addis Ababa Action Agenda)", United Nations General Assembly resolution A/RES/69/313 (69th session, 2015), Annex, para. 89.

providing internationally acceptable rules in commercial law, and supporting the enactment of those rules to assist in strengthening the economic fibre of States.

4. The international community has underscored the importance of business law as one of four pillars key to strengthening the legal empowerment of the poor, many of whom rely upon micro and small businesses for their livelihood.[3] In addition to other pillars (such as access to justice and the rule of law; property rights; and labour rights), business rights are seen as key to legal empowerment of the less advantaged, not only in terms of employment by others, but in developing micro and small businesses of their own. Business rights may be regarded as a composite of existing rights of groups and individuals to engage in economic activity and market transactions, and which include the right to start a legally recognized business without facing arbitrarily enforced regulations or discrimination, removing unnecessary barriers that limit economic opportunities, and protecting business investments, regardless of their size.[4] Measures that have been called for to strengthen business rights include:

(a) Guaranteeing basic business rights, including the right to sell, the right to have a workspace and the right to have access to the necessary infrastructure and services (for example, to electricity, water and sanitation);

(b) Strengthening, and making effective, economic governance in order to permit entrepreneurs to easily and affordably establish and operate a business, permit them access to markets, and permit them to exit a business;

(c) Expanding the accessibility of entrepreneurs to limited liability entities and to other legal mechanisms that allow owners to separate their business and personal assets;

(d) Promoting inclusive financial services that offer savings, credit, insurance, pensions and other tools for risk management; and

(e) Expanding the access of entrepreneurs to new business opportunities through specialized programmes to familiarize entrepreneurs with new markets, assisting them in creating links with other businesses of all sizes, and in complying with regulations and requirements.[5]

5. The experience of UNCITRAL may assist in the identification of the legal and regulatory framework that can best assist entrepreneurs and MSMEs in establishing business rights, thereby reducing some of the legal obstacles that such businesses face.

A. The importance of MSMEs in the global economy

6. UNCITRAL's decision to work on reducing the legal obstacles faced by MSMEs recognizes the importance of such enterprises to the economic health of the States in which they are found, and to the global economy more generally. This importance is underscored by a number of key facts that illustrate that MSMEs are seen as the backbone of the economy in both the developed and the developing world.

7. The total number of MSMEs worldwide is estimated to be between 420 to 510 million businesses, of which 360 to 440 million (around 86 per cent) are in emerging markets. Of these, 36 to 44 million SMEs globally (comprising about 9 per cent of the total MSME population) are registered, i.e. they are operating within the legally regulated economy, and of these, 25 to 30 million are in emerging markets.[6] In addition, SMEs

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[3] See, for example, "Making the Law Work for Everyone", Volume I, Report of the Commission on Legal Empowerment of the Poor (2008) (www.unrol.org/files/Making_the_Law_Work_for_Everyone.pdf). The findings of this Commission form an integral part of the United Nations Development Programme's (UNDP) Initiative on Legal Empowerment of the Poor (www.undp.org/content/undp/en/home/ourwork/democraticgovernance/focus_areas/focus_justice_law/legal_empowerment.html) and have contributed to similar work on Legal Empowerment of the Poor in international organizations such as the World Bank Group and the Open Society Foundations (www.opensocietyfoundations.org/projects/legal-empowerment).

[4] Ibid., pp. 30-31.

[5] Ibid., pp. 8-9.

[6] These figures are taken from the Global Partnership for Financial Inclusion (GPFI), which cites a study done by the International Finance Corporation (IFC). GPFI is the main implementing

(operating both within and outside of the legally regulated economy) account for 72 per cent of total employment and 64 per cent of Gross Domestic Product (GDP) in developed economies, while they represent 47 per cent of employment and 63 per cent of GDP in low-income countries. SMEs operating outside of the legally regulated economy provide 48 per cent of all jobs in emerging market countries, and 25 per cent of all jobs in developed countries, but account for only 37 per cent and 16 per cent of GDP in these markets, respectively.[7]

8. It may also be instructive to review some of the statistics on such enterprises on a regional and subregional basis. In the European Union (EU), 99 per cent of all businesses are SMEs, which provide two out of three private sector jobs and contribute to more than half of total value-added created by business in the EU. Further, nine out of ten SMEs in the EU are microenterprises (defined in the EU as having fewer than 10 employees), thus illustrating that the mainstays of Europe's economy are micro firms.[8]

9. Microenterprises are no less influential in other developed States. For example, the United States of America has 25.5 million micro-businesses (defined as enterprises having fewer than 5 employees, including the owner), or 92 per cent of all businesses. In 2011, the direct, indirect and induced effect microenterprises had an impact on over 40 million jobs in the United States: directly accounting for 26 million jobs; indirectly supporting 1.9 million jobs through business purchases; and having an induced effect (through the personal purchasing power of owners and employees of micro-businesses) on an additional 13.4 million jobs.[9]

10. MSMEs are also of great importance in regions of the world where a large number of developing States are found. SMEs represent 99 per cent of all enterprises in the Association of Southeast Asian Nations (ASEAN) region, and contribute from 30 to 60 per cent of the GDP.[10] In the States of the Asia-Pacific Economic Cooperation (APEC), SMEs account for around 90 per cent of all businesses and employ as much as 60 per cent of the work force.[11] In the Caribbean Community and Common Market (CARICOM), MSMEs provide more than 50 per cent of GDP and account for 70 per cent of the jobs,[12] while in Latin America, over 18.5 million MSMEs provide employment to about 70 per cent of the regional workforce and contribute almost 50 per cent of the region's GDP.[13] According to the African Development Bank (AfDB), SMEs in Africa, account for more than 45 per cent of employment and contribute 33 per cent to GDP.[14]

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mechanism of the Financial Inclusion Action Plan endorsed by the Group of 20 (G-20) leaders at the Seoul summit (10 December 2010, Seoul). The Action Plan identifies six areas to advance financial inclusion for individuals, households and MSMEs and to promote the application of the G-20 Principles for Innovative Financial Inclusion. See www.gpfi.org "GPFI, IFC, Small and medium enterprise finance: new findings, trends and G-20 global partnership for financial inclusion progress", 2013, p. 12, available at www.ifc.org/wps/wcm/connect/16bca60040fa5161b6e3ff25d54dfab3/SME+Finance+report+8_29.pdf?MOD=AJPERES.

[7] "IFC Jobs Study: Assessing Private Sector Contributions to Job Creation and Poverty Reduction", 2013, pp. 10-11.

[8] See European Commission, Enterprise and Industry at: http://ec.europa/enterprise/policies/facts-figures-analysis.

[9] See, for example, "Bigger than you think: The Economic Impact of microbusinesses in the United States", Association of Enterprise Opportunity (AEO), September 2014 (http://microenterprisealabama.org/wp-content/uploads/2014/09/Bigger-Than-You-Think-The-Economic-Impact-of-Microbusiness-in-the-United-States-copy.pdf), or "Microbusinesses: America's Unsung Entrepreneurs", Corporation for Enterprise Development (cfed), May 2013, (http://cfed.org/assets/pdfs/FactFile_May2013.pdf).

[10] P. Manawanitkul, Enabling Environment for Microbusiness — ASEAN Experience, Presentation delivered at the International Joint Conference on "Enabling Environment for Microbusiness and Creative Economy, organized by UNCITRAL, the Ministry of Justice in the Republic of Korea and the Korean Legislation Research Institute, Seoul, 14-15 October 2013.

[11] See www.apec.org/Groups/SOM-Steering-Committee-on-Economic-and-Technical-Cooperation/Working-Groups/Small-and-Medium-Enterprises.aspx.

[12] See www.oas.org/en/media_center/press_release.asp?sCodigo=E-061/12.

[13] Available at www.informeavina2008.org/english/develop_case2_SP.shtml.

[14] See the African Development Group News and Events page, "The AfDB SME Program Approval: Boosting Inclusive Growth in Africa", 2013, available at www.afdb.org/en/news-and-events/article/the-afdb-sme-program-approval-boosting-inclusive-growth-in-africa-12135.

B. Defining MSMEs

11. There is no standardized international definition of what constitutes an MSME, since each economy will define its own parameters for each size of business by taking into account its own specific economic context. For the purposes of work undertaken by UNCITRAL, it is not necessary or advisable to seek consensus on a definition for each category of MSME, since any legislative texts produced will be applied by States or regional economic groups to their MSMEs as defined by each of them, based on each unique economic context. The important common factor from State to State is that MSMEs, regardless of how they are defined in that jurisdiction, are enterprises that, by virtue of being the smallest and most vulnerable, face a number of common obstacles regardless of the particular jurisdiction in which they are found. For that reason, these materials do not offer guidance on how a State should define the different categories of MSMEs.[15]

C. The nature of MSMEs

12. MSMEs are incredibly varied in nature. They may consist of sole entrepreneurs, small family businesses or larger enterprises with several or many employees, and may operate in virtually any commercial sector, including in the service industry and the artisanal and agricultural sectors.

13. Moreover, MSMEs may be expected to vary depending on the local economic conditions, cultural traditions and the different motivations and characteristics of the entrepreneurs establishing them. Enterprises that have entered the legally regulated economy may also take various legal forms, depending on the options available to them under applicable law, and on how those different forms may meet their needs.

14. In addition, although MSMEs may be seen, particularly in the context of developing economies, mainly as a source of livelihood for the working poor, such enterprises need not be static; in fact, MSMEs may also serve a dynamic purpose as a source of entrepreneurial talent in an economy. Indeed, their importance in the world economy suggests that providing for and fostering the growth of MSMEs is a key goal in order to achieve economic progress, innovation and success.

15. However, despite their disparate nature, certain characteristics of MSMEs may be broadly shared. Some of these similarities may include, among others:

(a) Being and remaining small operations;

(b) Facing burdensome regulatory hurdles, which tend to have a disproportionate effect on them;

(c) Reliance on family and friends for loans or risk-sharing;

(d) Limited access to capital or to banking services;

(e) Employees, if any, are often drawn from family and friends and may be unpaid and unskilled;

(f) Markets may be limited to relatives, close friends and local contacts;

(g) Vulnerability to arbitrary and corrupt behaviour;

(h) Limited access to dispute settlement which puts them at a disadvantage in disputes with the State or with larger businesses;

(i) A lack of asset partitioning, so business failure often means that personal assets are also lost;

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[15] States may wish to note the definitions of the different categories of businesses included in MSMEs that have been established either by various States or by regional economic groups. Those definitions tend to be based on a number of elements, considered separately or along with other factors, including: (i) the number of employees at a specific point in time, such as the end of the financial or calendar year; (ii) the amount of annual revenue or turnover generated by the enterprise, or the balance sheet total of the business; (iii) the asset base of the business; (iv) the total monthly wages paid by the enterprise; or (v) the amount of capital invested in the enterprise.

(j) Vulnerability to financial distress; and

(k) Difficulty in transferring or selling a business and in profiting from both tangible and intangible assets (such as client lists or relationships with customers).[16]

D. Creating sound business environments for all businesses

16. Efforts to assist MSMEs at the start of their life cycle might first begin with consideration of the business environment in which an MSME will be conducting its affairs. A "business environment" may be defined in a number of different ways, but could be said to comprise the policy, legal, institutional and regulatory conditions that govern business activities, as well as the administration and enforcement mechanisms established to implement government policy, and the institutional arrangements that influence the way key actors operate. These key actors may include government agencies, regulatory authorities, business organizations, trade unions, and civil society organizations. All of these factors contribute to affect business performance.[17]

17. Sound business environments clearly have a positive influence on economic growth and poverty reduction. Views differ as to the significance and measurability of the link between the business environment, on one hand, and economic growth and poverty reduction, on the other. However, poor business environments may not provide sufficient incentive and opportunity for entrepreneurs to carry on their commercial activities in the legally regulated economy where their enterprise is more likely to thrive. In addition, poor business environments tend to be more susceptible to corruption and usually have a disproportionate gender impact, since the businesses most vulnerable in a weak business environment are micro-businesses, which are often owned by women.[18]

18. It should be noted that the quality of the business environment varies not only as between States but within their different regions as well. Such regional variations make it unlikely that a single solution will provide the answer for improving the business environment in every State. Similarly, the challenges faced by entrepreneurs, particularly by MSMEs, vary depending on the context in which they are doing business. However, the two concepts are linked, since many of the challenges faced by MSMEs are similar to those considered detrimental to a favourable business environment in general, including: burdensome regulation, high economic inequality, low institutional quality, low quality of public infrastructure, and a lack of access to credit and other resources.[19]

19. Improving the quality of the business environment and assisting MSMEs in overcoming the particular challenges facing them often require a State to take measures towards legal and policy reform. These reforms may include, among others, providing for a simple and effective system of business registration, as well as providing for a range of simplified and flexible business forms so as to meet the varied needs of MSMEs. States most often initiate such business reforms in order to: facilitate business start-up and operations, stimulate investment opportunities, and increase growth rates and employment. Such reforms require careful planning and commitment on the part of the State, as well as the involvement of many different entities at various administrative and governmental levels.[20]

II. The extralegal economy

20. As outlined above in paragraph 15, MSMEs generally face a number of key challenges, some of which are caused, and many of which are exacerbated, by operating in the extralegal

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[16] See, for example, supra note 3, pp. 8-9, 38-39 and 70-73.

[17] Donor Committee for Enterprise Development (DCED), 2008, "Supporting Business Environment Reforms", p. 2.

[18] Ibid., p. 3; see also, "Making the Law Work for Everyone", Volume I, Report of the Commission on Legal Empowerment of the Poor, supra note 3.

[19] See K. Kushnir, M. L. Mirmulstein and R. Ramalho, "Micro, small and medium enterprises around the world: How many are there, and what affects their count?", 2010, World Bank/IFC.

[20] See Donor Committee for Enterprise Development (DCED), Supporting Business Environment Reforms: Practical Guidance for Development Agencies, Annex: How Business Environment Reform Can Promote Formalisation, 2011.

economy.[21] As noted above, MSMEs are much more prevalent in developing States, which host over 85 per cent of the large number of MSMEs in business globally; of these, an estimated 90 per cent of MSMEs operate in the extralegal economy, which is sometimes referred to as the "informal" economy.

21. "Informality" is by no means a uniform concept. Many "informal" businesses actually operate in fixed premises and according to locally accepted commercial rules. In addition, they may be well-known by local authorities, pay some form of local taxes, and may even engage in cross-border trade. Others, on the other hand, may have little interaction with the State.

22. For greater certainty, these materials will refer to such commercial activity as "extralegal" rather than "informal". Moreover, since the entry point for enterprises wishing to access the legally regulated economy is in most States by way of registration with a commercial or business registry, extralegal enterprises will refer to those that are not entered into the official commercial or business registry of a State, and registration will be considered the main conduit through which businesses are permitted to operate in the legally regulated economy.

23. It should also be noted that the extralegal economy is not related to illegal or criminal activity. Illegal activities are contrary to the law, but informal activities are "extralegal", in that they are not officially declared and do not occur in the context of the legal and regulatory regime that should govern such activities. The discussion in these materials is limited to extralegal commercial activities and does not address trade in illicit goods or services.

24. In addition, extralegal commercial activity may be mainly of a different nature in some States, such as in developed economies. In such States, the extralegal economy may consist mainly of formal firms and workers that underreport their income to tax authorities, or that use undeclared labour in certain business domains.[22] These types of extralegal activities are not the focus of these materials.

25. It is also important to note that although extralegal business activity, particularly in the developing world, may exist largely as a result of economic necessity, as noted above in respect of MSMEs in general,[23] components of the extralegal economy may also be seen as quite dynamic and as an incubator for business potential that in fact provides economies with a large number of potential contributors to business development. In fact, such extralegal enterprises may be seen to provide a pool of talent and an important base of operations from which entrepreneurs can access, and graduate into, the legally regulated economy. There is increasing recognition that the extralegal sector is growing and that it should not be considered a marginal or peripheral sector, but rather as an important building block of a State's overall economy.[24]

26. In fact, a majority of the world's working population operates in the extralegal economy; that number is projected to grow to two-thirds of the global work force by 2020.[25] Although the very nature of such enterprises prevents the identification of precise statistics, estimates of the regional prevalence of extralegal economic activity as a percentage of GDP are as follows: 38 per cent in sub-Saharan Africa; 18 per cent in East Asia and the Pacific; 36 per cent in Europe and Central Asia; 35 per cent in Latin America and the Caribbean; and 27 per cent in the Middle East and North Africa. By way of comparison, the level of the extralegal economy as a percentage of GDP is estimated at 13 per cent in high-income OECD States, and at 17 per cent globally.[26]

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[21] See, for example, A.M. Oviedo, M.R. Thomas, K.K.Özdemir, Economic Informality, causes, costs and polices — a literature survey, 2009, pp. 14 et seq.

[22] Ibid., pp. 6 et seq.

[23] See para. 14 above.

[24] See, for example, UNCTAD's information on business facilitation (www.businessfacilitation.org/topics/formalization.html).

[25] "How to formalize the informal sector: Make formalization easy and desirable", UNCTAD, (www.businessfacilitation.org/topics/formalizing-the-informal-sector.pdf).

[26] "Economic Developments in Africa Report, 2013: Intra-African Trade: Unlocking Private Sector Dynamism", UNCTAD, pp. 65-66 (http://unctad.org/en/PublicationsLibrary/aldcafrica2013_en.pdf).

27. The institution of reforms to improve the business environment, as noted above in paragraphs 16 to 19, may encourage and facilitate the creation of enterprises through official registration and the migration of extralegal businesses to the legally regulated economy. However, in order to achieve success, policies that encourage businesses to enter the legally regulated economy should take into account the different motivations and characteristics of entrepreneurs operating in the extralegal sector. Such motivations will vary depending on the economy, and may include: micro and small businesses that cannot access the legally regulated economy due to high entry barriers and costs (including taxes and other social contributions); subsistence entrepreneurs that lack alternative job opportunities; and those entrepreneurs that consider that the costs of entering the legally regulated economy outweigh the benefits they expect to receive.[27]

28. Variations in the size and characteristics of the extralegal economy are also apparent from region to region. An analysis of one region, for example, indicates high levels of extralegal commercial activity, partially due to the fact that the extralegal economy is where most new jobs are found, and in which many entrepreneurs must trade by necessity.[28] In this region, a job, an enterprise and a household are often the same thing,[29] and lack of entrepreneurial skills, access to credit, and infrastructure are seen as the most restrictive constraints to growth. In other regions, the extralegal sector tends to behave like a typical small business sector, and is often the main entry point for young, uneducated workers seeking employment, as well as for those seeking part-time work.[30] Other regions have experienced growth of the extralegal economy in recent years, apparently driven by a lack of jobs in the legally regulated sector and reduced demand for goods and services from those employed in that sector.[31]

29. The debate on the reasons for the extralegal sector, on its effect on national economies and on how to approach the issue has been vibrant for decades and has in recent years had a major influence on policymaking. The view that extralegal commercial activity is the result of burdensome regulation and costly procedures required by the State for businesses to enter the legally regulated economy, and that a reduction of those barriers will help extralegal MSMEs move towards a greater degree of business registration, has generated strong momentum for reforming regulations and laws in order to simplify business entry into the legally regulated economy.[32] A wide array of policies have been designed and implemented in several States and regions of the world, since, as noted earlier, the variable nature of the extralegal sector, and the different levels of development of States, render elusive the identification of a single optimal approach. The most successful interventions have been comprehensive policy packages that aimed at achieving various goals, such as economic growth, social protection, and inclusion, and which often include:

(a) Reducing the costs of a business entering (and remaining in) the legally regulated sector, which include entry costs, taxes, fees and social contributions, and costs of compliance;

(b) Improving the benefits of entering the legally regulated economy by reducing the bureaucracy and expense involved in obtaining fixed premises, and obtaining access to business development services and new markets;

(c) Improving the general business environment, so that policies to reduce costs and to improve the benefits of entering the legally regulated economy also assist firms already operating in that sector; and

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[27] M. Jaramillo, “Is there demand for formality among firms?”, Discussion paper, 2009, pp. 2 et seq; See also “Enterprise Surveys — Enterprise Note Series: Formal and Informal Microenterprises”, World Bank Group, Enterprise Note No. 5, 2009.

[28] See Sub-Saharan Africa; UNIDO, GTZ, 2008, Creating an enabling environment for private sector development in sub-Saharan Africa, p. 16.

[29] See Sub-Saharan Africa, Donor Committee for Enterprise Development (DCED), 2009, Business Environment Reforms and the Informal Economy — Discussion Paper, p. 2.

[30] See Latin American and Caribbean States; Donor Committee for Enterprise Development (DCED), 2009, Business Environment Reforms and the Informal Economy — Discussion Paper, p. 2.

[31] See Asia and southeast Europe; Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ), website, Toolkit: Learning and Working in the informal economy, www.giz.de/expertise/html/10629.html.

[32] Supra, note 27, pp. 2 et seq.

(d) Strengthening the enforcement of a State's legal regime in order to encourage entry to the legally regulated economy.[33]

III. Making entry into the legally regulated economy simple and desirable for MSMEs

30. In order to encourage MSMEs to start their enterprises in the legally regulated economy or to move their extralegal businesses into that sector, States may wish to consider how best to effectively convey to MSMEs the availability and advantages of that approach. In addition, States should also consider what steps they can take to motivate such behaviour by making it a desirable, easily accessible process, which will pose the least burden possible on the MSME.

A. Explain what entering the legally regulated economy means

31. To ensure widespread understanding of the advantages available to MSMEs, steps must be taken to explain to them the meaning of participating in the legally regulated economy. The State should consider how best to effectively convey relevant information to MSMEs, including the minimum requirements for such businesses to register in the jurisdiction and to operate in the legally regulated economy. This information should advise entrepreneurs of the benefits of official registration, as well as what business forms are available to them and the advantages of each, as well as what additional registrations might be necessary, for example for the purposes of licensing, taxation, social services, and the like. Information should be specifically adapted so that it is clear and easily understandable for the target audience, and it should be conveyed in a manner that is tailored for them.

1. The advantages of the legally regulated economy

32. Part of the message that must be conveyed to MSMEs in order to persuade them to operate their businesses in the legally regulated economy is to explain to them the advantages of that approach. The following sections outline the advantages of encouraging businesses to operate in the legally regulated economy for the State and for entrepreneurs.

(a) Advantages for the State

33. States have a clear interest in encouraging MSMEs to operate in the legally regulated economy. One of the reasons often cited for that interest is in terms of taxation, since encouraging MSMEs to migrate to, or to operate in, the legally regulated economy will broaden the tax base of the State.[34] It may also help reduce any friction that may exist with enterprises that are already operating in the legally regulated economy and are tax contributors, but that must compete for market share with extralegal businesses. However, there are additional reasons for the State to take action to encourage migration from the extralegal economy, such as, depending upon the specific economic sector, ensuring consumer protection and in generally engendering trust in business and commerce in the State for stakeholders including consumers, business partners and banks.

34. Other advantages to the State may be less direct, but are no less valuable. For example, providing previously extralegal businesses with the means to enter the formally regulated economy will permit those MSMEs to grow, to create jobs, and to increase their earnings and contribution to the creation of wealth and the reduction of poverty in the State. Businesses that enter the legally regulated economy can be expected to attract more qualified employees and to stay in business longer, thus making investment in the training of personnel and the acquisition of capital more profitable. The increase in the number of businesses registered will mean that there is more and better economic data available by way of the business registry, and that information exchange in respect of such businesses will

[33] International Labour Organization (ILO), GIZ, Enterprise formalization: fact or fiction?, A quest for case studies, 2014, p. 24.

[34] States may wish to note that reduced taxation rates and administration may be an incentive offered to MSMEs to join the legally regulated economy, and that too great an emphasis on expanding the tax base may be counterproductive.

increase and become more transparent. All of these effects will have an overall positive impact on the economy of the State.[35]

(b) Advantages for entrepreneurs

35. However, States must also ensure to convey clearly and effectively to MSMEs and entrepreneurs the benefits of doing business in the legally regulated economy. The following factors are often cited as key advantages for MSMEs that operate in the legally regulated economy.

(a) Visibility to the public and to markets

Registering a business is the primary means through which it becomes visible to the public and to markets, thus providing a means for exposure to potential clients and business contacts, and an expansion of market opportunities. This membership in the marketplace may provide opportunities both in terms of becoming a supplier of goods and services and in accessing them under favourable conditions, and can dramatically improve the profitability of the business. Moreover, such visibility enables, and reduces the costs of, MSMEs trading in economic circles beyond their relatives, friends and local contacts, thus opening up new markets for them.

(b) Visibility to the banking system

Business registration can also provide an enterprise with improved access to banking and financial services, including to bank accounts, loans and credit. This permits MSMEs to move away from financial reliance on relatives and friends and makes it easier for them to raise capital from a broader group of investors, as well as lowering the cost of that capital. This, in turn, permits businesses to expand, to make new investments, to diversify their risk, and to take up new business opportunities.

(c) Public procurement

In most States, public procurement contracts are only available to those businesses that are registered and are part of the legally regulated economy. Access to such contracts may be enhanced for certain groups, since some States have developed specific programmes to ensure that a certain percentage of public procurement contracts are granted to less entitled entrepreneurs, including women, youth, the disabled and the elderly.

(d) Legal validation

Officially registering a business permits it to operate commercially in the jurisdiction and provides the entrepreneur with documentation proving that status, and that the business is in compliance with the registration requirements. This status also permits registered businesses to enter into and enforce contracts more easily, and to have access to justice for commercial purposes, including in respect of reorganization or liquidation. In some legal systems, registration provides additional legal rights for the entrepreneur operating in the commercial sector, including flexible provisions on commercial contracts, specialized commercial court divisions, a relaxation of certain requirements in terms of legal form, and the like.

(e) Legal compliance

While related to the concept of legal validation, compliance with the law can itself be seen as an advantage, since it alleviates entrepreneurial anxiety in respect of operating extralegally, and makes it less likely that fines may be imposed. Being in compliance with the law will also reduce the business' vulnerability to corruption and bribery, and should assist the entrepreneur by providing recourse in cases of tax and other inspections.

(f) Access to flexible business forms and asset partitioning

Through registration, the entrepreneur will be entitled to choose the legal form available in the jurisdiction that is best suited for the business, and ideally, the State will provide for a range of legal business forms for that purpose. Most jurisdictions have at least one legal form that permits the entrepreneur to separate personal finances from business finances; such asset partitioning can be invaluable to a business, particularly if financial difficulty is encountered, as the entrepreneur is not in danger of losing all personal assets, and the value of the business

[35] See, for example, supra, note 21, pp. 14 et seq.

assets can be maximized in the case of reorganization or liquidation. Moreover, the value of a business with separate assets may be greater and can be more readily transferred.

(g) Unique name and intangible assets

Business registration usually requires an enterprise to operate under a sufficiently unique business name. This unique name translates through the business registry and other means into a market identity that can develop a value of its own, and that can be traded to a subsequent owner. Other intangible assets that can add to the value of a business and can be traded, particularly in the case of asset partitioning and a separate legal business identity, include client lists and commercial relationships.

(h) Opportunities for growth

In addition to the advantages of visibility set out above, business registration provides an enterprise with access to a much larger business network, which can permit it to grow the business and operate it on a much greater scale. Some States permit a registered business to become a member of the Chamber of Commerce or other trade organization, which can greatly enhance an enterprise's opportunities for development.

(i) Opportunities for specialization of labour

Registered businesses tend to be less constrained in their hiring practices and may be able to hire employees outside of family and friends. This can permit the business to have access to a larger pool of talent and to permit specialization among employees to make better use of their talent and improve overall productivity.

(j) Access to government assistance programmes

Many States provide specific assistance programmes for MSMEs or for specific types of disadvantaged entrepreneurs. Registration in the legally regulated economy will permit an enterprise to access all forms of government assistance available to such businesses.

(k) Empowerment and emancipation effects

Registration of businesses owned by women, youth, the disabled, the elderly and other less advantaged groups may have important empowerment and emancipation effects. This may be particularly so in respect of women entrepreneurs, many of whom are micro entrepreneurs and who are often exposed to greater risk as a result of corruption and abuse of authority.

(l) Longer term gains

Business registration is also the main conduit for the growth of an enterprise into cross-border trading. It is also possible that, in the longer term, robust business registration will lead to an increase in cross-border trading and foreign investment — advantages not only for the enterprise, but for the State as well.

2. Communication and education

36. Communication of, and education on, the advantages of legal and policy reforms undertaken by the State to assist MSMEs will be key to the success of those reforms. While this might seem a relatively small detail, in the context of States and regions in transition or with remote areas, all potential entrepreneurs may not be well-served by mass media or have dependable and regular access to telecommunications or the Internet. In such contexts, the potential obstacles to communication and education, and thus to the success of the reforms, can be expected to be more numerous.

37. An additional consideration for a State in developing communication and education strategies should be to consider that many micro entrepreneurs may face literacy challenges and that particular steps may need to be taken to overcome this hurdle. For example, pictograms could be used in addition to text in order to inform potential businesses of the programmes and advantages offered to them. Additional options could include using other culturally significant means of communicating with such groups, including through songs and storytelling. One example demonstrates how,[36] in order to publicize its programmes

[36] See, for example, efforts of the Democratic Republic of Congo in publicizing its OHADA "entreprenant" programme (www.ohada.com/actualite/2609/ohada-rdc-campagne-mediatique-de-

aimed at fostering micro entrepreneurs, a State launched a national campaign illustrating the benefits of those programmes by way of broadcasting on radio and television a simple and interesting scenario using well-known national actors performing in the national languages of the State.

38. In designing its communication and education plan, a State must be cognizant of the potential impediments outlined above and think practically how best to bridge such gaps. Possible solutions could include:

(a) Providing for mobile education and communication efforts, and for mobile business registration and facilitation counters, so as to enable travel to the entrepreneur's location;

(b) Using trade organizations or informal workers' associations to assist in publicizing the programmes;

(c) Using mass media that is broadly available, including radio, television and print media, as well as posters and billboards;

(d) Making blanket announcements via text on mobile phones; this may be particularly effective in areas where mobile payments are being used;

(e) Ensuring that communication and education is in the local language;

(f) Making use of social media; while less practical in terms of States that face technological hurdles, social media may be an effective tool, particularly to disseminate information among younger entrepreneurs and family members;

(g) Developing courses for gender-specific trading or involving other disadvantaged groups could be developed; and

(h) Using educational techniques that may be particularly useful in the context.[37]

B. Make it desirable for MSMEs to enter the legally regulated economy

39. Another component of the communication package that should be conveyed to prospective business registrants is clear information on the incentives that a State provides to MSMEs to encourage them to register and participate in the legally regulated economy.

40. The effectiveness of the incentives offered by the State will vary according to the specific economic, business and regulatory context. As such, it is not possible to specify precisely which incentives should be offered to encourage initiation in, or migration of extralegal MSMEs to, the legally regulated economy. However, States may wish to consider the following possible incentives, each of which, often in combination with others, has been found to be an effective means of encouraging MSMEs to enter the legally regulated economy. In addition, in planning for the creation of these incentives, States may need to ensure coordination with international organizations active in this area (including, for example, the World Bank Group, UNCTAD, UNIDO, the Asian Development Bank, or OHADA), business registration officials, local business incubators, the tax authority, and banks in order to maximize the impact of the incentives chosen.

41. The following is a non-exhaustive list of the incentives that States may consider offering to MSMEs in order to persuade them to start their businesses in the legally regulated economy or to migrate them from the extralegal economy. [The Working Group may wish

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sensibilisation-sur-l-entreprenant-communication-de-la-commission-nationale-ohada-de-rdc.html). A sample video may be viewed here: www.youtube.com/watch?v=lE1OIo1eNic.

[37] One such method may be "participatory learning and action", which has been described as an approach traditionally used with rural communities in the developing world. It combines participatory and visual methods with natural interviewing techniques and is intended to facilitate a process of collective analysis and learning. The approach can be used in identifying needs, planning, monitoring or evaluating projects and programmes, and offers the opportunity to go beyond mere consultation and promote the active participation of communities in the issues and interventions that shape their lives. See, for example, "What is Participatory Learning and Action (PLA): An Introduction", Sarah Thomas (http://idp-key-resources.org/documents/0000/d04267/000.pdf) or www.iied.org/participatory-learning-action.

to note that each of these incentives, and any additional ones suggested for inclusion, could be described in a brief paragraph, if desired.] A State may consider programmes along the following lines:

(a) Simplification of the business registration process;[38]

(b) Assistance in the business registration process;[39]

(c) Free (or very low-cost, if necessary) business registration;[40]

(d) Receipt of an official certificate indicating the registered status and legal form of the business;

(e) Organized access to and support with banking services (bank accounts and chequing accounts);

(f) Promoting access to credit for registered businesses;

(g) Accounting training and services;

(h) Assistance in the preparation of a business plan;

(i) Training (including managing inventory and finances);

(j) Providing credits for training costs;

(k) Protection against potential administrative abuse, possibly through access to mediation or other dispute resolution;

(l) Simpler and more equitable taxation (lower, simplified taxation rates), including tax mediation services;

(m) Business counselling services;

(n) Permitting a transition period to give new businesses time to comply fully with applicable laws;

(o) Providing a temporary "tax holiday" for small and microenterprises upon their initial registration;

(p) Providing lump sum monetary compensation or government subsidies and programmes[41] to foster MSME growth;

(q) Providing public communication and promotion of the registered business, for example through free memberships in industry organizations;

(r) Tailoring specific public procurement programmes to encourage small and micro-businesses or those owned by disadvantaged groups to have access to contracts; and

(s) Providing low-cost technological infrastructure.

C. Make it easy for MSMEs to enter the legally regulated economy

42. One of the most often-cited reasons given by MSMEs for their reluctance to register their business is the cost and administrative burden of doing so. Two areas of reform that States may undertake to assuage these concerns are to provide for flexible and simplified business forms for MSMEs and to simplify and streamline the procedures necessary to register a business.

1. Flexible and simplified business forms for MSMEs

43. Another aspect of creating an enabling legal environment and an attractive business registration programme for MSMEs is for the State to permit them simple access to flexible,

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[38] See, for example, the good practices outlined in Working Papers A/CN.9/WG.I/WP.93, Add.1 and Add.2.

[39] Ibid.

[40] Ibid.

[41] For example, some States have programmes to encourage young nationals who have been educated abroad to return to their State and start businesses.

legally recognized business forms. Many micro and small businesses are either sole proprietorships or family enterprises that do not possess a legal identity or a business form distinct from that of the owner. An entrepreneur should be permitted to easily and inexpensively register a business with a legally recognized form in that jurisdiction. States may wish to permit business registration of a range of different legal forms so as to provide entrepreneurs with sufficient flexibility to meet the needs of MSMEs, and to encourage their registration and foster their growth.

44. For some businesses, registering in the official business register as a simple sole proprietor may be sufficient for their purposes. However, some States and regional economic organizations have created a legal business form for individual entrepreneurs (defined as those whose business turnover is below a certain amount) which adds through simple business registration certain benefits to those otherwise available to the sole proprietor.[42] These benefits tend to include being subject to a simplified scheme for the calculation and payment of taxes and social security contributions, as well as fast, simplified and low (or no) cost registration requirements and formalities. In addition, States may also adopt a number of incentives available to such businesses which may include: assistance in opening a bank account and gaining access to banking services, access to mediation services (for example, in respect of taxation and legal services) and practical training and advisory services in key business areas (for example, in accounting, management and inventory, legal and tax obligations, financial education and awareness, business planning, and restructuring and growth strategies). Nonetheless, such schemes typically do not change the unlimited personal liability of a sole proprietor, whose personal and professional assets are all available to meet any business debt.

45. An important business right that should be offered to MSMEs is the opportunity for an enterprise to partition its business assets from the personal assets of its owner(s). The legal ability of an enterprise to partition its business assets from the personal assets of its owner(s) is an important building block for the encouragement of entrepreneurial activity since, even though a business may fail, the personal assets of the entrepreneur(s) will be protected.

46. Asset partitioning is seen as one of the defining features of a limited liability business entity, which is said to be among the most productivity enhancing legal institutions available. Offering entrepreneurs the opportunity to take on legal personality and limited liability through the adoption of a simplified business form is certainly a feature that States should consider in making policy decisions on legal forms to adopt in order to reduce the legal obstacles encountered by MSMEs. The key issues involved in adopting a legal regime for simplified business entities with these features, but adapted for MSMEs (including sole proprietors), is being dealt with in detail by the Working Group in parallel discussions.[43] However, it should be noted that the benefits of asset partitioning for MSMEs registering their businesses may also be available in a legal structure that stops short of full limited liability and legal personality, and is thus subject to fewer formal requirements.

47. One such model that has been adopted is that which permits an individual entrepreneur to officially allocate (and register with the business registry) a certain share of personal assets to the entrepreneur's professional activity. This approach permits the entrepreneur to segregate professional assets from personal assets so that, in the event of financial difficulty of the business, creditors will have access only to the professional assets of the entrepreneur.[44]

48. Another model that has been used in this regard is the establishment of a separate capital fund that has been established for a specific purpose. Such a fund may be established by individuals (and their spouses), into which specific assets can be placed that are identified

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[42] See, for example, the "auto-entrepreneur" in France, A/CN.9/WG.I/WP.87, paras. 22-23, and pp. 10 et seq., or the "entreprenant" in OHADA, Acte Uniforme Révisé Portant sur le Droi Commercial General, adopted 15 December 2011, entry into force 16 May 2011 (www.ohada.com/actes-uniformes/940/acte-uniforme-revise-portant-sur-le-droit-commercial-general.html).

[43] See Working Papers A/CN.9/WG.I/WP.82; A/CN.9/WG.I/WP.83; A/CN.9/WG.I/WP.86; and A/CN.9/WG.I/WP.89; and the reports of the twenty-second, twenty-third and twenty-fourth sessions (A/CN.9/800, A/CN.9/825, and A/CN.9/831, respectively).

[44] See A/CN.9/WG.I/WP.87, paras. 26-27.

as necessary for the family requirements of the individuals. Such assets are then protected from seizure in the case of business insolvency. A variation on this model may also be created by a corporation, which can establish a separate capital fund devoted to a specific purpose or which can agree that the earnings of an activity be dedicated to the repayment of loans obtained for the execution of certain specified activities. The establishment of such a fund is subject to certain requirements, including that its existence by made public by way of the business registry, and that it be open to opposition by existing creditors of the corporation. Once the fund is constituted, it is segregated from the other funds of the company, and may only be used to satisfy the claims of creditors arising as a result of the relevant activities. Other variations on the creation of a segregated fund may include the declaration of the fund to a specific purpose to the benefit of a natural or legal person, a public administrative body, or other entity, provided that the fund is established by public deed and is registered.[45]

49. An additional example of asset partitioning that stops short of providing legal personality and limited liability is the concept of "business network contracts". This legal tool can be used by a group of entrepreneurs (of various types and sizes, including sole proprietors, companies, public entities, and non-commercial and not-for-profit entities) who undertake a joint venture as agreed in the business network contract, which may be in respect of certain services or common activities within the scope of their business, or even with respect to the exchange of information. The goal of such an approach is to strengthen the individual businesses involved in the contract, as well as the network itself, at the national and international levels, so as to enable access to business opportunities not available to an individual enterprise, and thus to improve competitiveness. The contract must meet the formal requirements established by the State (for example, be duly executed in writing, indicate the objectives of the venture, its duration, the rights and obligations of participants, etc.), and be registered with the business registry. In addition, the contract must establish a capital fund to carry out the programme of the business network; this fund is then segregated from the individual assets of the founding entrepreneurs, and is available only to satisfy claims deriving from the activities performed within the scope of the network, and not for creditors of the individual entrepreneurs that created the business network.[46]

2. Simplified and streamlined business registration

50. One aspect of making it simple and desirable for an MSME to enter the legally regulated economy is to make the procedures for business registration accessible, simple and clear. In order to facilitate a migration of MSMEs from the extralegal to the legally regulated economy, and to encourage entrepreneurs to start their business in the legally regulated economy, States may wish to take steps to rationalize and streamline their systems of business registration. Improvements made by States to their business registration system may be expected to assist not only MSMEs, but businesses of all sizes, including those already operating in the legally regulated economy. Importantly, care must also be taken to effectively communicate these changes and their advantages to MSMEs and potential entrepreneurs throughout the jurisdiction.

51. Working Paper A/CN.9/WG.I/WP.93 and its addenda explore in detail the steps that can be taken by a State to simplify, streamline and adopt good practices in its system of business registration.

[45] See A/CN.9/WG.I/WP.87, paras. 2-7.
[46] See A/CN.9/WG.I/WP.87, paras. 8-17.

C. Note by the Secretariat on key principles of business registration

(A/CN.9/WG.I/WP.93 and Add.1-2)

[Original: English]

At its twenty-third session (Vienna, 17 to 21 November 2014), the Working Group considered issues outlined in Working Paper A/CN.9/WG.I/WP.85 on best practices in respect of business registration and related reform, which the Secretariat had prepared in response to a request by the Working Group at its twenty-second session. The Working Group was of the view that the issues and principles considered in that Working Paper should be explored more deeply in future discussions; in particular, parts IV (Best practices in business registration, paras. 18-47) and V (Reforms underpinning business registration, paras. 48-60) of A/CN.9/WG.I/WP.85 were thought to be particularly relevant.

This Working Paper and its addenda (A/CN.9/WG.I/WP.93/Add.1 and A/CN.9/WG.I/WP.93/Add.2) have been prepared in response to that request of the Working Group, but without prejudice to the final form of any future legislative text that the Working Group might wish to adopt on the topic of business registration.

Contents

Introduction

1. This Working Paper has been prepared on the understanding that, for the reasons described in document A/CN.9/WG.I/WP.92, it is in the interests of States and of micro, small and medium-sized enterprises (MSMEs) operating in the extra legal economy that such businesses migrate to the legally regulated economy. In addition, this Working Paper is also intended to reflect the idea that entrepreneurs that have not yet commenced a business may be persuaded to do so in the legally regulated economy if the requirements for formally starting their business are not considered overly burdensome. Finally, these materials are prepared on the understanding that, regardless of the particular nature or legal structure of the business, the primary means for an MSME to enter the legally regulated economy in most cases is through registration of their business.

2. In order to facilitate a migration of MSMEs from the extra legal to the legally regulated economy, and to encourage entrepreneurs to start their business in the legally regulated economy, States may wish to take steps to rationalize and streamline their systems of business registration. General improvements made by the State to its business registration system may be expected to assist not only MSMEs, but businesses of all sizes, including those already operating in the legally regulated economy. Many studies support the approach that faster and simpler procedures to start a business will assist in business formation and migration to the legally regulated economy. For these reasons, simplification and streamlining of business registration has become one of the most pursued reforms by States in all regions and at all levels of development. This trend has generated several best practices, whose features are shared among the best performing economies.[1] In order to assist States wishing to reform their business registration procedures so as to take into consideration the particular needs of MSMEs, or simply to adopt additional good practices to streamline existing procedures, these materials set out key principles and best practices in respect of business registration, and how to achieve the necessary reforms.

3. This Working Paper has been prepared in the form of a guide, which addresses legal, technological, administrative and operational issues of a business registration system. It is intended to facilitate the discussion of the Working Group by presenting an illustration of how the principles of an effective and efficient business registration system could appear in a future legislative text aiming at providing guidance to States. The materials are not intended to pre-empt any deliberation of the Working Group, which may agree that a different type of legislative text is better suited to assist States in the goal of streamlining their business registration system. Following the Working Group's decision on the form in which such guidance for States should be prepared, recommendations could be added to the text for the consideration of the Working Group.

A. Purpose of UNCITRAL guidance on business registration

4. Business registries are public entities, established by law, that record and update information on new and existing businesses — throughout the course of their lifespan — that are operating in the jurisdiction of the registry.[2] This process not only enables such businesses to comply with their obligations under the domestic legal and regulatory framework applicable to them, but it empowers them to participate fully in the legally regulated economy, including permitting them to benefit from legal and financial services not otherwise available to unregistered businesses.[3] Moreover, when information is appropriately maintained and shared by the registry, it allows the public to access business information, thus facilitating the search for potential business partners and/or clients and reducing risk when entering into business partnerships.[4] In performing its functions, the registry can thus play a key role in the economic development of a State.

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[1] See also A.CN.9/WG.I/WP.85, which provides information on several best practices in respect of business registration.

[2] See L. Klapper, R. Amit, M.F. Guillén, J.M. Quesada, Entrepreneurship and Firm Formation Across Countries, 2007, p. 8.

[3] See World Bank and International Finance Corporation, Doing Business, 2015, p. 47.

[4] Ibid.

5. Business registration systems vary greatly across States and regions, but a common thread to all is that the obligation to register can apply to businesses of all sizes depending on the legal requirements applicable to them under domestic legislation. Approaches to business registration reforms are thus most often "neutral" in that they aim at improving the functioning of the registries without differentiating between large scale business activities and much smaller business entities. Evidence suggests, however, that when business registries are structured and function in accordance with certain features, they are likely to facilitate the registration of MSMEs, as well as operating more efficiently for businesses of all sizes.

6. This Working Paper draws on the lessons learned through the wave of reforms of business registration systems implemented since the beginning of the year 2000 by various developed and developing economies.[5] Furthermore, these materials have benefitted from various tools prepared by international organizations that have supported those reform processes, in particular in developing and middle income economies. Data made available through the activity of international networks of business registries that, among other activities, survey and compare the practices of their affiliates have also been referenced. The main sources used in the preparation of this Working Paper include:

- Innovative Solutions for Business Entry Reforms: A Global Analysis (Investment Climate, World Bank Group, 2012)
- Reforming Business Registration: A Toolkit for the Practitioners (Investment Climate, World Bank Group, 2013)
- The International Business Registers Report 2015 (prepared by ASORLAC, CRF, ECRF and IACA)[6]
- The International Business Registers Report 2014 (prepared by ECRF)[7]
- The Business Facilitation Programme website (developed by the United Nations Conference on Trade and Development).[8]
- [… …]

[*The Working Group may wish to note that other resources will be added as the materials are further developed*.]

7. Should the Working Group decide to prepare a legislative text on the issue of facilitating business registration for MSMEs, those materials should be addressed to all stakeholders that are interested or actively involved in the design and implementation of business registration, as well as to those that may be affected by or interested in the establishment and operation of such a registry, including:

(a) Policymakers;

(b) Registry system designers, including technical staff charged with the preparation of design specifications and with the fulfilment of the hardware and software requirements for the registry;

(c) Registry administrators and staff;

(d) Registry clientele, including businesspersons, consumers, and creditors, as well as the general public and all others with an interest in the appropriate functioning of the business registry;

(e) Credit agencies and other entities that will provide credit to a business;

(f) The general legal community, including academics, judges, arbitrators and practising lawyers; and

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[5] See A/CN.9/WG.I/WP.85, para. 8.

[6] The report was prepared by the following registry organizations: Association of Registrars of Latin America and the Caribbean (ASORLAC); Corporate Registers Forum (CRF); European Commerce Registers' Forum (ECRF); and International Association of Commercial Administrators (IACA). These organizations include State registry officials from around the globe.

[7] The European Commerce Registers' Forum.

[8] See http://businessfacilitation.org/index.html.

(g) All those involved in company law reform and the provision of technical assistance in the simplification of business registration, such as international organizations, bilateral donors, multilateral development banks and non-governmental organizations active in the field of business registration.

8. This Working Paper seeks to use neutral and generic legal terminology so that any future guidance resulting from the Working Paper can be adapted easily to the diverse legal traditions and drafting styles of different States. The present materials also take a flexible approach, which will allow the guidance they contain to be implemented in accordance with local drafting conventions and legislative policies regarding which rules must be incorporated in principal legislation and which may be left to subordinate regulations or to ministerial or other administrative rules.

B. Terminology

9. The following paragraphs explain the meaning and use of certain expressions that appear frequently in this Working Paper:

- *Annual accounts*: The term "annual accounts" means the accounts prepared at the end of a financial year.
- *Annual returns*: The term "annual returns" means an annual statement which gives essential information about a business' composition, activities, and financial position, and which, subject to legislation, active incorporated or registered businesses must file with an appropriate authority.
- *Deregistration*: The term "deregistration" means the removal of a business from the registry once the business, for whatever reason, has permanently ceased to operate, including as a result of a merger or forced liquidation due to bankruptcy.
- *ICT*: "ICT" refers to information and communications technology.
- *Jurisdiction*: As used in this Working Paper, the term "jurisdiction" refers to the territory over which a State extends its authority.
- *Micro, small and medium-sized enterprises (MSMEs)*: As used in this Working Paper, the term "MSMEs" refers to micro, small and medium-sized enterprises as they are defined in the laws and regulations of the State undertaking the business registration reforms.
- *One-stop shop*: As used in this Working Paper, the term "one-stop shop" refers to an office or an organization that carries out more than one function relating to business registration.
- *Registered business or entity*: The term "registered business or entity" refers to those business entities that, further to filing an application for registration, have been officially registered in the business registry.
- *Registered information*: The term "registered information" means information contained in the registry.
- *Registrant*: As used in this Working Paper, the term "registrant" means the natural or legal person that submits the prescribed application form and documents to a business registry.
- *Registrar*: The term "registrar" means the person appointed pursuant to domestic law and/or regulation to supervise and administer the operation of the registry.
- *Registration*: The term "registration" means the entry of information required by domestic law and/or regulation into the registry.
- *Registration number*: The term "registration number" means a unique number assigned to a registered business and that is associated with that business during its life cycle.

- *Registry/Registration system*: The term "registry or registration system" means a State's system for receiving, storing and making accessible to the public certain information about business entities.

- *Unregistered business/entity*: The term "unregistered business or entity" means those business entities that are not included in the business registry.

- *Unique identifier*: The term "unique identifier" means a set of characters (numeric or alphanumeric) that is allocated only once to a business entity, that will never change throughout the business' lifetime and that remains unique across public agencies.

[*The Working Group may wish to note that the list of defined terms will be adjusted as the materials are further developed*.]

C. Key objectives of an effective business registration system

10. An effective system of business registration, as envisaged in these materials, is governed by the following overarching principles:

(a) Business registration is the key to permitting enterprises of all sizes and legal forms to be visible in the marketplace and to operate in the legally regulated commercial environment;

(b) Business registration is particularly important to enable MSMEs to increase their business opportunities and to improve the profitability of their businesses; and

(c) To be effective in registering businesses of all sizes, a business registration system should ensure that:

(i) The registration process is as simple, time and cost efficient, user-friendly and publicly accessible as possible;

(ii) The registered information on business entities is as easily searchable and retrievable as possible; and

(iii) The registered information is current, reliable and secure.

D. Core functions of business registries

11. There is no standard approach in establishing a business registry or in streamlining an existing one: models of organization and levels of complexity can vary greatly depending on a State's level of development, its priorities and its legal framework. However, regardless of the structure and organization of the registry, certain core functions can be said to be common to all registries.

12. The core functions of business registries are to:

(a) Record the identity and disclose the existence of a business to other businesses, to the public and to the State (ideally in a comprehensive database);

(b) Provide a commercial identity to the business which, depending on the applicable law of a State, may include legal personality and limited liability;

(c) Provide authority for the business to interact with business partners, the public and the State;

(d) Facilitate trade and interactions between business partners, the public and the State through the publication of the reliable, current and accessible information that business must provide in order to be registered; and

(e) Determine whether a business has fulfilled or continues to fulfil the conditions to operate in the commercial sector.

13. Effective and efficient performance of these functions will be examined in greater detail in A/CN.9/WG.I/WP.93/Add.1 and A/CN.9/WG.I/WP.93/Add.2.

E. Overview of standard registration procedures

14. Notwithstanding differences in the way business registries operate, efficient business registries perform similar steps when carrying out the registration of a new business or in recording the changes that may occur in respect of an existing business. A generic description of these steps may help to better understand the goals and impact of reforms aimed at streamlining the business registration process in a way that is more responsive to MSME needs. The following paragraphs intend to provide a non-exhaustive account of registration procedures, without reference to any specific legal form or size of business.

1. Business name

15. In a standard registration process, the entry point for entrepreneurs to business registries is often the support provided to them in choosing a unique name for the new business that they wish to establish. When registering, businesses are usually required to have a name which must be sufficiently distinguishable from other business names within that jurisdiction so that the business will be recognized and identifiable under that name.

16. Business registries usually assist entrepreneurs at this stage with a procedure that can be optional or mandatory, or they may provide business name searches as an information service. Registries may also offer a name reservation service prior to registering a new business entity, so that no other business can use that name. Such a name reservation service may be provided either as a separate procedure (again, which can be optional or mandatory), or as a service integrated into the overall business registration procedure.

2. Business entry

17. Business registries provide forms (either in paper or electronic form) and various types of guidance to entrepreneurs preparing the application and other necessary documents for registration.[9] Once the application is submitted, the registry performs a series of checks and control procedures to ensure that all the necessary information and documents are included in the application. In particular, a registry verifies the chosen business name as well as any requirements for registration that have been established in the State's applicable law, such as the legal capacity of the entrepreneur to operate the business. Some legal regimes may require the registry to perform simple control procedures (such as establishing that the name of the business is sufficiently unique), which means that if all of the basic legal and administrative requirements are met, the registry must accept the information as filed and record it. Other legal regimes may require more thorough verification of the information filed, such as ensuring that the business name does not violate any intellectual property requirement or that the rights of businesses with similar names are not infringed. All such information is archived by the registry, either before or after the registration process is complete.[10]

18. Payment of a registration fee (if any) must usually be made before the registration is complete, at which point the registry issues a certificate that confirms the registration and contains information about the business. Since the registered information must be disclosed to interested parties, registries make it publicly available through various means, including through publication on a website, or in publications such as the National Gazette or newspapers. Where the infrastructure permits, registries may offer, as an additional service, subscriptions to announcements of specific types of new registrations.

19. Registered information made available to the public can include basic information about the business, like the telephone number and address, or, depending on the requirements of applicable law, more sophisticated information on the business structure, such as who is authorized to sign on behalf of the business or who serves as the enterprise's legal representative. In some jurisdictions, the registered information is legally binding on third parties.

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[9] Examples of registry forms could be attached in future to these materials as annexes.

[10] See Investment Climate (World Bank Group), Innovative Solutions for Business Entry Reforms: A Global Analysis, 2012, (2012), p. 9.

3. Registration with other public authorities

20. A new business must usually register with several government agencies, such as taxation and social services authorities, which often require the same information as that gathered by the business registry. The business registry normally provides to entrepreneurs information on the necessary requirements of other agencies and refers them to the relevant agencies. In States with more developed registration systems, businesses may be assigned a registration number that also functions as a unique identifier (see A/CN.9/WG.I/WP.93/Add.2, paras. 38-49) which can then be used in all of the interactions that the business has with government agencies, other businesses and banks. This greatly simplifies business start-up since it allows the business registry to more easily exchange information with the other public institutions involved in the process. In several States that have reformed their registration systems, business registries function as "one-stop shops" (see A/CN.9/WG.I/WP.93/Add.2, paras. 2-11) to support registration with other authorities. The services operated by such outlets may include providing any necessary licensing, or they may simply provide information on the procedures to obtain such licences and refer the entrepreneur to the relevant agency.

4. Life cycle of a business

21. In addition to the function performed in the registration of an enterprise, business registries typically support businesses throughout their life cycle. In many jurisdictions, entrepreneurs have a legal obligation to inform the registries of any changes occurring in the business, whether these are factual changes (for example, address or telephone number) or whether they pertain to the structure of the business (for example, a change in the legal form of business entity). Information exchange between business registries and different government agencies operating in the same jurisdiction also serves the same purpose. In some cases, registries publish annual accounts or financial statements of enterprises that are useful sources of information on businesses in that jurisdiction for investors, clients, potential creditors and government agencies.

5. Deregistration: removal of a business from the registry

22. Deregistration is the removal of a business from the register once the business, for whatever reason, has permanently ceased to operate, including in cases of merger, forced liquidation due to bankruptcy, or cases where applicable law permits the registrar to deregister the business for failing to fulfil certain legal requirements. The registry, upon receiving notification of a business dissolution, which in the case of bankruptcy may be made available through insolvency registries, may issue an announcement stating that creditors have a certain length of time during which to advance their claims. After that period has passed, the business is removed from the register. This procedure ensures that businesses do not dissolve without providing creditors the opportunity to protect their rights.

F. Organization of the registry

23. In establishing or reforming a business registry, States will have to decide in which form the business registry will be organized and operated. Different approaches can be taken,[11] the most common of which is based on oversight by the government. In such States, a government department or agency, staffed by civil servants, and usually established under the authority of a particular government department or ministry, operates the registration system. Another type of organization of business registries is one which is subject to oversight by the judiciary: in such contexts, the registration body might be a court or a judicial registry, but in any event, that function is usually specified in the applicable law governing the judiciary.

24. States may also decide to outsource some or all of the registry operations through a contractual or other legal arrangement that may involve public-private partnerships or the

[11] According to The International Business Registers' Report 2015, registries can be organized in the following ways: 82 per cent of business registries are state governed; 7 per cent are organized as public-private partnerships; 5 per cent are governed by the judiciary and 1 per cent are operated by privately owned companies.

private sector.[12] When registration is outsourced to the private sector, it remains a function of the government, but the day-to-day operation of the system is entrusted to privately-owned companies. In one jurisdiction, for instance, such an outsourcing was accomplished by way of appointing a private company, in accordance with the law, as the assistant registrar with full authority to run the registration function.[13] However, operating the registry through public-private partnerships or private sector companies does not yet appear to be as common as the operation of the registry by a government agency. One reason might be that arrangements involving contracting with the private sector to provide business registration services require careful consideration of several legal and policy issues, such as the responsibilities of the government and the private provider, the form of the arrangements, the allocation of risk, and dispute resolution.[14] States may also decide to form entities with separate legal personality, such as Chambers of Commerce, with the object of managing and developing the business registry,[15] or to establish by law registries as autonomous or quasi-autonomous agencies, which can have their own business accounts and operate in accordance with the applicable regulations governing public agencies. In one State, for example, the registry is a separate legal person that acts under the supervision of the Ministry of Justice,[16] while in another State the registry is an executive agency of a government department, which is administratively separate from that department, but does not have separate legal status.[17] However, not all of these forms can be implemented in every State. In deciding which form of organization to adopt, States will have to consider their specific domestic circumstances, evaluate the challenges and trade-offs of the various forms of organization and then determine which one best suits the State's priorities and its human, technological and financial resources.

25. When organizing a business registry, the question of how it should be structured is another key issue. This can be done in one of two ways. The first approach would be to adopt a centralized registration system with an electronic format. Such a registry allows for consistency in identifying and classifying businesses, which usually permits more efficient collection of data from business and avoids duplication of procedures. In order to function efficiently, an electronic central registry should be accessible by terminals in the various regions and/or cities of a State, where other registry offices are located. This central system should also be able to process and store information from the local registries, even if this information is provided to those registries in paper format. Centralized registry systems with such features will allow equality of access for users in remote locations, assuming they have Internet or other electronic access, who otherwise might be at a great disadvantage. In one State, for instance, registration is conducted at the local commercial courts which are connected via a network to the central registry.[18] Recent international experience of States that have undertaken a reform of the registration system shows that maintaining a central registry (in electronic format) is the most common approach.

26. When the establishment of an electronic central registry is not possible, States turn to a decentralized structure where registries can also be organized as either autonomous or non-autonomous local offices. However, decentralization of the registration system may pose problems. In States where the registration process and its regulatory oversight is delegated to the local level, confusion can arise if each locality follows its own approach rather than adhering to a central vision. In States with a federal system that requires

[12] See European Commerce Registers' Forum, International Business Registers Report, 2014, p. 15.

[13] For instance, Gibraltar, cited in Investment Climate (World Bank Group), Outsourcing of Business Registration Activities, Lessons from Experience, 2010, p. 55 ff.

[14] The Working Group may wish to consider whether further details on the implications of operating the registry by way of private-public partnership should be included in a future annex to this Working Paper.

[15] See Luxembourg, supra footnote 13, p. 52 ff. In Luxembourg, the State, the Chamber of Commerce and the Chamber of Crafts formed an economic interest grouping, i.e. an entity with separate legal personality, with the object of managing and developing the business registry.

[16] See Latvia; for further reference see also A. Lewin, L. Klapper, B. Lanvin, D. Satola, S. Sirtaine, R. Symonds, Implementing Electronic Business Registry (e-BR) Services, Recommendations for policy makers based on the experience of the EU Accession Countries, 2007, p. 44.

[17] See the United Kingdom of Great Britain and Northern Ireland; for further reference see also Lewin and others, cited above, p. 44.

[18] See Austria; for further reference see also Lewin and others, cited above, p. 46.

companies to register in the locality where they regularly conduct their business, companies may have to undertake the cumbersome process of registering in every locality where they would like to open an office.[19] While it is possible to imagine the physical integration of decentralized registries, the goals of efficiency, accessibility and transparency in the registration system are more fully achieved through consolidation and centralization of an electronic-form registry.

G. International cooperation among business registries

27. The internationalization of businesses of all sizes creates an increasing demand for access to information on companies operating outside their national borders. Making the exchange of such information across borders as simple and fast as possible is of key importance in order to ensure the traceability of companies, the transparency of their operations and to create a more business-friendly environment. However, official information on registered businesses is not always readily available on a cross-border basis and business clients and other interested parties must search the register on a State-by-State basis when in need of information. This can result in a time-consuming and expensive effort that many interested users of the business registry may not be able to undertake due to travel distances, high costs and other potential obstacles.

28. States are increasingly aware of the importance of improving the cross-border exchange of data between registries; sustained progress in information and communication technology (ICT) now allows this aspect to be addressed. Accordingly, States implementing reforms to streamline their business registration system may wish to consider adopting solutions that will, in future, facilitate such information exchanges between registries from different jurisdictions and to consult with States that have already implemented approaches that allow for such interoperability (see A/CN.9/WG.I/WP.93/Add.2, paras. 55-58).

H. Preliminary considerations on the use of information technology and electronic services

29. The use of modern technology in business registration procedures is becoming a widespread practice in many States and is often part of larger programmes to establish e-government solutions. Such solutions are considered particularly well-suited to promote better governance and transparency, as well as to improve service performance and to eliminate bottlenecks in the service delivery process. Automation of business registration processes can bring about several benefits: it reduces the time and cost required for business registration; it improves access for smaller firms that operate at a distance from the registrar's offices (in many States entrepreneurs must still go to the capital city to register); and it permits the handling of increasing demands for company information from other government authorities and the consequent need for government databases to share information. Automation also provides revenue opportunities from other businesses and financial institutions that seek company information to inform their risk analysis of potential trading counterparties and borrowers.

30. Introducing ICT-based registration processes, however, often requires an in-depth re-engineering of the way the service is delivered, which may involve several core aspects of the State's apparatus in addition to their level of technological infrastructure, including: financial capability, organization and human resources capacity, legislative framework and institutional setting. Therefore, States launching a reform process aiming at the automatization of business registries would be advised to carry out a careful assessment of the various issues outlined above in order to identify those areas where reforms are needed and to adopt those technology solutions that are most appropriate to their current needs and capabilities.

[19] See supra footnote 2, p. 11.

I. Drafting considerations

31. States implementing the guidance contained in these materials should consider whether to place the various principles reflected in the commentary (and any recommendations that the Working Group may agree to include) in a law, in a subordinate regulation, in administrative guidelines or in more than one of these texts. This matter would be for States to decide in accordance with their own legislative drafting conventions.

I. Establishing the business registry

32. Streamlining business registration in order to meet the key objective of making the registration process simpler, time and cost efficient and user friendly (both for registrants and stakeholders searching the registry) usually requires undertaking reforms that address the State's legal and institutional framework. It may also be necessary to reform the business processes that support the registration system. Sometimes reforms are needed in all of these areas (see also para. 30 above). As already noted, the approach taken in these reforms may vary considerably among States as the design and features of a registration system are influenced by the State's level of development, priorities and legal framework. There are, however, several common issues that States should consider and several similar recommended steps for reform regardless of jurisdictional differences that may exist. These issues are examined in the sections below.

A. Foundations of the business registry

33. States should set the foundations of a business registry either by way of law or regulation. The opening provisions of such law or regulation will provide for the establishment of the registry and set out explicitly that the purpose of the registry is to receive, store and make available to the public relevant information relating to registered business entities. The applicable law in each State will determine which business entities must be registered, but it should be noted that these materials identify business registration as the key means by which businesses of all sizes, including MSMEs participate effectively in the legally regulated economic milieu. Subject also to the legal system of the State, whether influenced by particular legal traditions, or other policy considerations, States may establish that the information deposited in the registry has legal effect and ensure the protection of third parties in the framework of the mandatory provisions of private law. This means that the information can be relied upon by users in the form in which it is deposited in the registry. When States opt for a business registration system in which the registered information is considered to have such legal effect, the law or the regulation should establish the principle that the information stored in the business registry is original and legally valid.

B. Appointment of the registrar

34. The law or the regulation established by the State should identify, either directly or by reference to the relevant law, the authority that is empowered to appoint a natural or legal person as the registrar, to determine the registrar's duties, and generally to 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 to a natural or legal person, and that the term also includes a group of persons appointed to perform the registrar's duties under the registrar's supervision.

C. Functions of the registry

35. The opening provisions of the law or the regulation should also include a provision that lists the various functions of the registry, with cross references to the relevant provisions of the law or the regulation in which those functions are addressed in detail. 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 law or 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 law or regulation to which cross reference is made. Accordingly, implementation of this approach requires special care to avoid any omissions or inconsistencies.

D. Implementation considerations[20]

1. The reform catalysts

36. Business registration reform is a multifaceted reform process which addresses various aspects of the State apparatus; its implementation requires the participation of a broad range of stakeholders and a thorough understanding of the State's legal and economic conditions, as well as of the practical needs of the registry personnel and the intended users of the registry. To be successful, the reform must be driven by the need to improve private sector development and, for this reason, it is advisable that the reform be part of a larger private sector development or public sector modernization programme.[21] It is thus essential to gain an understanding of the importance of business registration in relation to other business environment challenges and of its relationship to other potential reforms. Part of this analysis will require, as a crucial step, ensuring that domestic circumstances are amenable to a business reform programme, that incentives for such a reform exist and that there is support in the government and in the private sector prior to embarking on any reform effort.

(a) Relevance of a reform advocate

37. As demonstrated by the example of several States, support or even leadership from the highest levels of government is of key importance for the success of the reform process. The engagement of relevant government ministries and political leadership in the reform facilitates the achievement of consensus on the steps required. This can be particularly important to facilitate access to financial resources, to make and implement decisions or when it is necessary to move business registry functions from one branch of government to another or to outsource them.[22]

(b) The reform committee

38. In order to oversee the day-to-day progress of the reform and to manage difficulties as they may arise, it is advisable that a steering committee be established to assist the State representative or body leading the reform. In addition to experts with technological, legal and administrative expertise, this committee should be composed of representatives of the public and private sector and should include a wide range of stakeholders, including those who can represent the perspectives of intended users. It may not always be necessary to create such a committee, since it may be possible to use existing mechanisms; in any event, a proliferation of committees is to be avoided, as their overall impact will be weakened.[23]

39. Experience indicates that reform committees should have clearly defined functions and accountability; it is advisable that their initial setup be small and grow progressively as momentum and stakeholder support increase. Although linked to the high level government body which is spearheading and advocating for the reform, the committee should operate transparently and independently from the executive branch. In certain jurisdictions, regulatory reform bodies have later been transformed into more permanent institutions that drive ongoing work on regulatory governance and regulatory impact analysis.

40. The reform committee must nurture the reform process and consider how to address concerns raised in respect of it.[24] Concerns could include those arising from bureaucratic

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[20] For a more detailed discussion on the approaches to implement a business registration system see A/CN.9/WG.I/WP.93/Add.2.

[21] See A. Mikhnev, Building the capacity for business registration reform, 2005, p. 16.

[22] See Investment Climate, (World Bank Group) Reforming Business Registration: A Toolkit for the practitioners, 2013, p. 23.

[23] See World Bank Group, Small and Medium Enterprise Department, Reforming Business Registration Regulatory Procedures at the National Level, A Reform Toolkit for Project Teams, 2006, p. 39.

[24] See supra footnote 22, p. 25.

inertia, or fears that registry employees may lose their jobs if their ICT skills are weak or if technology replaces human capital. Thus, it is likely to be important for the body overseeing the reform to be able to consider diverse interests and fully inform potential beneficiaries and political supporters.

(c) The project team

41. In collaboration with the reform committee, it is advisable that a project team be assigned the task of designing a reform programme tailored to country circumstances and providing technical expertise to implement the reforms. A successful reform will require a team of international and local specialists, with expertise and experience in business registration reform, in legal and institutional reform, and in a variety of ICT matters (for example, software design, hardware, database and Web specialists).

(d) Awareness-raising strategies

42. States embarking on a reform process should consider appropriate communication strategies aimed at familiarizing business entities and other potential registry users with the operation of the registry and of the legal and economic significance of business registration. Effective communication may also be expected to encourage the development of new enterprises and the registration of existing unregistered businesses, as well as providing signals to potential investors about the government's efforts towards improvement of the business environment. Awareness-raising strategies should commence early in the reform process and should be maintained throughout it, including after the enactment of the new business registry system. In coordination with the reform committee, the project team should determine which cost-effective media can best be used: these can include private-public dialogues, press conferences, seminars and workshops, television and radio programmes, newspapers, online and print advertisements, and preparing detailed instructions on submitting registration documentation and conducting searches.[25] In order to raise the awareness of MSMEs of the reforms to the business registry system, it may be advisable to consider communications strategies tailored specifically to that audience (see, for example, the "Communication" section of A/CN.9/WG.I/WP.92).

2. Phased reform process

43. The duration of a reform process can vary considerably, depending on the types of reform implemented and on other circumstances relevant to the particular economy. States may thus wish to consider a phased implementation of the reform. Lessons learned from experience in various jurisdictions demonstrate, for instance, that in countries with a large number of unregistered businesses, a reform process that adopts a "think small" approach at the outset of the reform process, might be more effective than a reform with a broader focus, which could be introduced at a later stage.[26] For example, if the main objective is to promote the registration of MSMEs, simple solutions addressing the needs of MSMEs operating at the local level may be more successful than introducing sophisticated automated systems that require high-level technological infrastructures, changes in the legal and institutional framework and that may be more appropriate to larger businesses or businesses operating in the international market. Even when the reform is carried out in more developed jurisdictions, it may be advisable to "start small" and pilot the reforms at a local level (for example, in a district or the capital) before extending them state-wide. Success in a pilot stage can have a strong demonstration effect, and is likely to build support for continued reform.[27]

3. Authority responsible for the registry

44. It will be necessary at an early stage to determine whether the registry is to be operated by a State entity, such as governmental agency or the judicial system, or whether it will be operated in partnership with a private sector firm with demonstrated technical experience and a proven record of financial accountability (see para. 24 above). However, while the day-to-day operation of the registry may be delegated to a private sector firm, the enacting

[25] Ibid., pp. 26-27.
[26] See supra footnote 10, p. 26.
[27] See supra footnote 23, p. 45.

State should always retain the responsibility of ensuring that the registry is operated in accordance with the applicable law or regulation. In addition, for the purposes of establishing public trust in the business registry and preventing the unauthorized commercialization or fraudulent use of information in the registry record, the enacting State should retain ownership of the registry record and, when necessary, the registry infrastructure (see para. 51 below).

E. Registry terms and conditions of use

45. The rules relating to access to business registry services are typically set out either in the applicable law or regulation, or both. They may also be addressed in the "terms and conditions of use" established by the registry in standard form agreements entered into with registry users. For example, the terms and conditions of access may address user concerns regarding the security and confidentiality of their financial and other data or the risk of changes being made to registration information without the authority of the registrant.

46. As noted in paragraphs 15-22 above, some registries may provide additional services, including the following: (a) assisting the registrant in searching an appropriate name for the business and offering a name reservation service pending the finalizations of registration formalities; (b) offering users a subscription service for announcements of certain kinds of business registrations; (c) preparing reports relating to the operation of the business registry that may provide registry designers, policymakers and academic researchers with useful data (for example, on the volume of registrations and searches, operating costs, or registration and search fees collected over a given period).[28]

F. Electronic or paper-based registry

47. An important aspect to consider when streamlining a business registration system is the form in which the application for registration should be filed and in which information contained in the registry should be stored and searchable. Paper-based registration requires sending the documents (usually completed in handwritten form) by mail or delivering them by hand to the registry for manual processing. Hand delivery and manual processing are not unusual in developing States where registration offices are often located in municipal areas which may not be easily reachable for many entrepreneurs, including MSMEs, in rural areas.[29] In addition, any copies of the documents required must usually also be provided on paper. The labour-intensive nature of this procedure normally results in a time-consuming and expensive process (for example, it may require more than one visit to the business registry), both for the registries and for the users, and it may easily lead to data entry errors. Furthermore, paper-based systems require considerable storage space as the documents with the registered information must be stored as hard copies. Finally, business registrations and search requests transmitted by paper, fax or telephone also give rise to delays, since registrants and searchers must wait until registry staff manually carry out the business registration or search and certify the registration or report the results.

48. In comparison, ICT-supported registration systems allow for improved efficiency of the registry and for more user-friendly services. This approach requires, at a minimum, that the information provided by the registrant be stored in electronic form in a computer database; the most advanced electronic registration systems, however, permit the direct electronic submission of business registration applications and relevant documents as well as of search requests by the users over the Internet or via direct networking systems as an alternative to paper-based submissions. The adoption of such systems enhances data integrity, information security, registration system transparency, and verification of business compliance, as well as permitting the avoidance of unnecessary or redundant information storage. Furthermore, when electronic submission of applications is allowed, business registries can produce standard forms that are easier to understand and therefore easier to complete correctly. Although the use of ICT solutions can carry with them risks of bugs and

[28] See, for instance, the Report of the Australian Business Registrar, 2013-2014, available at: abr.gov.au.

[29] See A/CN.9/WG.I/WP.85, para. 43.

errors, electronic systems do more to reduce those risks by providing automated error checks and other appropriate solutions. ICT is also instrumental in the development of integrated registration systems and the implementation of unique identification numbers (see A/CN.9/WG.I/WP.93/Add.2, paras. 38-49).

49. In addition to these features, which result in a more streamlined process and user-friendly services, electronic business registration and searching also offer the following advantages:

(a) A very significant reduction in the time required to perform the various registration steps, and consequently in the time required before successful registration of a business, as well as in the day-to-day cost of operating the registry;

(b) Reduced opportunity for fraudulent or corrupt conduct on the part of registry staff;

(c) A 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 such information accurately; and

(d) When direct registration and searches are allowed, the possibility for the user to access registration and search services outside of normal business hours.

50. If the State opts to implement an electronic registration system, the registry should be designed to permit registry users to submit registrations and conduct searches from any private computer, as well as from computer facilities made available to the public at branch offices of the registry or other locations. To further facilitate access to business registry services, the registry conditions of use may permit intermediaries (for instance, lawyers, notaries or private sector third-party service providers) to carry out registrations and searches on behalf of their clients when the applicable law permits or requires the involvement of such intermediaries. If the technological infrastructure of the State permits, or at a later stage of the reform, States should also consider adopting systems that will allow registration to be carried out through the use of mobile technology. This solution may be particularly appropriate for MSMEs in developing economies where mobile services are often easier to access than ICT services.

51. When the business registry record is computerized, the hardware and software specifications should be robust and should employ features that minimize the risk of data corruption, technical error and security breaches. 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 electronic. In addition to database control programs, software will also need to be developed to manage user communications, user accounts, payment of any required fees, financial accounting, computer-to-computer communication and the gathering of statistical data. When the State technological infrastructure is not sufficiently advanced to allow these features to be implemented, it is nevertheless important that the software put in place be flexible enough to accommodate additional and more sophisticated features in the future.

52. Implementing an online registration system will require defining the technical standards of the online system, a careful evaluation of the hardware and software needs of the business registry to make those standards operational in the context of the national technological infrastructure, and deciding whether it is feasible to develop the necessary hardware and software in-house or whether it must be purchased from private suppliers. In making that determination, it will be key to investigate whether an off-the-shelf product is available that can easily be adapted to the needs of the State. If different suppliers are used for the hardware and the software, it is important that the software developer or provider is aware of the specifications for the hardware to be supplied, and vice versa.

53. Following more recent technological advances, one option States may want to consider is whether to rely on traditional software or to move to more sophisticated applications such as cloud computing, which is an Internet-based system and allows the delivery of different services, such as storing and processing of data, to an organization’s computers through the Internet, The use of cloud computing allows for considerable reduction in the resources needed to operate an ICT supported registration system, since the registry does not have to maintain its own ICT infrastructure. However, data and information

security can represent an issue when introducing such a system and it would be advisable for States to conduct a careful risk analysis before establishing a system exclusively based on cloud applications.[30]

54. Additional aspects that States may consider when adopting an ICT supported registry should include:

(a) Scalability of the ICT infrastructures, so that the system can handle an increasing volume of clientele over time as well as traffic peaks that may occasionally arise;

(b) Flexibility: as already noted (para. 51 above), the ICT infrastructure of the registry should be easily adaptable to new user and system requirements;

(c) Interoperability: the registry should be designed to allow (even at a later stage) integration with other automated systems, such as other governmental registries operating in the jurisdiction (see A/CN.9/WG.I/WP.93/Add.2, paras. 38-49) and online or mobile payment portals;

(d) Costs: the ICT infrastructure should be financially sustainable both in term of initial and operating costs (see also para. 37, A/CN.9/WG.I/WP.93/Add.2); and

(e) Intellectual property rights: in order to avoid risks deriving from adverse circumstances affecting the intellectual property rights owner, for example, if the owner ceases to operate or is prohibited from doing business with the government, the State should always either be granted ownership of the system or an unrestricted license to the source code (see also para. 44 above).[31]

55. One important issue that would likely arise when the online business registry is able to offer full-fledged services would be whether to abolish any paper-based submissions or whether to maintain both paper-based and online registration (see A/CN.9/WG.I/WP.93/Add.2, para. 20). In many jurisdictions, registries choose to have mixed solutions with a combination of electronic and paper documents or electronic and manual processing during case handling. This approach may result in considerable cost for the registries, since the two systems require different tools and procedures. However, if this option is chosen, States would be advised to establish rules to determine the order of priority between paper-based and electronic submissions. Paper applications will have to be processed in any case, so that the information included in a hard document can be transformed into data that can be processed electronically; this can be done by way of scanning the paper-based application. However, since even the most advanced systems struggle with handwritten forms, either the registry must impose strict requirements for handwriting on paper applications or it must carefully check that the scanned record correctly represents the application.[32]

[30] See International Finance Corporation (World Bank Group), Task Manager's ICT Toolkit for Designing and Implementing Online Registry Applications (draft 8/3/2015), p. 28.

[31] Ibid., p. 29.

[32] See supra footnote 10, p. 13.

(A/CN.9/WG.I/WP.93/Add.1) (Original: English)

[Note by the Secretariat on key principles of business registration

ADDENDUM

Contents

II. Core functions of a business registry

1. As previously noted, the core functions of business registries include the registration of new and existing businesses of all sizes; the maintenance and update of reliable and secure information on those businesses throughout their life cycle; and the provision of easy access to that information by public and private users of the registry. When establishing or streamlining a business registration system, States should consider several elements that will enable the registry to discharge these and other functions in a simple, time and cost efficient way, in keeping with the key objectives of an effective business registration system as outlined in paragraph 10 of A/CN.9/WG.I/WP.93. The following paragraphs discuss these elements and their implications.

A. Registering a business

1. Scope of examination by the registry

2. As has been observed in A/CN.9/WG.I/WP.93, the method through which a business is registered varies from State to State,[1] ranging from those that tend to regulate less and rely on the legal framework that governs business behaviour, to States that opt for ex ante screening of businesses before their registration is allowed.[2] In this regard, a jurisdiction aiming at reforming the registration system must first decide which approach it will take so as to determine the scope of the examination that will have to be carried out by the registry. The jurisdiction may thus choose to have a system where the registry only records facts or a system where the registry is required to perform legal verifications and decide whether the business meets the criteria to register.

3. Evidence shows that the approach taken in a jurisdiction may often be a result of the particular State's legal tradition. Jurisdictions opting for ex ante verification of legal requirements and authorization before businesses can register often have court-based registration systems in which the judiciary, notaries and lawyers perform a key role in the registration process.[3] Other States structure their business registration as a declaratory system, in which no ex ante approval is required before business start-up and where registration is an administrative process. In such declaratory systems, verification of an event's legal status is made after it has taken place, and registration is under the oversight of the Government, which can choose whether to operate the system directly or to adopt other arrangements (see para. 24 of A/CN.9/WG.I/WP.93).[4]

4. Both the approval and the declaratory system have their advantages and disadvantages. Approval systems are usually said to help prevent errors or omissions prior to registration. Notaries and/or lawyers and courts exercise a formal review and, when appropriate, also a substantive review of the pre-requirements for the registration of business. By contrast, declaratory systems are said to be easier to manage and better-suited to deter corruption by avoiding opportunities for official decisions to be made with a view towards personal gain; furthermore, they seem to have lower maintenance costs.

2. Legal forms of entity registered and requirements to form a new entity

5. Not only must States decide on the scope of examination that should be conducted by a business registry, they must also define which commercial entities are required to register under the applicable law. As noted in paragraph 12 of A/CN.9/WG.I/WP.93, one of the key objectives of business registration is to permit businesses of all sizes and legal forms to be visible in the marketplace and to operate in the commercial environment. This objective is of particular importance in assisting MSMEs to participate effectively in the economy, and States may wish to consider requiring or permitting businesses of all sizes and legal forms to register in an appropriate business registry, or creating a single business registry that is tailored to accommodate registration by a range of different sizes and different legal forms of business.

6. Laws requiring the registration of businesses vary greatly from State to State, but one common aspect is that they all require registration of a particular legal form of economic entity. The nature of the legal forms of economic entity that are required or permitted to register in a given jurisdiction is, of course, determined by the applicable law.[5] In some legal traditions, it is common to require registration of all businesses, including sole proprietorships, professionals, and government bodies, since they are all said to constitute

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[1] See A/CN.9/WG.I/WP.85, para. 6.

[2] See World Bank Group, Small and Medium Enterprise Department, Reforming Business Registration Regulatory Procedures at the National Level, A Reform Toolkit for Project Teams, 2006, page 2.

[3] See A/CN.9/WG.I/WP.85, para. 9 and Investment Climate (World Bank Group), Innovative Solutions for Business Entry Reforms: A Global Analysis, 2012, pages 25-26.

[4] Ibid., and supra footnote 2, page 28.

[5] See L. Klapper, R. Amit, M. F. Guillén, J. M. Quesada, Entrepreneurship and Firm Formation Across Countries, 2007, pages 6 ff.

an economic entity;[6] while in other legal traditions, only corporations and similar entities (with legal personality and limited liability) are required to register.[7] This approach can exclude businesses like partnerships and sole proprietorships from mandatory registration, but variations on these regimes also exist, and some jurisdictions permit voluntary registration for businesses that would not otherwise be required to register, for example, because they are not economic entities or because they are not engaged in business activities.[8]

7. In several jurisdictions, when entrepreneurs decide to establish and to register their business, they tend to choose the simplest legal form available to them in order to minimize the regulatory and financial burden, as well as the expense, required to establish the business. A sole proprietorship or similar type of business with low legal and regulatory requirements is thus often the most popular business form. Some jurisdictions require that even simple business forms such as these be registered, and some jurisdictions have carried out reforms to facilitate the registration process for sole proprietorships or for simplified new types of limited liability entities.[9]

(a) Registration requirements

8. As a general rule, businesses must meet certain requirements in order to be registered; those requirements are determined by the State based on its legal and economic framework. In addition, the registered information required may vary depending on the legal form of business being registered — i.e. sole proprietorships and simplified business entities may be required to submit relatively simple details in respect of their business, while businesses such as public and private limited liability companies will be required to provide more complex and detailed information. Although the requirements for registration of each legal form of business will vary according to the applicable law of the relevant jurisdiction, there are, however, some requirements that can be said to be common for all businesses in most States, both during the initial registration process and throughout the business life of the enterprise.[10]

9. General requirements for the registration of all legal forms of enterprise are likely to include the following:

(a) Payment of any required fees to the registry; and

(b) Providing information in respect of the business and its founders, such as:

(i) The name and address of the business;

(ii) The name(s) and address(es) of the person(s) registering the business; and

(iii) The legal form of business that is being registered.

10. Other information that may be required for registration, depending on the jurisdiction of the registry and the legal form of the business being registered, can include:

(a) The names and addresses of the board of directors;

(b) The rules governing the operation or management of the business; and

(c) Information relating to the capitalization of the business.

11. Once a business has been registered, in order for it to remain validly registered, certain information is typically required by the registry throughout the course of the business life of the entity. Information required in this regard usually includes:

(a) (i) Changes in the name, address or legal form of the business;

(ii) Changes in the name(s) and address(es) of the person(s) founding the business;

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[6] See A/CN.9/825, para. 23.

[7] See supra footnote 5.

[8] Ibid.

[9] See A/CN.9/WG.I/WP.85, para. 51.

[10] It should be noted that information required for the registration of a simplified business entity is likely to be a less comprehensive list, and that this portion of the materials should be made consistent with what the Working Group agrees in respect of the simplified business entity.

(iii) The submission of financial information in respect of the business, depending on its legal form; and

(iv) Changes in any of the information that was initially required for the registration of the business;[11] and

(b) In some jurisdictions, information concerning insolvency proceedings, liquidation or mergers (see paras. 18-19 below) must also be registered.

12. Depending on the legal form of the business being registered, other details may be required in order to finalize the registration process. In some jurisdictions, proof of the share capital, the name of the chairperson, the identity of the person(s) or entity(ies) who may legally bind the business, information on the type of business engaged in by the entity, and agreements in respect of non-cash property constitute information that may also be required by registries in respect of certain legal forms of business.[12] In addition, in several jurisdictions, registration of shareholder details and any changes therein may be required; in a few cases, registration of shareholder details is carried out by a different authority.[13] In some other jurisdictions, it is now practice to register beneficial ownership details and changes in those details,[14] although the business registry is not always the authority entrusted with this task.[15] Transparency in the beneficial ownership of businesses can help prevent the misuse of corporate vehicles, including MSMEs, for illicit purposes.

13. The requirements enumerated above may be applicable to all businesses, regardless of their size. As previously noted, in order to facilitate MSME registration, States should consider including a range of possible legal forms in their business registry systems, and should adapt their registration requirements according to the level required by the complexity of each legal form. The goal should be for States to provide simplified registration procedures and only the minimum necessary requirements for MSMEs and simplified legal forms of business. The draft legislative text on simplified business entities that is currently being discussed by this Working Group will assist States in identifying such minimum necessary requirements (see A/CN.9/WG.I/WP.83, A/CN.9/WG.I/WP.86 and A/CN.9/WG.I/WP.89).

(b) Enforcement mechanisms

14. Requiring businesses to submit certain data is, however, not sufficient to ensure an efficient registration system. The State should have the ability to enforce proper compliance with initial and ongoing registration requirements. States with high quality registration systems usually possess enforcement mechanisms in respect of the information that the business is required to file throughout its life cycle as well as additional required reporting.[16] In some jurisdictions, for instance, law establishes sanctions on businesses that fail to submit timely or complete and accurate information (see also paras. 24-27 below).[17]

3. Registration of branches

15. Most States require the registration of national branches of a foreign company in order to permit those branches to operate in their jurisdiction and to ensure the protection of

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[11] See supra footnote 5, page 7.

[12] See The International Business Registers Report 2015, pages 26 ff. The Report was prepared by the following registry organizations: Association of Registrars of Latin America and the Caribbean (ASORLAC); Corporate Registers Forum (CRF); European Commerce Registers' Forum (ECRF); and International Association of Commercial Administrators (IACA).

[13] European Commerce Registers' Forum, International Business Registers Report 2014, page 26.

[14] See supra footnote 12, page 37.

[15] A "beneficial owner" is the natural person(s) who ultimately owns or controls a legal person or arrangement even when the ownership or control is exercised through a chain of ownership or by means of control other than direct control. These vehicles may include not only corporations, trusts, foundations, and limited partnerships, but also simplified business forms, and may involve the creation of a chain of cross-border company law vehicles created in order to conceal their ownership. See also, A/CN.9/825, paras. 47-55. The Working Group may wish to consider whether further details on this topic should be included in these materials, possibly as an annex.

[16] See supra footnote 5, page 8.

[17] See Ireland, in D. Christow, J. Olaisen, Business Registration Reform Case Studies, Ireland, 2009, pages 15 ff.

domestic creditors, businesses and other interested parties that deal with those branches. Registration of a company branch might not appear to be immediately relevant for micro- and very small entrepreneurs, whose main concern is more likely to be to consolidate their business without exceeding their human and financial capacity. However, this issue is relevant for those slightly larger business entities that, being of a certain size and having progressed to a certain volume of business, look to expand beyond their local or domestic market. In addition, even micro- and very small businesses may be highly successful and may wish to expand their operations. For such businesses, establishing branches abroad may be both an attractive goal and a realistic option. Although it may seem to be a daunting prospect, in fact, when a business expands to another State, it may find that setting up a foreign branch is cheaper and requires fewer formalities than establishing a local subsidiary.[18]

16. There may be considerable differences among those jurisdictions that register foreign company branches in terms of what triggers the obligation of those companies to register their branches. Some approaches are based on a wide interpretation of the concept of foreign establishment, for example, those which include not only a branch, but also any establishments with a certain degree of permanence or recognizability, such as a place of business in the foreign State.[19] Other approaches define more precisely the elements that constitute a branch which needs to be registered. They may include the presence of some sort of management, the maintenance of an independent bank account, the relation between the branch and the parent company, or the requirement that the parent company has its main office registered abroad.[20] Not all States define the notion of branch in their legislation, or state under what circumstances a foreign establishment in the State should be registered: laws may simply refer to the existence of a foreign branch. In these cases, registries may fill the gap by issuing guidelines that clarify the conditions under which such a registration should be carried out.[21] When this occurs, the guidelines should not be seen as an attempt to legislate by providing their own definition of branch, but rather as a tool to explain the features required by a branch of a foreign business in order to be registered.

17. When simplifying or establishing their business registration system, States should consider enacting provisions governing the registration of branches of foreign companies. Those provisions should address, at minimum, issues such as timing of registration, disclosure requirements, information on the persons who can legally represent the branch and the language in which the registration documents should be submitted.[22]

4. Status of the business and deregistration

18. One important aspect that States should take into account when establishing a business registration system is whether the registry should also be required to record certain procedures that affect the status of the business, for example bankruptcy, merger, winding up, or liquidation. The approach to such changes in status appears to vary from State to State.

19. Evidence suggests that registering bankruptcy, mergers, winding-up and liquidation may be performed by some registries, although this is subject to considerable regional variation. For instance, in some more developed States, registries are often also entrusted with the registration of bankruptcy cases. In developing States or economies in transition, registries tend not to perform this function. In certain jurisdictions, registries are also given the task of registering mergers as well as the winding-up and liquidation of businesses.[23]

20. In addition, States should consider the role of the registry in deregistering a business. In most jurisdictions, deregistration of a business is included as one of the core functions of the registry. It appears to be less common, however, to entrust the registry with the decision whether or not a business should be deregistered.[24] In jurisdictions where this function is

[18] See K. E. Sørensen, Branches of companies in the EU: balancing the Eleventh Company Law Directive, national company law and the right of establishment, 2013, page 9.
[19] Ibid., page 12.
[20] Ibid.
[21] Ibid., page 13.
[22] The Working Group may wish to consider whether further details on this topic should be included in a future annex to these materials.
[23] See supra footnote 13, pages 33 ff.
[24] Ibid. and see supra footnote 12, pages 40 ff.

included, statutory provisions determine the cause of the deregistration and the procedures to follow. In order to deregister a business, registries are generally required to have reasonable cause to believe that a registered enterprise has not carried out business or that it has not been in operation for a certain period of time. Such a situation may arise, for example, when a business has failed to submit its annual statutory filings within a certain period following the filing deadline. In several States, before commencing deregistration procedures, the registry must inform the business in writing of its intended deregistration and allow time for the business to reply. Only if the registry receives a reply that the business is no longer active or if no reply is received within the time prescribed by the law, will the business be struck from the registry. A common requirement for a deregistration to become effective is that notice of it be published (see also para. 34 below).[25]

B. Maintaining the information contained in the business registry

21. Maintaining high quality, current and reliable information is imperative for the business registry in order to make the information useful for the registry users and to establish users' confidence in business registry services. This applies not only to the information provided when applying to register a business, but also to the information that the entrepreneur submits during the lifetime of the business. Moreover, in several States, the information deposited in the registry, or part of that information, has third party effectiveness, that is by virtue of registration, all parties dealing with a business are deemed to have had notice of such information. In such States the applicable law or regulation usually prescribes that the information provided to the registry must be accurate and correct. However, even in those States where the registry does not validate the veracity of the information provided by the registrant, it is important that the information meets certain requirements in the way it is submitted to the registry and then made available to searchers. For these reasons, States should devise provisions that allow the registry to operate according to principles of transparency and efficiency in the way information is collected, maintained and released.

1. General considerations concerning the registration of the business and any subsequent changes

22. As mentioned in paragraphs 2 to 3 above, a series of checks and control procedures are required to ensure that the necessary information and documentation is provided in order to register the business; however, the extent of such controls vary according to the jurisdiction. In those legal regimes where the registry performs simple control procedures, if all the basic legal and administrative requirements established by the domestic legal and regulatory framework are met, the registry must accept the information as filed and record it. When the legal regime requires a more thorough verification of the information filed, registries may have to check whether any mandatory provisions of the law are infringed by the content of the application and documentation submitted, or any changes thereto. Whatever approach is chosen, States should define in their legislative or regulatory framework which requirements the information and documentation to be submitted to the registry should meet. In certain jurisdictions, the registrar is given the authority to impose requirements as to the form, authentication and manner of delivery of documents to be submitted to the registry.[26] In keeping with the discussion of Working Group I on the legal questions surrounding the simplification of incorporation,[27] it would be advisable, when registration concerns an MSME, that such requirements should be kept at a minimum in order to facilitate the registration process of MSMEs. This will reduce administrative hurdles and help in promoting business registration among such businesses.

23. Registration of MSMEs would also be facilitated if the registry is granted the power to accept and register documents that do not fully comply with the requirements for proper submission and to rectify clerical mistakes in order to bring the entry in the register into

[25] See Lexis PSL Corporate, Striking off and dissolution — overview, www.lexisnexis.com/uk/lexispsl/corporate/document/391387/55YB-2GD1-F186-H4MP-00000-00/Strikingoffanddissolutionoverview. See also T. F. MacLaren, in Eckstrom's Licensing in Foreign and Domestic Operations: Joint Ventures, 2015 [as it appears in Westlaw], page 30.

[26] See, for instance, Section 1068, UK Companies Act 2006.

[27] See A/CN.9/WG.I/WP.83, A/CN.9/WG.I/WP.86 and A/CN.9/WG.I/WP.89.

conformity with the documents submitted by the registrant. This will avoid imposing the potentially costly and time-consuming burden of requiring the registrant to resubmit documents. When the registry is entrusted with these responsibilities, however, the law or the regulation should also determine under which conditions the responsibilities should be discharged. When the information provided is not sufficient to comply with the requirements for registration, the registry should be granted the authority to request from the business additional information in order to finalize the registration process.

24. States should provide that registries may reject the registration of an application if it does not meet the requirements prescribed by the legislative and/or regulatory framework for registration. This approach is implemented in several jurisdictions regardless of their legal tradition. In order to prevent any arbitrary use of such power, however, the registry must provide, in writing, a notice of the rejection of an application and the reasons for which it was rejected, and the registrant must be allowed time to appeal against that decision.

25. In cases where the application is submitted in paper form and the reason for its rejection is that the application was incomplete or illegible, there might be some delay between the time of receipt of the application by the registry and the time of communication of its rejection, and the reasons therefor, to the registrant. In a registry system that allows registrants to electronically submit applications and the relevant documents directly to the registry, the system should be designed, when permitted by the State's technological infrastructure, so as to automatically reject the submission of incomplete or illegible applications and to display the reasons for the rejection on the registrant's screen.

26. In order to ensure that reliable information is always submitted to the registry, States should also adopt provisions that establish the responsibility of the registrant for any misleading, false or deceptive information that the registrant has knowingly, or recklessly, submitted to the registry. Adoption of similar provisions might be particularly relevant in States that chose business registration systems in which the registry only records facts and does not perform any ex ante legal verification.

27. Once the information is collected and properly recorded, it is imperative that it be kept current in order to be of value to its users. It would thus be advisable for States to have in place provisions that enable the registration system to achieve this purpose. Evidence shows that different methods can be adopted. One approach (also see para. 78 below) is for the State to require that the business re-register at regular intervals. Another similar approach is to require the business to file at regular intervals, for example once a year, an updating declaration stating that certain core information contained in the register concerning the business is accurate or, as applicable, stating what changes should be made. Although these approaches may be valuable as a means of identifying dormant companies that may be struck off the registry and may not necessarily be burdensome for larger business with sufficient human resources, they could be quite demanding for less generously staffed MSMEs, in particular if there is a cost associated with making such submissions. A third approach, which seems preferable as it better takes into account the needs of MSMEs, is for the State to update the information in the registry only when a change in any piece of the registered information occurs. The risk of this approach, which is largely dependent on the registrant complying with the rules, may be that the filing of changes is delayed or does not occur. To prevent this, States could adopt a system pursuant to which regular prompts are sent (electronically, in the best case scenario) to businesses to request updated information. Such an approach might be preferable for dealing with less experienced MSMEs than the alternative, through which States could adopt provisions declaring the liability of the registrant on conviction to a fine if the change is not filed within the time prescribed by the law or the regulation. In addition, enhancing the interconnectivity and the exchange of information between business registries and other public registries would help mitigate any potential deterioration of the information collected in the business registry.

28. Regardless of the approach chosen to maintain an updated information record, it would be advisable that the formalities for updating MSME records be as simple as possible. This could involve extending the period for such businesses to declare a change; harmonizing the information needed when the same information is required in various declarations; or exempting MSMEs from certain obligations in specific cases.

2. Period of effectiveness of registration

29. States may adopt one of two approaches in terms of determining the period of effectiveness of the registration of a business. Under the first approach, the registration of the business is subject to a maximum period of duration established by law. It follows that unless the registration is renewed, the registration of the business will expire on the date stated in the certificate of registration or upon the termination of the business.[28] As seen in paragraph 27 above, while this approach provides certainty as to the existence of the business and the reliability of the information provided, it however imposes a burden on the registrant to regularly re-register or risk termination of the business. This danger could be particularly onerous for MSMEs, that often operate with limited staff and knowledge of the applicable rules. In addition, if more information or documentation is required and not furnished by the applicant, renewal of the registration could also be refused, thus further threatening the existence of the business.

30. Under the second approach, no maximum period of validity is established for the registered business and the registration is effective until the business ceases to operate and is deregistered. While this approach may provide less certainty in terms of the currency of the information in the registry, it simplifies the intake process and both encourages and reduces the burden of registration on businesses, in particular on MSMEs.

3. Time of effectiveness of registration and of changes to the registered information

31. In the interests of transparency and predictability of a business registration system, States should determine the time when the registration of a business or any later change to the information recorded is effective. It would be advisable for the registration to become effective when the information contained in the application or in the notification of changes is entered into the registry record rather than when the information is received by the registry. In addition, the effective time of registration of an application or a later change should be indicated in the registry record relating to the relevant business entity.

32. As mentioned in paragraphs 29 to 30 of A/CN.9/WG.I/WP.93, States are advised to adopt registries supported by the use of ICT. If the registry is designed to enable users to electronically submit information, whether an application or a change, without the intervention of registry staff and to use online payment methods for the registration, the registry software should ensure that the information becomes effective immediately or nearly immediately after it is transmitted. As a result, any delay between the electronic transmission of the information and the effective time of registration will be eliminated.

33. In registry systems that permit or require registration information to be submitted to the registry using a paper form, registry staff must enter the information on the paper form into the registry record on behalf of registrants. In these systems, there will inevitably be some delay between the time when the paper form is received in the registry office and the time when the information set out on the form is entered into the registry record. In these cases, the domestic legislative or regulatory framework should provide that the registry must enter the information received into the registry record as soon as practicable and possibly set a deadline by which the application or the changes should be registered. In a hybrid registry system which permits information to be submitted in both paper and electronic form, registrants who elect to use the paper form should be alerted that this method may result in some delay in the time of effectiveness of registration.

4. Time of effectiveness of business deregistration

34. Transparency is equally required with regard to the deregistration of a business. The time of effectiveness of the cancellation should be established in a law or regulation, which should distinguish between deregistration on registrar's initiative and deregistration at the request of the registrant. While the requirements of these two types would vary, in both cases

[28] It should be noted that the general law of the enacting State for calculating time periods will apply to the calculation of the period of effectiveness, unless the applicable law or regulation provides otherwise. For example, if the general law of the enacting State provides that, if the applicable period is expressed in whole years from the day of registration, the year runs from the beginning of that day.

it would be advisable that the notice of deregistration issued by the registry states the date of effect of the deregistration, in addition to the reasons therefor. Moreover, in cases where deregistration is decided by the registrar, the registrant should be given sufficient time to oppose that decision. As in the case of the application for registration or a subsequent change, the effective date and time of registration of a notice of deregistration should be indicated on the registry record relating to that deregistration. If the notice of the deregistration is submitted electronically, the time between receipt of that notice and amendment of the information on the registry record will be very short. If notice of deregistration is submitted in paper form, there will be a greater time lag.

5. Preservation of records

35. Those States with paper-based or hybrid registration systems, should adopt rules that specify a minimum period of time for which documents submitted in hard copy should be kept in the registry. The length of the preservation period would be influenced by the way the registry operates, i.e. if it is an ICT supported registry or whether the system is paper-based or is a hybrid system.

36. In the case of ICT supported registries, original documents submitted in hard copies could be kept for a short period (for example, not over 5 years after they were received by the registry) providing that the information contained in such documents has been recorded in the registry.

37. In the case of a paper-based registry which cannot convert the documents received into an electronic form or other non-paper forms (for instance, microfilm) that allow transmission, storage, reading, and printing of the documents, the records will have to be preserved until the business is deregistered and for an appropriate period of time after deregistration has occurred. It will be for the State to decide the length of such an appropriate period. States may also decide to apply their general rules on preservation of public documents.

6. Preserving the integrity and security of the registry record

38. As already noted, a registry can be organized in several ways, including delegating the day-to-day operation of the registry to a private entity. However, for the purposes of establishing public trust in the registry, the State should always retain the responsibility of monitoring the operation of the registry, the ownership of the registry record and, if necessary, of the registry infrastructure (see para. 44 of A/CN.9/WG.I/WP.93).

39. Other steps to ensure the integrity and security of the registry record include: (a) requiring the registry to request and maintain the identity of the registrant; (b) obligating the registry to promptly notify the applicant business about the registration; and (c) eliminating any discretion on the part of registry staff to reject users' access to registry services. With regard to (b), however, it can be noted that, in order to improve the efficiency of the business registries, some States have introduced "silence is consent" rules pursuant to which when a business does not receive a decision on its registration application within a certain time limit (established by law or regulation), it is considered to be registered.[29]

40. States may also consider adopting additional measures in order to ensure that the integrity of the registry record is preserved. A short account is provided in the paragraphs below.

41. First, by way of law or regulation, it should be established that registry staff may not alter or remove registered information, except as specified in the law or the regulation and that any change can be made only in accordance with the law or the regulation. As seen in paragraph 23 above, however, to ensure the smooth functioning of the registry, in particular when registrants submit registration information using paper forms, it would be advisable that the registry be authorized to correct clerical errors made in the forms submitted. This would, of course, include any errors made by registry staff in entering the registration information on the paper forms into the registry record. If this approach is adopted, notice of the correction should promptly be sent to the registrant (and a notification of the nature of the correction and the date it was effected should be added to the public registry record

[29] See A/CN.9/WG.I/WP.85, para. 50.

linked to the relevant business). Alternatively, the State could require the registry to notify the registrant of its error and that person could then submit an amendment free of charge.

42. Second, to protect the registry record against the risk of physical damage or destruction, the State should maintain back-up copies of the registry record. Any rules governing the security of other public records in the enacting State might be applicable in this context.

43. 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 registered 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 infrastructure so as to ensure that it can preserve the information and the documents concerning the cancelled business for as long as prescribed by the law or the regulation.

44. Fourth, it should be made clear to registry staff and registry users, inter alia, that 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, nor should staff make recommendations on which intermediary (if any) the entrepreneur should choose to perform its registration or any amendments thereto. However, registry staff should be able to give practical advice with respect to the registration and search processes. In States that opt for a judiciary-based registry system, this measure should of course not be applicable to the judges, notaries and lawyers entrusted with the registration procedures.

45. Finally, as already discussed, the registry should be designed, if possible, to enable registrants and searchers to directly submit information for registration and search requests electronically as an alternative to using paper forms and having registry staff enter the registration or conduct a search on their behalf. Under this approach, users bear the 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. Consequently, the potential for corruption or misconduct on the part of 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.

7. Liability of the registry

46. The State, by way of law or regulation, should provide for the allocation of responsibility for loss or damage caused by an error or negligence in the administration or operation of the registration and searching system.[30]

47. As noted above, the registrants or users bear responsibility for any errors or omissions in the information contained in an application or search request they submit to the registry, and carry the burden of making the necessary corrections or amendments. If applications and search requests are directly submitted by users electronically without the intervention 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 users. However, if application forms or search requests are submitted using a paper form, the 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 information contained in the application into the registry record or to correctly carry out search requests.

48. While it should be made clear that registry staff are not allowed to give legal advice (subject to the type of registration system chosen), the State will also need to address whether and to what extent it should be liable if registry staff nonetheless provide incorrect or misleading information on the requirements for effective registration and searching or on the legal effects of registration.

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[30] In Norway, for instance, the registrar is liable if it supplies incorrect information in transcripts, certificates or public notices, which causes damage to persons who relied on the incorrect information. See The Business Enterprise Registration Act (Act of 15 June 2001, No. 59 and Act of 19 December 2003, No. 120), § 10-3, available at www.brreg.no.

49. If States accept legal responsibility for loss or damage caused by system malfunction or error or misconduct by registry staff, they may consider whether to allocate part of the registration and search fees collected by the registry to a compensation fund to cover possible claims, or whether the claims should be paid out of general revenue. States might also decide to set a maximum limit on the monetary compensation payable in respect of each claim.

8. Confidentiality

50. To maintain the integrity and reputation of the registry as a trusted collector of information that has public relevance and, in some States, legal effect, and while access to the registries should be granted to all interested entities and to the public at large (see section C below), access to sensitive data should be controlled to avoid any breach of confidentiality. States should thus put in place proper disclosure procedures. They can do so by adopting provisions that list which information is not available for public disclosure or they can follow the opposite approach and adopt provisions that list the information that is publicly accessible and at the same time state that information that is not listed cannot be disclosed.

9. Language of the documents to be submitted

51. When entering information, one important issue for the State to consider is the language in which the required documents or electronic records must be submitted. Language can be a barrier and can cause delays in registration if documents need to be translated into the language of the registry.[31] On the other hand, a business can be registered only if the content of the documents or electronic records can be verified by the registry staff. For this reason, it is not common for jurisdictions to allow documents or electronic records to be submitted in a foreign language. States, however, can consider whether such documents can be accepted. There are some States which allow all or some documents to be submitted in a foreign language. Should States opt for this approach, it would be advisable to establish that the documents or electronic records must be accompanied by a sworn-in court interpreter's translation into the registry's national language(s) or any other form of authenticating the documents or electronic records that is used in the State.[32]

52. Another issue is whether the documents submitted to the registry include information, such as names and addresses, which uses a set of characters different from the characters used in the language of the registry. In this case, the State should provide guidance on how the characters are to be adjusted or transliterated to conform to the language of the registry.

53. A number of States have more than one official language. In these States, registration systems are usually designed to accommodate registration in all official languages. To ensure that information on businesses operating in the State is available to all registrants and searchers, different approaches can be adopted. States may require parties to make their registration in all official languages; or they may permit filing in one language only, but then require the registry to prepare and register duplicate copies in all official languages. Both these approaches, however, may be quite costly and invite error. A more efficient way of dealing with multiple official languages, any one of which may be used to register, would be to allow registrants to carry out registration in only one of those official languages. Such a language could be that of the province or the region where the registry office or the registry branch is located and where the registrant has its place of business. This approach would also take into account the financial constraints of MSMEs and, according to circumstances, possible literacy issues, as entrepreneurs may not be equally fluent in all official languages spoken in a State. When such an approach is chosen, however, States should ensure that the registration and search interface on the website are available in all official languages of the registry. Whatever approach is taken, however, States will have to consider ways to address this matter so as to ensure that the registration and any subsequent change can be carried out in a cost effective way for both the registrant and the registry and, at the same time, ensure that information can be understood by the registry's users.

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[31] See supra footnote 13, page 23.
[32] Ibid., page 24.

C. Making information available

54. In order for the business registries to facilitate trade and interactions between business partners, the public and the State, easy access to business services should be provided both to businesses that want to register and to interested stakeholders who want to search registered information.

1. Information to register a business

55. For business wanting to register, surveys often show that many microbusinesses operating in the extra-legal sector are not aware of the process of registering or of its costs: often they overestimate time and cost, even after efforts to simplify the registration process.[33] Easily retrievable information on the registration process and the relevant fees can reduce compliance costs, and make the outcome of the application more predictable, thus encouraging entrepreneurs to register. Restricted access to such information, on the contrary, might require meetings with registry officials in order to be apprised of the registration requirements, or the involvement of intermediaries to facilitate the registration process.

56. In jurisdictions with developed ICT infrastructures, information on the registration process and documentation requirements should be available on the registry website or the website of the government agency overseeing the process. As already discussed, States should consider whether the information included on the website should be offered in a foreign language in addition to official and local languages. States with more than one official language should make the information available in all such languages (see para. 53 above).

57. Lack of new technology, however, should not prevent access to information that could be ensured through other means, such as the posting of communication notes at the relevant agency or dissemination through public notices. In some jurisdictions, for instance, it is required to have large signs in front of business registry offices stating their processes, time requirements and fees.[34] In any event, information for businesses that want to register should be made available at no cost.

2. Operating hours

58. The approach to the operating days and hours of the registry depends on whether the registry is designed to permit direct electronic registration and searching by users or whether it requires their physical presence at an office of the registry. In the former case, electronic access should be available continuously except for brief periods to undertake scheduled maintenance; in the latter case, the registry offices should operate during reliable and consistent hours that are compatible with the needs of potential registry users. In view of the importance of ensuring ease of access to registry services for users, these recommendations should be incorporated in the law or regulation governing business registration or in administrative guidelines published by the registry, and the registry should ensure that its operating days and hours are widely publicized.

59. If the registry provides services through a physical office, the minimum operating days and hours should be the normal business days and hours of the public offices in the State. To the extent that the registry requires or permits the registration of paper-based submissions, the registry should be aimed at ensuring that the paper-based information is entered into the registry record and made available to searchers as soon as practicable, but preferably on the same business day that the information 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 based information or search requests may be set independently from the business hours.[35] Alternatively, the registry office could continue to

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[33] M. Bruhm, D. McKenzie, Entry Regulation and Formalization of Microenterprises in Developing Countries, 2013, pages 7-8.

[34] See Bangladesh and Guinea cited in A/CN.9/WG.I/WP.85, para. 31.

[35] For example, the law, regulation or administrative guidelines of the registry could stipulate that, while the registry office is open between, for example, 9 a.m. and 5 p.m., all applications, changes and search requests must be received by an earlier time (for example, by 4 p.m.) so as to ensure that the registry staff has sufficient time to enter the information included in the application into the

receive paper forms (regardless if they are applications or changes) and search requests throughout its business hours, but set a "cut off" time after which information 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 application or search request.

60. The law, regulation or administrative guidelines of the registry could also enumerate, in either an exhaustive or an indicative way, the circumstances under which access to the registry services may temporarily be suspended. An exhaustive list would provide more certainty, but there is a risk that it might not cover all possible circumstances. An indicative list would provide more flexibility but less certainty. Circumstances justifying a suspension of registry services would include any event that makes it impossible or impractical to provide those services (such as force majeure, for example, fire, flood, earthquake or war, or if the registry provides users with direct electronic access, a breakdown in the Internet or network connection).

3. Modes of access to the registry

61. Working Paper A/CN.9/WG.I/WP.93 and this Addendum have highlighted in several paragraphs the benefits of an ICT based registration system over a paper-based one. Most obviously, one of the advantages of the use of modern technologies is that they simplify access to the registry, whether this means filing an application, submitting information on a change or performing a search. This is especially true when the systems authorize direct electronic submission of registrations and the electronic submission and retrieval of search requests and search results by clients and stakeholders. Direct access significantly reduces the costs of operation and maintenance of the system and also enhances the efficiency of the registration process by putting direct control over the timing of the business registration into the hands of the registrant. Direct electronic access eliminates any time lags between submission of information to the registry and the actual entry into the database of that information. In some States,[36] for instance, electronic access (either from a client's premises or from a branch office of the registry) is the only available mode of access for both registration and searching. As the data to be registered is submitted in electronic form, no paper record is ever generated. A fully electronic system of this kind places the responsibility for accurate data entry directly on registrants. As a result, staffing and operational costs of the registry are minimized and the risk of registry personnel making an error in transcribing documents is eliminated (see paras. 46-49 above).

62. Other States provide for electronic registration and searches but also give clients the option of submitting a registration or search request in other forms. The information is distributed through other channels that can complement the use of the Internet or that may even represent the main method of distribution if an online registration system is not yet fully developed. The following means of sharing information are also used in some States:

(a) Telephone services to provide information on registered businesses and product ordering;

(b) Subscription services to inform subscribers about events pertaining to specified businesses;

(c) Ordering services to enable access to various products, most often using an Internet browser; and

(d) Delivery services to convey various products, such as transcripts of registered information on a business, paper lists, or electronic files with selected data.

63. However, in many States, electronic submission is by far the most prevalent mode of data submission and it is used in practice for the vast majority of registrations. It is thus recommended that, to the extent possible, States should establish a business registry that is computerized and that permits direct electronic access by registry clientele. Nonetheless, given the practical considerations involved in establishing an electronic registry, multiple

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registry record or conduct the searches.

[36] See A/CN.9/WG.I/WP.85, para. 44.

modes of access should be made available to registry clientele at least in the early stages of implementation in order to reassure users who are unfamiliar with the system. Finally, to facilitate use, the registry should be organized to provide for multiple points of access for both electronic and paper submissions and search requests. However, even where States continue to use paper-based registries, the overall objective is the same: that is, to make the registration and searching process as simple, transparent, efficient, inexpensive and accessible as possible.

4. Access to search services

64. In keeping up with its functions as a collector and disseminator of business-related information, the registry should make publicly available all information on a registered business that is relevant for those that interact with the business (whether they be public authorities or private entities) to be fully aware of the business identity and status of that enterprise. This will allow interested users to make informed decisions about who they wish to do business with, and for organizations and other stakeholders to gather business intelligence. This function of a business registry is demonstrably valuable to the economy of a State. Moreover, in several States the information deposited in the registry, or part of that information, is of a legal nature and has third-party effectiveness, so that searchers of the registry can rely upon the information as it appears on the registry, and assert that information against third parties.

65. While providing public disclosure of the registered information is an approach followed in most States, the way in which stakeholders access information, the format in which the information is presented and the type of information available, varies greatly from State to State. This variation is not only a function of the technological advances of a State, but of an efficient accessing framework, including that provided by national legislation.[37] For instance, an aspect on which States may differ concerns the criteria that may be used to search the registry.

66. This Working Paper takes the view that in order to achieve the objectives of a business registration system, a registry must facilitate access to the registered information by the general users, which enhances certainty of and transparency in the way the registry operates. Because of its importance, this principle of public access to the information deposited in the registry should be stated in the law or the regulation governing business registration.

67. Further, in order to facilitate dissemination of information, information should be made available at no cost or for a low cost. This approach may be greatly facilitated, as seen in paragraph 45 above, by the development of ICT supported registries that allow users to submit applications or make searches electronically without the need to rely on intermediation by registry personnel. Such an approach is also much cheaper for the registry. Where registration systems are paper-based, customers must either visit the registry office and conduct the research on site (whether manually or using ICT facilities that are available) or the information is sent to them on paper. In both cases, registry staff may need to assist the customer to locate the information and prepare it for disclosure. As previously noted, this is associated with higher costs, delay and the potential of error and liability for the registry. Making registered data available electronically would also allow for the provision of regularly updated information, as compared with paper-based information which can sometimes be outdated by the time it reaches the intended user.

(a) Entitlement to search the registry

68. Evidence shows that in most States public access to search the registry is generally unqualified. Permitting full public access does not compromise the confidentiality of information, which can be protected by allowing users to search only certain types of information. This approach avoids any unnecessary cost and delay in initiating a search.

69. It is not recommended that States restrict access to search the business registry or that searchers be required to demonstrate a reason to request access. Such a policy could seriously compromise the core function of the registry to publish and disseminate information on registered entities. Moreover, if a discretionary element is injected into

[37] See supra footnote 5, page 8.

granting an information request, equal public access to the information in the registry could be impeded, and some potential searchers might not have access to information that was available to others.

70. For these reasons, it is recommended that the registry should be fully accessible to the public, subject only to necessary confidentiality restrictions in respect of certain information.

71. The applicable business registration law or regulation can however make access to the registry subject to certain procedural requirements, such as requiring that users submit the search request in the prescribed form and pay, or make arrangements to pay, any prescribed fee. If a searcher does not use the prescribed registry form or pay the necessary fee, the searcher may be refused access to the search services of the registry. As in the case of refusing access to registration services, the registry should be obliged to give the specific reason for refusing access to search services as soon as practicable so that the searcher can remedy the problem.

72. Unlike the approach adopted for registrants, the registry should not request and maintain evidence of the identity of a searcher as a precondition to obtaining access to the search services of the registry since a searcher is merely retrieving information contained in registered information from the public registry record. Accordingly, identification evidence should be requested of searchers only if it is necessary for the purposes of collecting search fees, if any.

73. The applicable law or regulation should also 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 as soon as practicable. In registry systems that permit registrants to electronically submit search requests to the registry, the software should be designed to automatically prevent the submission of search requests that do not include a legible search criterion in the designated field and to display the reason for the refusal on the electronic screen.

(b) Type of information provided

74. Information can be of particular value to stakeholders if it is available to the public, although the type of registered information that is available will depend on the legal form of the business being searched. Information available from the business registry that may be of value includes: the company profile and company officers (directors, auditors); annual accounts (in both e-format and paper format); a list of the company's business divisions or places of business; the certificate of registration or incorporation; the publication of companies' memorandums, articles of association, or other rules governing the operation or management of the business; existing company names; company history; insolvency-related information; information on the company's registration process; company share capital; related laws and regulations; certified copies of registry documents; information on registry fees; notifications of events (late filing of annual accounts, newly submitted documents, etc.).[38] According to a recent survey, information on company data, annual accounts and annual returns, as well as information about fees, are the most popular pieces of information and the most requested by the public.[39]

75. If the State is one where shareholder details are registered, access to such information would also be advisable. Most States that register shareholder details make the relevant information available to the public.[40] A similar approach can be recommended with regard to information on beneficial ownership, although, as previously noted, to date, not many jurisdictions collect information on beneficial ownership. A State may also consider making information on beneficial ownership available to the public in order to allay concerns over the potential misuse of business entities. However, the sensitive nature of the information on beneficial ownership may require the State to exercise caution before opting for disclosure of beneficial ownership without any limitation.

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[38] See, for instance, supra footnote 13, pages 77 ff.

[39] See supra footnote 12, page 131.

[40] See supra footnote 13, pages 30 ff.

(c) Bulk information

76. In addition to making individual information available, business registries in some jurisdictions also offer the possibility of obtaining "bulk" information,[41] i.e. a compilation of data on selected, or all, registered businesses. Such information can be requested for commercial or non-commercial purposes and is often used by public agencies as well as private organizations (such as banks) that deal with businesses and perform frequent data processing on them. Distribution of bulk information varies according to the needs and capability of the receiving entity. In performing this function, one approach would be for the registry to ensure the electronic transfer of selected data on all registered entities, combined with the transfer of data about all new registrations, amendments, and deregistrations during a specified period. Another option for the registry would be to make use of web-based or similar services for system-to-system integration that provides both direct access to selected data on specific entities and name searches. Direct access avoids unnecessary and redundant storage of information by the receiving organization and States where such services are not yet available should consider it as a viable option when streamlining their business registration system.[42] Distribution of bulk information can represent a practicable approach for the registry to derive self-generated funds (see also para. 76 in A/CN.9/WG.I/WP.93/Add.2).

(d) Actual use of the information

77. Simply because information is made available for use does not necessarily equate to that information being used. It would be useful for the State to devise effective means that encourage customers to actually use the information services of the registry. As previously mentioned, adoption of ICT supported registries that permit direct and continuous access to stakeholders (except for periods of scheduled maintenance) will promote the actual use of the information. Communication campaigns on the services available at the registry will also contribute to the active take-up of registry services by its potential users (see para. 42 of A/CN.9/WG.I/WP.93).

(e) Quality and reliable information

78. Another aspect that will contribute to making business registry services valuable for the public is ensuring that the information maintained in the registry is of good quality and that it is reliable. The registry can implement certain actions in order to improve the quality of the information provided, such as taking action to prevent corporate identity theft (see para. 30 of A/CN.9/WG.I/WP.93/Add.2) through the use of monitoring systems, checks by an intermediary, or establishing access through the use of passwords. Another way to ensure that the data kept in the registry is reliable would be the adoption of identity verification methods for those who deliver information to the business register and the secure signature requirements for the provision of that information (such as through the use of electronic signatures or electronic certificates). Paragraphs 27 to 30 of A/CN.9/WG.I/WP.93/Add.2 discuss these two topics extensively. A third approach that would contribute to the quality of the information deposited in the registry may be to require businesses to reregister at certain intervals, which would provide a means of confirming whether the information in the register is up to date.[43] However, adoption of such an approach could impose a considerable burden on businesses and on MSMEs in particular, as already discussed (see para. 27 above). A fourth method to protect the reliability and quality of the information would be through attention paid to the interval with which the registry is updated. Updating the registry in real time would be the preferable approach, or where this is not possible, daily updates of the registry should be ensured.[44]

(f) Accessibility

79. Finally, the registry needs to ensure that searchable information is easily accessible. Even though the information is available, it does not always mean that it is easy for

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[41] See supra footnote 3, page 14.
[42] Ibid.
[43] See supra footnote 12, page 134.
[44] Ibid., pages 119 ff.

stakeholders to access. There are often different barriers to accessing the information, such as the format in which the information is presented: if special software is required to read the information, or if it is only available in one particular format, it cannot be said to be accessible. In several States, some information is made available in paper and electronic formats; however, information available only on paper likely entails reduced accessibility. Other barriers that may make information less accessible are charging fees for it, requiring users to register prior to providing access to the information, and if there is a fee connected to the user registration. States should find the most appropriate solutions according to their needs, their conditions and their legal framework.

80. One often overlooked barrier to accessing information, whether in order to perform a search or to register a business, is a lack of knowledge of the official language(s). Providing forms and instructions in other languages is likely to make the registry more accessible to users. However, recent evidence shows that, with the exception of Europe, business registries seldom offer services in languages additional to the official language(s). [45] Although making all information available in additional languages may incur some expense for the registry, a more modest approach may be to consider making information on only core aspects of registration, for instance instructions or forms, available in a foreign language(s). In deciding which foreign language would be most appropriate, the registry may wish to base its decision on historical ties, the economic interests of the jurisdiction and the geographic area in which the jurisdiction is situated.

[45] Ibid., page 141.

(A/CN.9/WG.I/WP.93/Add.2) (Original: English)

Note by the Secretariat on key principles of business registration

ADDENDUM

Contents

III. Implementation of a business registry

1. As already noted in several paragraphs, business registration can be implemented through many different organizational tools that vary according to jurisdiction. States embarking on a reform process to simplify registration will have to identify the most appropriate and efficient solutions to deliver the service, given the prevailing domestic conditions. Regardless of the approach chosen by the State, aspects such as the general legal

and institutional framework affecting business registration, the legal foundation and accountability of the entities mandated to operate the system and the budget needed by such entities should be carefully taken into account. Evidence[1] shows that reform efforts rely to a different extent on a core set of tools, including: establishment of single interfaces for business start-up (better known as "one-stop shops"); the use of ICT; and ensuring interconnectivity between the different authorities involved in the registration process (with the possible adoption of a unique business identifier). Other important components include a domestic legal framework that is generally supportive of business registration, establishing appropriate pricing policies for the use of the registry and developing the capacity of registry operators. As outlined in paragraph 42 of A/CN.9/WG.I/WP.93, awareness-raising strategies to promote business registration will also play a key role in the in the implementation of an efficient registry.

A. A single interface for business registration and registration with other authorities: one-stop shops

2. As discussed above, a new business is usually required to register with several different government agencies, which often require the same information that has already been gathered by the business registry. Entrepreneurs must often personally visit each agency and fill out multiple forms. Taxation, justice, employment and social services agencies are usually involved in this process; other administrative offices and institutions, specific to each jurisdiction, may also be involved. This often results in multiple procedures governed by different applicable laws, duplication of information and lack of ownership or full control of the process by the agencies involved. Possibly worst for MSMEs wishing to register, the overall process can require weeks, if not months.[2]

3. Establishment of "one-stop shops" have thus become one of the most popular reforms to streamline business registration in recent years. One-stop shops are single interfaces where entrepreneurs receive all of the information and forms they need in order to complete the necessary procedures to establish their business rather than having to visit several different government agencies. Some States have several one-stop shops throughout their territory.

4. Beyond this general definition, the scope of the one-stop shops can vary according to the services offered. Some one-stop shops only provide business registration services, which may still be an improvement if the registration process previously involved a number of separate visits to the relevant authorities; others carry out other functions related to business start-up.[3] The most common of these other functions is tax registration, although there are also examples of one-stop shops dealing with registration for social security and statistical purposes. In rare cases,[4] one-stop shops assist entrepreneurs not only with business licences and permits but also with investment, privatization procedures, tourism-related issues and State-owned property management.

5. One-stop shops can be virtual or physical offices. Physical premises, when in rural areas, are particularly appropriate for businesses with limited access to municipal centres. Of course, online business registration can also be offered as one option available for registering, the other being visiting the one-stop shop (or the registration office). Online one-stop shops take advantage of solutions supported by ICT, which allows for rapid completion of several formalities due to the use of dedicated software. Such online portals may provide a fully integrated facility or still require separate registration in respect of some requirements, for example taxation services.[5]

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[1] See J. Olaisen, Business Registration Reform Case Studies, Malaysia, 2009, page 3.

[2] See World Bank Group, Small and Medium Enterprise Department, Reforming Business Registration Regulatory Procedures at the National Level, A Reform Toolkit for Project Teams, 2006, page 30.

[3] Investment Climate (World Bank Group), How Many Stops in a One-Stop Shop? A Review of Recent Developments in Business Registration, 2009, pages 1 ff.

[4] See Georgia, in World Bank and International Finance Corporation, Doing Business 2011, page 21; see also A/CN.9/WG.I/WP.85, para. 38.

[5] See supra footnote 3, page 4.

1. Different approaches to establish a one-stop shop

6. When establishing one-stop shops, in particular those performing functions in addition to business registration, States can choose among different approaches. In the "one door" approach, representatives of different government agencies involved in registration are brought together in one physical place, but the applicant must deal separately with each representative (for example, the commercial registry official dealing with the approval of the business name, the clerks checking the documents, the taxation official, and the notary public), although the different agencies liaise among themselves.[6] As may be apparent, this solution is relatively uncomplicated and would normally not require any change in legislation or ministerial responsibilities, but it would involve establishing effective cooperation between the different government ministries. One issue States should consider when opting for this approach would be how much authority the representatives of each agency should have; for example, should they have the discretion to process the registration forms on site or would they simply be acting on behalf of their agencies and be required to take the documents to their home agencies for further processing?[7] Similarly, it is also important to consider clarifying the lines of accountability of the various representatives from the different agencies to the one-stop shop administrator.[8]

7. Another form of one-stop shop is the so-called "one window" or "one table" version, which offers a higher level of integration of the different agencies involved in the start-up of a business.[9] In this case, the one-stop shop combines the process for obtaining business and other registrations, such as for taxation and social services, with other arrangements, like publishing the registration in a National Gazette or newspapers, when required. All relevant documents are submitted to the one-stop shop administrator who is authorized, and properly trained, to accept them on behalf of the various government agencies involved. Documents are then dispatched, electronically or by hand or courier, to the competent agency for processing. This type of one-stop shop requires detailed coordination between the different government agencies, which must modify their procedures to ensure an effective flow of information. A memorandum of understanding between the key agencies involved may be needed in order to establish the terms in respect of the sharing of company information.[10] In some cases, taking such an approach may also require a change in legislation.[11]

8. A third approach, which is less common, is based upon the establishment of a separate entity to coordinate the business registration function and to deal with other requirements that the entrepreneurs must meet, such as making tax declarations, obtaining the requisite licences, and registering with social security authorities. Pursuant to this model, the entrepreneur would apply to the coordinating entity after having registered with the business registry in order to fulfil the various additional aspects of the procedures necessary prior to commencing business. Although this approach results in adding a step, it could be useful to some States since it avoids having to restructure the bodies with the main responsibility for business registration. On the other hand, the adoption of such a structure could involve an increase in the cost of the administrative functions and may only reduce timeframes to the extent that it allows the various functions to take place successively or enables participants in the one-stop shop to network with the other agencies to speed up their operations. From the registrant's perspective, however, the advantage of being able to deal with a single organization remains.[12]

9. Finally, in States with developed ICT infrastructures, the functions of the agencies concerned with registration could be fully integrated through the use of a common database, which is operated by one of the agencies involved and provides simultaneous registration for various purposes, i.e. business registration, taxation, social services, etc. In some

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[6] Ibid., page 3.

[7] Ibid., page 2 and see A/CN.9/WG.I/WP.85, para. 42.

[8] See A/CN.9/WG.I/WP.85, para. 42.

[9] See supra footnote 3, page 3.

[10] See World Bank Group, Small and Medium Enterprise Department, Reforming Business Registration Regulatory Procedures at the National Level, A Reform Toolkit for Project Teams, 2006, page 31.

[11] See supra footnote 3, page 3.

[12] See Benin and France, ibid., page 4.

jurisdictions, a public agency (such as the tax administration) is responsible for the registration of business entities, or ad hoc entities have been set up to perform such simultaneous registration.[13]

2. Authority overseeing the one-stop shop

10. One issue that States should consider when establishing a one-stop shop is its location. It is usually advisable for the one-stop shop to be directly connected to the business registry office, either because it is hosted there or because the registry is part of the one-stop shop. The organization(s) responsible for the one-stop shop could thus be the same as that/those which oversee(s) the business registration process. This approach should take into account whether such organizations are equipped to administer the one-stop shop. Examples from various jurisdictions indicate that where authorities such as executive agencies are responsible for business registration, they possess the skills to perform one-stop shop functions as well. The same can be said of chambers of commerce, government commissions, and regulatory authorities.[14] There are very few examples of courts that have adopted a one-stop shop approach in those States where business registration is court-based.

3. Requirements of one-stop shops

11. Although one-stop shops do not necessarily require changes in the domestic legal framework, as seen in the paragraphs above, it is important for the operation of such mechanisms to be legally valid, which may involve adapting existing laws to the new structure and method of proceeding. The extent of the changes will thus vary according to the different needs of States. In addition, one-stop shops should be given a sufficient budget, since they can be quite expensive to establish and maintain, they should be staffed with well-trained personnel, and they should have their performance regularly monitored by the supervising authority in accordance with client feedback.

B. Use of information and communications technology (ICT)

1. Introducing an ICT supported business registry

12. As seen in paragraphs 47 to 55 of A/CN.9/WG.I/WP.93, an important aspect of streamlining a business registration system is deciding upon the form in which the system will operate, i.e. whether it should be supported by paper or by modern technology. Referring to available evidence, this Working Paper has expressed the view in several paragraphs that, whenever the state of domestic technology permits, ICT solutions should be used to operate the business registration system since they present the most efficient and effective means of performing registration functions.

13. Subject to the level of development of the implementing State, introducing ICT supported business registration, can be expensive and difficult, since it may require reforming legislation to allow for electronic signature or information security laws, and/or establishing complex e-government platforms or other ICT infrastructures. For instance, in several developing States and mid-level economies, only information about registering a business is available online, while a functioning electronic registry has not yet been implemented. This could be explained by the fact that making information electronically available is less expensive and less difficult to achieve than is the establishment of an electronic registry, nor does it require any legislative reform or specialized ICT.

14. In locations where Internet penetration is not extensive, a phased in approach may be an appropriate way forward.[15] Automation would start with the use of simple databases and workflow applications for basic operations, such as name searches or the sharing of information with other government agencies, and then would progress to more sophisticated web-based systems that would enable customers to conduct business with the registry

[13] See the Albania's National Registration Center, ibid.

[14] Ibid., page 7.

[15] The technical assistance experience of international organizations, in particular of the World Bank, has provided most of the background material upon which this section and the following one are based. See, in particular, Investment Climate (World Bank Group), Reforming Business Registration: A Toolkit for the practitioners, 2013, pages 12 ff.

entirely online. These web-based systems could be quite convenient for smaller businesses operating at a distance from the registry, provided that those entrepreneurs were able to access the system. The final phase of the approach would be to accommodate ICT interoperability between those agencies involved in business registration.

15. The methods used to establish the online system should be consistent with the reforms required as they would determine the success or the failure of the initiative. Moving directly to a full online solution before reengineering registry business processes would be a mistake in many cases, as the solutions designed would not be able to capture the technology's full benefits.[16]

16. The simplest approach for States beginning their activity in this area would be to develop a content-rich website that consolidates registration information, provides downloadable forms, and enables users to submit feedback. This simple resource would allow users to obtain information and forms in one place and would make registries more efficient by enabling users to submit e-mail inquiries before going to registry offices with the completed forms.[17] Since this solution does not require a stable Internet connection, it may appeal to States with limited Internet access.

17. If only limited Internet bandwidth is available, then automatizing front-counter and back-office operations prior to moving online would be a suitable approach. If the registry has branches outside its main location (for instance, in rural areas), it would be important to establish a dedicated Internet connection with them. This approach would still require entrepreneurs to visit the registry, but at least it would establish a foundation on which the registry could later develop a more sophisticated web platform. A key factor even at this basic stage, would be for the system to be able to digitize historical records and capture key information, such as the names of shareholders and directors, in the registry database.[18]

18. Once the government capacity in ICT and Internet penetration allows for digital commerce, then platforms that enable businesses to apply and pay for registration online as well as to file annual accounts and update registration details as operations change can be developed. With regard to online payment of a registration fee, it should be noted that ICT supported solutions would depend on a State's available modes of payment and on the regulatory framework that establishes the modes of payment a public authority can accept. When the jurisdiction has enacted laws that allow for online payment, experience shows that the most efficient option is to combine the filing of the electronic application and the fee payment into one step. ICT systems incorporating this facility should include error checks, so that applications are not submitted before payments are completed and registry officials can see payment information along with the application.[19] When fee payment is required before registration, this constitutes a separate procedural step and the use of ICT solutions in order to be user-friendly would require streamlining the procedures for filing the applications and for payment.

19. When a State has developed the ICT infrastructure to achieve full registry automation, integration of online registration processes with registration required for taxation, social security and other purposes could be considered. Even if no integration with other registrations is built into the system, it would nevertheless be advisable that States implement data interchange capabilities so that the relevant company information could be shared across government agencies. A final improvement would be the development of mechanisms for disseminating business information products to all interested parties. Such products could substantially contribute to the financial sustainability of the registry (see para. 76 below): in States with highly developed online registration systems, registries can derive up to 40 per cent of their operating revenues by selling such information.[20]

20. One issue that would likely arise when the online registry is able to offer full-fledged services would be whether to abolish any paper-based submission or to maintain both paper-based and online registration. In many jurisdictions, registries choose to have

[16] Ibid.
[17] Ibid.
[18] Ibid.
[19] See Investment Climate (World Bank Group), Innovative Solutions for Business Entry Reforms: A Global Analysis, 2012, page 13.
[20] See supra footnote 15, page 13.

mixed solutions with a combination of electronic and paper documents or electronic and manual processing during case handling (see also paras. 47 to 55 A/CN.9/WG.I/WP.93). This approach may result in considerable cost for registries, since the two systems require different tools and procedures. Moreover, if this option is chosen, it is important to establish rules to determine the time of registration as between paper-based and electronic submissions. Finally, paper applications must be processed in any case, so that the information included in a hard document can be transformed into data that can be processed electronically; this can be done by way of scanning the paper-based application. However, in order to ensure that the record made by scanning correctly represents the paper application, the registry will likely have to employ staff to check that record, thus adding a step that increases costs and reduces the benefits of using an online system.[21]

2. Other registration-related services supported by ICT solutions

21. Automation should enable the registry to perform other functions in addition to the processing of applications. Where jurisdictions require user-friendly electronic filing and repopulated forms,[22] for instance, it can assist businesses in the mandatory filing of annual returns and/or annual accounts. Electronic filing and automated checks also help reduce processing time by the registry.[23]

22. ICT supported registration could also assist the registry in deregistration procedures. These usually require an official announcement that a business will be deregistered (see para. 22 of A/CN.9/WG.I/WP.93 and para. 20 of A/CN.9/WG.I/WP.93/Add.1). ICT can provide for automation of such announcements, from initiating the process to producing a standard notice, thus helping registries to ensure that businesses are not deregistered before the creditors' time limit has elapsed and to reduce processing time. In order to be fully effective, however, adoption of an ICT-based system needs to be supported by streamlined procedures that enable businesses to deregister in a simplified and quick way.[24]

23. ICT solutions could also support follow-up and enforcement procedures of business registries when businesses fail to comply with registration requirements. In one jurisdiction, for instance, the back-office system of the registry monitors the records of businesses and detects whether certain circumstances suggest that the business is not in compliance with statutory requirements. An automatic notice to the business is then produced in order for it to remedy the situation. Should the business fail to do so within the statutory deadline, the ICT solution starts a new procedure to forward the case to the district court, which may make a decision on the compulsory liquidation of the business. Upon an order for compulsory liquidation, the court notifies the registry which deregisters the business.[25]

3. The legislative framework supporting ICT-based registries

24. Establishing an ICT supported registration system requires a well-designed legal and regulatory framework that supports simplicity and flexibility and avoids, to the greatest extent possible, discretionary power and exception-making. For instance, provisions requiring the interpretation of several documents and the collection of several pieces of information are difficult to adapt to electronic processing; the same applies to the use of discretionary power and complex structures of rules and exceptions.

25. States should adopt legislation that facilitates the implementation of electronic solutions, although the obligation to use these solutions should be considered only when the various stakeholders concerned with the registration process (including the registrant, government agencies, and other relevant authorities) are prepared to comply. Furthermore, when developing such legislation, States should take into account that while certain elements of a legal framework can be checked electronically, the most complex aspects of the process

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[21] See supra footnote 19, page 13. See also A/CN.9/WG.I/WP.93/Add.1, para. 14.

[22] Repopulated forms allow for selected fields to be automatically filled based on information previously provided by the registrant or maintained in their user account. When changes in the registrant's information occur, the registrant is not required to fill out the entire form again, but only to enter the relevant changes. Information included in the repopulated form is stored and may be made accessible to and exchangeable with other relevant agencies.

[23] See supra footnote 19, page 15.

[24] Ibid., page 16.

[25] See Norway, supra footnote 19, page 16.

will need to be addressed by a registry official. For instance, the electronic system may check plain numbers (for example, if the stated share capital meets any minimum requirement), while the registry official will have to check if the share capital recorded accords with that in the documentation.[26]

26. Since information technology is a field marked by rapid technological evolution, it would be advisable to establish guiding legal principles in the primary legislation, leaving secondary legislation to stipulate the specific provisions regulating the detailed functioning and the requirements of the system (see para. 59 below).[27] Once the registration process is fully automated, States should establish provisions (preferably in the secondary legislation) or policies that discipline government-to-government data exchange in order to avoid any lack of cooperation among different agencies.

(a) Electronic documents and electronic signatures

27. Entering information into an ICT supported registry is a business-to-government transaction that should be subject to the same treatment, under domestic legislation, as any other electronic transaction.[28] Therefore, if an appropriate domestic legislative framework for electronic transactions is not in place, a preliminary step for a reform aimed at supporting electronic business registration would be to recognize and regulate the use of such electronic transactions. Among other things, States should adopt laws permitting electronic signatures and the submission of electronic documents (see also para. 32 below).[29] In some States, for instance, the use of an advanced electronic signature is mandatory when transmitting information to a business registry. When laws on electronic communications are enacted, they should establish, at minimum, principles of non-discrimination, technological neutrality and functional equivalence allowing for equal treatment of paper-based and electronic information. The principle of non-discrimination ensures that a document would not be denied legal effect, validity or enforceability solely on the grounds that it is in electronic form. The principle of technological neutrality mandates the adoption of provisions that are neutral with respect to the technology used. The principle of functional equivalence lays out criteria under which electronic communications and electronic signatures may be considered equivalent to paper-based communications and hand-written signatures.

28. Further, it would be advisable that the laws include provisions to mitigate the risks that the use of ICT can carry with it and that can affect the validity, and in certain jurisdictions the legal validity, of the information transmitted through the electronic means. The most common risks include: confirming the identity of the entrepreneur filing for registration (referred to as “authentication”); preventing conscious or unconscious alteration of information during transmission (referred to as “integrity”); ensuring that sending and receiving parties cannot deny having sent or received the transferred message (referred to as “non-repudiation”) and preventing disclosure of information to unauthorized individuals or systems (referred to as “confidentiality”).[30] In those States where the law does not require business registries to check the veracity of the information submitted during the registration process, these risks may be more problematic as it can be relatively easy to manipulate registration systems and filing processes.

29. Verifying the identity of the registrant and ensuring the integrity of the application and the attached documents are key elements to ensure trust in ICT supported registration systems and their corresponding use. Consequently, States should carefully consider the requirements that electronic signatures and electronic documents should have in order to minimize any risks of corporate identity theft[31] and invalid information (see also para. 78 of A/CN.9/WG.I/WP.93/Add.1).

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[26] Ibid., pages 13-14.

[27] Ibid., page 7.

[28] See A. Lewin, L. Klapper, B. Lanvin, D. Satola, S. Sirtaine, R. Symonds, Implementing Electronic Business Registry (e-BR) Services, Recommendations for policy makers based on the experience of EU Accession Countries, 2007, page 47.

[29] UNCITRAL has adopted several texts dealing with electronic commerce. Those texts and relevant information on them can be found on the UNCITRAL website at: www.uncitral.org.

[30] See supra footnote 19, page 12.

[31] Corporate identity theft can occur through the theft or misuse of key business identifiers and credentials, manipulation or falsification of business filings and records, and other related criminal

30. Whether or not the adoption of legislation on electronic signatures is premature due to the technological infrastructure of the State, various other techniques can prevent corporate identity theft and ensure security. The experience of several States has laid the groundwork for practices that may be replicated in other regions. Simple methods include the use of appropriate user names and passwords; electronic certificates; biometric verification (for example, fingerprints); monitoring systems and/or e-mail systems that notify registered users about changes or whenever documents are filed on their business record; and the implementation or increase of penalties for false and/or misleading information submitted to the commercial registries. An approach followed in some jurisdictions is to require the identity of the person registering the business to be checked by a notary public or by another designated authority. Where this is not possible, entrepreneurs may be required to visit the registry office in order for their identity to be verified. Another approach, employed in other jurisdictions, allows only those individuals expressly identified in the law to submit an application for entry into the register or to change an entry in the register. This application must then be legalized by a public notary or another designated authority (if submitted in paper form). However, recourse to a notary or other intermediary or personal visits to the registry office may present expensive and time-consuming barriers for businesses wishing to register, in particular for MSMEs. Therefore, in order to facilitate MSME registration, States may wish to opt for the adoption of simpler ways to ensure the authentication of business entrepreneurs, such as the use of appropriate user names and passwords. This could be particularly appropriate in the case of micro-businesses or in cases where MSMEs intend to register but choose a simplified business form.

(b) Dispatch and receipt of electronic messages[32]

31. Another issue to consider when implementing a business registry through the use of ICT solutions is that electronic registries may make it difficult to ascertain the time and place of dispatch and receipt of information. This is an aspect that may acquire relevance due to the time sensitivity of certain submissions, such as establishing the exact time and place at which a business has been registered. For this reason, it would be key to have clear rules that define the time of "dispatch" and "receipt" of electronic messages. If such rules are not clearly defined in a State legislative framework, or if they are not defined with the specificity required for the purposes of time-sensitive registration applications, then ad hoc laws addressing the issue of dispatch and receipt may be required.

(c) UNCITRAL Model Laws

32. States that enact legal regimes on electronic communications and electronic signatures may wish to consider the UNCITRAL Model Law on Electronic Commerce and the UNCITRAL Model Law on Electronic Signatures.[33] These two legislative texts establish those principles of reliability, noted above, that are needed to ensure equal treatment between paper-based and electronic communications and deal extensively with provisions covering the issues of legal validity of electronic documents and signatures, authentication, and the time and place of dispatch and receipt of electronic messages. Because of the way these Model Laws, as well as all other UNCITRAL legislative texts, are negotiated and adopted, they offer solutions appropriate to different legal traditions and to States at different stages of economic development. Furthermore, domestic legislation based on the UNCITRAL Model Laws will greatly facilitate cross-border recognition of electronic documents and signatures.

(d) Operating the ICT supported registry

33. When establishing an ICT supported registry, States will have to consider issues concerning the treatment of personal data that is included in the application for registration (on this matter, see also para. 8 of A/CN.9/WG.I/WP.93/Add.1 and para. 52 below) and its

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activities. Despite the use of the term "corporate", corporations are not the only business entities that are victimized by this crime. Any type of business or organization of any size or legal structure, including sole proprietorships, partnerships and limited liability companies can be targets of business identity theft.

[32] See supra footnote 28, page 48.

[33] See www.uncitral.org.

protection, storage and use. Appropriate legislation should be in place to ensure that data is protected. In the European Union, for instance, several Directives apply when data concerning individuals (for instance, information on officers or directors) is included in the application.

34. Another aspect that may warrant consideration by States is that of natural hazards or other accidents that can affect the processing, collection, transfer and protection of the data housed in the electronic registry and under the responsibility of the registry office. Given the expectations of the users of the reliable functioning of the registry, the registry office will want to ensure that any interruptions in operations are brief, infrequent and minimally detrimental to users, as well as to States.[34] For this reason, States should devise appropriate measures to facilitate protection of the ICT-based registry.

(e) Possible threats to ICT supported registries

35. The threats that can affect an ICT supported registry are not only confined to disruptions relating to the daily operation of the registry, but also include criminal activities that may be committed through the use of ICT. Providing effective enforcement remedies would thus be an important part of a legislative framework aimed at supporting the use of electronic solutions for business registration. Typical issues that should be addressed by States would include unauthorized access or interference with the electronic registry; unauthorized interception of or interference with data; misuse of devices; fraud and forgery.[35]

(f) E-payment legislation

36. As seen in paragraphs 51 of A/CN.9/WG.I/WP.93 and 18 above, once States have reached a certain level of technological maturity, they could consider developing electronic platforms that enable businesses to pay online when filing their application with the registry. This will require enacting appropriate legislation concerning e-payments in order to enable the registry to accept online payments. By way of example, such laws should address issues like who should be allowed to provide the service and under which conditions; access to online payment systems; liability of the institution providing the service; customer liability and error resolution. Furthermore, such laws should be consistent with the general policy of the country on financial services.

4. Cost and security considerations

37. When establishing an electronic registration system, the level of security needed and its relevant cost must also be carefully addressed. In particular, it is important to align the risk attached to a specific interaction (between the registry and the business or the registry and other public agencies) with the costs and administration required to make that interaction secure. Low security may deter parties from using electronic services (unless it is mandatory), but costly high security measures could have the same effect.[36]

C. Interoperability between the business registry and other government authorities and use of the unique identifier

38. As noted in paragraph 2 above, businesses are usually required to register with several government agencies (for example, for taxation, social services and pension purposes) which often entails providing the same information as that collected by the business registry. In jurisdictions where these agencies operate in isolation from each other, it is not unusual for this procedure to result in duplication of systems, processes and efforts, which is not only expensive but may also cause errors. Moreover, if agencies assign registration numbers to the businesses they register, and the use and uniqueness of those numbers is restricted to the authority assigning them, information exchange among the agencies requires each authority to map the different identification numbers applied by the other agencies. Even when electronic solutions are used, they can facilitate such mapping, but they cannot exclude the

[34] See supra footnote 19, page 49.
[35] Ibid.
[36] Ibid., page 12.

possibility that different entities will have the same identifier, thus reducing the benefits (in terms of cost and usefulness) obtained from the use of such tools.[37]

39. In recent years, several jurisdictions have thus adopted integrated registration systems in which the application submitted for business registration includes all of the information required by the different agencies. Once completed, the information in the application for business registration is transmitted by the registry to all relevant authorities. Information and any necessary approvals from the other agencies are then communicated back to the registry, which immediately forwards the information and approvals to the entrepreneur.[38] While this is beneficial for all businesses, regardless of their size, it is particularly valuable for MSMEs, which may not have the resources necessary to cope with the compliance requirements of multiple government authorities in order to establish their business.

40. States aiming at fostering such integration among different agencies may wish to consider that in recent years some international organizations have developed tools that facilitate inter-agency cooperation. For instance, one international organization has developed an online system that allows for the interoperability of the various public agencies involved in business registration with minimal or no changes at all in the internal processes of the participating agencies nor in their computer systems.[39]

41. Some developed States have introduced a more sophisticated approach, which considerably improves information exchange throughout the life cycle of a business. This approach requires the use of a single unique business identification number or unique identifier, which ties information to a given business and allows for information in respect of it to be shared among different public and private agencies.

42. A unique identifier is structured as a set of characters (they may be numeric or alphanumeric) which distinguishes registered entities from each other; it is allocated only once (usually upon establishment) to a single business and does not change during the existence of that business. The same unique identifier is used for that business by all agencies, which permits information about that particular registered entity to be shared within or between the public and private sectors.[40]

43. The experience of States that have adopted unique identifiers has demonstrated their usefulness. As noted above, they permit all government agencies to easily identify new and existing companies and cross-check information in respect of them. In addition, the use of unique identifiers improves the quality of the information contained in the business registry, since the identifiers ensure that information is linked to the correct entity even if its identifying attributes (for example name, address, and type of business) change. Moreover, unique identifiers prevent the situation where, intentionally or unintentionally, businesses are assigned the same identification; this can be especially important where financial benefits are granted to legal entities or where liability to third parties is concerned.[41] Unique identifiers have been found to produce benefits for businesses as well, in that they considerably simplify business administration procedures: entrepreneurs do not have to manage different identifiers from different authorities, nor are they required to provide the same or similar information to different authorities.

44. The effective use of unique identifiers is enhanced by the adoption of full electronic solutions which do not require manual intervention. However, electronic solutions are not a mandatory prerequisite to introducing unique identifiers, as they can also be effective in a paper-based environment.[42] When unique identifiers are connected to an online registration system, it is important that the solution adopted fits the existing technology infrastructure.

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[37] Ibid., page 22.

[38] See supra footnote 15, page 9.

[39] The United Nations Conference on Trade and Development Business Facilitation Programme provides for an online tool designed to computerize simple or complex administrative procedures (eRegistration) and that can handle simultaneous operations involving multiple agencies (such as the business registry, tax office, and social services) thus promoting interoperability among these different agencies. See http://businessfacilitation.org/ and A/CN.9/WG.I/WP.81, para. 40.

[40] See supra footnote 19, page 20.

[41] Ibid., page 22.

[42] Ibid.

1. Prerequisites

45. The use of unique identifiers requires sustained cooperation and coordination among the authorities involved, and a clear definition of their roles and responsibilities, as well as trust and collaboration between the public and business sectors. Since the introduction of a unique identifier does not of itself prevent government agencies from asking a business for information that has already been collected by other agencies, States should ensure that any reform process in this respect start with a clear and common understanding of the reform objectives among all the stakeholders involved. Moreover, States should ensure that a strong political commitment is in place. Potential partners should ideally include the business registry, the taxation authority, the statistics office, the social services agency, the pension fund, and any collateral registries. If agreement among these stakeholders is elusive, at a minimum, the business register and taxation authority should be involved. Information on the identifiers in use at the other authorities and within the business sector is also a prerequisite for reform, as is a comprehensive assessment to identify the needs of all stakeholders.

46. In order to permit the introduction of a unique identifier, the domestic legal framework should include provisions on a number of issues including:

(a) Identification of the authority charged with allocating the unique identifier;

(b) Allocation of the unique identifier before or immediately after registration with the authorities involved in business entry;

(c) Listing of the information that will be related to the identifier, including at least the name, address and type of business;

(d) The legal mandate of the public authorities to use the unique identifier and related information, as well as any restrictions on requesting information from businesses;

(e) Access to registered information by public authorities and the private sector;

(f) Communication of business registrations and amendments among the public authorities involved; and

(g) Communication of deregistration of closed businesses.[43]

2. Introducing unique identifiers

47. Adoption of a unique business identifier normally requires a centralized database linking the businesses to all relevant government agencies whose information and communication systems must be interoperable. This requirement can be a major obstacle when implementing this in practice if the technological infrastructure of the State is not sufficiently advanced.

48. States can introduce the unique business identifier in one of two ways. In the first approach, business registration is the first step and includes the allocation of a unique identifier, which is made available (together with the identifying information) to the other authorities involved in the registration process (for instance taxation and social security authorities), and which is re-used by those authorities. In the second approach, the allocation of a unique business identifier represents the beginning of the process. The unique identifier and all relevant information are then made available to the government agencies involved in business registration, including the business registry, and is then re-used by all agencies.[44] Either of these two approaches can be followed by the authority entrusted with allocating unique business identifiers, regardless of whether the authority is the business register, a facility shared by public agencies or the taxation authority. It is important to note that in some States, the use of a unique identifier may be restricted: in some jurisdictions, certain government agencies still allocate their own identification number although the business carries a unique identifier.[45]

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[43] See supra footnote 15, page 32.

[44] See supra footnote 19, page 20 and A/CN.9/WG.I/WP.85, paras. 34 ff.

[45] Ibid.

49. Introducing a unique business identifier usually requires adaptation both by public authorities in processing and filing information and by businesses in communicating with public authorities or other businesses. A unique business identifier requires the conversion of existing identifiers; this can be accomplished in various ways. Taxation identifiers are often used as a starting point in designing a new identifier, since the records of the taxation authorities cover most types of businesses and are often the most current.[46] Examples also exist in which, rather than introducing a completely new number, the taxation number itself is retained as the enterprise's unique number. New identification numbers can also be created using other techniques according to a country's registration procedures. In such a situation, it is important that each business, once assigned the new number, verifies the related identifying information, such as name, address, and type of activity.[47]

3. Unique identifiers and individual businesses

50. One issue a State may have to consider when introducing unique identifiers is that of individual businesses that do not possess a separate legal status from their owners. In such cases, taxation authorities may prefer to rely on the identifier for the individual, who may be a natural person, rather than on the business identifier.

51. Situations may arise in which different agencies in the same jurisdiction allocate identifiers to businesses based on the particular business form of the enterprise. In order to avoid a situation where several identifiers may be allocated to one business or where several businesses may be allocated the same identifier, a common regime should be established for the identification of all possible business forms in a particular jurisdiction.[48]

4. Information-sharing and data protection

52. While facilitating information-sharing, it is important that unique business identifiers protect sensitive data and privacy. National legislation often includes provisions on data protection and privacy and in some States, registered information related to businesses is considered private and is not publicly available. However, a major trend towards increased transparency in order to avoid misuse of corporate vehicles for illicit purposes (see also para. 75 of A/CN.9/WG.I/WP.93/Add.1) has resulted from international efforts to fight money-laundering and terrorist and other illicit activities, as well as from the adoption of policies to know your customers and business counterparts. Such an enhanced quest for transparency has an impact on the way the information retained in the registry is shared among the different authorities. When a State introduces interoperability among different authorities, it should address issues of individual privacy[49] so that no protected information about the business is made public, but that information that must be made public by the registry can legally be made public.[50]

5. Interoperability

53. As discussed in paragraphs 47 to 49 above, the interoperability of the different agencies' ICT systems could be a major obstacle when implementing unique business identifiers. The ability of different information technology infrastructures to exchange and interpret data, however, is only one aspect of interoperability that States should consider. Another issue is that of semantic interoperability, which can also pose a serious threat to a successful exchange of information among the agencies involved as well as between relevant agencies and users in the private sector. For this reason, it is important to ensure that the precise meaning of the information exchanged is understood and preserved throughout the process and that semantic descriptions are available to all of the stakeholders involved. Measures to ensure interoperability would thus require State action on a dual level: i.e. agreement on common definitions and terminology on one hand, and development of appropriate technology standards and formats on the other. This approach should be based

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[46] See Belgium in A/CN.9/WG.I/WP.85, para. 35.
[47] See Norway, ibid.
[48] Ibid., paras. 36 ff. and see supra footnote 19, page 21.
[49] See A/CN.9/WG.I/WP.85, para. 37.
[50] See supra footnote 28, page 50.

on a mutual understanding of the legal foundation, responsibilities and procedures among all those involved in the process.[51]

6. Integration of registration functions

54. In some jurisdictions, advanced interconnectivity among the different agencies involved in the registration process has resulted in a single form for registration with all agencies. As a result, businesses are required to submit only one form instead of several, and authorities need not ask repeatedly for the same information. Examples exist of consolidated (electronic) registration forms that can be repopulated[52] with information from the different authorities concerned. Integration of registration functions can be facilitated by the use of one common database. In jurisdictions where this approach has been developed, agencies perform regular file transfers to update the database as well as their own records; they have direct access to the common database and use the same back-office systems to update it; and the information registered is regularly verified by trusted staff of the agencies. Such strong coordination among the concerned agencies is often based on regulatory provisions that allocate roles and responsibilities among the various agencies involved. Appropriate funding should also be allocated from the State's budget.[53]

7. Cross-border data exchange

55. Introducing unique business identifiers that enable different public authorities to exchange information about the business among themselves is relevant not only at the national level, but also in an international context. Unique identifiers allow interoperability among business registries located in different States as well as between business registries and public authorities in different States. Implementation of cross-border exchange of data can result in more reliable information for consumers and existing or potential business partners, including small businesses that provide cross-border services.

56. In the European Union (EU), for instance, EU-Directive 2012/17[54] requires Member States to ensure that companies have a unique identifier "to be unequivocally identified" in the new system of interconnected business registries that the Directive aims to establish.[55] This will facilitate exchanging information between the registry of a company and those of its branches in other Member States on the opening and termination of any winding-up or insolvency proceedings of the company and on the deregistration of the company from the registry. As a result, when a company has been dissolved or otherwise stricken from the registry, its foreign branches are likewise removed from the register without undue delay.

57. There are, at present, no other examples of similar initiatives in other regions of the world. However, the adoption of unique identifiers by non-EU States could lay the groundwork for future coordination in the regulatory community in order to create international standards for a global unique identifier.

58. Introducing unique identifiers does not only benefit businesses that have branches outside their State. It is also beneficial for local entrepreneurs since it enables those entrepreneurs to establish commercial relationships with multinationals or other foreign businesses that are active in the domestic markets where the local entrepreneurs operate. In a global economy, it is often difficult for a micro-entrepreneur to become a supplier or a customer of larger companies since it may not be easy for those companies to obtain information on the existence and the reliability (for instance, in terms of their financial situation) of the small businesses. A unique identifier, recognizable worldwide, would assist in creating a safe and reliable "connection" between a business and all of the information that relates to it, thus making it possible for the small business to obtain visibility in bigger markets.

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[51] See supra footnote 19, page 23.
[52] See supra footnote 22.
[53] See Norway, supra footnote 19, page 23.
[54] See Directive 2012/17/EU of the European Parliament and of the Council of 13 June 2012.
[55] Ibid., and see A/CN.9/WG.I/WP.85, para. 32.

D. Changes to underlying laws and regulations

59. Business registration reform can entail amending either primary legislation or secondary legislation or both. Primary legislation concerns texts such as laws and codes that must be passed by the legislative bodies of a State. Reforms that consider this type of legislation thus require the involvement of the legislature and, for this reason, can be quite time-consuming. Secondary legislation is that body of texts composed of regulations, directives and other similar acts made by the executive branch within the boundaries laid down by the legislature. Reform of secondary legislation does not need to be reviewed by the legislature and thus it can be carried out in a shorter time frame. Therefore, when domestic circumstances allow, it can thus be a more viable option than the reform of primary legislation.

60. In addition to legislation that is meant to govern the way business registration is carried out, States may need to update or change laws that affect the registration process in various ways, but which no longer respond to the needs of MSMEs. There is no single solution in this process that will work for all States, since the reforms will be influenced by the State's legislative framework. However, the reforms should aim at developing a domestic legal framework that supports business registration with features such as: transparency and accountability, clarity of the law and use of flexible legal entities.

61. Regardless of the approach chosen, i.e. whether to implement a reform though primary or secondary legislation, and the extent of the reform, changes in the domestic legal framework should carefully consider the potential costs and benefits of this process, as well as the capacity and the will of the government and the human resources available. An important preparatory step of a reform programme thus involves a thorough inventory of the laws that are relevant to business registration and a thorough legal analysis of them[56] with the view to evaluating the need for change, the possible solutions, and the prospects for effective reform. In some cases, this assessment could result in deferring any major legislative reform, if significant gains to the simplification process can be achieved by the introduction of operational tools[57] or, as mentioned above, by adopting or reforming secondary legislation. Once it has been decided what changes should be made and how, ensuring their implementation is equally important. In order to avoid the possible risk of unimplemented reforms, the government, the reform steering committee and the project teams should carefully monitor the application of the new legal regime. The following paragraphs offer some examples of approaches that can be taken to streamline domestic laws and regulations with a view to simplifying business registration and to making it more accessible to MSMEs.

1. Transparency and accountability

62. A legal framework that fosters a transparent and accountable registration system will have a number of advantages. It will allow registration to occur with a limited number of steps, and it will require limited interaction with authorities, permit short time limits, be inexpensive, result in registration of a long-term or unlimited duration, apply countrywide and make registration very accessible for applicants.

63. Some of these objectives can be achieved by introducing short statutory time limits on business registration procedures and/or "silence is consent" rules, as seen in paragraph 39 of A/CN.9/WG.I/WP.93/Add.1. As a result of the "silence is consent" rules, when a business does not receive a decision on its registration application within a given time limit (established by law or regulation) it is considered to be duly registered.[58]

64. Another approach that can be, and often is, used in association with the previous one, is the use of standard registration forms. Such forms can easily be filled out by businesses without the need to seek the assistance of an intermediary, thus reducing the cost and de facto contributing to the promotion of business registration among MSMEs. These forms also help prevent errors by the registries, thus speeding up the overall process. In some

[56] See supra footnote 10, page 40.
[57] Ibid., page 74.
[58] See A/CN.9/WG.I/WP.85, paras. 49 ff.

jurisdictions, the adoption of standardized documents has been instrumental in streamlining the registration requirements and disposing of unnecessary documents.[59]

2. Clarity of the law

65. For jurisdictions wishing to facilitate business start-up, in particular of MSMEs, it is important to review the existing legal framework so as to identify possible impediments to the simplification of the registration process. The nature of the reform would very much depend on the status of the domestic legal framework and a variety of examples, based on States' experiences, are available.

66. These reforms may include decisions by States to shift the focus of the law towards private companies (such as the simplified business entities being considered by the Working Group), as opposite to public limited companies, particularly if the former currently account for the majority of the firms in the State. Reforms could also include the decision to move the legal provisions pertaining to small companies to the beginning of any new company law in order to make them easier to find or to use simpler language in any updated company law.[60]

67. One particularly relevant reform that would especially serve the purpose of clarity of the law would be a comprehensive review of the legal framework on business registration and a resulting unification of the various rules into a single piece of legislation. This could also allow for some flexibility to be built into the system, with the adoption of certain provisions as regulations or simply providing for the development of the necessary legal basis in order to introduce legal obligations by way of regulation at a later stage.[61]

3. Flexible legal entities[62]

68. As seen in paragraph 7 of A/CN.9/WG.I/WP.93/Add.1, evidence suggests that entrepreneurs tend to choose for their business the simplest legal form available when they decide to register and that States with rigid legal forms have an entry rate considerably lower than States with more flexible requirements. Jurisdictions should thus consider having simplified registration for sole proprietorships as well as introducing new types of business forms including limited liability vehicles, such as the simplified business entity, to meet MSME needs. For instance, in one State that has introduced a new legal form for business, the registration process for that new business type is much simpler. Entrepreneurs are not required to publish the articles of association (or other rules governing the operation or management of the business) in the Official Gazette; instead, these can be posted online through the Commercial Registry; and the involvement of a lawyer, notary or other intermediary is not obligatory for the preparation of documents or conducting a business name search.[63]

69. Abolishing or reducing the minimum paid in capital requirement,[64] would also facilitate MSME registration, since micro- and small businesses may not have the funds to meet a minimum capital requirement, and if they do, they may be unwilling or unable to commit part, or all, of their capital in order to establish their business. Instead of relying on a minimum capital requirement to protect creditors and investors, States have implemented alternative approaches such as the inclusion of provisions on solvency safeguards in their

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[59] The Working Group may wish to note in this regard its decision to prepare standard forms in respect of its work on a legislative text on simplified business entities (see A/CN.9/800, para. 63).

[60] See A/CN.9/WG.I/WP.85, para. 56.

[61] See Investment Climate (World Bank Group), Business Registration Reform case study: Norway, 2011.

[62] For this section the Working Group may wish to note its discussion in respect of a legislative text on a simplified business entity. As those materials develop, their content will be reflected in this section on flexible legal entities.

[63] See, for example, Greece in V. Saltane, J. Pan, Getting Down to Business: Strengthening Economies through Business Registration Reforms, 2013, page 2. Other examples, including Colombia, exist (see A/CN.9/WG.I/WP.83).

[64] For a more thorough discussion on minimum capital requirements and simplified business entities, see A/CN.9/825, paras. 75-79.

legislation; conducting solvency tests; or preparing audit reports that show that the amount a company has invested is enough to cover the establishment costs.[65]

70. Introducing new simplified forms of limited liability and other enterprises is often coupled with a considerable reduction or complete abolition of the minimum capital requirements that other legal forms of enterprise are required to deposit upon formation. In several States that have adopted simplified business entities, the minimum capital requirement has been abolished completely, and in other cases, initial registration or incorporation has been allowed upon deposit of a nominal amount of capital. In other States, progressive capitalization has been introduced, requiring the business to set aside a certain percentage of its annual profits until its reserves and the share capital jointly total a required amount.[66] In other cases, progressive capitalization is required only if the simplified limited liability enterprise intends to graduate into a full-fledged limited liability company, for which a higher share capital would be required. There is however no obligation to do so.[67]

71. Another reform that would be conducive to improved business registration is to provide freedom to entrepreneurs to conduct all lawful activities without requiring them to specify the scope of their venture.[68] This is particularly relevant in those jurisdictions where entrepreneurs are required to list in their articles of association the specific activity or activities in which they intend to engage so as to restrain firms from acting beyond the scope of their goals and, according to certain literature, to protect shareholders and creditors. Allowing for the inclusion in the articles of association (or other rules governing the operation or management of a business) of a so-called "general purpose clause" which states that the company's aim is to conduct any trade or business and grants it the power to do so, facilitates business registration. This approach is far less likely to require additional or amended registration in the future, as enterprises may change their focus since entrepreneurs could change activities without amending their registration, provided that the new business activity is a lawful one and that the appropriate licences have been obtained. Additional options to the inclusion of a general purpose clause, which would support the same goal, could be passing legislation that makes unrestricted objectives the default rule in the jurisdiction, or abolishing any requirement for businesses, in particular privately held companies, to state objectives for registration purposes.[69]

E. Business registration and other fees

72. Payment of a fee in order to ensure the provision of registration services can be said to be a standard procedure across jurisdictions, including in those jurisdictions whose registries are run by the government and receive public funding. The most common types of fees are those for registration and for information products, while fines may also generate funding to a lesser extent. In some jurisdictions, registries may also charge an annual fee to keep a company in the registry (these fees are unrelated to any particular activity), as well as fees to register annual accounts or financial statements.[70]

73. Although they generate revenue for the registries, fees can affect a business' decision whether to register, since they may impose a heavy burden on businesses, in particular on MSMEs. Fees for new registrations, for instance, can prevent businesses from registering, while annual fees to keep a company in the registry or to register annual accounts could encourage businesses not to maintain their registered status. States should take these and other indirect effects into consideration when establishing fees for registration services. A registration system aiming to support MSMEs and increase the number of them that register should adopt a balanced approach between recovering capital and operational costs within a reasonable period of time and encouraging MSMEs to register.

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[65] See A/CN.9/WG.I/WP.85, para. 28.

[66] See Italy, ibid., para. 29.

[67] See, for instance, Germany, in Simplified business forms in the context of small and medium enterprises, the German approach, presentation at the UNCITRAL International Colloquium on Microfinance (16-18 January 2013), available at www.uncitral.org.

[68] This is a feature on which the Working Group has already agreed in its discussion of a legislative text on a simplified business entity (see A/CN.9/825, para. 70).

[69] See A/CN.9/WG.I/WP.85, para. 52.

[70] See European Commerce Registers' Forum Report 2013, page 72.

1. Registration fees

74. Several States see business registration as a public service that should encourage enterprises to enter the legally regulated economy rather than as a revenue-generating mechanism, and have thus set registration fees at a level that encourages businesses to register. In such States, the use of flat fee schedules for registration, regardless of the size of the business, is the most common approach. There are also examples of States that provide business registration free of charge. This approach may encourage businesses to register.

2. Fines

75. Fines for breaching obligations related to business registration, such as late filing, can represent a means of revenue generation. Their collection, however, again requires a balanced approach. Several jurisdictions use fines as disincentives for businesses to operate extra-legally. In some cases, legislative provisions link the company's enjoyment of certain benefits to the timely filing of required submissions; in others, a sequence of increasing fines for late filing is enforced that ultimately can result in compulsory liquidation. However, if fines are used as the main source of funding for the registry, as occurs in certain jurisdictions, it can have a detrimental effect on the efficiency of the registry. Since registries would lose revenue as a result of improved business compliance, they could have weak motivation to improve it. It is thus recommended that States should not consider fines as the main source of revenue of a registry, but that they determine fines at a level that encourages business registration without negatively affecting the funding of registries when compliance improves.

3. Fees from information products

76. As is the case in various jurisdictions, fees from information products can be a more viable option for registries to derive their self-generated funding. Such fees also motivate registries to provide valuable information to their clients, to maintain the currency of their records and to offer additional information services. A recommended good practice for jurisdictions aiming at improving this type of revenue generation would be to avoid charging fees for basic services, such as name searches, but to charge for more sophisticated services (for example, direct downloading or providing bulk information). Since fees for information products may influence consumers' choice of products, they should be set at a level low enough to make the use of less expensive products attractive to businesses; otherwise, businesses may request information products that are more costly for the registry to produce (for example, ordering printed versions by telephone).[71]

4. Fee determination

77. It is evident from the above paragraphs that striking a balance between the sustainability of the registry operations and the promotion of business registration is a key consideration when setting fees, regardless of the type of fee. One recommended approach, followed in many States, is to apply the principle of "cost recovery" according to which there should be no profit from fees generated in excess of cost. When applying such a principle, States would be required to first assess the level of revenue from registry fees needed to achieve cost recovery. In carrying out the assessment, account should be taken not only of the initial start-up costs related to the establishment of the registry but also of the costs necessary to fund its operation. By way of example, these costs may include: (a) the salaries of registry staff; (b) upgrading and replacing hardware and software; (c) ongoing staff training; and (d) promotional activities and training for registry users. In the case of ICT supported registries, 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 operational.

78. Evidence shows, however, that even when the cost-recovery approach is followed, there is considerable room for variation among States, as the approach requires a determination of which costs should be covered, which can be interpreted in many different ways. In one jurisdiction, for instance, fees for new registrations are calculated according to

[71] See supra footnote 19, page 17.

costs incurred by an average business for registration activities over the life cycle of the business. In this way, potential amendments, apart from those requiring official announcements, are already covered by the fee that companies pay for new registration. This approach is said to result in several benefits, such as: (a) rendering most amendments free of charge, which encourages compliance among registered businesses; (b) saving resources related to fee payment for amendments for both the registry and the businesses; and (c) using the temporary surplus produced by advance payment for amendments to improve registry operations and functions. In other cases, jurisdictions have decided to charge fees below the actual costs registries need to sustain in order to promote business registration. In these cases, however, the services provided to businesses would likely be subsidized with public funds.

79. Regardless of the approach taken to determine the applicable fees, States should clearly establish which registration and information fees are due from the registry users. One approach would be to set out the fees in a "regulation", which could be either a formal regulation or more informal administrative guidelines that the registry can revise according to its needs. If administrative guidelines are used, this approach would provide greater flexibility to adjust the fees in response to subsequent events, such as the need to reduce the fees once the capital cost of establishing the registry has been recouped. The disadvantage of this approach, however, is that the lack of a formal arrangement may be abused by the registry to unjustifiably adjust the fees upwards. Alternatively, a State may choose not to specify the registry fees in such a regulation, but rather to designate the administrative authority that is permitted to set the registry fees. The State may also wish to consider specifying in the law or the regulation on business registration the types of service that the registry may provide free of charge.

80. In setting fees in a hybrid (paper and electronic) registry system, it may be reasonable for the State to decide to charge higher fees to process applications and search requests submitted in paper form because they must be processed by registry staff, whereas electronic applications and search requests are directly submitted to the registry and do not require attention from registry staff. Charging higher fees will also encourage the user community to eventually transition to using the direct electronic registration and search functionalities. However, in making this decision, States may wish to consider whether charging such fees may have a disproportionate effect on MSMEs that may not have easy access to electronic services.

F. Capacity development

81. Once a reform of the registration system has been initiated, developing the capacity of the personnel entrusted with registration functions is an important aspect of the process. Poor service often affects the efficiency of the system and it can result in errors or necessitate multiple visits to the registry by users.[72] Capacity development of registry staff could not only focus on enhancing their performance and improving their knowledge of the new registration processes, ICT solutions and client orientation, but staff could also be trained in new ways of improving registration.[73]

82. As seen in various States, different approaches can be followed, from the more traditional training methods based on lectures and classroom activities, to more innovative ways that can be driven by the introduction of new registration systems. In some jurisdictions, team-building activities and role-playing have been used with some success, since reforms often break barriers between various government departments and require the improvement of the flow of information among them, as well as an understanding of different aspects of the procedures with which specific registry staff may not be familiar.[74] In other cases, States have opted for developing action plans with annual targets for improving in international rankings, and linking promotions and bonuses for staff to the achievement of the action plan's goals. In still other cases, States have decided to introduce new corporate values in order to enhance the public service system, including business registration.[75] Although the

[72] See supra footnote 15, page 37.
[73] See A/CN.9/WG.I/WP.85, para. 60.
[74] Ibid., see also K. Rada and U. Blotte, Improving business registration procedures at the sub-national level: the case of Lima, Peru, 2007, page 3.
[75] See A/CN.9/WG.I/WP.85, para. 60 and supra footnote 15, page 21.

relevant governmental authority will usually take the lead in organizing capacity development programmes for the registry staff, the expertise of the legal and business communities could be enlisted to assist.

83. Peer-to-peer learning and international networks are also effective approaches to build capacity to operate the registry. These tools enable registry staff to visit other jurisdictions and States with efficient and effective registration systems. In order to maximize the impact of such visits, it is important that they occur in jurisdictions familiar to the jurisdiction undergoing the reform. This approach has been followed with success in several jurisdictions engaging in business registration reform. International forums and networks also provide platforms for sharing knowledge and exchanging ideas among registry personnel around the world for implementing business registration reform.[76]

84. It is equally important that potential registry users, whether they are business registrants or searchers, are given clear advice on the practical logistics of the registration and searching processes, for example, through the dissemination of guidelines and tutorials (ideally in both printed and electronic form) and the availability of in-person information and training sessions (see also para. 7 of A/CN.9/WG.I/WP.93/Add.1). In some States, for instance, prospective users of the system are referred to classroom-based and/or eLearning opportunities available through local educational institutions or professional associations.[77]

[76] Ibid.

[77] See Service Alberta, Canada, at www.servicealberta.com/1005.cfm.

D. Note by the Secretariat on observations by the Government of the French Republic

(A/CN.9/WG.I/WP.94)

[Original: French]

The Government of the French Republic has submitted to the Secretariat of the United Nations Commission on International Trade Law (UNCITRAL) the following observations in order to provide the Working Group with additional information for its deliberations. The text of the observations is reproduced as an annex to this note in the form in which it was received by the Secretariat, with formatting changes.

Contents

Annex

Observations by the Government of the French Republic

1. The present document complements document A/CN.9/WG.I/WP.87, prepared at the request of the Working Group, and is submitted in preparation for future work on simplified business registration.

1. The need for an effective scheme to protect individual entrepreneurs

1.1. The importance of individual entrepreneurs

2. Today in France over 1.5 million business heads, representing almost half of all existing enterprises, are self-employed. Seventy per cent of enterprises set up in 2014 were done so on a self-employment basis, reflecting the appeal of this status for entrepreneurs.

3. The entry into force of the tax and social security regime for *auto-entrepreneurs* [simplified form of self-employment], aimed exclusively at the self-employed, has contributed substantially to the increase in this modus operandi.

4. Thus, in 2014, of the 550,000 new enterprises established, 390,000 were in the form of sole proprietorships [*entreprises individuelles*], including 280,000 under the *auto-entrepreneur* regime. New enterprises in the form of companies account for less than one third of the total number of new enterprises.

5. Figures also show that while individual entrepreneurs account for more than half of all enterprises, they are, in fact, small enterprises, 75 per cent of which have no employees. The share of such enterprises in added value, understood as turnover less all intermediate consumption expenditure on delivering the services or products sold, is around 20 per cent.

6. In fact, individuals seeking to establish and develop a business, whether of a commercial, agricultural, artisanal or professional nature, alone or with employees, mostly choose the self-employment option owing to its great simplicity.

7. However, while self-employment today remains the preferred modus operandi of small entrepreneurs, the latter and their families are at risk if the business fails: the entrepreneur is liable for professional commitments from the totality of his assets, whether those assets are allocated to the enterprise or not, owing to the lack of distinction between the assets of the enterprise and the personal assets of the entrepreneur.

8. Very small enterprises are often vulnerable. In 2009, 61,595 business failures were recorded. The sole proprietorship constitutes a form of enterprise that is exposed to the risk of bankruptcy, making it vulnerable if a client defaults on payment or if it is a subcontractor of larger entities that are themselves in difficulty. Failures of sole proprietorships account for 15,500 failures, or around one failure in four. Ninety per cent of these latter cases involve craftspeople or retailers (13,710 failures in 2009).

1.2. Inadequate protection provided by schemes for individual entrepreneurs

9. Prior to the “Individual Entrepreneur with Limited Liability” (EIRL) scheme, there were two main schemes for limiting the liability of an individual entrepreneur. It is worth recalling such schemes here, as, by showing their limitations, they highlight the inadequacy of certain responses to the needs of small entrepreneurs:

(i) Formation of a Single-Member Private Limited Liability Company (EURL);

(ii) Declaration of unseizability allowing the individual entrepreneur to render exempt from seizure certain property from his personal assets.

10. (i) Use of the EURL form of company, introduced in 1985, has remained limited, despite successive reforms that have greatly simplified the formation and operation of such companies. Such reforms include the abolition of a minimum capital for multi-member and single-member limited liability companies (Economic Initiative Act of 1 August 2003); the introduction of model statutes (Small and Medium-Sized Enterprises Act of 2 August 2005); the lightening of the occupational legal publication regime, and the automatic

implementation by default of model statutes (Economic Modernization Act of 4 August 2008).

11. However, after 25 years in operation, the EURL scheme has been largely unused by entrepreneurs. In 2008, EURLs accounted for only 6.2 per cent of all enterprises.

12. There may be a number of reasons for this relative lack of success:

(a) Many entrepreneurs believe that the obligations arising from EURL status (maintaining a record of decisions, accounting and financial management) are an obstacle to initiative;

(b) Psychological barriers remain for some entrepreneurs who are not seeking to create a legal personality separate from themselves for their entrepreneurial activities;

(c) In fact, the changeover to company status is for many only contemplated once an enterprise has reached a sufficient level of growth, when the individual entrepreneur seeks to develop his business together with other partners, or when development and the attendant fiscal and accounting implications require the formation of a legal person.

13. (ii) The declaration of unseizability enables the self-employed person to declare as exempt from seizure his rights on the immovable property which constitutes his principal place of residence (Economic Initiative Act of 1 August 2003) and, more generally, his rights on any land or building not allocated to business use (since the Economic Modernization Act of 4 August 2008).

14. However, this measure has had limited success. It appears to concern only a small number of entrepreneurs. Thus, by late 2009, only a cumulative total of around 10,000 declarations of unseizability had been registered since the scheme's inception in 2003.

15. This is due to the partial nature of the protection afforded, which relates only to immovable assets and not to savings or movable assets, which may in some instances be more significant. Such protection is therefore useful only if the entrepreneur owns immovable property; this is not always the case, especially at the start-up phase for new enterprises.

1.3. Individual Entrepreneur with Limited Liability (EIRL) scheme

16. Creating allocated assets consists, for a natural person, in allocating assets to his professional activity that are segregated from his personal assets, but without creating a legal person that is separate from the natural person.

17. The concept of allocated assets challenges the civil law principle, hitherto uncontested on account of the unity of legal personality, of the unity of assets, as it may be understood from article 2284 of the Civil Code, which provides that "[w]hoever has bound himself personally, must fulfil his commitment from all his movable and immovable property, present and future". Likewise, article 2285 provides that "[t]he property of a debtor is the common pledge of his creditors; and the proceeds of its sale shall be distributed among them pro rata, unless there are lawful causes of preference among the creditors".

18. According to the unity of assets principle, to one person corresponds one set of assets, the basis of assessment for the creditors' general right of pledge. Therefore, all the debtor's assets serve to cover the contracted obligations, subject to the availability of securities. It is irrelevant whether the debts are of a personal nature or arose in the context of the professional activity.

19. In France, the EIRL Act of 15 June 2010 therefore constituted a departure based on two principles:

(a) Freedom of choice for the entrepreneur, who is not forced to set up a company to protect his assets and family;

(b) Encouragement for entrepreneurship by preventing the bankruptcy of a business from automatically leading to personal and family ruin.

20. It is notable that such a legal status already existed in many countries, both developed and developing. Those countries include: Liechtenstein since 1926 (under the title *Einzelunternehmung mit beschränkter Haftung*), Costa Rica since 1964, Panama since 1966,

El Salvador since 1970, Chile since 2003, Peru since 2005, Dominican Republic since 2009, Brazil since 2012 (under the titles *Empresa individual de responsabilidad limitada* in Spanish, and *Empresa individual de responsabilidade limita* in Portuguese), and Portugal since 1986 (under the title *Estabelecimento mercantile individual de responsabilidade limitada*).

21. In France, since the EIRL status came into operation in 2011, more than 30,000 EIRLs have been registered.

2. How the EIRL scheme operates

2.1. Scope of application

22. The status of individual entrepreneur with limited liability is open to any natural person engaged on their own behalf in a business activity of a commercial, craft, professional or agricultural nature. *Auto-entrepreneurs* who are individual entrepreneurs are therefore eligible for the scheme. The place of filing of the allocation declaration may differ depending on the activity carried out by the EIRL.

2.2. Formation of allocated assets

23. The regulations seek to combine simplicity with third-party protection, either at the time the allocated assets are formed or during the lifetime of the activity.

24. The allocated assets shall be formed pursuant to the filing of an allocation declaration containing:

(a) A description of the nature, quality, quantity and value of the property, rights, obligations or securities allocated to the professional activity;

(b) A reference to the object of the professional activity to which the assets are allocated;

(c) Where applicable, documents certifying the completion of additional formalities required in the case of allocation of immovable property, jointly-owned or undivided property, or valuable property.

25. The allocation declaration must be filed:

(a) Either with the occupational legal publications register with which the individual entrepreneur is required to register (i.e. the commercial and companies register for traders and the trades register for craftspeople);

(b) Or with the occupational legal publications register chosen by the individual entrepreneur in the case of dual registration (this applies to craftspeople registered with the trades register who may also have to register with the register of companies if they also carry out commercial transactions), in which case, a note will be inserted on the other register;

(c) Or, for natural persons not required to register with an occupational legal publications register (i.e. members of the liberal professions and *auto-entrepreneurs* exempt from registration) and for farmers (as there is not yet an agricultural register), with a register held at the registry of the court ruling on commercial matters with jurisdiction over their principal place of business. The regulations prescribe a special register at the registry of the commercial court, which is also responsible for holding the commercial and companies register. The publishing conditions of this register shall be set out in a Council of State decree.

26. Allocation does not constitute a contribution as it does not entail transfer of title in consideration of company shares. Nevertheless, certain formalities relating to contributions to a company have been included in the regulations in order to protect third parties. Thus, the allocation of immovable property must be notarized and published in the mortgage registry, while the allocation of jointly-owned or undivided property requires the express consent of spouses or undivided co-owners and proof that they have been informed about the rights of creditors on the allocated assets.

27. Lastly, the allocation of property exceeding an amount fixed by decree (30,000 euros) must be valued by an expert along the lines of a valuation by a valuer of contributions in the case of a contribution in kind to a company. However, it has been agreed,

in the interest of simplicity and cost savings, to allow the valuation to be made not only by an external auditor, but also by a public accountant, management and accounting association or notary (the latter may only value immovable property).

28. Failure to observe these formalities when forming allocated assets or during the lifetime of the activity shall result in the unenforceability of the property allocation.

2.3. Composition of allocated assets

29. The composition of assets must comply with certain rules of allocation that are both objective and subjective:

(a) The property, rights, obligations or securities needed to carry out the professional activity must be allocated. The concept of necessary property is somewhat restrictive: in essence it pertains to property that is work-related in nature (e.g. business or goodwill);

(b) The property, rights, obligations or securities used to carry out the professional activity may also be allocated if the entrepreneur so decides, to enable the entrepreneur to provide a broader basis for assessment for his business assets (this may include mixed property).

30. The assets comprise property and liabilities. The allocation of debts attached to property follows the rules mentioned in the preceding paragraphs: where debt is attached to necessary property, it must be allocated, whereas when it is attached to property that is used, the entrepreneur is free to decide whether or not to allocate it.

2.4. Consequences of allocation declaration

31. The allocation declaration effects the segregation of assets and thereby reduces the basis for assessment for the right of pledge of the EIRL's business creditors and the other creditors against whom the declaration is enforceable: the entrepreneur's liability is thus limited both with regard to his business creditors, whose rights have arisen in the context of the professional activity to which the assets are allocated and whose sole general right of pledge are the allocated assets, and with regard to the other creditors, whose sole general right of pledge are the unallocated assets. However, these other creditors retain, in the event that the unallocated assets are insufficient, a right of pledge on the profits made by the EIRL during the financial year ended. This is a consideration granted to personal creditors who, unlike in the case of incorporation, do not get back shares in the corporate assets of their debtor.

2.5. Development of allocated assets

32. All assets are subject to change in accordance with the developing professional activity of the entrepreneur. In the interest of simplicity, there is no requirement to file an allocation declaration each time a new allocation is made. If, however, property is allocated during the lifetime of the professional activity, certain formalities need to be completed.

33. The law provides that third parties must be notified of the composition and value of the assets allocated through the filing of annual accounts, which the EIRL, unlike other individual entrepreneurs, is obliged to do. The annual accounts are filed with the registry where the allocation declaration was filed. This formality ensures that third parties are properly notified insofar as the accounts are prepared pursuant to the financial obligations applicable to traders. Thus, the balance sheet of the EIRL shows the assets and liabilities of the allocated fund, and thus its development from one year to the next. A decree sets out the simplified accounting obligations for *auto-entrepreneurs*, intended to reconcile the accounting simplicity inherent in the *auto-entrepreneur* regime with proper notification of third parties of the development of the allocated assets.

3. Rules governing the EIRL scheme

Article L. 526-6 of the Commercial Code

Any individual entrepreneur may allocate separate assets to his professional activity as distinct from his personal assets, without creating a legal person.

These assets shall comprise all property, rights, obligations or securities held by the individual entrepreneur and that are necessary to carry out his professional activity. It may also include property, rights, obligations or securities held by the individual entrepreneur, used for carrying out his professional activity and which he decides to allocate to his professional activity. The same property, right, obligation or security may only be part of a single allocation of assets.

As an exception to the preceding paragraph, individual entrepreneurs carrying out an agricultural activity as set out in article L. 311-1 of the Rural and Maritime Fisheries Code have the option of not allocating the land used for their farm to their professional activity. This option applies to all land owned by the farmers.

In order to carry out the professional activity to which the assets are allocated, individual entrepreneurs shall use a name incorporating their name, immediately preceded or followed by the words "Individual Entrepreneur with Limited Liability" or the initials "EIRL".

Article L. 526-7 of the Commercial Code

The allocated assets shall be formed pursuant to a declaration filed:

1. Either with the occupational legal publications register with which the individual entrepreneur is required to register;

2. Or with the occupational legal publications register chosen by the individual entrepreneur in the case of dual registration, in which case a note will be inserted on the other register;

3. Or, for natural persons not required to register with an occupational legal publications register, with a register held at the registry of the court ruling on commercial matters with jurisdiction over their principal place of business;

4. Or, for farmers, with the relevant chamber of agriculture.

When the individual entrepreneur is transferred to another registry or attached to another registry during the course of the activity, his allocation declaration, the other declarations provided for under this section, any entries made in the register and all the public records filed are transferred by the former body maintaining the register to the newly competent body. In this case, the newly competent body shall be exempted from the verifications referred to in article L. 526-8 and a note regarding the transfer shall be entered on the first register. The transfer shall be effected digitally and shall not give rise to any charges or fees.

Article L. 526-8 of the Commercial Code

Bodies charged with keeping the registers mentioned in article L. 526-7 shall only accept the filing of a declaration referred to in that same article after verifying that it includes:

1. A description of the property, rights, obligations or securities allocated to the professional activity, in terms of nature, quality, quantity and value;

2. Reference to the object of the professional activity to which the assets are allocated. A change to the object shall give rise to a note entered in the register where the declaration provided for under article L. 527-7 was filed;

3. Where necessary, the documents certifying the completion of formalities referred to in articles L. 526-9 to L. 526-11.

Without prejudice to compliance with the valuation and allocation rules provided for under this section, if the individual entrepreneur was exercising his professional activity prior to filing the declaration, he may submit as a description the balance sheet of his last financial year, provided that the said balance sheet was closed at least four months prior to the date of filing of the declaration. In this case, all the elements contained in the balance sheet comprise the description, and the transactions effected since the date of the last financial year for which the accounts have been closed are included in the first financial year of the individual entrepreneur with limited liability.

Article L. 526-9 of the Commercial Code

The allocation of an immovable property or part thereof shall be received by notarial deed and published in the mortgage registry or, in the departments of Bas-Rhin, Haut-Rhin and Moselle, in the land registry where the property is located. Where the individual entrepreneur allocates only a portion of one or more immovable properties, he shall identify this in a description of the division of property.

The drafting of the notarial deed and the completion of the land registration formalities shall give rise to the payment to notaries of fees for which the ceiling is determined by decree.

Where the allocation of an immovable property or portion thereof occurs after the formation of the allocated assets, a supplementary declaration shall be filed in the register where the declaration stipulated under article L. 526-7 was filed. Article L. 526-8 shall apply, with the exception of 1 and 2.

Non-compliance with the rules set out in this article shall result in the allocation being ineffective against third parties.

Article L. 526-10 of the Commercial Code

Any part of the allocated assets other than liquid assets with a declared value higher than a total sum fixed by decree shall be valued based on a report appended to the declaration and drawn up, under their responsibility by an external auditor, a public accountant, an association for accounting and management or a notary appointed by the individual entrepreneur. Valuation by a notary may only relate to immovable property.

Where property referred to in the first paragraph is allocated after the formation of allocated assets, it shall be valued in the same way and shall give rise to the filing of a supplementary declaration in the register where the declaration set out under article L. 526-7 was filed. Article L. 526-8 shall apply, with the exception of 1 and 2.

Where the declared value is higher than that proposed by the external auditor, public accountant, association for accounting and management or notary, the individual entrepreneur shall be responsible, for a period of five years in respect of third parties for all of its allocated and unallocated assets up to the difference between the value proposed by the external auditor, public accountant, association for accounting and management or notary and the declared value.

Where an external auditor, public accountant, association for accounting and management or notary has not been used, the individual entrepreneur shall be responsible for a period of five years in respect of third parties for all its allocated and unallocated assets, up to the difference between the actual value of the property at the time of allocation and the declared value.

Article L. 526-11 of the Commercial Code

Where all or some of the allocated property is jointly owned or undivided, the individual entrepreneur shall provide proof that the spouse or undivided co-owners have consented to the allocation and that they have been informed of the rights of creditors as set out in 1 of article L. 526-12 on the allocated assets. The same jointly-owned or undivided property or the same part of a jointly-owned or undivided immovable property may only be allocated to a single set of allocated assets.

Where the allocation of jointly-owned or undivided property or part thereof occurs after the formation of the allocated assets, a supplementary declaration shall be filed in the register where the declaration stipulated under article L. 526-7 was filed. Article L. 526-8 shall apply, with the exception of 1 and 2.

Non-compliance with the rules set out in this article shall result in the allocation being ineffective against third parties.

Article L. 526-12 of the Commercial Code

The allocation declaration referred to in article L. 526-7 shall be enforceable by operation of law against creditors whose rights arose after it was filed.

It is enforceable against creditors whose rights arose prior to its filing provided that the individual entrepreneur with limited liability mentions this in the allocation declaration and notifies the creditors as set out in conditions fixed by regulation.

In this case, the creditors concerned may lodge an objection to the declaration being effective against them within a period fixed by regulation. A court order shall reject the objection or order either the repayment of the debts or the formation of guarantees if the individual entrepreneur offers them and if they are judged adequate.

Failing repayment of the claims or formation of the guarantees ordered, the declaration shall not be enforceable against the creditors whose objection has been accepted.

Objections made by a creditor shall not have the effect of preventing the formation of the allocated assets.

As an exception to articles 2284 and 2285 of the Civil Code:

1. Creditors against whom the allocation declaration is effective and whose rights arose during the exercising of professional activity to which the assets are allocated shall have as sole general right of pledge the allocated assets;

2. The other creditors against whom the declaration is effective shall have as sole right of general pledge the unallocated assets.

However, the individual entrepreneur with limited liability shall be responsible from all of his assets and rights in the case of fraud or in the event of a serious breach of the rules set out in the second paragraph of article L. 526-6 or of the obligations set out in article L. 526-13.

Where the unallocated assets are insufficient, the general right of pledge of creditors mentioned in 2 of this paragraph may be exercised on the profits made by the individual entrepreneur with limited liability over the financial year ended.

Article L. 526-13 of the Commercial Code

The professional activity to which the assets are allocated shall be determined by self-balancing accounting, performed in conditions defined in articles L. 123-12 to L. 123-23 and L. 123-25 to L. 123-27.

As an exception to article L. 123-28 and to the first paragraph of this article, simplified accounting obligations shall apply to the professional activity of persons coming under the taxation systems defined in articles 50-0, 64 and 102 ter of the General Tax Code.

The individual entrepreneur with limited liability shall be required to open one or more bank accounts in a credit institution, exclusively dedicated to the activity to which the assets have been allocated.

Article L. 526-14 of the Commercial Code

The annual accounts of the individual entrepreneur with limited liability or, where applicable, the document or documents arising from simplified accounting obligations as set out under the second paragraph of article L. 526-13 shall be filed each year in the register where the declaration set out under article L. 526-7 was filed, and appended thereto. They shall be transmitted, for appending thereto, to the register set out under 3 of article L. 526-7 where the declaration is filed with the trades register in the case set out under 1 of the same article and, where applicable, with the commercial and companies register in the case provided for under 2 of the same article. From the date of filing, they shall constitute an update to the formation and value of the allocated assets.

In the case of non-compliance with the obligation referred to in the first paragraph, the presiding judge of the court, ruling by way of summary proceedings may, at the request of any interested party or the Office of the Public Prosecutor and subject to a coercive progressive fine, enjoin the individual entrepreneur with limited liability to file his annual accounts or, where applicable, the document or documents arising from the simplified accounting obligations set out under the second paragraph of article L. 526-13.

Article L. 526-15 of the Commercial Code

In the event of a waiver by the individual entrepreneur with limited liability or the death of the individual entrepreneur, the allocation declaration shall cease to be effective. However, in the event of cessation of the professional activity to which the assets are allocated and concurrent with the waiver or in the event of death, the creditors referred to in 1 and 2 of article L. 526-12 shall retain as sole general right of pledge that right which was theirs at the time of cessation or death.

In the case of a waiver, the individual entrepreneur shall have a note entered in the register where the declaration provided for under article L. 526-7 was filed. In the event of death, an heir, legal successor or any other person authorized for this purpose shall have the note entered in the register.

Article L. 526-16 of the Commercial Code

As an exception to article L. 526-15, the allocation shall not cease where one of the deceased individual entrepreneur's heirs or legal successors expresses his intention to continue the professional activity to which the assets were allocated, subject to compliance with the inheritance provisions. The person having expressed his intention to continue the professional activity shall have a note entered in the register where the declaration referred to in article L. 526-7 is filed within three months from the date of death.

The taking over of the allocated assets, where applicable after the partition and sale of some allocated assets for inheritance purposes, is subject to the filing of a takeover declaration in the register where the declaration referred to in article L. 526-7 was filed.

Article L. 526-17 of the Commercial Code

I. — The individual entrepreneur with limited liability may assign against payment, transfer inter vivos free of charge or contribute to the company all of his allocated assets and transfer title thereof under the terms set out in II and III of this article without liquidating the assets.

II. — Assignments against payment or transfers inter vivos free of charge of the allocated assets to a natural person shall entail their takeover with allocation retained to the assets of the assignee or donee. Such assignment or transfer shall lead to the assignor or donor filing a declaration of transfer in the register where the declaration referred to in article L. 526-7 was filed and shall be published. The takeover shall not be enforceable against third parties until these formalities have been completed.

The assignment or contribution of allocated assets to a legal person shall entail the transfer of title to the assignee's or the company's assets but the allocation thereof shall not be retained. It shall give rise to the publication of a notice. Transfer of title shall not be effective against third parties until this formality has been completed.

III. — The declaration or notice mentioned in II shall be accompanied by a description of the property, rights, obligations or securities comprising the allocated assets.

Articles L. 141-1 to L. 141-22 shall not apply to the assignment or contribution to a company of a business occurring subsequent to the assignment or contribution to a company of the allocated assets.

The assignee, donee or beneficiary of the contribution shall be indebted to the creditors of the individual entrepreneur with limited liability referred to in 1 of article L. 526-12 in place of the latter, without this replacement leading to novation in their respect.

The creditors of the individual entrepreneur with limited liability referred to in 1 of article L. 526-12 whose claim predates the publication date mentioned in II of this article, as well as the creditors against whom the declaration is not effective and whose rights arose prior to the filing of the declaration referred to in article L. 526-7, may, where the allocated assets are the subject of a donation inter vivos, lodge an objection to the transfer of the allocated assets within a fixed period set by regulation. A court order shall reject the objection or order either the repayment of the debts or the formation of guarantees if the assignee or donee offers them and if they are judged adequate.

Failing repayment of the claims or formation of the guarantees ordered, the transfer of the allocated assets shall not be binding on those creditors whose objection has been accepted.

Objections made by a creditor shall not have the effect of preventing the transfer of the allocated assets.

Article L. 526-18 of the Commercial Code

The individual entrepreneur with limited liability shall determine the income he shall pay into the unallocated assets.

Article L. 526-19 of the Commercial Code

The scales of charges for the formalities for filing and transferring declarations and for registering the notes referred to in this section, as well as for the filing and transfer of annual accounts or of the document or documents arising from simplified accounting obligations provided for under the second paragraph of article L. 526-13 shall be fixed by decree.

The formality of filing the declaration referred to in article L. 526-7 shall be free of charge where the declaration is filed simultaneously with the application for registration in the occupational legal publications register.

Article L. 526-20 of the Commercial Code

The Office of the Public Prosecutor and any interested party may apply to the presiding judge of the court ruling by way of summary proceedings to enjoin the individual entrepreneur with limited liability, subject to a progressive fine, to display the company name on all deeds and documents, immediately preceded or followed by the words “Individual Entrepreneur with Limited Liability” or the initials “EIRL”.

Article L. 526-21 of the Commercial Code

The implementing provisions of the present section shall be determined in a State Council decree.

E. Report of the Working Group on MSMEs on the work of its twenty-sixth session (New York, 4-8 April 2016)

(A/CN.9/866)

[Original: English]

Contents

I. Introduction

1. At its forty-sixth session, in 2013, the Commission requested that a working group should commence work aimed at reducing the legal obstacles encountered by micro, small and medium-sized enterprises (MSMEs) throughout their life cycle.[1] At that same session, the Commission agreed that consideration of the issues pertaining to the creation of an enabling legal environment for MSMEs should begin with a focus on the legal questions surrounding the simplification of incorporation.[2]

2. At its twenty-second session (New York, 10 to 14 February 2014), Working Group I (MSMEs) commenced its work according to the mandate received from the Commission. The Working Group engaged in preliminary discussion in respect of a number of broad issues relating to the development of a legal text on simplified incorporation[3] as well as on what form that text might take,[4] and business registration was said to be of particular relevance in the future deliberations of the Working Group.[5]

3. At its forty-seventh session, in 2014, the Commission reaffirmed the mandate of Working Group I, as set out above in paragraph 1.[6]

4. At its twenty-third session (Vienna, 17 to 21 November 2014), Working Group I continued its work in accordance with the mandate received from the Commission. Following a discussion of the issues raised in working paper A/CN.9/WG.I/WP.85 in respect of best practices in business registration, the Working Group requested the Secretariat to prepare further materials based on parts IV and V of that working paper for discussion at a future session. In its discussion of the legal questions surrounding the simplification of incorporation, the Working Group considered the issues outlined in the framework set out in working paper A/CN.9/WG.I/WP.86, and agreed that it would resume its deliberations at its twenty-fourth session beginning with paragraph 34 of that document.

5. At its twenty-fourth session (New York, 13 to 17 April 2015), the Working Group continued its discussion of the legal questions surrounding the simplification of

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[1] *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17* (A/68/17), para. 321.

[2] For a history of the evolution of this topic on the UNCITRAL agenda, see A/CN.9/WG.I/WP.95, paras. 5-18.

[3] A/CN.9/800, paras. 22-31, 39-46 and 51-64.

[4] Ibid., paras. 32-38.

[5] Ibid., paras. 47-50.

[6] *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 134.

incorporation. After initial consideration of the issues as set out in Working Paper A/CN.9/WG.I/WP.86, the Working Group decided that it should continue its work by considering the first six articles of the draft model law and commentary thereon contained in Working Paper A/CN.9/WG.I/WP.89, without prejudice to the final form of the legislative text, which had not yet been decided. Further to a proposal from several delegations, the Working Group agreed to continue its discussion of the issues included in A/CN.9/WG.I/WP.89, bearing in mind the general principles outlined in the proposal, including the "think small first" approach, and to prioritize those aspects of the draft text in A/CN.9/WG.I/WP.89 that were the most relevant for simplified business entities. The Working Group also agreed that it would discuss the alternative models introduced in A/CN.9/WG.I/WP.87 at a later stage.

6. At its forty-eighth session, in 2015, the Commission noted the progress made by the Working Group in the analysis of the legal issues surrounding the simplification of incorporation and to good practices in business registration, both of which aimed at reducing the legal obstacles encountered by MSMEs throughout their life cycle. After discussion, the Commission reaffirmed the mandate of the Working Group under the terms of reference established by the Commission at its forty-sixth session in 2013 and confirmed at its forty-seventh session in 2014.[7] In its discussion in respect of the future legislative activity, the Commission also agreed that document A/CN.9/WG.I/WP.83 should be included among the documents under consideration by Working Group I for the simplification of incorporation.[8]

7. At its twenty-fifth session (Vienna, 19 to 23 October 2015), the Working Group continued its preparation of legal standards aimed at the creation of an enabling legal environment for MSMEs, exploring the legal issues surrounding the simplification of incorporation and on good practices in business registration. In terms of the latter, following presentation by the Secretariat of documents A/CN.9/WG.I/WP.93, Add.1 and Add.2 on key principles of business registration and subsequent consideration by the Working Group of A/CN.9/WG.I/WP.93, it was decided that a document along the lines of a concise legislative guide on key principles in business registration should be prepared, without prejudice to the final form that the materials might take. To that end, the Secretariat was requested to prepare a set of draft recommendations to be considered by the Working Group when it resumed its consideration of Working Papers A/CN.9/WG.I/WP.93, Add.1 and Add.2 at its next session.[9] In respect of the legal issues surrounding the simplification of incorporation, the Working Group resumed its consideration of the draft model law on a simplified business entity as contained in working paper A/CN.9/WG.I/WP.89, starting with Chapter VI on organization of the simplified business entity, and continuing on with Chapter VIII on dissolution and winding up, Chapter VII on restructuring, and draft article 35 on financial statements (contained in Chapter IX on miscellaneous matters).[10] The Working Group agreed to continue discussion of the draft text in Working Paper A/CN.9/WG.I/WP.89 at its twenty-sixth session, commencing with Chapter III on shares and capital, and continuing with Chapter V on shareholders' meetings.

II. Organization of the session

8. Working Group I, which was composed of all States members of the Commission, held its twenty-sixth session in New York from 4 to 8 April 2016. The session was attended by representatives of the following States Members of the Working Group: Armenia, Canada, China, Colombia, Croatia, Czech Republic, Ecuador, El Salvador, France, Germany, Hungary, India, Indonesia, Israel, Italy, Japan, Mexico, Namibia, Panama, Philippines, Poland, Republic of Korea, Russian Federation, Switzerland, Thailand, Turkey, Uganda, and United States of America.

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[7] *Official Records of the General Assembly, Seventieth Session, Supplement No. 17* (A/70/17), paras. 220 and 225; *Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 134; and *Sixty-eighth Session, Supplement No. 17* (A/68/17), para. 321.

[8] Ibid., *Seventieth session, Supplement No. 17* (A/70/17), para. 340.

[9] See Report of Working Group I (MSMEs) on the work of its twenty-fifth session, A/CN.9/860, para. 73.

[10] Ibid., paras. 76 to 96.

9. The session was attended by observers from the following States: Iraq, Jamaica, Latvia, Libya, Mozambique, Netherlands, Romania, Sudan and Syrian Arab Republic.

10. The session was attended by the following non-member States having received a standing invitation to participate as observer in the sessions and the work of the General Assembly: Holy See.

11. The session was also attended by observers from the European Union.

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

(a) *Organizations of the United Nations system*: United Nations Conference on Trade and Development (UNCTAD); World Bank (WB);

(b) *Invited intergovernmental organizations*: Organisation pour l'Harmonisation en Afrique du Droit des Affaires (OHADA);

(c) *Invited international non-governmental organizations*: American Bar Association (ABA); American Society of International Law (ASIL); Commercial Finance Association (CFA); Conseil des Notariats de l'Union Européenne (CNUE); European Commerce Registers' Forum (ECRF); European Law Students' Association (ELSA); Fondation pour le droit continental (FDC); and the National Law Center for Inter-American Free Trade (NATLAW).

13. The Working Group elected the following officers:

Chair: Ms. Maria Chiara Malaguti (Italy)

Rapporteur: Mr. Jerry T. Clavesillas (Philippines)

14. In addition to documents presented at its previous sessions (Reducing the legal obstacles faced by micro, small and medium-sized enterprises (MSMEs), A/CN.9/WG.I/WP.92; Key principles of business registration, A/CN.9/WG.I/WP.93, Add.1 and Add.2; and Observations by the Government of the French Republic, A/CN.9/WG.I/WP.94), the Working Group had before it the following documents:

(a) Annotated provisional agenda (A/CN.9/WG.I/WP.95); and

(b) Draft recommendations on key principles of business registration (A/CN.9/WG.I/WP.96 and Add.1).

15. The Working Group adopted the following agenda:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Preparation of legal standards in respect of micro, small and medium-sized enterprises.
5. Other business.
6. Adoption of the report.

III. Deliberations and decisions

16. The Working Group engaged in discussions in respect of the preparation of legal standards aimed at the creation of an enabling legal environment for MSMEs, in particular on the legal issues surrounding the simplification of incorporation and on good practices in business registration on the basis of documents presented at its previous sessions and on Secretariat documents A/CN.9/WG.I/WP.96 and Add.1. The deliberations and decisions of the Working Group on these topics are reflected below.

IV. Preparation of legal standards in respect of micro, small and medium-sized enterprises

17. The Working Group was reminded that it had had before it at its previous session Working Paper A/CN.9/WG.I/WP.92, which contained a general note by the Secretariat in respect of reducing the legal obstacles faced by MSMEs. It was further recalled that while that document had been introduced (paras. 15 and 16, A/CN.9/860), the Working Group had not had time at its previous session to consider its contents. With a view to keeping in mind the contents of Working Paper A/CN.9/WG.I/WP.92 in order to discuss it in greater detail at the end of the session, the Secretariat briefly explained that it had prepared the document to provide context for the overall work of Working Group I. It was noted that the document had been conceived to provide an overarching framework for all of UNCITRAL's current and possible future work on MSMEs by explaining the reasons for undertaking the MSME work, and indicating that the preparation of legal texts was only one aspect of an overall policy approach that States might wish to adopt to support and foster MSMEs. The legal texts that were being and might in future be prepared by UNCITRAL could then be described as legal pillars that provided support to the overarching MSME policy context. The Working Group was encouraged to consider that possible approach to the preparation of MSME texts for discussion later in the session (see below, paras. 86 to 88).

18. Reference was also made to the items listed in paragraph 66 of document A/CN.9/800.

19. The Working Group also recalled the decision at its previous session to commence the current session with a continuation of its consideration of the draft model law on a simplified business entity for the first two days of the session, and to continue for the next two days of the session by taking up the further exploration of key principles and good practices in business registration (para. 95, A/CN.9/860).

20. During its current session, the Working Group heard a presentation by the United Nations Environment Program (UNEP) on its work to promote sustainable development through international trade and investment regulation, and on the importance of providing capacity-building and policy advice for MSMEs in this regard. In addition, the Working Group was advised that a toolkit was being prepared to facilitate the incorporation of environmental and social sustainability factors in regional trade and investment agreements.

21. The Working Group heard presentations from several delegations on legislative reforms carried out by them to assist MSMEs. One delegation informed the Working Group of their recently reformed General Law of Commercial Corporations which adopted a simplified regime for incorporation and registration of MSMEs. Another delegation gave an introduction of their recently adopted legislation designed to protect MSMEs and facilitate their development, ultimately aiming to stimulate migration of MSMEs from the informal to the formal economy. This legislation had, among others, introduced a simplified procedure for business registration and technical assistance to MSMEs.

A. Draft model law on a simplified business entity

1. Previous consideration of the draft model law (A/CN.9/WG.I/WP.89)

22. The Working Group recalled the decision at its twenty-fifth session to resume its consideration of the draft model law on a simplified business entity contained in document A/CN.9/WG.I/WP.89. It was further recalled that at previous sessions, the Working Group had considered Chapters I (General provisions) and II (Formation and proof of existence) of the draft model law (paras. 36 to 75 of A/CN.9/831), as well as additional provisions thought to be of central importance to the draft text in Chapters VI (Organization of the simplified business entity), VII (Restructuring) and VIII (Dissolution and winding-up), and draft article 35 (Financial statements) (paras. 80 to 95 of A/CN.9/860). In keeping with its earlier decision to examine issues in the draft model law in the order of their importance to the final text, the Working Group decided to commence its discussion on Chapter III of the draft model law on shares and capital and Chapter V on shareholders' meetings.

2. Chapter III — Shares and capital (A/CN.9/WG.I/WP.89)

General discussion on terminology and approach used in the draft model law

23. The Working Group was reminded that the draft model law had been prepared on the basis of certain principles, as set out in paragraph 2 of A/CN.9/WG.I/WP.89. It was further recalled that although discussion was continuing on the basis of the draft model law, the Working Group had not yet made a decision in terms of the form that the final text should take (for that decision, see below, paras. 48 to 50).

24. The view was expressed that since States and regional groups had established criteria to determine which enterprise should be considered micro, small or medium-sized in their particular economic context, the draft model law might usefully separate its treatment of different sizes of enterprise by referring to considerations such as the amount of revenue of the business. However, it was observed that the Working Group had considered this approach at previous sessions, and had decided that it was unnecessary in the draft model law to seek to harmonize such criteria, since States would simply apply the model law to the different sizes of business as established in their particular context. Instead, it had been agreed that the main concern had been to ensure that an individual business person was included in the model law, and that the text should accommodate the growth of an enterprise from a small and simple business to a more complex and multi-member enterprise (paras. 23 to 24 of A/CN.9/800, and para. 68 of A/CN.9/825).

25. Concerns were raised in respect of the use of specific terminology in the draft model law. Although the Working Group had previously decided to refer to "members" rather than to "shareholders" (para. 48 of A/CN.9/831), the view was expressed that the draft text should use the terminology "share" and "shareholders", as those terms were said to be used broadly in the existing company law regimes of various States. However, there was support for the alternative view expressed that the term "share" was unclear in some languages since it generally referred to an ownership document, but did not necessarily include in it the concept of membership in the enterprise, and that several jurisdictions used terms other than "share", such as "quota", "part" or "interest". In light of that concern, it was suggested that in order to achieve a common understanding, the next draft of the text should include an explanation of what was intended by the word "share", along with suggestions for possible alternative and more neutral terms which could be considered by the Working Group at a future session. That suggestion received broad support in the Working Group.

26. In general reference to Chapter III, a proposal was made that the entire chapter should be greatly simplified, with its primary focus on distributions and limitations thereon, while simply permitting a simplified business entity to create shares, but leaving any detailed mention of them to the operating agreement. In pursuit of that general suggestion, it was proposed that draft articles 7, 8, 10 and 13 could be deleted in favour of appropriate references being made in the operating agreement, while article 9 could simply refer to what the default position on distributions should be unless otherwise agreed, and discussion of the content of draft article 12 could proceed. No conclusions were reached on that proposal, but its content was kept in mind as the Working Group proceeded with its review of the chapter.

Article 7. Shares

27. The Working Group commenced its consideration of Chapter III of the draft model law with a discussion of draft article 7. There was support for the view that draft article 7 was too complex and sophisticated to assist the simple enterprises for which the model law was intended. Support was expressed for the view that the model law should contain the broadest possible flexibility for members to decide on the structure of an entity, but that the draft provision was not suitable for a member wishing to start a simple business. A proposal was made that the provision could be redrafted to start with the simplest model, establishing the default rule to be one of equal voting rights and equal distributions unless otherwise agreed in the operating document, followed by rules permitting the establishment of more complex structures and clearly indicating that even simple businesses were permitted to issue shares. After discussion, the Working Group expressed its support for that proposal, noting that more detailed information on classes of shares could be included in the commentary.

28. It was also observed that draft article 7 referred to the publication of information on the classes of shares in the simplified business entity in the operating document, but that such information should be made available to third parties dealing with the entity. A proposal made to resolve that problem was that the model law could require the existence of any different classes of shares to be noted in the operating document. It was also suggested that reference in the text to par value shares should be deleted, as the modern trend was away from the issuance of par value shares, which were said to be misleading for shareholders and failed to protect creditors. In that regard, it was observed that paragraph 22 of document A/CN.9/WG.I/WP.89 made reference to States that may have abolished the notion of par value, and there was support for the view that the matter should be left to the decision of implementing States.

Article 8. Special rights

29. The view was expressed that draft article 8 of the model law was also too complex for the MSME context and that it could be deleted given the broader agreement of the Working Group on a simple default rule of equal voting rights and equal distributions. However, it was observed that draft article 8 should be maintained for larger, more complex enterprises that might have more than a single class of shares and that would opt out of the default rule. The Working Group agreed that draft article 8 was a more specific rule for larger companies and that the concept should be reflected in the commentary.

Article 9. Distributions

30. In considering draft article 9, there was agreement in the Working Group that the article should be retained as being important to protect creditors, but that paragraphs 1 to 3 would require simplification. In particular, it was noted that paragraph 3 might be too onerous for micro and small businesses in setting out either an insolvency test in subparagraph (a) or a balance sheet test in subparagraph (b) as the standard for determining whether distributions could properly be made. Additional views were expressed that the purpose of the rules included in draft article 9 was also to protect members and future members of the business entity. It was suggested that a more viable approach for such businesses would be for the draft model law to set out more specifically what could be distributed to the shareholders, with specific reference to maintaining certain amounts due to creditors and other third parties in a reserve fund. An additional proposal was made to delete the test in subparagraph (a) of draft article 9(3) as being the more complex of the two. A concern was also raised that paragraphs 1 and 2 might overlap, and it was further noted that a definition of "distribution" should be considered but that it should not include payments of reasonable compensation for services rendered. In respect of the drafting of article 9, a proposal was made to simplify it along the lines of deleting in paragraph 1 the phrase "the board of management or shareholders or" and deleting in paragraph 2 the phrase "The board of management of every simplified business entity or shareholders or", as well as deleting the latter part of paragraph 3 following the phrase "sum of its total liabilities". It was also suggested that references to "classes of shares" in the text should be made consistent with drafting decisions made earlier in respect of article 7.

31. After discussion, it was agreed that the Secretariat would redraft article 9 on the basis of the suggestions made and that it would propose different variants for consideration by the Working Group.

Article 10. Redemption

32. The Working Group agreed that draft article 10 could be deleted.

Article 11. Liability for improper distributions

33. Support was expressed in the Working Group for draft article 11 in its current form, but a concern was raised that the provision appeared to be silent on the liability of decision makers of the simplified business entity responsible for the improper distribution. In this vein, it was suggested that the title of the article could be adjusted to better reflect its content by deleting the phrase "Liability for". The Working Group agreed to retain article 11 as drafted and to make reference in the commentary to the liability of the entity's decision makers for improper distributions, noting other provisions of the model law that set limits

on the decision maker's authority to declare and pay dividends in draft article 9(2), and to the possibility of including fiduciary duties in the text (para. 38, A/CN.9/WG.I/WP.89). It was further agreed that article 11 should only refer to actual knowledge by the shareholder that a distribution had violated article 9 paragraph 3 and that the phrase "ought reasonably to have known" should be deleted.

Article 12. Consideration for shares

34. The Working Group continued its consideration of Chapter III of the draft model law with a discussion of draft article 12. There was broad support for the view that in order to facilitate the establishment of a simplified business entity, the draft article should allow for maximum flexibility and leave it to members to decide how much and in what form they would contribute to the entity. It was further noted that such an approach would need to preserve the principle that in the case of simplified business entities with several shareholders, contributions should be in equal portions unless otherwise agreed by the shareholders. In addition, there was support for the view that members were in the best position to determine the value of their contributions and that they should be permitted to do so.

35. However, it was observed that provision of the contribution to the simplified business entity in the form of intangible benefits such as promissory notes and services to be performed could raise issues in some cases. In one State, for instance, shares needed to be paid in full in order to be issued, which precluded the issuance of shares for promissory notes or for the provision of future services to the enterprise. In another State, contributions to the business entity were associated with the type of company liability and in case of limited liability companies, contributions were required to be tangible and accounted for in order to protect third parties and creditors. In this regard, it was observed that provision of future services to the simplified business entity would not guarantee that protection. In other States, mainly civil law systems, domestic legislation would simply not permit the provision of services as a contribution to the establishment of a business entity. The view was expressed that such specific concerns should be addressed in the commentary as matters to be left for States to decide when adopting the model law.

36. In specific reference to paragraph 3 of draft article 12, there was some support for the view that the value of contributions to the establishment of a simplified business entity through the provision of services and/or labour, promissory notes and future assets should be audited to protect third parties and creditors, but only when such contributions comprised share capital and when it was required or permitted by the law of the enacting State or agreed by the members. It was, however, noted that such a practice would be burdensome for MSMEs and that it would be inconsistent with the purpose of the draft model law to simplify the legal framework applicable to MSMEs. It was also observed that the burden of risk of financing a simplified business entity should rest on its voluntary creditors and that protection of third parties in case of bankruptcy of the business entity was usually ensured by imposing upon members the burden of proving that there had been sufficient consideration when the business entity was established. There was some support, however, for the view that liability should be imposed on members of the business entity for miscalculation of the value of consideration other than cash.

37. After discussion, it was agreed that the Secretariat should be requested to redraft paragraphs 1 to 3 of draft article 12 along the lines of allowing the business entity's members maximum flexibility to agree on the type and amount of contribution, making observations on the specific issues related to the different types of consideration in the commentary. It was also observed that while the provision did not deal squarely with the issue of liability for fraudulent or negligent miscalculation of the value of contributions, links could be provided in the commentary to protection available to third parties and to other members in such cases. It was further agreed that paragraph 4 could be deleted and that paragraph 5 should either be simplified as being too detailed for MSMEs or deleted.

Article 13. Partly paid shares

38. In keeping with the earlier suggestion to delete several articles of the draft model law in favour of appropriate references being made in the operating agreement (see paras. 26 to 28 above), the Working Group agreed to delete draft article 13.

3. Chapter V — Shareholders' meetings (A/CN.9/WG.I/WP.89)

General discussion

39. In general reference to Chapter V, concern was raised in the Working Group that the provisions as drafted were too sophisticated and complex for micro and small enterprises. In this regard, the Working Group was urged to be mindful not to include requirements in the model law that placed unnecessary burdens on simple enterprises. Concern was also expressed that the detailed requirements for shareholders' meetings contained in Chapter V might interfere too much with the autonomy of the members of the enterprise. A proposal was made that Chapter V be deleted altogether, but that certain concepts be kept and reflected in other chapters of the model law. With regard to the structure of Chapter V, the Working Group agreed that the chapter should first contain a general rule reflecting the freedom of the members to decide how to organize their shareholders' meetings, before setting out the default rules containing the requirements applicable in the absence of any agreement between the members.

Article 17. Meetings

40. The Working Group commenced its consideration of the draft articles contained in Chapter V with a discussion of whether the requirement reflected in article 17 that shareholders' meetings must be held at least once a year should be kept. After discussion, there was support in the Working Group for the view that that requirement should be omitted as being potentially too burdensome for MSMEs. However, recalling that the Working Group had previously agreed that financial statements and annual accounts must be submitted to the shareholder's meeting for approval (A/CN.9/860, para. 94), concern was raised in respect of maintaining consistency in the model law. After discussion on this issue, the Working Group supported the view that yearly meetings should only be required when necessary to adopt such annual financial statements, bearing in mind that meetings need not be held in person.

41. Support was also expressed in the Working Group that a provision be included in the model law to reflect that members have the right to demand that a shareholders' meeting be held at any time, but that this right should be subject to certain limitations. Several delegations expressed support for the view that the model law should require that a minimum amount of shares be held by a member in order to be eligible to call for a meeting, however that no restriction should be placed on the topics that may be addressed at such meetings. Further, one delegation expressed the view that it should be reflected in the model law that all members have the right to attend all shareholders' meetings.

42. In addition, it was suggested that, where applicable, the board of directors should also be permitted to designate the place of the shareholders' meeting. The Working Group agreed that the specific drafting of the provision should be left to the Secretariat for discussion at a future session.

Article 18. Conduct of the shareholders' meeting

43. After consideration, the Working Group agreed to delete article 18 of the draft model law as being unnecessary in that members should be left free to decide upon the conduct of their meetings.

Article 19. Meetings by technological means or by written consent

44. Although a view was expressed that the provision should clarify that meeting in person should have greater priority than voting by written consent, the Working Group was in general agreement with the first sentence of the draft article permitting the holding of shareholder meetings through any available technological means or by written consent. However, concerns were raised in respect of the remainder of the draft provision in respect of the keeping of minutes, with one suggestion being that such matters were best left to be agreed by the members. There was support in the Working Group for the view that it was important that minutes of meetings be recorded to increase legal certainty and to inform shareholders who had not attended the meeting of the outcome, but there were differing views on whether that information should be made public or simply recorded in the records

of the business. It was further observed that MSMEs often operated quite informally, and that the establishment of mandatory rules such as keeping minutes was impractical, potentially burdensome (particularly if there were literacy issues) and likely to be ignored, and might be better reflected as a recommendation. The general view, however, was that there should be some sort of record prepared representing the minutes of shareholder meetings. In terms of whether there should be a time limit within which such minutes should be prepared, the Working Group was of the view that while it was better for such minutes to be prepared as soon as practicable, no time limit need be included in the draft provision, and discussion of the importance of the time frame could best be made in the commentary.

Article 20. Notice of meeting

45. There was agreement in the Working Group that draft article 20 could be simplified, and that in any event, the provision should not be expressed as a mandatory obligation. Although a view was expressed that section 20 of the annex to document A/CN.9/WG.I/WP.83 was a better approach, it was observed that that provision was actually more restrictive of members' freedom. Instead, it was agreed that members should be free to decide on how notice of meetings should be provided, and it was proposed that the default rule could be that notice should be in writing or in any other form, with an explanation in the commentary of what other forms that notice might take. The Working Group agreed that while it was difficult to conclude on what should be included in the text of a model law, if the text were along the lines of a legislative guide it should confirm that the members could decide for themselves how to convene their meetings, but that a legislative guide could recommend that notice for the meeting be provided in writing or any other form. In addition, it was observed that reference should be made (possibly in the commentary) to what information should be included in the notice, for example, whether a copy of financial statements or more detailed information on the content of the agenda should be included with the notice.

Article 21. Waiver of notice

46. The Working Group agreed that it should be possible for a member to waive the receipt of notice of a meeting, and that the substance of draft article 21 could be supported.

Article 22. Quorum and majorities and Article 23. Cumulative voting

47. The Working Group did not have sufficient time to consider draft articles 22 and 23, but requested the Secretariat to refer to the discussions in the Working Group on the draft model law in general and to prepare a revised version of the text for future consideration.

4. Model law, legislative guide or another form

48. In concluding its consideration of the draft model law on a simplified business entity at its current session, the Working Group recalled that it had at previous sessions considered what would be the best form for its legislative work on a simplified business entity (A/CN.9/800, paras. 34 to 38; and A/CN.9/831, paras. 28 and 33 to 35), but that it had decided to reserve its decision on the form that the text should take until after it had further considered the issues that would be included in the text, as well as what it should achieve (A/CN.9/800, para. 38). Having substantially completed its review of those issues through its consideration of documents A/CN.9/WG.I/WP.86 and A/CN.9/WG.I/WP.89, and taking into account the annex to document A/CN.9/WG.I/WP.83, the Working Group turned its focus once more to what form the legislative text on a simplified business entity should take.

49. Several delegations expressed support for the preparation of a model law, citing its perceived greater influence and easier utility for States seeking a solution for a simplified business form. In addition, it was observed that the Working Group had previously expressed its support for the preparation of standard forms relating to the creation of simplified business entities but that such forms were likely to be more easily created in relation to a model law. Another possible form suggested for the text was a limited form of key recommendations or principles of ten main elements (see the list in A/CN.9/825, para. 66(b)(ii) and as reflected in A/CN.9/WG.I/WP.89, para. 2), which could be supplemented with an annex illustrating how those key elements had been reflected in the laws of various States. A third proposal, which received the greatest support in the Working

Group, was for the preparation of a legislative guide, which was thought to be the approach most likely to be successful, to provide sufficient flexibility for States, and on which the Working Group could achieve consensus.

50. In light of its support for the preparation of a legislative guide on a simplified business entity, the Working Group requested the Secretariat to prepare a legislative guide, consisting of recommendations and commentary, that should reflect its policy discussions to date in respect of A/CN.9/WG.I/WP.86 and the draft model law in A/CN.9/WG.I/WP.89. The Working Group would begin its consideration of that draft legislative guide at a future session.

B. Key principles of business registration

1. Presentation of Working Papers A/CN.9/WG.I/WP.96 and Add.1 and introductory observations

51. The Working Group resumed the consideration commenced at its last session of the draft commentary contained in documents A/CN.9/WG.I/WP.93, Add.1 and Add.2, this time in conjunction with the draft recommendations on key principles of business registration contained in documents A/CN.9/WG.I/WP.96 and Add.1, which had been prepared in response to a request by the Working Group at its twenty-fifth session in October 2015.[11] The Secretariat highlighted certain aspects of Working Papers A/CN.9/WG.I/WP.96 and Add.1, which had been prepared in the form of draft recommendations of a legislative guide. In particular, the Working Group was advised that A/CN.9/WG.I/WP.96 and Add.1 did not follow the order of the draft commentary in A/CN.9/WG.I/WP.93, Add.1 and Add.2, but that the draft recommendations had been reordered in a manner thought to be more logical and more efficient, moving from the objectives of a business registry, to its functions and establishment, to its operation, and then to registration and post-registration matters. It was noted that following each draft recommendation, a paragraph had been inserted noting the relevant supporting paragraphs in the draft commentary (A/CN.9/WG.I/WP.93, Add.1 and Add.2), and highlighting any additional information that it was thought might be considered for inclusion in the commentary. The Working Group was advised that the two sets of documents (including any adjustments agreed by the Working Group) would be combined into a single draft legislative guide for the review of the Working Group at a future session, and that the draft commentary would be revised and consolidated from its current state in A/CN.9/WG.I/WP.93, Add.1 and Add.2.

52. It was further highlighted that throughout the draft recommendations, the term “the Regulation” had been used to indicate the body of rules adopted by the enacting State with respect to the business registry, whether such rules were found in administrative guidelines or in the specific law governing business registration. The term “law of the enacting State”, on the other hand, had been used to denote those provisions of domestic law in the broader sense that were somehow relevant to and touched upon issues related to business registration.

53. The Working Group then proceeded with its consideration of the two sets of documents containing a draft commentary and draft recommendations. The Working Group may wish to note that the heading of each of the draft recommendations below also lists the relevant cross reference to the draft commentary contained in A/CN.9/WG.I/WP.93, Add.1 and Add.2.

54. It was suggested that the draft recommendations and commentary on key principles of business registration, applicable to all mandatory registries, contained a level of detail that could inhibit core principles from being communicated sufficiently clearly to developing States. In this regard, it was suggested that principles found by the Working Group to be the most essential to assist MSMEs could be set out at the beginning of the legislative guide. For example, it was suggested that the materials could focus on three key principles: setting out the reasons for registering a business; permitting registration through one integrated service (including one form, one set of information and one payment); and that information on those services should be widely communicated to all entrepreneurs.[12] It was further

[11] A/CN.9/860, para. 73.

[12] These and other matters were outlined by the United Nations Conference on Trade and

suggested that draft recommendation 12 on a single interface for business registration could be moved to the beginning of the legislative guide. The Working Group decided, however, to leave such specific drafting and structural considerations to be discussed at a later time.

55. With regard to the terminology and approach adopted in the draft recommendations, concern was raised that use of the terms "business registry" and "single interface for business registration" could be confusing, since a single interface should ideally be the sole portal through which an entrepreneur would access all necessary approvals to commence a business (for example, tax identification numbers, social services and the like) and was not limited to access to the business registry. Support was expressed that the meaning of these terms and the overall approach of providing a single interface for all businesses to enter the formal economy (which would nonetheless preserve the functions of the various regulatory agencies), should be clearly established in the introductory paragraphs of the legislative guide. In response to the suggestion that the draft text could reconsider the use of the term "Regulation", it was observed that appropriate terminology could be arrived at through a consideration of the draft recommendations, with appropriate reference to additional sources.

2. Objectives of a Business Registry (A/CN.9/WG.I/WP.96, paras. 4 to 7)

Recommendation 1: Registration permitted for all businesses (A/CN.9/WG.I/WP.93, paras. 10 and 33)

56. After discussion, the Working Group agreed that it should be left for the enacting State to decide which businesses should be required to register. However, support was expressed that the commentary should note that States typically require registration for more sophisticated business forms, particularly those that were granted limited liability. The Working Group also agreed that the recommendation should require that all businesses be permitted to register.

57. Two delegations informed the Working Group of new legislation establishing a single window approach for their MSME registration. One example, in particular, had taken the same approach to the registry reform as the draft legislative guide, i.e. the system permitted the registration of any business wishing to register, but did not require all businesses to be registered.

58. Concern was expressed that the wording in draft recommendation 1 "permits and facilitates" referred to two different concepts, and therefore should be separated into two different recommendations: one stating that registration should be permitted and a second that registration should be facilitated. However, after discussion, support was expressed for the suggestion that the word "facilitates" be deleted from recommendation one, and that the principle that registration should be facilitated could be reflected elsewhere. Support was expressed in the Working Group for the drafting suggestion that the phrase "legal forms" in recommendation 1 could be changed to terminology along the lines of "businesses". A further drafting suggestion was that the title of draft recommendation 1 could be changed to better reflect the content of the recommendation. Concern was also expressed that the reference to businesses of "all sizes" could divert attention away from MSMEs, however, the Working Group was reminded that while the recommendations were aimed at streamlining business registry practices to assist MSMEs, such improvements would ultimately assist businesses of all sizes and levels of sophistication.

Recommendation 2: Purposes of the business registry (A/CN.9/WG.I/WP.93, para. 33)

59. It was observed that draft recommendation 2 might not be expressed in clear enough terms as in, for example, the phrase "an identity recognised by the enacting State". The Working Group agreed that the draft recommendation should be clarified.

Development (UNCTAD) in its paper "Lessons learned on business registration" (see under "References" at www.ger.co), to be submitted as an official document prior to the next session of the Working Group. See, also, the report of the previous session of the Working Group (A.CN.9/860, paras. 74-75).

Recommendation 3: Key features of a business registration system (A/CN.9/WG.I/WP.93, para. 10)

60. A concern was expressed with respect to the use of the word "reliable" in paragraph (d) of the draft recommendation, and the possible perception that the recommendation could be suggesting that the registry was responsible for the accuracy of the registered information. That concern also suggested that use of the word "reliable" in the draft recommendation could be seen to be favouring the approval system of business registration, given the emphasis of that system on ex ante verification of information.

61. It was also observed that the word "reliable" in paragraph (d) might refer to either the reliability of the information or of the system itself. It was noted that if the term referred to the information, it was possible that the draft recommendations in respect of the effects of registration that appeared later in the text might deal appropriately with the issue (for example, whether the registrant should be held responsible for the accuracy of the information it submitted). It was also observed that draft recommendations appearing later in the text also considered certain aspects of the reliability of the system, including, for example, recommendations on access to services and preservation of records.

62. The Working Group recalled that the issue of the reliability of the information contained in the business registry and whether or not the use of the term "reliable" connoted a preference for the declaratory or approval systems had been extensively considered at its previous session (A/CN.9/860, paras. 31, 35 and 61). The conclusion of the Working Group at its previous session had been that there was broad agreement that the provision of reliable information was a core function of the business registry and that the use of the term "reliable" did not indicate acceptance of either the declaratory or approval system, and that its meaning could be understood in the context of the chosen system of each State (A/CN.9/860, para. 35). Moreover, it had been decided at the previous session that information in the business registry should be reliable, but that it would be left to the State to determine how best to ensure its reliability, regardless of the particular approach adopted in the business registry (A/CN.9/860, para. 61).

63. Support was reiterated for the position taken by the Working Group at its previous session in the terms outlined in the paragraph above. However, one delegation expressed its view that the term "reliable" was defined as "able to be trusted" and insisted that the information contained in business registries in its jurisdiction was not reliable or trustworthy, and that the term "reliable" should thus not be used. Other delegations did not support the use of the term "reliable".

64. A proposal was made to address the matter by revising the chapeau of the draft recommendation to read "The Regulation should ensure the following key features:". Another proposal was to split the draft recommendation into two recommendations, with one dealing with the reliability of the system, and the other dealing with the reliability of the information. Those suggestions did not receive broad support, nor did the suggestion to solve the apparent impasse by deleting the word "reliable" in paragraph (d).

65. Another question was raised concerning the use of the term "current" in draft recommendation 3. The Working Group agreed to place paragraph (d) in square brackets for inclusion in a future iteration of the text, along with additional information in the commentary referring to the consideration of the issues as outlined in paragraphs 60 to 64 above. The Working Group again agreed that the text in this regard should be very clear to avoid appearing to favour either the declaratory system or the approval system of business registration.

Recommendation 4: Minimum regulatory burden on micro, small and medium-sized enterprises (A/CN.9/WG.I/WP.93/Add.1, paras. 5, 13, 22 and 28)

66. The Working Group agreed that the principles expressed in the draft recommendation, i.e. that MSMEs should be subject to the minimum obligations necessary for entry into the formal economy, should be retained in the commentary or in an introductory section, and should appropriately be emphasized. Further, the Working Group agreed that draft recommendation 4 should be deleted (see, however, paras. 71 and 74 below).

3. Establishment and functions of the business registry (A/CN.9/WG.I/WP.96, paras. 8 to 13)

Recommendation 5: Responsible authority (A/CN.9/WG.I/WP.93, paras. 23, 24 and 44)

67. The view was expressed that there was no need to establish the authority of the State over the operation of the registry nor its ownership of the registry record, since those were matters under the State's responsibility and each State should choose how best to legislate on those aspects in light of its domestic legal framework. After discussion, the Working Group agreed that the introductory sentence of the draft recommendation ("The Regulation should establish that the organization and operation of the business registry is a function of the enacting State") should be retained as a draft recommendation, while paragraphs (a) and (b) should be deleted and their contents appropriately reflected in the commentary to the recommendation.

Recommendation 6: Appointment of the registrar (A/CN.9/WG.I/WP.93, para. 34)

68. Concern was expressed that draft recommendation 6 might not include the practice of those States that did not designate an authority to appoint a registrar, and it was suggested that the principle expressed in the draft recommendation could be moved to the commentary. It was further suggested that if the draft recommendation were to be retained, its text should be clarified in order to indicate that the primary or secondary legislation should set out rather than "determine" the registrar's duties.

69. The view was also expressed that draft recommendations 5 and 6 appeared to be linked, and might possibly be merged. The Working Group requested the Secretariat to consider merging the two draft recommendations.

Recommendation 7: Simple and predictable legislative framework (A/CN.9/WG.I/WP.93/Add.2, paras. 24 to 25)

70. It was suggested that, since draft recommendation 7 appeared to deal with what was said to be a general principle of legislative drafting rather than a legal principle applicable to business registration, the concept expressed could be moved to the commentary or to the introduction to the draft legislative guide. It was also observed that the concepts expressed in the second part of the recommendation, which made reference to the "unnecessary use of exceptions and discretionary power" were not sufficiently clear and could be misunderstood since, if the law was silent on a matter, it would be desirable for the registrar to have a certain amount of discretion. There was some support for the view that draft recommendation 7 should be deleted.

71. The Working Group also heard a view that the principles included in draft recommendation 4, which the Working Group had agreed to delete (see para. 66 above), could be combined with those contained in draft recommendation 7 to possibly be included in a new draft recommendation. That recommendation would set out more general principles, including that the legislative framework applicable to business registration should be simple and predictable and that the business registration system should provide for simplified registration and post-registration procedures for MSMEs. There was support in the Working Group for the view that the principles expressed in draft recommendations 4 and 7 were crucial for establishing a system promoting registration of MSMEs and that, as such, they should be properly reflected in the recommendations themselves.

72. It was suggested that lessons learned from a technical assistance programme for business registration reforms (see footnote 12 above) indicated that the general principles of transparency and simplicity were key to success. In this respect, transparency was said to entail making known the necessary documents and other requirements for entering the formal economy, while simplicity was requiring the minimum steps possible from potential entrepreneurs. It was observed that these principles were similarly found in the draft recommendations and the draft commentary under consideration by the Working Group (e.g. draft recommendations 4, 7, 8, 17 and 40). Further, there was support for concern expressed that the Working Group should not too hastily delete large swaths of the draft

recommendations during its initial review of the materials, but that it should take a measured approach so as not to lose any of the important concepts arrived at from a distillation of principles from earlier Working Papers (e.g. A/CN.9/WG.I/WP.85, and A/CN.9/WG.I/WP.93, Add.1 and Add.2).

73. A discussion ensued in the Working Group on the form that the recommendations in the legislative guide should take and whether they should be drafted as a checklist referring to broad principles, or whether they should be more detailed and based on legal standards supported by commentary, which could provide States with more detailed guidance in order to properly assist them in the legislative reform of their system of business registration. It was observed that UNCITRAL's legislative function meant that it prepared legal standards, and that it was not in the business of preparing checklists, although its specific legislative recommendations could be used functionally by States to track whether they were meeting the necessary requirements. After discussion, it was agreed that the Working Group would continue its consideration of the materials in A/CN.9/WG.I/WP.96 and A/CN.9/WG.I/WP.96/Add.1 in the form of draft recommendations for a legislative guide, which would be clearly drafted, and which States could use to implement and monitor the progress of their reform process.

74. The Working Group agreed to request the Secretariat to draft a new recommendation 1 that would include the principles expressed in draft recommendations 4 and 7, which also reflected the general principle of the need for transparent and simplified methods of registration.

Recommendation 8: Transparency and accountability (A/CN.9/WG.I/WP.93/Add.2, paras. 62 to 64)

75. The view was expressed in the Working Group that the meaning of the term "accountability" and its applicability to the business registry rather than to a person might be unclear. After discussion, it was agreed that "accountability" could be deleted from recommendation 8, but that the concept might be retained, possibly in the draft commentary, particularly if the emphasis of that term was on issues related to corruption. However, if the concept were retained, the Working Group was of the view that the meaning of the term should be established clearly either in a recommendation or in the commentary.

76. It was drawn to the attention of the Working Group that the concept of capacity-building was addressed in the commentary related to recommendation 8 (A/CN.9/WG.I/WP.93/Add.2, paras. 81 to 83), but that it had not been reflected in a recommendation itself. There was support in the Working Group for the proposal that a new draft recommendation could be added to reflect this concept, despite the reservations expressed by one delegation that the issue of capacity-building might not be appropriate for a recommendation on a legal standard. After discussion, the Working Group agreed to ask the Secretariat to draft a separate recommendation reflecting the concepts currently contained in A/CN.9/WG.I/WP.93/Add.2, paragraphs 81 to 83, bearing in mind UNCITRAL's focus on the preparation of legal standards, for it to be discussed by the Working Group at a future session.

77. In addition, there was support in the Working Group to request the Secretariat to draft a recommendation reflecting the considerations contained in A/CN.9/WG.I/WP.93/Add.2, paragraph 64 on the use of standard registration forms.

78. As indicated through an initial discussion earlier in the session (see para. 72 above), there was broad agreement in the Working Group that transparency was an important feature of an effective business registration system. A view was expressed that the issue of transparency might be dealt with in more general legislation requiring transparency and that specific mention of it in the draft recommendation might not be necessary. Another view was that the concept of transparency could be clarified either in the recommendation itself or in the commentary, possibly through reflecting in more specific terms what measures should be undertaken to ensure transparency.

79. The Working Group entered into a discussion regarding whether recommendations 8 and 17 reflected the same rule, and consequently should be merged. There was some support for the suggestion that the two draft recommendations should be combined. However, after discussion, it was agreed that the scope of the recommendations should be clarified to

establish whether they reflected different concepts before a final decision on the matter could be made by the Working Group. In a similar vein, after a brief discussion on whether draft recommendation 8 should be expanded to include the requirement that information in respect of the business registry should be made available online, and having observed that draft recommendations later in the text might deal with this concern in greater detail, the Working Group agreed to leave the issue for consideration at a future session.

80. Following from this discussion, the Working Group entered into a more general discussion on the relation between the general principles set out in the beginning of the legislative guide and the more specific application of those general principles throughout the legislative guide. The Working Group recalled that the draft legislative guide set out general principles at the outset, and then reflected the specific application of those principles throughout the more detailed recommendations in the remainder of the guide. The suggestion that cross references between the general principles and the related recommendations could be included in the commentary was widely supported in the Working Group.

Recommendation 9: Functions of the business registry (A/CN.9/WG.I/WP.93, paras. 12, 35, 45 and 46)

81. The Working Group was reminded that the draft commentary underlying draft recommendation 9 had been considered at its previous session (A/CN.9/860, paras. 34-36, 63, and 65-66), and that the Working Group had at that time requested a few clarifications and made some drafting suggestions. In respect of the chapeau, it was suggested that it might read "the Regulation could" rather than "the Regulation should", in order to indicate the non-mandatory nature of some of its paragraphs. However, there was support in the Working Group for the alternative proposal that some of the paragraphs should be mandatory as they set out the most fundamental functions of a business registry, while others might be of a less mandatory nature, and that the draft recommendation should differentiate between the two.

82. There was support for the proposal that the Working Group should set aside its review of draft recommendation 9 until it had reviewed the rest of the draft recommendations and had a better sense of the entire draft. That approach was taken up by the Working Group, on the understanding that a decision to separate the paragraphs in draft recommendation 9 into a list of those functions that should be established and those of a less fundamental nature that could be established could be made after that review had taken place.

Recommendation 10: Storage of and access to information contained in the registry (A/CN.9/WG.I/WP.93, paras. 25 to 26)

83. It was noted that the term "registry's users" in the draft recommendation might be broader than intended and it was suggested that it be replaced with a narrower reference, such as "registrants and registry staff".

84. Concern was expressed that reference to "a centralized registration system" in the first sentence of the recommendation, would not be accurate enough as it did not consider States where local and/or regional registration offices were reciprocally interconnected. There was some support for the suggestion that the recommendation could include reference to such an approach (so that the first sentence would read: "the Regulation should establish a centralized or interconnected registration system …"). The view was expressed that interconnected registries might not be mutually consistent so that stored information might not be accessible from throughout the system, and that the recommendation should emphasize the need for such consistency. In addition, it was observed that regardless of the architecture of the system, information on registered businesses should be stored and made accessible in digital format through a single national database that would allow exchange of information.

85. The Working Group agreed that the Secretariat would accommodate the comments above in the draft recommendation and the commentary, as appropriate.

C. Document A/CN.9/WG.I/WP.92 and the structure of MSME work

86. The Working Group recalled that Working Paper A/CN.9/WG.I/WP.92 had been prepared by the Secretariat to provide context for the overall work of Working Group I on MSMEs (see para. 17 above). The Working Group was also reminded that potential future topics relating to MSMEs had been mentioned at a previous session (see para. 18 above and A/CN.9/800, para. 66, which stated "that the Working Group acknowledged and welcomed the Commission's mandate relative to the establishment of an enabling legal environment to facilitate the life cycle of MSMEs"); however, the Commission had not yet given a mandate to a Working Group to consider those topics. In that light, it was thought that the consideration of how to structure the MSME legislative texts should encompass the two topics currently being considered in Working Group I, in addition to Working Group V's anticipated discussion of simplified insolvency provisions for MSMEs, as well as possible future but as yet undecided MSME projects that might be considered in Working Group I or in other relevant Working Groups. Reference was also made to recent legislative efforts on MSMEs in relation to insolvency, in respect of which, it was noted, a State had recently adopted a framework specifically for MSMEs.

87. With the considerations outlined in paragraph 86 above in mind, there was broad support in the Working Group for the proposal that its MSME work be accompanied by an introductory document along the lines of A/CN.9/WG.I/WP.92, which, once specifically considered and adopted by the Working Group, would form a part of the final texts and would provide an overarching framework for current and future work on MSMEs. Attached to and underpinning that contextual framework as legal pillars would be the current two legislative texts on MSMEs being discussed by Working Group I, as well as any future MSME texts. Importantly, the framework could be expanded with any additional legislative texts as they were adopted by the Commission.

88. The Working Group made the following drafting suggestions in respect of A/CN.9/WG.I/WP.92, bearing in mind that it (or a revised version of it) would be considered in detail by the Working Group at a future session:

(a) It was suggested that for greater clarity, paragraph 41 setting out a non-exhaustive list of possible incentives for MSMEs to join the formal economy could be separated into pre-formalization (e.g. subparas. (a) to (c)) and post-formalization (e.g. subparas. (g) to (s)) incentives;

(b) It was suggested that "organized access to and support with health insurance" could be added to paragraph 41;

(c) It was suggested that information could be added to the text on the potential cross-border activities of MSMEs, as well as reference to how electronic commerce and the Internet have improved those possibilities;

(d) It was suggested that a footnote to the main text in A/CN.9/WG.I/WP.92 could include reference to the history of Working Group I and to possible future work on MSMEs;

(e) It was suggested that a footnote to the main text in A/CN.9/WG.I/WP.92 could include reference to other UNCITRAL texts that could have a positive impact on MSMEs; and

(f) Additional aspects of the document "Lessons learned" referred to above in footnote 12 could be considered for addition, as appropriate, to the text in A/CN.9/WG.I/WP.92.

D. Other matters

89. The Working Group recalled that its twenty-seventh session was scheduled to be held in Vienna from 3 to 7 October 2016. If an additional week of conference time in Vienna were to become available (due to the completion of the work in another Working Group), possibly the week of 5 to 9 September 2016, the Working Group considered whether it wished to avail itself of that additional week so as to spend one full week considering a legislative guide on key principles of business registration and a separate full week considering a legislative guide on a simplified business entity. Some delegations expressed

concern that they might have budgetary problems in attending two full sessions of Working Group I in Vienna in the latter part of 2016, and, in any event, it was noted that the Commission would make the decision on the allocation of conference time to Working Groups at its session in June-July 2016.

90. The Working Group next considered whether it should continue to discuss both legislative projects for two days each at its upcoming sessions. In order to make more progress, the Working Group decided that it would spend the entire week of its twenty-seventh session considering a draft legislative guide on a simplified business entity, and that it would spend the entire week of its twenty-eighth session considering the draft legislative guide on key principles of business registration. The Working Group also agreed to consider A/CN.9/WG.I/WP.94 at its next session.

F. Note by the Secretariat on draft recommendations on key principles of business registration

(A/CN.9/WG.I/WP.96 and Add.1)

[Original: English]

Contents

Introduction

1. At its twenty-fifth session (Vienna, 19-23 October 2015), the Working Group, had before it three documents on Key principles of business registration (A/CN.9/WG.I/WP.93, A/CN.9/WG.I/WP.93/Add.1, and A/CN.9/WG.I/WP.93/Add.2), which the Secretariat had been requested to prepare at a previous session (twenty-third session, paras. 43-46, A/CN.9/825). Without intending to pre-empt any decision by the Working Group on the form that a legislative text on business registration might take, those documents were prepared in the form of a draft commentary for a possible legislative guide and were intended to be considered together to facilitate discussion in the Working Group on how the principles of an effective and efficient business registration system could appear in a future legislative text. At its twenty-fifth session, the Working Group considered the first of those documents, A/CN.9/WG.I/WP.93, and strongly supported the view that the Working Group should prepare an instrument along the lines of a concise legislative guide on business registration, without prejudice to considering other texts at a later date. To that end, the Secretariat was requested to prepare a set of draft recommendations to be read along with the draft commentary in Working Papers A/CN.9/WG.I/WP.93, Add.1, and Add.2 when the Working Group resumed its consideration of them at its twenty-sixth session (para. 73, A/CN.9/860). This Working Paper and A/CN.9/WG.I/WP.96/Add.1 are intended to be read together as a response to that request by the Working Group.

2. The order of the draft recommendations in this document and A/CN.9/WG.I/WP.96/Add.1 reflects the order in which it was thought that a draft legislative guide on business registration could most efficiently and logically be presented. The order of these draft recommendations does not precisely follow the order of the draft commentary reflected in Working Papers A/CN.9/WG.I/WP.93, Add.1, and Add.2, and as such, each of the draft recommendations is followed by a brief paragraph, which begins with a cross-reference to the relevant paragraphs of those documents in order to facilitate the reading of the draft commentary with the related draft recommendation. When the two sets of materials are combined into one draft legislative guide in a future iteration, the order in which they are presented will follow the order of the draft recommendations, as adjusted by the Working Group, and each draft recommendation will be preceded by the relevant discussion in the draft commentary. To the extent that the current draft commentary in A/CN.9/WG.I/WP.93, Add.1, and Add.2 needs to be supplemented with additional information on the particular draft recommendation, the brief paragraph following each draft recommendation will suggest possible additional commentary. In addition, not all paragraphs of the draft commentary are reflected in a draft recommendation, and, in any event, the Working Group is encouraged to make suggestions for additional draft recommendations where there are any perceived gaps.

3. The Working Group may also wish to note that the draft recommendations in this Working Paper refer to both "the Regulation" and the "law of the enacting State". The Regulation is intended to mean the body of rules adopted by the enacting State with respect to the business registry, whether such rules are found in administrative guidelines or in the law of the enacting State governing business registration. The term "law of the enacting State" is intended to denote those provisions of domestic legislation in the enacting State in the broader sense that are somehow relevant to and touch upon issues related to business registration. The Working Group may also wish to note that the term "business", as used in these draft recommendations is not intended to include those professions that are otherwise regulated by professional bodies. These and other important terms will form a section on terminology and interpretation in a future iteration of the draft legislative guide.

Draft Recommendations

I. Objectives of a Business Registry

Recommendation 1: Registration permitted for all businesses

The Regulation should establish a system for the registration of businesses that permits and facilitates registration of businesses of all sizes and of all legal forms, but that requires the registration of only those legal forms as established by the law of the enacting State.

4. The Working Group may wish to note that paragraphs 10 and 33 of the draft commentary in A/CN.9/WG.I/WP.93 explain that the approach taken by the draft legislative guide is to recommend that all businesses should be permitted to register, since business registration is considered as the key means through which all businesses, including micro, small and medium-sized enterprises (MSMEs), can participate effectively in the economy. The applicable law in each State should determine which businesses are required to register, and which additional conditions they may have to fulfil as part of that requirement.

Recommendation 2: Purposes of the business registry

The Regulation should provide that the business registry is established for the purposes of:

(a) Providing an identity recognized by the enacting State to a business that fulfils the requirements established by law; and

(b) Making accessible to the public information in respect of those businesses that are required or permitted to register.

5. The Working Group may wish to note that this draft recommendation should be read alongside paragraph 33 of the draft commentary in A/CN.9/WG.I/WP.93, which clarifies that States should set the foundations of a business registry either by way of law or regulation. The opening provisions of such law or regulation should set out explicitly the purpose of a system for the registration of businesses.

Recommendation 3: Key features of a business registration system

The Regulation should ensure that the system for business registration contains the following key features:

(a) The registration process is publicly accessible, simple, user-friendly and time and cost-efficient;

(b) The registration process is adapted to the needs of micro, small and medium-sized enterprises (MSMEs);

(c) The registered information on businesses is easily searchable and retrievable; and

(d) The registered information is current, reliable and secure.

6. The Working Group may wish to note that this draft recommendation should be read alongside paragraph 10 of the draft commentary in A/CN.9/WG.I/WP.93, which enumerates the key features of an effective system for the registration of businesses that are included in this recommendation and are informed by international good practice in the domain of business registration. Such good practice has been outlined in the following Working Papers: A/CN.9/WG.I/WP.85, A/CN.9/WG.I/WP.93, A/CN.9/WG.I/WP.93/Add.1 and A/CN.9/WG.I/WP.93/Add.2.

Recommendation 4: Minimum regulatory burden on micro, small and medium-sized enterprises (MSMEs)

The Regulation should ensure that micro, small and medium-sized enterprises (MSMEs) are subject to the minimum obligations necessary pursuant to the Regulation, except where such a business is subject to additional requirements under the law of the enacting State as a consequence of its particular legal form.

7. The Working Group may wish to note that this draft recommendation should be read alongside paragraphs 5, 13, 22 and 28 of the draft commentary in A/CN.9/WG.I/WP.93/Add.1, which emphasize that in order to promote registration of MSMEs, business registration systems should provide for simplified registration and post-registration procedures. However, it should be noted that MSMEs may be subject to additional requirements as a result of their particular legal form.

II. Establishment and functions of the business registry

Recommendation 5: Responsible authority

The Regulation should establish that the organization and operation of the business registry is a function of the enacting State and that:

(a) The enacting State retains the authority over the operation of the registry in accordance with the applicable law of the enacting State regardless of the entity responsible for the daily operation of the registry; and

(b) The enacting State retains ownership of the registry record and, where appropriate, the registry infrastructure.

8. The Working Group may wish to note that this draft recommendation should be read alongside paragraphs 23 to 24 and 44 of the draft commentary in A/CN.9/WG.I/WP.93, which clarify that the business registry can be operated by the State in various ways, including by way of partnership with a private sector firm. However, the State should always retain responsibility for ensuring that the registry is operated in accordance with the applicable law or regulation. State ownership of the registry record and, when necessary, of the registry infrastructure is meant to establish public trust in the business registry and prevent the unauthorized commercialization or fraudulent use of information in the registry record.

Recommendation 6: Appointment of the registrar

The Regulation should provide that the person or entity authorized by the enacting State has the authority to appoint and dismiss the registrar, to determine the registrar's duties and to monitor the registrar's performance.

9. The Working Group may wish to note that this draft recommendation should be read alongside paragraph 34 of the draft commentary in A/CN.9/WG.I/WP.93, which clarifies that the term "registrar" should be understood as referring to a natural or legal person, and that the term also includes a group of persons appointed to perform the registrar's duties under the registrar's supervision.

Recommendation 7: Simple and predictable legislative framework

The Regulation should adopt a simple structure for rules governing the business registry and should avoid the unnecessary use of exceptions or discretionary power.

10. The Working Group may wish to note that this draft recommendation should be read alongside paragraphs 24 to 25 of the draft commentary in A/CN.9/WG.I/WP.93/Add.2, which explain that an electronic registration system requires a legal framework that supports simplicity and flexibility. Should the Working Group decide to retain this recommendation, the commentary may be adjusted accordingly and in line with paragraphs 59 to 71 of A/CN.9/WG.I/WP.93/Add.2, which provide an overview of the necessary features of the laws and regulations underlying business registration.

Recommendation 8: Transparency and accountability

The Regulation should ensure that rules or criteria that are developed are made public to ensure transparency of the registration procedures and accountability of the business registry.

11. The Working Group may wish to note that this draft recommendation should be read alongside paragraphs 62 to 64 of the draft commentary in A/CN.9/WG.I/WP.93/Add.2, which provide some examples of features required for a legislative framework promoting transparency and accountability in business registration. It should also be noted that paragraphs 81 to 83 of the draft commentary in A/CN.9/WG.I/WP.93/Add.2 suggest that appropriate institutional mechanisms should be established and sufficient financial means provided to ensure appropriate capacity-building programmes for personnel and supervisory authorities responsible for business registration services.

Recommendation 9: Functions of the business registry

The Regulation should establish that the functions of the business registry include:

(a) Registering the business when the business fulfils the necessary conditions established by the law of the enacting State;

(b) Providing guidance, particularly to the registrants of MSMEs, on the registration process and on the business's rights and obligations in connection thereto;

(c) Providing access to the services of the business registry;

(d) Assisting businesses in searching and registering a business name;

(e) Listing all the documents that must be submitted in support of an application to the registry;

(f) Providing the reason for any rejection of an application for business registration;

(g) Entering the information contained in the application submitted to the registry into the registry record, and indicating the time and date of each registration;

(h) Assigning a unique business identifier to the registered business;

(i) Sharing information among public agencies;

(j) Providing the person identified in the application as the registrant of the business with a copy of the notice of registration;

(k) Ensuring that any required fees for registration have been paid;

(l) Providing public notice of the registration in the means specified by the enacting State;

(m) Ensuring that the information in the registry is kept as current as possible;

(n) Entering the information contained in an amendment notice into the registry record;

(o) Entering the information on, including the date of and any reasons for, the declaration of deregistration of a business from the registry record;

(p) Publicizing the means of access to the services of the business registry, and the opening days and hours of any office of the registry;

(q) Indexing or otherwise organizing the information in the registry record so as to make it searchable;

(r) Protecting the integrity of the information in the registry record;

(s) Archiving information removed from the registry record; and

(t) Offering services incidental to or otherwise connected with business registration.

12. The Working Group may wish to note that this draft recommendation should be read alongside paragraphs 12, 35 and 45 to 46 of the draft commentary in A/CN.9/WG.I/WP.93, which clarify that listing the various functions of the business registry in the opening provisions of the law or the regulation governing business registration promotes clarity and transparency as to the nature and scope of the issues that are dealt with in detail later in the law or regulation. It is, however, important that such a list is read as an overview of the functions of the business registry and is not read as implying unintended limitations on the detailed provisions of the law or regulation.

Recommendation 10: Storage of and access to information contained in the registry

The Regulation should establish a centralized registration system that would process and store all information received from the registry's users. Such a central repository should permit access by satellite registry offices through the use of modern technology.

13. The Working Group may wish to note that this draft recommendation should be read alongside paragraphs 25 to 26 of the draft commentary in A/CN.9/WG.I/WP.93, which explain that centralized registration systems with an electronic format that are able to process data from the local registries permit a more efficient collection of data from businesses and avoid the duplication of procedures. In States where the registration process and its regulatory oversight are delegated to the local level, confusion can arise if each locality follows its own approach rather than adhering to a central vision. In order to function efficiently, an electronic central registry should be accessible by terminals in the various regions and/or cities of a State, where other registry offices are located.

III. Operation of the business registry

Recommendation 11: Electronic, paper-based or mixed registry

The Regulation should provide that the optimal medium to operate an efficient business registry is electronic. Should full adoption of electronic services not yet be possible, such an approach should nonetheless be implemented to as great an extent as permitted by the current technological infrastructure of the enacting State, as well as its institutional and legal framework, and expanded as that infrastructure improves.

14. The Working Group may wish to note that this draft recommendation should be read alongside paragraphs 47 to 55 of the draft commentary in A/CN.9/WG.I/WP.93, and paragraphs 12 to 23 of the draft commentary in A/CN.9/WG.I/WP.93/Add.2, which explain in broad terms the different media in which the application for registration should be filed and which information contained in the registry should be stored and searchable. In accordance with the consideration of these issues by the Working Group at its twenty-fifth session (paras. 67-68, A/CN.9/860), this draft recommendation and the relevant draft commentary take the view that achieving a registration system fully based on the use of modern technology should be the goal to which all registries should aspire. These materials, however, recognize that in several States, paper-based or mixed registration systems are in place and that such systems might be the only option available due to a lack of advanced technological infrastructure. Those States might benefit from the implementation of a phased-in approach, starting with the adoption of more simple electronic solutions and then progressing to more sophisticated solutions.

Recommendation 12: A single interface for business registration and registration with other authorities

The Regulation or the law of the enacting State should establish a single interface for business registration and registration with other public agencies, including designating

which public agency should have overall authority for the single interface. Such an interface:

(a) May consist of virtual or physical offices; and

(b) Should integrate the services of as many public agencies requiring the same information as possible, but at a minimum should include taxation and social service agencies.

15. The Working Group may wish to note that this draft recommendation should be read alongside paragraphs 2 to 11 of the draft commentary in A/CN.9/WG.I/WP.93/Add.2, which clarify that establishing a single interface, also known as a "one-stop shop", for the registration of businesses is one of the most effective approaches to streamline business registration. As a new business is usually required to register with several different government agencies, which often require the same information that has already been gathered by the business registry, the adoption of a "one-stop shop" permits businesses to, at a minimum, receive all the information and forms they need in order to complete the necessary procedures to establish their business by visiting one single office.

Recommendation 13: Use of unique business identifiers

The Regulation should provide that a unique business identifier should be allocated to each registered business and should:

(a) Be structured as a set of numeric or alphanumeric characters;

(b) Be unique to the business to which it has been allocated; and

(c) Remain unchanged until [x period of time] after any deregistration of the business.

15. The Working Group may wish to note that this draft recommendation should be read alongside paragraphs 38 to 44 of the draft commentary in A/CN.9/WG.I/WP.93/Add.2, which clarify the importance of interoperability between the business registry and other public agencies with which the business is required to register. This draft recommendation and its related commentary promote the view that integrated registration systems should be adopted based on the use of a unique business identifier, which ties information to a given business and allows for information in respect of it to be shared among different public and private agencies. The appropriate period of time in paragraph (c) should be chosen by the enacting State in keeping with its laws on the preservation of records.

Recommendation 14: Allocation of unique business identifiers

The Regulation or the law of the enacting State should specify that the allocation of a unique business identifier should be carried out either by the business registry upon registration of the business, or before registration by a legally-designated authority. In either case, the unique business identifier should then be made available to all other public agencies sharing the information associated with that identifier, and should be used in all official communication in respect of that business.

16. The Working Group may wish to note that this draft recommendation should be read alongside paragraphs 45 to 49 of the draft commentary in A/CN.9/WG.I/WP.93/Add.2, which provide examples of different ways to allocate unique business identifiers.

Recommendation 15: Implementation of a unique business identifier

The Regulation or the law of the enacting State should ensure that, when adopting a unique business identifier across different public agencies:

(a) There is interoperability between the technological infrastructure of the business registry and of the other public agencies sharing the information associated with the identifier; and

(b) That existing identifiers are linked to the unique business identifier.

17. The Working Group may wish to note that this draft recommendation should be read alongside paragraphs 47 to 49 and 53 to 54 of the draft commentary in A/CN.9/WG.I/WP.93/Add.2, which clarify that adoption of a unique business identifier normally requires a centralized database linking the businesses to all relevant government agencies whose information and communication systems must be interoperable. Use of a unique identifier also requires adaptation by public authorities of their existing identifiers, which can be accomplished in various ways.

Recommendation 16: Unique business identifiers and individual businesses

The Regulation or the law of the enacting State should adopt a verification system to avoid multiple unique business identifiers being allocated to the same business by different public agencies.

18. The Working Group may wish to note that this draft recommendation should be read alongside paragraphs 50 to 51 of the draft commentary in A/CN.9/WG.I/WP.93/Add.2, which explain that situations may arise in which different agencies in the same jurisdiction allocate identifiers to businesses based on the particular business form of the enterprise. This may result in one business being allocated several identifiers or in several businesses being allocated the same identifier.

IV. Registration

Recommendation 17: Accessibility of information on how to register

The Regulation should specify that information on the registration process and the applicable fees, if any, should be widely publicized, readily retrievable, and available free of charge.

19. The Working Group may wish to note that this draft recommendation should be read alongside paragraphs 55 to 57 of the draft commentary in A/CN.9/WG.I/WP.93/Add.1 and paragraph 84 of the draft commentary in A/CN.9/WG.I/WP.93/Add.2, which explain that in order to encourage businesses to register, it is important to make available to the registry's users information concerning the registration process and the relevant fees. The commentary notes that while developed technological infrastructures facilitate sharing such information, lack of modern technology should not prevent access to information, which could be ensured through other means.

Recommendation 18: Businesses required or permitted to register

The Regulation or the law of the enacting State should specify:

(a) Which businesses are required to register; and

(b) Which businesses are permitted to register.

20. The Working Group may wish to note that this draft recommendation should be read alongside paragraphs 5 to 7 of the draft commentary in A/CN.9/WG.I/WP.93/Add.1, concerning which commercial entities are required to register. In accordance with draft recommendation 1, this recommendation requires that it be made clear which businesses are required to register and which are permitted to register. The commentary could clarify that such a distinction should be made in the law establishing the business registry or in the law specifying the legal form of the business, but that, in any event, the two bodies of law should be consistent.

Recommendation 19: Minimum information required for registration

The Regulation or the law of the enacting State should establish the minimum information and supporting documents required for the registration of a business, including at least:

(a) The name and address of the business or, in cases where the business does not have a standard form address, the precise description of the geographical location of the business;

(b) The identity of the person or persons registering the business;

(c) The identity of the person or persons who are authorized to act on behalf of the business; and

(d) The legal form of the business being registered.

21. The Working Group may wish to note that this draft recommendation should be read alongside paragraphs 8 to 9 of the draft commentary in A/CN.9/WG.I/WP.93/Add.1, which explain the requirements businesses must meet in order to be registered. Although such requirements are determined by the State based on its legal and economic framework and may vary depending on the legal form of the business being registered, the common minimum requirements for business registration are thought to be those listed in subparagraphs (a) to (d) of this draft recommendation.

Recommendation 20: Language in which information submitted

The Regulation should provide that the information and documents submitted to the business registry must be expressed in the language or languages specified by the enacting State, and in the character set as determined and publicized by the registry.

22. The Working Group may wish to note that this draft recommendation should be read alongside paragraphs 51 to 53 and 80 of the draft commentary in A/CN.9/WG.I/WP.93/Add.1, which explain that in most States, the business registration request can only be submitted in the official language(s) of the State or region of the business registry. There are States, however, where information can be submitted in a foreign language. The commentary further clarifies that States with multiple official languages should ensure that the registration, post-registration and information services of the registry are available to all users regardless of the official language with which they are conversant.

Recommendation 21: Notice of registration

The Regulation should establish that the business registry should notify the registrant whether or not its registration is effective as soon as practicable, and in any event no later than [x] business days following receipt of the application for registration.

23. The Working Group may wish to note that this draft recommendation should be read alongside paragraphs 38 to 45 of the draft commentary in A/CN.9/WG.I/WP.93/Add.1, which clarify the importance for the business registry of ensuring the integrity and the security of the registry record. Again, the enacting State is to choose the shortest possible appropriate time period within which the registrant should be notified of the effectiveness of the business registration.

Recommendation 22: Content of notice of registration

The Regulation should provide that the notice of registration may be in the form of a certificate, notice or card, and that it should contain the following information:

(a) The unique business identifier;

(b) The date of registration;

(c) The name of the business; and

(d) The legislation under which the registration has been effected.

24. The Working Group may wish to note that there is no specific paragraph in the draft commentary that supports this recommendation, but that if the draft recommendation is retained, an appropriate addition should be made to the draft commentary currently found in paragraphs 22 to 26 of A/CN.9/WG.I/WP.93/Add.1.

Recommendation 23: Period of effectiveness of registration

The Regulation should clearly establish that the registration is valid until the business is deregistered.

25. The Working Group may wish to note that this draft recommendation should be read alongside paragraphs 29 to 30 of the draft commentary in A/CN.9/WG.I/WP.93/Add.1, which clarify the approaches a State can adopt in order to determine the period of effectiveness of the registration of a business. Under the first approach, the registration of the business is subject to a maximum period of duration established by law, so that unless the registration is renewed, the registration of the business will expire on the date stated in the certificate of registration (or upon termination of the business). This recommendation opts for the second approach under which no maximum period of validity is established for the registered business.

Recommendation 24: Time and effectiveness of registration

The Regulation should:

(a) Require the business registry to time and date stamp applications for registration and to process them in the order in which they are received and as soon as practicable, but in any event not later than [x] business days after their receipt;

(b) Establish that the registration of the business is effective from the moment the notice of registration is issued; and

(c) Specify that the registration of the business must be entered into the business registry as soon as practicable thereafter, and in any event within [x] business days.

26. The Working Group may wish to note that this draft recommendation should be read alongside paragraphs 31 to 33 of the draft commentary in A/CN.9/WG.I/WP.93/Add.1, which explain that the requirement to determine the time when the registration of a business is effective ensures the transparency and predictability of the business registration system. The Working Group may wish to note that paragraph (a) of the recommendation takes into consideration both electronic registry systems in which the registry software usually time and date stamp the information submitted as well as registry systems in which the information to be registered is submitted in paper form and must be entered into the registry record by the registry staff. Again, the enacting State is to choose the shortest possible appropriate time period within which the registration of the business should be entered into the business registry.

Recommendation 25: Refusal to register and incorrect or incomplete information

The Regulation should provide that the business registrar:

(a) Must refuse registration of the business if the application does not meet the requirements specified in the Regulation or the law of the State and is required to provide to the registrant the reasons for refusal in written form; and

(b) Is granted the authority to correct its own errors as well as any incidental errors that may appear in the information and documents submitted in support of the registration of the business. The Regulation should strictly determine the conditions under which the registrar may exercise this authority.

27. The Working Group may wish to note that this draft recommendation should be read alongside paragraphs 22 to 26 and 38 to 39 of the draft commentary in A/CN.9/WG.I/WP.93/Add.1, which explain that while the business registrar does not have the discretion to refuse to register a business for reasons other than those established by law, the registrar should be given the authority to rectify its own clerical mistakes and any incidental errors that may be noted in the information and documents submitted in support of the business registration. Such an approach could avoid imposing a potentially costly and time-consuming burden on the registrant to resubmit information and documents.

Recommendation 26: Registration of branches

The Regulation should ensure that:

(a) Registration of branches of businesses established outside the jurisdiction of the business registry is required or permitted;

(b) Any definition of "branch" for registration purposes is consistent with the definition provided in the law of the enacting State; and

(c) Provisions regarding branch registration should address the following issues:

(i) Time and date of registration of the branch;

(ii) Disclosure requirements, such as name, address of the person or persons registering the branch; name and address of the branch and copy of the notice of registration of the parent company;

(iii) Information on the person or persons who can legally represent the branch; and

(iv) The language in which the registration documents should be submitted.

28. The Working Group may wish to note that this draft recommendation should be read alongside paragraphs 15 to 17 of the draft commentary in A/CN.9/WG.I/WP.93/Add.1, which outline the advantages of permitting the registration in the enacting State of branches of a foreign company. It would also be possible to include in the draft recommendation reference to the situation where a person or branch does not have a standard form address and should instead include a precise description of the geographical location.

V. Post-registration

Recommendation 27: Information required after registration

The Regulation should specify that after registration, the registered business must file with the business registry the following information:

(a) Annual or periodic reports and financial documents as required by the law of the enacting State;

(b) The identity of the owner of the business if different from that of the registrant, and as required by the law of the enacting State;

(c) Amendments to the current information in the business registry in respect of changes as they occur:

(i) In the name, address, description of geographical location, or legal status of the business;

(ii) In the identity of the person or persons authorized to act on behalf of the business; and

(iii) Any other changes to the information that was initially required for the registration of the business.

29. The Working Group may wish to note that this draft recommendation should be read alongside paragraphs 11 to 13 of the draft commentary in A/CN.9/WG.I/WP.93/Add.1, which explain that registered businesses, in order to remain validly registered, are usually

required to provide certain information throughout their life cycle. The information enumerated in this recommendation should be required from all registered businesses regardless of their size or legal form. Depending on the legal form of the business being registered, additional information may be required pursuant to the law of the enacting State.

Recommendation 28: Maintaining a current registry

The Regulation should require the registrar to ensure that the information in the business registry is kept current, including through:

(a) Sending an automated request to registered businesses at intervals of [x] year(s) requiring them to report whether the information maintained in the registry continues to be accurate or stating which changes should be made; and

(b) Updating the registry immediately upon receipt of the amending information or as soon as practicable thereafter.

30. The Working Group may wish to note that this draft recommendation should be read alongside paragraphs 27 and 78 of the draft commentary in A/CN.9/WG.I/WP.93/Add.1, which stress that the information maintained in the registry must be of good quality, current and reliable in order to make the services of the business registry valuable for the users. The commentary provides examples of various approaches that have been adopted in this regard. If the Working Group decides to retain this recommendation, it may wish to include in the commentary an additional clarification on the advantages and disadvantages of the various approaches and in particular of the approach recommended in this recommendation. With regard to paragraph (a) of the recommendation, the Working Group may also wish to note that the enacting State should determine the length of the interval at which the automated request to the registered business should be sent.

Recommendation 29: Time and effectiveness of amendments to registered information

The Regulation should:

(a) Require the business registry to time and date stamp amendments to registered information and to process them in the order in which they are received;

(b) Notify the registered business as soon as practicable that its registered information has been amended; and

(c) Establish that amendments to the registered information are effective from the moment the notice of amendment is issued.

31. The Working Group may wish to note that this recommendation mirrors draft recommendation 24 which discusses the time and effectiveness of registration. As explained in paragraphs 31 to 33 of the draft commentary in A/CN.9/WG.I/WP.93/Add.1, it is also important to establish the time and effectiveness of amendments to registered information in order to ensure the transparency and predictability of the business registration systems. Paragraph (a) of the draft recommendation takes into consideration both electronic registry systems in which the registry software usually time and date stamp the information submitted as well as registry systems in which the information to be registered is submitted in paper form and must be entered into the registry record by the registry staff.

(A/CN.9/WG.I/WP.96/Add.1) (Original: English)

Note by the Secretariat on draft recommendations on key principles of business registration

ADDENDUM

Contents

Draft Recommendations (*continued*)

VI. Accessibility and information-sharing

Recommendation 30: Public access to the business registry

The Regulation should permit any person to access the services of the business registry and the information contained in the registry.

1. The Working Group may wish to note that this draft recommendation should be read alongside paragraphs 64 to 67 of the draft commentary in A/CN.9/WG.I/WP.93/Add.1, which stress that in order to achieve the objectives of a business registration system (see draft recommendations 2 and 3) the system must facilitate access by general users of the registered information. The principle of public access enhances certainty and transparency in the operation of the business registry, and due to its importance, it should be stated in the Regulation governing business registration.

Recommendation 31: Hours of operation

The Regulation should provide that:

(a) If access to the services of the business registry 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 the services of the business registry is provided electronically, access is available at all times; and

(c) Notwithstanding subparagraphs (a) and (b) of this recommendation:

(i) The business registry may suspend access to the services of the registry 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 on the registry's website, if any, or otherwise widely publicized, in advance when feasible and, if not feasible, as soon thereafter as reasonably practicable, and, if

the registry provides access to its services through physical offices, the notification is posted at each office.

2. The Working Group may wish to note that this draft recommendation should be read alongside paragraphs 58 to 60 of the draft commentary in A/CN.9/WG.I/WP.93/Add.1, which explain that the approach to establish the operating days and hours of the business registry depends on whether the registry requires users to be physically present at the business registry office or whether they may access its services electronically from another location. With regard to paragraph (c) of the draft recommendation, the commentary provides a non-exhaustive list of events justifying a suspension of registry services, such as fire, flood, earthquake or war, or if the registry provides users with direct electronic access, a breakdown in the Internet or network connection. Further, the Working Group may wish to consider whether it would be useful to add information to the draft commentary in respect of acceptable time periods for such service interruptions.

Recommendation 32: Electronic access to submit registration, to search and to request amendments

The Regulation should establish that, where information and communication technology is available, registrants should be permitted to enter and submit their information, and the public should be permitted to search the business registry, without requiring the physical presence in the business registry office of the user of the services or the intermediation of the registry staff.

3. The Working Group may wish to note that this draft recommendation should be read alongside paragraphs 45, 61 to 63 and 67 of the draft commentary in A/CN.9/WG.I/WP.93/Add.1, which explain that when business registries are operated electronically, they should allow users to submit applications or make searches without the need to rely on intermediation by the registry staff.

Recommendation 33: Unnecessary barriers to accessibility

The Regulation should ensure the facilitation of access to business registration and registered information by avoiding the creation of unnecessary barriers such as requirements for the installation of specific software; charging prohibitively expensive access fees; requiring users of information services to register; or unduly limiting the languages in which information on the registration process is available.

4. The Working Group may wish to note that this draft recommendation should be read alongside paragraphs 79 to 80 of the draft commentary in A/CN.9/WG.I/WP.93/Add.1, which clarify that information being publicly available does not mean that information is also easily accessible to users. States should thus identify potential barriers that prevent easy access to business registry services and implement the necessary measures to remove those barriers or minimize their negative effect.

Recommendation 34: Public availability of information

The Regulation should specify that all registered information is available to the public unless it is restricted for reasons of confidentiality as set out in the law of the enacting State, or for reasons of personal security.

5. The Working Group may wish to note that this draft recommendation should be read alongside paragraphs 68 to 73 of the draft commentary in A/CN.9/WG.I/WP.93/Add.1, which clarify that permitting full public access to the registered information should not compromise the confidentiality of private data, which can be protected by allowing users to search only certain types of information.

Recommendation 35: Where information is not made public

In cases where information in the business registry is not made public, the Regulation should:

(a) Establish which information concerning the registered business is subject to the applicable rules in the enacting State on public disclosure of private data and require the registrar to list the types of information that cannot be publicly disclosed; and

(b) Specify the circumstances in which the registrar may use or disclose information that is subject to confidentiality restrictions.

6. The Working Group may wish to note that this draft recommendation should be read alongside paragraph 50 of the draft commentary in A/CN.9/WG.I/WP.93/Add.1 and paragraph 33 of the draft commentary in A/CN.9/WG.I/WP.93/Add.2, which explain that in order to maintain the integrity of the registry, access to sensitive data, such as dates of birth or personal addresses, should be controlled.

Recommendation 36: Sharing of private data between public agencies

The Regulation should ensure that rules for the sharing of private data between public agencies pursuant to the unique business identifier system adopted:

(a) Conform with the applicable rules in the enacting State on public disclosure of private data;

(b) Permit public agencies to access private data included in the unique business identifier system only in order to carry out their official functions; and

(c) Permit public agencies to access private data included in the unique business identifier system only in relation to those businesses with respect to which they have statutory authority.

7. The Working Group may wish to note that this draft recommendation should be read alongside paragraphs 33, 52 and 55 to 58 of the draft commentary in A/CN.9/WG.I/WP.93/Add.2, which clarify that increased transparency to avoid misuse of the business for illicit purposes may affect the sharing of information among the different public authorities linked by the unique business identifier.

Recommendation 37: Exchange of information among business registries

The Regulation should specify that systems for the registration of businesses should adopt solutions that facilitate information exchange between registries from different jurisdictions.

8. The Working Group may wish to note that this draft recommendation should be read alongside paragraphs 27 to 28 of the draft commentary in A/CN.9/WG.I/WP.93.

VII. Fees

Recommendation 38: Fees charged for registry services

The Regulation should establish fees for registration and post-registration services, if any, at a level that is low enough that it encourages business registration, and that, in any event, does not exceed a level that enables the business registry to cover the cost of performing those services.

9. The Working Group may wish to note that this draft recommendation should be read alongside paragraphs 74, 77 to 78 and 80 of the draft commentary in A/CN.9/WG.I/WP.93/Add.2, which explain that business registration is a public service that should encourage businesses to register and that it should not serve as a revenue-generating mechanism.

Recommendation 39: Fees charged for information

The Regulation should establish that information contained in the business registry should be available to the public free of charge, but should permit modest fees to be charged for value-added information products produced or developed by the registry.

10. The Working Group may wish to note that this draft recommendation should be read alongside paragraph 76 of the draft commentary in A/CN.9/WG.I/WP.93/Add.2, which explains that providing information products upon the payment of a fee can be a viable option for registries to derive self-generated funding. However, fees should not be charged for basic services, such as name searches or access to the raw information contained in the business registry, but only for more sophisticated services.

Recommendation 40: Publication of fee amounts and methods of payment

The Regulation should provide that information that clearly establishes the amount of any fees for registration and information services should be widely publicized, as should acceptable methods of payment. Such methods of payment should include permitting users to enter into an agreement with the business registry to establish a user account for the payment of fees.

11. The Working Group may wish to note that this draft recommendation should be read alongside paragraph 79 of the draft commentary in A/CN.9/WG.I/WP.93/Add.2, which provides examples of how information on the amount of fees for registration and other services provided by the business registry could be publicized.

VIII. Sanctions and liability

Recommendation 41: Sanctions

The Regulation should establish and ensure wide publication of sanctions (including fines, deregistration and loss of access to services) that may be imposed on a business for a breach of its obligations under the Regulation. Such rules may include provisions pursuant to which a breach of obligation may be forgiven provided it is rectified within a specified time.

12. The Working Group may wish to note that this draft recommendation should be read alongside paragraph 14 of the draft commentary in A/CN.9/WG.I/WP.93/Add.1 and paragraph 75 of the draft commentary in A/CN.9/WG.I/WP.93/Add.2, which suggest that it is important for a State to have the ability to enforce proper compliance with initial and ongoing registration requirements. It should also be noted that it would be possible to add a draft recommendation reflecting paragraph 35 of the draft commentary in A/CN.9/WG.I/WP.93/Add.2, which suggests that the law of the enacting State should include legislative and other measures to prevent unauthorized access to or interference with the business registry system; unauthorized interception of or interference with data; and misuse of devices and fraud and forgery.

Recommendation 42: Liability for submission of misleading, false or deceptive information

The Regulation or the law of the enacting State should establish the liability of the registrant or the registered business for any misleading, false, incomplete or deceptive information that the registrant or business has knowingly submitted to the business registry.

13. The Working Group may wish to note that this draft recommendation should be read alongside paragraph 26 of the draft commentary in A/CN.9/WG.I/WP.93/Add.1, which clarifies that in order to ensure that reliable information is always submitted to the registry, the liability of the registrant should be established for any deliberate act that results in serious inaccuracies in the information delivered to the business registry.

Recommendation 43: Liability of the business registry

The Regulation or the law of the enacting State should establish the liability of the business registry for loss or damage caused by error or negligence in the registration of businesses or the administration or operation of the registry.

14. The Working Group may wish to note that this draft recommendation should be read alongside paragraphs 46 to 49 of the draft commentary in A/CN.9/WG.I/WP.93/Add.1, which clarify that the registry is liable for its errors or negligence in the registration of businesses or in the administration or operation of the business registry.

IX. Deregistration

Recommendation 44: Voluntary deregistration

The Regulation should require the registrar to deregister a business on the application of the business for a declaration of deregistration that fulfils the requirements according to the law of the enacting State.

15. The Working Group may wish to note that this draft recommendation should be read alongside paragraphs 18 to 20 of the draft commentary in A/CN.9/WG.I/WP.93/Add.1, which explain that deregistration is the removal of a business from the business registry record once the business, for whatever reason, has permanently ceased to operate.

Recommendation 45: Compulsory deregistration

The Regulation should:

(a) Require the registrar to deregister a business when it is ordered to do so by a specified competent authority or the court; and

(b) Provide that the decision or order for deregistration of the business must be placed on the registry.

16. The Working Group may wish to note that this draft recommendation should be read alongside paragraphs 18 to 20 of the draft commentary in A/CN.9/WG.I/WP.93/Add.1.

Recommendation 46: Process of deregistration

The Regulation should provide that:

(a) A written notice of the request for a declaration of deregistration is sent to the registered business; and

(b) The declaration of deregistration is publicized in accordance with the legal requirements of the enacting State.

17. The Working Group may wish to note that this draft recommendation should be read alongside paragraph 34 of the draft commentary in A/CN.9/WG.I/WP.93/Add.1, which explains that the law or regulation should distinguish between voluntary and compulsory deregistration and that in those cases where deregistration does not occur at the request of the business, the business should be given sufficient time to oppose that decision.

Recommendation 47: Revocation of deregistration

The Regulation or the law of the enacting State should specify the circumstances under which and the time limit within which the registrar is required to restore a business entity that has been deregistered.

18. The Working Group may wish to note that this draft recommendation is not currently supported by any corresponding paragraphs in the draft commentary, but that should the draft recommendation be retained, appropriate information could be inserted into the commentary.

Recommendation 48: Time and effectiveness of deregistration

The Regulation should:

(a) Specify when the deregistration of a business has legal effect;

(b) Specify that any required notice of the deregistration for that legal form of business has been publicized in accordance with the law of the enacting State; and

(c) Specify the legal effects of deregistration.

19. The Working Group may wish to note that this draft recommendation should be read alongside paragraph 34 of the draft commentary in A/CN.9/WG.I/WP.93/Add.1, which clarifies that the time and effectiveness of the deregistration should be established by law or regulation, and that regardless of whether the deregistration is voluntary or compulsory, a notice of deregistration should be issued by the registry stating the date of effect of the deregistration, and the reasons therefor.

X. Preservation of records

Recommendation 49: Preservation of records

The Regulation should provide that:

(a) Documents and information submitted by the registrant and the registered business, including information in respect of deregistered businesses, should be preserved by the registry for a specified period of time in a manner that enables the information to be retrieved by the registry and other interested users;

(b) Where paper documents have been submitted and the information contained in them has been entered into an electronic registry that meets the reliability standards established by the State, the period of preservation should be [x] years, to be specified by the enacting State; and

(c) Where paper documents have been submitted and the information contained in them has not been entered into an electronic registry, the period of preservation should be longer, up to [x] years, to be specified by the enacting State.

20. The Working Group may wish to note that this draft recommendation should be read alongside paragraphs 35 to 37 of the draft commentary in A/CN.9/WG.I/WP.93/Add.1, which highlight the importance of preservation of the documents submitted by the registrant and the registered business. The length of the preservation period would be influenced by the way the registry operates, i.e. if it is electronic, paper-based or mixed.

Recommendation 50: Amendment or deletion of information

The Regulation should provide that the business registry does not have the authority to amend or delete information contained in the registry record except in those cases specified in the Regulation or elsewhere in the law of the enacting State.

21. The Working Group may wish to note that this draft recommendation should be read alongside paragraphs 41 and 43 of the draft commentary in A/CN.9/WG.I/WP.93/Add.1.

Recommendation 51: Protection against loss of or damage to the business registry record

The Regulation or the law of the enacting State should require the business registry to protect the registry records from loss or damage by maintaining back-up mechanisms to allow for any necessary reconstruction of the registry record.

22. The Working Group may wish to note that this draft recommendation should be read alongside paragraph 42 of draft commentary in A/CN.9/WG.I/WP.93/Add.1, which explains that preserving the integrity and the security of the registry record also requires the business registry to implement measures to permit reconstruction of the business registry. Rules governing the security of other public records in the enacting State might be applicable in this context.

Recommendation 52: Safeguards from accidental destruction

The Regulation should provide that appropriate procedures should be established to mitigate risks from force majeure, natural hazards, or other accidents that can affect the processing, collection, transfer and protection of data housed in electronic or paper-based registries.

23. The Working Group may wish to note that this draft recommendation should be read alongside paragraph 34 of the draft commentary in A/CN.9/WG.I/WP.93/Add.2, which considers the risk-management procedures that the business registry should implement in order to ensure the reliable functioning of the registry. The Working Group may wish to note that while this draft recommendation refers to both electronic and paper-based registries, the draft commentary refers to electronic registries only, and should be amended accordingly if the draft recommendation is retained.

XI. The underlying legislative framework

Recommendation 53: Clarity of the law

The law of the enacting State should, to the extent possible, consolidate legal provisions pertaining to business registration in a single legislative text, which is clearly written and uses simple language that can be easily understood.

24. The Working Group may wish to note that this draft recommendation should be read alongside paragraphs 59 to 61 and 65 to 67 of the draft commentary in A/CN.9/WG.I/WP.93/Add.2, which clarify that States wishing to promote business registration, in particular of MSMEs, should consider reviewing their existing legal framework in order to identify possible impediments to the simplification of the registration process.

Recommendation 54: Flexible legal forms

The law of the enacting State should permit flexible and simplified legal forms for business in order to facilitate and encourage registration of businesses of all sizes, including those forms considered in the [UNCITRAL model law on a simplified business entity].

25. The Working Group may wish to note that this draft recommendation should be read alongside paragraphs 68 to 71 of the draft commentary in A/CN.9/WG.I/WP.93/Add.2. The Working Group may also wish to consider whether the results of its ongoing discussion in respect of a legislative text on a simplified business entity should be reflected in this draft recommendation.

Recommendation 55: Primary and secondary legislation to accommodate the evolution of technology

The law of the enacting State should establish guiding legal principles in relation to electronic registration in primary legislation, and should set out specific provisions on the detailed functioning and requirements of the electronic system in secondary legislation.

26. The Working Group may wish to note that this draft recommendation should be read alongside paragraph 26 of the draft commentary in A/CN.9/WG.I/WP.93/Add.2, which explains that since information technology is a field marked by rapid technological evolution, it would be advisable to establish guiding legal principles in the primary legislation, leaving secondary legislation to stipulate the specific provisions regulating the detailed functioning and the requirements of the system.

Recommendation 56: Electronic documents and electronic authentication methods

The law of the enacting State should:

(a) Permit and encourage the use of electronic documents as well as of electronic signatures and other equivalent identification methods; and

(b) Regulate such use pursuant to the following principles:

(i) Documents cannot be denied legal effect, validity or enforceability solely on the grounds that they are in electronic format, or they are signed electronically;

(ii) The place of origin of the electronic signature should not determine whether and to what extent the electronic signature is legally effective;

(iii) Different technologies that may be used to communicate, store and/or sign information electronically should be subject to the same legal treatment; and

(iv) Electronic documents and electronic signatures have the same purpose and function as their paper-based counterparts and are thus functionally equivalent to them; and

(c) Establish criteria to reliably identify the person submitting an electronic document and/or using an electronic signature or equivalent authentication method.

27. The Working Group may wish to note that this draft recommendation should be read alongside paragraphs 27 to 32 of the draft commentary in A/CN.9/WG.I/WP.93/Add.2 and paragraph 78 of the draft commentary in A/CN.9/WG.I/WP.93/Add.1, which clarify the main features of a legislative reform undertaken to support electronic business registration. Such features include the adoption of laws permitting electronic signatures and the submission of electronic documents, which should establish, at a minimum, principles of non-discrimination, technological neutrality and functional equivalence allowing for equal treatment of paper-based and electronic information. The commentary further notes that whether or not legislation on electronic signatures is adopted, various other techniques could and should be used by the business registry to prevent identity theft of the users of the electronic registry and ensure security of the information by them.

Recommendation 57: Electronic payments

The law of the enacting State should include legislation to enable and facilitate electronic payments.

28. The Working Group may wish to note that this draft recommendation should be read alongside paragraph 36 of the draft commentary in A/CN.9/WG.I/WP.93/Add.2, which clarifies that once the technological infrastructure of the State is sufficiently developed, users of the business registry should be enabled to pay electronically any required fees.

II. DISPUTE SETTLEMENT

A. Report of Working Group on Arbitration and Conciliation on the work of its sixty-third session (Vienna, 7-11 September 2015)

(A/CN.9/861)

[Original: English]

Contents

I. Introduction

1. At its forty-seventh session, the Commission had before it a proposal for future work in relation to enforceability of settlement agreements resulting from international commercial conciliation (A/CN.9/822). The Commission agreed that the Working Group should consider at its sixty-second session the issue of enforcement of international settlement agreements resulting from conciliation proceedings and should report to the Commission at its forty-eighth session, in 2015, on the feasibility and possible form of work in that area.[1]

2. At its sixty-second session, the Working Group considered that topic on the basis of notes by the Secretariat (A/CN.9/822 and A/CN.9/WG.II/WP.187). After discussion, the Working Group agreed to suggest to the Commission that it be given a mandate to work on the topic of enforcement of settlement agreements, to identify the relevant issues and develop possible solutions, including the preparation of a convention, model provisions or guidance texts. Considering that differing views were expressed as to the form and content, as well as the feasibility, of any particular instrument, it was also agreed to suggest that a mandate on the topic be broad enough to take into account the various approaches and concerns (A/CN.9/832, para. 59).

3. At its forty-eighth session, the Commission had before it the report of the Working Group on the work of its sixty-second session (A/CN.9/832) as well as comments by States on their legislative framework in relation to enforcement of settlement agreements

[1] *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 129.

(A/CN.9/846 and its addenda). After discussion, the Commission agreed that the Working Group should commence work at its sixty-third session on the topic of enforcement of settlement agreements to identify relevant issues and develop possible solutions, including the possible preparation of a convention, model provisions or guidance texts. The Commission also agreed that the mandate of the Working Group with respect to that topic should be broad to take into account the various approaches and concerns.[2]

4. At its forty-eighth session, the Commission also approved the draft text of the revised UNCITRAL Notes on Organizing Arbitral Proceedings in principle and requested the Secretariat to revise the draft text in accordance with the deliberations and decisions of the Commission. The Commission agreed that the Secretariat could seek input from the Working Group on specific issues, if necessary, during its sixty-fourth session and further requested that the draft revised Notes be finalized for adoption by the Commission at its forty-ninth session, in 2016.[3]

5. Further, at that session, the Commission considered the topic of concurrent proceedings and the preparation of a code of ethics/conduct, in the field of both investor-State and purely commercial arbitration. Regarding concurrent proceedings, the Commission requested the Secretariat to explore the topic further, in close cooperation with experts including those from other organizations working actively in that area and to report to the Commission at a future session with a detailed analysis of the topic including possible work that could be carried out. Regarding the preparation of a code of ethics/conduct, the Secretariat was requested to assess the feasibility of work in that area and report to the Commission at a future session.[4]

6. In addition, the Commission agreed that the Secretariat should continue to coordinate with organizations in relation to the various types of arbitration to which UNCITRAL standards were applicable, and to closely monitor developments, further exploring areas for cooperation and coordination. In relation to investor-State arbitration, the Commission noted that the current circumstances posed a number of challenges and proposals for reforms had been formulated by a number of organizations.[5]

II. Organization of the session

7. The Working Group, which was composed of all States members of the Commission, held its sixty-third session in Vienna, from 7-11 September 2015. The session was attended by the following States members of the Working Group: Algeria, Argentina, Armenia, Australia, Austria, Belarus, Brazil, Bulgaria, Canada, China, Colombia, Croatia, Czech Republic, Denmark, Ecuador, El Salvador, France, Germany, Hungary, India, Indonesia, Iran (Islamic Republic of), Israel, Italy, Japan, Kenya, Kuwait, Malaysia, Mexico, Pakistan, Panama, Paraguay, Philippines, Poland, Republic of Korea, Russian Federation, Singapore, Spain, Switzerland, Thailand, Turkey, United States of America and Venezuela (Bolivarian Republic of).

8. The session was attended by observers from the following States: Angola, Bangladesh, Belgium, Bolivia (Plurinational State of), Chile, Dominican Republic, Finland, Lebanon, Luxembourg, Netherlands, Niger, Norway, Peru, Portugal, Qatar, Romania, Slovakia, Somalia, South Africa, Sweden and Viet Nam.

9. The session was attended by observers from the European Union.

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

(a) *United Nations system*: Food and Agriculture Organization of the United Nations (FAO);

(b) *Intergovernmental organization*: Central American Court of Justice (CCJ);

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[2] Ibid., *Seventieth Session, Supplement No. 17* (A/70/17), paras. 135-142.
[3] Ibid., para. 133.
[4] Ibid., paras. 143-147.
[5] Ibid., para. 268.

(c) *Invited non-governmental organizations*: American Bar Association (ABA), American Society of International Law (ASIL), Arbitration Institute of the Stockholm Chamber of Commerce (SCC), Asociacion Americana de Derecho Internacional Privado (ASADIP), Association Suisse de l'Arbitrage (ASA), Association for the Promotion of Arbitration in Africa (APAA), Belgian Center for Arbitration and Mediation (CEPANI), Center for International Legal Studies (CILS), China International Economic and Trade Arbitration Commission (CIETAC), Construction Industry Arbitration Council (CIAC), European Law Students' Association (ELSA), Florence International Mediation Chamber (FIMC), G.C.C. Commercial Arbitration Centre (GCCCAC), German Institution of Arbitration (DIS), International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry (ICAC-UCCI), International Council for Commercial Arbitration (ICCA), International Insolvency Institute (III), International Mediation Institute (IMI), Korean Commercial Arbitration Board (KCAB), Madrid Court of Arbitration, Miami International Arbitration Society (MIAS), Milan Club of Arbitrators (MCA), Moot Alumni Association (MAA), New York International Arbitration Centre (NYIAC), P.R.I.M.E. Finance Foundation (PRIME), Pakistan Business Council (PBC), Queen Mary University of London, School of International Arbitration (QMUL), Regional Centre for International Commercial Arbitration-Lagos (RCICAL) and Vienna International Arbitral Centre (VIAC).

11. The Working Group elected the following officers:

Chairperson: Ms. Natalie Yu-Lin Morris-Sharma (Singapore)

Rapporteur: Ms. Ximena Bustamante (Ecuador)

12. The Working Group had before it the following documents: (a) provisional agenda (A/CN.9/WG.II/WP.189); (b) notes by the Secretariat, enforceability of settlement agreements (A/CN.9/WG.II/WP.190, A/CN.9/WG.II/WP.191 and A/CN.9/WG.II/WP.192).

13. The Working Group adopted the following agenda:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Enforceability of settlement agreements.
5. Organization of future work.
6. Adoption of the report.

III. Deliberations and decisions

14. The Working Group then considered agenda item 4 on the basis of documents prepared by the Secretariat. The deliberations and decisions of the Working Group with respect to agenda item 4 are reflected in chapter IV.

IV. Enforceability of settlement agreements

15. The Working Group recalled that UNCITRAL had developed two instruments aimed at harmonizing international commercial conciliation: the Conciliation Rules (1980) and the Model Law on International Commercial Conciliation (2002) (the "Model Law on Conciliation" or the "Model Law"), which formed the basis of an international framework for conciliation. The issue of enforcement of agreements settling a dispute (referred to as "settlement agreement(s)") had been considered when preparing the Model Law on Conciliation resulting in article 14 which provided as follows: "If the parties conclude an agreement settling a dispute, that settlement agreement is binding and enforceable ... [*the enacting State may insert a description of the method of enforcing settlement agreements or refer to provisions governing such enforcement*]."

16. The Working Group agreed to consider, on a preliminary basis, questions underlying enforceability of settlement agreements as presented in section C of document A/CN.9/WG.II/WP.190.

A. Settlement agreements resulting from conciliation

17. The Working Group considered whether an instrument to be prepared on enforcement of settlement agreements (referred to as the "instrument") should be limited to settlement agreements resulting from conciliation.

18. The Working Group noted that one possible approach would be to address enforcement of settlement agreements, regardless of the procedure that led to their conclusion, as long as their purpose was to settle a dispute. That approach did not receive support because such an approach could over-complicate the enforcement procedure, as the enforcing authority would have to determine whether there existed a dispute in the first instance and whether the purpose of the agreement was to settle that dispute.

19. Broad support was expressed for limiting the scope of the instrument to settlement agreements that resulted from conciliation, as that approach would: (i) be consistent with the mandate given to the Working Group and in line with the proposal considered by the Commission (see above, paras. 1-3); (ii) promote conciliation as an effective means of solving disputes; (iii) bring certainty to the enforcement procedure which would favour settlement agreements over ordinary contracts; and (iv) avoid additional disputes on whether or not a settlement agreement fell within the scope of the instrument.

1. Notion of conciliation

20. The Working Group then considered how the term "conciliation" should be understood in the instrument. In so doing, the Working Group identified a wide range of issues with the understanding that it was premature at that stage to agree on a preferred approach.

Article 1(3) of the Model Law

21. It was widely felt that the broad definition of "conciliation" in article 1(3) of the Model Law provided a useful reference. In that context, it was suggested that the notion of "conciliation" in the instrument should be broad and inclusive to cover different types of conciliation techniques, while the Working Group would be free to exclude certain types at a later stage. It was suggested that the notion should be clear so that it would be understood uniformly in various jurisdictions and provide sufficient certainty regarding the trustworthiness of the conciliation process.

22. It was highlighted that, according to the definition in article 1(3) of the Model Law, a conciliator did not have the authority to impose upon the parties a solution to the dispute. A question was raised whether that characteristic should be retained in the notion of conciliation in the instrument.

Possible additional characteristics

23. It was further suggested that additional characteristics of the conciliation procedure such as the qualifications of conciliators and the professional nature of the procedure might need to be taken into account, either as part of the definition or as separate conditions, reflecting the objective of the instrument and depending on its form.

Origin of the conciliation process and its impact on the scope of the instrument

24. The Working Group noted that a settlement agreement might find its origin in an agreement to submit a dispute to conciliation, or it might be concluded in the course of a dispute resolution process including judicial or arbitral proceedings, which might not necessarily contain a conciliation component. In that context, situations were described where parties might reach an agreement that would resolve their dispute in the course of a judicial or an arbitral proceeding. As a result, that agreement might be recorded in the form of a judicial decision or an arbitral award on agreed terms. It was said that those situations would need to be taken into account when defining the scope of the instrument.

25. In that respect, various views were expressed. One view was that the scope of the instrument should be limited to agreements resulting only from conciliation. It was mentioned that work beyond that scope could overlap with ongoing work by other

international organizations with respect to enforcement of court judgements (for instance, the judgements project of the Hague Conference on Private International Law), as well as the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the New York Convention") particularly with respect to an award on agreed terms. It was noted that in certain jurisdictions, agreements arising from conciliation processes within courts had the same effect as court judgements and were enforceable as such. It was suggested that a careful assessment should be made whether there would be any overlap that could be problematic.

26. Another view was that the scope of the instrument should include situations where the parties had reached an agreement in the course of judicial or arbitral proceedings. In support of that view, it was noted that many commercial disputes did not necessarily begin with a conciliation process and that parties, after submitting a dispute to a court or an arbitral tribunal, might at a later stage reach an agreement during the judicial or arbitral proceedings. In that context, attention was drawn to article 1(8) of the Model Law which addressed the basis upon which the conciliation procedure could be undertaken, such as an agreement between the parties, a direction or suggestion of a court, arbitral tribunal or competent authority.

27. In response, it was stated that if such an approach were to be adopted in the instrument, it should be limited to situations where there was a conciliation process during the judicial or arbitral proceedings and where the agreement was not recorded in a judicial decision or an arbitral award. Furthermore, attention was drawn to article 1(9) which excluded from the scope of the Model Law situations where a judge or an arbitrator, in the course of judicial or arbitral proceedings, attempted to facilitate a settlement. It was underlined that the judicial process was not consensual, and therefore it was questioned whether agreements reached following such a procedure would have the same nature as agreements reached as a result of a conciliation process.

28. A view was expressed that agreements reached in the course of judicial or arbitral proceedings should not be considered in relation to the notion of conciliation but rather as possible exclusions from the scope of the instrument.

2. Domestic or international conciliation process

29. The Working Group then considered whether the instrument should address agreements resulting from conciliation generally, regardless of whether the conciliation process was domestic or international.

30. One view was that the scope of the instrument should be limited to settlement agreements arising from an "international" conciliation process, distinct from a domestic process. It was said that the instrument should generally not interfere with domestic regimes. Furthermore, it was stated that it would be difficult or cumbersome for jurisdictions that already had a regime in place for enforcement of settlement agreements resulting from a domestic conciliation process to adopt or opt-in to a regime which would encompass both international and domestic conciliation processes. It was mentioned that flexibility should be provided to permit States to decide whether to adopt a regime applicable to international conciliation processes for domestic conciliation processes, if they so wished.

31. Another view was that there was no need to make a distinction between international and domestic conciliation processes, as the focus of the instrument was not on the conciliation process but rather on the enforcement of settlement agreements, which would involve cross-border or international aspects. It was further mentioned that many jurisdictions did not differentiate between international and domestic conciliation processes. Moreover, it was stated that if the instrument were to deal with both international and domestic conciliation processes, it would have a greater impact on harmonizing the regime for enforcement of settlement agreements in a general manner.

32. During that discussion, it was also suggested that the form of the instrument would determine whether there was a need to distinguish an international conciliation process from a domestic one. It was mentioned that, for example, if a convention were to be prepared, settlement agreements arising from a domestic conciliation process should be excluded from its scope. The Working Group agreed to further consider the matter in light of its deliberations on the international aspect of settlement agreements (see below, paras. 33-39).

3. Domestic, foreign and international settlement agreements

33. The Working Group then considered whether a distinction should be drawn between "international" and "domestic" settlement agreements and whether to focus its work on "foreign" settlement agreements as opposed to "international" settlement agreements.

Foreign settlement agreements

34. One view was that the approach adopted under the New York Convention should be followed, and the instrument should address enforcement of foreign settlement agreements. For example, the instrument could apply to the enforcement of a settlement agreement made in the territory of a State other than the State where the enforcement of such settlement agreement was sought; it would also apply to settlement agreements not considered as domestic settlement agreements in the State where the enforcement was sought. It was explained that that would simplify the implementation of the instrument as a practice had already developed on those matters under the New York Convention. In support, it was said that the objective of the instrument should be to facilitate cross-border enforcement rather than to provide a regime for enforcement of settlement agreements in general.

35. However, it was pointed out that settlement agreements could not be treated in a similar fashion as arbitral awards as it was not always easy to identify the factor connecting settlement agreements to a specific place or legal seat of conciliation, whereas arbitral awards usually had a place of issuance which determined their "foreign" nature.

International settlement agreements

36. In that context, attention was drawn to article 35 of the Model Law on International Commercial Arbitration ("Model Law on Arbitration") that treated awards rendered in international commercial arbitration in a uniform manner irrespective of where they were made. The Model Law on Arbitration distinguished between "international" and "non-international" awards instead of relying on the traditional distinction between "foreign" and "domestic" awards. It was suggested that a similar approach could be considered for the instrument.

37. Along the same lines, a suggestion was made that "international" settlement agreements could be defined following the approach adopted in article 1(4)(a) of the Model Law on Conciliation. Consequently, a settlement agreement would be considered international where at least two parties to the settlement agreement had their places of business in different States at the time of the conclusion of the settlement agreement.

38. On whether to limit international elements to the places of business being in different States, it was suggested that they should be expanded to consider other elements mentioned in article 1(4)(b) of the Model Law on Conciliation. It was mentioned that the enforcement of a settlement agreement between parties having their places of business in the same State might also have an international element, for example, if one of the parties had to enforce that agreement in another State where assets were located. It was further mentioned that other criteria might need to be considered, including the law applicable to the conciliation process and the nationality of the conciliator.

39. In conclusion, it was generally agreed that the instrument should focus on international settlement agreements as distinct from domestic settlement agreements. It was said that States should be given the flexibility to apply the regime designed for international settlement agreements to domestic settlement agreements, if they so wished. It was also suggested that the determination of the international element of settlement agreements should be considered in a broad manner taking into account the views expressed above and other possible approaches such as a territorial or a personal approach as well as private international law criteria. It was mentioned that such criteria should be objective and relevant to achieving the purpose of the instrument.

4. Content of and parties to the settlement agreements

Commercial settlement agreements

40. It was generally felt that the scope of the instrument should be limited to the enforcement of "commercial" settlement agreements. In that context, it was suggested that

the definition of "commercial" in the Model Law as well as other UNCITRAL texts provided a useful reference.

41. There was general agreement to exclude settlement agreements involving consumers from the scope of the instrument and reference was made to article 2(a) of the United Nations Convention on Contracts for the International Sale of Goods (1980) as well as article 2 of the Convention on Choice of Court Agreements (2005) as possible models of formulation.

42. It was generally felt that settlement agreements dealing with family and labour law matters and other areas where party autonomy was limited due to overriding mandatory rules or public policy should also be excluded from the scope of the instrument. However, it was noted that if the scope of the instrument were to be limited to "commercial" settlement agreements, such exclusions would not be necessary as they would generally not fall within the scope of the instrument.

43. While it was generally considered that it was premature to decide whether the instrument should have an illustrative list of subject matters to be covered or a negative list of those excluded, it was pointed out that a negative list could run the risk of not being exhaustive.

Agreements involving government entities

44. As regards settlement agreements involving government entities, it was suggested that those agreements should be excluded from the scope of the instrument as, in some jurisdictions, government entities were not authorized to conclude them. In response, it was said that, in those jurisdictions, that situation could be addressed under the defences to enforcement through wording that might be extrapolated from article V(1)(a) of the New York Convention (see below, section E), instead of excluding settlement agreements involving government entities entirely from the instrument.

45. It was said that issues relating to sovereign immunity would need to be considered in light of existing standards and reference was made to the United Nations Convention on Jurisdictional Immunities of States and Their Property (2004), yet to enter into force. It was said that the instrument would not need to delve into issues of state immunity. It was further said that such questions should be left to be decided by the enforcing authority on the basis of the applicable rules on foreign state immunity.

46. The view generally shared by the Working Group was that it would not be desirable for the instrument to include a blanket exclusion of settlement agreements involving government entities as there were government entities that engaged in commercial activities and that might seek to use conciliation to resolve disputes in the context of those activities. It was noted that excluding settlement agreements involving government entities would deprive those entities of the opportunity to enforce such agreements against their commercial partners. It was suggested that a possible manner to address that issue would be to allow States wishing to exclude such agreements to formulate a reservation or a declaration, if the instrument were to be a convention.

Pecuniary and non-pecuniary as well as conditional obligations

47. As to obligations covered by settlement agreements, it was generally felt that the instrument should apply to settlement agreements in their entirety regardless of whether they included pecuniary or non-pecuniary obligations. It was said that settlement agreements might contain both types of obligations, and therefore the enforcement of only pecuniary obligations would be overly limitative and create an imbalance between the parties. It was also noted that any issues that might arise in enforcing non-pecuniary obligations could be handled by the enforcing authority in accordance with the applicable law. In that context, it was stated that domestic enforcement systems had developed to address the enforcement of such obligations.

48. It was noted that the flexible nature of settlement agreements, which allowed for conditional obligations, was a key feature of conciliation that made it attractive to parties and thus, the need to preserve such a feature was highlighted. It was said that the instrument could include as a defence to enforcement the non-fulfilment of certain conditions in the settlement agreement.

49. A suggestion was made that settlement agreements stating declarations of intent should be excluded from the scope of the instrument. In response, it was said that such agreements would generally not include enforceable obligations.

50. After discussion, it was generally agreed that the scope of the instrument should not be limited to pecuniary settlement agreements but rather cover all types of settlement agreements without any limitation as to the nature of the remedies or obligations provided under those agreements.

5. Form requirements of the settlement agreements

51. The Working Group considered the requirements that a settlement agreement would need to meet for it to be enforceable under the regime envisaged by the instrument. It was said that the purpose of determining requirements was to give the necessary level of certainty to the enforcing authority faced with a request for enforcing an agreement and to determine the elements that would need to be considered by the enforcing authority with regard to the settlement agreement. It was underlined that the instrument should clearly and objectively differentiate settlement agreements from other agreements so as to avoid enforcement of agreements other than those reached through conciliation under the regime envisaged by the instrument.

Writing requirement

52. It was suggested that settlement agreements should be in writing to be enforceable under the regime envisaged by the instrument. The Working Group recalled its works on the writing requirement in relation to arbitration agreements, including article 7 of the Model Law on Arbitration and the 2006 recommendation on the interpretation of article II(2) of the New York Convention. It was generally agreed that any writing requirement would need to be determined in a flexible manner reflecting current practices, including the use of other means that would be considered equivalent.

Parties' signature

53. It was said that the consensual nature of conciliation and the settlement agreement resulting from that process made the signature of the parties significant. Therefore, it was suggested that the settlement agreement should be signed by the parties or that at least, it should be clearly established that the parties concluded the agreement. The need to take into account current practices, including the use of electronic signatures, was mentioned.

Requirements to ascertain the involvement of the conciliator in the process

54. The Working Group considered various means to indicate the involvement of a conciliator in the procedure that led to the conclusion of the settlement agreement.

55. In relation to the suggestion that the settlement agreement should be signed by the conciliator, it was said that in certain jurisdictions, signature by the conciliator was not common practice, for example, due to potential liability issues. In response, it was pointed out that if conciliators signed the settlement agreement, it would generally be for the purpose of certifying that he or she was involved in the conciliation, which would be unlikely to give rise to liability issues.

56. In that context, it was explained that conciliators were usually not involved in the drafting or preparation of settlement agreements so as to respect party autonomy and to avoid any complications that might arise (for example, a conciliator by signing the settlement agreement might be called as a witness in a dispute involving the agreement).

57. It was suggested that the settlement agreement could include information about the identity of the conciliator. However, it was pointed out that in practice, information about the conciliator would usually not be included in the settlement agreement.

58. It was suggested that the conciliator could be required to prepare a declaration separate from the settlement agreement stating that he or she acted as a conciliator in relation to the dispute concerned.

59. In response to a suggestion that the settlement agreement should include a reference to the qualifications of the conciliator, it was said that not all jurisdictions required such qualifications, and that, in principle, requirements in domestic legislation should not result in limiting the enforceability of settlement agreements under the regime envisaged by the instrument.

Inclusion of information about the dispute in the settlement agreement

60. A suggestion was made that settlement agreements should include various information on the dispute (such as a brief description of the basis on which the dispute arose) and whether the dispute was settled in whole or in part. In response, it was said that the conciliation process usually focused on solutions, and requiring the parties to provide information about their disputes might inadvertently exacerbate the differences.

Indication by the parties that they agreed to enforcement under the instrument

61. It was suggested that the parties should indicate in their settlement agreement their willingness to subject the agreement to the enforcement regime envisaged by the instrument. It was further underlined that, as conciliation was fully consensual, the enforcement regime envisaged by the instrument should apply only where the parties consented to it.

62. Views were expressed that it would be cumbersome to require such an opt-in mechanism and that it might result in an instrument, which would be less commonly used. It was suggested that further consultations with the users of conciliation on the possible effects in practice of such an opt-in mechanism might be useful.

63. It was suggested that an alternative approach would be for the parties to expressly exclude the enforcement regime envisaged by the instrument in their settlement agreement.

Non bis in idem

64. It was suggested that settlement agreements did not always resolve a dispute in its entirety, and therefore a question was raised whether the *non bis in idem* principle should be considered under the instrument. In response, it was said that that question should be left to be addressed by the enforcing authority depending on the applicable law and the circumstances of the case.

Treatment of different requirements

65. As to form requirements in general, it was said that the requirements should not be overly prescriptive nor too detailed, as that could complicate the enforcement procedure, possibly by resulting in additional claims about whether the requirements were met. Reference was made to paragraph 9 of document A/CN.9/WG.II/WP.192, which contained a proposed definition of "settlement agreement". It was stated that a stricter form requirement could harm the informal nature and amicable atmosphere of the conciliation process and that the variance in conciliation practice would need to be considered. It was further noted that as the purpose of the instrument should not be to harmonize domestic legislative framework or the manner in which conciliation was carried out in many jurisdictions but rather to focus on enforcement of international settlement agreements resulting from conciliation, it would be preferable to simply set minimum requirements, providing States with the flexibility to introduce any other requirements if they so wished. In that context, it was mentioned that the New York Convention did not include any form requirements of arbitral awards and that article 31 of the Model Law on Arbitration included minimum form requirements, some of which might not necessarily be applicable to settlement agreements (for example, the reasons upon which the settlement agreement was based).

66. Furthermore, it was suggested that the issue of form requirements could be left to the enforcing authority as it would need to determine whether those requirements were met. It was also mentioned that certain form requirements or elements might be better considered in the context of the enforcement or review mechanism, where the party applying for enforcement would need to furnish certain proof of those elements and the party against whom the settlement agreement was being invoked could object to the enforcement by furnishing proof to support its defence. Lastly, it was mentioned that if the instrument were

to be a convention, States should be given flexibility to formulate a reservation or declaration regarding those form requirements.

67. After discussion, the Working Group agreed that there was a need to provide for form requirements that would allow settlement agreements to be distinguished from other agreements, which would facilitate their expedited enforcement. It was generally felt that those requirements should not be prescriptive and should be set out in a brief manner or as minimum requirements, to preserve the flexible nature of the conciliation process. It was widely felt that settlement agreements to be enforceable under the regime envisaged by the instrument should be in writing and indicate the agreement of the parties to be bound by the terms of the settlement (for example, by signing or by concluding the agreement). There were diverging views on whether those requirements would be the only or minimum requirements, or whether additional elements would need to be provided for in the instrument, for example indications that (i) a conciliator was involved in the process (for example, by him/her signing the settlement agreement, indicating his/her identity in the settlement agreement or submitting a separate statement to that purpose); (ii) the settlement agreement resulted from a conciliation process; (iii) the parties to the settlement agreement were informed of the enforceability of the agreement upon its conclusion; or (iv) the parties opted in to the regime envisaged by the instrument.

B. Agreement to submit a dispute to conciliation

68. It was generally agreed that the instrument would not need to address the agreement to submit a dispute to conciliation, as the bases upon which conciliation might be carried out were diverse including not only the agreement between the parties, but also mandatory provisions of the law or an order by a competent authority. It was underlined that the outcome of the conciliation procedure, i.e., the settlement agreement, should be the focus of the instrument. It was, however, noted that the agreement to submit a dispute to conciliation could be produced in the enforcement procedure as possible evidence that conciliation took place and that it resulted in the settlement agreement.

69. During that discussion, it was pointed out that settlement agreements might resolve matters not contemplated when the conciliation started or matters not discussed during the conciliation. Whether such practice could have an impact on the enforcement procedure was questioned. It was suggested that settlement agreements could be defined as those "resulting from" conciliation so as to avoid issues at the enforcement stage.

70. While a suggestion was made that the Working Group should consider streamlining certain aspects of the conciliation procedure, it was agreed that that was outside of the mandate of the Working Group.

C. Recognition of settlement agreements

71. The Working Group considered whether a distinction should be made between recognition and enforcement of settlement agreements and whether the instrument would need to address recognition in addition to enforcement. It was recalled that the New York Convention provided for the recognition of arbitration agreements as well as arbitral awards. It was said that under the New York Convention, "recognition" of arbitral awards referred to the process of considering an arbitral award as binding but not necessarily enforceable, while "enforcement" referred to the process of giving effect to the award.

72. Diverging views were expressed regarding the need for the instrument to provide for the recognition of settlement agreements, due to a wide range of domestic recognition procedures as well as different understandings regarding the notions of both recognition and settlement agreements (as private contracts or special instruments resulting from a dispute resolution procedure). A suggestion was to avoid using the term "recognition" in the instrument as that term might carry different meanings depending on the jurisdictions and to first describe the envisaged procedure and its legal effects.

Addressing recognition in the instrument

73. Views were expressed in favour of addressing recognition of settlement agreements in the instrument on the basis that recognition would give legal effect to the settlement agreement and was, in certain jurisdictions, a necessary procedural step triggering the enforcement procedure. It was suggested that the recognition procedure could be straightforward and expedited, allowing the defendant to raise defences against recognition. The practical effect would be that settlement agreements would be given legal value before being considered for enforcement. It was further mentioned that there might be instances where parties might require recognition of settlement agreements containing non-pecuniary obligations without necessarily pursuing enforcement.

74. It was pointed out that settlement agreements might be recognized by courts in a variety of situations, such as, for dismissing a claim as the dispute had already been resolved by the settlement agreement and for the purposes of set-off. It was stated that in such circumstances, courts could use other processes to recognize or take account of settlement agreements.

Addressing only enforcement in the instrument

75. Views were expressed in support of the instrument only addressing enforcement as recognition of settlement agreements would be inappropriate and superfluous. It was said that recognition was a procedure usually applied to give legal effect to a public act emanating from another State, such as court decisions, whereas settlement agreements were of a private nature.

76. In addition, it was said that recognition would not have any practical effect. It was also said that the recognition procedure could have a negative impact on the expeditious enforcement of settlement agreements as, at the recognition stage, the validity of the conciliation procedure and its outcome might be examined. It was further said that settlement agreements might become void, be terminated or amended by the parties at any time including after the recognition of the agreement by a court, which could raise legal difficulties. It was pointed out that inclusion of a recognition procedure would generally require formalities in relation to settlement agreements, which were usually not required in relation to ordinary contracts.

Recognition and enforcement — proposals

77. It was proposed that the instrument should not seek to provide specific rules on the recognition procedure (such as filing of the settlement agreement with a court or homologation by a court). It was suggested that article III of the New York Convention could provide a useful model. Another suggestion was that it might be worthwhile to consider the instrument explicitly requiring that settlement agreements be treated at least as favourably as arbitral awards under the New York Convention.

78. During the discussion, reference was made to the recognition of foreign proceedings and reliefs as dealt with in the UNCITRAL Model Law on Cross-border Insolvency as possible guidance.

79. It was suggested that the instrument could refer to both recognition and enforcement of settlement agreements, without providing details on the recognition procedure, leaving that matter to domestic regimes which, in any case, could not easily be harmonized. It was further suggested that that matter should be revisited after consideration of issues relating to enforcement.

D. Direct enforcement or review mechanism as a prerequisite for enforcement

80. The Working Group then considered whether the instrument would provide an enforcement mechanism where a party to a settlement agreement would be able to seek enforcement directly at the place of enforcement (referred to as “direct enforcement”) or incorporate a review or control mechanism in the State where the settlement agreement was originating from (referred to as “originating state”) as a precondition for enforcement.

81. A number of concerns were raised with regard to requiring or establishing a review or control mechanism in the originating state. One was that unlike court judgements and arbitral awards, it could be very difficult to determine the originating state of settlement agreements as the connecting factor might be subject to different determinations. It was also mentioned that a review mechanism was likely to result in double exequatur, which would be at odds with the purpose of the instrument to provide an efficient and simplified enforcement mechanism. Furthermore, it was stated that any defences to enforcement could be raised at the court where enforcement was sought, making any review by a court at the originating state superfluous.

82. It was further mentioned that direct enforcement would not deprive courts at the originating state to review the validity of the settlement agreement. In that context, questions were raised on the consequences of concurrent court proceedings on enforcement and on the validity of the settlement agreement.

83. The view was expressed that providing for a simple review mechanism at the originating State could facilitate the overall enforcement procedure. It was noted that courts at the originating state would be better placed to determine prima facie certain questions, such as the validity of the settlement agreement and fulfilment of procedural requirements pertaining to the conciliation process. It was suggested that such a simple review mechanism would not amount to double exequatur, as it would only ascertain matters such as the validity of the settlement agreement before such an agreement could be enforced in other jurisdictions. Under that approach, the grounds for refusing enforcement would be limited.

84. After discussion, it was generally agreed that the instrument should provide a mechanism where a party to a settlement agreement would be able to seek direct enforcement (at the place of enforcement) without imposing a requirement for a review of the settlement agreement at the originating state. It was further noted that the concerns raised about such an approach could be further considered in the context of defences to enforcement and reference was made to article V(1)(e) of the New York Convention as a possible model.

E. Defences to enforcement of settlement agreements

85. The Working Group considered the question of defences to enforcement of settlement agreements with the assumption that a party to the settlement agreements subject to the regime envisaged by the instrument would be able to seek direct enforcement (at the place of enforcement) without review or control at the originating State (see above, para. 84). The Working Group exchanged preliminary views on defences that should be included in the instrument, how they should be presented, and how to determine the law applicable to defences.

Possible defences to enforcement

86. The Working Group considered defences as listed under paragraph 46 of document A/CN.9/WG.II/WP.190 and paragraph 18 of document A/CN.9/WG.II/WP.192. In the discussion, reference was made to defences contained in legislation of certain jurisdictions (see document A/CN.9/846 and its addenda) as well as to articles II(3) and V of the New York Convention.

87. Document A/CN.9/WG.II/WP.190 listed defences in relation to the capacity of the parties, their consent, and existence of duress, unconscionability, undue influence, misrepresentation, mistake or fraud, defences in relation to the purpose of the agreement, its cause, validity, formalities, public policy and non-compliance with mandatory provisions, and defences in relation to whether the subject matter of the dispute was capable of being resolved by conciliation.

88. While there was general support for the inclusion of fraud, public policy and the subject matter not capable of being conciliated as defences, diverging views were expressed on other possible defences and how they should be presented (see below, paras. 93-97).

89. A suggestion was made that the enforcement process should include some scrutiny over the conciliation procedure. It was pointed out that certain legislations on conciliation imposed homologation procedures or formal requirements which could constitute a ground

for refusing enforcement when those mandatory procedures or requirements were not complied with. In response, it was pointed out that importing specific requirements of domestic legislation into the contemplated international enforcement regime might be detrimental to the enforcement process, and run contrary to the objective of the instrument. It was further pointed out that the instrument should take into account the various techniques of conciliation.

90. It was suggested that lack of due process in conciliation should be considered as a specific defence and that any settlement agreement that disregarded due process should not be enforced. In support of that view, it was stated that elements of due process in conciliation would be, for example, impartiality and neutrality of the conciliator, confidentiality of the proceedings and equal treatment of the parties. In response, it was said that the outcome of conciliation was an agreement and not a binding decision imposed by a third party, and therefore, due process in conciliation could not be equated to that in judicial or arbitral proceedings. In addition, it was said that due process was usually considered in the broader context of procedural public policy, and thus need not constitute a separate defence under the instrument.

91. During the discussion on possible defences, questions were raised with regard to situations where the settlement agreement might not necessarily be the final resolution of the dispute, as it was modified, amended or terminated by the parties, as it was found to be null and void by a competent authority or where the obligations therein were partially or fully performed by the parties, or were conditional. One view was that those issues could constitute possible defences, which could be handled by the enforcing authority in a flexible manner. Another suggestion was that those issues could be resolved by including a finality aspect in the definition of settlement agreements and as a consequence, excluding from the scope of the instrument any settlement agreement that had been modified or amended.

92. It was suggested that a possible model to address those issues could be found in article II(3) of the New York Convention and article 8(1) of the Model Law on Arbitration, which referred to arbitration agreements being deprived of effect when found to be "null and void, inoperative or incapable of being performed". It was suggested that those terms had been interpreted by courts in a number of jurisdictions in a harmonized fashion and therefore could be used in the instrument.

Presentation of defences in the instrument

93. It was generally agreed that defences to be provided in the instrument should be limited and not cumbersome to implement in order to allow for a simple and efficient verification by the enforcing authority of the grounds for refusing enforcement. It was widely felt that the grounds for refusing enforcement under the instrument should also be exhaustive and stated in general terms, giving flexibility to the enforcing authority with regard to their interpretation.

94. It was suggested that the draft provision in paragraph 18 of document A/CN.9/WG.II/WP.192 provided a useful basis. As a further illustration of a simplified approach to enforcement, it was suggested that the instrument could provide that enforcement should be denied if a party to conciliation did not sign, or consent to, the agreement; the settlement agreement was obtained by fraud; or the settlement agreement did not accurately reflect the terms agreed to by the parties. It was further mentioned that the enforcement procedure should not be detrimental to the rights of the parties involved.

95. The possibility of the instrument setting out limited defences and giving flexibility to States to incorporate other defences was mentioned as a possible approach.

96. It was noted that when considering defences to enforcement, the consensual nature of settlement agreements needed to be highlighted.

97. It was suggested that possible defences identified should be broadly categorized and set out in general terms. As to the possible categories of defences, reference was made to those pertaining to the genuineness of the settlement agreement (reflecting the parties' consent, not being fraudulent), those pertaining to the readiness or validity of the settlement agreement to be enforced (being final, not having been modified or performed, binding on the parties) and those pertaining to international public policy. Another category identified

was where the subject matter of the settlement agreement was not capable of being settled through a conciliation process and the obligations contained in the settlement agreement were not capable of being enforced at the place of enforcement. In that context, it was said that some categories of defences might also be considered by the enforcing authority at its own initiative.

98. During the discussion, a view was expressed that a court of the originating state might be better suited to review some of the defences mentioned above for procedural efficiency, and it was suggested that a review mechanism should be incorporated at the originating state. In response, the difficulties in determining the originating state were reiterated.

99. With respect to defences to be included in the instrument, it was mentioned that it was important to consider whether they could increase forum shopping.

Applicable law

100. The Working Group considered how the law applicable with respect to defences in the enforcement procedure should be addressed in the instrument. It was generally felt that that raised complex issues, particularly as different laws might be applicable depending on the defences. For example, the competent authority might need to consider the law applicable to the parties (in relation to capacity), to the enforcement procedure, to the settlement agreement and to the conciliation process. Doubts were expressed whether the place of conciliation and the place of conclusion of the settlement agreement would have any relevance to the determination of the applicable law.

101. It was noted that while parties might have chosen the law applicable to the settlement agreement, that would not necessarily have any bearing on the determination of the law applicable to defences nor exclude application of other laws in the enforcement procedure. Another illustration was that the law governing the underlying contract under which the dispute arose might be different from the law governing the settlement agreement, which might create uncertainty regarding the applicable law.

102. After discussion, it was generally felt that the instrument should not address the laws applicable with respect to defences in the enforcement procedure, with the assumption that the enforcing authority or the court seized with the matter would usually apply the conflict-of-law rules at the place of enforcement and where relevant, consideration of the parties' choice of law in the settlement agreement. It was stated that the instrument could state that principle in broad terms. It was further suggested that the instrument should seek to provide unambiguous guidance regarding the laws applicable to defences to the extent possible.

Possible impact of judicial or arbitral proceedings

103. The Working Group then considered the possible impact that other judicial or arbitral proceedings relating to the settlement agreement could have on the enforcement procedure. A question was raised whether the enforcing authority would need to adjourn its procedure in such circumstances. It was said that that question would be treated differently, depending on whether the proceedings were taking place in the same jurisdiction, or in another jurisdiction. In the former case, lis pendens rules would provide clear rules while in the latter case, there was a risk that the courts would not coordinate.

104. One view was that there was no need to establish a link between the judicial or arbitral proceedings and the enforcement procedure as they dealt with issues of a different nature. Another view was that the instrument should require the enforcing authority to take into account court decisions. It was also mentioned that evidence of the absence of review of the settlement agreement by the court at the originating state could be a precondition for the enforcement.

105. It was suggested that the approach adopted in article V(1)(e) and VI of the New York Convention could provide useful guidance. Accordingly, it was suggested that the enforcing authority might, if it considered proper, adjourn its decision on the enforcement when a judicial proceeding was pending or refuse enforcement if that settlement agreement had been found to be null and void by a competent court. It was further suggested to refer to court decisions that were capable of being recognized by the court of the State where enforcement would be sought instead of generally referring to decisions made by a competent authority,

thereby providing that the enforcing authority should only take account of judicial decisions that could be recognized in the State where enforcement would be sought, be it through a treaty or through the operation of the private international law rules. In response, it was said that that suggestion might complicate the procedure, and in certain instances, be too limitative. It was suggested that the approach in the instrument should mirror that of the New York Convention and should provide discretion to the enforcing authority.

106. In that context, a question was raised whether court decisions that considered the validity of the settlement agreement as a precondition for the relief sought should also be taken into account or only those decisions that would be declaratory, for example, nullifying the settlement agreement.

107. After discussion, while it was widely felt that the instrument would need to indicate the possible impact judicial or arbitral proceedings could have on the enforcement procedure, it was said that it was premature to make a decision on how that question should be addressed.

F. Possible form of the instrument

108. The Working Group recalled the mandate given by the Commission that the Working Group should consider developing possible solutions to address enforcement of settlement agreements, including a convention, model provisions or guidance texts. The Working Group had a preliminary discussion on the possible form that the instrument could take. The prevailing view was that there were a number of issues that would require further consideration before a decision could be made on the form of the instrument. Nonetheless, a number of delegations expressed preference for preparing a convention, as a convention could more efficiently contribute to the promotion and harmonization of conciliation.

109. After discussion, it was agreed that progress could be made based on draft provisions without prejudging the final outcome. In order to facilitate further consideration, the Working Group requested the Secretariat to prepare a document outlining the issues considered at the session and setting out possible draft provisions, including those that would be relevant if the instrument were to be a convention (for example, possible reservations or declarations). It was generally felt that the final form would be decided upon at a later stage.

B. Note by the Secretariat on settlement of commercial disputes: international commercial conciliation: enforceability of settlement agreements

(A/CN.9/WG.II/WP.190)

[Original: English]

Contents

I. Introduction

1. At its forty-seventh session (New York, 7-18 July 2014), the Commission agreed that the Working Group should consider at its sixty-second session the issue of enforcement of international settlement agreements resulting from conciliation proceedings and should report to the Commission, at its forty-eighth session, in 2015, on the feasibility and possible form of work in that area.[1]

2. At that session, the Commission had before it a proposal to undertake work on the preparation of a convention on the enforceability of international commercial settlement agreements reached through conciliation (A/CN.9/822). In support of that proposal, it was said that one obstacle to greater use of conciliation was that settlement agreements reached through conciliation might be more difficult to enforce than arbitral awards. In general, it was said that settlement agreements reached through conciliation were already enforceable as contracts between the parties but that enforcement under contract law cross-border could be burdensome and time-consuming. It was further said that the lack of easy enforceability of such contracts was a disincentive to commercial parties to mediate. Consequently, it was proposed that the Working Group develop a multilateral convention on the enforceability of international commercial settlement agreements reached through conciliation, with the goal of encouraging conciliation in the same way that the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) ("New York Convention") had facilitated the growth of arbitration.[2]

3. Support was expressed for possible work in that area on many of the bases expressed above. Doubts were also expressed as to the feasibility of the proposal and questions were raised in relation to that possible topic of work, including: (a) whether the new regime of enforcement envisaged would be optional in nature; (b) whether the New York Convention was the appropriate model for work in relation to mediated settlement agreements;

[1] *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 129.

[2] Ibid., para. 123.

(c) whether formalizing enforcement of settlement agreements would in fact diminish the value of mediation as resulting in contractual agreements; (d) whether complex contracts arising out of mediation were suitable for enforcement under such a proposed treaty; (e) whether other means of converting mediated settlement agreements into binding awards obviated the need for such a treaty; and (f) what the legal implications for a regime akin to the New York Convention in the field of mediation might be.[3]

4. It was furthermore observed that UNCITRAL had previously considered that issue when preparing the UNCITRAL Model Law on International Commercial Conciliation (2002) ("Model Law on Conciliation"),[4] and particular reference was made to article 14 of the Model Law on Conciliation and paragraphs 90 and 91 of the Guide to Enactment and Use of that text.[5]

5. At its forty-eighth session (Vienna, 29 June-16 July 2015), the Commission noted that the Working Group considered the topic of enforcement of settlement agreements resulting from international commercial conciliation at its sixty-second session (A/CN.9/832, paras. 13-59). At that session of the Working Group, while a number of questions and concerns were expressed, it was generally felt that they could be addressed through further work on the topic (A/CN.9/832, para. 58). The Working Group, therefore, suggested that it be given a mandate to work on the topic of enforcement of settlement agreements, to identify the relevant issues and develop possible solutions, including the preparation of a convention, model provisions or guidance texts. Considering that differing views were expressed as to the form and content, as well as the feasibility, of any particular instrument, the Working Group also suggested that a mandate on the topic be broad enough to take into account the various approaches and concerns (A/CN.9/832, para. 59).

6. At the forty-eighth session of the Commission, there was general support to resume work in that area with the aim to promote conciliation as a time- and cost-efficient alternative dispute resolution method. It was said that an instrument in favour of easy and fast enforcement of settlement agreements resulting from conciliation would further contribute to the development of conciliation. It was further pointed out that the lack of a harmonized enforcement mechanism was a disincentive for businesses to proceed with conciliation, and that there was a need for greater certainty that any resulting settlement agreement could be relied on. However, doubts were expressed on whether it would be desirable to have a harmonized enforcement mechanism as it might have a negative impact on the flexible nature of conciliation. Another concern was whether it would be feasible to provide a legislative solution on enforcement of settlement agreements beyond article 14 of the Model Law on Conciliation. Furthermore, it was pointed out that procedures for enforcing settlement agreements varied greatly between legal systems and were dependent upon domestic law, which did not easily lend themselves to harmonization. Nonetheless, it was stated that legislative frameworks on enforcement of settlement agreements were being developed domestically and that it might be timely to consider developing a harmonized solution. It was suggested that work on the topic should generally not dwell into the domestic procedures; instead, a possible approach could be to introduce a mechanism to enforce international settlement agreements, possibly modelled on article III of the New York Convention.[6]

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[3] Ibid., para. 124.

[4] Discussions by UNCITRAL on enforcement of settlement agreements resulting from conciliation when it prepared of the Model Law on Conciliation may be found in the following documents: Notes by the Secretariat: A/CN.9/460, paragraphs 16-18; A/CN.9/WG.II/WP.108, paragraphs 34-42; A/CN.9/WG.II/WP.110, paragraphs 105-112; A/CN.9/WG.II/WP.113/Add.1, footnote 39; A/CN.9/WG.II/WP.115, paragraphs 45-49; A/CN.9/WG.II/WP.116, paragraphs 66-71; A/CN.9/514, paragraphs 77-81; Reports of Working Group II (Arbitration and Conciliation): thirty-second session (A/CN.9/468, paras. 38-40); thirty-fourth session (A/CN.9/487, paras. 153-159); thirty-fifth session (A/CN.9/506, paras. 38-48; 133-139; 160 and 161); Report of the Commission on the work of its thirty-fifth session: *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 17* (A/57/17), paras. 119-126 and 172.

[5] *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 125.

[6] Report of the Commission on the work of its forty-eighth session, under preparation.

7. After discussion, the Commission agreed that the Working Group should commence work at its sixty-third session on the topic of enforcement of settlement agreements to identify relevant issues and develop possible solutions, including the possible preparation of a convention, model provisions or guidance texts. The Commission also agreed that the mandate of the Working Group with respect to that topic should be broad to take into account the various approaches and concerns.[7]

8. To facilitate discussions of the Working Group, the present note seeks to identify the existing legal frameworks under which settlement agreements can be enforced, the issues underlying the enforceability of settlement agreements as well as the possible forms of work.

II. Enforceability of settlement agreements[8]

A. General remarks

9. UNCITRAL had developed two instruments aimed at harmonizing international commercial conciliation/mediation:[9] the Conciliation Rules, in 1980, and the Model Law on Conciliation, in 2002, which form the basis of an international framework for conciliation. The Conciliation Rules were the first international step taken in harmonizing that field. Upon their adoption, the United Nations General Assembly recognized that the use of conciliation "results in significant benefits, such as reducing the instances where a dispute leads to the termination of a commercial relationship, facilitating the administration of international transactions by commercial parties and producing savings in the administration of justice by States."[10]

10. Since the adoption of the two instruments, the use of conciliation for settling commercial disputes has increased considerably. Legislation on conciliation has been enacted in a growing number of jurisdictions;[11] conciliation and mediation institutes have proliferated, as well as trainings for conciliators and mediators (see A/CN.9/WG.II/WP.187, paras. 16-18 and Annex I).

11. Enforcement of settlement agreements is often cited as one crucial aspect that would make conciliation a more efficient tool for resolving disputes. In preparing the Model Law on Conciliation, the Commission was generally in agreement with the general policy that "easy and fast enforcement of settlement agreements should be promoted".[12] Accordingly, the Model Law on Conciliation includes a provision on enforcement of settlement agreements stating the principle that settlement agreements should be enforceable, without attempting to specify the method by which such settlement agreements may actually be enforced, a matter that is left to each enacting State. Article 14 of the Model Law on Conciliation (Enforceability of settlement agreement) reads as follows: "If the parties conclude an agreement settling a dispute, that settlement agreement is binding and enforceable ... [*the enacting State may insert a description of the method of enforcing settlement agreements or refer to provisions governing such enforcement*]."

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[7] Ibid.

[8] The term "settlement agreement" is used to generally refer to an agreement that resolves a dispute, in all or in part and is to be differentiated from the "agreement to submit a dispute to conciliation".

[9] The terms "conciliation" and "mediation" are used in this note as broad notions referring to proceedings in which a third person or persons assists the parties in their attempt to reach an amicable settlement of their dispute (see article 1(3) of the Model Law on Conciliation and para. 5 of its Guide to Enactment and Use).

[10] Resolution 57/18 of 19 November 2002.

[11] Policy Research Working Paper, Arbitrating and Mediating Disputes, Benchmarking Arbitration and Mediation Regimes for Commercial Disputes Related to Foreign Direct Investment, The World Bank, Financial and Private sector Development Network, Global Indicators and Analysis Department, October 2013, at p. 9.

[12] Guide to Enactment of the Model Law on Conciliation, para. 88.

B. Existing legal frameworks on enforcement of settlement agreements

12. Replies to the questionnaire circulated by the Secretariat to collect information regarding the legislative framework and practices with respect to enforcement of settlement agreements were published in document A/CN.9/846 and its addenda. An overview of the current legislative trends is contained in document A/CN.9/WG.II/WP.187, paras. 20 to 30.

13. Replies to the questionnaire illustrate that some jurisdictions have no specific legislation on enforcement of settlement agreements, which are treated as commercial agreements between private parties, and enforced accordingly. In jurisdictions that have provided for a method of enforcing settlement agreements, the purpose of such legislation is generally to ensure that settlement agreements should benefit from some form of expedited recognition of their enforceability. In that respect, three main approaches have been identified.

14. One approach is that a settlement agreement can be enforced through a court procedure, which usually requires compliance with formalities (for example, deposition or registration of the settlement agreement before the competent court). Another approach is that a settlement agreement can be enforced once it has been notarized according to the regime applicable to notarized documents. Yet another approach is that a settlement agreement can be enforced through an arbitration procedure where an arbitral tribunal is appointed for the purpose of issuing a consent award based on the settlement agreement. Some jurisdictions have adopted more than one of the approaches mentioned above.

15. In most jurisdictions, no distinction is made between international and domestic settlement agreements in relation to the enforcement procedure. However, a few jurisdictions have legislative provisions specific to cross-border enforcement of international settlement agreements.

16. In one jurisdiction, an international settlement agreement is enforceable as long as it is enforceable in the State where it was concluded; no particular form or procedural steps are required. Nevertheless, the enforcement court in that jurisdiction may refuse enforcement, if the parties lacked capacity, if the subject matter of the dispute could not be subject to conciliation, or if the settlement agreement would contradict public policy, general principles of law or good faith. In another jurisdiction, an international settlement agreement is enforceable through a judicial ruling confirming the validity of the agreement. In a few jurisdictions, an international settlement agreement can be enforced if recorded in the form of a notarized document in the State where the settlement agreement was concluded, provided that the agreement is not contrary to public policy of the jurisdiction where enforcement is sought.

17. There is currently no uniform international or regional instrument addressing enforceability of settlement agreements. However, it might be possible to utilize existing international or regional instruments, such as conventions on recognition and enforcement of arbitral awards, and judgements.

18. For example, the New York Convention can be used in countries where parties who have settled a dispute through conciliation may appoint an arbitrator to issue an award based on the settlement agreement. When settlement of a dispute is reached during an arbitration procedure, the arbitral tribunal may record the settlement agreement in the form of an arbitral award on agreed terms, if requested by the parties.

19. It should be noted that the New York Convention is silent on the question of its applicability to decisions that record the terms of a settlement between parties. The travaux préparatoires of the New York Convention show that the issue of the application of the New

York Convention to consent awards was raised during its deliberations, while no decision was made.[13] There is no reported case law on this issue.[14]

20. A settlement agreement which is recorded as a court judgement could be recognized and enforced under the conventions on enforcement of foreign judgements.

C. Questions underlying enforceability of settlement agreements

21. In accordance with the mandate of the Commission (see above, para. 7), this section seeks to outline issues that the Working Group may wish to address in considering the preparation of an instrument (convention, model legislative provisions or guidance texts) for the enforcement of settlement agreements, with the objective being that settlement agreements would be granted enhanced enforceability compared to ordinary contracts.

1. Settlement agreements

(a) Relevance of the procedure

22. The Model Law on Conciliation does not include provisions concerning the formation of settlement agreements, their definition or their enforcement procedure, and leaves those matters to be determined in accordance with the applicable domestic law.

23. The term "settlement agreement" generally refers to an agreement between the parties to resolve a dispute, in all or in part. It may find its origin in an agreement to submit a dispute to conciliation, or it may be concluded in the course of a dispute resolution process including arbitral or court proceedings. In considering the scope of its work, the Working Group may wish to consider whether to use the term "settlement agreement" in a broad manner or to limit it as the result of a conciliation procedure.

- *Any agreement settling a dispute regardless of the procedure*

24. One possible approach would be to address enforcement of settlement agreements, regardless of the procedure that led to their conclusion, as long as their purpose is to settle a dispute. Such an approach would make it possible to include settlement agreements resulting from mere negotiation between the parties (see A/CN.9/832, para. 42). However, in considering the enforcement procedure, the question would arise whether the competent authority for the enforcement of the settlement agreement would then have to determine whether there existed a dispute in the first instance and whether the purpose of the agreement was to settle that dispute.

- *Settlement agreements resulting from a process with a neutral assisting the parties*

25. Another possible approach would be to limit the scope of work to enforcement of settlement agreements resulting from conciliation, i.e., a process in which a third-party intermediary assisted the parties with the settlement. This approach would make it necessary to define the procedure under which the settlement agreement was concluded.

26. For instance, article 1(3) of the Model Law on Conciliation provides a broad definition of "conciliation"[15] aimed at clarifying the procedural features in generic terms, as follows: "For the purposes of this Law, "conciliation" means a process, whether referred to by the expression conciliation, mediation or an expression of similar import, whereby parties request a third person or persons ("the conciliator") to assist them in their attempt to reach

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[13] *Travaux préparatoires*, Recognition and Enforcement of Foreign Arbitral Awards, Report by the Secretary-General, Annex I, Comments by Governments, E/2822, at 7, 10; *Travaux préparatoires*, United Nations Conference on International Commercial Arbitration, Consideration of the Draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards, E/CONF.26/L.26. See also *Travaux préparatoires*, United Nations Conference on International Commercial Arbitration, Activities of Inter-Governmental and Non-Governmental Organizations in the Field of International Commercial Arbitration, Consolidated Report by the Secretary-General, E/CONF.26/4, at 26.

[14] UNCITRAL Secretariat Guide on the New York Convention, Article I, para. 37, available on the Internet at www.newyorkconvention1958.org.

[15] See also para. 5 of its Guide to Enactment and Use.

an amicable settlement of their dispute arising out of or relating to a contractual or other legal relationship. The conciliator does not have the authority to impose upon the parties a solution to the dispute."

27. It may be noted that the various techniques, that lead to settlement agreements referred to under the terms "conciliation", "mediation", "neutral evaluation", may be subject to different legal regimes depending on the jurisdiction. Therefore, any definition of the process that led to the settlement agreement would need to be either wide enough to include the numerous forms of alternative dispute resolutions known under different terminology (following the approach adopted under the Model Law on Conciliation) and ensure that such definition would be understood in the same manner in various jurisdictions, or distinctive enough to exclude certain forms of alternative dispute resolution.

28. The Working Group may wish to consider whether an instrument on enforcement of settlement agreements would address certain characteristics or requirements with respect to the conciliation procedure (for instance, that the third-party neutral assisting the parties fulfil certain qualifications). If such requirements are to be included, the Working Group may wish to consider how to ascertain that the procedure that led to the conclusion of the settlement agreement has been followed, without adopting too formalistic an approach (such as requiring that the settlement agreement bears certain mentions, or is signed by the conciliator or parties' counsels).

- *Whether the process would need to be international*

29. In addition, the Working Group may wish to consider whether the scope of its work should focus on conciliation procedures that are international. In that respect, it may be noted that the Model Law on Conciliation refers to "international commercial conciliation", whereas a vast majority of jurisdictions do not differentiate between international and domestic commercial conciliation, generally applying the same procedure for both (see above, para. 15). Therefore, the Working Group may wish to consider whether an instrument on enforcement of settlement agreements should address generally settlement agreements resulting from conciliation, regardless whether the procedure is domestic or international.

- *The basis upon which the process is initiated*

30. Furthermore, the Working Group may wish to consider whether the basis upon which the conciliation procedure started would have any relevance. In that respect, it should be noted that article 1(8) of the Model Law on Conciliation provides as follows: "This Law applies irrespective of the basis upon which the conciliation is carried out, including agreement between the parties whether reached before or after a dispute has arisen, an obligation established by law, or a direction or suggestion of a court, arbitral tribunal or competent governmental entity".

(b) International and domestic settlement agreements

31. The Working Group may wish to consider whether to (i) distinguish between "international" and "domestic" settlement agreements; (ii) deal with "foreign" as opposed to "international" settlement agreements (A/CN.9/832, para. 26); or (iii) only address settlement agreements that need to be enforced cross-border, without any distinction. Consideration of that question might differ based on the instrument to be developed.

32. If the Working Group would consider it necessary to determine the notion of "international" or "foreign" and the relevant criteria for such determination, it may wish to consider how those notions have been defined in UNCITRAL texts.

33. For example, the notion of "foreign" settlement agreement could be determined based on a territorial approach (place where the conciliation took place, place of conclusion of the settlement agreement), a personal approach (parties' place of business), the law applicable to the settlement agreement, or any other private international law criteria (A/CN.9/832, para. 27).

34. In its consideration of the matter, the Working Group may wish to refer to article 1(4), (5) and (6) of the Model Law on Conciliation which provides as follows: "4. A conciliation is international if: (a) The parties to an agreement to conciliate have, at the time of the

conclusion of that agreement, their places of business in different States; or (b) The State in which the parties have their places of business is different from either (i) The State in which a substantial part of the obligations of the commercial relationship is to be performed; or (ii) The State with which the subject matter of the dispute is most closely connected. 5. For the purposes of this article: (a) If a party has more than one place of business, the place of business is that which has the closest relationship to the agreement to conciliate; (b) If a party does not have a place of business, reference is to be made to the party's habitual residence. 6. This Law also applies to a commercial conciliation when the parties agree that the conciliation is international or agree to the applicability of this Law."

35. As a further illustration, article 35 of the Model Law on International Commercial Arbitration ("Model Law on Arbitration") treats awards rendered in international commercial arbitration in a uniform manner irrespective of where they were made. The Model Law on Arbitration distinguishes between "international" and "non-international" awards instead of relying on the traditional distinction between "foreign" and "domestic" awards. A similar approach could be considered for an instrument on enforcement of settlement agreements, delineating application based on substantive grounds rather than territorial borders, which may be inappropriate in view of the difficulty to determine the place where the settlement is concluded, in certain instances.

(c) Parties to the settlement agreement

36. UNCITRAL instruments usually apply to commercial matters, defined in a broad manner. In that context, the Working Group may wish to consider whether the scope of its work should exclude settlement agreements involving consumers (A/CN.9/832, para. 43). The Working Group may also wish to consider how to take account of settlement agreements concluded by government entities.

(d) Content of the settlement agreement

37. The Working Group may wish to consider whether its work should take into account the substantive contents of settlement agreements. For example, it might be envisaged to limit the scope of work to enforcement of pecuniary settlement agreements. Another approach would be to cover all types of settlement agreements, without limitations as to the remedies or nature of obligations that are provided under those agreements (A/CN.9/832, para. 41).

38. The obligations stipulated in a settlement agreement might be broad. The Working Group may wish to consider elements of complexities pertaining to settlement agreements, such as reciprocal or conditional obligations and conditions for the implementation of obligations and their impact on enforcement of settlement agreements. Further, the Working Group may wish to consider whether and, in the affirmative, how to address enforcement of settlement agreements that are conditional on certain future events.

(e) Form of the settlement agreement

39. The Working Group may wish to consider whether to address form requirement with respect to settlement agreements (for example, agreements in writing, containing all relevant terms and conditions of the settlement, signed by the parties, or their representatives and, if relevant, the conciliator). In so doing, the Working Group may wish to consider article 31 of the Model Law on Arbitration, which addresses form and contents of an award, and requires that an award shall be made in writing, and shall be signed by the arbitrators. Furthermore, the Working Group may wish to keep in mind that form requirements should not undermine the flexibility that characterizes conciliation.

2. Agreement to submit a dispute to conciliation

40. At the sixty-second session of the Working Group, a question was raised whether the agreement to submit a dispute to conciliation should also be included in the scope of work on the matter. That question was considered in light of a proposal to develop a convention on enforcement of settlement agreements modelled on the New York Convention. It was said that, in the field of arbitration, the exclusive nature of an arbitration agreement (referring a dispute to arbitration) created the need for its recognition, which did not necessarily arise

with respect to conciliation (A/CN.9/832, para. 25). Article II (1) of the New York Convention provides: "Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration." Article II (3) of the New York Convention and article 8(1) of the Model Law on Arbitration provide for the obligation of courts to refer the parties to arbitration.

41. It should be noted that the basis upon which conciliation is carried out may be diverse, which may include the agreement of the parties, a mandatory provision under law or an order by the court (see above, para. 30). While the arbitration agreement is the basis for the arbitration procedure representing the agreement of the parties to be bound by the decision of the arbitral tribunal, the outcome of conciliation is fully consensual. Therefore, addressing recognition of the agreement to submit a dispute to conciliation may be superfluous.

3. Enforcement procedure

(a) Recognition

42. The Working Group may wish to consider whether a distinction should be made between recognition and enforcement of a settlement agreement and whether its work would need to address recognition in addition to enforcement.

(b) Direct enforcement or a review mechanism as a prerequisite for enforcement

43. The Working Group may wish to recall its discussions at its sixty-second session on whether an instrument on enforcement of settlement agreements would make settlement agreements directly enforceable, incorporate a review mechanism in the jurisdiction where the settlement agreement is originating from or include a combination of the two options (A/CN.9/832, paras. 50-55).

44. If an instrument on enforcement of settlement agreements were to promote the approach that settlement agreements should be directly enforceable, it would set out the minimum requirements that a settlement agreement would need to meet to be enforceable (A/CN.9/832, para. 51). Emphasis would also be on the procedure that led to the settlement agreement and the guarantees required to make the agreement resulting from that procedure directly enforceable (for example, the obligation stipulated in the agreement should be capable of being enforced in that State and the conciliation procedure should comply with due process). That matter is closely related to the question whether all settlement agreements or only those resulting from a conciliation procedure would be included within the scope of an instrument on enforcement.

45. An instrument on enforcement of settlement agreements incorporating a review mechanism in the jurisdiction where the settlement agreement is originating from would provide that, to be enforceable, a settlement agreement would need to be first authenticated or endorsed by a competent authority and some formal requirements would have to be met in order for the agreement to benefit from an enforcement procedure in another State. If the Working Group considers that that approach should be further explored, it may wish to consider how to determine the jurisdiction competent to review the settlement agreement in the first place for it to be enforceable abroad and whether a minimum standard should be established to give international effect to domestic enforcement procedures (A/CN.9/832, para. 54). For instance, if a settlement agreement would need to be authenticated to benefit from any enforcement procedure, questions such as the competent authority (the conciliator, an institution or a court) and the procedure for obtaining authentication would need to be further addressed (A/CN.9/832, para. 50). The efficiency of such an approach compared to existing available enforcement mechanisms would also need to be considered.

4. Defences to enforcement of settlement agreements

46. The Working Group may wish to consider whether, and in the affirmative, how, to determine the defences to enforcement of settlement agreements. When enforcing settlement agreements, the following issues may become relevant: (i) in relation to the parties, their capacity, their consent, and existence of duress, unconscionability, undue influence,

misrepresentation, mistake or fraud; (ii) in relation to the agreement, its purpose, cause, validity, formalities required, non-contradiction with public policy and compliance with mandatory provisions.

47. Various questions would need consideration, such as:

-Whether a competent authority considering the enforcement of a settlement agreement:

- o Would have jurisdiction to also consider the validity of that agreement (A/CN.9/832, para. 44);
- o Should limit itself to examining the legality of that agreement, without considering the merits;
- o Would give effect to a determination in a different jurisdiction that the settlement agreement is invalid or otherwise not enforceable;

- What law would be relevant to the consideration of the settlement agreement, in particular its validity;
- How to address parallel proceedings, for instance, a proceeding on the validity of the agreement in one jurisdiction and an enforcement procedure in another jurisdiction; on that matter, the Working Group may wish to note article VI of the New York Convention, which addresses the situation where a party seeks to set aside an award in the country where it was issued, while the other party seeks to enforce it elsewhere; article VI achieves a compromise between the concerns of promoting the enforceability of foreign arbitral awards and preserving judicial oversight over awards by granting courts of contracting States the discretion to decide whether or not to adjourn enforcement proceedings;
- How to address the interrelation between an instrument on enforcement of settlement agreements and existing mechanisms (for example, if parties decide to enforce their settlement agreement under contract law or by any other means);
- Whether and, in the affirmative, how, an enforcement mechanism should address possible subsequent procedure on rectification if unforeseen circumstances arise in the course of enforcement;
- How to address the interrelation between a contractual claim based on the breach of a settlement agreement and the enforcement of the settlement agreement itself (A/CN.9/832, para. 38); and
- Whether and to what extent dispute settlement clauses usually contained in settlement agreements would have an impact on enforcement (A/CN.9/832, para. 34).

D. Possible forms of work

1. Convention

48. A its forty-seventh session, the Commission had before it, a proposal to undertake work on the preparation of a convention on the enforceability of international commercial settlement agreements resulting from conciliation (A/CN.9/822). At the sixty-second session of the Working Group, it was noted that a convention could provide a clear and uniform framework for facilitating enforcement of settlement agreements in different jurisdictions (A/CN.9/832, para. 18). To the contrary, another view was that an international regime created by a convention might result in a more cumbersome review of settlement agreements than under domestic mechanisms, as currently settlement agreements could circulate as contracts without any formalities or control in any State, the situation being different for foreign judgements and arbitral awards (A/CN.9/832, para. 21). Paragraphs 49 to 56 below provide a summary of that proposal with comments made during the sixty-second session of the Working Group.

49. Under the proposal, the scope of a convention could provide that it would apply to “international” settlement agreements (such as when the parties have their principal places of business in different States) and settlement agreements resolving “commercial” disputes (excluding agreements involving consumers). As to the substance, it could include

provisions on the form of settlement agreements (for example, agreements in writing, signed by the parties and the conciliator) and stating that settlement agreements falling within the scope of the convention are binding and enforceable.

50. It could also include certain limited exceptions similar, but not identical, to those provided in article V of the New York Convention. For example, the fact that a party to the settlement agreement was coerced to conclude such an agreement could be an additional reason for refusing enforcement. On the other hand, the conciliation procedure not being in accordance with the agreement of the parties or the applicable law (mirroring article V 1(d) of the New York Convention) might not be so relevant.

51. A convention would, in any case, need to build on existing domestic legislation. Modelled on the New York Convention, a convention could set forth that States would need to provide through their domestic legal systems a mechanism to enforce settlement agreements, without trying to harmonize the specific procedure for reaching that goal. Therefore, it would not address the procedural aspects dealt with in domestic legislation and would only introduce a mechanism to enforce international settlement agreements (A/CN.9/832, para. 22). It would also not seek to harmonize rules on the conciliation process nor address matters related to the attachment or execution of assets, both of which are not dealt with under the New York Convention. Article III of the New York Convention does not provide specific rules with respect to the procedure (formalities) for enforcement (such as filing of the agreement with a court or homologation by a court) nor with respect to the competent authority, both of which are left to domestic legislation.

52. If a convention were to be prepared, the interaction of the regime created by a convention with the principle of party autonomy might need to be addressed (for example, whether the regime under a convention would be optional in nature and allow parties to a settlement agreement to either opt-in or out of that regime). In relation to party autonomy, the Working Group may also wish to consider whether consent of the parties to the enforceability of a settlement agreement would be required to make that agreement enforceable. The Working Group may also wish to take note of the view expressed at its sixty-second session that a convention should not deprive the parties of any contractual remedies they might have under the applicable contract law (A/CN.9/832, para. 36).

53. If a convention were to be prepared, the Working Group may also wish to consider the flexibility to be given to States, more specifically the issue of possible declarations or reservations. One example would be a declaration whereby a State could exclude settlement agreements involving government entities from the scope of the convention (A/CN.9/832, para. 55).

2. Model legislative provisions

54. During the sixty-second session of the Working Group, it was mentioned that a more gradual approach to harmonize the regime of enforcement of settlement agreements could be preferable, starting from the harmonization of domestic legislation (A/CN.9/832, para. 19). In line with that suggestion, another possible form of work may be the preparation of model legislative provisions, which would be proposed for enactment by States in their domestic legislation.

55. Such work would generally build upon article 14 of the Model Law on Conciliation, which leaves the method of enforcement to each enacting State. Provisions along the lines of articles 28 to 36 of the Model Law on Arbitration could be considered (for example, the form and contents of the settlement agreement, corrections and interpretation of the settlement agreement, recourse against the settlement agreement and recognition and enforcement of the settlement agreement). Alternatively, work could be limited to recognition and enforcement of the settlement agreement (including a minimum uniform rule on defences to enforcement), which could complement article 14 of the Model Law on Conciliation. As mentioned above in relation to preparation of a convention (see above, para. 51), one approach would be to not reopen procedural issues addressed by domestic legislation.

56. In this respect, the footnote to article 14 recommends to States that they consider whether the enforcement procedure should be mandatory or not. Further, the Guide to

Enactment encourages States to adopt expedited or simplified enforcement procedures. These aspects could also be reflected in the model legislative provisions.

57. Work on model legislative provisions might necessitate revising other articles of the Model Law on Conciliation (and possibly the Conciliation Rules) to ensure consistency (for example, including a definition of "settlement agreement", possible form requirements and issues that could be addressed in the settlement agreement).

3. Guidance text

58. Another possible form of work could be to expand paragraphs 87 to 92 of the Guide to Enactment of the Model Law on Conciliation or to prepare a legislative guide with relevant recommendations and commentary. Such a text could set out information about various approaches taken in different jurisdictions based on replies received by the Secretariat in that respect and presented in document A/CN.9/846 and addenda. It could also include specific legislative recommendations including, for example, a recommendation on the application of the New York Convention to consent awards.

C. Note by the Secretariat on settlement of commercial disputes: enforcement of settlement agreements: compilation of comments by Governments

(A/CN.9/WG.II/WP.191)

Contents

I. Introduction

1. At its forty-seventh session, in 2014, the Commission agreed that the Working Group should consider at its sixty-second session the issue of enforcement of settlement agreements resulting from international commercial conciliation and should report to the Commission at its forty-eighth session, in 2015, on the feasibility and possible form of work in that area. The Commission invited delegations to provide information to the Secretariat in respect of that subject matter.[1] For the preparation of possible future work on the matter, and to facilitate the collection of information by delegations, the Secretariat circulated to States a questionnaire, reproduced in section II of document A/CN.9/846. The replies received by the Secretariat before the commencement of the forty-eighth session of the Commission have been reproduced in document A/CN.9/846 and its addenda. A reply received after that date is reproduced below.

II. Compilation of comments

1. India

[Original: English]
[Date: 14 July 2015]

Question 1: Information regarding the legislative framework

As per Indian domestic law, the terms "mediation" and "conciliation" are not used as synonym to each other. Both terms are having their own meaning. The Supreme Court of India in *Salem Advocate Bar Assn. (II) v. Union of India, (2005) 6 SCC 344*, while considering the Report submitted by a Committee under the chairmanship of the then Chairman Law Commission appointed by the Supreme Court so as to ensure that amendments made in the Code of Civil Procedure, 1908 in 1999 and 2002 related to Alternative Disputes Resolution method become effective and quicker dispensation of justice, observed as under:

> "61. It seems clear from the Report that while drafting the model rules, after examining the Mediation Rules in various countries, a fine distinction is tried to be maintained between conciliation and mediation, accepting the views expressed by the British author Mr. Brown in his work on India that in 'conciliation' there is a little more latitude and a conciliator can suggest some terms of settlements too."

The said Committee defined the term mediation and conciliation in the following words:

Settlement by "conciliation" means the process by which a conciliator who is appointed by parties or by the Court, as the case may be, conciliates the disputes between the parties to the suit by the application of the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) insofar as they relate to conciliation, and in particular, in exercise of his powers

[1] *Official Records of the General Assembly, Sixty-ninth session, Supplement No. 17* (A/69/17), para. 129.

under Sections 67 and 73 of that Act, by making proposals for a settlement of the dispute and by formulating or reformulating the terms of a possible settlement; and has a greater role than a mediator.

Settlement by "mediation" means the process by which a mediator appointed by parties or by the Court, as the case may be, mediates the dispute between the parties to the suit by the application of the provisions of the Mediation Rules, 2003 in Part II, and in particular, by facilitating discussion between parties directly or by communicating with each other through the mediator, by assisting parties in identifying issues, reducing misunderstandings, clarifying priorities, exploring areas of compromise, generating options in an attempt to solve the dispute and emphasizing that it is the parties' own responsibility for making decisions which affect them.

There is no specific law dealing with "mediation" except it has been referred to in Section 89 of the Code of Civil Procedure, 1908. On the other hand, "conciliation" is a non-adjudicatory alternative dispute resolution process, which is governed by the provisions of the Arbitration and Conciliation Act, 1996. There can be a valid reference to conciliation only if both parties to the dispute agree to have negotiations with the help of a third party or third parties either by an agreement or by the process of invitation and acceptance provided in Section 62 of the Arbitration and Conciliation Act, 1996 followed by appointment of conciliator(s) as provided in Section 64 of the said Act. Section 73 of the Act provides for settlement agreement. If the parties to a dispute reach a settlement, they may draw up and sign a written agreement. The signed agreement is final and binding on the parties and persons claiming under them respectively. As provided in Section 74, the settlement agreement shall have the same status and effect as if it is an arbitral award on agreed terms on the substance of the dispute rendered by an arbitral tribunal under Section 30 of the Arbitration and Conciliation Act, 1996.

Further, when a dispute is already referred to the Arbitral Tribunal, it may with the agreement of the parties use mediation, conciliation or other procedures at any time during the arbitral proceedings to encourage settlement. If, during arbitral proceedings, the parties settle the dispute, the Arbitral Tribunal shall terminate the proceedings and, if requested by the parties and not objected to by the Arbitral Tribunal, record the settlement in the form of an arbitral award on agreed terms. An arbitral award on agreed terms shall be made in accordance with Section 31 of the Arbitration and Conciliation Act, 1996 and shall state that it is an arbitral award. Such an arbitral award on agreed terms shall have the same status and effect as any other arbitral award on the substance of the dispute.

Further, when a dispute is already filed in the Civil court, and if it appears to the court that there exist elements of a settlement which may be acceptable to the parties, the said court is required to formulate the terms of settlement and give them to the parties for their observations and after receiving the observations of the parties, the court may reformulate the terms of a possible settlement and refer the same for alternative disputes resolutions mechanism such as arbitration, conciliation or mediation. Where a dispute had been referred to arbitration or conciliation, the provisions of the Arbitration and Conciliation Act, 1996 shall apply for mediation, the court can effect a compromise between the parties and shall follow such procedure as may be prescribed.

The enforcement of "international commercial settlement agreement" arising out of mediation/conciliation depends upon the seat/place of such settlement agreement.

(i) If the place of settlement is outside India — Part II of the Arbitration and Conciliation Act, 1996 deals with enforcement of foreign awards. The definition of the term "foreign award" is provided in Section 44, in respect of New York Convention awards and in Section 53 in respect of Geneva Convention awards. If any international commercial settlement agreement arising out of conciliation proceeding falls within the definition of "foreign award" as provided in Sections 44 or 53, such an agreement is enforceable in India as provided in Sections 49 and 58 of the Arbitration and Conciliation Act, 1996;

(ii) If the place of settlement is India — If such settlement agreement has been arrived and signed in India, the same is binding on the parties in terms of Section 74 of the Arbitration and Conciliation Act, 1996.

As per Section 74 of the Arbitration and Conciliation Act, 1996, the status of the written settlement agreement signed by the parties arising out of the conciliation proceedings shall have same status and effect as if it is an arbitral award on agreed terms on the substance of the dispute rendered by an arbitral tribunal under Section 30.

There are no procedures for expedited enforcement of international commercial settlement agreements.

If a settlement agreement comes into existence under Section 73 of the Arbitration and Conciliation Act, 1996 satisfying the requirements stated therein, it gets the status and effect of an arbitral award on agreed terms on the substance of the dispute rendered by an Arbitral Tribunal under Section 30 of the Act and it is enforceable in terms of Section 36.

(2) A settlement agreement should result from conciliation proceedings as envisaged in Part III of the Arbitration and Conciliation Act, 1996. It should be in writing and signed by the parties and should be authenticate by the conciliator.

(3) If an award on agreed terms falls within the definition of foreign awards contemplated in Section 44 of the Arbitration and Conciliation Act, 1996, courts consider such awards enforceable under the New York Convention.

Question 2: Grounds for refusing enforcement of a commercial settlement agreement

If the settlement agreement comes into existence under Section 73 of the Arbitration and Conciliation Act, 1996 satisfying the requirements stated therein, it gets the status and effect of an arbitral award on agreed terms on the substance of the dispute rendered by an Arbitral Tribunal under Section 30 of the Act and it is enforceable in terms of Section 36 of the Act.

Question 3: Validity of international commercial settlement agreements

There are no specific criteria that international commercial settlement agreements need to meet to be deemed valid.

D. Note by the Secretariat on settlement of commercial disputes: enforcement of settlement agreements: comments by Israel and the United States of America (A/CN.9/WG.II/WP.192)

[Original: English]

In preparation for the sixty-third session of Working Group II (Arbitration and Conciliation), during which the Working Group is expected to consider the question of the enforceability of settlement agreements, the Governments of Israel and the United States of America, on 31 July 2015, submitted comments for consideration by the Working Group. The text of the comments is reproduced as an annex to this note in the form in which it was received by the Secretariat.

Annex

Comments by Israel and the United States of America

1. Israel and the United States would like to thank the Secretariat for the paper, A/CN.9/WG.II/WP.190, that has been prepared for the sixty-third session of Working Group II. The paper concisely sets forth many of the issues that the Working Group may need to address in developing an instrument on the recognition and enforcement of conciliated settlement agreements, and very helpfully identifies key questions that the Working Group will need to address.

2. In advance of the Working Group's session, Israel and the United States would like to provide the following comments on some of the issues identified in sections C and D of the Secretariat's paper.

3. In our view, the intended goal of the project by the Working Group should not be to harmonize domestic legislation on conciliation. The aim is merely to facilitate, and increase, the use of conciliation and settlement agreements to support international trade, by providing them with the appropriate international legal framework which is currently lacking.

4. As a general note, the draft provisions proposed below are not necessarily intended to reflect the specific positions of Israel and the United States, but rather are meant to provide initial drafting language for the Working Group's consideration and as illustration of potential text.

Section C.1 — Settlement agreements

5. The Secretariat raises several questions regarding the scope of the instrument that the Working Group will develop. At this stage, we believe that several restrictions on the scope would be prudent, particularly if the Working Group determines that the instrument should be a convention.

6. First, the instrument should be restricted to settlement agreements resulting from conciliation. A primary purpose of this project is to promote the use of conciliation as a means of settling cross-border commercial disputes; developing an instrument specific to conciliation would ensure that conciliation is not disadvantaged relative to other forms of dispute resolution such as arbitration or litigation (which are addressed, respectively, by the New York Convention and by the in-progress Hague Conference work on judgements). Broadening the scope beyond such settlements would make reaching consensus on rules regarding recognition and enforcement much more difficult.

7. Second, the instrument should only apply to "international" settlement agreements — i.e., those in which the parties to the dispute had their places of business in different States at the time of the settlement.

8. Third, not only should consumer disputes be excluded, as suggested in paragraph 36 of the Secretariat paper, but the instrument should restrict its scope to "commercial" settlements (excluding settlements in areas such as employment law or family law).

9. The following draft definitions illustrate how some of these issues might be addressed:

> "Conciliation" is a process whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person or persons lacking the authority to impose a solution upon the parties to the dispute. This definition includes cases in which parties to a dispute reached a settlement agreement in the course of arbitration proceedings.[1]
>
> A dispute is not "Commercial" if it involves employment law or family law, or if a consumer — acting for personal, family, or household purposes — is a party.[2]
>
> A "Settlement Agreement" is an agreement in writing (a) that is concluded by the parties to a Commercial dispute, (b) that results from Conciliation, and (c) that resolves all or part of the dispute.
>
> A Settlement Agreement is "International" if at least two parties to the Settlement Agreement had their places of business in different States at the time of the conclusion of the Settlement Agreement. If a party has more than one place of business, the place of business is that which has the closest relationship to the dispute resolved by the Settlement Agreement, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the Settlement Agreement.[3]

10. The recognition and enforcement regime would then apply only to "International Settlement Agreements." In addition, the instrument could allow a State to tailor its scope of application, such as by a declaration mechanism if the instrument takes the form of a convention. For example, paragraphs 37 and 38 of the Secretariat paper note a number of questions regarding the content of settlement agreements, such as non-monetary elements of settlements and other complex obligations that may be included. While creative approaches to settling disputes can be one of the main advantages of conciliation, not all legal systems may deem expedited recognition and enforcement appropriate for all types of obligations. Thus, a declaration mechanism could allow States to decline to apply the instrument to certain classes or types of settlements, including limiting them solely to monetary settlements. Similarly, paragraph 36 notes the issue of settlements concluded by government entities; this issue, too, may be one for which States should be able to tailor the extent of the instrument's application. Another useful option would be to allow States to declare whether the instrument would apply by default (allowing parties to a settlement to opt out of its application, as discussed below) or only apply when parties specifically invoke the instrument in the settlement itself.

11. To provide these options (as well the possibility for States to apply the instrument only on the basis of reciprocity) without limiting other potential reservations and declarations that may be provided for, text such as the following might be appropriate, if the instrument takes the form of a convention:

> A Party to this Convention may make declarations providing for any or all of the following:
>
> 1. It shall apply this Convention to International Settlement Agreements to which a government or government entity is a party only to the extent specified in a declaration, including their exclusion from the applicability of this Convention.
>
> 2. A party to an International Settlement Agreement shall not be eligible to seek recognition and enforcement of an International Settlement Agreement under this Convention if that party has its place of business in a State that is not a Party to this Convention.[4]

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[1] This definition would be based on Article 1.3 of the UNCITRAL Model Law on International Commercial Conciliation. Additional consideration may need to be given to the applicability of the convention to consent awards.

[2] The description of "consumer" matters draws on Article 2(a) the United Nations Convention on Contracts for the International Sale of Goods (CISG).

[3] This definition draws on Article 1.4(a) of the Model Law on International Commercial Conciliation as well as Article 10 of the CISG.

[4] Such a declaration would be similar to that permitted by Article I(3) of the New York Convention.

3. It shall not apply this Convention to certain classes or forms of International Settlement Agreements specified in a declaration.[5]

4. It shall only apply this Convention to International Settlement Agreements in which the parties to the International Settlement Agreement have explicitly agreed that the Convention would apply.

Section C.3 — Enforcement procedure

12. The core of the instrument should be an obligation similar to Article III of the New York Convention, requiring recognition and enforcement of International Settlement Agreements but not dictating a particular procedure for domestic use. Nor should the instrument require a "review mechanism" as a prerequisite for recognition and enforcement of a conciliated settlement. Requiring such a review in some country deemed the "competent" jurisdiction, as described in paragraph 45 of the Secretariat paper, would be equivalent to the "double exequatur" procedures required for arbitral awards prior to the New York Convention.

13. A question that has been raised is whether a conciliated settlement is sufficiently "trustworthy" to be recognized and enforced without a review mechanism. The experience of the New York Convention has demonstrated that even without judicial review of arbitral awards in the State of origin, courts in other jurisdictions are adequately able to determine whether recognition and enforcement should be denied under the New York Convention. The exceptions in Article V provide a sufficient basis for denying recognition and enforcement of arbitral awards that are not sufficiently "trustworthy," even though that Convention neither requires double exequatur nor dictates the use of particular arbitration rules to ensure the adequacy of the arbitration process.

14. We believe the same approach would work for recognition and enforcement of conciliated settlements, with some adaptations. For both arbitration and conciliation, the trustworthiness of the award or settlement agreement will depend on the specifics of the process used to resolve the particular dispute. In either type of process, problems can arise that would caution against recognizing or enforcing the result. But just as the exceptions in Article V of the New York Convention suffice to address these situations in the context of arbitration, an analogous set of exceptions should suffice for conciliation, to ensure that only sufficiently "trustworthy" settlements are recognized and enforced.

15. Thus, rather than simply copying Article III of the New York Convention, it might be worthwhile to consider that the instrument also explicitly require that International Settlement Agreements be treated at least as favourably as international arbitral awards under the New York Convention. For example, if the instrument takes the form of a convention, it could require that States "not impose substantially more onerous conditions or higher fees or charges on the recognition or enforcement of International Settlement Agreements to which they apply this Convention than they impose on the recognition or enforcement of arbitral awards or of other Settlement Agreements."

Section C.4 — Defences

16. If the instrument requires recognition and enforcement of International Settlement Agreements as suggested above, it would then need to include a range of exceptions, similar to Article V of the New York Convention. Courts should be able to refuse recognition and enforcement in instances when a party lacked the capacity to conclude the settlement or concluded it due to coercion or fraud. In this context, it may be worthwhile to consider providing additional defences surrounding the unique circumstances of the concluding an International Settlement Agreement.

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[5] Such a declaration would be similar to that permitted by Article 25(4) of the ICSID Convention. It would permit limits on enforcement under the Convention for Settlement Agreements that pose particular problems under a State's domestic legal system. For example, a State could exclude Settlement Agreements with long-term or complex obligations (other than an obligation by one party to pay a sum to another party) if it considers that its courts may not be able to evaluate them in a streamlined enforcement process and that those International Settlement Agreements may be more appropriately addressed under contract law.

17. The instrument should also include equivalents to Articles V(2)(a) and (b) of the New York Convention, permitting a refusal to recognize or enforce due to a subject matter not capable of settlement or due to incompatibility with public policy of the State where recognition and enforcement is sought. Finally, and without prejudice to other potential exceptions that might be agreed by the Working Group, recognition and enforcement should not be required when it would be contrary to the terms of the International Settlement Agreement itself. Such an exception could apply when the International Settlement Agreement includes a forum selection clause specifying that recognition and enforcement could only occur in a different jurisdiction, or when the International Settlement Agreement includes other limitations on remedies (e.g., requiring any disputes to be brought back to the conciliator before recognition and enforcement is sought, requiring disputes to be settled by arbitration rather than recognition and enforcement in court, or providing that recognition and enforcement under the convention is unavailable). Such an exception would, in effect, allow parties to an International Settlement Agreement to opt out of the recognition and enforcement regime in whole or in part (while other States might use the declaration mechanism described above to require parties to affirmatively opt into the recognition and enforcement regime).

18. Again, for the purpose of illustration, these exceptions could be provided through text such as the following:

> Recognition and enforcement of an International Settlement Agreement may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:
>
> A. The party against whom the International Settlement Agreement is invoked was, under the law applicable to it, under some incapacity or concluded the International Settlement Agreement due to coercion or fraud; or
>
> B. The subject matter of the International Settlement Agreement is not capable of settlement under the law of the country where recognition and enforcement is sought; or
>
> C. The recognition or enforcement of the International Settlement Agreement would be contrary to the public policy of the country where recognition and enforcement is sought; or
>
> D. Recognition or enforcement would be contrary to the terms of the International Settlement Agreement itself; or
>
> E. […]

Section D — Possible forms of work

19. Given the number of substantive issues to be discussed, the Working Group does not need to decide at this session what form the instrument should take.

20. In considering these issues preliminarily, however, the development of a convention would seem to have several advantages. As noted in paragraph 51 of the Secretariat paper, using certain aspects of the New York Convention as a model would enable the Working Group to avoid some particularly difficult issues, such as "trying to harmonize the specific procedure for reaching [the] goal" of recognition and enforcement, as noted at the outset — issues that could be harder to avoid if drafting model legislative provisions. Additionally, in choosing the form of an instrument, the technical elements are not the only relevant considerations. As noted above, other forms of dispute resolution are already the subject of treaties — existing or in-progress — establishing frameworks for cross-border recognition and enforcement. By developing an analogous convention for conciliation, UNCITRAL would underscore that conciliation should be seen as an important form of dispute resolution. This type of endorsement, in combination with the creation of a cross-border framework that would provide greater confidence in the ability to obtain recognition and enforcement of a settlement in another jurisdiction, could help to encourage the use of conciliation around the globe.

E. Note by the Secretariat on settlement of commercial disputes: enforcement of settlement agreements resulting from international commercial conciliation/mediation: compilation of comments by Governments

(A/CN.9/846 and Add.1-5)

[Original: English/French/Russian/Spanish]

Contents

I. Introduction

1. At its forty-seventh session, in 2014, the Commission agreed that the Working Group should consider at its sixty-second session the issue of enforcement of settlement agreements resulting from international commercial conciliation and should report to the Commission at its forty-eighth session, in 2015, on the feasibility and possible form of work in that area. The Commission invited delegations to provide information to the Secretariat in respect of that subject matter.[1]

2. For the preparation of possible future work on the matter, and to facilitate the collection of information by delegations, the Secretariat circulated to States a questionnaire, reproduced below in section II. The replies are reproduced below in section III in the form in which they were received.

[1] *Official Records of the General Assembly, Sixty-ninth session, Supplement No. 17* (A/69/17), para. 129.

II. Questionnaire

A. Questions regarding the legislative framework with respect to enforcement of settlement agreements resulting from international commercial conciliation/mediation

3. In August 2014, the Secretariat circulated to States a questionnaire on the legislative framework on enforcement of international settlement agreements resulting from mediation. The questionnaire aimed at collecting information on whether States have already adopted legislation addressing enforcement of settlement agreements. It was circulated a second time in February 2015 in accordance with a request of the Working Group (A/CN.9/832, para. 21). The questionnaire contained the following questions:

(1) Please provide information regarding the legislative framework or other rules in your jurisdiction regarding the enforcement of international commercial settlement agreements arising out of mediation/conciliation[2] proceedings.

In particular, does the law applicable to the enforcement of international commercial settlement agreements include:

i. Specific enforcement procedures if those agreements result from mediation/conciliation proceedings?

ii. Any procedure for expedited enforcement of international commercial settlement agreements? (In the affirmative, what are the conditions for the procedure to apply?)

iii. Any provision to the effect that an international commercial settlement agreement be treated as a final award rendered by an arbitral tribunal?

In the affirmative, please indicate:

1. Whether arbitral proceedings have to take place (possibly in a simplified form, with the only purpose of recording in an award the terms of the settlement between the parties) or whether the settlement agreement can be treated as an award on agreed terms without involving the actual commencement of any arbitral proceedings;

2. Whether specific conditions are required: for instance, should the settlement agreement result from mediation/conciliation proceedings? Should it be in writing, and signed by the parties/their representatives and the mediator(s)/conciliator(s)?

3. Whether courts in your jurisdiction consider awards on agreed terms enforceable under the New York Convention on the Recognition and Enforcement of Arbitral Awards (1958)?

(2) What are the grounds for refusing enforcement of a commercial settlement agreement in your jurisdiction?

(3) Are there any criteria that international commercial settlement agreements need to meet to be deemed valid? Are there any bases in law for challenging the validity of an agreement to refer a dispute to mediation/conciliation or the validity of the resulting mediated/conciliated settlement agreement?

(4) Please add any comment you may wish to make on the question of enforcement of international mediated/conciliated settlement agreement.

[2] Please note that in the questions below, the terms “mediation” or “conciliation” are used interchangeably as broad notions both referring to proceedings in which a person or a panel of persons assist parties in their attempt to reach an amicable settlement of their disputes.

B. Reference to the questionnaire

4. In the remainder of this note and its addenda, the above questions are referred as follows:

Question 1: Information regarding the legislative framework

Question 2: Grounds for refusing enforcement of a commercial settlement agreement

Question 3: Validity of international commercial settlement agreements

Question 4: Any other comment

III. Compilation of comments

1. Armenia

[Original: English]
[Date: 5 November 2014]

Question 1: Information regarding the legislative framework

The legal relations subject matter of the questions below are regulated by the Law of the Republic of Armenia on Commercial Arbitration.

(i) The Law does not contain any specific enforcement procedures considering the agreements result from conciliation/mediation proceedings.

(ii) There is not any expedited procedure for enforcement of international commercial agreements.

(iii) There is no provision to the effect that an international commercial settlement agreement can be treated as a final award rendered by an arbitral tribunal.

If, during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and, if requested by the parties and not objected to by the arbitral tribunal, shall make an award on reconciliation agreement on agreed terms.

Question 2: Grounds for refusing enforcement of a commercial settlement agreement

The law of the Republic of Armenia on Commercial Arbitration does not settle this issue.

Question 3: Validity of international commercial settlement agreements

The Law of the Republic of Armenia on Commercial Arbitration does not settle this issue.

2. Austria

[Original: English]
[Date: 10 March 2015]

Question 1: Information regarding the legislative framework

Austria has no specific legal regime regarding this kind of enforcement. International commercial settlement agreements arising out of mediation/conciliation proceedings are per se no executory title according to Austrian law. By the way the same is true for national settlement agreements.

Question 2: Grounds for refusing enforcement of a commercial settlement agreement

As most other laws, Austrian law refuses to immediately enforce any kind of private agreements. If a party wants to enforce a right arising out of a contract (even if the contract was aimed at settling a dispute between the parties), they have to refer to the competent court to gain an executory title in a court proceeding. It is however possible to convert an agreement into a "*vollstreckbarer Notariatsakt*" according to Sec. 3 of our Notarial Code

(*Notariatsordnung* — NO) or into a court agreement (*prätorischer Vergleich*) according to Sec. 433 Civil Procedure Code (Zivilprozessordnung — ZPO) and in this manner create a title without recourse to a contentious court proceeding.

As yet there seem to exist no standards for mediation/conciliation proceedings (both on the national and on the international level) that warrant sufficient trust in the proceeding itself, its independence from either party and from negative influence from outside, the quality of mediators/conciliators, the quality of the outcome and the fact that the outcome is not agreed upon by the parties to the detriment of a third person. Such trust, however, seems indispensable if one considers rendering the result of such a proceeding directly enforceable.

Question 4: Any other comment

Austria is very sceptical towards an attempt to find and regulate sufficient criteria for mediation/conciliation proceedings that could justify immediate enforceability of their results. We also doubt the necessity of such an endeavour as there already exist functioning structures for generating enforceability, in particular international arbitration which allows for converting an agreement into an arbitral award and thereby making it enforceable under the regime of the 1958 New York Convention. A possible parallel structure might have little or no added value. It could even reduce the value of existing structures by enhancing legal complexity in the field and thus confusing market participants. In addition the necessity to formalize mediation/conciliation proceedings in order to create reliable structures for a "product", the outcome of which might warrant immediate enforcement, runs the danger of compromising, if not destroying, one of the most important merits of mediation/conciliation namely its flexibility and the relative absence of red tape.

3. Belarus

[Original: Russian]
[Date: 12 January 2015]

Question 1: Information regarding the legislative framework

The execution of settlement agreements resulting from mediation/conciliation proceedings is governed in the Republic of Belarus by the following basic legislative acts:

- Code of Economic Procedure of the Republic of Belarus (hereinafter "CEP");
- Code of Civil Procedure of the Republic of Belarus (hereinafter "CCP");
- Mediation Act of the Republic of Belarus (hereinafter "Mediation Act"); and
- Act of the Republic of Belarus "On the International Arbitration Court" (hereinafter "Arbitration Act").

Under article 2 of the Mediation Act, mediation/conciliation may be conducted either prior to recourse by the parties to civil or economic court proceedings or subsequent to the commencement of court proceedings.

A mediation/conciliation agreement reached subsequent to the commencement of court proceedings by the parties through mediation/conciliation and approved by the court as an amicable settlement may constitute the final outcome of the proceedings (article 157 of the CEP, article 285(1) of the CCP, and article 39 of the Arbitration Act).

The execution of such agreements is provided for in the general rules on the execution of judicial decisions, including on enforcement (article 461 of the CCP, article 124 of the CEP, and article 39 of the Arbitration Act).

As a general rule, settlement/conciliation/mediation agreements are executable on the basis of the principles of voluntariness and good faith of the parties (article 15 of the Mediation Act, and articles 124 and 157 of the CEP).

Question 2: Grounds for refusing enforcement of a commercial settlement agreement

The Mediation Act provides for a number of requirements the non-fulfilment of which excludes the possibility of enforcement of a mediation agreement. Thus, under article 15 of

the Mediation Act, the following types of mediation agreement are not executable under procedural law, i.e. they are not enforceable:

- Those not approved by the court as settlement agreements for disputes adjudicated in accordance with civil procedural law; (*In the event that the parties conclude a mediation agreement, the court shall establish a time limit for the execution thereof (article 285 of the CCP). In the event that the parties conclude a mediation agreement and that in this connection an application for approval of the settlement agreement is submitted to the court, the court shall resume the suspended proceedings and consider the application for approval of the settlement agreement (article 285(1) of the CCP)*).
- Those not meeting the requirements of the economic procedural law on settlement agreements; (*The settlement agreement must be approved by the court (article 123 of the CEP) in form and substance (article 122 of the CEP)*).
- Those concluded with the participation of a mediator not included in the Register of Mediators.

Enforcement of mediation agreements:

Under article 461 of the CCP, settlement agreements approved by the court shall be executed in accordance with the provisions of the CCP. Under article 462 of the CCP, court orders include the writ of execution, which is issued by the court pursuant to international agreements approved by the court in order to ensure the execution, including where necessary the enforcement, thereof.

Under article 40(1) of the CEP, in the event of non-execution of a voluntary mediation agreement meeting the requirements of the CEP for settlement agreements, a court order for the enforcement of the mediation agreement shall be issued by the economic court in accordance with the rules established by articles 262(1) to 262(3) of the CEP.

Under article 262(1) of the CEP, an application for the issuance of a court order for the enforcement of a mediation agreement shall be filed by the interested party to the mediation agreement with the economic court that has jurisdiction over the location or place of residence (place of stay) of the debtor or that has jurisdiction over the location of the debtor's property if the debtor's location or place of residence (place of stay) is unknown.

Article 262(1) of the CEP also defines the content of the application for the issuance of a court order for the enforcement of a mediation agreement and the list of documents to be attached thereto. The said article also provides for the possibility of filing an application and attached documents electronically. An application for the issuance of a court order for the enforcement of a mediation agreement may be submitted within six months of the date of expiry of the period for voluntary execution of the mediation agreement.

4. Brunei Darussalam

[Original: English]
[Date: 6 January 2015]

Question 1: Information regarding the legislative framework

Brunei Darussalam has in force the International Arbitration Order 2009 (IAO 2009) which came into force on 23 February 2010. Part III of the IAO 2009 deals with foreign awards. The IAO 2009 is limited to arbitral award resulting from an arbitration, and it does not cover mediation/conciliation. Brunei Darussalam currently does not have laws and regulations governing mediation or conciliation.

However, the following are responses to some of the questions relating to agreements arising out of an arbitration proceeding.

Question 1 (iii): An international commercial settlement agreement arising out of an arbitration proceeding may be treated as a final award (See sections 42(2) and 31(1) of the IAO 2009).

Question 2: Grounds for refusing enforcement of a commercial settlement agreement

The grounds for refusing enforcement of international commercial settlement agreements arising out of an arbitration proceeding are provided under section 44 of the IAO 2009.

Question 3: Validity of international commercial settlement agreements

An international commercial settlement agreement arising out of an arbitration proceeding is valid where (Section 42(1) of the IAO 2009) the said agreement is from a country which is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, and which recognizes and will enforce awards made in Brunei Darussalam.

In a court proceeding, the parties must produce: (i) the duly authenticated original award or a duly certified copy thereof; (ii) the original arbitration agreement or a duly certified copy thereof, and (iii) where the agreement is in a foreign language, a translation of it in the English language.

5. Canada

[Original: English/French]
[Date: 8 December 2014]

Question 1: Information regarding the legislative framework

(i) In Canada, the enforcement of mediation agreements, except agreements involving the federal Crown or relative to subject matters falling under federal legislative powers, are generally governed by provincial contract law. A settlement agreement resulting from conciliation or mediation proceedings can be presented in a court of law for enforcement if a party to the agreement refuses to comply with the terms of the settlement. In that situation, the settlement agreement would need to be presented according to normal rules on presenting documentary evidence in a court of law. Two Canadian provinces, Ontario and Nova Scotia, have adopted legislation based on the UNCITRAL Model Law on International Commercial Conciliation, which provides a framework for the enforcement of commercial conciliation agreements. In Quebec, a mediated agreement can constitute a settlement (called transaction) which is *res judicata* between the parties (sec. 2631 to 2637 and 2848 Code civil (« C.c.Q. »; see also new sec. 613 Nouveau Code de procédure civile (« N.C.p.c. »)). Transactions enforceable at their places of origin are recognized and, where applicable, declared to be enforceable in Québec, on the same conditions as judicial decisions, to the extent that those conditions apply to the transactions (sec. 3163 C.c.Q.). These conditions are provided for by articles 3155 and following.

(ii) Under Ontario law, a party to a commercial conciliation settlement may apply to the Superior Court of Justice for an order authorizing the registration of the agreement with the court. On the filing of a true copy of the settlement agreement with the registrar pursuant to an order authorizing the registration of the agreement, the settlement agreement is registered with the court and has the same force and effect as if it were a judgement obtained and entered in the Superior Court of Justice on the date of the registration (see Commercial Mediation Act, 2010 S.O. 2010, Chapter 16, Schedule 3, s. 13).

In Nova Scotia, a settlement agreement is binding on the parties. On application to the Supreme Court of Nova Scotia with notice to all parties, the agreement may be filed with the Court. Once filed, the agreement is enforceable as if it were a judgement of that court (see Commercial Mediation Act, S.N.S. 2005, c. 36, s. 15).

In Quebec, in order for a settlement to be subject to compulsory execution, it must be homologated by a court (sec. 2633 C.c.Q. according to the process detailed in section 885 a) of the Code de procédure civile (« C.p.c. »)).

(iii) In general, no provision to the effect that an international commercial settlement agreement be treated as a final award rendered by an arbitral tribunal.

1. In Quebec, the Code of Civil Procedure provides that if the parties settle the dispute, the arbitrators shall record the agreement in an arbitration award (sec. 945.1 C.p.c.; sec. 642(4) par. N.C.p.c.). In that case, the arbitral process shall take place. The

New Code of Civil Procedure, scheduled to come into force in 2015, provides that the arbitrator's mission also includes attempting to reconcile the parties, if they so request and circumstances permit, and continuing the arbitration process, with the parties' express consent, if the conciliation attempt fails (sec. 620(2) N.C.p.c.).

In situations where no arbitration proceeding took place, the agreement can constitute a settlement (called transaction) which is res judicata between the parties (sec. 2631 to 2637 and 2848 Code civil; sec. 613 N.C.p.c.).

2. In Quebec, an award must be in writing and signed by the arbitrators (sec. 945.2 C.p.c.; sec. 642(1) N.C.p.c.). Settlement agreements are not subject to any particular form requirements (sec. 2811 and 2827 C.c.Q.).

3. In Quebec, the legislation does not distinguish between arbitral awards and awards on agreed terms, which means that both should be enforceable under the New York Convention. There is no reported case law confirming this interpretation.

Question 2: Grounds for refusing enforcement of a commercial settlement agreement

The grounds for refusing the enforcement of a commercial settlement agreement depend on whether there is a specific framework on enforcement of settlement agreements or enforcement is achieved by application of contract law.

Where enforcement is done under contract law, enforcement of the contract can be denied on the basis of existing grounds such as duress, unconscionability, illegality, undue influence, misrepresentation, mistake or fraud.

Specific legislation in Ontario, mentioned under 1 above, provides that no judgement or order shall be granted or made if it is shown to the court that, a party to the mediation against whom the applicant is seeking to enforce the settlement agreement did not sign the agreement or otherwise consent to the terms of the agreement that the applicant is seeking to enforce; the settlement agreement was obtained by fraud; or the settlement agreement does not accurately reflect the terms agreed to by the parties in settlement of the dispute to which the agreement relates (see Commercial Mediation Act, *S.O. 2010*, Chapter 16, Schedule 3, s. 13 (6)).

The legislation in Nova Scotia is silent on this issue.

In Quebec, the homologating court only examines the legality of the act and as a general rule it cannot rule on its advisability or merits (sec. 527 and 528 N.C.p.c.).

Question 3: Validity of international commercial settlement agreements

Under contract law, there are no rules specific to commercial settlement agreements. The general contract law rules govern the validity of the agreement.

Where a legislative framework exists, a commercial settlement agreement needs to address commercial disputes, that is, the subject matter does not cover family or household disputes. The settlement agreement must be signed by more than one party to the mediation, or minutes of settlement signed by more than one of the parties, that disposes of one or more issues in dispute in the mediation. There is no need for the agreement to be signed by an accredited mediator or conciliator in order to be valid (see Commercial Mediation Act, *S.O.* 2010, Chapter 16, Schedule 3, ss 2, 3, 12 and 13).

The legislation in Nova Scotia is silent on this issue.

In Quebec, the Civil Code provides specific ground for annulling a settlement agreement as well as a number of exceptions to the general contract law rules (sec. 1398, 1399, 1411, 1413, 2631 to 2637 C.c.Q.).

Question 4: Any other comment

See document A/CN.9/WG.II/WP.188.

6. Colombia

[Original: Spanish]
[Date: 30 December 2014]

Question 1: Information regarding the legislative framework

The legislative framework of Colombia does not contain any specific laws governing the cross-border enforcement of commercial settlements.

Colombia has a General Code of Procedure (Act 1564 of 2012), which contains, at articles 605 to 607, rules for the recognition and enforcement of foreign judgements, and the Arbitration Statute (Act 1563 of 2012), which regulates, at articles 111 to 116, the procedure for recognition and enforcement of foreign awards with the same requirements as those of the New York Convention.

However, the Arbitration Statute contains a specific article on settlements in international arbitration as a form of terminating arbitral proceedings and provides that, if the parties agree and the tribunal does not object, the agreements reached may be included in an award, and the award shall have the same effects as an award rendered on the merits of the claim. As mentioned, this situation is regulated within the arbitration process conducted in accordance with the Statute, but it is not intended specifically for commercial settlements concluded abroad. (*"Article 103. Settlements. If during arbitral proceedings the parties reach a settlement or conciliation/mediation agreement resolving the dispute, the tribunal shall terminate the proceedings. If requested by both parties and the tribunal does not object, the tribunal shall include in an award the terms agreed by the parties. The award shall have the same effects as any other award rendered on the merits of the claim."*)

In Colombia, a settlement agreement may be understood as an enforceable title, that is to say, clear, express, due and payable obligations contained in documents coming from the debtor or from the originator of the documents evidencing those obligations, or obligations arising from a judgement or decision issued by a judge or tribunal of any jurisdiction, or from another legal source (article 422 of the General Code of Procedure). This category could include commercial settlement agreements, which would be enforced pursuant to the provisions on enforcement in Section II, Title I of the aforementioned Code.

7. Cyprus

[Original: English]
[Date: 11 November 2014]

It is recalled that the Republic of Cyprus is a Member State of the European Union where the principles of the Single Market apply. It is thus clarified that the information below concerns only commercial settlements between Cyprus and non-EU Member States.

Question 1: Information regarding the legislative framework

International commercial arbitration in the Republic of Cyprus is governed by two laws: "*The International Commercial Arbitration Law of 1987*" and "*The Arbitration Law*". None of these two laws makes reference to international commercial mediation/conciliation proceedings.

The Republic of Cyprus is a contracting State to the New York Convention on the Recognition and Enforcement of Arbitral Awards (1958) since 29 December 1980. Declaration made upon accession: "*The Republic of Cyprus will apply the Convention, on the basis of reciprocity, to the recognition and enforcement of awards made only in the territory of another Contracting State; furthermore it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under its national law.*"

Question 2: Grounds for refusing enforcement of a commercial settlement agreement

Please see answer (1) above.

Question 3: Validity of international commercial settlement agreements

Please see answer (1) above.

8. Ecuador

[Original: Spanish]
[Date: 2 March 2015]

Question 1: Information regarding the legislative framework

In Ecuador, the mediation instrument (*acta de mediación*), which contains the agreement, has the effect of an enforceable ruling and of res judicata. It is therefore enforced in the same way as a final ruling, through a court order, and the judge who enforces it may accept no challenges other than those brought after the mediation instrument is signed.

In order for the mediation instrument to have that effect, it must be signed by the parties and the mediator as part of mediation proceedings conducted in accordance with the Arbitration and Mediation Act of Ecuador. That is, even if the matter involves an international commercial settlement, the mediation proceedings from which the settlement arises must be conducted at a mediation centre registered with the Council of the Judiciary, in accordance with Ecuadorian law.

There is no legislation regulating the effect of mediation instruments resulting from proceedings in other States. The National Assembly is currently considering a proposal which, if adopted, would give mediation instruments concluded in other States and recognized in Ecuador the same force as international treaties and agreements currently in force; in the absence of such treaties, such mediation instruments would be enforced as a ruling, without the possibility of review of the substance of the matter.

It should be noted that a settlement agreement has the effect of res judicata under the Civil Code of Ecuador. Moreover, under the Code of Civil Procedure, settlement instruments have the effect of an enforceable instrument and are therefore enforced by means of a court order. In such cases there are no prior mediation proceedings.

(i) As mentioned above, as in the case of final rulings, a mediation instrument that has been signed as part of domestic proceedings is enforced by court order even if it contains an international commercial settlement agreement.

Thus, once a request to enforce a mediation instrument has been submitted, the judge's first step is to issue an enforcement order whereby: (1) the debtor is ordered to pay or deliver goods within 24 hours; (2) the debtor is compelled to deliver the good; (3) the action is performed at the expense of the debtor; or (4) the debtor is ordered to pay compensation for failure to deliver the good or perform the action.

Upon the issue of the enforcement order, the debtor must comply with the order or apply for extinction or modification of the obligation, provided that that application is made after the instrument has been signed. If the debtor fails to comply or to raise an objection, the debtor's assets are confiscated and auctioned and the proceeds of their sale paid to the creditor.

There is no legislation regulating the effect of mediation instruments signed as part of proceedings in another State; consequently, the issue of enforcement of such instruments is unclear.

(ii) The issuing of court orders as described above is a procedure for the expedited enforcement of mediation instruments signed as part of mediation proceedings conducted in Ecuador. In order for the procedure to apply, a mediation instrument concluded in accordance with the Arbitration and Mediation Act is required. There are no other requirements or procedures.

There is no procedure for the enforcement of mediation instruments concluded in another State.

(iii) In accordance with the Arbitration and Mediation Act, once arbitration proceedings have begun, such proceedings may end in a settlement agreement that has the same effect as

an arbitral award, i.e., the effect of an enforceable final ruling and of res judicata, and that is enforced by means of a court order.

Accordingly, article 28 of the Arbitration and Mediation Act provides that "Where arbitration ends in a settlement, that settlement shall be of the same nature and have the same effect as an arbitral award and shall be in writing and in accordance with article 26 of this Act."

However, an award rendered as part of foreign arbitral proceedings that includes an international commercial settlement agreement is considered an award in Ecuador in accordance with Ecuadorian legislation on arbitration. Such an award would therefore be enforced in Ecuador in the same way as an award rendered in Ecuador, that is, by means of a court order.

A draft general code of procedure that would establish a procedure for the recognition of foreign arbitral awards, following which the awards would be enforced in the same way as domestic awards, is currently under discussion.

1. Arbitral proceedings may end in a settlement but must begin with an actual dispute. The law does not provide for arbitral proceedings of which the sole purpose is to enable a settlement between the parties to be treated as an award. In particular, given that a settlement instrument (which does not result from mediation proceedings) has the effect of res judicata, and that a mediation instrument (resulting from mediation proceedings) has the same effect as an award, i.e. the effect of an enforceable ruling and of res judicata, and is enforceable by means of a court order, the parties may not, by agreement, give a settlement agreement the effect of an award.

2. Even if the mediation instrument contains an international commercial settlement agreement, in order for that instrument to have the effect of an enforceable ruling and of res judicata, it must result from mediation proceedings with the participation of a mediator accredited by a mediation centre registered with the Council of the Judiciary.

   The mediation instrument must be in writing and contain, at a minimum, an account of the facts that led to the dispute, a clear description of the obligations of each party and the electronic fingerprints or signatures of the parties and of the mediator, as provided for in article 47 of the Arbitration and Mediation Act.

3. If awards on agreed terms are treated as awards under arbitration law, they are enforceable in Ecuador on the basis of the New York Convention and the Inter-American Convention on International Commercial Arbitration (Panama Convention).

Question 2: Grounds for refusing enforcement of a commercial settlement agreement

During enforcement proceedings, the only objections that may be raised with respect to a mediation instrument signed as part of domestic proceedings are those arising after that instrument is signed. Such objections relate to the extinction or modification of the obligation set forth in the instrument.

Question 3: Validity of international commercial settlement agreements

In order for an international commercial settlement agreement to be considered valid, it must fulfil the same validity requirements as those that apply to contracts (capacity, consent free of defect, lawful purpose, legitimate cause and the formalities required). In addition, it should deal with a matter on which settlement can be reached in accordance with Ecuadorian law.

There is no legal basis for challenging the validity of a mediation agreement (an agreement whereby a dispute is referred to mediation). In accordance with article 46, paragraph (a), of the Arbitration and Mediation Act, where a mediation agreement has been concluded, judges must refrain from considering petitions concerning the dispute that is the subject of the agreement unless there is no possibility of settlement being reached or there is an express or implied waiver by the parties. In any case, in Ecuador, mediation is voluntary; consequently, even if such proceedings have been initiated, the defendant may withdraw from those proceedings without being compelled to continue to participate.

The validity of the mediation instrument (settlement agreement resulting from mediation) may be challenged on the basis of defects in the contracts between the parties (lack of capacity, defect of consent, unlawful purpose, illegal cause or lack of formalities); on the ground that it does not relate to a matter on which settlement can be reached; on the basis of failure to summons or notify the Counsel-General of the State in cases involving public entities, in accordance with article 6 of the Act on the Office of the Counsel-General of the State; on the basis of lack of authorization or delegation by the Counsel-General of its signature in cases involving public sector entities, in accordance with article 12 of the Act on the Office of the Counsel-General of the State; or if the mediator is not accredited by a mediation centre, or if the centre that has accredited the mediator is not registered with the Council of the Judiciary, in accordance with articles 48 and 52 of the Arbitration and Mediation Act.

It should be noted that there is no specific procedure for challenging the validity of a mediation instrument.

Question 4: Any other comment

Ecuador has detailed legislation relating to mediation that gives mediation instruments the effect of enforceable rulings and of res judicata and permits their enforcement in the same way that rulings are enforced. This provision, contained in article 47 of the Arbitration and Mediation Act, has raised concerns with regard to its application in a civil-law system, but those concerns have been dispelled by practice.

Clarity is needed with regard to the effect that mediation instruments resulting from foreign mediation proceedings should have.

9. Egypt

[Original: English]
[Date: 11 November 2014]

Question 1: Information regarding the legislative framework

According to the Egyptian law, international commercial agreements do not benefit from special nor expedited enforcement procedures.

Egyptian law does not treat an international commercial settlement as a final award rendered by an arbitral tribunal.

Question 2: Grounds for refusing enforcement of a commercial settlement agreement

Requests for enforcement of commercial settlement agreements can be denied if its provisions contradict with Egyptian public order.

Question 3: Validity of international commercial settlement agreements

Only officially authenticated international agreement can be directly enforced according to the Egyptian law.

An ordinary international settlement agreement may be enforced through a judicial ruling confirming its validity.

10. Germany

[Original: English]
[Date: 17 November 2014]

Question 1: Information regarding the legislative framework

(i) Under German law, agreements resulting from mediation/conciliation are governed by the rules that apply to agreements resulting from negotiations between parties. They are regarded as contracts and thus subject to the applicable general rules of contract law. There

are different ways of having such agreements/contracts declared enforceable in Germany. No specific enforcement procedures exist for foreign commercial settlement agreements.

Agreements/contracts can be made enforceable as follows:

(A) Action in court

- Internal: First, an action can be brought before a German court requesting the other party to comply with the contract/agreement; subsequently, the German court decision must be enforced.
- International: If mediation/conciliation agreements have been confirmed by court decisions in other States, such court decisions may be recognized and declared enforceable in Germany.

1. Court decisions from an EU Member State are declared enforceable under a simplified procedure (Article 38 et seqq. of Regulation (EC) No. 44/2001). As of 10 January 2015, the procedure for declaring the enforceability of court decisions from EU Member States will be done away completely (Article 39 et seqq. of Regulation (EU) No. 1215/2012). Recognition of the decision can, on the application of the person against whom enforcement is sought, in general be refused especially if certain procedural errors have occurred in the original proceedings or if the result of compulsory enforcement would violate the German *ordre public*.
2. Court decisions from a Contracting State of the Lugano Convention are declared enforceable under a simplified procedure (Article 38 et seqq. of the Lugano Convention of 30 October 2007).
3. Decisions by courts of other States have to be declared enforceable under the German procedure to obtain a declaration of enforceability. The preconditions for recognition and enforcement are governed by German international civil procedure law (sections 328, 722 and 733 of the Code of Civil Procedure (*Zivilprozessordnung*, ZPO)).

(B) Submission to immediate enforcement in a public document drawn up by a German notary

- Internal: Second, parties may include the agreement in a public document drawn up by a German notary or a German court and add a declaration by the party concerned, in which he or she accepts to submit to immediate enforcement in relation to an obligation resulting from that agreement.
- International: If such a document has been drawn up abroad by a civil law notary (notaries public are not included) and if it is enforceable under the law of the State of origin (the State in which it has been drawn up), it can be declared enforceable under the Lugano Convention or under Regulation (EC) No. 44/2001, or under a bilateral agreement with another State if such an agreement exists. It is a matter of dispute in German legal literature as to whether foreign documents which include a declaration of submission to enforcement may be recognized or not in the absence of such an agreement between States.

(C) Court settlement

- Internal: Third, the settlement agreement (mediation/conciliation agreements generally represent settlement agreements between the parties) may be declared enforceable by a German court or a German notary; this is subject to the proviso that one of the parties has its habitual residence in Germany and the agreement has been negotiated by attorneys representing the parties to the settlement and lodged with the competent court in Germany. Enforcement of an out-of-court settlement concluded by attorneys will be refused if the settlement agreement is void or invalid, or if its recognition would be contrary to the German *ordre public*.
- International: If the settlement agreement has been concluded between foreign parties abroad, it can also be declared enforceable under the Lugano Convention or under Regulation (EC) No. 44/2001, or under a bilateral agreement with another State if such an agreement exists. In respect of these cases as well, it is a matter of dispute in

German legal literature as to whether foreign documents which include a declaration of submission to enforcement may be recognized or not.

The compulsory enforcement of German court decisions, German enforceable public documents and German settlement agreements is subject to German law governing compulsory enforcement, as is the compulsory enforcement of foreign decisions, foreign enforceable documents and foreign settlement agreements which have been declared enforceable in Germany. In other words, compulsory enforcement as such follows identical rules once the foreign decision or public document or settlement has been declared enforceable.

(ii) There is no special procedure guaranteeing the expedited enforcement of international commercial settlement agreements in German law (see answer re (i)).

(iii) German law does not contain any provisions in which international commercial settlements are regarded as arbitral awards. In view of the distinct procedures that lead either to this type of settlement on the one hand, or to arbitral awards on the other, Germany does not see any possibility of automatic legal conversion or equal treatment and will therefore oppose any endeavours to this effect at international level.

(1) A settlement agreement can on no account be regarded as an award on agreed terms without an arbitral tribunal having reviewed the conclusion of the settlement (including, at least, the procedure, the applicable law and the result). It is conceivable, however, that a settlement agreement from another State — upon the joint request of both parties, or upon the request of one party provided that this party is able to produce an arbitration agreement — could be followed by simplified arbitral proceedings in the State of origin or in the State of enforcement, which may then result in an award on agreed terms. In the case of foreign arbitral awards, the State of enforcement must retain a general possibility of review and at least the ordre public exception. Whether it is necessary to convert a settlement agreement into an arbitral award in order to improve the enforcement of such settlements at international level still needs to be examined in detail.

(2) Subsequent simplified arbitral proceedings should only be opened for international commercial settlement agreements. A precondition for this is, of course, that such a settlement (including the claimed content) has been concluded effectively between the parties. The minimum requirements for this are that the document is available in written form (which may include a secured electronic form), that it is signed, and that it contains comprehensible statements which can form the basis of an award and a declaration of enforceability.

(3) An award on agreed terms can be recognized and declared enforceable in Germany under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 if no grounds exist for refusing recognition.

Question 2: Grounds for refusing enforcement of a commercial settlement agreement

If and insofar as an international commercial settlement can be converted into a German enforceable instrument in Germany by using the procedure available for internal settlement agreements, no additional declaration of enforceability is required before compulsory enforcement can commence.

If a settlement agreement concluded abroad and enforceable under its law of origin is intended to be enforced in Germany without being converted, in general this first requires a declaration of enforceability (see answer to question 1). The grounds for refusing enforcement are laid down in the applicable European or international law instruments governing enforcement procedure (Regulation (EC) No. 44/2001 and Article 38 et seqq. of the Lugano Convention of 30 October 2007; bilateral agreements with other States). If no such instrument is applicable, there is no explicit provision on enforceability, and it is disputed whether such agreements concluded abroad and enforceable under their law of origin can be declared enforceable. However, in any event, even if they were capable of being declared enforceable, as for internal settlements (see above), enforcement will be refused if the settlement agreement is void or invalid, or if its recognition would be contrary to the German *ordre public*.

Question 3: Validity of international commercial settlement agreements

Since mediation/conciliation agreements are regarded as contracts in Germany, the question as to their validity is governed by the contract law applicable under the conflict of laws provisions. Agreements to mediate/conciliate as well as agreements resulting from mediation/conciliation are regarded as contracts subject to the applicable contract law rules.

Under German law, an international commercial settlement agreement may be invalid in particular if it has been challenged due to an error made by a party to the contract, or due to a threat made against the other party to the contract, or due to the intentional deception of the latter. The same applies if the international commercial settlement agreement violates a statutory prohibition applicable in Germany or is *contra bonos mores*. Beyond that, German law does not contain any special requirements for the validity of such an agreement.

Question 4: Any other comment

See document A/CN.9/WG.II/WP.188.

11. Hungary

[Original: English]
[Date: 2 December 2014]

Question 1: Information regarding the legislative framework

(i) Hungary has not enacted special provisions on the enforceability of mediation settlement agreements. Therefore, mediation settlement agreements are only enforceable in the same way as any other contract between the parties.

(ii) There is no procedure for expedited enforcement of international commercial settlement agreements.

(iii) (1) According to Section 39(2) of the Act LXXI of 1994 on Arbitration if requested by the parties, the arbitration tribunal shall fix the settlement in the form of an award under the agreed terms, provided that it finds the settlement in compliance with the law. Arbitral proceedings have to take place in this case.

(2) No other specific conditions are required.

(3) According to Section 39(3) of the Act LXXI of 1994 on Arbitration, an award on agreed terms has the same effect as that of any other award made by the arbitration tribunal.

Question 2: Grounds for refusing enforcement of a commercial settlement agreement

The grounds for refusing enforcement of a commercial settlement agreement as an award on agreed terms are the same as in case of the arbitral awards according to Section 59 of the Act on Arbitration. The court shall refuse to execute the award of the arbitration tribunal if, in its judgement: (a) the subject matter of the dispute is not subject to arbitration under Hungarian law; or (b) the award is contrary to Hungarian public policy.

Question 3: Validity of international commercial settlement agreements

The Hungarian Act on Conciliation has no provisions on enforceability of a mediation settlement agreement; according to the Act on Arbitration, the criteria of the award on agreed terms is the same as the criteria of the arbitral award.

(A/CN.9/846/Add.1)(Original: English/French)

Note by the Secretariat on settlement of commercial disputes: enforcement of settlement agreements resulting from international commercial conciliation/mediation: compilation of comments by Governments

ADDENDUM

Contents

III. Compilation of comments

12. Indonesia

[Original: English]
[Date: 29 October 2014]

Question 1: Information regarding the legislative framework

The enforcement of international commercial settlement agreements arising out of mediation/conciliation proceedings is regulated by the Government of the Republic Indonesia in the Law Number 30 Year 1999 on Arbitration and Alternative Dispute Resolution (Arbitration Law). This Law regulates the resolution of dispute or difference of opinion between the parties in a particular legal relationship that have entered into an arbitration agreement which explicitly states that those disputes or differences of opinion arising or which may arise from a legal relationship will be resolved by arbitration or through alternative dispute resolutions. Arbitration means a method of settling commercial disputes outside the general courts, based on an arbitration agreement made in writing by the parties to the dispute and Alternative Dispute Resolution means a mechanism for the resolution of dispute or difference of opinion through procedures agreed by the parties, such as resolutions outside the courts by consultation, negotiation, mediation, conciliation, or expert assessment.

Indonesia's Arbitration Law takes the territorial view of the nature of arbitration, meaning that all arbitrations conducted in Indonesia are considered domestic. Those conducted outside of the archipelago are considered "international", regardless of the nationality of the parties, governing law, or location of the subject of dispute. This Law also regulates

enforcement of international awards which rendered in any other State signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) which deemed as in the questions "International Commercial Settlement Agreement arising out of mediation and conciliation proceedings". Article 5, paragraph 1, of the Arbitration Law stipulates that the only disputes which may be settled by arbitration are disputes in the commercial sector concerning rights which, according to the law and regulations, have the force of law and are fully controlled by the parties in dispute.

(a) Recognition and Enforcement of Awards

In accordance with Article 66 of Arbitration Law, international arbitration awards will only be recognized and may be enforced in the jurisdiction of the Republic of Indonesia if they fulfil the following criteria: (1) The international arbitration award is rendered by an arbitrator or arbitration panel in a country which is bound to the Republic of Indonesia by a bilateral or multilateral treaty on the recognition and enforcement of international arbitration awards; (2) The international arbitration awards stated in paragraph 1 are limited to awards which are included within the scope of commercial law under Indonesian law; (3) The international arbitration awards stated in paragraph 1, which may only be enforced in Indonesia, are limited to those which do not conflict with public order; (4) An international arbitration award may be enforced in Indonesia after obtaining a writ of execution from the Chairman of the Central Jakarta District Court; and (5) The international arbitration awards stated in paragraph 1, which involve the Republic of Indonesia as one of the parties to the dispute, may only be enforced after obtaining an exequatur from the Supreme Court of the Republic of Indonesia, which will then delegate it to the Central Jakarta District Court. […]

(b) Provisions to the Effect that an International Commercial Settlement Agreement Be Treated as a Final Award Rendered by an Arbitral Tribunal

The Arbitration Law does not allow for appeal of any arbitration award. This is clear from the provision of Article 60 which stipulates that arbitration awards shall be final and binding.

Question 2: Grounds for refusing enforcement of a commercial settlement agreement

There are several grounds for refusal enforcement of an award including where both the nature of the dispute and the agreement to arbitrate do not meet the requirements set out in the Arbitration Law as follow: (a) The dispute must be commercial in nature and within the authority of the parties to settle and the arbitration clause must be contained in a signed writing; or (b) Where the award is in conflict with public morality and order (Articles 4, 5 and 6 of the Arbitration Law).

Question 3: Validity of international commercial settlement agreements

There is no provision in the Arbitration Law concerning the criteria of international commercial settlement agreements to be deemed valid.

13. Israel

[Original: English]
[Date: 5 January 2015]

Question 1: Information regarding the legislative framework

(i) Article 79C(h) of the Courts Law, 1984 (the "Law") authorizes a court to give effect to a mediated settlement agreement (a "Settlement") as a court judgement — provided that the Settlement was reached in a mediation process that complies with the Law and the Courts Regulations (Mediation), 1993 (the "Regulations") — whether the Settlement was achieved as a result of a referral by the court or in stand-alone mediation proceedings.

The Law does not preclude the use of this mechanism in respect of a Settlement of an international commercial dispute, so long as the Settlement was reached in the framework of mediation proceedings that meet the requirements of the Law and Regulations.

(ii) According to the Regulations there are two mechanisms for giving effect to a Settlement as a court judgement:

(1) According to article 9, the mediator in a mediation referred by the court must notify the court "as soon as possible" that the parties achieved a Settlement, and if the parties agree to ask the court to give effect to the Settlement as a court judgement, the mediator must attach it to his notice. The court is authorized to request clarifications on the Settlement from the parties prior to giving effect to the Settlement as a court judgement. The request to the court is contingent upon the agreement of both parties; this allows a party, for example, to prevent publication of the agreement. However, article 4 of the "model mediation agreement", which applies by default unless the parties have agreed otherwise, provides that each party undertakes to sign the settlement agreement and understands that such agreement is a contract which can be granted the status of a court judgement.

(2) According to article 10 of the Regulations, in a stand-alone mediation, the parties together or each party independently may request the Court, by way of an "expedited application", to give effect to a Settlement as a court judgement.

(iii) There is no provision referring specifically to the treatment of international commercial settlement agreements. Article 29A of the Israel Arbitration Law, 1968, provides that arbitral awards to which an international convention applies (i.e., awards governed by the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards) are to be enforced in accordance with the terms of such Convention. Accordingly, if a settlement agreement were to be given the effect of an award as part of the arbitral proceedings ("consent award"), it would likely be enforceable as an ordinary arbitral award pursuant to Article 29A.

(1) There is no provision in Israeli law dealing specifically with the matter [whether the settlement agreement can be treated as an award on agreed terms without involving the actual commencement of arbitral proceedings].

(2) Article 9(A) of the Regulations (Settlement reached within the framework of a pre-existing court case) provides that the agreement must be in writing, it must contain all relevant terms and conditions of the settlement, and it must be signed by the parties and the mediator.

With respect to an application for validation of a Settlement resulting from stand-alone mediation proceedings, article 10(B) of the Regulations requires that the facts of the dispute and the details of the agreement be described. In addition, the agreement, signed by the parties and the mediator, must be included.

(3) Courts consider awards on agreed terms enforceable under the New York Convention.

Question 2: Grounds for refusing enforcement of a commercial settlement agreement

As provided above.

Question 3: Validity of international commercial settlement agreements

The applicable criteria for the validity of an international commercial settlement agreement would presumably be the same as those that apply to contracts generally.

Additional information: According to article 5(h) of the Regulations, after the termination of the mediation, the parties may agree that the mediator be appointed as arbitrator in the dispute. In such a case, the parties can also agree to empower the mediator to issue a consent award.

14. Japan

[Original: English]
[Date: 4 November 2014]

Question 1: Information regarding the legislative framework

(i) Civil Conciliation Act (Act No. 222 of 1951, last amended by Act No. 53 of 2011) provides: "When a dispute arises over civil affairs, a party may file with a court a petition for conciliation." (Art. 2) The Act is also applicable to international commercial conciliation (Art. 3(4)). Article 16 provides: "When an agreement is reached between the parties at conciliation in court entered in a record, conciliation becomes successful, and such entry shall have the same effect as a judicial settlement." The legal effect of judicial settlements is stipulated in Art. 267 of the Code of Civil Procedure (Act No. 109 of 1996, last amended by Act No. 30 of 2012), which provides: "When a settlement or a waiver or acknowledgement of a claim is stated in a record, such statement shall have the same effect as final and binding." Art. 22 of the Civil Execution Act (Act No. 4 of 1979, last amended by Act No. 96 of 2013) provides: "Compulsory execution shall be carried out based on any of the following […] (i) A final and binding judgment".

Regarding international commercial settlement agreements other than those reached at conciliation in court, see (iii) below.

(ii) There is no procedure for expedited enforcement of international commercial settlement agreements.

(iii) 1. The Code of Civil Procedure provides: "With regard to a civil dispute, a party may file a petition for settlement with the summary court that has jurisdiction over the location of the general venue of the opponent, by indicating the object and statement of claim as well as the actual circumstances of the dispute." (Art. 275(1)) The legal effect of such settlements is also governed by Art. 267 of the Code of Civil Procedure. The settlement prior to filing of action is used when the disputing parties have agreed to a settlement before coming to the court, which ascertains the validity of the settlement.

2. The settlement needs to be made in writing (Art. 275(1), Code of Civil Procedure). The disputing parties must appear before the summary court (Art. 275(3), idem.).

3. Arbitration Act (Act No. 138 of 2003, last amended by Act No. 147 of 2004) provides: "An arbitral award (irrespective of whether or not the place of arbitration is in Japan; hereinafter the same shall apply in this Chapter) shall have the same effect as a final and binding judgement; provided, however, that a civil execution based on such arbitral award requires an execution order under the provisions of the following Article." (Art.45(1)), "A party, who intends to have a civil execution based on an arbitral award carried out, may file an application with the court for an execution order (meaning an order allowing the civil execution based on an arbitral award; the same shall apply hereinafter), by specifying the obligor as the respondent."(Art.46(1))

The Japan Commercial Arbitration Association submitted on 13 November 2014 the following complementary information on question 1 as follows:

With respect to the above subject matter, the Japan Commercial Arbitration Association (JCAA) has the International Commercial Mediation Rules effective as of January 1, 2009 (the "Rules") in which under Rule 11 of the Rules, the parties, upon arriving at a settlement agreement, may agree to appoint the mediator as an arbitrator and request him or her to make an arbitral award which incorporates with the settlement agreement. Under the present Japanese law, a mediated settlement agreement is merely an agreement between the parties and it cannot be enforceable equally as an arbitral award.

On the other hand, however, like the UNCITRAL Arbitration Model Law, under Article 38 of the Japanese Arbitration Law, if, during arbitral proceedings, the parties have reached the settlement agreement and the parties so request, the arbitral tribunal may make a ruling on agreed terms, which shall have the same effect as an arbitral award. Rule 11 of the Rules

aims to make the settlement agreement an enforceable arbitral award under Article 38 of the Arbitration Law.

In this respect, the JCAA recognizes that there is a view that if the dispute has been settled by the agreement of the parties in the mediation proceedings before the parties appoint the arbitrator, the arbitrator has no jurisdiction because there is nothing for the arbitrator to arbitrate. However, there is also a different view that even if the parties have reached the settlement in the mediation proceedings, the dispute may still exist between the parties in that if the parties request the arbitrator to make an arbitral award based on the agreed terms, the dispute has not been ultimately settled between the parties and it will be finally settled when the arbitrator renders the arbitral award.

As a matter of fact, there have been no Japanese court decisions on this issue while in practice, such a med-arb case can be found in a sufficient number of the domestic mediation cases particularly at the dispute resolution centres operated by the local bar associations in Japan. In the context of international dispute settlement, whether a mediated settlement agreement can be enforceable under the New York Convention still remains untested while the similar provision can be found in Article 14 of the Mediation Rules of the Arbitration Institute of the Stockholm Chamber of Commerce, providing that in case of settlement, the parties may, subject to the consent of the mediator, agree to appoint the mediator as an arbitrator and request him/her to confirm the settlement agreement in an arbitral award.

Under such present circumstances, in view of the benefit of the final settlement of the disputes for parties and the possibility that a mediated settlement agreement can become an enforceable arbitral award, this provision was introduced in the JCAA Rules in 2009.

Question 2: Grounds for refusing enforcement of a commercial settlement agreement

With respect to a settlement reached at conciliation in court (1)(i) above) or to a settlement prior to filing of action (1)(iii)(1) above), the court may refuse its enforcement if it finds any illegality in the enforcement procedure or if it finds that the claim pertaining to the title of obligation is absent or has disappeared.

Question 3: Validity of international commercial settlement agreements

In cases of conciliation in court, an agreement between the parties is necessary (see (1)(i) above). However, where the conciliation committee[3] finds that the agreement reached is inappropriate, it may close the case, considering that conciliation is unsuccessful (Art. 14, Civil Conciliation Act).

In cases of settlement prior to filing of action (1)(iii)(1) above), the validity of the agreement between the parties is verified by the court, as indicated above.

15. Mauritius

[Original: English]
[Date: 3 November 2014]

Question 1: Information regarding the legislative framework

(i) In Mauritius, there is no law applicable to the enforcement of international commercial settlement agreements arising out of conciliation or mediation proceedings. The closest applicable mechanism would be the Supreme Court (Mediation) Rules 2010 (hereinafter the "Mediation Rules"). The Mediation Rules cater specifically for a civil suit, action, cause or matter which has been brought and is pending before the Supreme Court and which the Chief Justice refers for mediation before a Judge of the Mediation Division of the Supreme Court. Any party to the civil action may also apply to the Chief Justice for the matter to be referred to mediation.

[3] Upon application, the court conducts conciliation by a conciliation committee (Art. 5(1), Civil Conciliation Act). A conciliation committee shall be composed of a chief conciliator and two or more civil conciliation commissioners (Art. 6).

Under the Mediation Rules, where the parties have reached a formal agreement, the mediation judge records the settlement agreement in the form of a memorandum setting out the terms of the agreements. The agreement which is embodied in the memorandum is thereafter executed in the same manner as if it were a judgement of the court of Mauritius by consent of and between the parties who have signed it.

(ii) No procedure for expedited enforcement of international commercial settlement agreement is available in Mauritius.

(iii) There are no legal provisions to the effect that an international commercial settlement agreement be treated in Mauritius as a final award rendered by an arbitral tribunal.

Question 2: Grounds for refusing enforcement of a commercial settlement agreement

As set out in paragraph l(i) above, there is no legislative framework in Mauritius for the enforcement of international commercial settlement agreements arising out of mediation proceedings.

A commercial settlement agreement arising out of mediation proceedings in Mauritius is given the full force and effect of a judgement of the Supreme Court.

Question 3: Validity of international commercial settlement agreements

Please refer to responses above.

Strictly speaking, as stated above, there is no specific law in Mauritius governing the enforcement of international commercial settlement agreements arising out of mediation/conciliation proceedings.

However, there is nothing, in an appropriate case, to prevent a party from challenging the validity of an agreement to refer a dispute to mediation/conciliation or the validity of the resulting mediated/conciliated settlement agreement, where that party claims that the agreement has been entered into by mistake or has been procured by misrepresentation, duress or undue influence (Article 1109 of the Mauritius Civil Code).

16. Norway

[Original: English]
[Date: 5 October 2014]

Question 1: Information regarding the legislative framework

According to section 4-1 of the Enforcement Act and section 19-16 of the Civil Procedure Act, a foreign settlement agreement may be recognized and enforced only if it can be considered as a decision rendered by a foreign court or as a foreign arbitral award. Of particular importance for the former is the 2007 Lugano Convention, and for the latter the 1958 New York Convention.

The legislation of the country of origin would be of importance to determine whether the foreign settlement may be considered as a court decision or as an arbitral award from that country.

In domestic Norwegian legislation (sections 8-3ff. of the Civil Procedure Act), a settlement may be considered as a court decision if it was reached in the framework of court mediation. Court mediation is offered to all parties who initiated a civil law suit, and requests the consent of both parties to be carried out. It can be carried out by a judge of the competent court or by a mediator appointed by the competent judge. If the court mediation results in a settlement agreement, this will have the status and effect as a court judgement. Settlement agreements deriving from out-of-court mediation proceedings do not have the status or effect as a court decision.

In domestic Norwegian legislation (section 35 of the Arbitration Act) a settlement may be considered as an arbitral award if the parties reached a settlement during an arbitration proceeding, asked the arbitral tribunal to record the settlement in an award and the arbitral tribunal rendered an award based on the settlement agreement.

17. Republic of the Congo

[Original: French]
[Date: 22 October 2014]

Question 1: Information regarding the legislative framework

In the Republic of the Congo, there is no specific legislative framework laying down rules for enforcing international commercial settlement agreements resulting from mediation/conciliation proceedings.

(i) Concerning difficulties arising from the enforcement of commercial settlement agreements, no distinction is made between those arising from domestic agreements and those from international agreements. These issues are brought before the commercial courts and commercial divisions of the national courts of appeal. As the Congo is a member of the Organization for the Harmonization of Business Law in Africa (OHADA), appeals in commercial disputes are brought before the Common Court of Justice and Arbitration (CCJA) of the OHADA, based in Abidjan, Republic of Côte d'Ivoire. Under the founding Treaty and the uniform acts of the OHADA, specific procedures are implemented for the settlement of disputes arising from the enforcement of commercial settlement agreements in general.

(ii) With regard to procedures for the expedited enforcement of international commercial settlement agreements, it should be noted that the Congo has recourse to the Uniform Act on Simplified Recovery Procedures of the OHADA, which was adopted on 10 April 1998 (OHADA Official Journal No. 6 of 1 July 1998).

(iii) In Congolese positive law, an international commercial settlement agreement is treated as a final award rendered by an arbitral tribunal solely between the parties by virtue of the principle of *pacta sunt servanda* (contracts entered into serve as law for the parties).

1. Recognition of a private settlement agreement as an award rendered by an arbitral tribunal may ensue only from a specific arbitral proceeding ending in an award separate from the settlement agreement, and furthermore the parties must previously have included in their international commercial settlement agreement an arbitration clause or must agree to settle their dispute by arbitration.

2. In Congolese positive law as it stands, a written document remains the supreme form of proof of commitments made by parties in commercial settlement agreements, all the more so in international agreements. The process of recognizing a commitment signed by one of the parties to an agreement begins with authentication of the signature of the counterparty to whom the undertaking is imputed. That is the principal task of the ombudsman institution or arbitrator/conciliator.

3. With regard to third parties, awards on agreed terms are enforceable only on the basis of a decision of the competent court authorizing the affixation of the enforcement order at the conclusion of an approval process. This is because the Congo is not a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958).

Question 2: Grounds for refusing enforcement of a commercial settlement agreement

There are no specific grounds for refusing enforcement of a commercial settlement agreement in the Congo except for non-compliance with the legal provisions in force as defined in paragraphs (iii)(1) and (iii)(2) above. With that sole proviso, an international commercial settlement agreement may be enforced in Congolese territory only on the initiative of the parties concerned, who must seek approval of the agreement before the competent court of the place of enforcement.

Question 3: Validity of international commercial settlement agreements

In addition to the standard conditions of validity of agreements (capacity of the parties, mutual consent, and lawfulness of the object and the cause), the Congo does not impose specific conditions that do not reflect the will of the parties themselves.

Question 4: Any other comment

International commercial trade has always been the basis of human solidarity and interdependence. It follows that international society is not the result of coexistence and the proximity of States but of the intermingling of peoples through international commerce. The Congolese authorities conclude that it would be senseless not to support the harmonization of global trade standards. That is why the process of expedited ratification of a number of UNCITRAL instruments is under way.

18. Republic of Korea

[Original: English]
[Date: 4 December 2014]

Question 1: Information regarding the legislative framework

A. Under Article 731 of the Civil Act of Korea, a compromise shall become effective when the parties have agreed to terminate a dispute between them by mutual concessions. Also under Article 732, a contract of compromise shall have the effect that the rights conceded by one of the parties are thereby extinguished and the other party will in turn acquire the pertinent rights by virtue of the compromise.

Where the compromise was worked out through private mediation or conciliation (as opposed to court-annexed conciliation), however, if the terms of the contractual agreement is not fulfilled, the offended party has no recourse but to take a legal action or resort to binding arbitration for compulsory execution/enforcement of the agreed terms.

Compulsory execution of the settlement terms may be commenced only when the names of an applicant therefor, and of the person subject to such execution have been indicated in the execution titles with an execution clause attached thereto (Article 39, Paragraph 1, of the Civil Execution Act).

- An execution title refers to a notarial act which indicates the existence and scope of the right to claim performance in private law and recognizes the legal enforceability of the claimed right.
- Primarily, judicial judgement or comparable court decisions have effect as execution titles, but certified notarial acts done by a notary public or a law firm, etc., in compliance with the entrustment of the parties, can become execution titles as well.
- The executor, contents and scope of enforcement is determined according to the execution titles.
- The execution titles must have an execution clause which is a clause that a court official performing his/her notarial functions ex officio, adds at the end of execution titles in order to notarize the executory power of the execution titles and the relevant parties thereto (Article 29, Paragraphs 1 and 2, of the Civil Execution Act).

An execution clause is granted upon an application for compulsory enforcement, and a creditor shall attach and submit such execution clause when he/she applies for compulsory execution by an executing institution (the court of execution or an execution officer).

There is no specific enforcement procedures, no procedure for expedited enforcement of international commercial settlement agreement and no provision to the effect that an international commercial settlement agreement be treated as a final award rendered by an arbitral tribunal.

Question 2: Grounds for refusing enforcement of a commercial settlement agreement

Because a commercial settlement agreement is treated like any other agreement between private parties, to have such commercial settlement agreement enforced, the applying party needs to acquire execution titles with an execution clause attached thereto. Enforcement of a commercial settlement agreement will be refused in absence of execution titles.

Question 3: Validity of international commercial settlement agreements

There are no specific criteria for validity that only apply to international commercial settlement agreements. Nothing that specifically applies only to mediation/ conciliation.

19. Singapore

[Original: English]
[Date: 27 October 2014]

Question 1: Information regarding the legislative framework

There is presently no legislation in Singapore that addresses international commercial mediation. Enforcement of international commercial settlement agreements is governed by the usual common law principles of contract.

However, the proposed introduction of a Mediation Act is presently in the works, which contemplates provisions allowing parties to additionally enforce certain mediated settlement agreements as orders of court. The details are still being worked through.

Question 2: Grounds for refusing enforcement of a commercial settlement agreement

Commercial settlement agreements can be reviewed and invalidated at common law, under the usual contractual principles, if there are vitiating factors that render the agreement or part of it, either void or voidable, or which allow the court to order the rescission of the agreement. Such vitiating factors include the incapacity of one or more parties to the agreement, misrepresentation, mistake, duress and undue influence.

Question 3: Validity of international commercial settlement agreements

Please see the answer to question 2 above. A commercial settlement agreement may be deemed void if there are vitiating factors rendering it invalid.

There is no legislative basis governing the validity or enforcement of an agreement to mediate. The validity of an agreement to mediate and any resulting settlement agreement will be determined according to general contractual principles. Thus, for example, a mediation clause may be struck down for want of certainty.[4] Nonetheless, the Singapore courts are supportive of the mediation process, and generally will not refuse to enforce express dispute resolution clauses requiring private mediation where the nature of the exercise and the extent of parties' obligations are clear.[5]

Question 4: Any other comment

Singapore is generally supportive of mediation/conciliation processes, and the enhanced enforceability of international mediated/conciliated settlement agreements will be useful for mediation users. That said, it would be useful to hear more about what the proposers have in mind for such a multilateral convention on the enforceability of international commercial settlement agreements reached through mediation, bearing in mind that the implementation details of such a convention will have to be carefully worked out, taking into account different approaches across jurisdictions.

[4] See e.g. *Insigma Technology Co Ltd v Alstom Technology Ltd* [2009] 1 SLR(R) 23, where a clause requiring a dispute to be referred to parties for "settlement through friendly consultations" was held to be too uncertain to be enforceable.

[5] See e.g. *International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd and another* [2013] 1 SLR 973, citing the Court of Appeal's comments in *HSBC Institutional Trust Services (Singapore) Ltd v Toshin Development Singapore Pte Ltd* [2012] 4 SLR 738, to note that Asian and Western perspectives on negotiation and mediation dispute resolution clauses differed, and in considering the enforceability of such clauses, "clearly, it is in the wider public interest in Singapore as well to promote such an approach towards resolving differences".

20. Slovakia

[Original: English]
[Date: 3 November 2014]

Question 1: Information regarding the legislative framework

(i) Agreements resulting from mediation as agreements on the successful resolution of the dispute through mediation are enforceable if these are drafted in the form of enforceable notarial act with the consent of the parties to the dispute with the execution or if agreements on mediation as a settlement are approved by a general court or arbitration body — the Court of Arbitration.

(ii) Relatively flexible enforcement procedure of international settlement agreements is governed by Act. No. 244/2002 Coll. Arbitration Act, as amended (the "ZRK"), which allows enforceability of the settlement agreement in case the agreement was approved by the arbitration body under the rules of arbitration and on this basis becomes immediately enforceable. In this connection we also pay attention to amendment of the Arbitration Act (parliamentary papers no. 1126), that significantly makes arbitration flexible, with reference to former changes of the UNCITRAL rules.

(iii) A settlement agreement resulting from arbitration is according to ZRK regulated in Art. 39, which provides: "(1) Where the parties to arbitration partway conclude a settlement, the arbitration court stops arbitration. At the request of the parties to arbitration, the tribunal records the settlement in the form of a closed arbitration award on agreed terms. "(2) […] The arbitral award on agreed terms shall have the same effect as an arbitration award on the merits."

In any case, the settlement agreement cannot be approved by the arbitration body without the beginning of the arbitration procedure.

Question 2: Grounds for refusing enforcement of a commercial settlement agreement

(1) Slovak law recognizes, in principle, two cases of settlement agreements as enforcement orders which must meet the following conditions:

(a) In the case of a settlement agreement approved by the arbitration body — the essentials of the arbitration award on agreed terms, which are the same as in case of the final arbitration award;

(b) In the case of a settlement agreement approved by a general court — the essentials of resolution of the approval of court settlement under the provisions of Act no. 99/1963 Coll. Code of Civil Procedure, as amended;

(c) In the case of a settlement agreement, respectively mediation agreement drawn up in form of a notarial act — the requirements under Art. 41, paragraph 2, of Act no. 233/1995 Coll. on Judicial Distrainers and Execution proceedings (Execution Code).

In all three cases, the written form agreed by the parties to the dispute must be preserved and the agreement shall be approved by competent national authorities.

Courts consider awards on agreed terms enforceable under the New York Convention.

(2) The refusal of settlement agreement's enforcement may be invoked in the execution proceedings, e.g. the person can bring the action for annulment of an arbitration award, for the annulment of the court settlement (within three years of its approval), for annulment of mediation agreement drawn up in a form of notarial act. If the effects of the settlement agreement will be revoked, or if the conflict with the substantive law will affect the enforceability of the execution title, it will lead to discontinuance of execution.

(3) In accordance with the classification set out in paragraph (1) Slovak law recognizes the following remedies: (a) an action for annulment of an arbitration award, (b) an action for annulment of the court settlement, (c) the application for annulment of legal action drawn up in the form of a notarial act.

21. Sweden

[Original: English]
[Date: 3 March 2015]

Question 1: Information regarding the legislative framework

(i) Under the Swedish Act (2011:860) on mediation in civil and commercial matters an agreement resulting from mediation can be rendered enforceable. An application for declaration on enforceability shall be submitted to a District Court. The local jurisdiction is primarily decided by the place of domicile of any of the parties. The Swedish legislation implements Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters.

(ii) There is no particular procedure for expedited enforcement of international commercial agreements.

(iii) There is no provision in Swedish law to the effect that an international commercial settlement agreement be treated as a final award rendered by an arbitral tribunal.

Question 2: Grounds for refusing enforcement of a commercial settlement agreement

A precondition under the Mediation Act is that the agreement resulting from mediation concerns an obligation that is enforceable in Sweden.

There are also objections to enforcement that can be made during the enforcement stage (that is after a declaration of enforceability has been rendered by the court). Pursuant to the Swedish Enforcement Code (1981:774) enforcement may not take place if the defendant shows that he or she has satisfied an obligation to pay or other obligation to which the application concerning enforcement relates. This also applies if the defendant as a set-off refers to a claim, which has been confirmed by an enforcement title that may be enforced or which is based on a promissory note or other written evidence of debt, and the general preconditions for set-off exist. Nor may enforcement take place if the defendant claims that another circumstance involving the relationship of the parties constitutes an impediment to enforcement and if the objection cannot be ignored.

Question 3: Validity of international commercial settlement agreements

See reply to question 2.

22. Thailand

[Original: English]
[Date:17 November 2014]

Question 1: Information regarding the legislative framework

Under the Thai judicial system, conciliation and/or mediation proceedings are based on the consent of parties to the dispute. Thailand has no legal requirements for the parties to the dispute to resort to these types of alternative dispute resolution. In addition, there are no specific laws (*lex specialis*) on the enforcement of international commercial settlement agreements ("settlement agreements") arising out of mediation and/or conciliation proceedings.

(i) The Thai legislation has no specific provisions on enforcement of, or enforcement procedure for, the settlement agreement arising out of mediation or conciliation proceedings.

However, the settlement agreements are considered contracts of compromise under the Thai Civil and Commercial Code, Title XVII (Compromise), Sections 850-852. Such contract of compromise can be enforced by a court decision if it is in writing and signed by the party held liable in that particular case or by his/her agent.

Incidentally, the Act on Conflict of Laws of B.E. 2481 (A.D. 1938), Section 13 will apply in case where there is a question as to which law is applicable to the settlement agreements

that are international in nature, i.e. concluded by the disputing parties having different nationalities or residing in different countries.

(ii) Under the Thai laws, there are no specific provisions on procedure for expedited enforcement of the settlement agreement. In this connection, the period of limitation for such settlement agreements is ten years, as stipulated in the Thai Civil and Commercial Code, Title VI, Prescription, Chapter II (Period of Limitation), Section 193/30. Thus, if a disputing party fails to fulfil his/her obligations under the settlement agreement, the other party can file an application to the competent court to enforce such agreement within ten years from the date of the conclusion of the agreement.

(iii) The Thai legislation has no provision treating the settlement agreement arising out of mediation and/or conciliation proceedings as a final award rendered by an arbitral tribunal. Such settlement agreement can be enforced under the relevant provisions regarding a contract of compromise, as mentioned above.

However, the parties may give the effect to the settlement agreement by mutually agreeing to submit the dispute to an arbitral tribunal with a request to settle the dispute in accordance with the settlement agreement. As a consequence, the settlement agreement shall enjoy the same status and effect as a final award by an arbitral tribunal in accordance with the Arbitration Act of B.E. 2545 (A.D. 2002), Section 36. The award must be made in accordance with Section 37, and like other final awards rendered by an arbitral tribunal, can be enforced within three years from the date that the award is enforceable in accordance with Section 42 of the Arbitration Act.

Question 2: Grounds for refusing enforcement of a commercial settlement agreement

The settlement agreements which fulfils the conditions of a contract under Thailand's Civil and Commercial Code shall bind the disputing parties and can be enforced under the law of compromise, as mentioned above.

Consequently, the grounds for refusing enforcement of a settlement agreement are based on the same grounds for refusing enforcement of a contract that is void or voidable under the laws due to, inter alia, the lack of legal capacity, fraud, prohibition by laws or contrary to the public order and good morals.

Question 3: Validity of international commercial settlement agreements

The validity of those settlement agreements and legal bases for challenging their validity are the same as those for a contract and a contract of compromise under Thailand's Civil and Commercial Code, as explained in (1) and (2) above.

23. Turkey

[Original: English]
[Date: 7 January 2015]

Question 1: Information regarding the legislative framework

There is no legislation concerning the reconciliation/mediation actions emerging from the execution of international commercial reconciliation agreements. Therefore, no answer is available for the questions set forth in the paragraphs (i), (ii) and (iii). Our country has got legislation regarding the recognition and enforcement of foreign arbitral awards and court decisions. Foreign arbitral decisions may be executed according to the New York Convention of 1958. If a country is not a party to the said Convention, then an arbitral decision rendered in that country may be implemented according to the International Private and Procedural Law. Likewise, the enforcement of foreign court decisions shall be done according to the relevant provisions of that International Private and Procedural Law.

Question 2: Grounds for refusing enforcement of a commercial settlement agreement

There is no regulation related to rejection of execution, because there is no legislation concerning the reconciliation/mediation actions emerging from the execution of international commercial reconciliation agreements. Liabilities of enforcement are regulated

by the New York Convention and International Private and Procedural Law. As it was stated above, validity criteria are not in place, because no legal legislation exists regarding the international commercial reconciliation agreements. There is no legal regulation concerning the nature of an agreement rendered through mediation agency of a foreign State. Thus, it is considered to be a convention concluded between the parties. Inconsistency with this convention shall be another matter of dispute. Information on the current Law concerning mediation is as follows. Our country adopted the Law on Mediation in Civil Disputes No. 6325 in 2012. This law is applied only for the settlement of private law disputes emerging from cases or actions that the parties can freely dispose, including the ones that have the nature of foreignness.

Article 18 of the Law on Mediation in Civil Disputes No. 6325 states that: (1) The scope of the agreement reached as the result of the mediation activity shall be determined by the parties; in case of preparation of an agreement document, this document shall be signed by the parties and the mediator. (2) Should the parties reach an agreement at the end of the mediation process, they may submit such agreement to an enforcement court — whose authority is to be determined according to the rules of authority concerning the actual dispute — and may demand for the issuance of a commentary regarding its enforceability. The agreement containing such commentary shall be considered as a document with the force of a verdict.

Question 3: Validity of international commercial settlement agreements

The issuance of the commentary of enforceability is an undisputed judgement affair, and the examination concerning this is carried out on the file. However the examination concerning family law disputes suitable for mediation shall hold by oral hearing. The scope of such examination is limited to whether the content of the agreement is suitable for mediation and compulsory enforcement. In case that an application is made to the court for the issuance of commentary of enforceability for the agreement document, and in case that the concerned party appeals decisions given upon such application, the fixed fees shall be collected. Should the parties wish to use the agreement document in another official transaction without obtaining a commentary of enforceability, then fixed stamp duty shall also be collected. Therefore, if the parties fulfil their responsibilities in a dispute settled by mediation, including the ones having the nature of foreignness, they shall not encounter a lawsuit in terms of enforceability. If one of the parties does not fulfil its responsibilities, the other party has the right to bring the mediation agreement to the authorized court and get endorsement of enforceability, except disputes of family law, without any hearing. Such a mediation agreement containing endorsement of enforceability is considered to be a document in the capacity of a writ. This agreement text is considered to be enforceable in the framework of general provisions of Execution and Bankruptcy Law No. 2004.

24. United States of America

[Original: English]
[Date: 30 October 2014]

Question 1: Information regarding the legislative framework

(1)(i) through (1)(iii)(2): In the United States, settlement agreements (whether or not reached through conciliation) would generally be enforceable as contracts under existing state law. See, e.g., Snyder-Falkinham v. Stockburger, 457 S.E. 2d 36, 39 (Va. 1995); 15B Am. Jur.2d Compromise & Settlement §10 (2014). At least one U.S. state imposes additional requirements on the content of settlement agreements in the context of mediation, see Minn. Stat. §572.35, while another provides that settlements can be enforceable as court orders if they are presented to and approved by a court, see Colo. Rev. Stat. §13-22-308.

However, at least five states — California, Texas, Ohio, North Carolina, and Oregon — have regimes in place that provide special treatment for settlement agreements resulting from conciliation in international, commercial disputes. For these regimes to apply, either the conciliation agreement or the underlying transaction must be "international," see Cal. Civ. Pro. §1297.13; Tex. Civ. Prac. & Rem. Code §172.003; Ohio Rev. Code §2712.03; N.C. Gen. Stat. §1-567.31; Or. Rev. State. §36.454, as well as "commercial," see Cal. Civ. Pro.

§1297.16; Tex. Civ. Prac. & Rem. Code §172.004; Ohio Rev. Code §2712.04; N.C. Gen. Stat. §1-567.31; Or. Rev. State. Ann. §36.450. If an agreement settling such a dispute is in writing signed by the parties (or their representatives) and the conciliator, the agreement will be given the same effect as an arbitral award. Cal. Civ. Pro. §1297.401; Tex. Civ. Prac. & Rem. Code §172.211; Ohio Rev. Code §2712.87; N.C. Gen. Stat. §1-567.84; Or. Rev. State. §36.546. No arbitral proceedings need to have taken place for these regimes to apply.

(1)(iii)(3): U.S. courts have not resolved the issue of whether an arbitral award on agreed terms would be deemed eligible for enforcement under the New York Convention.

Question 2: Grounds for refusing enforcement of a commercial settlement agreement

(2) through (3): With respect to the special regimes that five states have in place for international commercial settlement agreements, the case law applying these statutory schemes does not appear to resolve whether the grounds for refusing enforcement are identical to those available for arbitral awards. Otherwise, as noted above, settlement agreements are generally governed by contract law in the United States; thus, the defences generally available under contract law would apply (e.g., duress and incapacity). Similarly, agreements to mediate may also be enforceable under contract law. See, e.g., Santana v. Olguin, 41 Kan. App. 2d 1086, 208 P.3d 328 (2009).

Question 3: Validity of international commercial settlement agreements

See question 2 above.

Question 4: Any other comment

See document A/CN.9/WG.II/WP.188.

(A/CN.9/846/Add.2) (Original: Chinese/English/Spanish)

Note by the Secretariat on settlement of commercial disputes: enforcement of settlement agreements resulting from international commercial conciliation/mediation: compilation of comments by Governments

ADDENDUM

Contents

III. Compilation of comments

25. Australia

[Original: English]
[Date: 13 April 2015]

Question 1: Information regarding the legislative framework

There is no statutory basis for the enforcement of international commercial settlement agreements out of mediation in Australian legislation. Further, there are no provisions regarding the enforcement of mediation settlement agreements (or mediation at all) in the International Arbitration Act 1973 (Cth) or in the Civil Dispute Resolution Act 2011 (Cth), which imposes requirements for litigants to take genuine steps to resolve disputes before initiating court proceedings.

(i) There are no provisions in Australian legislation that specifically govern the enforcement of international or domestic mediation settlement agreements. Common law principles apply to the enforcement of domestic settlement agreements, in two specific scenarios:

A. Where the parties have not yet initiated court proceedings, the mediated outcome is classified as a contract. Therefore, in ascertaining the validity of the mediation settlement agreement, the court will apply the ordinary principles of contract law.

These require that the agreement results from an intention to create legal relations, that the document contains the terms of the agreement and that the agreement involves consideration, or is in the form of a deed.[6] Consequently, the remedies available to the creditor, if the other party does not fulfil its obligations under the settlement agreement are the same remedies available as to any contractor. The creditor can commence a legal proceeding alleging breach of contract and ask for specific performance or other available remedies. In order to enforce the settlement agreement, a court must hold a hearing where the onus is on the creditor to prove the

[6] J Hambrook, C Wappett and B Whittaker, Australian Encyclopaedia of Forms and Precedents, Lexis Nexis (online, accessible here: www.lexisnexis.com/au/legal/docview/getDocForCuiReq?lni=4DMK-W3X0-TWN4-60HD&csi=267952&oc=00240&perma=true) at [30-225].

existence of the agreement and its validity. Therefore, the court has to consider the merit of the dispute mediated, and not just the enforcement of the solution that has been reached in the mediation process.[7]

B. Where the parties choose to mediate after court proceedings have been initiated, theoretically the mediated outcome will be decided by the court as a consensual judgement or settlement, or as it is expressed in many Australian laws as a "consent order".[8] Therefore, any subsequent proceedings relating to the order before the court will be enforcement proceedings.[9]

In practice, however, where proceedings have been commenced and parties negotiate/mediate a settlement, they will typically enter into a contract (by agreement or deed) whereby: (a) monetary compensation (or some other remedy) will be agreed upon; (b) releases (either unilateral or mutual) will be given; (c) the parties will agree to the steps to be taken to finalize the proceedings (whether by discontinuance, dismissal or entry of judgement).

The parties to the dispute/litigation are then in a situation where they can, if necessary: (a) bring proceedings against each other for breach of the settlement agreement; (b) have consent orders set aside and continue the litigation.

The industry practice of ADR practitioners may be a relevant factor in determining whether there was an intention for the agreement to be binding. The courts are more likely to presume that an agreement made between parties involved in a commercial dispute was created with an intention to create legal relations.[10]

(ii) There are no procedures for expedited enforcement of international commercial settlement agreements.

(iii) There are no provisions to the effect that an international commercial settlement agreement be treated as a final award rendered by an arbitral tribunal.

Question 2: Grounds for refusing enforcement of a commercial settlement agreement

This issue only arises if the settlement agreement was reached before court proceedings were initiated (in which case the agreement is classified as a contract, criteria for validity see above 1A).

Question 3: Validity of international commercial settlement agreements

See above 1A and B.

With regard to the validity of an agreement to refer a dispute to mediation/conciliation:[11]

There is no legislative basis for the enforcement of an agreement to mediate. Under the common law,[12] there is a list of minimum requirements for a mediation clause to be enforceable:

- The mediation clause must be in a form that operates to make mediation a condition precedent to litigation (rather than a replacement of litigation);
- The clause must be sufficiently certain. If agreement is subsequently needed on some other aspect of the process before mediation can proceed then, should the parties fail to reach agreement, the mediation clause will only amount to an agreement to agree and will not be enforceable.

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[7] *EL SIDDIK Abbas*, Enforceability of the mediation outcome, in: eLaw Journal: Murdoch University Electronic Journal of Law (2010) 17(2), p. 17 f.

[8] See for example Federal Court Rules 2011 (Cth) — Rule 28.25; Civil Procedure Act 2005 (NSW) — Sect 29 (1); Supreme Court Act 1935 (SA) — Sect 65 (7).

[9] *EL SIDDIK Abbas*, Enforceability of the mediation outcome, in: eLaw Journal: Murdoch University Electronic Journal of Law (2010) 17(2), p. 18 f.

[10] Hambrook, above n 1.

[11] See also Hambrook above n 1.

[12] Aiton Australia Pty Ltd v Transfield Pty Ltd (1999) 153 FLR 236.

- The mediation clause should set out the rules for selecting a mediator and determining the mediator's remuneration. The clause should also specify a mechanism for a third party to select the mediator where the parties cannot reach agreement.
- The clause should also set out in detail the mediation procedure to be followed or incorporate these rules by reference to the rules of a particular institution. These rules will also need to state with particularity the mediation model that will be used.

With regard to the validity of a mediated/conciliated settlement agreement arising from an agreement to refer a dispute to mediation/conciliation:

It was held in the New South Wales Supreme Court that dispute resolution clauses, in the correct form, merely postpone a party's right to commence proceedings, and therefore generally do not offend the rule against ousting the jurisdiction of the court.[13] By extension, a mediated or conciliated agreement arising from an agreement to refer a dispute to mediation/conciliation is enforceable at common law.

Question 4: Any other comment

While Australia lacks a statutory regime for the enforcement of mediated settlements, the flexibility of the common law allows parties to tailor their dispute resolution process to their individual needs. We question whether a Convention will be useful in light of the aim of mediation to be a more flexible and informal method of dispute resolution.

There may also be some practical barriers to implementing a New York Convention style of enforcement for mediation in Australia, given that there must be a clear constitutional basis for parliament to implement this treaty and the obligations under the Convention must not impose non-judicial functions on the courts.

However, establishing an international framework for the enforcement of settlement agreements may go toward increasing the popularity and utility of a mediation and conciliation.

26. China

[Original: English/Chinese]
[Date: 10 April 2015]

I. The basis of legislative framework for cross-border enforcement of foreign settlement agreements in three cases

1. Arbitration procedure

Article 283: If an award made by a foreign arbitral organ requires the recognition and enforcement by a people's court of the People's Republic of China, the party concerned shall directly apply to the intermediate people's court of the place where the party subjected to enforcement has his domicile or where his property is located. The people's court shall deal with the matter in accordance with the international treaties concluded or acceded to by the People's Republic of China or with the principle of reciprocity.

2. Judicial procedure

Article 281: If a legally effective judgement or written order made by a foreign court requires recognition and enforcement by a people's court of the People's Republic of China, the party concerned may directly apply for recognition and enforcement to the intermediate people's court of the People's Republic of China which has jurisdiction. The foreign court may also, in accordance with the provisions of the international treaties concluded or acceded to by that foreign country and the People's Republic of

[13] *Aiton*, above n 7.

China or with the principle of reciprocity, request recognition and enforcement by a people's court.

3. Currently, there is no legislative framework providing for cross-border enforcement of settlement agreement reached only by the parties abroad.

II. The confirmed procedures of Chinese law on settlement agreements reached in domestic proceedings

1. Judicial procedure

Civil Procedure Law of the People's Republic of China

Article 93: In the trial of civil cases, the people's court shall distinguish between right and wrong on the basis of the facts being clear and conduct conciliation between the parties on a voluntary basis.

Article 97: When a settlement agreement through conciliation is reached, the people's court shall draw up a conciliation statement. The conciliation statement shall clearly set forth the claims, the facts of the case, and the result of the conciliation.

The conciliation statement shall be signed by the judges and the court clerk, sealed by the people's court, and served on both parties.

Once it is signed for receipt by the two parties concerned, the conciliation statement shall become legally effective.

2. Arbitration procedure

Arbitration Law of the People's Republic of China

Article 51: The arbitration tribunal may carry out conciliation prior to giving an arbitration award. The arbitration tribunal shall conduct conciliation if both parties voluntarily seek conciliation. If conciliation is unsuccessful, an arbitration award shall be made promptly.

If conciliation leads to a settlement agreement, the arbitration tribunal shall make a written conciliation statement or make an arbitration award in accordance with the result of the settlement agreement. A written conciliation statement and an arbitration award shall have equal legal effect.

Article 52: A written conciliation statement shall specify the arbitration claim and the results of the settlement agreed upon between the parties. The written conciliation statement shall be signed by the arbitrators, sealed by the arbitration commission, and then served on both parties.

The written conciliation statement shall become legally effective immediately after both parties have signed for receipt thereof.

If the written conciliation statement is repudiated by a party before he signs for receipt thereof, the arbitration tribunal shall promptly make an arbitration award.

III. The situations that Chinese court does not confirm the domestic commercial settlement agreements

In 2011 Supreme People's Court — "The certain Provisions on the judicial confirmation process of people's mediation agreement"

Article 7: In one of the following circumstances, the court shall refuse to enforce a commercial settlement agreement:

(1) In violation of the provisions of laws, administrative regulations and mandatory;

(2) Infringe on the interests of the state, social and public interests;

(3) Against the legitimate rights and interests of the third parties;

(4) Damage to public order and good morals;

(5) The content is not clear, can not be confirmed;

(6) Another situation that is not a judicial confirmation.

27. Georgia

[Original: English]
[Date: 14 April 2015]

Question 1: Information regarding the legislative framework

In Georgia, there exists no special enforcement regime for those international commercial settlement agreements that are concluded as a result of mediation/conciliation proceedings. Therefore, there is no procedure for expedited enforcement of such agreements either. All settlement agreements are treated as ordinary agreements between the parties. Georgian arbitration law, however, provides a possibility for a settlement agreement concluded by the parties to arbitration proceedings to be adopted as an award by the arbitral tribunal. Georgia has implemented the UNCITRAL Model Law on International Commercial Arbitration in its arbitration legislation and according to Article 38(1) of the Law of Georgia "on Arbitration", "if requested by the parties, the arbitral tribunal has a right to approve the settlement of the parties in accordance with the agreed terms by way of rendering an arbitral award." It can be seen from the wording that these agreements are not automatically approved through arbitral awards. The tribunal has a right to refuse to record the parties' settlement in the form of an arbitral award and, in that case, the agreement will operate just like an ordinary contract between the parties.

According to Article 38(3), "an arbitral award on settlement shall be rendered in accordance with the provisions of Article 39 of th[e] Law." Article 39 sets the requirements for an arbitral award. However, there is no provision in Georgian legislation that would stipulate any specific conditions for the settlement agreement subject to the adoption in the form of the award.

As Article 38(3) indicates, an arbitral award on agreed terms "has the same legal force as any other arbitral award rendered as a result of examination of the merits of the case." Hence, such arbitral awards will fall under the recognition and enforcement regime of the New York Convention on the Recognition and Enforcement of Arbitral Awards (1958).

Question 2: Grounds for refusing enforcement of a commercial settlement agreement

As noted above, a special regime for the enforcement of international commercial settlement agreements does not exist in Georgia. Every commercial settlement agreement is treated as a regular contract and its fulfilment is a matter of contract law, regulated by the Civil Code of Georgia. In case of those settlement agreements which are approved through the arbitral awards, the New York Convention applies mutatis mutandis, due to the reason that those settlement agreements become awards and fall under the recognition and enforcement regime of the arbitral awards.

Question 3: Validity of international commercial settlement agreements

There are no different or additional criteria that international commercial settlement agreements need to meet. Criteria for the validity of commercial agreements, regardless of their subject matter, are stipulated in the Civil Code of Georgia.

28. Paraguay

[Original: Spanish]
[Date: 30 March 2015]

Question 1: Information regarding the legislative framework

The Paraguayan legal system recognizes the enforcement of foreign judgements, arbitral awards and judicial decisions, but not international commercial settlement agreements, whether arising out of negotiations or mediation/conciliation proceedings, that have not been judicially approved.

Rules are prioritized simply according to the hierarchy that exists within the legal system, with the aim of ensuring that they are correctly applied. Kelsen outlined his theory in a pyramid, in which each higher rule is the basis of the validity of the lower rule. Thus, it is stated in our National Constitution — the Basic Law of the Republic — at article 137 on the Supremacy of the Constitution: "The supreme law of the Republic is the Constitution. The Constitution, the approved and ratified international treaties, conventions and agreements, the laws adopted by Congress and other lower-ranking legal provisions constitute Paraguay's positive law in the stated order of priority." Likewise, it is stated at article 145 on the Supranational Legal Order: "The Republic of Paraguay, on an equal footing with other States, recognizes a supranational legal order which guarantees the validity of human rights, peace, justice, cooperation and development in the political, economic, social and cultural fields." […]

International commercial settlement agreements arising out of non-judicially approved mediation or conciliation proceedings would be treated as private agreements between parties, which should be submitted to a court for judicial approval, as is the case with all commercial settlement agreements arising out of mediation proceedings whether conducted at a private mediation centre or by the Judiciary's Mediation Directorate.

(i) The Montevideo Treaties of 1888 and 1940 respectively establish the aforementioned requirements […]. Where no treaty exists, procedures are governed by article 532 of the Civil Procedure Code. Similarly, agreements that are not judicially approved in the country where they were drafted may not be enforced, unless judicial approval is sought before our courts.

(ii) The Paraguayan legal system does not provide for procedures for the expedited enforcement of international commercial settlement agreements.

(iii) Act No. 1879/02 Art. 10.- Form of the arbitration agreement. The arbitration agreement shall be in writing. The agreement shall be deemed to be in writing when it is contained in a document signed by the parties or in an exchange of letters or telegrams in which said agreement is established; or in an exchange of written statements of claim and defence in which the existence of an agreement and its terms is affirmed by one party without being denied by the other. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference implies that the clause forms part of the contract.

The Arbitration and Mediation Act is very clear concerning the form of the arbitral agreement or award, and, on the basis of the aforementioned, for such an agreement to be enforceable in Paraguay it must meet all the requirements of the Montevideo Treaties and Acts Nos. 889/91 and No. 1879/02. […]

Question 2: Grounds for refusing enforcement of a commercial settlement agreement

No further conditions are required other than those established in laws for the recognition and enforcement of international commercial settlement agreements.

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards was approved and ratified by Paraguay, in accordance with Act No. 948/96, article 1 of

which reads: "The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, adopted in New York, United States of America, on 10 June 1958, is hereby adopted." As it is an Act, the courts are obliged to implement the provisions contained therein.

If a commercial settlement agreement was judicially approved in its place of origin, and if it complies with all the legal provisions established for its enforcement, under no circumstances may its enforcement be refused; however, if the agreement was not judicially approved in its place of origin, naturally the judge will refuse enforcement of that agreement.

Question 3: Validity of international commercial settlement agreements

The criteria indicating whether an international commercial settlement agreement is valid are those that have been established in the treaties and laws, and national judges and courts may only rule in accordance with current provisions and rules, therefore the criteria for the validity or invalidity of an agreement are established by the treaties and laws.

Question 4: Any other comment

While the terms "mediation" and "conciliation" are used interchangeably in the questionnaire, Paraguayan legislation makes a clear distinction between them. Article 53 of Arbitration and Mediation Act No. 1879/02 establishes the definition of mediation, and article 55 of that Act clearly establishes that mediation and conciliation are different from one another.

Further, article 170 of the Civil Procedure Code states that conciliation shall be conducted solely and exclusively by judges.

[Article 53.- Definition. Mediation is a voluntary mechanism aimed at conflict resolution, by which two or more persons seek for themselves an amicable settlement of their differences, with the assistance of a qualified and neutral third party known as a mediator.

Article 55.- Effects of the mediation hearing. If, prior to conducting a conciliation hearing as provided for in the procedural rules, the parties decide to resort to mediation, the written report prepared by the mediator or the Mediation Centre stating that the parties have attended at least one mediation hearing, shall have the same legal effect as the conciliation hearing provided for in the said procedural rules.

Article 170.- EFFECTS. Conciliation agreements concluded by the parties before a judge and approved by the judge shall have the authority of res judicata. They shall be prepared in the form required for judgement enforcement procedures. If the agreement is only partial, it shall be enforced in respect of the relevant part, the process continuing as and when pending claims are settled].

29. Poland

[Original: English]
[Date: 15 April 2015]

Question 1: Information regarding the legislative framework

(i) The conciliation/mediation agreements, with the exception of agreements concluded before the court or validated by it, are considered private agreements. With regard to agreements in the form of notary deed there is a possibility to include into it the statement of voluntary submission to enforcement — in such a case an agreement is an enforcement title under article 777, paragraph 1, points 4, 5 and 6 of the Civil Procedure Code.

(ii) The above mentioned procedure (voluntary submission to enforcement in the notary deed) can be considered as the expedited procedure. Such a notary deed constitutes the enforcement title: after having been appended by the court with the so

called enforcement clause (klauzula wykonalności) and it can be basis for enforcement by the bailiff.

(iii) There are no rules which provide for the same treatment of international commercial agreements as the ones applicable to final arbitral awards under New York Convention on the Recognition and Enforcement of Arbitral Awards (1958).

Question 2: Grounds for refusing enforcement of a commercial settlement agreement

As regards sub question 2, the Civil Procedure Code provides for mediation as voluntary procedure (art. 1831, para. 1). The mediation starts following the agreement on mediation between the parties or as a result of the common court's decision referring the parties to mediation. The mediation can start also when the other party agrees to it following the request for the mediation filed with the mediator by the first party. Art. 1831, para. 3 provides that agreement on mediation should stipulate the subject of mediation and designate the mediator (or define the way for its selection). There are no specific rules on the form of the agreement on mediation.

As regards question (2) the commercial settlement can be treated as the civil law agreement, and specifically as a mutual obligation agreement in the meaning of article 487, paragraph 2, of the Civil Code. The usual procedure for the enforcement of civil claims applies to such agreements. The request should be submitted to the competent court.

Question 3: Validity of international commercial settlement agreements

As regards question (3), in order to answer this question it is necessary to determine the law applicable to the international (foreign) settlement. Such law allows to establish the validity of the agreement.

30. Portugal

[Original: English]
[Date: 15 April 2015]

Question 1: Information regarding the legislative framework

(i) In Portugal, the Law 29/2013 of 19 April establishes in article 15 that the provisions of the present section (Civil and Commercial Mediation) are applicable, with the necessary adaptations, to the mediation procedures carried out in another Member State of the European Union, insofar as these respect the principles and standards of the legal system of this State.

According to article 14 (1): "In those cases in which the law does not determine its obligation, the parties have the option to request the judicial homologation of the settlement agreement obtained through pre-court mediation".

According to article 9 (4) the mediation settlement agreement obtained through mediation carried out in another Member State of the European Union that respects the provisions of subparagraphs (a) and (d) of paragraph 1 (that concerns a dispute that may be subjected to mediation and for which the law does not demand judicial homologation; for which the parties had capacity to agree hereon; that is obtained through mediation carried out pursuant to the terms legally foreseen; and the content of which does not violate public policy) are enforceable, without the need for judicial homologation, if the legal system of this State also attributes it enforceability.

(ii) There are no procedures for expedited enforcement of international commercial settlement agreements. All the enforcement procedures have the same rules.

(iii) There are no provisions to the effect that an international commercial settlement agreement be treated as a final award rendered by an arbitral tribunal.

Question 2: Grounds for refusing enforcement of a commercial settlement agreement

The grounds for refusing enforcement of international commercial settlement agreements are the following:

- The dispute can't be the subject of mediation;
- Parties incapacity to agree hereon;
- The agreement does not respect the general principles of law or the good faith;
- It constitutes an abuse of law;
- Its content violates public policy.

Question 3: Validity of international commercial settlement agreements

It can be deemed valid an international commercial settlement agreement that concerns a dispute that may be the subject of mediation, for which the parties had capacity to agree hereon, if it respects the general principles of law, if it respects good faith, if it does not constitute an abuse of law and if its content does not violate public policy.

(A/CN.9/846/Add.3) (Original: English/French/Spanish)

Note by the Secretariat on settlement of commercial disputes: enforcement of settlement agreements resulting from international commercial conciliation/mediation: compilation of comments by Governments

ADDENDUM

Contents

III. Compilation of comments

31. Algeria

[Original: French]
[Date: 20 April 2015]

Question 1: Information regarding the legislative framework

i. There is no specific procedure in the existing laws and regulations in Algeria concerning international commercial settlement agreements resulting from conciliation/mediation proceedings.

However, the general civil procedure regime includes as enforceable titles:

- Records of conciliation or agreements approved by Algerian judges and filed with a court registry.
- Notarized documents and certified documents and instruments prepared abroad which may be enforced in Algeria only if they have been declared enforceable by Algerian courts.

ii. There is no procedure for expedited enforcement of international commercial settlement agreements.

iii. There are no provisions to the effect that an international commercial settlement agreement be treated as an arbitral award given that our Civil Procedure Code provides for only two types of arbitration: ad-hoc arbitration and institutional arbitration.

Question 2: Grounds for refusing enforcement of a commercial settlement agreement

There are no specific grounds for refusing enforcement of a commercial settlement agreement in our country, but the general rule applicable to any agreement is that it must not be contrary to Algerian legislation, public policy or morality.

Question 3: Validity of international commercial settlement agreements

There are no specific conditions for international commercial settlement agreements to be deemed valid, but the general rule applicable to any agreement is that it must not be contrary to Algerian legislation, public policy or morality.

There are no bases in law for challenging the validity of an agreement to refer a dispute to mediation/conciliation or the validity of the resulting mediated/conciliated settlement agreement. However, the parties may provide, in their agreement, an arbitration clause on mediation or conciliation, subject to the legal conditions provided for in the Civil Procedure Code.

Question 4: Other comments

Mediation/conciliation remains the most appropriate procedure to resolve commercial disputes.

The international community would benefit from promoting mediation/conciliation by developing provisions to ensure the enforcement of international settlement agreements resulting from mediation/conciliation.

Algeria is willing to make its contribution to that end.

32. Cameroon

[Original: French]
[Date: 20 April 2015]

Question 1: Information regarding the legislative framework

Act No. 2007/001 of 19 April 2007 establishes the office of enforcement judge and also establishes the conditions for the enforcement in Cameroon of foreign judicial decisions and public acts, as well as foreign arbitral awards.

Question 2: Grounds for refusing enforcement of a commercial settlement agreement

According to the provisions of the above-mentioned Act, foreign arbitral awards have the effect of res judicata and may be recognized and rendered enforceable in Cameroon by the enforcement judge, subject to the conditions provided for in the applicable international conventions or, in the absence of such conventions, under the same conditions as those set forth in the provisions of the Uniform Act on Arbitration Law of the Organization for the Harmonization of Business Law in Africa (OHADA) and Act No. 2003/009 of 10 July 2003 designating competent courts under the Uniform Act on Arbitration Law and establishing the procedure for referral to those courts.

Accordingly, foreign public acts, in particular foreign notarized instruments that are enforceable in the State in which they were issued, are declared enforceable in Cameroon by the president of the court of first instance of the place where enforcement is taking place or is envisaged or by a judge of the same court who has been appointed by the president for that purpose.

The enforcement judge verifies that such acts fulfil the necessary conditions with respect to their authenticity in their countries of origin and that they are not contrary to public order in Cameroon.

Question 3: Validity of international commercial settlement agreements

In accordance with the aforementioned Act, the president of the court of first instance or the judge delegated by him or her is the judge responsible for determining whether foreign court rulings and public acts, as well as foreign arbitral awards, are enforceable.

A party requesting the recognition or enforcement of an instrument relating to a civil, commercial or social matter must submit the following documents to the judge: a

certified copy of the decision that fulfils the necessary conditions with respect to its authenticity; the original of the record of service of the decision or any other legal instrument confirming service of the decision; a court registrar's certificate to the effect that the decision has not been subject to challenge or appeal; if appropriate, a copy of the notice or summons issued to a party that has failed to appear before the court, a certified copy issued by the registrar of the court that issued the decision and any other documents required in order to establish that the notice or summons reached the party in good time.

The enforcement judge is required only to verify that: the decision was issued by a competent court in the country of origin; the parties have been duly summonsed, represented and declared in default; the decision is enforceable in its country of origin; the decision is contrary neither to public order in Cameroon nor to a final court decision rendered in Cameroon.

Question 4: Any other comment

In view of the foregoing, it can be said that Cameroonian legislation contains provisions on the enforceability of foreign public acts and foreign arbitral awards and thus agreements resulting from conciliation/mediation, which are enforceable as any contract between the parties. In other words, a written conciliation statement and a written arbitration award would have equal legal validity and effect.

The enforcement judge is required simply to record in his or her decision the outcome of his or her verifications. Enforcement may be granted in part, with respect to any part of the decision in question.

The decision of the enforcement judge may be challenged only through an appeal to the Supreme Court. Failure to submit one of the above-listed documents to the judge may also be considered as a ground for challenging the validity of an international commercial agreement resulting from mediation/conciliation proceedings and for rendering the agreement unenforceable.

33. Chile

[Original: Spanish]
[Date: 20 April 2015]

Question 1: Information regarding the legislative framework

In Chile, mediation, broadly understood as an alternative dispute resolution mechanism in which a mediator assists parties in their attempt to reach an amicable settlement to their dispute, has been progressively incorporated into the domestic legal system in various areas, for example in family law and labour law. However, it has not yet been provided for in national legislation in the area of international commercial settlements.

In particular, with regard to alternative means of dispute resolution, it should be noted that articles 2446 et seq. of the Chilean Civil Code regulate settlement agreements, defining them as agreements in which the parties settle pending disputes out of court, or take steps to prevent possible future disputes.

In addition, articles 262 et seq. of the Civil Procedure Code provide for conciliation proceedings, which may be conducted in any civil action in which settlement is admissible, with certain exceptions specifically identified.

Question 2: Grounds for refusing enforcement of a commercial settlement agreement — Question 3: Validity of international commercial settlement agreements

However, it should be noted that the enforcement of international mediation or settlement agreements is not specifically regulated in national law. As regards decisions on disputes tried abroad, Chilean legislation regulates the enforcement of foreign decisions in articles 242 to 251 of the Civil Procedure Code, Title XIX

No. 2 “On decisions passed by foreign courts”, which establish the rules governing the recognition and enforcement of decisions handed down by foreign courts. These rules also apply to the decisions issued by judges in arbitral proceedings. In this regard, the law provides that decisions delivered in foreign countries shall have the same force in Chile as they are granted by the relevant treaties and shall be enforced according to the procedures established by Chilean law, unless otherwise modified by the treaties.

In the absence of relevant treaties with the State where the decisions originate, the decisions shall be given the same force as those issued in Chile. In cases where the aforementioned rules cannot be applied, the decisions of foreign courts shall have the same force in Chile as if they had been issued by Chilean courts, provided that they meet the conditions expressly provided for in the Civil Procedure Code.

Therefore, in accordance with the Chilean legal system, it is possible to confer enforceability on international commercial settlement agreements through their recognition by a court.

Furthermore, it should be noted that article 30 of Act No. 19.971 on international commercial arbitration provides that, during arbitral proceedings, the parties may reach a settlement resolving the dispute, allowing the arbitral tribunal to terminate proceedings, and, at the request of both parties and if the arbitral tribunal has no objections, the settlement may be recorded in the form of an arbitral award under the terms agreed by the parties. Consequently, it is also possible to confer enforceability on an international commercial settlement agreement concluded within arbitral proceedings.

34. Mexico

[Original: Spanish]
[Date: 16 April 2015]

Question 1: Information regarding the legislative framework

Concept of “international commercial settlement agreement”

The concept of “international commercial settlement agreement” does not exist in Mexican law. Furthermore, the Government of Mexico is unaware of the existence of such a concept in comparative law.

The concept may therefore be understood in two ways. The first would be as the result of international conciliation proceedings. It is likely that some States have enacted legislation defining international commercial settlement agreements for the purposes of their domestic law.

If that is the case, since there are no provisions in Mexican legislation for the enforcement of such agreements under a special regime, the general regime described below would apply.

The second way in which the concept may be understood would be that an international commercial settlement exists if the parties reach a settlement with respect to a dispute arising from a relationship or contract that is considered to be international in accordance with provisions in force that govern such status. No special regime would apply to such settlements under Mexican law. For example, in the case of a settlement agreement resulting from a dispute concerning an international sales contract in the terms of the United Nations Convention on Contracts for the International Sale of Goods, the Code of Commerce would apply to the enforcement of that agreement.

Consequently, the responses to the secretariat’s questionnaire refer exclusively to settlement agreements in general with respect to legal relations under Mexican commercial law.

Conciliation proceedings excluded

Mexico is one of the countries that regulate civil law and commercial law separately. Civil law applies according to local jurisdiction, as a result of which each federal entity has a civil code and a code of civil procedure. Consequently, provisions are established in each federal entity with respect to the enforcement of settlement agreements reached in relation to civil cases.

Following a trend that appears to be universal, laws on conciliation have been enacted in all or most of the federal entities of Mexico. Since those entities are State-level jurisdictions, settlement agreements in such cases are typically non-commercial. However, in many cases, the parties agree to conciliation proceedings in accordance with the provisions of those laws and conclude agreements that settle their disputes. By virtue of the rule that the will of the parties prevails, such settlement agreements may be considered valid and enforceable under the legislation of the federal entity concerned.

Such laws usually establish special procedures facilitating the enforcement of settlement agreements reached through or formalized by a conciliator. They typically establish requirements of nationality and professional qualification that are incompatible with conciliation in relation to international commerce and have therefore not been taken into account in the completion of this questionnaire.

There are other relations for which separate regulatory provisions are established, such as employer-employee relations and relations between providers of goods and services and consumers.

Legal regulation of conciliation

The law applicable to commercial settlement agreements is the Code of Commerce. The Federal Civil Code supplements the Code of Commerce. Since the Code of Commerce has no specific provisions regarding settlement agreements, the following provisions of the Federal Civil Code apply: 10.1 “Article 2944. A settlement is a contract whereby the parties end or prevent a dispute by making reciprocal concessions.” 10.2 “Article 2945. In the case of a settlement that prevents future disputes, if the value exceeds 200 pesos, that fact must be recorded in writing.” 10.3 “Article 2953. The settlement shall have, with respect to the parties, the same effect and force as res judicata; however, a request to terminate the settlement agreement or render it null and void may be made in the cases permitted by law.”

The following provisions of the Code of Commerce are relevant to the enforcement of settlement agreements: 11.1 “Article 1391. Enforcement proceedings take place where an action is based on an enforceable document. The following documents are enforceable [...] II. Public instruments, as well as statements and certified copies thereof issued by a notary public; […] VII. … any other commercial contracts signed and legally recognized by the debtor ...”

Question 2: Grounds for refusing enforcement of a commercial settlement agreement

The grounds for refusing enforcement of a commercial settlement agreement in Mexico are the same as those for refusing enforcement of any other contract under the applicable law of obligations and contracts.

Agreements to settle disputes through conciliation and settlement agreements that have been concluded in another State in accordance with the laws of that State are recognized in Mexico (Federal Civil Code, article 13-I). However, if a settlement agreement involves the creation, regulation and extinguishment of rights in rem in respect of immovable property, leasing contracts or contracts for the temporary use of such property and movable property, it is governed by the law of the jurisdiction in which it was concluded, even if the parties to the agreement are foreign.

There are no specific provisions for the enforcement of international settlement agreements.

Commercial settlement agreements as awards

In Mexican law there is no provision for the treatment of a commercial settlement agreement as a final award. The only possibility for a settlement agreement to take the form of an award is under article 1447 of the Code of Commerce (the text of which is identical to that of article 30 of the UNCITRAL Model Law on International Commercial Arbitration), which provides for the recording of the settlement in the form of an award on the terms agreed by the parties if requested by the parties and not objected to by the arbitral tribunal.

Under Mexican law it would be legally impossible to initiate arbitration proceedings with the sole objective of recording a settlement between the parties as an award. According to the definition of "arbitration agreement" as set out in article 1416-I of the Code of Commerce and article 7 of the Model Law on International Commercial Arbitration, disputes which have arisen or which may arise between the parties are the subject of arbitration. A settlement constitutes the resolution of the dispute (Federal Civil Code, article 2944, and Code of Commerce, article 78) and requires only the agreement of the parties, as a result of which arbitration would be inappropriate because there is no dispute for the arbitrator to resolve.

Question 3: Validity of international commercial settlement agreements

In Mexican law, no specific conditions or formalities are required in order for the settlement agreement to be valid and binding. Article 78 of the Code of Commerce provides that, under commercial agreements, each party agrees to become bound in the manner and on the terms that they wish; the validity of the agreement does not depend on the fulfilment of specific requirements or formalities. The Federal Civil Code does not establish any requirements with regard to the settlement of a dispute that has arisen between parties. Requirements are established only with regard to disputes that may arise in the future, and then only when the value of the dispute exceeds 200 pesos (currently 0.2 pesos).

However, in order for enforcement to take place with respect to a commercial matter, it is necessary for the settlement to be recorded in a public instrument (i) issued by a notary public or commercial notary public or (ii) signed before or recognized by a judicial authority (Code of Commerce, article 1391).

Unlike awards on terms agreed between the parties that have been issued in Mexico in accordance with article 1440 of the Code of Commerce (article 30 of the UNCITRAL Model Law on International Commercial Arbitration), it is doubtful whether such an award rendered abroad falls within the scope of the 1958 New York Convention. There is no indication in published case law that Mexican courts have ruled on this matter.

Draft legislation

A draft law enacting the UNCITRAL Model Law on International Commercial Conciliation is to be submitted to Congress, containing the following provisions:

21.1 "Article 14. If the parties, by means of conciliation or negotiation, reach an agreement settling a dispute, that agreement shall constitute a commercial settlement." "The settlement shall have, with respect to the parties, the same effect and force as res judicata; however, nullity or termination of the settlement agreement may be requested in the cases permitted by law." "The commercial settlement shall be binding and enforceable as a commercial settlement, in accordance with the [special procedure established for the recognition and enforcement of awards]." "With the exception of [provisions relating to the transfer of rights and strict interpretation], the provisions [of the Federal Civil Code relating to settlement agreements] shall also apply to commercial settlements."

21.2 "Article 15. If the recognition and enforcement of a commercial settlement is requested, only exceptions made after the settlement has been reached or specifically provided for by law may be admitted, and such exceptions must be supported by

documentary evidence or replies to interrogatories. Once those exceptions are ruled on, no further exceptions may be admitted."

21.3 "Article 16. If, in the commercial settlement agreement, the parties have agreed on an arbitration clause, any disputes arising from or relating to the commercial settlement shall, unless otherwise agreed, be settled by arbitration. If a party applies to a judicial authority, proceedings shall take place in accordance with article 1424 of the Code of Commerce (article 8 of the UNCITRAL Model Law on International Commercial Arbitration)."

35. Philippines

[Original: English]
[Date: 17 April 2015]

Question 1: Information regarding the legislative framework

The following are the legislative framework in the Philippines relating to the enforcement of international commercial settlement agreements arising out of mediation/conciliation proceedings: Republic Act (RA) No. 9285,[1] otherwise known as the "Alternative Dispute Resolution Act of 2004", which was issued on 2 April 2004; Implementing Rules and Regulations (IRR) of the Alternative Dispute Resolution Act of 2004 (ADR Act),[2] as embodied in the Philippine Department of Justice's Department Circular No. 98 dated 4 December 2009; Special Rules of Court on Alternative Dispute Resolution (Special ADR Rules), which took effect on October 30, 2009.

(i) Section 17 of the ADR Act provides for the enforcement of mediated settlement agreements, to quote: […] "(a) A settlement agreement following successful mediation shall be prepared by the parties with the assistance of their respective counsel, if any, and by the mediator. The parties and their respective counsels shall endeavour to make the terms and conditions thereof complete and make adequate provisions for the contingency of breach to avoid conflicting interpretations of the agreement. (b) The parties and their respective counsels, if any, shall sign the settlement agreement. The mediator shall certify that he/she explained the contents of the settlement agreement to the parties in a language known to them. (c) If the parties so desire, they may deposit such settlement agreement with the appropriate Clerk of a Regional Trial Court of the place where one of the parties resides. Where there is a need to enforce the settlement agreement, a petition may be filed by any of the parties with the same court, in which case, the court shall proceed summarily to hear the petition, in accordance with such rules of procedure as may be promulgated by the Supreme Court."

Complementary to the foregoing is Article 3.20 of the IRR of the ADR Act, as embodied in the Philippine Department of Justice's Department Circular No. 98 dated 4 December 2009. […]

Likewise, Rule 15 of the Special Rules of Court for ADR specifically laid down the rules for the deposit and enforcement of mediated settlement agreements. It states: […] "Rule 15.5. Enforcement of mediated settlement agreement. - Any of the parties to a mediated settlement agreement, which was deposited with the Clerk of Court of the Regional Trial Court, may, upon breach thereof, file a verified petition with the same court to enforce said agreement. Rule 15.6. Contents of petition. - The verified petition shall: a. Name and designate, as petitioner or respondent, all parties to the mediated settlement agreement and those who may be affected by it; b. State the following: (i). The address of the petitioner and respondents; and (ii). The ultimate facts that would show that the adverse party has defaulted to perform its obligations under said agreement; and c. Have attached to it the following: (i). An authentic copy

[1] "An Act to institutionalize the use of an alternative dispute resolution system in the Philippines and to establish the office for alternative dispute resolution, and for other purposes".
[2] A.M. NO.07-11-08-SC.

of the mediated settlement agreement; and (ii). Certificate of Deposit showing that the mediated settlement agreement was deposited with the Clerk of Court. Rule 15.7. Opposition. - The adverse party may file an opposition, within fifteen (15) days from receipt of notice or service of the petition, by submitting written proof of compliance with the mediated settlement agreement or such other affirmative or negative defences it may have. Rule 15.8. Court action. - After a summary hearing, if the court finds that the agreement is a valid mediated settlement agreement, that there is no merit in any of the affirmative or negative defences raised, and the respondent has breached that agreement, in whole or in part, the court shall order the enforcement thereof; otherwise, it shall dismiss the petition."

(ii) The procedure stated above does not include a procedure for expedited enforcement of international commercial settlement agreements.

(iii) Under Paragraph (d), Section 17 of the ADR Act, it is provided therein that a settlement agreement shall be treated as an arbitral award, if the parties agree in the settlement agreement that the mediator shall become a sole arbitrator for the dispute. As the settlement agreement is treated as an arbitral award it shall be subject to enforcement under RA No. 876, otherwise known as "The Arbitration Law". It states: […] "(d) The parties may agree in the settlement agreement that the mediator shall become a sole arbitrator for the dispute and shall treat the settlement agreement as an arbitral award which shall be subject to enforcement under Republic Act No. 876, otherwise known as the Arbitration Law, notwithstanding the provisions of Executive Order No. 1008 for mediated disputes outside of the CIAC." A restatement of this provision was made in Paragraph (d), Article 3.20 of the IRR of the ADR Act […].

As mentioned in the immediately preceding paragraphs, the provisions of RA No. 876[3] shall apply to a settlement agreement that shall be treated as an arbitral award. […] Relevant to the foregoing is Section 40 of the ADR Act […].

To reiterate, the provisions of RA No. 876 shall apply to a settlement agreement that shall be treated as an arbitral award. Hence, for the confirmation of a settlement agreement that was considered as an arbitral award, Section 28 of RA No. 876 requires the following: "SEC. 28. Papers to accompany motion to confirm, modify, correct, or vacate award. - The party moving for an order confirming, modifying, correcting, or vacating an award, shall at the time that such motion is filed with the court for the entry of judgement thereon also file the following papers with the Clerk of Court: (a) The submission, or contract to arbitrate; the appointment of the arbitrator or arbitrators; and each written extension of the time, if any, within which to make the award. (b) A verified copy of the award. (c) Each notice, affidavit, or other paper used upon the application to confirm, modify, correct or vacate such award, and a copy of each of the court upon such application."

RA No. 876 is silent with respect to the application of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards to awards on agreed terms.

Question 2: Grounds for refusing enforcement of a commercial settlement agreement

RA No. 9285 or the ADR Act and its IRR as well as the Special Rules of Court on ADR are silent with respect to the grounds for refusing to enforce a commercial settlement agreement.

Question 3: Validity of international commercial settlement agreements

For the validity of international commercial settlement agreements, the procedure prescribed under Section 17 of the ADR Act, Article 3.20 of the IRR of the ADR Act and Rule 15 of the Special Rules of Court for ADR should be followed.

RA No. 9285 or the ADR Act and its IRR and the Special Rules of Court on ADR are silent with respect to the question on challenging the validity of an agreement to

[3] "An Act to authorize the making of arbitration and submission agreements, to provide for the appointment of arbitrators and the procedure for arbitration in civil controversies, and for other purposes".

refer a dispute to mediation/conciliation or the validity of the resulting mediated/conciliated settlement agreement.

36. Qatar

[Original: English]
[Date: 5 May 2015]

Question 1: Information regarding the legislative framework

Mediation or conciliation is a recognized pattern for the amicable settlement of disputes under Qatari Law. Several contracts include the agreement of the parties to resort to mediation or conciliation before either going to litigation or arbitration.

There is no legal framework organizing mediation practice. Therefore, the concerned partners are free to organize the mediation according to their wishes and concerns.

Within the Chamber of Commerce & Industry of Qatar, the Qatar International Center for Conciliation & Arbitration (QICCA) has issued in 2012 a specific set of mediation rules largely inspired from the UNCITRAL Conciliation Rules. Article l5 of the QICCA conciliation rules governs the "settlement agreement" reached by the parties with the assistance of the conciliator. Such agreement is subject to the general rules of contract under the Qatari Civil Code issued by law n. 22 of 2004. Also, a settlement agreement may be considered in respect of the so-called "contract of compromise" which is regulated by art. 573-581 of the Qatari Civil Code. The applicable law to the enforcement of the conciliation agreement shall be the law decided by the parties (autonomy of the parties principle).

There is no difference in the applicable rules whether the enforcement of the settlement (or compromise) agreement results from conciliation or not.

No procedure exists for "expedited" enforcement of international commercial settlement agreements.

Question 2: Grounds for refusing enforcement of a commercial settlement agreement

A settlement agreement is not treated as a final award rendered by an arbitral tribunal. The parties enjoy full liberty to organize the conciliation and to draft the settlement agreement in the form they consider appropriate.

In case a settlement between parties is reached during arbitration proceedings, it may happen that the parties opt for requesting from the arbitral tribunal to record the settlement in the form of an arbitral award on agreed terms (see art. 37 of QICCA Arbitration Rules).

A settlement agreement should be in writing, signed by the parties and the conciliator. Qatari Courts shall consider "awards on agreed terms" enforceable under the New York Convention of 1958. Yet, there are not many applications of the enforcement of foreign arbitral awards in Qatar.

The traditional grounds for refusing the enforcement of a commercial settlement agreement are the same for any contract such as in case the subject of the contract is contrary to public order, or in case the parties are under legal capacity, etc.

Question 3: Validity of international commercial settlement agreements

There are no specific criteria regarding the validity of the settlement agreement in Qatar.

37. Spain

[Original: Spanish]
[Date: 16 April 2015]

Question 1: Information regarding the legislative framework

The regulatory framework for the enforcement of international commercial settlement agreements arising out of mediation/conciliation proceedings in Spain consists of the following legislation:

(a) Act No. 5/2012 of 6 July 2012 on mediation in civil and commercial matters (hereinafter "the Mediation Act");

(b) Act No. 1/2000 of 7 January 2000 on civil procedure (hereinafter "the Civil Procedure Act").

(a) The Mediation Act regulates mediation in civil or commercial matters, including cross-border disputes, provided that such mediation does not affect rights and obligations unavailable to the parties under the applicable legislation.

Its preamble states that the advantages of mediation include the fact that it provides practical, effective and financially beneficial solutions to certain disputes between parties and is therefore an alternative to legal proceedings or arbitration, from both of which it must be clearly distinguished. Mediation consists of the appointment of a neutral professional mediator who facilitates settlement of the dispute by the parties themselves in an equitable way, enabling underlying relationships to be maintained and allowing the parties to retain control over the outcome of the dispute.

Furthermore, the preamble to the Mediation Act defines as one of the Act's primary objectives the establishment of a general regime applicable to any mediation proceedings that take place in Spain and that have binding legal effect. The Act applies only to civil and commercial matters and is part of a model that takes into account the provisions of the UNCITRAL Model Law on International Commercial Conciliation of 24 June 2002.

The following are excluded from the scope of application of the Mediation Act: mediation in criminal cases; mediation in disputes involving government entities; mediation in labour disputes; and mediation in consumer matters.

The scope of application of the Mediation Act includes mediation in cross-border disputes, which are defined as follows: "1. A dispute is cross-border when at least one of the parties is domiciled or habitually resident in a State other than that in which any other party is domiciled and the parties agree to refer the dispute to mediation or mediation is obligatory under the applicable law. Disputes covered by or resolved by means of mediation agreements shall also be regarded as cross-border disputes, regardless of the place where the mediation agreement is concluded, if, as a consequence of transfer of domicile of any of the parties, the enforcement of the agreement or of any of its consequences is sought in the territory of a different State. 2. In cross-border litigation between parties residing in different member States of the European Union, domicile shall be determined pursuant to articles 59 and 60 of Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters."

(b) The Civil Procedure Act regulates the enforcement by Spanish judicial bodies of agreements arising from mediation. To that end, the Act establishes a finite list of instruments (documents) that are enforceable by Spanish courts.

Extrajudicial mediation agreements are recognized as enforceable, as are agreements between the parties to terminate legal proceedings that have already commenced, the latter being referred to as "court settlement" agreements. The Civil Procedure Act thus recognizes the following as enforceable: arbitral awards or decisions and mediation agreements, with the requirement that the latter be recorded in a notarial instrument in accordance with the Mediation Act; court rulings that approve or confirm court settlements and agreements reached during proceedings, accompanied,

if necessary in order to record their specific content, by the corresponding official copies of the record of proceedings.

i. On specific enforcement procedures, it is important to differentiate between:

(a) Requirements of form with respect to mediation agreements of a general nature;

(b) Additional formalities required for the enforcement of such mediation agreements; and

(c) Additional requirements for the enforcement of cross-border or international mediation agreements.

(a) With respect to mediation agreements of a general nature, both the Mediation Act and the Civil Procedure Act require the mediation agreement to comply with a series of requirements of form. Furthermore, the mediation agreement is required to be recorded in a public instrument in the presence of a notary public.

The mediation agreement must meet the following requirements: it must be in writing; it may deal with a part or the whole of the matter submitted to mediation; it must state the identity and domicile of the parties and the place and date of its signature; it must state the obligations assumed by each party; it must certify that mediation proceedings have been conducted in line with the provisions of the Mediation Act, indicating the mediator or mediators that have taken part in those proceedings and, where applicable, the mediation institution where the proceedings were conducted; it must be signed by the parties or their representatives.

(b) In addition to the requirements set out above, the mediation agreement must be recorded in a public instrument before a notary public in order to be considered by the courts to be enforceable. If an agreement is reached after legal proceedings have commenced, it is submitted for approval by the court or judicial body considering the case rather than being recorded in a notarial instrument. The mediation agreement is submitted by the parties to a notary public, accompanied by a copy of the records of the constitutive and closing sessions of the proceedings, without the presence of the mediator being required. In order for the mediation agreement to be recorded in a notarial instrument, the notary public must verify that it complies with the requirements of the Mediation Act and that its content is not contrary to law.

Where the mediation agreement is to be enforced in another State, in addition to being recorded in a notarial instrument, it must comply with the requirements, if any, of the relevant international conventions to which Spain is a party and of the relevant European Union instruments.

Where an agreement has been reached through mediation conducted after legal proceedings have begun, the parties may request the court to approve it.

(c) With respect to the enforcement of cross-border mediation agreements, the Mediation Act distinguishes between those mediation agreements that have become enforceable in the State in which they were concluded and those that have not. Mediation agreements are enforceable if declared as such by the judicial authority and/or the entity concerned. If the agreement is not enforceable, it must be recorded in a public instrument before a Spanish notary public at the request of the parties.

The Mediation Act and the Civil Procedure Act thus establish that: “1. Without prejudice to the terms set forth in the relevant European Union instruments and the international conventions in force in Spain, a mediation agreement that has already become enforceable in another State may be enforced in Spain only if it is declared enforceable by a competent authority that carries out functions equivalent to those performed by the Spanish authorities. 2. A mediation agreement that has not been declared enforceable by a foreign authority may be enforced in Spain only if it has been recorded in a public instrument by a Spanish notary public at the request of the parties, or at the request of one of the parties with the express consent of the others. 3. A foreign document may not be enforced when it is manifestly contrary to Spanish public order.”

ii. As indicated in the response to question i. above, a mediation agreement that has already become enforceable in another State may be enforced in Spain if it is declared enforceable by a competent authority that carries out functions equivalent to those performed by the Spanish authorities.

A mediation agreement that has not been declared enforceable by a foreign authority may be enforced in Spain only if it has been recorded in a public instrument by a Spanish notary public at the request of the parties, or at the request of one of the parties with the express consent of the others.

iii. The Arbitration Act (Act No. 60/2003) of 23 December 2003 enables parties to reach a settlement agreement in the course of arbitral proceedings. Such settlement agreements end the arbitral proceedings. They take the form of an award and the content agreed upon by the parties is enforceable in the same way as an award rendered by an arbitral tribunal.

Article 36 of the Arbitration Act thus provides as follows: "Award by agreement of the parties 1. If, during arbitration proceedings, the parties reach an agreement that settles the dispute wholly or partially, the arbitrators shall terminate the proceedings with respect to the matters agreed upon and, if they are requested by both parties to do so and consider that there are no grounds to object to that request, shall record the settlement in an award on the terms agreed by the parties. 2. The award shall be rendered in accordance with the following article and shall have the same legal consequences as any other award rendered on the merits of the case."

Such agreements constitute genuine arbitral awards that comply with the requirements of form applicable to an arbitral award. The proceedings resulting in the award are conducted by arbitrators rather than mediators or conciliators.

Awards on terms agreed by the parties as described above are enforceable under the New York Convention.

Question 2: Grounds for refusing enforcement of a commercial settlement agreement

As a rule, a nullity action may be filed with respect to the terms agreed upon in a mediation agreement only on the ground of contract invalidity.

If the contents of the mediation agreement meet the general requirements of form and the requirements for its enforcement, as described in the response to question (1) i. of this questionnaire, there are very limited grounds for refusing enforcement.

The party to the agreement against whom an action is to be enforced may, within 10 days following notice of issue of the writ of execution by the judicial authority concerned, object to the enforcement in writing on the basis that payment has been made or the action required of that party under the mediation agreement has been performed, providing documentary evidence thereof.

An objection may also be raised with respect to the time limit for enforcement and to any agreements or settlements that have been agreed upon in order to avoid enforcement, provided that such agreements and settlements are recorded in a notarial instrument.

Furthermore, in international mediation agreements, a foreign document may not be enforced if it is manifestly contrary to Spanish public order.

Question 3: Validity of international commercial settlement agreements

There are no such bases or criteria in domestic Spanish law beyond the general requirements set out in the response to question (1) i. of this questionnaire. It should also be borne in mind that no agreement may be enforced if it is contrary to public order; consequently, there is no scope in such cases for challenging the validity of the agreement.

38. Switzerland

[Original: English]
[Date: 14 April 2015]

Swiss law has no specific rules as to the enforcement of commercial settlement agreements resulting from international mediation or conciliation proceedings. Agreements of that kind are not treated in any different way than other commercial agreements between private parties.

39. Viet Nam

[Original: English]
[Date: 29 May 2015]

Viet Nam's legal documents relevant to this issue include the 2004 Code of Civil Procedure and the 2010 Law on Commercial Arbitration. These legal documents contain provisions on the enforcement of commercial settlement agreements mediated by a domestic court or an arbitral tribunal established in accordance with the Vietnamese Law on Arbitration, provided that these agreements are recorded in the form of decisions by that court or tribunal. Currently, Viet Nam is considering regulations on procedures for Vietnamese courts to recognize and enforce commercial settlement agreements mediated by mediation centres established under Vietnamese laws.

However, Vietnamese laws do not provide for the cross-border enforcement of international commercial settlement agreements resulting from international commercial mediation and conciliation proceedings.

Likewise, Vietnamese laws remain silent on the issues stated in the UNCITRAL's list of questions, including those on the grounds for refusing enforcement of a commercial settlement agreement, criteria for the validity of commercial settlement agreements, bases in law for commercial settlement agreements to be deemed as invalid.

(A/CN.9/846/Add.4) (Original: Russian)

Note by the Secretariat on settlement of commercial disputes: enforcement of settlement agreements resulting from international commercial conciliation/mediation: compilation of comments by Governments

ADDENDUM

Contents

III. Compilation of comments

40. Russian Federation

[Original: Russian]
[Date: 11 June 2015]

Responses to the questions of UNCITRAL Secretariat regarding legislative framework with respect to cross-border enforcement of international commercial settlement agreements (resulting from international commercial mediation/conciliation proceedings)

1. In the Russian Federation, the main regulatory acts applicable in resolving the issue of enforcement of international commercial settlement agreements are Federal Act No. 193-FZ of 27 July 2010 on the alternative dispute settlement procedure with the participation of an intermediary (mediation procedure), Russian Federal Act No. 5338-1 of 7 July 1993 on international commercial arbitration, and Russian Federal Arbitration Procedure Code No. 95-FZ of 24 July 2002.

(i) An amicable agreement on the settlement of a dispute (mediation agreement) is enforceable as a normal court judgement if it has been approved by a court. This rule applies if an agreement is reached as a result of a conciliation proceeding (mediation) held following referral of the dispute to a court or arbitral tribunal. In order to be approved by the court, the mediation agreement must be concluded in writing and contain information about the parties, the matter in dispute, the mediation proceeding, the mediator and the obligations, conditions and time frame for their implementation agreed by the parties. If a settlement agreement was reached by the parties as a result of a mediation proceeding without the referral of the dispute to a court or arbitral tribunal, such an agreement is regarded as a civil transaction, to which the rules of civil law on compensation for termination of contract, novation, debt forgiveness, offset of counterclaims of a similar kind and compensation for harm apply. The protection of rights violated as a result of non-enforcement or improper enforcement of such a mediation agreement is exercised by means provided for in civil law.

(ii) Federal Act No. 193-FZ of 27 July 2010 on the alternative dispute settlement procedure with the participation of an intermediary (mediation procedure) imposes no restrictions on nationality or objective content as regards a conciliation proceeding (mediation) carried out on the territory of the Russian Federation. Further, the current legislation does not provide for special procedures for the enforcement of international commercial settlement agreements, where such agreements are the result of a conciliation/mediation proceeding (mediation). There is no procedure for the expedited enforcement of international commercial settlement agreements.

(iii) Under Russian legislation on international commercial arbitration, parties who have concluded an international commercial settlement agreement may request

an international arbitral tribunal within the territory of the Russian Federation to make an arbitral award on agreed terms in accordance with the commercial settlement agreement submitted by them.

The enforcement of an international commercial settlement agreement which has been formalized as an arbitral award on agreed terms is governed by the legislation on international commercial arbitration.

(1) There are no special rules in Russian legislation relating to the procedure for the rendering, content and drafting of an award on agreed terms. In particular, there is no obligation whatsoever to conduct arbitral proceedings if the parties have requested the arbitral tribunal to make an arbitral award on the basis of a settlement agreement submitted by them.

(2) Russian legislation does not contain any specific requirements, as regards either form or content, applicable to a settlement agreement submitted by the parties to an arbitral tribunal for approval and for the issuance of an award on agreed terms. It is not stipulated in the legislation that a settlement agreement submitted to the arbitral tribunal for an award on agreed terms must have been reached by the parties as a result of conciliation proceedings (mediation). It is reasonable to conclude therefore that, when making an arbitral award on agreed terms, an arbitral tribunal will apply the general provisions that apply when making conventional international arbitral awards.

(3) There is currently no information on judicial practice relating either to the challenging or enforcement of international arbitral awards on agreed terms made in the Russian Federation, or to the recognition and enforcement of foreign arbitral awards in accordance with the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) and the European Convention on International Commercial Arbitration (Geneva, 1961). Nevertheless, we may assume that if such situations arise, Russian courts will approach the enforcement of international arbitral awards on agreed terms in the same way as they approach normal international arbitral awards. In particular, they will consider whether under Russian law the matter in dispute settled by the agreement is admissible as the subject of the arbitration proceeding, and consider whether the arbitral award on agreed terms is contrary to the public policy of the Russian Federation.

2. According to established judicial practice, if a settlement agreement is presented for approval by the court, the court may refuse to approve the settlement agreement and thereby exclude the possibility of its enforcement if the conditions of the agreement are inconsistent with the existing legislation or violate the rights and legitimate interests of others. If the settlement agreement takes the form of an arbitral award on agreed terms, its enforcement will be denied unconditionally if the object of the dispute to which the settlement agreement relates may not under Russian law be admitted as a subject of arbitral proceedings, and if the content of the settlement agreement would be contrary to the public policy of the Russian Federation.

3. Russian legislation does not impose any criteria with which an international commercial settlement agreement must comply in order to be considered valid. A general requirement of Federal Act No. 193-FZ of 27 July 2010 on the alternative dispute settlement procedure with the participation of an intermediary (mediation procedure) is that the settlement agreement (mediation agreement) must be in writing and contain information about the parties, the matter in dispute, the mediation proceeding, the mediator and the obligations, conditions and time frames of their implementation agreed by the parties. In accordance with this law, an agreement to have the dispute dealt with in the framework of a mediation proceeding must be in writing. Moreover, such an agreement must contain information on the matter in dispute; on the mediator, mediators or organization handling the mediation procedure; on the procedure for conducting the mediation proceeding; on the conditions of the sharing of costs related to the mediation by the parties; and on the time periods for

conducting the mediation proceeding. The question of whether flaws in the agreement to participate in conciliation may be grounds for challenging a settlement agreement reached as a result of the procedure provided for by this agreement is not resolved directly in law. Further, the law does not provide for any procedure or grounds for challenging the validity of a settlement (mediation) agreement reached within the framework of mediation/conciliation proceedings.

4. In the Russian Federation, the practice of using mediation/conciliation proceedings in commercial relations is currently in the very early stages of development. The business community in the Russian Federation has not yet gained the necessary experience for a broad application of this alternative method of settling disputes and differences of opinion in both domestic and international trade. However, it appears that the use of this method of settling commercial disputes in international commercial trade is unlikely to become more frequent in the coming years because, as practice shows, the availability of international arbitration procedures to contractors on the whole meets the demand dictated by the current level of development of international economic relations. Almost all international contracts drawn up in the vast majority of commercial transactions in international commercial trade include an arbitration clause. This allows contractors who have reached a settlement agreement resulting from mediation/conciliation proceedings to have such an agreement enforced, having requested an arbitral tribunal to convert their settlement agreement into an arbitral award on agreed terms. Even when the counterparties to an international commercial transaction have the opportunity to apply to a court for approval of a settlement agreement, they are unlikely to prefer this way, because in many cases this will mean involving a national court in their relationship, which they sought to avoid by including an arbitration clause in their contract. In view of the range of problems arising in this area of legal regulation, it appears that the legal mechanism needed to enforce international settlement agreements is unlikely to be less complex than the current mechanism for enforcing international arbitral awards. In addition, to develop it will require unified solutions, which will be extremely difficult to achieve given the rather profound differences in approach in this matter among domestic legal systems, which largely reflect their prevailing cultural and legal traditions.

(A/CN.9/846/Add.5) (Original: English)

Note by the Secretariat on settlement of commercial disputes: enforcement of settlement agreements resulting from international commercial conciliation/mediation: compilation of comments by Governments

[Original: English]

ADDENDUM

Contents

III. Compilation of comments

41. Czech Republic

[Original: English]
[Date: 29 June 2015]

Responses to the questions of UNCITRAL Secretariat regarding legislative framework with respect to cross-border enforcement of international commercial settlement agreements (resulting from international commercial mediation/conciliation proceedings)

1. (i) There is no specific legislative framework with regard to the enforcement of international commercial settlement agreements arising out of mediation or conciliation proceedings. For the purposes of presented questions the Act No. 202/2012 Coll., on mediation which covers only the enforcement of domestic mediation agreement (the final act of mediation) will be applied.

The mediation agreement is binding as a private contract. However, it is not enforceable by itself. In the case that the mediation agreement is not carried on voluntary, there are three ways of enforcing it.

The enforceability of the mediation agreement is possible through the institution of the court proceedings in which the court recognizes such agreement as being equivalent to the court decision which can be subject to enforcement proceedings. The court examines the validity of the mediation agreement by itself. For further enforcement of the mediation agreement in another EU member State, the Council Regulation No. 44/2001, on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters is applied.

The second possible way is the notarial record with enforcement clause, which is issued by a notary. The notary draws up a document which has character of a public document and which is subject to statutory requirements.

The last option for enforcement of the mediation agreement is through arbitral proceedings. On the request of the parties the arbiter may issue the settlement as an arbitral award. As opposed to the previous methods the settlement of the parties does not arise from mediation but from arbitration proceedings.

(ii) No.

(iii) As it has been already mentioned, the settlement of dispute may be issued as an arbitral award only on the request of the parties. However, it arises from arbitral proceedings and not from mediation. The mediation agreement itself is not treated as a final award rendered by an arbitral tribunal.

(1) The commencement of arbitral proceedings is not required. In general the mediation commences by conclusion of an agreement on mediation. The agreement must contain following information: identification of the parties,

identification of mediator, the subject matter, the remuneration of mediator and the determination of period during which is the mediation held.

(2) Under the Czech law is required writing form of the mediation agreement which includes signature of parties, date and signature of mediator.

(3) No.

2. Grounds for refusing enforcement of the mediation agreement:

- The subject matter of the mediation agreement is not capable of settlement by mediation or conciliation under the Czech law.
- The mediation agreement is in conflict with the provisions of substantive law and the public order of the Czech Republic.
- The mediation agreement is not valid under legal incapacity (undue duress; minors; insanity).
- The mediation agreement is not valid or enforceable in the state of origin.
- The mediation agreement was cancelled in the state of origin.

3. As it has been already mentioned, the mediation agreement must be valid and enforceable in the state of origin. Its subject matter must be capable of settlement by mediation under the Czech law and cannot be in conflict with the provisions of substantive law and the public order of the Czech Republic.

F. Report of the Working Group on Arbitration and Conciliation on the work of its sixty-fourth session (New York, 1-5 February 2016)

(A/CN.9/867)

[Original: English]

Contents

I. Introduction

1. At its forty-eighth session, the Commission had before it the report of the Working Group on the work of its sixty-second session (A/CN.9/832) as well as comments by States on their legislative framework in relation to enforcement of settlement agreements (A/CN.9/846 and its addenda). After discussion, the Commission agreed that the Working Group should commence work at its sixty-third session on the topic of enforcement of settlement agreements to identify relevant issues and develop possible solutions, including the possible preparation of a convention, model provisions or guidance texts. The Commission also agreed that the mandate of the Working Group with respect to that topic should be broad to take into account the various approaches and concerns.[1] The Working Group commenced its consideration of that topic at its sixty-third session (A/CN.9/861).

2. At its forty-eighth session, the Commission considered the work undertaken by the Working Group in relation to the revision of the UNCITRAL Notes on Organizing Arbitral Proceedings (also referred to below as the "Notes"). The Commission approved the revised draft of the Notes in principle (contained in document A/CN.9/844) and requested the Secretariat to provide an updated draft in accordance with the deliberations and decisions of the Commission. The Commission also agreed that the Secretariat could seek input from the Working Group on specific issues, if necessary, during its sixty-fourth session and further requested that the revised Notes be finalized for adoption by the Commission at its forty-ninth session, in 2016.[2]

3. Further, at that session, the Commission considered items for possible future work, including the topic of concurrent proceedings and the preparation of a code of ethics/conduct, in the field of both investor-State and purely commercial arbitration. Regarding concurrent proceedings, the Commission requested the Secretariat to explore the topic further, in close cooperation with experts including those from other organizations working actively in that area and to report to the Commission at a future session with a detailed analysis of the topic including possible work that could be carried out.[3] Regarding the preparation of a code of

[1] *Official Records of the General Assembly, Seventieth Session, Supplement No. 17* (A/70/17), paras. 135-142.
[2] Ibid., para. 133.
[3] Ibid., paras. 143-147.

ethics/conduct, the Secretariat was requested to assess the feasibility of work in that area and report to the Commission at a future session.[4]

4. In addition, the Commission agreed that the Secretariat should continue to coordinate with organizations in relation to the various types of arbitration to which UNCITRAL standards were applicable, and to closely monitor developments, further exploring areas for cooperation and coordination. In relation to investor-State arbitration, the Commission noted that the current circumstances posed a number of challenges, and proposals for reforms had been formulated by a number of organizations.[5]

5. 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.193, paragraphs 5-7 and 12-15.

II. Organization of the session

6. The Working Group, which was composed of all States members of the Commission, held its sixty-fourth session in New York, from 1-5 February 2016. The session was attended by the following States members of the Working Group: Argentina, Armenia, Australia, Austria, Belarus, Brazil, Bulgaria, Canada, China, Croatia, Czech Republic, Denmark, Ecuador, El Salvador, France, Germany, Greece, India, Iran (Islamic Republic of), Israel, Italy, Japan, Kuwait, Malaysia, Mexico, Namibia, Pakistan, Panama, Philippines, Republic of Korea, Russian Federation, Singapore, Spain, Switzerland, Thailand, Turkey, Uganda and United States of America.

7. The session was attended by observers from the following States: Albania, Belgium, Chile, Cyprus, Egypt, Finland, Iraq, Lebanon, Libya, Mozambique, Netherlands, Norway, Qatar, South Africa, Sudan, Sweden and Viet Nam.

8. The session was also attended by observers from the Holy See and the European Union.

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

(a) *Intergovernmental organizations*: International Cotton Advisory Committee (ICAC);

(b) *Invited non-governmental organizations*: American Arbitration Association/International Centre for Dispute Resolution (AAA/ICDR), American Bar Association (ABA), American Society of International Law (ASIL), Arab Association for International Arbitration (AAIA), ArbitralWomen, Association for the Promotion of Arbitration in Africa (APAA), Association Suisse de l'Arbitrage (ASA), Belgian Center for Arbitration and Mediation (CEPANI), Cairo Regional Centre for International Commercial Arbitration (CRCICA), Chartered Institute of Arbitrators (CLARB), China International Economic and Trade Arbitration Commission (CIETAC), CISG Advisory Council (CISG-AC), Construction Industry Arbitration Council (CIAC), Cámara de Comercio de Lima (CCL), European Law Students' Association (ELSA), Florence International Mediation Chamber (FIMC), Forum for International Conciliation and Arbitration (FICACIC), G.C.C. Commercial Arbitration Centre (GCCAC), Institute of International Commercial Law (IICL), Inter-American Bar Association (IABA), Inter-American Commercial Arbitration Commission (IACAC), International Chamber of Commerce (ICC), International Council for Commercial Arbitration (ICCA), International Insolvency Institute (III), International Law Association (ILA), International Mediation Institute (IMI), Kuala Lumpur Regional Centre for Arbitration (KLRCA), Miami International Arbitration Society (MIAS), Milan Club of Arbitrators (MCA), Moot Alumni Association (MAA), New York City Bar Association (NYCBAR), New York International Arbitration Centre (NYIAC), P.R.I.M.E. Finance Foundation (PRIME), Queen Mary University of London School of International Arbitration (QMUL), Regional Centre for International Commercial Arbitration-Lagos (RCICAL) and Swedish Arbitration Association (SAA).

[4] Ibid., paras. 148-151.
[5] Ibid., para. 268.

10. The Working Group elected the following officers:

Chairperson: Ms. Natalie Yu-Lin Morris-Sharma (Singapore)

Rapporteur: Mr. Jeremy Shelly (Australia)

11. At the invitation of the Chairperson, Mr. Michael E. Schneider (Vice-Chair of UNCITRAL, Switzerland) presided over the discussion on the revision of the UNCITRAL Notes on Organizing Arbitral Proceedings (agenda item 4).

12. The Working Group had before it the following documents: (a) provisional agenda (A/CN.9/WG.II/WP.193); and (b) notes by the Secretariat regarding the revision of the UNCITRAL Notes on Organizing Arbitral Proceedings (A/CN.9/WG.II/WP.194) and regarding enforceability of settlement agreements resulting from international commercial conciliation (A/CN.9/WG.II/WP.195 and A/CN.9/WG.II/WP.196).

13. The Working Group adopted the following agenda:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Revision of the UNCITRAL Notes on Organizing Arbitral Proceedings.
5. International commercial conciliation: enforceability of settlement agreements.
6. Organization of future work.
7. Adoption of the report.

III. Deliberations and decisions

14. The Working Group considered agenda items 4 and 5 on the basis of the notes prepared by the Secretariat (A/CN.9/WG.II/WP.194, A/CN.9/WG.II/WP.195 and A/CN.9/WG.II/WP.196 and its Addendum). The deliberations and decisions of the Working Group with respect to agenda items 4 and 5 are reflected in chapters IV and V, respectively.

15. At the close of its deliberations, in relation to agenda item 4, the Working Group requested the Secretariat to prepare an updated draft of the UNCITRAL Notes on Organizing Arbitral Proceedings based on its deliberations and discussions for consideration by the Commission at its forty-ninth session. In relation to agenda item 5, the Working Group requested the Secretariat to prepare a document outlining the issues considered at the session and setting out draft provisions without prejudice to the final form of the instrument, grouping provisions into broad categories.

IV. Revision of the UNCITRAL Notes on Organizing Arbitral Proceedings

16. The Working Group commenced its consideration of the draft revised UNCITRAL Notes on Organizing Arbitral Proceedings as contained in paragraph 6 of document A/CN.9/WG.II/WP.194. The Working Group noted that the draft revised Notes had been prepared taking account of the decisions of the Working Group at its sixty-first and sixty-second sessions and of the Commission at its forty-eighth session.

Introduction

Paragraph 5

17. The Working Group agreed that the word “dictate” in paragraph 5 should be replaced by the word “indicate”.

Paragraph 7

18. With respect to the second sentence of paragraph 7, which addressed the benefits of selecting a set of arbitration rules, it was agreed that the advantage of such rules as having been widely interpreted by arbitral tribunals and courts and analysed in detail through a wide range of publications should be highlighted.

Annotations

Note 1 (Consultation for decisions on the organization of arbitral proceedings and procedural meetings)

Paragraph 9

19. While a suggestion was made that the first sentence of paragraph 9 should be elaborated to specifically deal with instances where a decision by the arbitral tribunal would require a subsequent agreement of the parties, it was generally felt that paragraph 9 sufficiently set forth the principle of requiring consultation between parties and the arbitral tribunal and that paragraph 15 also dealt with such circumstances.

Paragraph 10

20. It was agreed that the first sentence of paragraph 10 should make a distinction between the situation where the agreement of the parties affected the organization of the arbitral proceedings, in which case consultation with the arbitral tribunal would be sufficient, and the situation where the agreement of the parties affected the planning of the arbitrators, in which case the parties would be advised to not only consult but also seek the agreement of the arbitral tribunal.

21. It was further agreed that the last sentence of paragraph 10 should be revised to indicate that the parties would "usually" secure the agreement of the arbitral tribunal in addition to that of the arbitral institution when they agreed that an arbitral institution would administer the arbitration after the arbitral tribunal had been constituted.

Paragraph 13

22. With respect to paragraph 13, it was suggested that the paragraph could include a list of specific issues that might be discussed at the first procedural meeting, for example, bifurcation of the proceedings, possible use of conciliation/mediation, rules on evidence, and possibility of joinder. While there was some support for that suggestion, it was generally felt that retaining a general approach would be adequate as those issues might not necessarily arise in all arbitrations. In that context, reference was made to the last sentence of paragraph 5 which provided guidance on when to raise a matter. After discussion, it was agreed that the first sentence of paragraph 13 should remain unchanged, stating in general terms that a number of issues covered by the Notes would be addressed at the first procedural meeting.

23. Another suggestion with respect to paragraph 13 was that, where relevant, a reference to statutory and/or mandatory time limits imposed on the arbitral tribunal for rendering an arbitral award should be included as an item for consideration in the procedural timetable. Noting that there was a wide range of different approaches to imposing such limits and of practices, it was questioned whether such limits should be discussed at the first procedural meeting and included in the procedural timetable. It was also stated that that issue could be dealt with in paragraph 143 of the Notes. After discussion, it was agreed that paragraph 13 should be revised to indicate that it would be advisable for the parties and the arbitral tribunal to consider any statutory and/or mandatory time limits for rendering an award.

24. It was further agreed that time limits for communication of documentary evidence should also be mentioned in the list of items to be included in the procedural timetable.

Paragraph 14

25. With respect to paragraph 14, it was agreed that the word "regularly" in the last sentence should be replaced by the word "accordingly".

Paragraph 15

26. With respect to the first sentence of paragraph 15, it was suggested that the words "preferably with the prior consent of the parties" should be inserted after the words "revisited and modified" to highlight the need for the parties' prior agreement. In response, it was recalled that the Working Group had agreed to include a general statement in the Notes, referring to the need for the arbitral tribunal to consult and where possible, to seek the agreement of the parties (paragraph 9 of the Notes) without repeatedly mentioning that provision throughout the Notes. After discussion, it was agreed that paragraph 15 should not be amended as suggested. It was further agreed to consider revising the heading of Note 1 and restructuring its sections to highlight the general application of paragraph 9.

27. It was further agreed that the last sentence of paragraph 15 should be revised to not rule out the possibility of the arbitral tribunal modifying a procedural arrangement agreed by the parties by seeking their agreement to such modification.

Paragraph 16

28. With respect to paragraph 16, it was agreed that the last sentence should be revised so as not to imply that the production of transcripts might limit open discussion at procedural meetings. It was further agreed that the paragraph may include a cross-reference to paragraph 134 of the Notes dealing with arrangements for a record of hearings.

Paragraph 18

29. With respect to paragraph 18, it was agreed that the words "at all" should be inserted after the words "in a procedural meeting" in the first sentence to clearly indicate that the hypothesis addressed in that paragraph related to the non-participation of a party as well as its representative in a procedural meeting.

Note 2 (Language or languages of the arbitral proceedings)

Paragraph 20

30. While preference for the use of a single language for the arbitral proceedings was suggested in the Notes, it was agreed that the first sentence of paragraph 20 should nevertheless mention "language or languages" in order to indicate that the parties would be free to choose either a single language or multiple languages. Paragraph 20 should then be restructured to deal with the choice of one language by the parties.

Paragraph 21

31. It was clarified that the phrase "a single template translation for similar documents with largely pictorial or numeric content" at the end of paragraph 21 referred more generally to documents that included standard content, and therefore the words "similar documents" should be replaced by the words "documents of similar or standardized content".

Paragraph 26

32. With respect to the second sentence of paragraph 26, it was agreed that, for the sake of clarity, the word "however" should be replaced by words along the lines of "irrespective of who paid the costs when they were incurred".

Note 3 (Place of arbitration)

Paragraph 28

33. With respect to paragraph 28, it was agreed that the second sentence should be revised to clarify that the "determination" of the place of arbitration had legal consequences. It was further agreed that the sentence should mention that such determination would have an impact on the determination of the court competent with respect to the arbitral proceedings. In addition, it was agreed to add the words "and challenges" after the words "appointment".

34. A suggestion that the third sentence of paragraph 28 should be expanded to provide for the need for the parties and the arbitral tribunal to familiarize themselves with not only

the "law" but also "practice", and "enforcement" law in addition to the arbitration law and any other relevant procedural law, did not receive support.

Paragraph 29

35. With respect to paragraph 29, a suggestion was made that certain aspects of subparagraphs (ii)(a) and (iii) might be redundant and should be clarified.

36. Another suggestion was that rules or regulations on confidentiality should be included as one of the prominent legal factors in selecting the place of arbitration. That suggestion did not receive support.

Paragraph 31

37. Recalling the discussions at the forty-eighth session of the Commission (A/70/17, para. 41), the Working Group agreed that paragraph 31 should include an additional sentence providing that the parties and the arbitral tribunal should consider that holding all hearings outside of the place of arbitration might have an impact at the stage of judicial review, setting aside or enforcement of the arbitral award in certain jurisdictions.

Note 4 (Administrative support for the arbitral tribunal)

38. A suggestion to expand Note 4 to address legal support in addition to administrative support was objected to as it fell outside the scope of the Notes.

Paragraph 36

39. The Working Group considered the two options contained at the end of paragraph 36 regarding the role of secretaries in relation to the decision-making of the arbitral tribunal. Preference was expressed for option 2 with the following modifications: (i) the word "typically" should be deleted, so as to clarify that secretaries should not be involved in any decision-making, save in relation to specific types of arbitration or in exceptional circumstances; (ii) concrete examples of such types of arbitration and exceptional circumstances should be provided; (iii) the word "function" should be deleted; (iv) the notion of secretaries performing tasks related to decision-making should be replaced by the notion of secretaries being involved or participating in the decision-making process. After discussion, it was agreed that paragraph 36 should be revised accordingly.

Paragraph 38

40. The suggestion to add the words "particularly if the secretaries carry out substantive tasks", after the words "performed by the secretary" in the first sentence of paragraph 38 did not receive support. It was said that such an addition would put too much emphasis on the substantive tasks carried out by the secretaries and might raise questions about what constituted a substantive task.

Note 5 (Costs of arbitration)

Paragraph 39

41. It was suggested that the in-house costs of the parties should be included in the list of costs mentioned in paragraph 39, possibly under subparagraph (iv), or as a separate paragraph providing information on the nature of those costs. It was pointed out that a reference to those costs would be important as the Notes should not mistakenly imply that only the legal fees of external counsel would be recoverable.

42. It was further mentioned that the treatment of in-house costs as part of arbitration costs was a controversial matter and the Notes should indicate the different approaches. After discussion, the Working Group agreed that that matter, which had not been previously discussed, should be brought to the attention of the Commission at its forthcoming session.

Paragraph 40

43. It was agreed to redraft paragraph 40 along the following lines: "It is useful for the arbitral tribunal to identify at the outset of the arbitral proceedings principles in determining

the costs of arbitration and the allocation thereof unless the agreement between the parties, the applicable arbitration law or arbitration rules adequately address those matters."

Paragraph 42

44. It was agreed that a reference to paragraph 39 (iii) should be added in the first sentence of paragraph 42, as the fees and expenses of arbitral institutions would usually be included in the deposit for costs.

Paragraph 43

45. It was suggested that paragraph 43 should clarify that the payment by a party of the deposit should not have an impact on that party's ability to challenge the jurisdiction of the arbitral tribunal. That suggestion received support.

Paragraph 46

46. The Working Group agreed to delete the words "portion of the" in the first sentence of paragraph 46 in order to make clear that the decision on costs concerned not only whether costs were recoverable in full or in part, but also whether certain items of the costs claimed were admissible or reasonable.

Paragraph 47

47. It was suggested that more detailed information should be given in paragraph 47 on how the costs should be allocated. It was said that, for instance, a party could be successful on certain claims and unsuccessful on others. After discussion, the Working Group agreed to add the words "in whole or in part" after the words "the costs of the arbitration should be borne by the unsuccessful party or parties" in the third sentence.

48. It was suggested that the last sentence of paragraph 47 should be redrafted along the following lines: "Conduct so considered might include a party's failure to comply with procedural orders of the arbitral tribunal or a party's procedural requests (for example, document requests, procedural applications and cross-examination requests) that are unreasonable, to the extent that any such failure or any unreasonable request actually had a direct impact on the costs of the arbitration and/or are determined by the arbitral tribunal to have unnecessarily delayed or obstructed the arbitral proceedings." That suggestion received support.

49. While a suggestion was made to include a reference to the complexity of the case as an additional element to be taken into consideration by the arbitral tribunal when allocating the costs, that suggestion did not receive support.

Paragraph 48

50. It was suggested that the last sentence of paragraph 48 should be simplified to state that decisions on costs could also be made when proceedings terminated without a final award. That suggestion did not receive support. It was explained that paragraph 48 adequately reflected that a decision on costs could be made at any stage of the arbitral proceedings. After discussion, it was agreed that the last sentence should be retained with additional examples.

Note 6 (Possible agreement on confidentiality; transparency in treaty-based investor-State arbitration)

Paragraph 51

51. With respect to the first sentence of paragraph 51, it was suggested that the duration of the confidentiality obligation (whether it was indefinite or for a set period) was also a matter to be covered in an agreement on confidentiality. With respect to the last sentence of paragraph 51, it was suggested that reference might also be made to all persons associated with the parties during the arbitration proceedings in addition to witnesses and experts. It was further suggested that subsection (iii) in paragraph 51 could be expanded to cover instances where a State that was a party to arbitration might be obliged to disclose certain

information under its laws, for example, legislation relating to providing public access to that information.

Paragraph 53

52. With respect to paragraph 53 which dealt with certain information or material deemed to be confidential to one of the parties, it was agreed that information relating to national security should also be included as an example, as this would be relevant in arbitration involving a State or a government entity.

Paragraph 54

53. A suggestion was made that the Notes should deal with issues that arose where a State or a government entity was a party to the arbitration in a comprehensive manner (see above, paras. 51 and 52). That suggestion was objected to on the basis that the Notes were intended to be used in a general and universal manner (see paragraph 1 of the Notes) without distinguishing different types of arbitration. It was further stated that paragraph 54 reflected a consensus reached by the Working Group that the issue of transparency in treaty-based investor-State arbitration, a topic worked on by UNCITRAL, deserved a different treatment and did not necessarily imply that it should be expanded to deal with arbitration involving States in a general manner.

54. With respect to the second sentence of paragraph 54, the suggestion to insert the words "and exceptions thereto" at the end of the penultimate sentence did not receive support. It was recalled that the purpose of that paragraph was to highlight that treaty-based investor-State arbitration might be subject to provisions on transparency, by contrast to commercial arbitration where confidentiality was viewed as an inherent characteristic. After discussion, it was agreed that paragraph 54 should remain unchanged.

Note 7 (Means of Communication)

Paragraph 55

55. With respect to paragraph 55, it was suggested that reference could be made under subparagraph (i) to the growing practice of using databases for uploading and sharing documents.

Note 8 (Interim measures)

Paragraph 60

56. With respect to the first sentence of paragraph 60, it was agreed that, for the sake of clarity, the words "for interim relief" should be deleted.

Paragraph 61

57. Recalling the discussion at the forty-eighth session of the Commission (A/70/17, para. 70), the Working Group agreed that the list of issues in paragraph 61 should include the possible conflict between an arbitral tribunal's decision on an interim measure and a court-ordered interim measure.

Note 11 (Points at issue and relief or remedy sought)

Paragraph 67

58. With respect to paragraph 67, a number of suggestions were made. One suggestion was that the words "and obtain the parties' approval of the list" should be added at the end of the first sentence. In response, it was said that requiring such approval did not reflect usual practice. A further suggestion was that paragraph 67 should reflect the practice of the parties preparing the list of points at issue. In response, it was state that such practice was not frequent and that such a list was normally prepared by the arbitral tribunal to clarify its understanding of the issues at stake. Yet another suggestion was that the paragraph could illustrate circumstances where the preparation of a list of points at issue might be unhelpful or inconvenient, for example, when the arbitration dealt with a complex case. Those suggestions did not receive support.

59. Furthermore, it was proposed that the list of points at issue should be characterized as being indicative and not exhaustive. It was further said that the list was often prepared in consultation with the parties and explicit reference to such consultation should be included in paragraph 67. It was mentioned that the preparation of such a list might be perceived as being distinct from decisions on the organization of arbitral proceedings, which was generally covered under paragraph 9 of the Notes. To reflect those suggestions, the Working Group agreed that the first sentence of paragraph 67 should be revised along the following lines: "It is often considered helpful for the arbitral tribunal to prepare, in consultation with the parties, an indicative list of points at issue (…) parties' submission."

Paragraph 69

60. With respect to paragraph 69, the Working Group agreed to add the words "a separate" before "judicial review" in the second sentence to highlight the situation where, under the applicable arbitration law, partial awards were subject to review before the final award was rendered.

Paragraph 70

61. With respect to paragraph 70, the Working Group recalled that, at the forty-eighth session of the Commission, it was mentioned that depending on the circumstances (including the applicable arbitration law), it might not always be appropriate for the arbitral tribunal to inform the parties of its concerns (for instance, if it found that the relief or remedy sought was not sufficiently precise) (A/70/17, para. 78). After discussion, the Working Group agreed that the current text sufficiently covered the views expressed at the Commission.

Note 12 (Amicable Settlement)

Paragraph 71

62. A suggestion was made that the following sentences should be inserted after the first sentence of paragraph 71: "Such initiative by the arbitral tribunal should not be considered a prejudgement of the outcome of the proceedings before the relevant body. No draft or proposal of settlement agreement should limit the rights of any party in any subsequent proceeding." It was further suggested that paragraph 71 could refer to the diversity of practices, in addition to referring to the different legislative approaches. After discussion, the Working Group recalled that the current text of paragraph 71 was the result of a compromise reached by the Working Group reflecting such concerns and agreed that it should remain unchanged.

Note 13 (Documentary evidence)

Paragraph 75

63. A suggestion was made that the words "the reasons for the request" in the second sentence of paragraph 75 should be replaced by more detailed wording along the following lines, which was found in the IBA Rules on the Taking of Evidence in International Arbitration: "a statement as to how the documents requested are relevant to the case and material to its outcome". That suggestion did not receive support as the Notes did not refer to specific standards or guidance texts and as the current formulation of paragraph 75 provided a more general and neutral approach.

Paragraph 77

64. The Working Group agreed that paragraph 77, which highlighted the different approaches to, and practices regarding, disclosure of documents, could be placed before paragraph 75.

65. A suggestion was made to add at the end of paragraph 77 the words "and adverse inferences, if any, resulting from non-disclosure". While it was agreed that that wording could be added as it reflected common practice, it was suggested that it could be better placed possibly in paragraph 73, as a tribunal would generally not make an advance determination on inferences that it would draw from non-disclosure.

Paragraph 79

66. It was suggested that paragraph 79 should note that certain arbitration rules prevented an arbitral tribunal from taking steps to obtain documentary evidence from a third party without obtaining the consent of the parties. After discussion, the Working Group agreed to insert the words "and permitted by applicable arbitration law and rules" after the words "where necessary".

Paragraph 81

67. The Working Group agreed that a reference to the "completeness", in addition to provenance and authenticity, of evidence should be inserted in paragraph 81.

Notes 14 to 18

68. Before the close of the session devoted to the consideration of the Notes, the Working Group heard suggestions with respect to the remaining parts of the Notes, which would be reflected in the updated draft of the Notes for consideration by the Commission.

Note 14 (Witnesses of fact)

69. With respect to paragraph 86, the opening words "Subject to the applicable arbitration laws and arbitration rules" should be deleted.

70. With respect to paragraph 87, the words "sufficient to" should be replaced by the words "that may", in the first sentence; the second sentence should be placed at the end of that paragraph.

71. With respect to paragraph 89, the first sentence should refer to the party in addition to the persons related to that party and refer to divergent approaches in how a party not eligible to testify as a witness could nevertheless be heard.

72. With respect to paragraph 90, the second sentence should include a reference to contacts made to seek information about the facts of the case, in addition to contacts in relation to the preparation of written witness statements and oral testimony. Paragraph 90 should indicate that international arbitration could differ from domestic court practice in respect of the permissibility of pre-testimony contact, as well as in respect of the nature of such contact. The last sentence of that paragraph should be expanded to reflect the controversial nature and divergent approaches to the preparation of the witness for the hearing.

73. Paragraph 91 should mention that the parties should be informed that the arbitral tribunal might draw inferences from non-appearance of a witness.

74. With respect to paragraph 92, the words "or to lend support to the efforts of parties by inviting the appearance of a witness" should be added at the end of that paragraph.

Note 15 (Experts)

75. With respect to paragraph 94, the words "or otherwise assisting it in matters requiring specialized knowledge or skills" should be added at the end of that paragraph.

76. With respect to paragraph 97, the words ", factual assumptions" should be inserted before the words "and issues to be covered" in the first sentence.

77. As the parties would always be entitled to comment on a single joint report of the experts, the last sentence of paragraph 100 should be amended accordingly. Further, the question of whether the parties would be bound by the conclusions of the joint report by experts should be addressed.

78. Paragraph 104 should reflect that parties would usually be given an opportunity to comment on the expert's mandate, in addition to expert's qualification, impartiality and independence.

79. Paragraph 106 should expand on the question of ex-parte communication between an expert and a party and clarify how an expert's ex-parte communication would be treated.

80. Paragraph 107 should clarify the meaning of "formal and informal submissions" including the possibility for the parties to comment on the tribunal-appointed expert's report through their own expert's report.

Note 16 (Inspection of a site, property or goods)

81. The words "and the manner" should be inserted after the words "time schedule" in paragraph 111.

Note 17 (Hearings)

82. With respect to paragraph 118, the words "before or during the hearings" should be added at the beginning of the first sentence. The last sentence of paragraph 118 should state that the parties would be able to provide a summary of the case as it presented itself at the end of the proceedings.

83. With respect to paragraph 122, the manner in which time should be kept throughout the proceedings should be mentioned in a general fashion.

84. With respect to paragraph 125, cross-reference should be made to paragraph 132 of the Notes, which illustrated the order of questioning witnesses. The last sentence of paragraph 125 could be deleted as it did not reflect current practice.

85. With respect to paragraph 126, the second sentence should refer not only to "experts" but also to "witnesses".

86. With respect to paragraph 128, the Notes should indicate the flexibility given to the arbitral tribunal to not examine or cross-examine a witness even when requested by a party as a means to effectively manage the proceedings. In response, it was mentioned that such flexibility could raise concerns about due process and would require further consideration.

87. With respect to paragraph 129, reference to "managing directors or executives" should be included in addition to the example of "in-house legal counsel".

88. With respect to paragraph 131, the words "or when no arbitration rules apply" in the last sentence should be deleted.

Note 18 (Multiparty arbitration)

89. With respect to the second sentence of paragraph 137, the following could be added: "for example, if all the parties do not have an equal say in the appointment of the arbitral tribunal, it may raise concerns about the fairness of the proceedings".

V. International commercial conciliation: enforceability of settlement agreements

90. Upon completing its deliberation of the revision of the UNCITRAL Notes on Organizing Arbitral Proceedings, the Working Group considered the topic of enforceability of settlement agreements on the basis of document A/CN.9/WG.II/WP.195. It was agreed that section B on validity and content of settlement agreements would be considered in conjunction with section D on enforcement procedure and defences to enforcement. Furthermore, the Working Group agreed to consider the formulations of possible provisions contained in document A/CN.9/WG.II/WP.195 with the aim of delineating the various issues and focusing the discussion. Paragraphs referred to in the sections below are those contained in document A/CN.9/WG.II/WP.195.

91. A comment was made that the Working Group should be mindful of the need to ensure that the work on enforceability of settlement agreements would not result in duplication of efforts with work undertaken by the Hague Conference on Private International Law (the Convention on the Choice of Court Agreements (2005) and the Judgments Project). Further, it was said that the scope of a possible instrument on enforcement of settlement agreements (referred to below as the "instrument") should be limited to apply to settlement agreements resulting from conciliation and should preserve the flexible nature of conciliation. It was generally felt that those matters could be dealt with as the Working Group made progress.

A. International commercial settlement agreements resulting from conciliation

92. Recalling the understanding of the Working Group at its sixty-third session that the instrument should apply to enforcement of international commercial settlement agreements resulting from conciliation, the Working Group engaged in discussion on the different aspects to be considered.

"International" settlement agreements

93. Recalling the discussions during the preparation of the UNCITRAL Model Law on International Commercial Conciliation (referred to below as the "Model Law"), which only provided a definition of an international conciliation process, a suggestion was made that there was no need to limit the scope of the instrument to international settlement agreements and that the aim should be to provide an enforcement mechanism regardless of whether the settlement agreement was international or not. It was stated that such an approach would increase the usefulness of the instrument and take into account the evolving and global business practices. That suggestion did not receive support.

94. It was widely felt that the scope of the instrument should be limited to "international" settlement agreements and that the instrument should provide clear and simple criteria for determining whether or not a settlement agreement fell under the scope of the instrument. It was further noted that subjective elements should not form the basis of such criteria.

95. In that context, it was pointed out that the formulations in paragraphs 10 and 11 provided for a useful basis. However, it was noted that they were slightly distinct as the formulation in paragraph 11 not only defined what an "international" settlement agreement was but also provided the scope of application of a possible convention, thus elaborating the conditions for its application (i.e. that the State where enforcement was sought would need to be a Contracting State).

96. The Working Group then considered the formulation in paragraph 10. It was widely felt that subparagraph (a) as contained in paragraph 10 provided clear and objective criteria, which would be sufficient for the purposes of the instrument.

97. In that context, a suggestion was made that the instrument might provide a more detailed explanation of what was meant by a "party", taking into account the current global business practices as well as complex corporate structures. For instance, it was suggested that consideration be given to the shareholding of the parties. It was stated that such an approach could effectively broaden the scope of the instrument.

98. With respect to subparagraph (b) as contained in paragraph 10, a number of concerns were expressed: (i) that it introduced unnecessary complexities, (ii) that it might touch upon certain aspects of domestic law or laws governing domestic settlement agreements, and (iii) that it would be difficult to ascertain whether a settlement agreement fell within that category. While there was some support for retaining subparagraphs (b)(i) and (ii) in paragraph 10, doubts were expressed with regard to subparagraph (b)(iii). It was generally felt that the instrument should not apply to the enforcement of a settlement agreement concluded by parties that had their places of business in the same State, even if the enforcement was sought in another State. Accordingly, there was general support to delete subparagraph (b)(iii) in paragraph 10 and subparagraph (ii) in paragraph 11. Nonetheless, there was some support to retain subparagraph (b)(iii) in paragraph 10.

99. Another suggestion was that reference could be made to article 1(3)(c) of the UNCITRAL Model Law on International Commercial Arbitration, which provided that an arbitration was also international if the parties expressly agreed that the subject matter of the arbitration agreement related to more than one country.

100. With respect to the formulation in paragraph 12, a number of suggestions were made. One was that the last sentence could be deleted as the scope of the instrument would be limited to "commercial" settlement agreements, which presupposed that parties would usually have a place of business. In response, it was pointed out that non-business entities and natural persons might also engage in commercial activities and conclude settlement agreements, which would require a reference to their habitual residence. It was further

pointed out that there existed sufficient guidance on the notion of place of business. Another view was that the notion of "place of business" should be defined in the instrument.

101. Another suggestion was that the concept of "habitual residence" could be further developed based on the statutory seat, the law of incorporation, the place of central administration, or the principal place of business.

"Commercial" settlement agreements

Notion of "commercial"

102. The Working Group recalled that, at its sixty-third session, it was generally felt that the instrument should apply generally to the enforcement of "commercial" settlement agreements. The Working Group reiterated its understanding that the instrument should apply to enforcement of settlement agreements of a commercial nature. The Working Group considered how to define the commercial nature of the settlement agreement.

103. Preference was generally expressed for stating in general terms that the instrument would apply to commercial settlement agreements, without providing for an illustrative list or definition of the term "commercial" as suggested in footnote 8.

104. It was suggested that, depending on the form of the instrument, the notion of commercial could be considered through the scope provisions of the instrument. In that respect, the following drafting suggestion was made: "The instrument shall apply in commercial matters".

105. Suggestions were made that the definition of "commercial" should be considered in conjunction with the grounds for refusing enforcement particularly in relation to grounds indicated in subparagraphs A and B in paragraph 55. It was further suggested that the definition of the term "commercial" should be considered in light of its possible impact on the enforcement of settlement agreements.

Exclusions and reservations

106. It was generally felt that consumers, family and employment law matters should be explicitly excluded. It was also generally felt that there were no other exclusions to be mentioned in the instrument. A suggestion was made that the instrument should refer to family or employment "matters" instead of "law". In response, it was stated that family "matters" could encompass commercial disputes involving family member even without family law aspects, such as divorce or custody, and such disputes would actually be best suited for resolution by conciliation.

107. It was suggested that the use of the term "consumer" in option 2 in paragraph 18 should be avoided as it was too generic, and understood differently in various jurisdictions. As a drafting suggestion, reference was made to "settlement agreements concluded by one of the parties for personal or household purposes".

108. It was mentioned that the scope of family law matters was different in various jurisdictions and that clarification might be necessary possibly with examples (for example, religious bequests, inheritance and guardianship).

109. The Working Group reiterated its understanding that it would not be desirable for the instrument to include a blanket exclusion of settlement agreements involving government entities as those entities also engaged in commercial activities and might seek to use conciliation to resolve disputes.

110. It was suggested that if the instrument applied to commercial settlement agreements and a settlement agreement between a government entity and an investor was considered to be of a commercial nature under the applicable law, such an agreement should fall under the scope of the instrument.

111. It was suggested that if the instrument were to take the form of a convention, option 1 of paragraph 21 should be amended to only permit a State to declare that it would not apply the instrument to settlement agreements to which its government or governmental entities or agencies were a party.

112. It was suggested that the words "including their exclusion from the applicability of the instrument" could be inserted in option 2 of paragraph 21.

113. It was suggested that the instrument should not apply to liability of a State for its acts or omissions in the exercise of its authority (*Acta jure imperii*). It was suggested that the instrument should not refer to notions of State immunity.

114. After discussion, the Working Group agreed to further consider options 1 and 2 in paragraph 21 as well as the option provided above (see above, para. 113).

Settlement agreements resulting from "conciliation"

115. A suggestion was made that the instrument should apply to settlement agreements regardless whether they resulted from conciliation or not, as long as the parties to the settlement agreement expressly agreed to the application of the instrument. Although it was mentioned that the objective should be to promote all types of alternative dispute resolution methods without favouring conciliation over other means, that suggestion did not receive support. The Working Group reiterated its understanding that the instrument should apply to settlement agreements resulting only from conciliation.

116. With respect to the possible definition of the term "conciliation", it was reiterated that it should be broad and inclusive to cover different types of conciliation techniques. There was general support that the definition contained in article 1(3) of the Model Law as well as the formulation provided in paragraph 23, which built on article 1(3) of the Model Law with some minor adjustments, provided a good basis for discussion.

117. A suggestion was made that "conciliation" should be defined as a "structured" process to emphasize that the process involved a third person that facilitated the settlement agreement and to differentiate settlement agreements resulting from conciliation and those resulting from mere negotiation. While there was some support for that insertion, it was noted that it would constitute a departure from the definition contained in the Model Law and the purported aim of that insertion was already sufficiently highlighted in that definition. It was further mentioned that the term "structured" was not commonly used to qualify the conciliation process and could be understood differently, possibly introducing domestic requirements on conciliation into the instrument.

118. Another proposal was that the definition in article 1(3) of the Model Law should be supplemented by words along the following lines: "This definition excludes settlement agreements approved by a court or concluded before a court in the course of proceedings, as well as those formalized as awards on agreed terms issued by arbitral tribunals." The possible implication of that proposal in situations where an agreement would be enforced in more than one jurisdiction and could be approved by one of the courts as part of that process was questioned. In response, it was clarified that that exclusion should not apply in such circumstances. It was generally felt that it would not be appropriate to place such text within the definition of "conciliation". It was agreed that the proposed text would be considered when the Working Group discussed issues relating to settlement agreements reached during judicial or arbitral proceedings (see below, paras. 122-131).

119. A question was raised whether the term "conciliation" as defined in the instrument would cover conciliation administered by, or undertaken under, the auspices of an institution. In response, it was widely felt that the two formulations mentioned above (see para. 116) were broad enough to cover such type of conciliation and that it would not be necessary to include an explicit reference.

120. A view was expressed that the instrument should refer to "mediation" instead of "conciliation", as it was a more widely used term.

121. After discussion, it was widely felt that the definition of "conciliation" should not be overly prescriptive and should illustrate the key features of the process (i.e. that a third person assisted the parties to reach an amicable settlement of their dispute) irrespective of the terminology used to refer to that process. In that context, general support was expressed for using the definition in article 1(3) of the Model Law as a basis for future work, possibly incorporating the adjustments provided in the formulation in paragraph 23.

Settlement agreements reached during judicial or arbitral proceedings

122. The Working Group then considered whether settlement agreements reached during judicial or arbitral proceedings should fall within the scope of the instrument. It was mentioned that such settlement agreements could be broadly categorized into those that were recorded in a judicial decision or an arbitral award (on agreed terms) and those that were not recorded as such.

123. With respect to those that were recorded in a judicial decision or an arbitral award, it was mentioned that inclusion of such settlement agreements within the scope of the instrument could lead to overlap or conflict with the Convention on Choice of Court Agreements and the Judgements Project of the Hague Conference on Private International Law as well as the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (referred to below as the ''New York Convention''). It was cautioned that their inclusion could result in unnecessary complications in the implementation of the instrument and possibly open doors to abuse by parties. It was further stated that a single legal text should not be subject to different enforcement regimes. Along the same line, it was mentioned that even if a judicial decision or an arbitral award recorded the terms of a settlement agreement, it deserved a different treatment and should be duly enforced under the relevant regime. Accordingly, it was generally felt that a settlement agreement recorded in a judicial decision or an arbitral award should not fall within the scope of the instrument.

124. Nonetheless, views were expressed that such exclusion would result in depriving the parties of the opportunity to utilize the enforcement regime envisaged by the instrument. It was also noted that possible complications resulting from multiple enforcement regimes should be left to be addressed by courts where enforcement was sought. A concern was expressed with respect to the possibility of an award on agreed terms not being subject to court enforcement, for example, if the court found such an award to not fall within the scope of the New York Convention. It was stated that in such a scenario, in addition to not being able to enforce the award, the affected party would be deprived of the opportunity to resort to the enforcement mechanism envisaged by the instrument.

125. With respect to settlement agreements reached during judicial or arbitral proceedings but not recorded in a judicial decision or an arbitral award, it was widely felt that they should fall within the scope of the instrument. It was mentioned that even if the parties initially sought to resolve their dispute through judicial or arbitral proceedings, that should not result in excluding the settlement agreement from the scope of the instrument, as long as the agreement resulted from conciliation and was not recorded in a judicial decision or an arbitral award.

126. A number of different approaches to address issues relating to settlement agreements reached during judicial or arbitral proceedings were suggested.

127. One approach was that the definition of "conciliation" would expressly carve out settlement agreements recorded in a judicial decision or an arbitral award from the scope of the instrument (see above, para. 118).

128. Another approach was to address the issues in the scope provisions of the instrument along the following lines: "The instrument applies to settlement agreements, which were made in the course of judicial or arbitral proceedings but not recorded as a judgement or an arbitral award".

129. Yet another approach was to provide States with the flexibility in addressing issues relating to settlement agreements reached during judicial or arbitral proceedings, possibly through a declaration or a reservation, if the instrument were to be a convention. It was noted that such an approach would avoid blanket exclusions in the instrument, which would carve out settlement agreements reached during judicial or arbitral proceedings entirely, and provide States that wished to do so the option to apply the instrument to such settlement agreements. It was, however, cautioned that such an approach could result in multiple regimes complicating the enforcement procedure and possibly in forum shopping by parties seeking enforcement.

130. A fourth approach was that there would be no need to specify or highlight those issues in the instrument, as it should be left to the courts to determine whether the instrument would apply to settlement agreements reached during judicial or arbitral proceedings.

131. In that context, the Working Group also considered the possible impact that the involvement of a judge or an arbitrator in the conciliation process could have on the applicability of the instrument to settlement agreements resulting from that process. It was mentioned that there could be instances where a judge or an arbitrator might initiate the conciliation process with a third party acting as a conciliator and where the judge or the arbitrator might itself facilitate an amicable settlement, if permitted to do so. It was felt that a settlement agreement resulting from both scenarios would fall under the scope of the instrument and that mere involvement of a judge or an arbitrator should not result in excluding the settlement agreement from the scope of the instrument.

Definition of "settlement agreement"

132. It was suggested that a definition of "settlement agreement" could read as follows: "A settlement agreement is an agreement in writing that is concluded by the parties to a commercial dispute, that results from conciliation, and that resolves all or part of the dispute." It was mentioned that the elements therein could be included either in the definition or formulated as form requirements. The Working Group agreed to further consider the issue at a later stage.

B. Form and other requirements of settlement agreements

A written agreement concluded by the parties

133. With respect to form requirements of settlement agreements, it was reiterated that those requirements should not be prescriptive and should be set out in a brief manner preserving the flexible nature of the conciliation process. It was generally agreed that the instrument should require that the settlement agreement should be in writing and indicate the agreement of the parties to be bound by the terms of the settlement agreement. It was also widely felt that the principle of functional equivalence embodied in UNCITRAL texts on electronic commerce could be reflected in the instrument, allowing for the use of electronic and other means of communication to meet the form requirements therein.

134. A suggestion was made that the instrument should require that the settlement agreement be in a "single document" as distinct from mere exchange of communication between the parties. While there was some support for that suggestion, it was questioned whether the notion of "single document" was clear and whether it would be feasible to implement such a requirement considering that settlement agreements varied greatly in form and in content. It was also cautioned that such a requirement might result in excluding certain documents explicitly mentioned in the single document. In that context, attention was drawn to a wide range of contract formulation practices, including incorporation by reference.

135. Another suggestion was that there should be an indication in the settlement agreement that it superseded all previous relevant agreements between the parties. Yet another suggestion was that the instrument should require that a settlement agreement be recorded or deposited with a public or supervisory body so that its performance could be monitored. Those suggestions did not receive support.

Other requirements

136. The Working Group considered possible additional requirements in paragraph 42, which would be an indication: (i) that a conciliator was involved in the process; (ii) that the settlement agreement resulted from conciliation; (iii) that the parties to the settlement agreement were informed of the enforceability of the settlement agreement before or upon its conclusion; and (iv) that the parties opted into the enforcement mechanism envisaged by the instrument.

137. In relation to requirements (i) and (ii) in paragraph 42, it was widely felt that they were relevant, and could be retained, in particular following the understanding of the Working

Group that the instrument should cover settlement agreements resulting from conciliation (see above, para. 92).

138. However, diverging views were expressed on how to formulate such additional requirements. A view was that specific form requirements should be provided for (such as that the conciliator should sign the settlement agreement certifying that a conciliation took place, or that he or she should indicate his/her identity in the settlement agreement or submit a separate document for that purpose). One advantage of such form requirements, it was said, would be to avoid uncertainty about the applicability of the instrument. Those favouring that approach expressed different views on whether such requirements should be recorded in the settlement agreement itself or in a separate document.

139. A different view was that formulating such form requirements would run contrary to the objective of providing a simple and straightforward enforcement mechanism, aimed at promoting conciliation. In addition, formalities required in the conciliation process and its outcome varied among jurisdictions and such specific requirements would add another layer of complexity. It was said that form requirements in the instrument would bring more rigidity, without improving certainty. Further it was said that a number of States did not have legislation on conciliation and that requiring formalities might be detrimental to the development of conciliation in those States not familiar with conciliation.

140. Therefore, it was suggested that a preferable approach would be to avoid detailed form requirements which would be an impediment to the use of the instrument and that the instrument should only include those requirements necessary to ascertain that a settlement agreement fell within its scope. As an illustration of such an approach, a proposal was made that the parties could be required to show through appropriate means that conciliation took place. It was said that such an approach would take into account the context in which the conciliation took place, promote flexibility, while giving the necessary level of certainty as to the process that led to the settlement agreement. It was suggested that that proposal should be elaborated for further consideration.

141. The requirement (iii) in paragraph 42 was generally considered to be superfluous, particularly if the requirement (iv) were to be retained.

142. Diverging views were expressed in relation to the requirement (iv) in paragraph 42 (see also below, paras. 180-182). In favour of including that requirement in the instrument, it was said that an opt-in mechanism would ensure that parties would be aware of the expedited enforcement mechanism envisaged by the instrument. It was highlighted that the requirement for express consent would avoid the situation where the parties to conciliation would find a strengthen regime imposed upon them, which they might not find desirable. Contrary views were expressed that such an opt-in mechanism would limit the application of the instrument and should thus be avoided. In addition, it was observed that the New York Convention did not require parties to opt-in. From a practical perspective, it was said that, in most cases, it would be unlikely for the parties to agree to an expedited enforcement at the final stages of the conciliation process.

143. It was pointed out that form requirements in domestic laws governing conciliation were diverse and a possible approach for including form requirements in the instrument would be to permit States to make declarations, yet on a limited number of requirements. A further suggestion was that the instrument should focus on the requirements necessary to enforce "international" settlement agreements, thereby avoiding any application of requirements found in domestic legislation.

144. During the discussion on possible additional requirements, the need to find a balance between, on the one hand, the formalities that would be required to ascertain that the settlement agreement resulted from conciliation and, on the other, the need for the instrument to preserve the flexible nature of the conciliation process, was underlined. As a general comment, it was said that such additional requirements could be formulated as a pre-condition for applying for enforcement or as defences for resisting enforcement.

C. Enforcement procedure and defences to enforcement

Direct enforcement

145. With respect to the formulation in paragraph 45, it was suggested that reference should be made to "recognition" in both paragraphs therein (see also below para. 146). It was further suggested that the placement of that formulation in the instrument would need to be reconsidered as it dealt with the procedural aspects of obtaining enforcement and should follow the provisions on conditions for enforceability.

Notion of recognition

146. The Working Group considered whether a settlement agreement would need to be given effect through a procedure akin to recognition and what legal value such a procedure would give to settlement agreements. Different views were expressed. One was to adopt the approach of the New York Convention and refer to both recognition and enforcement. Another was that it would be preferable to avoid referring to the notion of "recognition". It was explained that the term "recognition" was understood in certain jurisdictions to have res judicata effect and the application of that principle might bear different consequences depending on the jurisdiction. Another view was that the notion of recognition should be qualified or its meaning elaborated in the instrument. The Working Group agreed to consider that matter further at a future session.

Defences to enforcement and applicable law

147. The Working Group considered the possible defences to enforcement, based on the assumption that the instrument would provide direct enforcement. It was reiterated that the defences in the instrument should be limited and not cumbersome for the enforcement authority to implement.

148. As a general comment, it was said that the standard for enforcement, including the defences to be provided in the instrument should not be lower than those provided for enforcement of arbitral awards under the New York Convention. Further, a preferable approach would be to differentiate between defences that could be raised by the parties and those that might be raised by the enforcing authority at its own initiative (ex officio), as provided in the formulation in paragraph 56.

149. A suggestion was made to determine, for the purposes of the discussion, whether settlement agreements were to be treated as contracts between private parties or acts of a particular nature resulting from a specific dispute resolution procedure.

150. The Working Group proceeded to consider the list of defences contained in paragraphs 55 and 56 as a basis for substantive discussion and not for drafting purposes.

Incapacity, coercion and fraud (subparagraph A in paragraph 55 and subparagraph 1(a) in paragraph 56)

151. A suggestion was made that incapacity should not be included as a defence as that matter would normally have been raised by the parties during the conciliation process or at the time of the conclusion of the settlement agreement. The example of institutional rules addressing the parties' capacity or authority to conclude the settlement agreement at the outset of the conciliation process was given.

152. In response, it was said that lack of capacity, as a ground for refusing enforcement, covered a wide range of situations (for instance, incapacity in the context of bankruptcy) and was commonly found in international instruments as well as domestic legislation. After discussion, it was generally felt that incapacity should be retained in the list of defences.

153. Support was also expressed for retaining "coercion" and "fraud" as defences, with the suggestion that alternative or more general wording might be preferable. For instance, it was suggested that paragraph 1(c) of the formulation in paragraph 56 could constitute a general provision that would also cover matters relating to coercion and fraud (see below, para. 159). It was further suggested that it might be desirable to provide that that defence would only

apply when the party enforcing the settlement agreement was involved in the coercion or fraud.

Subject matter of the settlement agreement not capable of settlement (subparagraph B in paragraph 55 and subparagraph 2 (a) in paragraph 56)

154. There was general agreement to retain "the subject matter of the agreement not capable of settlement by conciliation" as a defence, which could also be considered by the enforcing authority ex officio, as proposed in the formulation in paragraph 56.

Subject matter of the settlement agreement contrary to public policy (subparagraph C in paragraph 55 and subparagraph 2 (b) in paragraph 56)

155. There was general agreement to retain public policy in the list of defences, which could also be considered by the enforcing authority ex officio.

156. It was noted that public policy covered both substantive and procedural aspects. It was said that the flexible nature of conciliation could be easily used by parties to resist enforcement using the procedural public policy defence. In response, it was said that the enforcing authority would duly take into account the characteristics of conciliation in assessing such defence.

157. It was proposed that reference should be made to "international" public policy, as that notion would be more restrictive. In response, it was said that there was an established trend in case law that interpreted "public policy" more narrowly when there was an element of extraneity. It was suggested that the notion of international public policy might be understood as public policy shared by a number of States, which would make it more difficult for States to adopt the instrument.

Contrary to the terms and conditions of the settlement agreement (subparagraph 1 (b) in paragraph 56)

158. No comments were made with respect to subparagraph 1 (b) in paragraph 56.

Validity of the settlement agreement (subparagraph 1 (c) in paragraph 56)

159. It was suggested that subparagraph 1(c) in paragraph 56 could constitute a provision that would address matters relating to the validity of the settlement agreement in general terms. It was suggested that the words in square brackets could be retained for further consideration.

160. Concerns were expressed that subparagraph 1(c) would open the possibility of refusing enforcement in a wide range of circumstances, and result in the application of domestic legislation requirements, that might be too broad and include formal requirements thereby increasing the complexity and uncertainty of the outcome of enforcement under the instrument. In response, it was said that the inclusion of a provision in the instrument that the standard for enforcement would not be lower than those provided for enforcement of arbitral awards under the New York Convention (see above, para. 148) could accommodate those concerns on the understanding that such a provision would also apply to form requirements. It was suggested that following the decision of the Working Group at its sixty-third session that there should be no review mechanism as a pre-requisite to enforcement (A/CN.9/861, paras. 80-84), the instrument should not give the enforcement authority the ability to interpret the validity defence to impose requirements in domestic law. Suggestions were made to either omit validity in the list of defences, or to limit it to the validity of the settlement agreement, determined in accordance with the law deemed applicable to it by the enforcing authority. In that context, it was pointed out that it might be useful to differentiate the grounds for resisting enforcement and the grounds for challenging the validity of the settlement agreement, which might not necessarily fall under the competence of the enforcing authority. After discussion, there was a general understanding that consideration of the validity of the settlement agreement by the enforcing authority should not extend to form requirements.

161. Views were expressed that the terms "[not valid]" should be deleted from subparagraph 1(c), so that the provision would only refer to the settlement agreement being

"null and void, (…) enforced" following wording used in article II of the New York Convention and article 8 of the Model Law on International Commercial Arbitration.

The settlement agreement is not binding, is not final, has been subsequently modified or the obligations therein have been performed (subparagraph 1 (d) in paragraph 56)

162. It was generally felt that the provisions of subparagraph 1(d) in paragraph 56 could be retained and encompass other situations, such as when the settlement agreement contained conditional or reciprocal obligations and when certain obligations in the settlement agreement had been breached.

Enforcement of the settlement agreement would be contrary to a decision of another court or competent authority (subparagraph 1(e) in paragraph 56)

163. With respect to subparagraph 1(e), in paragraph 56, a few questions were raised. One was with regard to the meaning of "another court or competent authority". To avoid ambiguity, it was suggested that reference should be made to "the competent court or authority at the place where the settlement agreement was concluded or the place chosen by the parties". In response, it was noted that such a provision would be at odds with certain instruments or approaches, for example, the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Lugano, 2007). It was generally felt that there was no need to provide for such specificity in the instrument, particularly as it would be difficult to determine the place where the settlement agreement was concluded.

164. In response to a question on what types of decisions by another court or competent authority would be taken into account by the enforcing authority, it was mentioned that they could be decisions on the validity of the settlement agreement as well as those in relation to the recognition and enforcement of the settlement agreement in another State. In that context, a suggestion was made to limit the types of decisions to those that found a settlement agreement null and void. However, it was also suggested that decisions by another court or competent authority which found, for example, that an obligation had been performed or performed in part, might also be a valid ground on which an enforcement authority might wish to rely for refusing enforcement.

165. Diverging views were expressed with respect to whether subparagraph 1(e) should be retained in the instrument. One view was that there was merit in retaining the defence, as it was presented in a permissive manner ("may be refused") and it could accommodate the interest of States that might have obligations under certain treaties regarding recognition of decisions by foreign courts. It was highlighted that the enforcing authority would, in any case, have the final word in the enforcement process.

166. Another view was that there was no need to retain the defence in the instrument. It was pointed out that the provision as currently drafted could invite forum shopping by parties as it was not clear which would be the competent court or authority making the decision, possibly hindering the enforcement stage. It was also noted that the provision might inadvertently expand the principle of *res judicata* to those decisions that did not have such effect. In addition, it was stated that a refusal of enforcement by a court or competent authority in another State should not have an impact on the decision to be made by an enforcing authority.

Additional defences

167. In addition to the defences provided in the formulations in paragraphs 55 and 56, the following were suggested as possible defences: non-compliance with the form requirements contained in the instrument, mistake or misrepresentation in the settlement agreement and that the settlement agreement was obtained by duress or deceit.

Relationship of enforcement proceedings with judicial or arbitral proceedings

168. The Working Group then considered whether the instrument should include a provision on the impact judicial or arbitral proceedings with respect to settlement agreements could have on their enforcement process. Acknowledging the benefits of and the need for the enforcing authority to duly respect decisions by a court or

an arbitral tribunal, it was suggested that the instrument could provide for a non-mandatory rule that the enforcing authority might adjourn the enforcement process in such circumstances.

169. After discussion, it was widely felt that the instrument could include a provision based on article VI of the New York Convention, for example, providing that the enforcing authority might, if it considered proper, adjourn the enforcement process when there existed an application for a judicial or arbitral proceedings about the settlement agreement, in accordance with the rules of procedure of the enforcing State.

D. Conciliation process and content of settlement agreements

Impact of the conciliation process and the conduct of conciliators

170. The Working Group then engaged in a discussion on whether the conciliation process or the conduct of a conciliator could have an impact on the validity of the settlement agreement and its enforceability.

171. One view was that non-compliance by conciliators with standards of conduct or relevant domestic legislation (for example, misconduct or lack of impartiality), should have an impact on the settlement agreement and that the instrument should include a provision along the lines of article V(1)(d) of the New York Convention. It was mentioned that if a party furnished proof to the enforcing authority that the conciliation process had been tainted, the enforcing authority might refuse the enforcement of the settlement agreement. It was also noted that serious non-compliance would fall under the public policy defence.

172. In response, the voluntary nature of the conciliation process was highlighted. It was emphasized that parties were free to withdraw from the process at any time, that the conciliator lacked the authority to impose a settlement and that a settlement was a result reached voluntarily between the parties. It was also mentioned that conciliators were not subject to the same impartiality requirements as arbitrators or judges and as such, the breach of impartiality by a conciliator should not amount to a defence for refusing enforcement. It was reiterated that it was the parties themselves that concluded the final settlement agreement. In that context, a question was posed whether a different approach would be required if one of the parties became aware of the misconduct of the conciliator or of the other party only after the conclusion of the settlement agreement. After discussion, it was generally felt that such misconduct would usually qualify as one of the defences provided in the formulation in paragraph 56 (see above, paras. 153 and 167).

173. In that context, it was noted that there were existing resources that provided information about issues which arose at the stage of enforcement of settlement agreements. Delegations were invited to provide information to the Secretariat so as to assess current practice.

174. During the discussion, a suggestion was made that, while the instrument need not deal with the impact of the conciliator's conduct on the enforceability of the settlement agreement, it might be necessary to ensure consistency of the instrument with the Model Law which included a mandatory provision, article 6 (3), which required the conciliator to maintain fair treatment of the parties.

175. After discussion, there was an emerging view that serious misconduct during the conciliation process, which had an impact on its outcome, would probably be covered by the other defences to be provided for in the instrument. Delegates were encouraged to review the experience of those jurisdictions where the enforcement of settlement agreements had been the subject of litigation. It was suggested that that experience might be of assistance in confirming the emerging view of the Working Group.

Set-off

176. A suggestion was made that the instrument should not deal with instances where the settlement agreement might be used for set-off purposes based on the same reasons that it would be inappropriate for the instrument to deal with the recognition of settlement agreements. That issue was left for further discussion by the Working Group.

Dispute resolution clause in settlement agreements and party autonomy

177. Acknowledging that a settlement agreement might include a dispute resolution clause (for example, an arbitration clause or a choice of court provision), the Working Group considered whether it would be necessary for the instrument to deal with those issues. It was generally felt that the instrument would not need to include any provisions on the matter, as the treatment of such dispute resolution clauses were dealt with in other texts (for example, the New York Convention or the Convention on Choice of Court Agreements) and as the objective of the instrument was to facilitate enforcement.

178. In that context, the following example was provided: if a party were to seek enforcement of a settlement agreement which included an arbitration clause without engaging in arbitration, the party against whom the enforcement was invoked could raise a defence under subparagraph 1(b) in paragraph 56, as it would be contrary to the terms and conditions of the settlement agreement. If the enforcing authority were to be a court, it would also refer the parties to arbitration in accordance with article II(3) of the New York Convention.

179. It was generally felt that the parties' choice of dispute resolution included in the settlement agreement should be respected. It was noted that a distinction should be made between the dispute in merit and the enforcement process. However, it was also noted that such a distinction might not be practical.

Parties' agreement to apply the instrument (opt-in)

180. While the issue of whether the application of the instrument would depend on the parties' agreement to its application would remain under discussion at a future session, diverging view were expressed (see also above, para. 142).

181. There was support for the opt-in mechanism so as to provide parties with that option, to highlight the voluntary nature of the conciliation process and to raise the parties' awareness on the enforceability. However, it was also mentioned that requiring an opt-in by the parties might run contrary to the instrument having a broad scope, raise complexities if the instrument were to be a convention, which allowed for declaration by the States, and might not be practical at the conclusion of the settlement agreement. It was further pointed out that the opt-in by the parties should be distinguished from the possible options provided to States in the instrument (if it were to be a convention) to make a separate declaration requiring the parties' agreement to apply the enforcement mechanism envisaged by the instrument.

182. Although there was support for the opt-in requirement for the parties, it was felt that it was premature to make a decision, as it would largely depend on the form of the instrument and the mechanism envisaged therein.

G. Note by the Secretariat on settlement of commercial disputes: revision of the UNCITRAL Notes on Organizing Arbitral Proceedings

(A/CN.9/WG.II/WP.194)

[Original: English]

Contents

I. Introduction

1. Further to initial discussions at its twenty-sixth session, in 1993,[1] the Commission finalized the UNCITRAL Notes on Organizing Arbitral Proceedings (also referred to below as the "Notes") at its twenty-ninth session, in 1996.[2] At its forty-seventh session, in 2014, the Commission agreed that the Working Group should commence work on the revision of the Notes and, in so doing, should focus on matters of substance, leaving drafting to the Secretariat.[3]

2. At its forty-eighth session, in 2015, the Commission had before it the draft revised Notes (contained in document A/CN.9/844), as it resulted from the work of the Working Group at its sixty-first[4] (Vienna, 15-19 September 2014) and sixty-second[5] (New York, 2-6 February 2015) sessions.

3. The Commission approved the draft revised Notes in principle, and requested the Secretariat to revise the Notes in accordance with its deliberations and decisions.[6] It was further agreed that the Secretariat could seek input from the Working Group on specific issues during its sixty-fourth session. Accordingly, this note contains a revised version of the Notes for consideration by the Working Group. The Commission further requested that the draft revised Notes be finalized for adoption at its forty-ninth session, in 2016.[7]

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[1] *Official Records of the General Assembly, 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. The Working Group may also wish to consult the drafts considered, namely documents A/CN.9/378/Add.2, A/CN.9/396, A/CN.9/396/Add.1, A/CN.9/410 and A/CN.9/423.

[2] *Official Records of the General Assembly, Fifty-first Session, Supplement No. 17* (A/51/17), paras. 11-54 and Part II.

[3] Ibid., *Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 128.

[4] Report of the Working Group on the work of its sixty-first session (A/CN.9/826).

[5] Report of the Working Group on the work of its sixty-second session (A/CN.9/832).

[6] *Official Records of the General Assembly, Seventieth Session, Supplement No. 17* (A/70/17), paras. 14-133.

[7] Ibid., para. 133.

II. Revision of the UNCITRAL Notes on Organizing Arbitral Proceedings

A. Specific issues for consideration

4. The Working Group may wish to consider the following issues.

(a) Introduction: the introduction of the draft revised Notes focuses on the purpose and non-binding nature of the Notes, as well as on the general characteristics of arbitration. Matters which relate to the organization of the arbitral proceedings and were previously contained in the introduction (such as consultations and procedural meetings) have been moved to the annotations.

(b) Note 1 (Consultation for decisions on the organization of arbitral proceedings and procedural meetings): consultations between the parties and the arbitral tribunal as well as procedural meetings are essential aspects of the organization of arbitral proceedings, and therefore, it is proposed to deal with those topics in Note 1. The substance of Note 1 of the 1996 version ("Set of arbitration rules") has been placed in the introduction of the draft revised Notes (in para. 7), as it relates to the characteristics of arbitration.

(c) Note 2 (Language or languages of the arbitral proceedings): Note 2 has been restructured to highlight that the selection of multiple languages in arbitral proceedings raises difficulties, and should not be presented as a usual practice.

(d) Note 4 (Administrative support for the arbitral tribunal): a wide range of views were expressed at the forty-eighth session of the Commission in relation to the last sentence of paragraph 35 of the draft revised Notes (as contained in document A/CN.9/844) which provided that "secretaries would normally not be involved in the arbitral tribunal's decision-making functions".[8] The Working Group may wish to consider the options contained in the last sentence of paragraph 36 of the draft revised Notes below.

(e) Note 6 (Possible agreement on confidentiality; transparency in treaty-based investor-State arbitration): a suggestion was made at the forty-eighth session of the Commission that paragraphs 51 and 52 of the draft revised Notes (as contained in document A/CN.9/844) should be elaborated to illustrate instances where parties from different jurisdictions might be subject to different obligations in relation to confidentiality or disclosure under the law applicable to them or to their counsel in their respective jurisdiction. The Commission agreed that further consideration should be given as to whether a more detailed provision on the issue would be required.[9] The Working Group may wish to consider paragraphs 52 and 53 of the draft revised Notes below in that light.

(f) Note 11 (Points at issue and relief or remedy sought): at the forty-eighth session of the Commission, it was mentioned that depending on the circumstances (including the applicable arbitration law), it might not always be appropriate for the arbitral tribunal to inform the parties of concerns, for example, if it finds that the relief or remedy sought is not sufficiently precise.[10] The Working Group may wish to further consider the revised version of paragraph 70 of the draft revised Notes below.

(g) Note 14 (Witnesses of fact): the Working Group may wish to consider whether paragraph 90 of the draft revised Notes below sufficiently explains the various approaches to pre-testimony contact by a party with witnesses and to issues raised by the parties' involvement in the preparation of oral testimony by witnesses.[11]

(h) Note 15 (Experts): at the forty-eighth session of the Commission, it was said that the question of ex-parte communication by the tribunal-appointed expert was treated differently in various jurisdictions.[12] In that context, the Working Group may wish to consider whether paragraph 106 of the draft revised Notes below adequately deals with that question.

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[8] Ibid., paras. 44 to 48.
[9] Ibid., para. 59.
[10] Ibid., para. 78.
[11] Ibid., para. 101.
[12] Ibid., para. 118.

(i) Notes 18 (Multiparty arbitration) and Note 19 (Joinder and consolidation): the Working Group may wish to consider whether Notes 18 and 19 below sufficiently provide information about the issues that might arise from multiple arbitration agreements and from parallel proceedings.[13]

5. The Working Group may wish to note that, in order to avoid unnecessary repetitions, provisions in Note 14 (Witnesses of fact) on "Manner of taking oral evidence of witnesses" (paras. 90 to 93 of the draft revised Notes contained in document A/CN.9/844) have been deleted from that Note and grouped with similar provisions in Note 17 (Hearings).

B. Draft revised UNCITRAL Notes on Organizing Arbitral Proceedings

6. The Working Group may wish to consider the draft revised Notes below. References to discussions of the Working Group at its sixty-first and sixty-second sessions and of the Commission at its forty-eighth session are contained below.

"**2016 UNCITRAL Notes on Organizing Arbitral Proceedings**

"Preface

"The United Nations Commission on International Trade Law (UNCITRAL) adopted the first edition of the Notes at its twenty-ninth session, in 1996. UNCITRAL finalized a second edition of the Notes at its [forty-ninth] session, [in 2016]. In addition to representatives of the 60 member States of UNCITRAL, representatives of many other States and of international organizations participated in the deliberations. In preparing the second edition of the Notes, the Secretariat consulted with experts from various legal systems, national and international arbitration bodies, as well as international professional associations.

"List of matters for possible consideration in organizing arbitral proceedings

"Introduction

"**Purpose of the Notes** [*A/CN.9/826, paras. 13 to 15 and 28; A/CN.9/832, para. 61*]

"1. The purpose of the Notes is to list and briefly describe matters relevant to the organization of arbitral proceedings. The Notes, prepared with a focus on international arbitration, are intended to be used in a general and universal manner, regardless whether the arbitration is administered by an arbitral institution.

"2. Given that procedural styles and practices in arbitration vary widely, the Notes do not seek to promote any practice as best practice.

"**Non-binding character of the Notes** [*A/CN.9/832, para. 62*]

"3. The Notes do not impose any legal requirement binding on the parties or the arbitral tribunal. The parties and the arbitral tribunal may use or refer to the Notes at their discretion and to the extent they see fit and need not adopt or provide reasons for not adopting any particular element of the Notes.

"4. The Notes are not suitable to be used as arbitration rules, since they do not oblige the parties or the arbitral tribunal to act in a particular manner. Various matters discussed in the Notes may be covered by applicable arbitration rules. The use of the Notes does not imply any modification to such arbitration rules.

[13] Ibid., para. 126.

"5. The Notes, while not exhaustive, cover a broad range of situations that may arise in arbitral proceedings. In many arbitrations, however, only a limited number of the matters addressed in the Notes will arise or need to be considered. The specific circumstances of the arbitration will dictate which matters it would be useful to consider and at what stage of the arbitral proceedings those matters should be considered. Therefore, it is advisable not to raise a matter unless and until it appears likely that the matter needs to be addressed.

"**Characteristics of arbitration** [*A/CN.9/826, paras. 30, 31 and 41 to 50; A/CN.9/832, paras. 76 to 79; Official Records of the General Assembly, Seventieth Session, Supplement No. 17 (A/70/17), paras. 27 to 34*]

"6. Arbitration is a flexible process to resolve disputes; the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the arbitral proceedings, subject to mandatory provisions of the applicable arbitration law. The autonomy of the parties in determining the procedure is of special importance in international arbitration. It allows the parties to select and tailor the procedure according to their specific wishes and needs, unimpeded by possibly conflicting legal practices and traditions.

"7. The parties exercise their autonomy usually by agreeing on a set of arbitration rules to govern the arbitral proceedings. The benefits of selecting a set of arbitration rules are that the procedure becomes more predictable and that the parties and the arbitral tribunal may save time and costs by using an established set of arbitration rules that has been widely applied, has been carefully drafted by experienced practitioners, and may be familiar to the parties. In addition, the selected set of arbitration rules (as modified by the parties, to the extent permitted) usually prevails over the non-mandatory provisions of the applicable arbitration law and may better reflect the objectives of the parties than the default provisions of the applicable arbitration law. Where the parties have not agreed at an earlier stage on a set of arbitration rules, they may still agree on a set of arbitration rules after the arbitration has commenced (see below, para. 10).

"8. To the extent that the parties have not agreed on the procedure to be followed by the arbitral tribunal or on a set of arbitration rules to govern the arbitral proceedings, the arbitral tribunal has the discretion to conduct such proceedings in the manner it considers appropriate, subject to the applicable arbitration law. Arbitration laws usually grant the arbitral tribunal broad discretion and flexibility in the conduct of arbitral proceedings, provided that a fair, equitable and efficient process is observed.[14] A set of arbitration rules selected by the parties would also shape the arbitral tribunal's discretion to conduct the arbitral proceedings, either by strengthening or limiting that discretion. Discretion and flexibility are useful as they enable the arbitral tribunal to make decisions on the organization of arbitral proceedings that take into account the circumstances of the case and the expectations of the parties, while complying with due process requirements. In determining how the arbitral proceedings will be conducted where the parties did not agree on the procedure or on arbitration rules, the arbitral tribunal may use, as a reference, a set of arbitration rules.

[14] For example, article 19 of the UNCITRAL Model Law on International Commercial Arbitration (with amendments as adopted in 2006) provides as follows: "(1) Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings. (2) Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence."

"**Annotations**

"**1. Consultation for decisions on the organization of arbitral proceedings and procedural meetings** [*A/CN.9/826, paras. 27, 33 to 35 and 39; A/CN.9/832, paras. 66 to 75; Official Records of the General Assembly, Seventieth Session, Supplement No. 17 (A/70/17), paras. 22 to 26*]

"**(a) Consultation between the parties and the arbitral tribunal**

"9. It is usual for the arbitral tribunal to involve the parties in making decisions on the organization of the arbitral proceedings and, where possible, to seek their agreement. Such consultations are inherent to the consensual nature of arbitration and are relevant to most matters addressed in the Notes. For the purpose of keeping the Notes concise, the need for such consultation is not necessarily repeated in the relevant parts of the Notes.

"10. Likewise, it is usual for the parties to consult the arbitral tribunal whenever they agree between themselves on any issue that might affect the organization of the arbitral proceedings and the planning of the arbitrators. Moreover, if the parties agree after the arbitral tribunal has been constituted that an arbitral institution will administer the arbitration, the parties would usually inform the arbitral tribunal in addition to securing the agreement of that institution.

"**(b) Procedural meetings**

"*(i) First procedural meeting*

"11. It is advisable for the arbitral tribunal to give the parties a timely indication as to the organization of the arbitral proceedings and the manner in which it intends to proceed. In particular, in international arbitrations, parties may be accustomed to differing styles of arbitral proceedings and, without such guidance, they may find certain aspects of the arbitral proceedings unpredictable and difficult to prepare for.

"12. As a method of consultation with the parties, the arbitral tribunal may consider holding at the outset of the arbitral proceedings, a meeting or case management conference at which it determines the organization of the arbitral proceedings and a procedural timetable ('procedural meeting(s)').

"13. A number of issues covered by the Notes would usually be addressed at the first procedural meeting, and thus create the basis for a common understanding of the procedure among the parties and the arbitral tribunal. If a procedural timetable is established, it may serve, for instance, to indicate time limits for the communication of written submissions, witness statements and expert reports so that the parties are aware of such limits early in the arbitral proceedings. A procedural timetable may also include provisional dates for hearings.

"*(ii) Subsequent procedural meetings*

"14. The arbitral tribunal usually holds additional procedural meetings (sometimes referred to as 'preparatory conferences' or 'pre-hearing conferences') at subsequent stages of the arbitral proceedings. Procedural meetings are significant as they set the stage for the arbitral proceedings and aim at ensuring their efficiency. Procedural meetings may be used, for instance, for the arbitral tribunal to reassess whether further submissions are required or further evidence ought to be adduced. The procedural timetable can be updated regularly as the arbitral proceedings progress.

"*(iii) Modification of decisions on the organization of arbitral proceedings*

"15. Decisions on the organization of arbitral proceedings can be revisited and modified at relevant stages of the arbitral proceedings by the arbitral tribunal. However, the arbitral tribunal should exercise caution in modifying procedural arrangements, in particular where the parties have taken steps in reliance on those arrangements. Moreover, the arbitral tribunal may not be able to modify procedural arrangements to the extent that those arrangements result from an agreement between the parties.

"*(iv) Record of the outcome of a procedural meeting*

"16. A record of the outcome of a procedural meeting can take various forms depending on its significance, such as a procedural order, a summary minute, or an ordinary communication among the parties and the arbitral tribunal. Usually, the arbitral tribunal records the rules of procedure that have been determined to apply to the arbitral proceedings in a procedural order. The outcome of a procedural meeting can be made in writing or first made orally and recorded in writing at a later stage after the procedural meeting. The parties and the arbitral tribunal may consider whether to produce transcripts, which could provide a precise record of the procedural meeting but also limit open discussion at such meeting.

"*(v) Attendance of the parties*

"17. It is usually advisable that the parties themselves, in addition to any representatives they may have appointed, are present at procedural meetings.

"18. If a party does not participate in a procedural meeting, the arbitral tribunal should nevertheless ensure that the non-participating party will have an opportunity to participate in the further stages of the arbitral proceedings and to present its case. The procedural timetable, if established, should provide for such opportunity.

"19. Procedural meetings can be held either in the physical presence of all participants, or remotely via technological means of communication. The arbitral tribunal may consider, in each case, whether it would be preferable to hold the meeting in-person, which may facilitate personal interaction, or to use remote means of communication, which may reduce costs.

"**2. Language or languages of the arbitral proceedings** [*A/CN.9/826, paras. 51 to 60; A/CN.9/832, paras. 80 to 86; Official Records of the General Assembly, Seventieth Session, Supplement No. 17 (A/70/17), paras. 35 to 37*]

"**(a) Determination of the language**

"20. The parties may agree on the language of the arbitral proceedings. Such agreement ensures that the arbitral proceedings can be tailored to suit the common language of the parties, or at least that the parties have the capacity to communicate in the language in which the arbitral proceedings will be conducted. In the absence of such agreement, the language is usually determined by the arbitral tribunal. Common criteria for that determination are the primary language of the contract(s) or other legal instruments under which the dispute arose, and the language commonly used by the parties in their communication.

"**(b) Possible need for translation and interpretation**

"21. The parties may rely on documentary evidence, judicial decisions and juridical writings ('legal authorities') that are not in the language of the arbitral proceedings. In determining whether to provide for translation of those documents in full or in part, the arbitral tribunal may consider whether the parties and the arbitral tribunal are able to understand their content without translation and whether cost-efficient measures are available in lieu of translation in full (such as translation of part of documents, or a single template translation for similar documents with largely pictorial or numeric content).

"22. Interpretation may be necessary where witnesses or experts appearing at a hearing are unable to testify in the language of the arbitral proceedings. Witnesses and experts familiar with the language of the arbitral proceedings might still require occasional interpretation, rather than full interpretation. If interpretation is necessary, it is advisable to consider whether the interpretation will be simultaneous or consecutive. While simultaneous interpretation is less time-consuming, consecutive interpretation allows for a closer monitoring of the accuracy of the interpretation.

"23. The responsibility for arranging translation and/or interpretation typically lies with the parties even in arbitrations administered by an arbitral institution.

"**(c) Multiple languages**

"24. Because of the logistical difficulties and considerable extra costs that often arise from conducting arbitral proceedings in more than one language, the parties and the arbitral tribunal usually choose a single language to conduct the arbitral proceedings unless there are particular circumstances that would require the use of more than one language.

"25. When multiple languages are to be used in arbitral proceedings, the parties and the arbitral tribunal may need to decide whether:

(i) The languages are to be used interchangeably without any translation or interpretation;

(ii) One of the languages should be designated as authoritative for the purpose of the arbitral proceedings (such that multiple languages could be used during the proceedings, but procedural orders and arbitral awards, for example, would be issued in the authoritative language); or

(iii) All communication and documents need to be translated, and interpretation is required into all the languages; or, in the interests of economy and efficiency, it would be acceptable to limit translations to the relevant sections of documents or to exempt certain types of documents, such as legal authorities (see para. 21 above), from translation.

"**(d) Costs of translation and interpretation**

"26. When taking decisions about translation and interpretation, it is advisable for the arbitral tribunal to decide whether any or all of the costs are to be paid by the parties at the time the costs are incurred. However, if the arbitral tribunal considers that these costs are to be included in the costs of arbitration, it may later have to decide how these costs, along with other costs, will ultimately be allocated between the parties (see below, paras. 46 to 48).

"**3. Place of arbitration** [*A/CN.9/826, paras. 61 to 66; A/CN.9/832, paras. 87 to 94; Official Records of the General Assembly, Seventieth Session, Supplement No. 17 (A/70/17), paras. 38 to 42*]

"**(a) Determination of the place of arbitration**

"27. The parties may agree on the place (or 'seat') of arbitration. If the place of arbitration has not been agreed by the parties, typically the arbitral tribunal or the arbitral institution administering the arbitration will have to determine the place of arbitration at the outset of the arbitral proceedings. Arbitration rules of some institutions contain a default place of arbitration, applicable where the parties have not chosen one.

"**(b) Legal and other consequences of the place of arbitration**

"28. The place of arbitration normally determines the applicable arbitration law. The place of arbitration has legal consequences on various matters, such as on the requirements relating to the appointment of arbitrators, whether and on what grounds a party can seek judicial review or setting aside of an arbitral award, as well as the conditions for recognition and enforcement of an arbitral award in other jurisdictions. It is advisable that the parties and the arbitral tribunal familiarize themselves with the arbitration law and any other relevant procedural law at the place of arbitration, in particular, any mandatory provisions.

"29. Selection of the place of arbitration is influenced by various legal and other factors, the relative importance of which varies from case to case. Among the more prominent legal factors are:

(i) The suitability of the arbitration law at the place of arbitration;

(ii) The law and practices at the place of arbitration regarding (a) the nature and frequency of court intervention in the course of arbitral proceedings, (b) the

scope of judicial review or of grounds for setting aside an award, and (c) any qualification requirements with respect to arbitrators and counsel representation;

(iii) The jurisprudence at the place of arbitration in relation to arbitral procedure and other relevant matters; and

(iv) Whether the State where the arbitration takes place and hence where the arbitral award will be made is a Party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958, the 'New York Convention') and/or to any other multilateral or bilateral treaty on enforcement of arbitral awards.

"30. When it is expected that hearings will be held at the place of arbitration, other factors may become relevant in selecting the place of arbitration including:

(i) The convenience of the location for the parties and the arbitrators, including travel to the location;

(ii) The availability and costs of support services;

(iii) The location of the subject matter in dispute and proximity of evidence; and

(iv) Any qualification restrictions with respect to counsel representation.

"**(c) Possibility of holding hearings and meetings at a location different from the place of arbitration**

"31. The place of arbitration is not necessarily the place where hearings and/or meetings are held, although often the two are the same. In certain circumstances, it may be more expeditious or convenient for the parties and the arbitral tribunal to hold hearings and/or meetings at a location different from the place of arbitration, or remotely via technological means of communication. Many arbitration laws and arbitration rules expressly allow the arbitral tribunal to hold hearings and meetings elsewhere than at the place of arbitration.[15]

"**4. Administrative support for the arbitral tribunal** [*A/CN.9/826, paras. 67 to 73; A/CN.9/832, paras. 95 to 102; Official Records of the General Assembly, Seventieth Session, Supplement No. 17 (A/70/17), paras. 43 to 48*]

"**(a) Administrative support and arbitral institutions**

"32. The arbitral tribunal may need administrative support (for example, reserving hearing rooms) to carry out its functions. The arbitral tribunal and the parties should consider who will be responsible for arranging for such support.

"33. When a case is administered by an arbitral institution, the arbitral institution may provide some administrative support to the arbitral tribunal. The availability and nature of such support vary greatly depending on the arbitral institution. Certain arbitral institutions offer administrative support to arbitrations not conducted under their institutional rules. Some arbitral institutions have entered into cooperation agreements with a view to providing mutual assistance in supporting arbitral proceedings.

"34. Unless the administrative arrangements for the proceedings are made by an arbitral institution, they will usually be made by the parties or the arbitral tribunal. Some services and hearing facilities may be procured from entities, such as chambers of commerce, hotels or specialized firms providing such support services. Specialized arbitration hearing centres have been established in some cities. It may also be acceptable to leave some of the arrangements to one of the parties, subject to the agreement of the other party or parties.

[15] See, for example, article 20(2) of the UNCITRAL Model Law on International Commercial Arbitration (with amendments as adopted in 2006) and article 18(2) of the UNCITRAL Arbitration Rules (as revised in 2010).

"**(b) Secretary to arbitral tribunal**

"35. Administrative support might be obtained by engaging a secretary of the arbitral tribunal to carry out tasks under the direction of the arbitral tribunal. These or similar services may also be rendered by a registrar, clerk or administrator. Some arbitral institutions routinely assign secretaries to cases administered by them. Where this is not the case, some arbitrators frequently engage secretaries, at least in certain types of cases, whereas other arbitrators do not.

"36. Functions and tasks performed by secretaries are broad in range. Secretaries may provide purely organizational support, such as making reservations for hearing and meeting rooms and providing or coordinating administrative services. Some arbitral tribunals wish to have secretaries carry out more substantive functions including legal research and other professional assistance, such as preparing a summary of the facts or the procedural history of the arbitral proceedings, collecting or summarizing case law or published commentaries on legal issues defined by the arbitral tribunal, and preparing draft procedural decisions. [*Option 1*: In any event, secretaries would not exercise the decision-making function of the arbitral tribunal.] [*Option 2*: However, it is recognized that secretaries do not typically perform any decision-making function of the arbitral tribunal.]

"37. Secretaries are expected to be and remain impartial and independent during the arbitral proceedings. It is the arbitral tribunal's responsibility to ensure this. Some arbitral tribunals do this by requesting the secretary to sign a declaration of independence and impartiality.

"38. If the arbitral tribunal wishes to appoint a secretary, it would normally disclose this fact to the parties, along with the identity of the proposed secretary, the nature of the tasks to be performed by the secretary, and the amount and source of any proposed remuneration. The parties may wish to agree on the role and practices to be adopted in respect of the secretaries, as well as on the financial conditions applicable to their services. Institutional guidelines on secretaries may provide useful information to the parties.

"**5. Costs of arbitration** [*A/CN.9/826, paras. 22, 23 and 74 to 78; A/CN.9/832, paras. 103 to 112; Official Records of the General Assembly, Seventieth Session, Supplement No. 17 (A/70/17), paras. 49 to 56*]

"**(a) Items of costs**

"39. The costs of arbitration usually include:

(i) The fees of the arbitral tribunal;

(ii) The expenses incurred by the arbitral tribunal, such as for (a) travel and accommodation, (b) administrative support, if not directly covered by the parties, (c) tribunal-appointed experts (including their fees, travel and accommodation) and other assistance required by the arbitral tribunal, and (d) translation and interpretation, if required and to the extent the arbitral tribunal considers that these costs are to be included in the arbitration costs (see above, para. 26);

(iii) The fees and expenses of the arbitral institution; and

(iv) The expenses incurred by the parties, such as (a) legal fees and disbursements, and (b) expenses relating to witnesses (including their travel and accommodation) and experts (including their fees, travel and accommodation).

"40. If the agreement between the parties, the applicable arbitration law or arbitration rules do not address the costs of arbitration and the allocation thereof, it is useful for the arbitral tribunal to identify at the outset of the arbitral proceedings principles in determining those costs.

"41. The parties and the arbitrators may have to consider how to treat taxes on services, in particular value-added taxes, when determining costs.

"**(b) Deposit of costs**

"42. The arbitral tribunal usually requests the parties to deposit an amount as an advance for the costs referred to in paragraph 39(i) and (ii). Unless the matter is handled by an arbitral institution, the arbitral tribunal will have to estimate the amount to be deposited. If, during the arbitral proceedings, it emerges that the costs will be higher than anticipated (for example, because of the prolongation of the arbitral proceedings, additional hearings, appointment of an expert by the arbitral tribunal), supplementary deposits may be requested. Deposits can be paid in full or in instalments, and bank guarantees can be a means to secure such deposits.

"43. Many arbitration rules have provisions regarding these matters, including whether the deposit should be made in equal amounts by the parties and the consequences of the failure of a party to make the payment.[16]

"44. Where the arbitration is administered by an arbitral institution, the institution's services may include holding, managing and accounting for the deposits. If the arbitral institution does not offer such services, the parties or the arbitral tribunal will have to make necessary arrangements, for example, with a bank or other external provider. In any case, it might be useful to clarify matters, such as the type and the location of the account in which the deposit will be kept and how the deposit will be managed, including matters such as interest on the deposit.

"45. The parties, the arbitral tribunal and the arbitral institution should be aware of regulatory restrictions that may have an impact on the handling of deposits of costs, such as restrictions in bar regulations, financial regulations relating to the identity of beneficiaries and restrictions on trade or payment.

"**(c) Fixing and allocating the costs**

"46. The arbitral tribunal usually determines which portion of the costs incurred by the parties referred to in paragraph 39(iv) would be recoverable. In arbitrations administered by an arbitral institution, some of the costs referred to in paragraph 39 may be set by the arbitral institution. In fixing the recoverable costs, the arbitral tribunal would usually consider the reasonableness of the costs as well as the proportionality of the costs to the amount in dispute and decide whether to require evidence that the costs have actually been incurred.

"47. After fixing the costs of the arbitration, the arbitral tribunal determines how to allocate the costs between the parties. In so doing, the arbitral tribunal usually takes into account the allocation method agreed by the parties or provided in the applicable arbitration law or arbitration rules. There are various methods for allocating costs, the general rule being that costs follow the event, i.e., the costs of the arbitration should be borne by the unsuccessful party or parties. The arbitral tribunal may also consider the conduct of the parties in allocating costs. Conduct so considered might include failure to comply with procedural orders of the arbitral tribunal or procedural requests by a party (for example, document requests, procedural applications and cross-examination requests) to the extent that any such failure actually had a direct impact on the costs of the arbitration and/or is determined by the arbitral tribunal to have unnecessarily delayed or obstructed the arbitral proceedings.

"48. At an appropriate time during the arbitral proceedings, the arbitral tribunal may request from the parties that they make submissions on costs. Decisions by the arbitral tribunal on costs and their allocation do not necessarily need to be made in conjunction with a final award. Rather, decisions on costs may be made at any time during the arbitral proceedings (for example, where the proceedings terminate without a final award) as well as after the final award has been rendered.

[16] See, for example, article 43 of the UNCITRAL Arbitration Rules (as revised in 2010).

"**6. Possible agreement on confidentiality; transparency in treaty-based investor-State arbitration** [*A/CN.9/826, paras. 26, 79 to 89, 185 and 186; A/CN.9/832, paras. 114 to 121; Official Records of the General Assembly, Seventieth Session, Supplement No. 17 (A/70/17), paras. 57 to 60*]

"**(a) Agreement on confidentiality**

"49. A widely held view is that there is an inherent requirement of confidentiality in commercial arbitration and that confidentiality is an advantageous and helpful feature of international commercial arbitration. Nevertheless, there is no uniform approach in domestic laws or arbitration rules regarding the extent to which the participants in an arbitration are under a duty to maintain the confidentiality of information relating to the arbitral proceedings.

"50. Should confidentiality be a concern or priority and should the parties not be satisfied by the treatment of that issue in the applicable arbitration law or arbitration rules, the parties may agree on the desired confidentiality regime to the extent not precluded by the applicable arbitration law.

"51. An agreement on confidentiality might cover one or more of the following matters: (i) the material or information that is to be kept confidential (for example, the fact that the arbitration is taking place, identity of the parties and the arbitrators, pieces of evidence, written and oral submissions, content of the award); (ii) measures for maintaining confidentiality of such information and of the hearings; (iii) circumstances in which confidential information may be disclosed in whole or in part to the extent necessary to protect a legal right; and (iv) other circumstances in which such disclosure might be permissible (for example, information in the public domain, or disclosures required by law or a regulatory body). The parties may wish to consider how to extend the obligation of confidentiality to witnesses and experts.

"52. Whereas the obligation of confidentiality imposed on the parties and their counsel may vary with the circumstances of the case as well as the applicable arbitration law and arbitration rules, arbitrators are generally expected to keep the arbitral proceedings, including any information related to or obtained during those proceedings, confidential.

"53. There are also circumstances in which certain information or material is deemed to be confidential to one of the parties in an arbitration, for example, commercial secrets or intellectual property. Arrangements to protect such information or material may be made by the parties and, in certain circumstances, by the arbitral tribunal, for example, by restricting access to such information or material to a limited number of designated persons.

"**(b) Transparency in treaty-based investor-State arbitration**

"54. Adopting a regime of transparency in treaty-based investor-State arbitration may reflect the specific characteristics of arbitration between an investor and a State arising under an investment treaty. In such arbitration, the investment treaty may include specific provisions on publication of documents, open hearings, and confidential or protected information. Also, the applicable arbitration rules referred to in investment treaties may contain specific provisions on transparency.[17] Further, parties to a treaty-based arbitration may agree to apply certain transparency provisions.[18]

[17] See, for example, the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (the Rules on Transparency); the Rules on Transparency may also have an impact on various aspects of the arbitral proceedings, for example, regarding submissions by third parties, and conduct of the hearings.

[18] For example, under article 1(2)(a) of the Rules on Transparency.

"**7. Means of communication** [*A/CN.9/826, paras. 25 and 91 to 102; A/CN.9/832, paras. 123 and 124; Official Records of the General Assembly, Seventieth Session, Supplement No. 17 (A/70/17), para. 61*]

"**(a) Determination of the means of communication**

"55. It is useful for the parties and the arbitral tribunal to determine the means of communication at the outset of the arbitral proceedings. Factors that might be considered in selecting the means of communication include ensuring that:

(i) Documents are accessible and easily retrievable by the parties and the arbitral tribunal;

(ii) Receipt of the communication can be ascertained;

(iii) The means of communication is acceptable under the applicable arbitration law; and

(iv) The costs involved in the use of the selected means of communication are reasonable.

"56. Although more than one means of communication may be used (for example, paper-based as well as electronic means), the parties may wish to consider issues arising from the use of multiple means of communication, including which will be the authoritative means and, where time limits for submission apply, what action will constitute submission.

"**(b) Electronic means of communication**

"57. The use of electronic means of communication can make the arbitral proceedings more expeditious and efficient. However, it is advisable to consider whether all parties have access to, or are familiar with, such means. The parties and the arbitral tribunal may need to consider issues of compatibility, storage, access, data security as well as related costs when selecting electronic means of communication.

"**(c) Flow of communication**

"58. Communications are usually exchanged directly between the arbitral tribunal and the parties, unless an arbitral institution is acting as an intermediary. It is usual that all parties are copied on all communications to and from the arbitral tribunal.

"**8. Interim measures** [*A/CN.9/826, para. 24; A/CN.9/832, para. 113; Official Records of the General Assembly, Seventieth Session, Supplement No. 17 (A/70/17), paras. 62 to 74*]

"**(a) Granting of interim measures**

"59. During the course of the arbitration, a party may need to seek an interim measure, which is temporary in nature, either from the arbitral tribunal or a domestic court. Most arbitration laws and arbitration rules provide that the arbitral tribunal may, at the request of a party, grant interim measures.[19] Arbitration laws also provide for courts to grant interim measures in relation to an arbitration. An established principle is that any request made by a party to a domestic court for an interim measure before or during the arbitral proceedings is not incompatible with an agreement to arbitrate.

"60. Depending on the applicable arbitration laws or rules, a party may apply on an ex parte basis for an interim measure and, at the same time, for a preliminary order for interim relief (the purpose of which is to direct the parties to preserve the status quo while the arbitral tribunal decides whether to grant the requested interim measure). A party would normally only make such a request in circumstances where prior

[19] See, for example, chapter IV A of the UNCITRAL Model Law on International Commercial Arbitration (with amendments as adopted in 2006) and article 26 of the UNCITRAL Arbitration Rules (as revised in 2010).

disclosure of the request for the interim measure to the party against whom it is directed risks frustrating the purpose of the measure.[20]

"61. Issues to be considered by the parties and the arbitral tribunal in connection with application for interim measures include:

(i) The applicable law in relation to interim measures, including whether the granting of interim measures is within the scope of the arbitral tribunal's competence;

(ii) The type of measures that the arbitral tribunal may grant;

(iii) The conditions for requesting and granting interim measures;

(iv) The available mechanisms for enforcement of interim measures; and

(v) The limitations in granting interim measures when a third party may be affected by the measures.

"**(b) Costs and damages arising from interim measures; security for costs and damages**

"62. The party requesting an interim measure may be liable under the applicable law for costs and damages caused by the interim measure, if the arbitral tribunal later determines that, in the circumstances prevailing when the measure was ordered, the measure should not have been granted. The parties and the arbitral tribunal may determine a procedure for presenting claims on costs and damages arising from interim measures, indicating, for instance, at which point during the arbitral proceedings a party may make such claims and the arbitral tribunal may award such costs and damages.

"63. The party requesting an interim measure may be required by the arbitral tribunal to provide security for possible costs and damages arising therefrom.

"**9. Written submissions, witness statements, expert reports and documentary evidence ('submissions')** [*A/CN.9/826, paras. 103 to 109; A/CN.9/832, para. 125; Official Records of the General Assembly, Seventieth Session, Supplement No. 17 (A/70/17), para. 75*]

"64. During the arbitral proceedings, the parties usually submit a wide range of documents: written submissions, witness statements, expert reports and documentary evidence (referred to generally as "submissions"). Submissions comprise all written pleadings that the parties include in the records of the proceedings, such as a statement of claim and a statement of defence. A second round of rebuttal submissions is also common although the parties and the arbitral tribunal may consider whether more than one round of submissions is necessary.

"65. Submissions may be communicated consecutively, i.e., where one party (usually the party making the application or seeking the relief) makes its submission after which the other party or parties make a counter submission. Alternatively, all parties may be required to make their submissions simultaneously. The approach used may depend on the type of issues to be commented upon, the stage of the arbitral proceedings, and the time provided to the parties to comment. Most arbitration rules address this matter, sometimes detailing the sequences of submissions and required content.

"**10. Practical details regarding the form and method of submissions** [*A/CN.9/826, paras. 110 and 111; Official Records of the General Assembly, Seventieth Session, Supplement No. 17 (A/70/17), paras. 76 and 77*]

"66. Certain arbitration rules contain provisions on practical details concerning submissions. Depending on the volume and kind of submissions to be handled, the

[20] See, for example, section 2 of Chapter IV A of the UNCITRAL Model Law on International Commercial Arbitration (with amendments as adopted in 2006).

parties and the arbitral tribunal may consider whether it would be helpful to agree on practical details concerning, for instance, the following:

(a) The form in which submissions will be made (for example, in hard copy, electronic form or through a shared platform), including their format (for example, specific electronic formats, such as original or native format where applicable, search features);

(b) The particulars of management of submissions; the system for organizing, labelling, identifying and referencing submissions, including whether they can be presented in an efficiently accessible way (for example, by using hyperlinks);

(c) The organization of certain types of submissions (for example, whether large spreadsheets or diagrams, or other types of documents ought to be presented separately);

(d) The preservation and storage of submissions; in certain instances, the applicable law may require a specific procedure to preserve documentary evidence prior to the commencement of the arbitration; and

(e) The particulars of data protection (for instance, in relation to information on witnesses).

"**11. Points at issue and relief or remedy sought** [*A/CN.9/826, paras. 112 to 116; Official Records of the General Assembly, Seventieth Session, Supplement No. 17 (A/70/17), para. 78*]

"**(a) Preparation of a list of points at issue**

"67. It is often considered helpful for the arbitral tribunal to prepare a list of points at issue (as opposed to those that are undisputed) based on the parties' submissions. Such a list, when prepared at an appropriate stage of the arbitral proceedings and updated as necessary, can assist the parties in focusing their arguments on the issues identified as critical by the arbitral tribunal, thereby improving the efficiency of the arbitral proceedings and reducing costs.

"**(b) Determination of the order in which the points at issue will be decided; possibility of bifurcated proceedings**

"68. Subject to any agreement of the parties, the arbitral tribunal has the flexibility and discretion to determine the sequence of the arbitral proceedings and may deal with all the points at issue collectively or sequentially depending on the circumstances of the arbitration.

"69. Depending on the points at issue, the arbitral tribunal may consider the appropriateness of making a determination on certain claims or issues (such as jurisdiction, liability or other discrete issues whose resolution will likely advance the resolution of the case) before deciding on other points. In deciding on such an approach, the arbitral tribunal may wish to consider whether, under the applicable arbitration law, such determination is open to judicial review. Where the arbitral tribunal decides to adopt that approach, submissions and, where applicable, disclosure of documents may be organized in separate stages to reflect that staged organization of the arbitral proceedings. Such an approach may have an impact on the adjudicative process, and therefore, the arbitral tribunal may wish to consider carefully the implications of such a staged process on the overall proceedings, including on time and costs.

"**(c) Relief or remedy sought**

"70. If the arbitral tribunal considers that the relief or remedy sought by a party is not sufficiently precise, for example, to ensure the enforceability of the arbitral award, the arbitral tribunal may consider informing the parties of its concerns, bearing in mind that the arbitral tribunal would usually avoid suggesting new relief on its own initiative.

"**12. Amicable settlement** [*A/CN.9/826, paras. 117 to 124; A/CN.9/832, para. 126; Official Records of the General Assembly, Seventieth Session, Supplement No. 17 (A/70/17), paras. 79 to 81*]

"71. In appropriate circumstances, the arbitral tribunal may raise the possibility of a settlement between the parties. In some jurisdictions, the arbitration law permits facilitation of a settlement by the arbitral tribunal with the agreement of the parties. In other jurisdictions, it is not permissible for the arbitral tribunal to do more than raise the prospect of a settlement that would not involve the arbitral tribunal. Where the applicable arbitration law permits the arbitral tribunal to facilitate a settlement, it may, if so requested by the parties, guide or assist the parties in their negotiations. Certain sets of arbitration rules provide for facilitation of a settlement by the arbitral tribunal.

"**13. Documentary evidence** [*A/CN.9/826, paras. 125 to 136; A/CN.9/832, paras. 127 to 129; Official Records of the General Assembly, Seventieth Session, Supplement No. 17 (A/70/17), paras. 82 to 94*]

"**(a) Time limits for submission of documentary evidence by the parties; consequences of failure to submit or late submission**

"72. The arbitral tribunal usually fixes time limits for the submission of documentary evidence at the outset of the arbitral proceedings. The arbitral tribunal may direct the parties to submit evidence relied upon along with their written submissions or at a subsequent stage.

"73. The arbitral tribunal may clarify the consequences of late submissions of evidence and how it intends to deal with requests to accept late submissions. The arbitral tribunal may require a party seeking to submit evidence after the time limit to provide reasons for the delay. The arbitral tribunal, in determining whether to accept late submissions, would need to consider the procedural efficiency achieved by refusing late submissions, the possible usefulness of accepting them, and the interests of the parties (for example, providing the other party an opportunity to comment or submit further evidence with respect to the late submission).

"74. The arbitral tribunal may remind the parties that if a party makes submissions that were not scheduled, the arbitral tribunal may consider whether such submissions could be accepted. Also, if a party requested to submit evidence to support its case fails to do so within the time limit without showing sufficient cause for such failure, the arbitral tribunal may make the award solely on the evidence before it.

"**(b) Requests to disclose documents**

"75. A party may request the other party or parties to disclose certain documents. Such requests may be made in various ways but are typically recorded in a schedule, which sets out not only the documents requested, but also the reasons for the request. The other party may then state in the schedule whether it agrees with the request and if not, the reasons. Usually, the parties exchange among themselves disclosed documents and determine which of the disclosed documents to submit as evidence.

"76. Where requests for disclosure of documents are contested, the requesting party may decide whether to submit the contested requests to the arbitral tribunal for its consideration. The arbitral tribunal, if necessary, may add to the schedule its decision on any contested requests.

"77. When considering requests by the parties to disclose documents and ordering disclosure of documents for possible submission as evidence, the arbitral tribunal should be mindful that approaches of arbitration laws and practices vary. Therefore, it may be useful for the arbitral tribunal to clarify with the parties whether a party may request the other party to disclose documents and, if so, to set out the relevant time limits, the form of disclosure requests, and the procedures for contesting requests, if relevant.

"**(c) Admissibility of evidence**

"78. It is generally accepted that the arbitral tribunal would usually consult the parties if it has any concern regarding the admissibility of documentary evidence.

"**(d) Evidence obtained by the arbitral tribunal from third parties**

"79. Where necessary and after having consulted the parties, the arbitral tribunal itself may take appropriate steps to obtain documentary evidence from a third party.

"**(e) Assertions about the provenance and authenticity of documentary evidence**

"80. Unless a party raises objections to any of the following conclusions within a specified period of time, it is normally understood that:

(i) Documentary evidence is accepted as having originated from the source indicated in it;

(ii) A dispatched communication is accepted without further proof that it has been received by the addressee; and

(iii) A copy is accepted as a reproduction of the original; a statement by the arbitral tribunal to this effect can simplify the introduction of evidence and discourage unfounded and dilatory objections.

"81. If there are issues regarding the provenance and authenticity of evidence, the arbitral tribunal may require that the authenticity of the evidence and the integrity of the information contained therein are ascertained and that the evidence in its original form remains accessible to the parties and the arbitral tribunal.

"**(f) Presentation of documentary evidence**

"82. In order to avoid duplicate submissions, it is usual for the parties to agree or for the arbitral tribunal to direct that, once a given piece of documentary evidence is submitted in the record by one party, it will not be resubmitted by the other party.

"83. After each party has submitted its documentary evidence, the arbitral tribunal may encourage the parties to prepare, before the hearing, a joint set of evidence. It may also be practical for the parties and/or the arbitral tribunal to select the frequently used pieces of evidence and establish a set of 'working' or 'core' documents, regardless of whether these have been submitted jointly or otherwise.

"84. The presentation of certain evidence may be facilitated given its volume or nature if its content is summarized by way of a report from a counsel or an expert (for example, a public accountant or a consulting engineer). The report may present the information in the form of summaries, tabulations or charts. Depending on the evidence at issue, such presentation may be combined with arrangements that give the parties and the arbitral tribunal an opportunity to review the underlying data and the methodology used for the preparation of the report, as well as to verify any assumptions made in its preparation.

"85. Note 10 above provides for other practical details that the parties and the arbitral tribunal may wish to consider regarding the presentation of documentary evidence.

"**14. Witnesses of fact** [*A/CN.9/826, paras. 141 to 149; A/CN.9/832, paras. 130 to 135; Official Records of the General Assembly, Seventieth Session, Supplement No. 17 (A/70/17), paras. 94 to 111*]

"**(a) Identification of witnesses of fact; contact with the parties and their representatives**

"*(i) Witness statements and advance notice*

"86. Subject to the applicable arbitration laws and arbitration rules, the arbitral tribunal may consider requiring that each party give advance notice to the arbitral tribunal and the other party or parties of any witness it intends to present for oral

testimony. The arbitral tribunal may also wish to clarify with the parties whether written witness statements would be submitted.

"87. A witness statement is a document sufficient to serve as evidence from that witness. It is helpful that the witness statement identifies all documentary evidence upon which it relies. Where a witness statement is presented, it is generally accepted that this statement need not be repeated orally at the hearing. Often it is accepted as the witness' full testimony and only a short oral statement that summarizes, confirms or updates the written statement is required at the hearing. Further, a written witness statement may eliminate the need to hear a witness of uncontroversial facts, as not all witnesses who have submitted written statements need to be heard at a hearing (see below, para. 128).

"88. Where witness statements will not be submitted, the arbitral tribunal may wish to consider what form of advance notice it wishes to receive. As to the content of the advance notice, the following is an example of what might be required, in addition to the names and addresses of the witnesses:

(a) The subject and facts upon which the witnesses will testify;

(b) The language in which the witnesses will testify;

(c) The nature of the relationship with any of the parties;

(d) The qualifications and experience of the witnesses, if and to the extent these are relevant to the dispute or the testimony; and

(e) How the witnesses learned about the facts on which they will testify.

"*(ii) Whether persons related to a party may be heard as witnesses*

"89. International arbitration can differ from domestic court practice in respect of whether certain persons related to a party may be heard as witnesses (for example, its executives, employees or agents). While under some legal systems, such persons can only be heard as representatives of a party and not as witnesses, arbitration rules may provide otherwise. Therefore, it may be necessary to determine which persons may or may not testify as witnesses and submit witness statements, and the weight that may be given to statements by those determined not eligible as a witness.

"*(iii) Nature of the contact of a party or its representative with witnesses*

"90. The arbitral tribunal may consider clarifying at the outset of the arbitral proceedings the nature of the contact a party or its representative is permitted to have with its witnesses. This applies to contacts in relation to the preparation of written witness statements and oral testimony. International arbitration can differ from domestic court practice in respect of the permissibility of pre-testimony contact between a party or its representatives and the witnesses presented by that party. In international arbitration, pre-testimony contacts with witnesses are widely accepted. One common practice is to permit parties or their representatives to interview their witnesses about the facts of the dispute prior to their oral testimony and/or assist them in the preparation of their witness statements, if they are to be submitted.

"*(iv) Non-appearance of a witness*

"91. The arbitral tribunal may consider addressing the consequences of a witness who was invited to testify at the hearing not appearing. The arbitral tribunal usually has some flexibility in dealing with such non-appearances, including whether that witness' written statement, if submitted, may still be considered and, if so, what weight is to be given to such statement.

"*(v) Invitation of a witness by the arbitral tribunal*

"92. The arbitral tribunal may have to take appropriate steps to invite a witness, for instance, if the parties fail to call a key witness that the arbitral tribunal wishes to examine.

"**(b) Manner of taking oral evidence of witnesses**

"93. While arbitration laws and arbitration rules typically grant the arbitral tribunal broad discretion concerning the manner of taking oral evidence of witnesses (oral testimony), practices vary. In order to facilitate the parties' preparation for a hearing, the arbitral tribunal may consider clarifying some or all of the issues referred to in Note 17 below.

"**15. Experts** [*A/CN.9/826, paras. 150 and 151; A/CN.9/832, para. 136; Official Records of the General Assembly, Seventieth Session, Supplement No. 17 (A/70/17), paras. 112 to 122*]

"94. Many arbitration laws and arbitration rules provide for the participation of one or more experts in arbitral proceedings. Frequently, the parties will present a report of experts engaged by them (referred to as 'expert witnesses' or 'party-appointed experts') to address points at issue. An arbitral tribunal may appoint its own expert (referred to as 'tribunal-appointed expert') to present a report on issues requiring expert guidance.

"95. Experts are usually required to provide information on their expertise in a resume or list of recent experiences prior to being engaged or appointed. Arbitral institutions, chambers of commerce and other specialized organizations may be of assistance to the parties and the arbitral tribunal in relation to the selection of experts, if needed.

"**(a) Reports presented by party-appointed experts (expert witnesses)**

"96. Each party may instruct its own expert regarding the issues to be addressed in his or her report or the parties may agree on a joint list of issues to be addressed by the experts.

"97. The arbitral tribunal may require the party-appointed experts to agree on the scope of the reports and issues to be covered. It may further require them to submit a joint report identifying the points on which they agree and disagree, which may narrow issues to be dealt with in subsequent proceedings. Based on a joint understanding by the experts of the points of agreement and of disagreement, only those points of disagreement can be addressed in their respective reports.

"98. For instance, the arbitral tribunal may request the party-appointed experts to exchange their reports, and then hold an informal meeting where the points on which the experts agree or disagree are discussed. With this approach, the experts may respond to each other's questions more effectively, find common ground and/or take the time to discuss any specific issues. The reports of the experts can then be modified accordingly or the outcome of such procedure can be communicated by the experts at the hearing.

"99. Where the party-appointed experts express conflicting opinions, the arbitral tribunal may consider requesting supplementary or responsive expert witness statements to address the points at issue.

"100. Occasionally, it may be possible for the parties to agree on a single joint expert or to agree that the experts appointed by them will issue a single joint report. Such approaches have the benefit of reducing costs and streamlining the arbitral proceedings. In such circumstances, the parties normally are entitled to comment on the report.

"101. The arbitral tribunal may consider addressing whether expert reports should be filed consecutively or simultaneously as well as the timing of their submission, particularly whether such submission should be made along with a statement of claim or of defence.

"102. In addition, the arbitral tribunal may wish to clarify the nature and extent of communication between the parties or their representatives and their experts, and whether such communications will be treated as confidential.

"**(b) Report presented by a tribunal-appointed expert**

"*(i) Function of the tribunal-appointed expert*

"103. The function of an expert appointed by the arbitral tribunal usually consists in preparing a report on one or several specific points requiring specialized knowledge or assisting the arbitral tribunal in understanding certain technical issues. In deciding whether to appoint its own expert, the arbitral tribunal usually takes into account the efficiency of the arbitral proceedings. In some instances, the arbitral tribunal may decide to appoint an expert at a later stage of the arbitral proceedings, for example, if the opinions of the party-appointed experts diverge widely.

"104. Before appointing an expert, the arbitral tribunal will normally ensure that the expert has the required qualification and obtain a statement of his or her impartiality and independence. The arbitral tribunal usually gives the parties an opportunity to comment on the expert's qualification, impartiality and independence.

"105. It may be advisable for the arbitral tribunal to consult with the expert upon his or her appointment to clarify the scope of the report and the issues to be covered. The arbitral tribunal may also wish to consult with the expert before the completion of his or her report, in particular when more than one expert is appointed by the arbitral tribunal.

"106. The arbitral tribunal may consider clarifying the nature and extent of communication its expert may have with the parties and their representatives, jointly or separately, and how to deal with communications on confidential matters. Further, the arbitral tribunal may wish to instruct its expert to refrain from ex-parte communication.

"107. Where a tribunal-appointed expert has presented his or her report, the parties are normally entitled to comment on the report either through formal or informal submissions, and to question the tribunal-appointed expert at a hearing.

"*(ii) Terms of reference of the tribunal-appointed expert*

"108. The purpose of the terms of reference of a tribunal-appointed expert is to indicate the questions on which the expert is to provide his or her opinion, thereby avoiding opinions on points that are not for the expert to assess, and to commit the expert to a time schedule. The terms of reference also ensures transparency regarding the relation between the arbitral tribunal and the tribunal-appointed expert.

"109. The terms of reference usually set out details regarding which documents the expert will have access to, and how the expert will receive relevant information or have access to relevant documents, goods or other property necessary for the expert to prepare the report. In order to facilitate the evaluation of the expert's report, it is advisable to require the expert to include in the report the terms of reference as well as information on the method used in arriving at his or her conclusions and the factual assumptions made in preparing the report. The remuneration of a tribunal-appointed expert is usually indicated in the terms of reference.

"**16. Inspection of a site, property or goods** [*A/CN.9/826, paras. 137 to 140; A/CN.9/832, para. 137; Official Records of the General Assembly, Seventieth Session, Supplement No. 17 (A/70/17), paras. 123 and 124*]

"110. In some arbitrations, the arbitral tribunal may need to assess physical evidence other than documentary evidence, for example, by inspecting goods or property, or visiting a specific site. Physical or virtual site inspections may be evidentiary in nature or may serve an illustrative function for the arbitral tribunal for improving its understanding of the case.

"**(a) Physical evidence**

"111. If physical evidence will be submitted, the arbitral tribunal may fix the time schedule for presenting such evidence, make arrangements for the other party or

parties to prepare for the presentation of the evidence and take measures for safekeeping the items of evidence.

"**(b) Inspections of site, property or goods**

"112. The arbitral tribunal may consider whether inspection of a site, property or goods is useful or required. If so, it may consider whether the inspection requires the arbitrators' physical presence or whether a virtual inspection might be possible or adequate in the interest of efficiency or cost savings.

"113. If a physical inspection of a site, property or goods takes place, the arbitral tribunal will need to consider various issues. These include timing, cost allocation, arrangements necessary to ensure that all parties are able to be present or represented at the inspection and an indication of who will guide the inspection and provide explanations. Prior to the inspection, it may be useful for the parties and the arbitral tribunal to agree on an inspection protocol and on the scope of the inspection.

"114. The site, property or goods to be inspected are often under the control of one of the parties. If so, it may be advisable to allow the other party to visit the place of inspection before the arbitral tribunal does, in order to provide that party with the opportunity to acquaint itself with the state and condition of the site, property or goods and to request that the arbitral tribunal view additional or different evidence at the place of inspection.

"115. Where an employee or a representative of a party controlling the site, property or goods gives guidance or explanations to the arbitral tribunal, this is usually done in the presence of the other party or its representative. It should be borne in mind that such statements, in contrast to statements those persons might make as witnesses of fact in a hearing, are usually not treated as evidence in the arbitral proceedings.

"**17. Hearings** [*A/CN.9/826, paras. 159 to 174; A/CN.9/832, paras. 138 and 139; Official Records of the General Assembly, Seventieth Session, Supplement No. 17 (A/70/17), para. 125*]

"**(a) Decision whether to hold hearings; post-hearings submissions**

"116. Arbitration laws and arbitration rules often allow any party to request a hearing for the presentation of evidence by witnesses and experts and/or for oral argument. Where none of the parties requests a hearing, the arbitral tribunal may determine whether to hold a hearing. The need for a hearing might be reconsidered at a later stage in light of the parties' submissions.

"117. It is a widely accepted practice to have written submissions, witness statements, expert reports and other documentary evidence presented prior to the hearing. This may assist in focusing the issues that have to be dealt with at the hearing and avoid a lengthy hearing. In order to facilitate the parties' preparations, to avoid any misunderstanding and to prevent unexpected issues being raised, the arbitral tribunal may discuss this matter with the parties at the outset of the arbitral proceedings as well as in advance of any hearing.

"118. The parties and the arbitral tribunal will have to decide whether any additional submissions are to be made by the parties after the hearing and, if so, a corresponding timetable will have to be established. Such submissions may be necessary in order to allow the parties to address a specific issue that arose during the hearing, or to provide them with a final opportunity to address the impact on their case of the evidence that emerged during the hearing.

"119. Hearings can be held in-person or remotely via technological means. The decision whether to hold a hearing in-person or remotely is likely to be influenced by factors, such as the importance of the issues at stake, the availability of parties, witnesses and experts as well as the cost and possible delay of holding a hearing in-person. The parties and the arbitral tribunal may need to consider technical matters, such as the compatibility of the technological means to be used at different locations.

"**(b) Scheduling of hearings**

"120. Dates for hearings are normally set at the earliest possible opportunity so as to ensure availability of the participants. A common practice is to hold hearings in a single, consecutive period. However, holding hearings over separate periods is, in some instances, necessary in order to accommodate the different schedules of the parties, witnesses, experts and the arbitral tribunal.

"121. The length of a hearing primarily depends on the complexity of the issues and evidence as well as the number of witnesses and experts to be presented. The length also depends on the procedural style used in the arbitration.

"122. It may be useful to limit the aggregate amount of time each party has for making oral statements, questioning witnesses and experts it presents and questioning witnesses and experts of the other party or parties. In general, each party is allocated the same aggregate amount of time, unless the arbitral tribunal considers, after having heard the parties, that a different allocation is justified.

"123. Such time allocation, provided that it is realistic, fair and subject to supervision by the arbitral tribunal, will make it easier for the parties to plan their presentation of the various items of evidence and argument, reduce the likelihood of running out of time towards the end of the hearing and avoid any actual or perceived unfairness resulting from the parties having unequal time.

"124. The arbitral tribunal usually sets aside time for its deliberations throughout the duration of the arbitral proceedings as well as before and shortly after the close of the hearings.

"**(c) Manner of conducting hearings**

"*(i) Manner in which witnesses of fact and expert witnesses ('witnesses') will be heard*

"125. Arbitration laws and practices differ as to who will question the witnesses, and the degree of control the arbitral tribunal exercises over the hearing of witnesses. For example, when the parties question the witnesses, some arbitrators prefer to permit the parties to ask questions freely and directly to the witnesses, but may disallow a question particularly upon a well-founded objection by another party. Other arbitrators tend to exercise more control and may disallow questions by a party or require that questions from the parties be asked through the arbitral tribunal.

"126. If hearings are to be held for the purpose of presenting expert reports, the procedures in relation thereto should also be set out in advance by the arbitral tribunal. For example, where the parties present their own experts, the arbitral tribunal may consider whether the experts should be heard separately or together. In the latter case, the questioning is often led by the arbitral tribunal. The parties would usually be allowed to cross-examine any expert appointed by the other party.

"*(ii) Whether oral testimony will be given under oath or affirmation and, if so, in what form*

"127. Arbitration laws and practices differ as to whether oral testimony must be given under oath or similar affirmation of truthfulness. In some legal systems, the arbitral tribunal may require witnesses to take an oath, but it is usually within their discretion whether they want to do so. In other legal systems, oral testimony under oath is either unknown in arbitration or may even be considered improper, as only an official such as a judge or a notary is empowered to administer oaths. In such circumstances, the witnesses may simply be asked to affirm that they will testify truthfully. It may be necessary to clarify who will administer the oath or affirmation. Where applicable, the arbitral tribunal may draw the witnesses' attention to potential criminal sanctions for giving false testimony.

"*(iii) Deciding which witnesses will provide oral testimony*

"128. When the parties have already submitted written statements or reports from their witnesses, the arbitral tribunal may ask each party, prior to the hearing, which of the other party's or parties' witnesses it wishes to examine at the hearing. A party is normally responsible for making available any of its own witnesses at the hearing if another party has indicated that it wishes to examine that witness. If no other party wishes to examine a witness and the tribunal itself does not wish to examine the witness, the tribunal may decide, for the sake of efficiency, that the witness should not testify at the hearing. A decision not to hear oral testimony from a witness in these circumstances should not alter the consideration that would otherwise be given to that witness' written statement.

"*(iv) Whether witnesses may be in the hearing room when they are not testifying*

"129. Practices vary in relation to the presence of witnesses in the hearing room before and after they have testified. Some arbitrators consider, as a general rule, that witnesses should not be allowed in the hearing room except when they are testifying. The purpose is to prevent the witness from being influenced by statements of other witnesses and to prevent the possibility of one witness' presence influencing another witness. When witnesses are not allowed in the hearing room, measures would usually be taken to avoid that witnesses have access to any contemporaneous transcripts of the hearings. Other arbitrators consider that it is useful for witnesses to be present when other witnesses are testifying in order to deter untrue statements and clarify or reduce contradictions between witnesses. The arbitral tribunal may decide what approach to follow for each witness. For example, a separate rule may be appropriate for witnesses who also appear as representatives of a party (for example, an in-house legal counsel) as such representatives may need to be present throughout the hearing. As a general rule, witnesses should refrain from discussing their testimony during any breaks in their testimony.

"130. The arbitral tribunal may leave questions of witness presence in the hearing room to be decided during a hearing, or may give guidance on the question in advance, for example, where it may affect the organization of the hearing.

"*(v) Order in which the witnesses will be called and questioned*

"131. The arbitral tribunal has broad latitude to determine the order of presentations at hearings. Within that latitude, practices differ, for example, as to whether opening or closing statements are heard and if they are, their sequence and duration, and which of the parties has the last word. The broad latitude of the arbitral tribunal also applies to the manner and sequence in which witnesses and experts are heard and to other issues addressed at any hearing. When several witnesses are to be heard and longer testimony is expected, it is useful to determine in advance the order in which they will be called. This is likely to reduce costs and facilitate scheduling. Each party might be invited to suggest the order in which it proposes to have its own witnesses testify. In view of such differences, or when no arbitration rules apply, it may foster efficiency of the arbitral proceedings if the arbitral tribunal clarifies to the parties, in advance of the hearings, the manner in which it will conduct the hearings, at least in broad terms.

"132. Unless the witnesses are first examined by the arbitral tribunal, general practice is for witnesses to be examined first by the party calling that witness if necessary and then cross-examined by the other party or parties. After cross-examination, the witness might be re-examined by the party calling the witness with questions limited to issues raised during the cross-examination. Thereafter, the cross-examining party or parties as well as the arbitral tribunal may further question the witness.

"133. The arbitral tribunal may wish to discourage parties from submitting new evidence at hearings, or require further submissions so that the other party may respond.

"**(d) Arrangements for a record of the hearings**

"134. The arbitral tribunal may consider the method of preparing a record of oral statements and testimony during hearings as well as who will be responsible for making the necessary arrangements. Audio recording and transcription services are commonly used.

"135. The parties and the arbitral tribunal may consider whether audio recording should be transcribed, and clarify whether the audio recording would constitute the official record of the hearings. It may be advisable that the transcripts of audio recordings are made by a person who was present at the hearing. If transcripts are to be produced, the arbitral tribunal may consider whether and how the parties will be given an opportunity to check the transcripts. For example, it may be determined that any change to the record must be approved by the parties and, failing their approval, referred to the arbitral tribunal for determination.

"**18. Multiparty arbitration** [*A/CN.9/826, paras. 175 and 176; Official Records of the General Assembly, Seventieth Session, Supplement No. 17 (A/70/17), paras. 126 and 127*]

"136. When a single arbitration involves more than two parties (multiparty arbitration), many procedural issues remain the same as in two-party arbitration. However, caution may need to be exercised where the parties grouped together as claimants or defendants have divergent interests or seek different relief.

"137. The Notes, which identify matters that may be considered in organizing arbitral proceedings in general, do not cover the drafting of arbitration agreements or the constitution of the arbitral tribunal. Those matters give rise to special questions in multiparty arbitration as compared to arbitration involving only two parties. They may be dealt with under arbitration rules.[21]

"**19. Joinder and consolidation** [*A/CN.9/826, paras. 175 and 176; A/CN.9/832, para. 140; Official Records of the General Assembly, Seventieth Session, Supplement No. 17 (A/70/17), paras. 126 and 127*]

"**(a) Joinder**

"138. Joinder means adding a new party into an existing arbitration. Not all joinder applications necessarily require the contemporaneous consent of all parties (i.e. the parties to the arbitration and the new party). The new party may already be bound by the arbitration agreement and the joinder process might be authorized by the arbitration agreement, the applicable arbitration laws and/or the applicable arbitration rules.

"139. Parties may wish to join a new party to the arbitration in situations where they would be unable to fully present their claims without that new party's participation. Certain arbitration rules have addressed joinder by providing that the arbitral tribunal may, at the request of a party, allow one or more new parties to be joined to the arbitration, provided that the new party is bound by the arbitration agreement.[22] Other arbitration rules do not require that the party to be joined be bound by the arbitration agreement under which the claim arises, provided that it is bound by another relevant arbitration agreement that also binds the existing parties. In deciding whether to accept joinder, the arbitral tribunal may consider the procedural efficiency that may result therefrom, fairness to existing parties, or prejudice to any party. The arbitral tribunal may also consider its powers and the manner in which it was constituted.

"140. It is recommended that any new party be joined as early as possible in the arbitral proceedings. Many arbitration rules that address joinder restrict the ability to seek joinder after the arbitral tribunal has been appointed. For example, a party may

[21] See, for example, article 10(1) of the UNCITRAL Arbitration Rules (as revised in 2010), which provides that "(…) where three arbitrators are to be appointed and there are multiple parties as claimant or as respondent, unless the parties have agreed to another method of appointment of arbitrators, the multiple parties jointly, whether as claimant or as respondent, shall appoint an arbitrator."

[22] See, for example, article 17(5) of the UNCITRAL Arbitration Rules (as revised in 2010).

request the joinder when filing its response to the notice of arbitration.[23] In such a case, the new party could be joined to the procedure before the arbitral tribunal is appointed. Depending on the applicable arbitration law and arbitration rules, a third party may also be joined after the appointment of the arbitral tribunal if certain conditions are fulfilled.

"**(b) Consolidation**

"141. The question of consolidation arises in situations where several distinct arbitrations are initiated under the same or different arbitration agreements. Consolidation refers to the merging of separate arbitrations, regardless of whether or not the related arbitrations have been commenced pursuant to the same or a different arbitration agreement. Consolidation can increase efficiency and avoid inconsistent outcomes on related issues. However, one or more parties may have a justified interest in having several disputes dealt with separately, for example because one of the disputes may have priority or the consolidation of several cases would render the arbitral proceedings more complex and time consuming.

"142. An increasing number of arbitration rules address consolidation. Arbitration rules that expressly permit consolidation of two or more pending arbitrations do so upon consideration of various factors, such as whether (i) consolidation has been requested by a party, (ii) all the parties agree to consolidation, (iii) the disputes arise in connection with the same legal relationship or under the same arbitration agreement and, if not, whether those agreements are compatible, and (iv) an arbitral tribunal has been appointed in any of the arbitrations.

"**20. Possible requirements concerning form, content, filing, registration and delivery of the award** [*A/CN.9/826, paras. 177 to 181; Official Records of the General Assembly, Seventieth Session, Supplement No. 17 (A/70/17), paras. 128 to 132*]

"143. The parties and the arbitral tribunal should bear in mind the applicable arbitration law and the law at the potential place(s) of enforcement of the award, as well as the applicable arbitration rules, in considering any requirements as to the form, content, filing, registering or delivering of the award.

"144. Some laws require that arbitral awards be filed or registered with a court or similar authority, or that they be delivered in a particular manner or through a competent authority. Those laws differ with respect to, for example, the type of award to which the requirement applies (for example, to all awards or only to awards not rendered under the auspices of an arbitral institution); the time periods for filing, registering or delivering the award (in some cases those time periods may be rather short); and the consequences of failing to comply with such requirements.

"145. If such requirements exist, it is useful, before the issuance of an award, to determine who will take the necessary steps to meet the requirements and to decide how the costs are to be allocated. The failure to comply with such requirements might affect the validity and/or enforceability of the award."

[23] See, for example, article 4(2)(f) of the UNCITRAL Arbitration Rules (as revised in 2010).

H. Note by the Secretariat on settlement of commercial disputes: international commercial conciliation: enforceability of settlement agreements

(A/CN.9/WG.II/WP.195)

[Original: English]

Contents

I. Introduction

1. At its forty-seventh session, in 2014, the Commission had before it a proposal to undertake work on the preparation of a convention on the enforceability of international commercial settlement agreements reached through conciliation (A/CN.9/822). [1] The Commission agreed that the Working Group should consider at its sixty-second session the issue of enforcement of international settlement agreements resulting from conciliation proceedings and should report to the Commission, at its forty-eighth session, in 2015, on the feasibility and possible form of work in that area.[2]

2. At its sixty-second session, the Working Group considered the topic of enforcement of settlement agreements resulting from international commercial conciliation (A/CN.9/832,

[1] *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 123.

[2] Ibid., para. 129.

paras. 13-59). While a number of questions and concerns were expressed, it was generally felt that they could be addressed through further work on the topic (A/CN.9/832, para. 58). The Working Group, therefore, suggested that it be given a mandate to work on the topic of enforcement of settlement agreements, to identify the relevant issues and develop possible solutions, including the preparation of a convention, model provisions or guidance texts. Considering that differing views were expressed as to the form and content, as well as the feasibility, of any particular instrument, the Working Group also suggested that a mandate on the topic be broad enough to take into account the various approaches and concerns (A/CN.9/832, para. 59).

3. At the forty-eighth session of the Commission, in 2015, there was general support to resume work on enforcement of settlement agreements with the aim to promote conciliation as a time- and cost-efficient alternative dispute resolution method. It was said that an instrument in favour of easy and fast enforcement of settlement agreements resulting from conciliation would further contribute to the development of conciliation. It was further pointed out that the lack of a harmonized enforcement mechanism was a disincentive for businesses to proceed with conciliation, and that there was a need for greater certainty that any resulting settlement agreement could be relied on. However, doubts were expressed on whether a harmonized enforcement mechanism would be desirable as it might have a negative impact on the flexible nature of conciliation. Another concern was whether it would be feasible to provide a legislative solution on enforcement of settlement agreements beyond article 14 of the UNCITRAL Model Law on International Commercial Conciliation ("the Model Law"). Furthermore, it was pointed out that procedures for enforcing settlement agreements varied greatly between legal systems and were dependent upon domestic law, which did not easily lend themselves to harmonization. Nonetheless, it was stated that legislative frameworks on enforcement of settlement agreements were being developed domestically and that it might be timely to consider developing a harmonized solution. It was suggested that work on the topic should generally not dwell into the domestic procedures; instead, a possible approach could be to introduce a mechanism to enforce international settlement agreements, possibly modelled on article III of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) ("the New York Convention").[3]

4. After discussion, the Commission agreed that the Working Group should commence work at its sixty-third session on the topic of enforcement of settlement agreements to identify relevant issues and develop possible solutions, including the preparation of a convention, model provisions or guidance texts. The Commission also agreed that the mandate of the Working Group with respect to that topic should be broad to take into account the various approaches and concerns.[4]

5. At its sixty-third session, the Working Group had preliminary exchange of views on the matter.[5] The present note outlines the issues considered by the Working Group and sets out possible drafting formulations, including those that would be relevant if the Working Group were to prepare a convention (for example, possible reservations or declarations), yet with the understanding that the final form would be decided upon at a later stage (A/CN.9/861, para. 109).

II. Preparation of an instrument on enforcement of settlement agreements: scope of application and enforcement procedure

A. International commercial settlement agreements resulting from conciliation

6. At its sixty-third session, the Working Group considered the scope of application of a possible instrument on enforcement of settlement agreements (referred to below as the "instrument"). There was general agreement that the instrument should apply to the

[3] Ibid., *Seventieth Session, Supplement No. 17* (A/70/17), paras. 138-140.
[4] Ibid., para. 142.
[5] The report of the Working Group on the work of its sixty-third session is contained in document A/CN.9/861.

enforcement of international commercial settlement agreements resulting from conciliation (A/CN.9/861, paras. 19, 39 and 40).

1. "International" settlement agreements

7. At the sixty-third session of the Working Group, it was generally agreed that the instrument should apply to "international" settlement agreements and that the determination of the "international" character of a settlement agreement should be considered in a broad manner. It was also mentioned that the criteria for such characterization should be objective and relevant to achieving the purpose of the instrument (A/CN.9/861, para. 39).

8. In that context, it was suggested that criteria for determining that a settlement agreement was "international" under the instrument could mirror those under article 1(4)(a) of the Model Law. [6] Accordingly, a settlement agreement would be considered "international" where at least two parties to the settlement agreement had their places of business in different States at the time of the conclusion of that agreement (A/CN.9/861, para. 37). It was further suggested that elements mentioned in article 1(4)(b) of the Model Law could also be considered for characterizing a settlement agreement as "international" under the instrument (A/CN.9/861, para. 38).[7]

9. The Working Group may wish to consider whether the instrument should also apply to the enforcement of settlement agreements concluded by parties that had their places of business in the same State, provided that its enforcement is sought in another State (A/CN.9/861, para. 38). The purpose would be to ensure that the instrument would apply to cross-border enforcement of a settlement agreement in addition to being applicable to international settlement agreements.

10. For drafting purposes, the Working Group may wish to consider the following draft formulation based on article 1(4) of the Model Law:

"*A settlement agreement is international if:*

(a) [The parties] [at least two parties] to the settlement agreement have, at the time of the conclusion of that agreement, their places of business in different States; or

(b) The State in which the parties have their places of business is different from:

(i) The State in which [a substantial part of] the obligation is to be performed under the settlement agreement;

(ii) The State with which [the subject matter of] the dispute is most closely connected; or

(iii) The State in which [recognition and] enforcement of the settlement agreement is sought."

11. If the instrument were to take the form of a convention, the Working Group may wish to consider the following draft formulation based on article 1(1) of the United Nations Convention on Contracts for International Sale of Goods (1980) (CISG):

"*This Convention applies to the [recognition and] enforcement of settlement agreements concluded by parties whose places of business are (i) in different States or (ii) in a State different from the State where [recognition and] enforcement of settlement agreements is sought provided that:*

a. The State where [recognition and] enforcement is sought is a Contracting State; or

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[6] Article 1(4)(a) of the Model Law provides that: "*A conciliation is international if: (a) The parties to an agreement to conciliate have, at the time of the conclusion of that agreement, their places of business in different States; or (b) […]*".

[7] Article 1(4)(b) of the Model Law provides that: "*A conciliation is international if: (b) The State in which the parties have their places of business is different from either: (i) The State in which a substantial part of the obligations of the commercial relationship is to be performed; or (ii) The State with which the subject matter of the dispute is most closely connected*.".

b. The rules of private international law lead to the application of the law of a Contracting State."

12. In both instances, the following draft formulation could be added to provide guidance with regard to the determination of a party's place of business.

"*If a party has more than one place of business, the relevant place of business is that which has the closest relationship to [the dispute resolved by the settlement agreement][or any other criteria], having regard to the circumstances known to, or contemplated by, the parties at the time of the conclusion of the settlement agreement. If a party does not have a place of business, reference is to be made to the party's habitual residence.*"

2. "Commercial" settlement agreements

(a) Notion of "commercial"

13. At the sixty-third session of the Working Group, it was generally felt that the instrument should apply generally to the enforcement of "commercial" settlement agreements, without any limitation as to the nature of the remedies or obligations provided under those agreements (A/CN.9/861, paras. 40, 47 and 50). For example, it was agreed that the scope of the instrument should not be limited to pecuniary settlement agreements (A/CN.9/861, para. 47).

14. The Working Group may wish to further consider whether the "commercial" nature of the settlement agreement is to be derived from (i) the parties involved, (ii) the subject matter of the dispute being resolved, (iii) the obligation to be performed under the settlement agreement, or (iv) any of the above. For example, there may be obligations stipulated in the settlement agreement which are commercial in nature, whereas the parties are not necessarily commercial entities and the dispute itself could have arisen from a non-commercial relationship. The Working Group may wish to consider whether the instrument should address such circumstances in conjunction with other possible exclusions (see below, paras. 15-21).

(b) Possible exclusions

15. At the sixty-third session of the Working Group, it was generally considered that it was premature to decide whether the instrument should include an illustrative list of subject matters to be covered or a negative list of those to be excluded. However, it was pointed out that a negative list could run the risk of not being exhaustive (A/CN.9/861, para. 43).[8]

(i) Settlement agreements involving consumers, family and employment law matters

16. At the sixty-third session of the Working Group, there was general agreement that settlement agreements involving consumers should be excluded from the scope of the instrument. For drafting purposes, reference was made to article 2(a) of the CISG[9] as well as article 2 of the Convention on Choice of Courts Agreements (2005)[10] as possible models (A/CN.9/861, para. 41). The Working Group may wish to note that the CISG provision

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[8] In that respect, the Working Group may wish to note that footnote 1 of article 1 of the Model Law contains an illustrative list of commercial transaction, which provides that: "*The term 'commercial' should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road*."

[9] Article 2(a) of the CISG provides as follows: "*This Convention does not apply to sales: (a) of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use; [...]*".

[10] Article 2(1) of the Choice of Court Convention provides as follows: "*This Convention shall not apply to exclusive choice of court agreements: a) to which a natural person acting primarily for personal, family or household purposes (a consumer) is a party; b) relating to contracts of employment, including collective agreements.*".

focuses on the purpose of the transaction whereas the Choice of Court Convention provision focuses on the party to the agreement as well as the content of that agreement.

17. The Working Group may wish to determine whether the instrument should expressly exclude from its scope settlement agreements dealing with certain matters, such as family or employment law or whether such exclusions would not be necessary as settlement agreements dealing with those matters would generally not fall within the category of "commercial" settlement agreements (A/CN.9/861, para. 42).

18. For drafting purposes, the Working Group may wish to consider the following draft formulations:

> Option 1 (based on the CISG): *"This [instrument] does not apply to settlement agreements: (a) concluded by one of the parties for personal, family or household purposes; and (b) relating to family or employment law."*
>
> Option 2 (based on the proposed text in paragraph 9 of document A/CN.9/WG.II/WP.192): *"A dispute is not "commercial" if it involves employment law or family law, or if a consumer — acting for personal, family, or household purposes — is a party."*

(ii) Settlement agreements involving government entities

19. The view generally shared by the Working Group at its sixty-third session was that it would not be desirable for the instrument to include a blanket exclusion of settlement agreements involving government entities as those entities also engaged in commercial activities and might seek to use conciliation to resolve disputes. It was noted that excluding settlement agreements involving government entities would deprive those entities of the opportunity to enforce such agreements against their commercial partners (A/CN.9/861, para. 46). The Working Group may wish to confirm this understanding.

20. It may be noted that for States that would wish to exclude settlement agreements involving government entities from the scope of the instrument, a model legislative text would provide for such flexibility. In addition, as the currently suggested list of defences to enforcement includes lack of capacity, such ground could be invoked by government entities in jurisdictions where those entities are not authorized to conclude settlement agreements (A/CN.9/861, para. 44) (see below, paras. 55 and 56).

21. If the instrument were to take the form of a convention, States may be allowed to formulate a reservation or a declaration for that purpose (A/CN.9/861, para. 46). Depending on the scope of the instrument, the Working Group may wish to consider the following formulations:

> Option 1: "*A Party to this Convention may declare that it shall not apply this Convention to settlement agreements to which a government, a governmental agency or any person acting for a State is a party, unless otherwise indicated in the declaration*."
>
> Option 2 (based on the proposed text in paragraph 11 of document A/CN.9/WG.II/WP.192): "*A Party to this Convention may declare that it shall apply this Convention to settlement agreements to which a government, a governmental agency or any person acting for a State is a party only to the extent specified in a declaration*."

3. Settlement agreements resulting from "conciliation"

(a) Notion of "conciliation"

22. At the sixty-third session of the Working Group, broad support was expressed for limiting the scope of the instrument to settlement agreements that resulted from conciliation (A/CN.9/861, para. 19). Nonetheless, it was suggested that the notion of "conciliation" in the instrument should be broad and inclusive to cover different types of conciliation

techniques. It was widely felt that the definition of "conciliation" in article 1(3) of the Model Law provided a useful reference (A/CN.9/861, para. 21).[11]

23. For drafting purposes, the Working Group may wish to also consider the proposed text in paragraph 9 of document A/CN.9/WG.II/WP.192,which provides as follows:

> "*'Conciliation' is a process whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person or persons lacking the authority to impose a solution upon the parties to the dispute. […]*"

24. The Working Group may wish to note that both article 1(3) of the Model Law and the proposed text (see above, para. 23) underline that the conciliator would "lack the authority to impose a solution upon the parties to the dispute".

25. In addition, the Working Group may wish to consider whether the instrument should include provisions to ascertain that the settlement agreement actually resulted from conciliation (see below, paras. 42-43).

(b) Settlement agreements reached during judicial or arbitral proceedings

26. Confining the scope of the instrument to settlement agreements resulting from conciliation would generally exclude those resulting from any other dispute resolution methods, including judicial or arbitral proceedings. However, settlement agreements may be concluded in the course of such proceedings, as reflected in article 1(8) of the Model Law.[12] By way of illustration, the proposed text in paragraph 9 of document A/CN.9/WG.II/WP.192 provides as follows: "*'Conciliation' is a process […]. This definition includes cases in which parties to a dispute reached a settlement agreement in the course of arbitration proceedings.*"

27. Therefore, the Working Group may wish to consider whether the instrument should also apply where the parties have reached a settlement agreement in the course of judicial, arbitral or any other proceedings (A/CN.9/861, paras. 24-28). Diverging views were expressed at the sixty-third session of the Working Group on that question. One view was that the scope of the instrument should be limited to settlement agreements where the resolution of the dispute was initiated through conciliation and by no other means, in order to avoid overlap with other instruments (for instance, the judgements project of the Hague Conference on Private International Law, as well as the New York Convention) (A/CN.9/861, para. 25). A different view was that the resolution of many commercial disputes did not necessarily begin with a conciliation process and that parties, after submitting a dispute to a court or an arbitral tribunal, might reach an agreement during judicial or arbitral proceedings, in some cases through a conciliation process (A/CN.9/861, para. 26).

28. The Working Group may wish to consider whether the scope of the instrument should be expanded to settlement agreements concluded during judicial or arbitral proceedings and, in the affirmative, whether to then limit application to situations where there was a conciliation process that led to the settlement agreement and where the agreement was not recorded in a judicial decision or an arbitral award (A/CN.9/861, para. 27).

B. Validity and content of settlement agreements

29. The term "settlement agreement" is generally used to refer to an agreement that resolves a dispute, in all or in part and is to be distinguished from the agreement to submit a

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[11] Article 1(3) of the Model Law provides as follows: "*'Conciliation' means a process, whether referred to by the expression conciliation, mediation or an expression of similar import, whereby parties request a third person or persons ("the conciliator") to assist them in their attempt to reach an amicable settlement of their dispute arising out of or relating to a contractual or other legal relationship. The conciliator does not have the authority to impose upon the parties a solution to the dispute*.".

[12] Article 1(8) of the Model Law provides as follows: "*This Law applies irrespective of the basis upon which the conciliation is carried out, including agreement between the parties whether reached before or after a dispute has arisen, an obligation established by law, or a direction or suggestion of a court, arbitral tribunal or competent governmental entity*".

dispute to conciliation. The Working Group may wish to consider whether the instrument would need to provide a definition of the term "settlement agreement". In this context, it should be noted that the New York Convention does not define the term "award".

1. Validity of settlement agreements

30. The Working Group may wish to consider whether, and in the affirmative, at what stage of the procedure, the validity of settlement agreements should be considered under the instrument (A/CN.9/861, paras. 82-83). At the sixty-third session of the Working Group, it was suggested that a possible model to address that issue could be found in article II(3) of the New York Convention and article 8(1) of the UNCITRAL Model Law on International Commercial Arbitration, which referred to an arbitration agreement being deprived of effect when found to be "null and void, inoperative or incapable of being performed". It was suggested that those terms had been interpreted by courts in a number of jurisdictions in a harmonized fashion and therefore could be used if the instrument were to include a provision on the assessment of the validity of settlement agreements (A/CN.9/861, para. 92).

31. In this context, the Working Group may wish to consider whether the enforcing authority would be responsible for assessing the validity of the settlement agreement, the law applicable to that determination, and the possible legal consequences of that determination.

32. The Working Group may also wish to consider whether to address the possible impact of the conciliation process on the validity of the settlement agreement, for example, if the conciliation procedure was not in accordance with the law of the State where the conciliation took place.

2. Partial resolution of the dispute, finality of the settlement agreement, conditional provisions, set-off

33. As mentioned above, a settlement agreement may resolve a dispute in all or in part (see above, para. 29). The Working Group may wish to confirm that the instrument would apply to settlement agreement which partially resolve a dispute (A/CN.9/861, para. 64).

34. Settlement agreements are not necessarily final: they may be modified, amended or terminated by the parties, and such process may not necessarily involve conciliation. The Working Group may wish to consider whether such situations should be addressed under the instrument and in the affirmative, whether they could be treated as possible defences.

35. Another related question is whether and how the instrument would deal with situations where the obligations to be performed under the settlement agreement are conditional or have been partially performed by the parties and where the settlement agreement may be used for set-off purposes in a procedure. The Working Group may wish to consider whether the instrument should address those matters. At the sixty-third session of the Working Group, one view was that those circumstances could constitute possible defences, which could be handled by the enforcing authority in a flexible manner (A/CN.9/861, para. 91).

3. Dispute resolution clause in settlement agreements and party autonomy

36. Party autonomy plays a central role in conciliation. Parties may decide to enforce their settlement agreement under contract law or by any other means. They may provide for an arbitration clause in their settlement agreement as a means to resolve any dispute that could arise therefrom. In such circumstances, the Working Group may wish to consider whether the instrument should provide that the enforcing authority should refer the parties to arbitration (in accordance with article II of the New York Convention or the applicable arbitration law), or whether it should proceed with enforcement in accordance with the instrument.

37. Parties can also include a choice of court provision in the settlement agreement to determine the court competent to hear any dispute in relation to that agreement. In that

respect, the Working Group may wish to consider how to ensure that the instrument would effectively operate with the Choice of Court Convention.[13]

38. The Working Group may wish to consider whether the application of the instrument would depend on party autonomy, in particular if the instrument were to take the form of a convention (A/CN.9/861, paras. 61-63). Along those lines, the enforcement mechanism could be provided on an opt-in basis whereby the parties to the settlement agreement would agree to its application or on an opt-out basis whereby the parties would be free to exclude its application by agreement (see below, para. 42). If the Working Group considers that such a mechanism should be included in the instrument, it may wish to consider whether that mechanism would be optional for States Parties to the convention, and could be adopted or withdrawn through a declaration.

C. Form and other requirements of settlement agreements

1. A written agreement concluded by the parties

39. At its sixty-third session, the Working Group agreed that the instrument should provide certain form requirements of settlement agreements that would distinguish them from other agreements. Only those fulfilling such form requirements would be granted expedited enforcement under the instrument (A/CN.9/861, para. 51).

40. It was generally felt that those requirements should not be prescriptive and should be set out in a brief manner to preserve the flexible nature of the conciliation process (A/CN.9/861, para. 67). It was further noted that it would be preferable for the instrument to set minimum form requirements, providing States with the flexibility to introduce any other requirements if they so wished (A/CN.9/861, para. 65).

41. For example, the instrument may require that a settlement agreement should be in writing and indicate the agreement of the parties to be bound by the terms of the settlement agreement (by signing or by concluding the agreement) (A/CN.9/861, paras. 52, 53 and 67). In that respect, the Working Group may wish to consider how to formulate such requirements in the instrument, taking into account the use of electronic means of communication.

2. Other requirements

42. The Working Group may wish to consider whether the requirements referred to above (paras. 40-41) would be the only or minimum requirements and whether the instrument should require additional elements (A/CN.9/861, para. 67). By way of illustration, other elements might include an indication that: (i) a conciliator was involved in the process (for example, by him/her signing the settlement agreement, indicating his/her identity in the settlement agreement or submitting a separate statement to that purpose) (A/CN.9/861, paras. 54-58); (ii) the settlement agreement resulted from conciliation (see above, para. 25); (iii) the parties to the settlement agreement were informed of the enforceability of the settlement agreement before or upon its conclusion; or (iv) the parties opted into the enforcement mechanism envisaged by the instrument (A/CN.9/861, paras. 61-63 and 67; see also above, para. 38).

43. The Working Group may wish to consider whether the instrument would require these elements to be indicated in the settlement agreement. The Working Group may also wish to consider whether some of these elements could be taken into account in the definition of settlement agreements, if any. Alternatively, the instrument could provide that parties applying for the enforcement of settlement agreements are required to supply proof of these elements following article IV of the New York Convention (see below, para. 45).

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[13] Article 5(1) of the Convention reads as follows: "*The court or courts of a Contracting State designated in an exclusive choice of court agreement shall have jurisdiction to decide a dispute to which the agreement applies, unless the agreement is null and void under the law of that State. A court that has jurisdiction under paragraph 1 shall not decline to exercise jurisdiction on the ground that the dispute should be decided in a court of another State*.".

D. Enforcement procedure and defences to enforcement

1. Direct enforcement mechanism

44. At its sixty-third session, the Working Group generally agreed that the instrument should provide a mechanism where a party to a settlement agreement would be able to seek enforcement directly at the State of enforcement (referred to as "direct enforcement") without incorporating a review or control mechanism in the State where the settlement agreement was originating from (referred to as "originating State") as a pre-condition (A/CN.9/861, para. 80). In support of that approach, it was stated that (i) it could be very difficult to determine the originating State as the connecting factor might be subject to different determinations, and (ii) a review or control mechanism was likely to result in double exequatur, which would be at odd with the purpose of the instrument to provide an efficient and simplified enforcement mechanism. It was further noted that concerns raised by direct enforcement could be addressed in the context of possible defences to enforcement (A/CN.9/861, para. 84).

45. For drafting purposes, the Working Group may wish to consider the following formulation based on articles III and IV of the New York Convention:

> "*1. Settlement agreements shall be enforced in accordance with the rules of procedures of the [territory][place][State] where enforcement is sought, under the conditions laid down in [the instrument]*.
>
> *2. To obtain enforcement of a settlement agreement, the party applying for enforcement shall, at the time of application, supply* [form and other requirements mentioned above, in paras. 39-42]."

2. Notion of recognition

46. At its sixty-third session, the Working Group considered whether the instrument would need to provide for "recognition" of the settlement agreement by a court or competent authority at the place of enforcement (A/CN.9/861, paras. 71-79).

47. Diverging views were expressed regarding the need for the instrument to provide for the recognition of settlement agreements by a court or competent authority. This resulted from different understandings of the notions of "recognition" and "settlement agreements" as the subject of such recognition (as contracts between private parties or acts of a particular nature resulting from a dispute resolution procedure) (A/CN.9/861, para. 72).

48. By way of background on the reference to "recognition" in international texts, the concept of recognition of non-judicial/State action appears as early as the Geneva Protocol on Arbitration Clauses (1923) and the Geneva Convention on the Execution of Foreign Arbitral Awards (1927). Those conventions call for the recognition of arbitration agreements "as valid" and the recognition of arbitral awards "as binding". The notion of "recognition" of a non-judicial/State action absent any qualifier (e.g., "as binding" or "as valid") appears to have originated with the New York Convention with regards to recognition of arbitration agreements (article II (1)) and arbitral awards (article III which requires that they be recognized "as binding").

49. The Working Group may wish to consider whether a settlement agreement would need to be given effect through a procedure akin to recognition and which legal value such a procedure would give to settlement agreements. As an alternative, the Working Group may wish to consider clarifying the meaning of "recognition" in the context of the instrument, and refer, for instance, to the need to give legal effect to the settlement agreements.

50. If the recognition of settlement agreements is dealt with under the instrument, the Working Group may also wish to consider whether and how recognition would relate to the assessment of the validity of the settlement agreement (see above, paras. 30-32).

3. Defences to enforcement and applicable law

51. At its sixty-third session, the Working Group considered the question of defences to enforcement of settlement agreements with the assumption that the instrument would

provide direct enforcement (see above, paras. 44 and 45). The Working Group exchanged preliminary views on defences that should be included in the instrument, how they should be presented, and how to determine the law applicable to defences (A/CN.9/861, para. 85).

52. The Working Group agreed that defences in the instrument should be limited and not cumbersome for the enforcing authority to implement allowing for a simple and efficient verification of the grounds for refusing enforcement. It was widely felt that defences in the instrument should be exhaustive and stated in general terms, giving flexibility to the enforcing authority with regard to their interpretation (A/CN.9/861, para. 93). It was suggested that defences in the instrument should be broadly categorized and set out in general terms. As to the possible categories of defences, reference was made to those pertaining to: (i) the genuineness of the settlement agreement (reflecting the parties' consent, not being fraudulent), (ii) the readiness or validity of the settlement agreement to be enforced (being final, not having been modified or performed, binding on the parties) and (iii) international public policy. As to who could raise these defences, it was said that some categories of defences might also be considered by the enforcing authority at its own initiative (A/CN.9/861, para. 97).

53. At its sixty-third session, the Working Group considered some possible grounds for resisting enforcement of settlement agreements. There was general support that existence of fraud, violation of public policy and the subject matter not capable of being conciliated could be raised as defences (A/CN.9/861, para. 88). In addition, it was suggested that the instrument should provide that enforcement should be denied if a party to the settlement agreement did not sign, or consent to, the agreement (see above, paras. 39-41), and the settlement agreement did not reflect the terms agreed to by the parties.

54. At its sixty-third session, the Working Group also considered the question of the law or laws applicable to defences in the enforcement procedure and how it should be addressed. After discussion, it was generally felt that the instrument should not address the laws applicable with respect to defences in the enforcement procedure, with the assumption that the enforcing authority or the court seized with the matter would usually apply the conflict-of-law rules at the place of enforcement and where relevant, consideration of the parties' choice of law in the settlement agreement. It was stated that the instrument could state that principle in broad terms and provide unambiguous guidance regarding the laws applicable to defences to the extent possible (A/CN.9/861, paras. 100-102). The Working Group may wish to consider that for certain defences, the law applicable at the place of enforcement may be relevant and should be mentioned (for instance, public policy).

55. For drafting purposes, the Working Group may wish to consider the proposed text in paragraph 18 of document A/CN.9/WG.II/WP.192, which provides as follows:

> "*Recognition and enforcement of an International Settlement Agreement may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:*
>
> > *A. The party against whom the International Settlement Agreement is invoked was, under the law applicable to it, under some incapacity or concluded the International Settlement Agreement due to coercion or fraud; or*
> >
> > *B. The subject matter of the International Settlement Agreement is not capable of settlement under the law of the country where recognition and enforcement is sought; or*
> >
> > *C. The recognition or enforcement of the International Settlement Agreement would be contrary to the public policy of the country where recognition and enforcement is sought; or*
> >
> > *D. Recognition or enforcement would be contrary to the terms of the International Settlement Agreement itself; or […]*"

56. As an alternative, the Working Group may wish to consider the following draft formulation based on article V of the New York Convention and discussions at the sixty-third session of the Working Group:

"*1. Enforcement of a settlement agreement may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where enforcement is sought, proof that:*

(a) A party to the settlement agreement was under some incapacity under the law applicable to it; or

(b) The enforcement of the settlement agreement would be contrary to its terms and conditions (including the agreement by the parties that [the instrument] would not be applicable); or

(c) The settlement agreement was [null and void, inoperative or incapable of being enforced][not valid] under the law to which the parties have subjected it or failing any indication thereon, under the law deemed applicable by the competent authority; or

(d) The settlement agreement is not binding on the parties, is not a final resolution of the dispute, has been subsequently modified by the parties or the obligations therein have been performed; or

(e) Enforcement of the settlement agreement would be contrary to a decision of another court or competent authority.

2. Enforcement of a settlement agreement may also be refused by [the competent authority where enforcement is sought] if it finds that:

(a) The subject matter of the settlement agreement is not capable of settlement by conciliation under the law of the State where enforcement is sought; or

(b) The enforcement of the settlement agreement would be contrary to the public policy of the State where enforcement is sought."

4. Relationship of enforcement proceedings with judicial or arbitral proceedings

57. At the sixty-third session of the Working Group, it was widely felt that the instrument would need to address the possible impact that other related judicial or arbitral proceedings could have on the enforcement procedure (A/CN.9/861, para. 107). It was suggested that the approach adopted in article V(1)(e) and VI of the New York Convention could provide useful guidance. For instance, the instrument might provide that the enforcing authority might, if it considers proper, adjourn its decision on the enforcement of the settlement agreement when there exists an application for a judicial or arbitral proceeding about the settlement agreement.

III. Possible form of instrument

58. At its sixty-third session, the Working Group had a preliminary discussion on the possible form of the instrument, which could be a convention, model legislative provisions or a guidance text. The prevailing view was that there were a number of issues that would require further consideration before a decision could be made on the final form of the instrument. Nonetheless, a number of delegations expressed preference for preparing a convention, as it could more efficiently contribute to the promotion and harmonization of conciliation (A/CN.9/861, para. 108).

A. Convention

59. The proposal considered by the Commission (A/CN.9/822, see above, para. 1) was based on the preparation of a convention modelled on the New York Convention. One key feature of the proposal was that the proposed convention would provide the framework for the enforcement of international settlement agreements without seeking to harmonize the domestic legislation. Therefore, it would not address the procedural aspects dealt with in the domestic legislation and would only introduce a cross-border mechanism to enforce

international settlement agreements (A/CN.9/832, para. 22). It would also not seek to harmonize rules governing the conciliation process nor address matters related to the attachment or execution of assets, both of which are not dealt with under the New York Convention.

60. If a convention were to be prepared, the Working Group may wish to consider the flexibility to be given to States possibly through reservations or declarations (for example, see above, para. 21).

61. The Working Group may wish to note that the proposal further suggests that settlement agreements under the proposed convention should be treated at least as favourably as foreign arbitral awards under the New York Convention (see A/CN.9/WG.II/WP.192, para. 15 and A/CN.9/861, para. 77, see also Guide to Enactment of the Model Law, para. 87).Thus, if the instrument were to takes the form of a convention, it would require that States "*not impose substantially more onerous conditions or higher fees or charges on the [recognition or] enforcement of settlement agreements to which they apply this Convention than they impose on the recognition or enforcement of arbitral awards or of other settlement agreements.*"

B. Model legislative provisions

62. During the sixty-second session of the Working Group, it was mentioned that a more gradual approach to harmonize the regime of enforcement of settlement agreements could be preferable, starting from the harmonization of domestic legislation (A/CN.9/832, para. 19). In line with that suggestion, another possible form of work may be the preparation of model legislative provisions, which would be adopted and enacted by States in their domestic legislation. Such an instrument would likely build upon article 14 of the Model Law, which leaves the method of enforcement to each enacting State.

63. Some of the aspects that could be addressed in the model legislative provisions would be whether the enforcement procedure would be mandatory (see footnote to article 14 of the Model Law) and whether the procedure should provide for expedited or simplified enforcement.

C. Guidance text

64. Another possible form of work could be to expand paragraphs 87 to 92 of the Guide to Enactment on article 14 of the Model Law and to prepare a legislative guide with relevant recommendations and commentary. Such a guidance text could set out information about various approaches taken in different jurisdictions based on replies received by the Secretariat (see document A/CN.9/846 and addenda as well as document A/CN.9/WG.II/WP.193 and A/CN.9/WG.II/WP.196). It could also include specific legislative recommendations including, for example, a recommendation on the application of the New York Convention to consent awards.

I. Note by the Secretariat on settlement of commercial disputes: enforcement of settlement agreements: compilation of comments by Governments

(A/CN.9/WG.II/WP.196 and Add.1)

[Original: Arabic]

Contents

I. Introduction

1. At its forty-seventh session, in 2014, the Commission agreed that the Working Group should consider at its sixty-second session the issue of enforcement of settlement agreements resulting from international commercial conciliation and should report to the Commission at its forty-eighth session, in 2015, on the feasibility and possible form of work in that area. The Commission invited delegations to provide information to the Secretariat in respect of that subject matter.[1] For the preparation of possible future work on the matter, and to facilitate the collection of information by delegations, the Secretariat circulated to States a questionnaire, reproduced in section II of document A/CN.9/846. The replies received by the Secretariat before the commencement of the forty-eighth session of the Commission have been reproduced in document A/CN.9/846 and its addenda. Replies received after that date have been reproduced in document A/CN.9/WG.II/WP.191 and in this note.

II. Compilation of comments

1. Saudi Arabia

[Original: Arabic]
[Date: 30 September 2015]

Question 1: Information regarding the legislative framework

At present, there is no Law that regulates commercial mediation/conciliation judgements in the Kingdom. The organization, rules and procedures of the Reconciliation Center — operating in the Kingdom — do not make any reference to the enforcement of international commercial agreements resulting from mediation/conciliation procedures. There is, however, an arbitration/conciliation law that stipulates procedures for enforcement of judgements and agreements, as follows.

After ascertaining the procedural validity — subject matter and territorial jurisdiction — of the judgements and agreements to be enforced in the Kingdom, after ascertaining the formal procedures to be followed regarding the judgements and agreements resulting from arbitration and conciliation in Saudi laws, after ascertaining that these judgements and agreements do not contravene a judgement or decision rendered by a tribunal, commission or body having the competence to decide on the subject of dispute in the Kingdom, and after ascertaining that these judgements and agreements do not contain anything that contravenes the tenets of Islamic Law and public order in the Kingdom (if possible, the judgement or agreement may be split and the part not containing a contravention be enforced), the competent tribunal or its appointee shall issue an order enforcing the international commercial judgements and agreements resulting from mediation/conciliation procedures. The request is submitted to the tribunal together with the following: the original of the agreed

[1] *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 129.

document or a certified copy thereof; a true copy thereof; an Arabic translation thereof, certified by an accredited body (if written in a foreign language); and proof of its submission to the competent tribunal within 15 days of its issuance.

The Law in the Kingdom makes no distinction regarding the enforcement of international commercial settlement agreements, since they are adjudicated expeditiously in all cases. Therefore, the requirements are the same in regular and expeditious cases.

The Saudi laws do not provide for treating an international commercial settlement agreement as a final award rendered by an arbitral tribunal. They do, however, treat settlement/conciliation agreements — after all procedures and requirements stipulated in Saudi laws have been applied — as awards rendered by an arbitral tribunal, which leads to the same result as regards enforcement.

Question 2: Grounds for refusing enforcement of a commercial settlement agreement

The judicial system in the Kingdom does not reject local or international commercial settlement agreements, but encourages them in fulfilment of the Holy Koran verse ("And reconciliation Is better"). It does, however, highlight the need for the procedural validity — as stipulated in the Saudi laws — of the functioning of these agreements to ensure their enforcement.

Question 3: Validity of international commercial settlement agreements

The laws in the Kingdom specify all criteria to be applied to ensure that local or international commercial agreement resulting from mediation/conciliation procedures are enforceable. This is done by virtue of the Arbitration Law established by Royal Decree No. m/34 dated 24/5/1433 H [15 April 2012] and the Enforcement Law established by Royal Decree No. m/53 dated 13/8/1433 H [2 July 2012]. There are no bases in Saudi laws for challenging the validity of a settlement agreement resulting from mediation/conciliation other than what is mentioned in the Arbitration Law.

(A/CN.9/WG.II/WP.196/Add.1) (Original: English)

Note by the Secretariat on settlement of commercial disputes: enforcement of settlement agreements: compilation of comments by Governments

ADDENDUM

Contents

II. Compilation of comments

1. Italy

[Original: English]
[Date: 22 January 2016]

Question 1: Information regarding the legislative framework

Italian Decree No. 28/2010 on Mediation in Civil and Commercial disputes entered into force on the 20th of March 2010 and it has been amended with Law No. 98 of 2013. This decree sets up a mediation procedure for disputes regarding disposable civil and commercial rights, which can be resolved by conciliation (note: conciliation in this context refers to its legal meaning in Italian law, referring to the settlement agreement arising from a mediation proceeding). This particular kind of mediation has specific features provided by the law. The mediation procedure must be administered by accredited mediation institutions composed of certified (trained by accredited training centres) mediators. These mediation institutions are listed in a Registry at the Ministry of Justice.

In some cases, an attempt at mediation is mandated either by Italian law or by the order of a judge and in these cases the lawyers of all parties are obliged to be present. In other cases, the parties agree voluntarily and/or are obliged by contractual stipulations (conciliation clauses) to attempt mediation within the parameters of the decree.

Following the procedure set up by the decree, several legal guarantees — including guarantees of confidentiality, the suspension of the limitation period and the enforceability of the mediation clause — are granted. There are certain relevant advantages in following this procedure, such as fiscal benefits and especially the enforceability of settlement agreements resulting from this mediation procedure.

i. The enforceability of the agreement, as a result of a mediation proceedings as governed by Decree No. 28, including both pecuniary and non-pecuniary obligations, can be reached in two different ways (as per art. 12 of the Decree No. 28). All other settlement agreements, for example those arising from ad-hoc mediation, are treated by the law as contracts.

- First way: each party can present the settlement agreement to the Court to be ratified by the President of the Tribunal, provided its formal regularity and its compliance with imperative norms and public order have been verified;
- Second way, if the lawyers, having certified the conformity of the agreement with imperative norms and public order, agree to sign it, the settlement agreement becomes directly enforceable on the Italian territory.

Such provision does represent a significant development, making the procedure more attractive in the considerable number of cases where the parties have an interest in reaching a settlement within a short timescale and with a reasonable degree of certainty that they will be able to enforce any agreement reached.

ii. There is no express mention, in the Decree, of the enforceability of such agreements outside the Italian territory.

The only provision for expedited enforcement of international commercial settlement agreements is the one contained at the first paragraph of art. 12 of the Decree No. 28: "In the cross border disputes of art. 2 of EU Parliament and Council Directive 2008/52/CE dated 21 May 2008, the agreement is ratified ('omologato') by the President of the Tribunal where the Agreement has to be executed."

iii. There is no provision to the effect that an international commercial settlement agreement be treated as a final award rendered by an arbitral tribunal.

Question 2: Grounds for refusing enforcement of a commercial settlement agreement

Refusal of enforcement of a commercial settlement agreement may result from the failure to comply with formal requirements, imperative norms or public order.

Question 3: Validity of international commercial settlement agreements

Since mediation/conciliation agreements (clauses) are regarded as contracts in Italy, the question as to their validity is governed by the contract law applicable under the conflict of law provisions. Agreements to mediate/conciliate, as well as agreements resulting from mediation/conciliation, are regarded as contracts subject to the applicable contract law rules.

J. Note by the Secretariat on settlement of commercial disputes: revision of the UNCITRAL Notes on Organizing Arbitral Proceedings

(A/CN.9/879)

[Original: English]

Contents

I. Introduction

1. Further to initial discussions at its twenty-sixth session, in 1993,[1] the Commission finalized the UNCITRAL Notes on Organizing Arbitral Proceedings (also referred to below as the "Notes") at its twenty-ninth session, in 1996.[2] At its forty-seventh session, in 2014, the Commission agreed that the Working Group should commence work on the revision of the Notes and, in so doing, should focus on matters of substance, leaving drafting to the Secretariat.[3]

2. At its forty-eighth session, in 2015, the Commission had before it the draft revised Notes (contained in document A/CN.9/844), as it resulted from the work of the Working Group at its sixty-first[4] (Vienna, 15-19 September 2014) and sixty-second[5] (New York, 2-6 February 2015) sessions.

3. The Commission approved the draft revised Notes in principle, and requested the Secretariat to revise the Notes in accordance with its deliberations and decisions.[6] It was further agreed that the Secretariat could seek input from the Working Group on specific issues during its sixty-fourth session. The Commission further requested that the revised Notes be finalized for adoption at its forty-ninth session, in 2016.[7]

4. Accordingly, the Working Group considered the draft revised Notes (contained in document A/CN.9/WG.II/WP.194) at its sixty-fourth session (New York, 1-5 February 2016) and requested the Secretariat to prepare an updated draft of the Notes based on the deliberations and discussions for consideration by the Commission.[8] This note contains the draft revised Notes for finalization and approval by the Commission.

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[1] *Official Records of the General Assembly, 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. The Working Group may also wish to consult the drafts considered, namely documents A/CN.9/378/Add.2, A/CN.9/396, A/CN.9/396/Add.1, A/CN.9/410 and A/CN.9/423.

[2] *Official Records of the General Assembly, Fifty-first Session, Supplement No. 17* (A/51/17), paras. 11-54 and Part II.

[3] Ibid., *Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 128.

[4] Report of the Working Group on the work of its sixty-first session (A/CN.9/826).

[5] Report of the Working Group on the work of its sixty-second session (A/CN.9/832), paras. 60-142.

[6] *Official Records of the General Assembly, Seventieth Session, Supplement No. 17* (A/70/17), paras. 14-133.

[7] Ibid., para. 133.

[8] Report of the Working Group on the work of its sixty-fourth session (A/CN.9/867), paras. 15-89.

II. Revision of the UNCITRAL Notes on Organizing Arbitral Proceedings

A. Specific issues for consideration

5. The Commission may wish to note the following:

(a) Note 5 (Costs of arbitration): At its sixty-fourth session, the Working Group agreed that the question whether in-house costs of the parties should be included in the list of arbitration costs should be further considered by the Commission as that question had not been discussed previously, and is not fully settled in practice (A/CN.9/867, paras. 41 and 42); provisions on in-house costs are contained in the draft below in paragraphs 40 and 41;

(b) Notes 14 to 18: At its sixty-fourth session, the Working Group heard suggestions which were not discussed due to lack of time with respect to Notes 14 to 18 (A/CN.9/867, paras. 68-89); those suggestions are reflected in the draft below for consideration by the Commission.

B. Draft revised UNCITRAL Notes on Organizing Arbitral Proceedings

6. The Commission may wish to consider the draft revised Notes below. References to discussions of the Working Group at its sixty-first, sixty-second and sixty-fourth sessions and of the Commission at its forty-eighth session are contained below.

"2016 UNCITRAL Notes on Organizing Arbitral Proceedings

"Preface

"The United Nations Commission on International Trade Law (UNCITRAL) adopted the first edition of the Notes at its twenty-ninth session, in 1996. UNCITRAL finalized a second edition of the Notes at its [forty-ninth] session, [in 2016]. In addition to representatives of the 60 member States of UNCITRAL, representatives of many other States and of international organizations participated in the deliberations. In preparing the second edition of the Notes, the Secretariat consulted with experts from various legal systems, national and international arbitration bodies, as well as international professional associations.

"List of matters for possible consideration in organizing arbitral proceedings

"Introduction

"**Purpose of the Notes** [*A/CN.9/826, paras. 13 to 15 and 28; A/CN.9/832, para. 61*]

"1. The purpose of the Notes is to list and briefly describe matters relevant to the organization of arbitral proceedings. The Notes, prepared with a focus on international arbitration, are intended to be used in a general and universal manner, regardless whether the arbitration is administered by an arbitral institution.

"2. Given that procedural styles and practices in arbitration do vary and that each of them has its own merit, the Notes do not seek to promote any practice as best practice.

"**Non-binding character of the Notes** [*A/CN.9/832, para. 62; A/CN.9/867, para. 17*]

"3. The Notes do not impose any legal requirement binding on the parties or the arbitral tribunal. The parties and the arbitral tribunal may use or refer to the Notes at their discretion and to the extent they see fit and need not adopt or provide reasons for not adopting any particular element of the Notes.

"4. The Notes are not suitable to be used as arbitration rules, since they do not oblige the parties or the arbitral tribunal to act in any particular manner. Various matters discussed in the Notes may be covered by applicable arbitration rules. The use of the Notes does not imply any modification of such arbitration rules.

"5. The Notes, while not exhaustive, cover a broad range of situations that may arise in arbitral proceedings. In many arbitrations, however, only a limited number of the matters addressed in the Notes will arise or need to be considered. The specific circumstances of the arbitration will indicate which matters it would be useful to consider and at what stage of the arbitral proceedings those matters should be considered. Therefore, it is advisable not to raise a matter unless and until it appears likely that the matter needs to be addressed.

"**Characteristics of arbitration** [*A/CN.9/826, paras. 30, 31 and 41 to 50; A/CN.9/832, paras. 76 to 79; Official Records of the General Assembly, Seventieth Session, Supplement No. 17 (A/70/17), paras. 27 to 34; A/CN.9/867, para. 18*]

"6. Arbitration is a flexible process to resolve disputes; the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the arbitral proceedings, subject to mandatory provisions of the applicable arbitration law. The autonomy of the parties in determining the procedure is of special importance in international arbitration. It allows the parties to select and tailor the procedure according to their specific wishes and needs, unimpeded by possibly conflicting legal practices and traditions.

"7. The parties exercise their autonomy usually by agreeing on a set of arbitration rules to govern the arbitral proceedings. The benefits of selecting a set of arbitration rules are that the procedure becomes more predictable and that the parties and the arbitral tribunal may save time and costs by using an established set of arbitration rules that may be familiar to the parties, that has been carefully drafted by experienced practitioners, and that has often been widely applied and interpreted by arbitral tribunals and courts and commented by practitioners and academics. In addition, the selected set of arbitration rules (as modified by the parties, to the extent permitted) usually prevails over the non-mandatory provisions of the applicable arbitration law and may better correspond to the objectives of the parties than the default provisions of the applicable arbitration law. Where the parties have not agreed at an earlier stage on a set of arbitration rules, they may still agree on such a set after the arbitration has commenced (see below, para. 10).

"8. To the extent that the parties have not agreed on the procedure to be followed by the arbitral tribunal or on a set of arbitration rules to govern the arbitral proceedings, the arbitral tribunal has the discretion to conduct such proceedings in the manner it considers appropriate, subject to the applicable arbitration law. Arbitration laws usually grant the arbitral tribunal broad discretion and flexibility in the conduct of arbitral proceedings, provided that a fair, equitable and efficient process is observed.[9] A set of arbitration rules selected by the parties would also shape the arbitral tribunal's discretion to conduct the arbitral proceedings, either by strengthening or limiting that discretion. Discretion and flexibility are useful as they enable the arbitral tribunal to make decisions on the organization of arbitral proceedings that take into account the circumstances of the case and the expectations of the parties, while complying with due process requirements. Where the parties did not agree on the procedure or on arbitration rules, the arbitral tribunal may nevertheless take guidance from, and use as a reference, a set of arbitration rules.

[9] For example, article 19 of the UNCITRAL Model Law on International Commercial Arbitration (with amendments as adopted in 2006) provides as follows: "(1) Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings. (2) Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence."

"**Annotations**

"**1. Consultation regarding the organization of arbitral proceedings; Procedural meetings** [*A/CN.9/826, paras. 27, 33 to 35 and 39; A/CN.9/832, paras. 66 to 75; Official Records of the General Assembly, Seventieth Session, Supplement No. 17 (A/70/17), paras. 22 to 26; A/CN.9/867, paras. 19 to 29*]

"**(a) General principle of consultation between the parties and the arbitral tribunal**

"9. It is usual for the arbitral tribunal to involve the parties in making decisions on the organization of the arbitral proceedings and, where possible, to seek their agreement. Such consultations are intrinsic to the consensual nature of arbitration and are normally undertaken with respect to most organizational decisions addressed in the Notes. However, in order to remain concise, the need for such consultation is not necessarily repeated in the Notes each time consultation is expected to occur.

"10. Likewise, it is usual for the parties to consult the arbitral tribunal whenever they agree between themselves on any issue that might affect the organization of the arbitral proceedings. When the agreement of the parties affects the planning of the arbitrators, the parties would usually also seek the agreement of the arbitral tribunal. Moreover, if the parties agree after the arbitral tribunal has been constituted that an arbitral institution will administer the arbitration, the parties would usually secure the agreement of both the arbitral tribunal and that institution.

"**(b) Procedural meetings**

"*(i) First procedural meeting*

"11. It is advisable for the arbitral tribunal to give the parties a timely indication as to the organization of the arbitral proceedings and the manner in which it intends to proceed. In particular, in international arbitrations, parties may be accustomed to differing styles of arbitral proceedings and, without such guidance, they may find certain aspects of the arbitral proceedings unpredictable and difficult to prepare for.

"12. As a method of consultation with the parties, the arbitral tribunal may consider holding, at the outset of the arbitral proceedings, a meeting or case management conference at which it determines the organization of the arbitral proceedings and a procedural timetable.

"13. A number of issues covered by the Notes would usually be addressed at the first procedural meeting, and thus create the basis for a common understanding of the procedure among the parties and the arbitral tribunal. If a procedural timetable is established, it may serve, for instance, to indicate time limits for the communication of written submissions, witness statements, expert reports and documentary evidence, so that the parties may plan early in the arbitral proceedings. A procedural timetable may include provisional dates for hearings. In preparing the procedural timetable, the parties and the arbitral tribunal may also wish to consider whether any statutory and/or mandatory time limits on the duration of the arbitral proceedings are provided for in the applicable arbitration law or arbitration rules.

"*(ii) Subsequent procedural meetings*

"14. The arbitral tribunal usually holds additional procedural meetings (including what are sometimes referred to as 'preparatory conferences' or 'pre-hearing conferences') at subsequent stages of the arbitral proceedings. Procedural meetings are significant as they set the stage for the arbitral proceedings and aim at ensuring their efficiency. Procedural meetings may be used, for instance, for the arbitral tribunal to reassess whether further submissions are required or further evidence ought to be presented as well as to discuss matters relating to the organization of a hearing. The procedural timetable can be updated accordingly as the arbitral proceedings progress.

"*(iii) Modification of decisions on the organization of arbitral proceedings*

"15. Decisions on the organization of arbitral proceedings can be revisited and modified at relevant stages of the arbitral proceedings by the arbitral tribunal. However,

the arbitral tribunal should exercise caution in modifying procedural arrangements, in particular where the parties have taken steps in reliance on those arrangements. Moreover, the arbitral tribunal may not be able to modify procedural arrangements to the extent that those arrangements result from an agreement between the parties. If a modification is required, the arbitral tribunal would usually seek the agreement of the parties thereon.

"*(iv) Record of the outcome of a procedural meeting*

"16. A record of the outcome of a procedural meeting can take various forms depending on its significance, such as a procedural order, summary minutes, or an ordinary communication among the parties and the arbitral tribunal. Usually, the arbitral tribunal records the rules of procedure that have been determined to apply to the arbitral proceedings in a procedural order. The outcome of a procedural meeting can be made in writing or first made orally and recorded in writing after the procedural meeting. The parties and the arbitral tribunal may consider whether to produce transcripts, which could provide a precise record of the procedural meeting (see below, para. 135).

"*(v) Attendance of the parties*

"17. It is usually advisable that the parties themselves, in addition to any representatives they may have appointed, be present at procedural meetings.

"18. If a party neither participates nor is represented in a procedural meeting, the arbitral tribunal should nevertheless ensure that the non-participating party has an opportunity to participate in the further stages of the arbitral proceedings and to present its case. The procedural timetable, if established, should provide for such opportunity.

"19. Procedural meetings can be held either in the physical presence of all participants, or remotely via technological means of communication. The arbitral tribunal may consider, in each case, whether it would be preferable to hold the meeting in-person, which may facilitate personal interaction, or to use remote means of communication, which may reduce costs (see also below, para. 124).

"**2. Language or languages of the arbitral proceedings** [*A/CN.9/826, paras. 51 to 60; A/CN.9/832, paras. 80 to 86; Official Records of the General Assembly, Seventieth Session, Supplement No. 17 (A/70/17), paras. 35 to 37; A/CN.9/867, paras. 30 to 32*]

"**(a) Determination of the language**

"20. The parties may agree on the language or languages in which the arbitral proceedings will be conducted. Such agreement ensures that the parties have the capacity to communicate in the language or languages of the arbitral proceedings. In the absence of such agreement, the arbitral tribunal will usually determine the language or languages. Common criteria for that determination are the primary language of the contract(s) or other legal instruments under which the dispute arose, and the language commonly used by the parties in their communication. The parties and the arbitral tribunal usually choose a single language to conduct the arbitral proceedings (see below, para. 24).

"**(b) Possible need for translation and interpretation**

"21. The parties may rely on documentary evidence, judicial decisions and juridical writings ('legal authorities') that are not in the language of the arbitral proceedings. In determining whether to require translation of those documents in full or in part, the arbitral tribunal may consider whether the parties and the arbitral tribunal are able to understand the content of such documents without translation and whether cost-efficient measures are available in lieu of translation in full (such as translation of the relevant part of documents, or a single template translation for documents of similar or standardized content).

"22. Interpretation may be necessary where witnesses or experts appearing at a hearing are unable to testify in the language of the arbitral proceedings. Witnesses and experts familiar with the language of the arbitral proceedings might still require occasional interpretation, rather than full interpretation. If interpretation is necessary, it is advisable to consider whether the interpretation will be simultaneous or consecutive. While simultaneous interpretation is less time-consuming, consecutive interpretation allows for a closer monitoring of the accuracy of the interpretation.

"23. The responsibility for arranging translation and/or interpretation typically lies with the parties even in arbitrations administered by an arbitral institution.

"**(c) Multiple languages**

"24. Because of the logistical difficulties and considerable extra costs that often arise from conducting arbitral proceedings in more than one language, the parties and the arbitral tribunal usually choose to conduct the arbitral proceedings in a single language unless there are particular circumstances that would require the use of more than one language.

"25. When multiple languages are to be used in arbitral proceedings, the parties and the arbitral tribunal may need to decide whether the languages are to be used interchangeably without any translation or interpretation, or whether all communications and documents need to be translated and oral evidence interpreted into all the languages of the arbitration. As an alternative, the parties and the arbitral tribunal may decide that one of the languages will be designated as authoritative for the purpose of the arbitral proceedings (such that multiple languages could be used during the proceedings, but procedural orders and arbitral awards, for example, would be issued only in the authoritative language). In any case, where translation is required, the parties and the arbitral tribunal may need to consider whether, in the interest of economy and efficiency, it would be acceptable to limit translation to relevant sections of documents or to exempt certain types of documents, such as legal authorities (see above, para. 21), from translation.

"**(d) Costs of translation and interpretation**

"26. When making decisions about translation and interpretation, it is advisable for the arbitral tribunal to decide whether any or all of the costs are to be paid by the parties at the time the costs are incurred. Irrespective of who pays the costs when they are incurred, the arbitral tribunal may later have to decide how these costs, along with other costs, will ultimately be allocated between the parties, if the arbitral tribunal considers that these costs are to be included in the costs of arbitration (see below, paras. 39 and 47 to 49).

"**3. Place of arbitration** [*A/CN.9/826, paras. 61 to 66; A/CN.9/832, paras. 87 to 94; Official Records of the General Assembly, Seventieth Session, Supplement No. 17 (A/70/17), paras. 38 to 42; A/CN.9/867, paras. 33 to 37*]

"**(a) Determination of the place of arbitration**

"27. The parties may agree on the place (or 'seat') of arbitration. If the place of arbitration has not been agreed by the parties, typically the arbitral tribunal or the arbitral institution administering the arbitration will have to determine the place of arbitration at the outset of the arbitral proceedings. Arbitration rules of some institutions contain a default place of arbitration, applicable where the parties have not chosen one.

"**(b) Legal and other consequences of the place of arbitration**

"28. The place of arbitration normally determines the applicable arbitration law. Such determination has a legal impact on various matters, such as the requirements relating to the appointment and challenge of arbitrators, whether and on what grounds a party can seek judicial review or setting aside of an arbitral award, which court is competent with respect to the arbitral proceedings, as well as the conditions for recognition and enforcement of an arbitral award in other jurisdictions. It is advisable that the parties

and the arbitral tribunal familiarize themselves with the arbitration law and any other relevant procedural law at the place of arbitration, including in particular any mandatory provisions.

"29. Selection of the place of arbitration is influenced by various legal and other factors, the relative importance of which varies from case to case. Among the more prominent legal factors are:

(i) The suitability of the arbitration law at the place of arbitration;

(ii) The law, jurisprudence and practices at the place of arbitration regarding (a) the nature and frequency of court intervention in the course of arbitral proceedings, (b) the scope of judicial review or of grounds for setting aside an award, and (c) any qualification requirements with respect to arbitrators and counsel representation; and

(iii) Whether the State where the arbitration takes place and hence where the arbitral award will be made is a Party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958, the 'New York Convention') and/or to any other multilateral or bilateral treaty on enforcement of arbitral awards.

"30. When it is expected that hearings will be held at the place of arbitration, other factors may become relevant in selecting the place of arbitration including:

(i) The convenience of the location for the parties and the arbitrators, including travel to the location;

(ii) The availability and cost of support services;

(iii) The location of the subject matter in dispute and proximity of evidence; and

(iv) Any qualification restrictions with respect to counsel representation.

"**(c) Possibility of holding hearings and meetings at a location different from the place of arbitration**

"31. The place of arbitration is not necessarily the place where hearings and/or meetings are held, although often the two are the same. In certain circumstances, it may be more expeditious or convenient for the parties and the arbitral tribunal to hold hearings and/or meetings at a location different from the place of arbitration, or remotely via technological means of communication. Many arbitration laws and arbitration rules expressly allow the arbitral tribunal to hold hearings and meetings elsewhere than at the place of arbitration.[10] Nonetheless, the parties and the arbitral tribunal may need to consider whether holding all hearings outside the place of arbitration may create difficulties at the stage of judicial review, setting aside or enforcement of the arbitral award.

"**4. Administrative support for the arbitral tribunal** [*A/CN.9/826, paras. 67 to 73; A/CN.9/832, paras. 95 to 102; Official Records of the General Assembly, Seventieth Session, Supplement No. 17 (A/70/17), paras. 43 to 48; A/CN.9/867, paras. 38 to 40*]

"**(a) Administrative support and arbitral institutions**

"32. The arbitral tribunal may need administrative support to carry out its functions. The arbitral tribunal and the parties should consider who will be responsible for arranging such support.

"33. When a case is administered by an arbitral institution, that institution may provide some administrative support to the arbitral tribunal. The availability and nature of such support vary greatly depending on the arbitral institution. Certain arbitral

[10] See, for example, article 20(2) of the UNCITRAL Model Law on International Commercial Arbitration (with amendments as adopted in 2006) and article 18(2) of the UNCITRAL Arbitration Rules (as revised in 2010).

institutions offer administrative support even to arbitral proceedings not conducted under their institutional rules. Some arbitral institutions have entered into cooperation agreements with a view to providing mutual assistance in supporting arbitral proceedings.

"34. Unless the administrative arrangements for the proceedings are made by an arbitral institution, they will usually be made by the parties or the arbitral tribunal. Hearing facilities, including related services, may be procured from specialized arbitration hearing centres which have been established in some cities and are sometimes linked to arbitral institutions. Otherwise, such hearing facilities and related services may be procured from other entities, such as chambers of commerce, hotels or specialized firms providing such support services. It may also be acceptable to leave some of the arrangements to one of the parties, subject to the agreement of the other party or parties.

"**(b) Secretary to arbitral tribunal**

"35. Administrative support might be obtained by engaging a secretary to carry out tasks under the direction of the arbitral tribunal. Such services may also be rendered by a registrar, clerk or administrator. Some arbitral institutions routinely assign secretaries to cases administered by them. Where this is not the case, some arbitrators frequently engage secretaries, particularly in large or complex cases, whereas other arbitrators do not.

"36. Functions and tasks performed by secretaries are broad in range. Secretaries may provide purely organizational support, such as making reservations for hearing and meeting rooms and providing or coordinating administrative services. Some arbitral tribunals wish to have secretaries carry out more substantive functions including legal research and other professional assistance, such as preparing a summary of the facts or the procedural history of the arbitral proceedings, collecting or summarizing case law or published commentaries on legal issues defined by the arbitral tribunal, and preparing draft procedural decisions. However, it is recognized that secretaries are not involved and do not participate in the decision-making of the arbitral tribunal, except in certain rare, specialized types of arbitration (for example, where the specific arbitral rules provide that secretaries are expected to provide legal advice in relation to the decision of the arbitral tribunal if and when the arbitral tribunal is composed only of non-lawyer, subject matter specialists).

"37. Secretaries are expected to be and remain impartial and independent during the arbitral proceedings. It is the arbitral tribunal's responsibility to ensure this. Some arbitral tribunals do this by requesting the secretary to sign a declaration of independence and impartiality.

"38. If the arbitral tribunal wishes to appoint a secretary, it would normally disclose this fact to the parties, along with the identity of the proposed secretary, the nature of the tasks to be performed by the secretary, and the amount and source of any proposed remuneration. The parties may wish to agree on the role and practices to be adopted in respect of the secretaries, as well as on the financial conditions applicable to their services. Institutional guidelines on secretaries may provide useful information to the parties.

"**5. Costs of arbitration** [*A/CN.9/826, paras. 22, 23 and 74 to 78; A/CN.9/832, paras. 103 to 112; Official Records of the General Assembly, Seventieth Session, Supplement No. 17 (A/70/17), paras. 49 to 56; A/CN.9/867, paras. 41 to 50*]

"**(a) Items of costs**

"39. The costs of arbitration usually include:

(i) The fees of the arbitral tribunal;

(ii) The expenses incurred by the arbitral tribunal, such as for (a) travel and accommodation, (b) administrative support, if not directly covered by the parties, and (c) tribunal-appointed experts (including their fees, travel and accommodation) and other assistance required by the arbitral tribunal;

(iii) The fees and expenses of the arbitral institution; and

(iv) The costs incurred by the parties, such as (a) legal fees and disbursements, (b) expenses relating to witnesses (including their travel and accommodation) and experts (including their fees, travel and accommodation), and (c) translation and interpretation costs (see above, para. 26).

"40. While it is widely accepted that costs incurred by the parties in respect of external legal counsel, witnesses and experts are recoverable, most arbitral rules are silent on internal legal, management and other costs (referred to as 'in-house costs') that parties may incur in pursuing or defending arbitral claims, leaving the issue of their recoverability to the discretion of the arbitral tribunal. Such in-house costs may represent a large portion of a party's total costs when in-house counsel, managing directors, experts and other staff members take a proactive role before and during the arbitral proceedings. There is no principle prohibiting the recovery of in-house costs incurred in direct connection with the arbitration. Some arbitral tribunals have awarded such costs insofar as they were necessary, did not unreasonably overlap with external counsel fees, were substantiated in sufficient detail to be distinguished from ordinary staffing expenses and were reasonable in amount.

"41. If not adequately addressed by the agreement between the parties, the applicable arbitration law or arbitration rules, it may be useful for the arbitral tribunal to identify whether in-house costs incurred by the parties will be recoverable and, if so, what records will need to be submitted to substantiate such cost claims.

"42. The parties and the arbitrators may have to consider how to treat taxes on services, in particular value-added taxes, when determining costs.

"**(b) Deposit of costs**

"43. Unless the matter is handled by an arbitral institution, the arbitral tribunal usually requests the parties to deposit an amount as an advance for the costs referred to in subparagraphs (i), (ii) and (iii) of paragraph 39. Payment of such deposit by a party does not mean that such party has waived any objection it may have to the arbitral tribunal's jurisdiction. If, during the arbitral proceedings, it emerges that the costs will be higher than anticipated (for example, because of the prolongation of the arbitral proceedings, additional hearings, appointment of an expert by the arbitral tribunal), supplementary deposits may be requested. Deposits can be paid in full or in instalments, and bank guarantees can be a means to secure such deposits.

"44. Many arbitration rules have provisions regarding these matters, including whether the deposit should be made in equal amounts by the parties and the consequences of the failure of a party to make the payment.[11]

"45. Where the arbitration is administered by an arbitral institution, the institution's services may include fixing the amount of the deposit as well as holding, managing, and accounting for the deposits. If the arbitral institution does not offer such services, the parties or the arbitral tribunal will have to make necessary arrangements, for example, with a bank or other external provider. In any case, it is useful to clarify matters, such as the type and the location of the account in which the deposit will be kept, how the deposit will be managed and whether interest on the deposit will accrue.

"46. The parties, the arbitral tribunal and the arbitral institution should be aware of regulatory restrictions that may have an impact on the handling of deposits of costs, such as restrictions in bar regulations, financial regulations relating to the identity of beneficiaries and restrictions on trade or payment.

"**(c) Fixing and allocating the costs**

"47. The arbitral tribunal usually determines which costs incurred by the parties referred to in subparagraph (iv) of paragraph 39 and in-house costs referred to in paragraphs 40 and 41 will be recoverable. In arbitrations administered by an arbitral institution, some of the costs referred to in paragraph 39 may be set by the arbitral

[11] See, for example, article 43 of the UNCITRAL Arbitration Rules (as revised in 2010).

institution. In fixing the recoverable costs, the arbitral tribunal usually considers the reasonableness of the costs and decides whether to require evidence that the costs have actually been incurred.

"48. After fixing the costs of the arbitration, the arbitral tribunal determines how to allocate the costs between the parties. In so doing, the arbitral tribunal usually takes into account the allocation method agreed by the parties or provided in the applicable arbitration law or arbitration rules. There are various methods for allocating costs, the general rule being that costs follow the event, i.e., the costs of the arbitration should be borne by the unsuccessful party or parties in whole or in part. In allocating costs, the arbitral tribunal may also consider certain conduct of the parties. Conduct so considered might include a party's (i) failure to comply with procedural orders of the arbitral tribunal or (ii) procedural requests (for example, document requests, procedural applications and cross-examination requests), that are unreasonable, to the extent that such conduct actually had a direct impact on the costs of the arbitration and/or is determined by the arbitral tribunal to have unnecessarily delayed or obstructed the arbitral proceedings.

"49. At an appropriate time during the arbitral proceedings, the arbitral tribunal may request from the parties that they make submissions on costs. Decisions by the arbitral tribunal on costs and their allocation do not necessarily need to be made in conjunction with a final award. Decisions on costs may be made at any time during the arbitral proceedings (for example, when a partial award or a procedural decision is rendered) as well as after the award on the merits has been rendered.

"**6. Possible agreement on confidentiality; transparency in treaty-based investor-State arbitration** [*A/CN.9/826, paras. 26, 79 to 89, 185 and 186; A/CN.9/832, paras. 114 to 121; Official Records of the General Assembly, Seventieth Session, Supplement No. 17 (A/70/17), paras. 57 to 60; A/CN.9/867, paras. 51 to 54*]

"**(a) Agreement on confidentiality**

"50. A widely held view is that there is an inherent requirement of confidentiality in commercial arbitration and that confidentiality is an advantageous and helpful feature of international commercial arbitration. Nevertheless, there is no uniform approach in domestic laws or arbitration rules regarding the extent to which the participants in an arbitration are under a duty to maintain the confidentiality of information relating to the arbitral proceedings.

"51. Should confidentiality be a concern or priority and should the parties not be satisfied by the treatment of that issue in the applicable arbitration law or arbitration rules, the parties may agree on the desired confidentiality regime to the extent not precluded by the applicable arbitration law.

"52. An agreement on confidentiality might cover one or more of the following matters: (i) the material or information that is to be kept confidential (for example, the fact that the arbitration is taking place, the identity of the parties and the arbitrators, pieces of evidence, written and oral submissions, the content of the award); (ii) measures for maintaining the confidentiality of such information and of the hearings and the duration of the obligation on confidentiality; (iii) circumstances in which confidential information may be disclosed in whole or in part to the extent necessary to protect a legal right; and (iv) other circumstances in which such disclosure might be permissible (for example, information in the public domain, or disclosures required by law or a regulatory body). The parties may wish to consider how to extend the obligation of confidentiality to witnesses and experts as well as to other persons associated with the party in the arbitral proceedings.

"53. Whereas the obligation of confidentiality imposed on the parties and their counsel may vary with the circumstances of the case as well as the applicable arbitration law and arbitration rules, arbitrators are generally expected to keep the arbitral proceedings, including any information related to or obtained during those proceedings, confidential.

"54. There are also circumstances in which certain information or material is deemed to be confidential to one of the parties in an arbitration (for example, commercial secrets, intellectual property, or information relating to national security in an arbitration involving a State or a government entity). Arrangements to protect such information or material may be made by the parties and, in certain circumstances, by the arbitral tribunal, for example, by restricting access to such information or material to a limited number of designated persons involved in the arbitration.

"**(b) Transparency in treaty-based investor-State arbitration**

"55. The specific characteristics of investor-State arbitration arising under an investment treaty have prompted the development of transparency regimes for such arbitrations. The investment treaty under which the investor-State arbitration arises may include specific provisions on publication of documents, open hearings, and confidential or protected information. In addition, the applicable arbitration rules referred to in those investment treaties may contain specific provisions on transparency.[12] Further, parties to a treaty-based arbitration may agree to apply certain transparency provisions.[13]

"**7. Means of communication** [*A/CN.9/826, paras. 25 and 91 to 102; A/CN.9/832, paras. 123 and 124; Official Records of the General Assembly, Seventieth Session, Supplement No. 17 (A/70/17), para. 61; A/CN.9/867, para. 55*]

"**(a) Determination of the means of communication**

"56. It is useful for the parties and the arbitral tribunal to determine at the outset the means of communication to be used during the arbitral proceedings. Factors that might be considered in selecting the means of communication include ensuring that:

(i) Documents are accessible and easily retrievable by the parties and the arbitral tribunal, including through the use of a database for uploading and sharing documents;

(ii) Receipt of the communication can be ascertained;

(iii) The means of communication is acceptable under the applicable arbitration law; and

(iv) The costs involved in the use of the selected means of communication are reasonable.

"57. Although more than one means of communication may be used (for example, paper-based as well as electronic means), the parties may wish to consider issues arising from the use of multiple means of communication, including which will be the authoritative means and, where time limits for submission apply, what action will constitute submission.

"**(b) Electronic means of communication**

"58. The use of electronic means of communication can make the arbitral proceedings more expeditious and efficient. However, it is advisable to consider whether all parties have access to, or are familiar with, such means. The parties and the arbitral tribunal may need to consider issues of compatibility, storage, access, data security as well as related costs when selecting electronic means of communication.

[12] See, for example, the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration ('the Rules on Transparency'); the Rules on Transparency may also have an impact on various aspects of the arbitral proceedings, for example, regarding submissions by third parties, and conduct of the hearings.

[13] For example, under article 1(2)(a) of the Rules on Transparency.

"**(c) Flow of communication**

"59. Communications are usually exchanged directly between the arbitral tribunal and the parties, unless an arbitral institution is acting as an intermediary. It is usual that all parties are copied on all communications to and from the arbitral tribunal.

"**8. Interim measures** [*A/CN.9/826, para. 24; A/CN.9/832, para. 113; Official Records of the General Assembly, Seventieth Session, Supplement No. 17 (A/70/17), paras. 62 to 74; A/CN.9/867, paras. 56 and 57*]

"**(a) Granting of interim measures**

"60. During the course of the arbitration, it is possible that a party may need to seek an interim measure, which is temporary in nature, either from the arbitral tribunal or a domestic court. Most arbitration laws and arbitration rules provide that the arbitral tribunal may, at the request of a party, grant interim measures.[14] Arbitration laws may also provide that courts may grant interim measures in relation to an arbitration. An established principle is that any request made by a party to a domestic court for an interim measure before or during the arbitral proceedings is not incompatible with an agreement to arbitrate.

"61. Depending on the applicable arbitration laws or arbitration rules, a party may be able to apply on an *ex parte* basis (i.e., without notice to any other party) for an interim measure and to apply, at the same time, for what is often referred to as a 'preliminary order', i.e. an order usually directing the parties not to frustrate the purpose of the requested interim measure while the arbitral tribunal decides whether to grant it. A party would normally only make such an *ex parte* request in circumstances where disclosing the request for the interim measure (prior to the arbitral tribunal's issuance of a preliminary order securing the status quo) may prompt the party against whom the requested measure is directed to take action that could frustrate the purpose of the measure (for example, sequestering assets or removing goods in dispute to another jurisdiction).[15]

"62. Issues to be considered by the parties and the arbitral tribunal in connection with application for interim measures include:

(i) The applicable law in relation to interim measures, including whether the granting of interim measures is within the scope of the arbitral tribunal's competence;

(ii) The type of measures that the arbitral tribunal may grant;

(iii) The conditions for requesting and granting interim measures;

(iv) The available mechanisms for enforcement of interim measures;

(v) The limitations in granting interim measures when a third party may be affected by the measures; and

(vi) The possible conflict between an arbitral tribunal's decision on an interim measure and a court-ordered interim measure.

"**(b) Costs and damages arising from interim measures; security for costs and damages**

"63. The party requesting an interim measure may be liable under the applicable law for costs and damages caused by the interim measure, if the arbitral tribunal later determines that, in the circumstances prevailing when the measure was ordered, the measure should not have been granted. The parties and the arbitral tribunal may determine a procedure for presenting claims on costs and damages arising from interim

[14] See, for example, chapter IV A of the UNCITRAL Model Law on International Commercial Arbitration (with amendments as adopted in 2006) and article 26 of the UNCITRAL Arbitration Rules (as revised in 2010).

[15] See, for example, section 2 of chapter IV A of the UNCITRAL Model Law on International Commercial Arbitration (with amendments as adopted in 2006).

measures, indicating, for instance, at which point during the arbitral proceedings a party may make such claims and the arbitral tribunal may award such costs and damages.

"64. The party requesting an interim measure may be required by the arbitral tribunal to provide security for possible costs and damages arising therefrom.

"**9. Written submissions, witness statements, expert reports and documentary evidence ('submissions')** [*A/CN.9/826, paras. 103 to 109; A/CN.9/832, para. 125; Official Records of the General Assembly, Seventieth Session, Supplement No. 17 (A/70/17), para. 75*]

"65. During the arbitral proceedings, the parties usually submit a wide range of documents: written submissions, witness statements, expert reports and documentary evidence (referred to generally as 'submissions'). Submissions are all written pleadings that are placed in the record of the proceedings, such as a statement of claim and a statement of defence and any second round of rebuttal submissions that the parties and the arbitral tribunal may consider necessary.

"66. Submissions may be made consecutively, i.e., where one party (usually the party making the application or seeking the relief) makes its submission after which the other party or parties make a counter submission. Alternatively, all parties may be required to make their submissions simultaneously. The approach used may depend on the type of issues to be addressed in the pleading, the stage of the arbitral proceedings, and the time provided to the parties to prepare their submissions. Most arbitration rules address this matter, sometimes detailing the sequences of submissions and required content.

"**10. Practical details regarding the form and method of submissions** [*A/CN.9/826, paras. 110 and 111; Official Records of the General Assembly, Seventieth Session, Supplement No. 17 (A/70/17), paras. 76 and 77*]

"67. Regarding the form and method of submissions, practical details including those mentioned in Note 7 need to be considered. Certain arbitration rules contain relevant provisions on the matter. Depending on the volume and kind of submissions to be handled, the parties and the arbitral tribunal may consider whether it would be helpful to agree on practical details concerning, for instance, the following:

(a) The form in which submissions will be made (for example, in hard copy, electronic form or through a shared platform), including their format (for example, specific electronic formats, such as original or native format where applicable, search features);

(b) The particulars of management of submissions; the system for organizing, labelling, identifying and referencing submissions, including whether they can be presented in an efficiently accessible way (for example, by using hyperlinks to cite documentary evidence or legal authorities);

(c) The organization of certain types of submissions (for example, whether large spreadsheets or diagrams, or other types of documents ought to be presented separately);

(d) The preservation and storage of submissions; in certain instances, the applicable law may require a specific procedure to preserve documentary evidence prior to the commencement of the arbitration; and

(e) The particulars of data protection (for instance, in relation to information on witnesses).

"**11. Points at issue and relief or remedy sought** [*A/CN.9/826, paras. 112 to 116; Official Records of the General Assembly, Seventieth Session, Supplement No. 17 (A/70/17), para. 78; A/CN.9/867, paras. 58 to 61*]

"**(a) Preparation of a list of points at issue**

"68. It is often considered helpful for the arbitral tribunal to prepare, in consultation with the parties, an indicative list of points at issue (as opposed to those that are undisputed) based on the parties' submissions. Such a list, when prepared at an appropriate stage of the arbitral proceedings and updated as necessary, can assist the parties in focusing their arguments on the issues identified as critical by the arbitral tribunal, thereby improving the efficiency of the arbitral proceedings and reducing costs.

"**(b) Determination of the order in which the points at issue will be decided; possibility of bifurcated proceedings**

"69. Subject to any agreement of the parties, the arbitral tribunal has the flexibility and discretion to determine the sequence of the arbitral proceedings and may deal with all the points at issue collectively or sequentially depending on the circumstances of the arbitration.

"70. Depending on the points at issue, the arbitral tribunal may consider the appropriateness of deciding on certain claims or issues (such as jurisdiction, liability or other discrete issues whose determination will likely advance the resolution of the case) before others. In contemplating such an approach, the arbitral tribunal may wish to consider whether, under the applicable arbitration law, partial awards or decisions on those prioritized claims or issues are subject to judicial review before the final award is rendered. Where the arbitral tribunal decides to adopt a bifurcated approach to resolving certain issues, the parties' submissions and, where applicable, their disclosure of documents may be organized in separate stages to reflect that staged organization of the arbitral proceedings. Such an approach may have an impact on the adjudicative process, and therefore, the arbitral tribunal may wish to consider carefully whether such a staged process is likely to save time and costs of the overall proceedings or to have the opposite effect.

"**(c) Relief or remedy sought**

"71. If the arbitral tribunal considers that the relief or remedy sought by a party is not sufficiently precise, for example, to ensure the enforceability of the arbitral award, the arbitral tribunal may consider informing the parties of its concerns, bearing in mind that the arbitral tribunal would usually avoid suggesting on its own initiative that a new relief be requested.

"**12. Amicable settlement** [*A/CN.9/826, paras. 117 to 124; A/CN.9/832, para. 126; Official Records of the General Assembly, Seventieth Session, Supplement No. 17 (A/70/17), paras. 79 to 81; A/CN.9/867, para. 62*]

"72. In appropriate circumstances, the arbitral tribunal may raise the possibility of a settlement between the parties. In some jurisdictions, the arbitration law permits facilitation of a settlement by the arbitral tribunal with the agreement of the parties. In other jurisdictions, it is not permissible for the arbitral tribunal to do more than raise the prospect of a settlement that would not involve the arbitral tribunal. Where the applicable arbitration law permits the arbitral tribunal to facilitate a settlement, it may, if so requested by the parties, guide or assist the parties in their negotiations. Certain sets of arbitration rules provide for facilitation of a settlement by the arbitral tribunal.

"**13. Documentary evidence** [*A/CN.9/826, paras. 125 to 136; A/CN.9/832, paras. 127 to 129; Official Records of the General Assembly, Seventieth Session, Supplement No. 17 (A/70/17), paras. 82 to 94; A/CN.9/867, paras. 63 to 67*]

"**(a) Time limits for submission of documentary evidence by the parties; consequences of failure to submit or late submission**

"73. The arbitral tribunal usually fixes time limits for the submission of documentary evidence at the outset of the arbitral proceedings. The arbitral tribunal may direct the parties to submit evidence relied upon along with their written submissions or no later than a specified subsequent point in time.

"74. The arbitral tribunal may clarify the consequences of late submissions of evidence and how it intends to deal with requests to accept late submissions. It may require a party seeking to submit evidence after the time limit to provide reasons for the delay. The arbitral tribunal, in determining whether to accept late submissions, would need to consider the procedural efficiency achieved by refusing late submissions, the possible usefulness of accepting them, and the interests of the parties (for example, providing the other party an opportunity to comment or submit its own further evidence in response to the late submission).

"75. The arbitral tribunal may remind the parties that if a party makes submissions that were not scheduled, the arbitral tribunal may consider whether to accept such submissions. Also, if a party is requested to submit evidence to support its case but fails to do so within the time limit without showing sufficient cause for such failure, the arbitral tribunal may make the award solely on the evidence before it.

"**(b) Requests to disclose documents**

"76. Approaches of arbitration laws and practices vary on whether a party may request the other party or parties to disclose specified documents and to what extent the arbitral tribunal should order such disclosure (for possible submission as evidence), when the requested party refuses to disclose voluntarily. Therefore, it may be useful for the arbitral tribunal to clarify with the parties at an early stage of the proceedings whether a party may request the other party to disclose documents and, if so, to indicate the scope of such disclosure, and to set out the relevant time limits, the form of disclosure requests and the procedures for contesting requests, if relevant.

"77. Requests for disclosure of documents may be made in various ways but are typically recorded in a schedule that is provided to the other party and sets out not only the documents requested, but also the reasons for the request. The other party may then state in the schedule whether it agrees with the request and if not, the reasons. Usually, the parties first exchange the disclosed documents only among themselves and then they determine which of the disclosed documents to submit as evidence.

"78. Where requests for disclosure of documents are contested, the requesting party may decide to submit the contested requests to the arbitral tribunal for its determination whether to order either or both parties to disclose documents. The arbitral tribunal, if necessary, may add to the schedule a record of its decision whether to order disclosure on any contested requests.

"**(c) Evidence obtained by the arbitral tribunal from third parties**

"79. Where necessary and permitted by applicable arbitration law and arbitration rules, the arbitral tribunal may itself take appropriate steps to obtain evidence from a third party after consulting the parties. This applies in relation to documentary evidence as well as other evidence (see below, Note 16).

"**(d) Assertions about the provenance and authenticity of documentary evidence**

"80. At an early stage of the arbitral proceedings, the arbitral tribunal will often specify that unless a party raises objections to any of the following conclusions within a specified period of time, it will be understood that: (i) documentary evidence is accepted as having originated from the source indicated in it; (ii) a dispatched

communication is accepted without further proof that it has been received by the addressee; and (iii) a copy is accepted as a faithful reproduction of the original. A statement by the arbitral tribunal to this effect can simplify the introduction of evidence and discourage unfounded and dilatory objections.

"81. If there are issues regarding the provenance, authenticity or completeness of documentary evidence, the arbitral tribunal may require verification thereof; it may further require that the evidence in its original form remain accessible to the parties and the arbitral tribunal.

"**(e) Presentation of documentary evidence**

"82. In order to avoid duplicate submissions, it is usual for the parties to agree or for the arbitral tribunal to direct that, once a given piece of documentary evidence is submitted in the record by one party, it does not need to be resubmitted by the other party.

"83. After each party has submitted its documentary evidence, the arbitral tribunal may encourage the parties to prepare, before the hearing, a joint set of evidence. It may also be practical for the parties and/or the arbitral tribunal to select the frequently used pieces of evidence and establish a set of 'working' or 'core' documents, regardless of whether these have been submitted jointly or otherwise.

"84. The presentation of certain evidence may be facilitated given its volume or nature if its content is summarized by way of a report from counsel or from an expert (for example, a public accountant or a consulting engineer). The report may present the information in the form of summaries, tabulations or charts. Such presentation may be combined with arrangements that give the parties and the arbitral tribunal an opportunity to review the underlying data and the methodology used for the preparation of the report, as well as to verify any assumptions made in its preparation.

"85. Notes 7 and 10 address other practical details that the parties and the arbitral tribunal may wish to consider regarding the presentation of documentary evidence.

"**14. Witnesses of fact** [*A/CN.9/826, paras. 141 to 149; A/CN.9/832, paras. 130 to 135; Official Records of the General Assembly, Seventieth Session, Supplement No. 17 (A/70/17), paras. 94 to 111; A/CN.9/867, paras. 69 to 74*]

"**(a) Identification of witnesses of fact; contact with the parties and their representatives**

"*(i) Witness statements and advance notice*

"86. The arbitral tribunal may clarify with the parties whether witnesses of fact will be presented and if so, whether written witness statements will be submitted (see below, para. 88).

"87. The arbitral tribunal may also clarify how witnesses and the scope of their expected testimony will be identified in advance of any hearing. In particular, the arbitral tribunal may request from the parties the following information regarding the proposed witnesses in addition to their names and addresses:

(a) The subject and facts upon which the witnesses will testify;

(b) The language in which the witnesses will testify;

(c) The nature of the witnesses' relationship with any of the parties and the dispute;

(d) The qualifications and experience of the witnesses, if and to the extent these are relevant to the dispute or the testimony; and

(e) How the witnesses learned about the facts on which they will testify.

"88. A witness statement is a document that may serve as evidence from that witness and would usually include the information contained in paragraph 87. It is helpful if a witness statement identifies all documentary evidence upon which it relies. Where a witness statement is submitted, it is generally accepted that this statement need not be

repeated orally at the hearing. Often it is accepted as the witness' full direct testimony and only a short oral statement that confirms (possibly highlighting certain points) or that updates the written statement is required at the hearing. A written witness statement may eliminate the need to hear a witness of undisputed facts, as not all witnesses who have submitted witness statements need to be heard at the hearing (see below, para. 125). The arbitral tribunal may require each party to identify which of the other party's or parties' witnesses it wishes to examine at the hearing.

"*(ii) Whether a party or persons related to a party may be heard as witnesses*

"89. International arbitration can differ from domestic court practice in respect of whether a party or certain persons related to a party may be heard as witnesses (for example, its executives, employees or agents). Under some legal systems, a party or such persons may not be permitted to testify as witnesses in court proceedings, but may be heard in a different capacity (such as a party or person having relevant information). Nonetheless, in international arbitration, such distinction is rarely observed and a party or such persons can typically be heard as witnesses.

"*(iii) Nature of the contact of a party or its representative with witnesses*

"90. The practice in international arbitration can differ from that in domestic courts as to the permissibility of pre-testimony contact between a party or its representative and the witnesses presented by that party, and the nature of such contact. In international arbitration, pre-testimony contacts are widely accepted, although some bar rules prohibit counsel from discussing the witness' testimony in advance of a court hearing or arbitration. The arbitral tribunal may consider clarifying at the outset of the arbitral proceedings the nature of the contact a party or its representative is permitted to have with its witnesses, when inquiring about the facts of the case, when preparing written witness statements and when a witness is preparing to give oral testimony. While one common practice is to permit parties or their representatives to interview their witnesses about the facts of the dispute and/or assist them in the preparation of their witness statements, there exist divergent views as to how far a party or its representative may assist witnesses in preparing for the hearing.

"*(iv) Non-appearance of a witness*

"91. The arbitral tribunal may consider informing the parties about the possible consequences of a witness who was invited to testify at the hearing not appearing. The arbitral tribunal usually has some flexibility in dealing with such non-appearances, including regarding whether that witness' written statement may still be considered and, if so, what weight is to be given to such statement.

"*(v) Invitation of a witness by the arbitral tribunal*

"92. The arbitral tribunal may have to take appropriate steps to invite a witness to testify, for instance, where the parties fail to call a witness that the arbitral tribunal wishes to examine. The arbitral tribunal may also lend support to the parties by securing the attendance of a witness not under their control.

"**(b) Manner of taking oral evidence of witnesses**

"93. While arbitration laws and arbitration rules typically grant the arbitral tribunal broad discretion concerning the manner of taking oral evidence of witnesses (oral testimony), practices vary in this respect. In order to facilitate the parties' preparation for a hearing, the arbitral tribunal may consider clarifying some or all of the issues referred to below in Note 17.

"**15. Experts** [*A/CN.9/826, paras. 150 and 151; A/CN.9/832, para. 136; Official Records of the General Assembly, Seventieth Session, Supplement No. 17 (A/70/17), paras. 112 to 122; A/CN.9/867, paras. 75 to 80*]

"**(a) Types of experts and selection**

"94. Many arbitration laws and arbitration rules provide for the participation of one or more experts in arbitral proceedings. Frequently, the parties will present a report of one or more experts engaged by them (referred to as 'party-appointed experts' or 'expert witnesses') to address points at issue. An arbitral tribunal may appoint its own expert (referred to as 'tribunal-appointed expert') to present a report on issues requiring expert guidance or to assist it in matters requiring specialized knowledge or skills.

"95. Arbitral institutions, chambers of commerce and other specialized organizations may be of assistance to the parties and the arbitral tribunal in the selection of experts, if needed. Experts are usually required to provide information on their expertise and recent experiences in a résumé prior to being engaged or appointed.

"**(b) Party-appointed experts (expert witnesses)**

"96. Each party may instruct its own experts ('party-appointed experts' or 'expert witnesses') regarding the issues to be addressed in their reports or the parties may agree on a joint list of issues to be addressed by the experts.

"97. The arbitral tribunal may subsequently invite the party-appointed experts who are addressing the same topic to submit a joint report identifying the points on which they agree and disagree, which may narrow issues to be dealt with later in the proceedings.

"98. Where the party-appointed experts express conflicting opinions, the arbitral tribunal may consider requesting supplementary or responsive expert reports to address the points at issue.

"99. The arbitral tribunal may also request the party-appointed experts to exchange their reports, and then hold an informal meeting where the points on which the experts agree or disagree are discussed. With this approach, the experts may respond to each other's questions more effectively, find common ground and/or take the time to discuss any specific issues. The reports of the experts can then be modified accordingly or the outcome of such procedure can be communicated by the experts at the hearing.

"100. Occasionally, it may be possible for the parties to agree on a single joint expert or to agree that the experts appointed by them will issue a single joint report, on which the parties are entitled to comment. Such approaches may have the benefit of reducing costs and streamlining the arbitral proceedings. When agreeing on a single joint expert or the issuance of a single joint report, it may be necessary to clarify at the outset whether the parties would be bound by the conclusions of the joint expert or those contained in the joint report.

"101. The arbitral tribunal may consider addressing whether expert reports should be filed consecutively or simultaneously as well as the timing of their submission, particularly whether such submission should be made along with a statement of claim or of defence.

"102. In addition, the arbitral tribunal may wish to clarify the nature and extent of communication between the parties or their representatives and their experts, and whether a party might be requested to disclose such communications.

"**(c) Tribunal-appointed experts**

"*(i) Function of the tribunal-appointed expert*

"103. The function of an expert appointed by the arbitral tribunal usually consists in preparing a report on one or several specific points requiring specialized knowledge or assisting the arbitral tribunal in understanding certain technical issues. In deciding whether to appoint its own expert, the arbitral tribunal usually takes into account also

the efficiency of the arbitral proceedings. In some instances, the arbitral tribunal may decide to appoint an expert at a later stage of the arbitral proceedings, for example, if the opinions of the party-appointed experts do not allow the arbitral tribunal to reach a conclusion.

"104. Before appointing an expert, the arbitral tribunal will normally ensure that the expert has the required qualification and obtain a statement of his or her impartiality and independence. The arbitral tribunal usually gives the parties an opportunity to comment on the expert's proposed mandate, qualification, impartiality and independence.

"105. It may be advisable for the arbitral tribunal to consult with the expert upon his or her appointment to clarify the scope of the report and the issues to be covered. The arbitral tribunal may also wish to consult with the expert before the completion of his or her report to ensure that the report is responsive to the proposed mandate.

"106. The arbitral tribunal may consider clarifying the nature and extent of communication its expert may have with the parties and their representatives, jointly or separately, and how to deal with communications on confidential matters.

"107. Where a tribunal-appointed expert has presented his or her report, the parties are normally entitled to comment on the report either through formal or informal submissions (including through a report by their own experts), and to question the tribunal-appointed expert at a hearing.

"*(ii) Terms of reference of the tribunal-appointed expert*

"108. The purpose of the terms of reference of a tribunal-appointed expert is to indicate the questions on which the expert is to provide his or her opinion, thereby avoiding opinions on points that are not for the expert to assess, and to commit the expert to a time schedule. The terms of reference also ensure transparency regarding the relation between the arbitral tribunal and the tribunal-appointed expert.

"109. The terms of reference usually set out details regarding the documents and sites, property or goods that the expert can access, and how the expert will receive such information to prepare the report. In order to facilitate the evaluation of the expert's report, it is advisable to require the expert to include in the report the terms of reference as well as information on the method used in arriving at his or her conclusions, the sources of information relied upon, and the factual assumptions made in preparing the report. The remuneration of a tribunal-appointed expert is usually indicated in the terms of reference.

"**16. Inspection of a site, property or goods** [*A/CN.9/826, paras. 137 to 140; A/CN.9/832, para. 137; Official Records of the General Assembly, Seventieth Session, Supplement No. 17 (A/70/17), paras. 123 and 124; A/CN.9/867, para. 81*]

"110. In some arbitrations, the arbitral tribunal may need to assess physical evidence other than documentary evidence, for example, by inspecting goods or property, or visiting a specific site. Physical or virtual site inspections may be evidentiary in nature or may serve an illustrative function, improving the arbitral tribunal's understanding of the case.

"**(a) Physical evidence**

"111. If physical evidence will be submitted, the arbitral tribunal may fix the time schedule and the manner for presenting such evidence, make arrangements for the other party or parties to prepare for the presentation of the evidence and take measures for safekeeping the items of evidence.

"**(b) Inspections of site, property or goods**

"112. The arbitral tribunal may consider whether inspection of a site, property or goods is useful or required. If so, it may consider whether the inspection requires the arbitrators' physical presence or whether a virtual inspection might be possible or adequate in the interest of efficiency or cost savings.

"113. If a physical inspection of a site, property or goods takes place, the arbitral tribunal will need to consider various issues. These include timing, cost allocation, arrangements necessary to ensure that all parties are able to be present or represented at the inspection and an indication of who will guide the inspection and provide explanations. Prior to the inspection, it may be useful for the parties and the arbitral tribunal to agree on an inspection protocol and on the scope of the inspection.

"114. The site, property or goods to be inspected are often under the control of one of the parties. If so, it may be advisable to allow the other party to visit the place of inspection before the arbitral tribunal does, in order to provide that party with the opportunity to acquaint itself with the state and condition of the site, property or goods and to request that the arbitral tribunal view additional or different evidence at the place of inspection.

"115. Where an employee or a representative of a party controlling the site, property or goods gives guidance or explanations to the arbitral tribunal, this is usually done in the presence of the other party or its representative. It should be borne in mind that such explanations, in contrast to statements those persons might make as witnesses of fact in a hearing, are usually not treated as evidence in the arbitral proceedings.

"**17. Hearings** [*A/CN.9/826, paras. 159 to 174; A/CN.9/832, paras. 138 and 139; Official Records of the General Assembly, Seventieth Session, Supplement No. 17 (A/70/17), para. 125; A/CN.9/867, paras. 82 to 88*]

"**(a) Decision whether to hold hearings**

"116. Arbitration laws and arbitration rules often allow any party to request a hearing for the presentation of evidence by witnesses and experts and/or for oral argument. Where none of the parties requests a hearing, the arbitral tribunal may determine whether to hold a hearing. The need for a hearing might be reconsidered at a later stage in light of the parties' submissions.

"117. It is a widely accepted practice to have written submissions, witness statements, expert reports and other documentary evidence submitted prior to the hearing. This may assist in focusing the issues that have to be dealt with at the hearing and avoid a lengthy hearing. In order to facilitate the parties' preparations, to avoid any misunderstanding and to prevent unexpected issues being raised, the arbitral tribunal may discuss this matter with the parties at the outset of the arbitral proceedings as well as in advance of any hearing.

"**(b) Scheduling of hearings**

"118. Dates for hearings are normally set at the earliest possible opportunity so as to ensure availability of the participants. A common practice is to hold hearings in a single, consecutive period. However, holding hearings over separate periods is, in some instances, necessary in order to accommodate the different schedules of the parties, witnesses, experts and the arbitral tribunal.

"119. The length of a hearing primarily depends on the complexity of the issues and evidence as well as the number of witnesses and experts to be heard. The length also depends on the procedural style used in the arbitration.

"120. It may be useful to limit the aggregate amount of time each party has for making oral statements, questioning witnesses and experts it presents and questioning witnesses and experts of the other party or parties. In general, each party is allocated the same aggregate amount of time, unless the arbitral tribunal considers that a different allocation is justified. It is useful to determine the manner in which time would be kept throughout the hearing.

"121. Such time allocation, provided that it is realistic, fair and subject to supervision by the arbitral tribunal, will make it easier for the parties to plan their presentation of the various items of evidence and argument, reduce the likelihood of running out of time towards the end of the hearing and avoid any actual or perceived unfairness resulting from the parties' having unequal time.

"122. The arbitral tribunal usually sets aside time for its deliberations throughout the duration of the arbitral proceedings as well as before and shortly after the close of the hearings.

"**(c) Manner of conducting hearings**

"*(i) Different practices*

"123. In view of the broad latitude of the arbitral tribunal in the conduct of hearings and of the different practices in relation thereto, it may foster efficiency of the arbitral proceedings if the arbitral tribunal clarifies to the parties, in advance of the hearings, the manner in which it will conduct the hearings, at least in broad terms.

"*(ii) Holding of a hearing in-person or remotely*

"124. Hearings can be held in-person or remotely via technological means (see also above, para. 19). The decision whether to hold a hearing in-person or remotely is likely to be influenced by various factors, such as the importance of the issues at stake, the desirability of interacting directly with the witnesses, the availability of parties, witnesses and experts as well as the cost and possible delay of holding a hearing in-person. The parties and the arbitral tribunal may need to consider technical matters, such as the compatibility of the technological means to be used at different locations.

"*(iii) Deciding which witnesses of fact and expert witnesses ('witnesses') will provide oral testimony*

"125. Where the parties have already submitted written statements or reports from their witnesses, the arbitral tribunal may ask each party, prior to the hearing, which of the other party's or parties' witnesses it wishes to examine at the hearing (see above, para. 88). A party is normally responsible for making available any of its own witnesses at the hearing if another party or the arbitral tribunal has indicated that it wishes to examine that witness. If no other party wishes to examine the witness and the arbitral tribunal itself does not wish to do so, the arbitral tribunal may decide that the witness need not testify at the hearing. For the sake of efficiency, the arbitral tribunal may make a similar decision even when another party has requested the opportunity to cross-examine a witness, while this may raise concerns about the requesting party's opportunity to present its case. A decision not to hear oral testimony from a witness in these circumstances should not alter the weight that would otherwise be given to that witness' written statement.

"*(iv) Whether oral testimony will be given under oath or affirmation and, if so, in what form*

"126. Arbitration laws and practices differ as to whether oral testimony must be given under oath or similar affirmation of truthfulness. In some legal systems, the arbitral tribunal may in its discretion require witnesses to take an oath. In other legal systems, oral testimony under oath is either unknown in arbitration or may even be considered improper, as only an official such as a judge or a notary is empowered to administer oaths. In such circumstances, the witnesses may simply be asked to affirm that they will testify truthfully. It may be necessary to clarify who will administer any oath. Where applicable, the arbitral tribunal may draw the witnesses' attention to potential criminal sanctions for giving false testimony.

"*(v) Order of presentations at hearings*

"127. The arbitral tribunal has broad latitude to determine the order of presentations at hearings. Within that latitude, practices differ, for example, as to whether opening or closing statements are heard and if they are, their sequence and duration, and which of the parties has the last word.

"128. The broad latitude of the arbitral tribunal also applies to the manner and sequence in which witnesses are heard and to other issues addressed at any hearing. When several witnesses are to be heard and longer testimony is expected, it is useful to determine in advance the order in which they will be called. In certain circumstances,

it may be desirable to hear collectively several witnesses on the same subject matter. This is likely to reduce costs and facilitate scheduling. Each party might be invited to suggest the order in which it proposes to have its own witnesses testify.

"*(vi) Manner in which witnesses of fact and expert witnesses ('witnesses') will be heard*

"129. Witnesses may be first examined by the arbitral tribunal. Otherwise, the general practice is for witnesses to be examined first by the party calling that witness (to the extent permitted and if required, see above, paras. 88 and 125) and then cross-examined by the other party or parties. In this context, the question may arise whether cross-examination shall be restricted to the scope of the witness statement and oral testimony. The parties and the arbitral tribunal may wish to clarify this issue in advance of the submission of witness statements and the hearing. After cross-examination, the witness might be re-examined by the party calling the witness with questions limited to issues raised during the cross-examination. Thereafter, the cross-examining party or parties may further question the witness. The arbitral tribunal may normally ask questions at any time.

"130. Arbitration laws and practices differ as to the degree of control the arbitral tribunal exercises over the questioning of witnesses by the parties. For example, some arbitrators permit the parties to ask questions freely and directly to the witnesses. Other arbitrators apply stricter rules and limitations concerning the form of direct or cross-examination similar to those applied in court proceedings.

"*(vii) Whether witnesses of fact may be in the hearing room when they are not testifying*

"131. Practices vary in relation to the presence of witnesses of fact in the hearing room before and after they have testified. Some arbitrators consider, as a general rule, that witnesses of fact should not be allowed in the hearing room except when they are testifying. The purpose is to prevent the witnesses of fact from being influenced by statements of other witnesses and to prevent the possibility of one witness' presence influencing another witness' testimony. When witnesses of fact are not allowed in the hearing room, measures would usually be taken to avoid that they have access to any contemporaneous transcripts of the hearings. Other arbitrators consider that it is useful for witnesses of fact to be present when other witnesses are testifying in order to deter untrue statements and to clarify or reduce contradictions between witnesses. As a general rule, witnesses of fact should refrain from discussing their testimony during any breaks in their testimony. The arbitral tribunal may wish to give guidance on these questions in advance, as it may affect the organization of the hearing.

"132. The arbitral tribunal may decide what approach to follow for each witness of fact. For example, a separate rule may be appropriate for witnesses of fact who also appear as representatives of a party (for example, managing directors, executives or in-house counsel), as such representatives may need to be present throughout the hearing in order to oversee the presentation of their case.

"*(viii) Submission of new evidence*

"133. The arbitral tribunal may wish to emphasize to the parties that new evidence will usually not be accepted during a hearing. In exceptional circumstances where the arbitral tribunal admits such new evidence, it may have to consider whether to permit further submissions so that the other party may respond.

"**(d) Arrangements for a record of the hearings**

"134. The arbitral tribunal may consider the method of preparing a record of oral statements and testimony during hearings as well as who will be responsible for making the necessary arrangements. Audio recording and transcription services are commonly used.

"135. The parties and the arbitral tribunal may consider whether audio recording should be transcribed, and clarify whether the audio recording would constitute the official record of the hearings (see also above, para. 16). If transcripts are to be

produced, the arbitral tribunal may consider whether and how the parties will be given an opportunity to check the transcripts. For example, it may be determined that any change to the record must be approved by the parties and, failing their approval, referred to the arbitral tribunal for determination.

"**(e) Post-hearing submissions**

"136. Before or during the hearings, the parties and the arbitral tribunal usually decide whether any additional submissions are to be made by the parties after the hearing and, if so, a corresponding timetable is usually established. Such post-hearing submissions may be necessary in order to allow the parties to provide a summary of the case, to address specific issues that arose during the hearing, or to address the impact on their case of the evidence that emerged during the hearing.

"**18. Multiparty arbitration** [*A/CN.9/826, paras. 175 and 176; Official Records of the General Assembly, Seventieth Session, Supplement No. 17 (A/70/17), paras. 126 and 127; A/CN.9/867, para. 89*]

"137. When a single arbitration involves more than two parties (multiparty arbitration), many procedural issues remain the same as in two-party arbitration. However, difficulties may arise in multiparty arbitration. For example, the arbitral tribunal should be mindful not to assume that parties grouped together as claimants or respondents will necessarily have the same interest, will make similar submissions, or will seek the same relief.

"138. In addition, a further difficulty is ensuring the fairness of the proceedings and that the various parties have an equal opportunity to participate in the appointment of the arbitral tribunal. The Notes, which identify matters that may be considered in organizing arbitral proceedings in general, do not cover the drafting of arbitration agreements or the constitution of the arbitral tribunal. Those matters give rise to special questions in multiparty arbitration as compared to arbitration involving only two parties, and are addressed under certain arbitration rules.[16]

"**19. Joinder and consolidation** [*A/CN.9/826, paras. 175 and 176; A/CN.9/832, para. 140; Official Records of the General Assembly, Seventieth Session, Supplement No. 17 (A/70/17), paras. 126 and 127*]

"**(a) Joinder**

"139. Joinder means adding a new party or parties into an existing arbitration. Not all joinder applications necessarily require the contemporaneous consent of all parties (i.e. the parties to the arbitration and the new party). The new party may already be bound by the arbitration agreement and the joinder process might be authorized by the arbitration agreement, the applicable arbitration laws and/or the applicable arbitration rules.

"140. Parties may wish to join a new party to the arbitration in situations where they would be unable to fully present their claims without that new party's participation or wish to avoid conflicting decisions with respect to different parties. Certain arbitration rules have addressed joinder by providing that the arbitral tribunal may, at the request of a party, allow one or more new parties to be joined to the arbitration, provided that the new party is bound by the arbitration agreement.[17] Other arbitration rules do not require that the party to be joined be bound by the arbitration agreement under which the claim arises, provided that it is bound by another relevant arbitration agreement that also binds the existing parties. In deciding whether to accept joinder, the arbitral tribunal may consider the procedural efficiency that may result therefrom, fairness to

[16] See, for example, article 10(1) of the UNCITRAL Arbitration Rules (as revised in 2010), which provides that "(…) where three arbitrators are to be appointed and there are multiple parties as claimant or as respondent, unless the parties have agreed to another method of appointment of arbitrators, the multiple parties jointly, whether as claimant or as respondent, shall appoint an arbitrator."

[17] See, for example, article 17(5) of the UNCITRAL Arbitration Rules (as revised in 2010).

existing parties, or prejudice to any party. The arbitral tribunal may also consider its powers and the manner in which it was constituted.

"141. It is recommended that any new party be joined as early as possible in the arbitral proceedings. Many arbitration rules that address joinder restrict the ability to seek joinder after the arbitral tribunal has been appointed. For example, a party may request the joinder when filing its response to the notice of arbitration.[18] In such a case, the new party could be joined to the procedure before the arbitral tribunal is appointed. Depending on the applicable arbitration law and arbitration rules, a third party may also be joined after the appointment of the arbitral tribunal if certain conditions are fulfilled.

"**(b) Consolidation**

"142. The question of consolidation arises in situations where several distinct arbitrations are initiated under the same or different arbitration agreements. Consolidation refers to the merging of separate arbitrations, regardless of whether or not the related arbitrations have been commenced pursuant to the same or a different arbitration agreement. Consolidation can increase efficiency and avoid inconsistent outcomes on related issues. However, one or more parties may have a justified interest in having several disputes dealt with separately, for example because one of the disputes has priority or the consolidation of several cases would render the arbitral proceedings more complex and time-consuming. It may not always be feasible to consolidate arbitrations if an arbitral institution is not involved.

"143. An increasing number of arbitration rules address consolidation. Arbitration rules that expressly permit consolidation of two or more pending arbitrations do so upon consideration of various factors, such as whether (i) consolidation has been requested by a party, (ii) all the parties agree to consolidation, (iii) the disputes arise in connection with the same legal relationship or under the same arbitration agreement and, if not, whether those agreements are compatible, and (iv) an arbitral tribunal has been appointed in any of the arbitrations.

"**20. Possible requirements concerning form, content, filing, registration and delivery of the award** [*A/CN.9/826, paras. 177 to 181; Official Records of the General Assembly, Seventieth Session, Supplement No. 17 (A/70/17), paras. 128 to 132*]

"144. The parties and the arbitral tribunal should bear in mind the applicable arbitration law and the law at the potential place(s) of enforcement of the award, as well as the applicable arbitration rules, in considering any requirements as to the form, content, filing, registering or delivering of the award.

"145. Some laws require that arbitral awards be filed or registered with a court or similar authority, or that they be delivered in a particular manner or through a competent authority. Those laws differ with respect to, for example, the type of award to which the requirement applies (for example, to all awards or only to awards not rendered under the auspices of an arbitral institution); the time periods for filing, registering or delivering the award (in some cases those time periods may be rather short); and the consequences of failing to comply with such requirements.

"146. If such requirements exist, it is useful, before the issuance of an award, to determine who will take the necessary steps to meet the requirements and to decide how the costs are to be allocated. The failure to comply with such requirements might affect the validity and/or enforceability of the award."

[18] See, for example, article 4(2)(f) of the UNCITRAL Arbitration Rules (as revised in 2010).

III. ONLINE DISPUTE RESOLUTION

A. Report of the Working Group on Online Dispute Resolution on the work of its thirty-second session (Vienna, 30 November-4 December 2015)

(A/CN.9/862)

[Original: English]

Contents

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] The Commission decided inter alia at that session 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 that it should report to the Commission at its forty-fifth session.[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 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] The Commission furthermore requested the Working Group to continue to explore a range of means of ensuring that online dispute resolution outcomes were effectively implemented, including arbitration and possible alternatives to arbitration.[5]

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[1] *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17* (A/66/17), para. 218.

[2] Ibid.

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

[4] Ibid.

[5] Ibid.

4. At its forty-sixth[6] and forty-seventh[7] sessions, the Commission affirmed the decisions made at its forty-fifth session.

5. At its forty-eighth[8] session (Vienna, 29 June-16 July 2015), the Commission instructed Working Group III to continue its work towards elaborating a non-binding descriptive document reflecting elements of an ODR process, on which elements the Working Group had previously reached consensus, excluding the question of the nature of the final stage of the ODR process (arbitration/non-arbitration). It was also agreed that the Working Group would be given a time limit of one year or no more than two Working Group sessions, after which the work of the Working Group would come to an end, whether or not a result had been achieved.

6. A compilation of historical references regarding the consideration by the Commission of the work of the Working Group between 2000 and 2014 can be found in document A/CN.9/WG.III/WP.126, paragraphs 5-15.

II. Organization of the session

7. Working Group III (Online Dispute Resolution), which was composed of all States members of the Commission, held its thirty-second session in Vienna, from 30 November to 4 December 2015. The session was attended by representatives of the following States members of the Working Group: Argentina, Austria, Belarus, Brazil, China, Colombia, Czech Republic, El Salvador, France, Germany, Hungary, Indonesia, Iran (Islamic Republic of), Israel, Italy, Japan, Kenya, Kuwait, Malaysia, Mexico, Pakistan, Panama, Philippines, Republic of Korea, Russian Federation, Singapore, Spain, Thailand, Uganda, United States of America and Venezuela (Bolivarian Republic of).

8. The session was also attended by observers from the following States: Bolivia (Plurinational State of), Cyprus, Dominican Republic, Luxemburg, Moldova, Netherlands, Peru, Romania, Senegal, Slovakia, Syrian Arab Republic, United Arab Emirates.

9. The session was also attended by observers from the European Union (EU).

10. The session was also attended by observers from the following non-governmental organizations: American Bar Association (ABA), Asia Pacific Regional Arbitration Group (APRAG), Asociación Americana de Derecho Internacional Privado (ASADIP), Chartered Institute of Arbitrators (CIARB), China International Economic and Trade Arbitration Commission (CIETAC), China Society of Private International Law — Wuhan University (CSPIL), Electronic Consumer Dispute Resolution — University College Dublin (ECODIR), Eurochambres, European Law Institute (ELI), European Law Students' Association (ELSA), Forum for International Conciliation and Arbitration C.I.C. (FICACIC), ICC International Court of Arbitration (ICC), Institute of International Commercial Law (IICL), Institute of Law and Technology — Masaryk University (ILT), International Bar Association (IBA), Law Association for Asia and the Pacific (LAWASIA), Regional Centre for International Commercial Arbitration-Lagos (RCICAL).

11. The Working Group elected the following officers:

Chairman: Mr. Jeffrey Wah-Teck CHAN (Singapore)

Rapporteur: Mr. Nasir AYYAZ (Pakistan)

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

(a) Annotated provisional agenda (A/CN.9/WG.III/WP.135);

(b) A note by the Secretariat on a non-binding descriptive document reflecting elements and principles of an ODR process (A/CN.9/WG.III/WP.137);

(c) A note by the Secretariat on the proposal by the Russian Federation (A/CN.9/WG.III/WP.136); and

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[6] Ibid., *Sixty-eighth Session, Supplement No. 17* (A/68/17), para. 222.
[7] Ibid., *Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 140.
[8] Ibid., *Seventieth Session, Supplement No. 17* (A/70/17), para. 352.

(d) A note by the Secretariat on the proposal by Israel (A/CN.9/WG.III/WP.138).

13. The Working Group adopted the following agenda:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Consideration of the notes on a non-binding descriptive document reflecting elements and principles of an ODR process.
5. Other business.
6. Adoption of the report.

III. Deliberations and decisions

14. 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.137) and other proposals submitted during the session. The deliberations and decisions of the Working Group with respect to this item are reflected in chapter IV.

IV. Draft non-binding descriptive document reflecting elements and principles of an ODR process

15. The Working Group heard a proposal by Colombia and the United States of America for Technical Notes on Online Dispute Resolution (referred to herein as the Proposal). The proponents informed the Working Group that the proposal had been prepared to implement the Commission's mandate and to reflect existing UNCITRAL documents, notably its Notes on Organizing Arbitral Proceedings.[9] It was added that the Proposal closely followed the elements and description of A/CN.9/WG.III/WP.137, and the contents of its paragraph 44 (addressing next steps that the Working Group might wish to take), so as to take the form of a draft outcome document.

16. For these reasons, the proponents noted, the Proposal set out introductory paragraphs presenting the purpose, character and overview of an ODR process. It was added that the document had been submitted in order to assist the Working Group in finalizing its text on the ODR process in the very short time available.

17. The delegation submitting A/CN.9/WG.III/WP.138 presented the proposal therein, and noted that the two proposals reflected similar areas for discussion for the Working Group.

18. The Working Group proceeded to base its deliberations on A/CN.9/WG.III/WP.137, with appropriate reference to the equivalent paragraphs of the other proposals noted above. The discussion from paragraphs 20 through 118 herein is based upon and follows the structure of the Proposal. Another delegation stated that it would make further proposals as that process continued. It was noted that the Working Group would record its agreements on the substance of a draft outcome document in its Report of the session, and that it would finalize the editing thereof at the next session.

19. Reference was made to paragraph 44 of A/CN.9/WG.III/WP.137. As regards paragraph 44(a), it was agreed that the question of the title of the document would be considered at a later time. As regards paragraph 44(b), it was agreed on a preliminary basis that an introductory text for an ODR process in the outcome document could read as set out in the Proposal.[10]

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[9] See UNCITRAL Notes on Organizing Arbitral Proceedings (1996).

[10] For the purposes of this Report only, and in order to avoid confusion between the numbered paragraphs of A/CN.9/WG.III/WP.137 and this Report, and the paragraphs of the Proposal, references to "item numbers" in this document are to the numbered paragraphs of the Proposal.

A. The Proposal for an outcome document

1. Section I of the Proposal

20. The Working Group proceeded to consider an introductory text to describe an ODR process for which the following text was proposed.

"***Section I — Introduction***

Purpose of Technical Notes

§1. The purpose of the Technical Notes is to foster the development of ODR as a form of dispute resolution by assisting the participants in an Online Dispute Resolution (ODR) system in the conduct of ODR proceedings.

§2. The Technical Notes apply to the online resolution of disputes arising from cross-border low-value sales or service contracts concluded using electronic communications. Given that procedural styles and practices in ODR proceedings vary widely, the Technical Notes are intended to be of assistance regardless of the structure or framework of an ODR system.

§3. The Technical Notes are intended to assist the full range of potential participants in an ODR system, including ODR administrators, ODR platforms, neutrals, and the parties to the dispute.

§4. The Technical Notes reflect approaches to ODR systems that reflect principles of fairness, due process, transparency and accountability that are essential to any ODR system, but they are not intended to be an exhaustive or exclusive summary of approaches that incorporate such principles. The Technical Notes do not promote any practice of ODR as best practice.

Non-binding Character of the Technical Notes

§5. The Technical Notes do not impose any legal requirement binding on the parties or any persons and/or entities administering or facilitating an ODR proceeding.

§6. The Technical Notes are not suitable to be used as rules for any ODR proceeding, since they are only of a descriptive nature and do not establish any obligation on the parties or on persons and/or entities administering or facilitating an ODR proceeding to act in a particular manner. Accordingly, the use of the Technical Notes does not imply any modification to any ODR rules that the parties may have selected.[11]

Overview of ODR

§7. In tandem with the sharp increase of cross-border transactions concluded via the Internet, there has been extensive discussion regarding the use of information and communication technology tools for resolving disputes which arise from such online transactions.

§8. One such tool is online dispute resolution ('ODR'), which has emerged as having the potential to provide a simple, fast, flexible and effective option for the resolution of such disputes, in particular when they relate to low-value transactions. ODR encompasses a broad range of approaches, including the potential for hybrid processes including both online and offline elements. ODR systems can be designed to facilitate communications in an efficient and user-friendly manner, in order to obtain an outcome without the need for physical presence at a meeting or hearing. ODR can provide a more cost-effective alternative to traditional approaches, the latter of which in some cases may be overly complex, costly and time-consuming in light of the nature and value of the dispute. As such, ODR represents significant opportunities for access to dispute resolution by buyers and sellers concluding cross-border commercial transactions, both in the developed and developing world."

[11] See UNCITRAL Notes on Organizing Arbitral Proceedings (1996), paras. 2-3.

21. It was agreed that any further comments on the proposed text would take the form of proposed amendments to the wording itself.

22. It was suggested, as regards the remainder of the document, that the repeated phrase in the proposal "*it is advisable that*" could be replaced with an introductory phrase to express the concept throughout the document. It was also suggested that the location of the definitions in the outcome document would be considered at a later stage.

23. It was noted that an UNCITRAL document would not generally contain footnotes but that, as subparagraph 44(c) of A/CN.9/WG.III/WP.137 indicated, relevant elements of the elaboration process could be set out in the outcome document so as to assist the reader.

24. It was suggested that (a) the outcome document could be called a "Guideline", and (b) items 1-8 of the Proposal be shortened by replacing them with the following sentences:

> "*Guideline on Online Dispute Resolution (ODR) for cross-border electronic commerce transactions of UNCITRAL (hereinafter referred to as Guideline) aims to provide an easy, fast, cost-effective convenient and efficient procedure for dispute resolution in low-value, high-volume cross-border electronic commerce transactions. The Guideline is a non-binding descriptive document reflecting present common commercial practices of ODR process*."

25. The suggestion to reduce the length of the text received support, though a concern expressed was that the suggested revised text might not include all elements that could be considered necessary. It was said that a revised text could be proposed at a later stage (see paras. 128 and 129 below).

2. Section II of the Proposal

26. The Working Group then proceeded to consider the principles that would underpin an ODR process, for which the following text was proposed.[12]

> "***Section II — Principles***
>
> *§9. Certain principles that should underpin any ODR process include fairness, transparency, due process and accountability.*"[13]

27. An alternative proposal was that this item should read, "*The principles that underpin any ODR process include fairness, transparency, due process and accountability*". After discussion, this proposal was accepted and the Working Group proceeded with the consideration of items 10 to 16.

> "*§10. ODR may assist in addressing a situation arising out of cross-border e-commerce transactions, namely the fact that traditional judicial mechanisms for legal recourse may not offer an adequate solution for cross-border e-commerce disputes.*[14]
>
> *§11. ODR ought to be simple, fast and efficient, in order to be able to be used in a "real world setting", including that it should not impose costs, delays and burdens that are disproportionate to the economic value at stake.*"[15]
>
> "***Transparency***
>
> *§12. It is advisable to disclose any contractual relationship between the ODR administrator and a particular vendor, so that users of the service are informed of potential conflicts of interest.*[16]

[12] Commentary and proposals made during the session are included under each relevant item of the Proposal.
[13] A/CN.9/WG.III/WP.137, para. 3.
[14] Ibid., para. 4.
[15] Ibid., para. 5.
[16] A/CN.9/WG.III/WP.138, para. 1.

§13. The ODR administrator may wish to publish anonymized data or statistics on its decisions, in order to enable parties to assess its overall record.[17]

§14. All relevant information should be available on the ODR administrator's website in a user-friendly and accessible manner."[18]

"***Independence***

§15. It would be advisable for the ODR administrator to adopt a code of ethics for its neutrals, in order to guide neutrals as to conflicts of interest and other rules of conduct.[19]

§16. It would be useful for the ODR administrator to adopt internal policies dealing with identifying and handling conflicts of interest."[20]

28. It was noted that while these policies might be internal, their existence might be publicly-acknowledged. Accordingly, it was agreed that this item should read, "*It would be useful for the ODR administrator to adopt policies dealing with identifying and handling conflicts of interest.*" and the Working Group proceeded with the consideration of items 17 and 18.

"***Expertise***

§17. The ODR administrator may wish to implement comprehensive policies governing selection and training of neutrals.[21]

§18. An internal oversight/quality assurance process could help the ODR administrator to ensure that neutrals' decisions conform with the standards it has set for itself."

29. It was proposed that a discussion of confidentiality and of the mode of agreement of ODR rules should be included in this section of the outcome document, given the importance of these concepts.

30. In this regard, an additional item, to read as follows, was proposed: "*The ODR administrator should adopt and implement appropriate confidentiality measures.*" While support was expressed for this proposal, it was queried whether including the question of confidentiality had previously been agreed in the Working Group. In response, it was stated that the principle had been implicit in earlier discussions in the Working Group, though had not been addressed extensively. After discussion, the proposal was deferred to a later stage in the session.

31. A further proposal was to include the following paragraph: "*It is desirable for the ODR administrator to provide the means by which the parties can indicate their consent to ODR process and awareness of its stages and procedures.*" While support was expressed for this proposal, to reflect the principle that there should be no ODR without consent, it was suggested that this issue would be better addressed in a dispute resolution clause, as the ODR administrator would not always be engaged at the relevant time. In response, it was stated that the proposal could be qualified so that the provision would apply only where the ODR administrator was engaged in the process, or that the principle could be expressed in more general terms. After discussion, it was agreed that the principle would be phrased as "*The ODR process should be based on the explicit and informed consent of the parties*".

32. Subject to the amendments to items 9 and 16 of the Proposal, and the additional text in paragraph 31 immediately above, the Working Group agreed the text of this Section as proposed.

[17] Ibid., para. 2.
[18] Ibid., para. 3.
[19] Ibid., para. 4.
[20] Ibid., para. 5.
[21] Ibid., para. 6.

3. Section III of the Proposal

33. The Working Group then proceeded to consider the stages of an ODR process, for which the following text was proposed.[22]

> "***Section III. Stages of an ODR Process***
>
> "*§19. The process of an online dispute resolution proceeding may consist of stages including: negotiation; facilitated settlement; and a third (final) stage.*"[23]

34. An alternative proposal, that this item should read, "*The process of an online dispute resolution proceeding consists of three stages, namely negotiation; facilitated settlement; and a third (final) stage*", did not gain support and the Working Group proceeded with the consideration of items 20 and 21.

> "§*20. The ODR process may commence when a claimant submits a notice of claim through the ODR platform to the ODR administrator. The ODR administrator informs the respondent of the existence of the claim and the claimant of the response. The first stage of proceedings — a technology-enabled negotiation — commences, in which the claimant and respondent negotiate directly with one another through the ODR platform.*[24]
>
> *§21. If that negotiation process fails (i.e. does not result in a settlement of the claim, the process may move to a second, 'facilitated settlement' stage (see, further, paragraphs 40-42 below). In that stage of proceedings, the ODR administrator appoints an individual that will assist the parties in settling or resolving the dispute (a 'neutral'), who communicates with the parties in an attempt to reach a settlement.*"[25]

35. The Working Group included a definition of the term "neutral" in this item pending a final decision on the location of the definitions section in the outcome document and proceeded with the consideration of item 22.

> "*§22. If facilitated settlement fails, a third and final stage of proceedings might commence.*"[26]

36. The Working Group agreed items 19-21 of the section as proposed and deferred its consideration of item 22 to a later time.

4. Section IV of the Proposal

37. The Working Group then proceeded to consider the scope of an ODR process, for which the following text was proposed.[27]

> "***Section IV. Scope of ODR Process***
>
> *§23. An ODR process may be particularly useful for disputes arising out of cross-border, low-value e-commerce transactions. An ODR process may apply to disputes arising out of both a business-to-business as well as business-to-consumer transactions.*"[28]

38. It was further proposed that the types of claims should be limited to (a) goods sold or services rendered that were not delivered, not timely delivered, that were not properly charged or debited, and/or that were not provided in accordance with the sales or service contract; and (b) where full payment was not received for goods or services provided. The proposal, however, did not gain support and the Working Group proceeded with the consideration of item 24.

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[22] Commentary and proposals made during the session are included under each relevant item of the Proposal.
[23] A/CN.9/WG.III/WP.137, para. 7.
[24] Ibid., para. 8.
[25] Ibid., para. 9.
[26] Ibid., para. 10.
[27] Commentary and proposals made during the session are included under each relevant item of the Proposal.
[28] A/CN.9/WG.III/WP.137, para. 11.

"*§24. An ODR process may apply to disputes arising out of both sales and service contracts.*"[29]

39. The importance of the issue of consent to ODR, notably as regards whether any such consent should be required at the time of the transaction, was recalled. Accordingly, it was suggested that paragraph 13 of A/CN.9/WG.III/137 should be included in the text. In response, it was suggested that the Working Group had considered that consent to ODR could be given at a later time such as when a dispute arose. After discussion, it was agreed that the agreed wording in paragraph 31 above would address this issue satisfactorily, and that reference to the issue of consent in this item was not necessary.

40. The Working Group agreed the Section as proposed.

5. Section V of the Proposal

41. The Working Group then proceeded to consider provisions on definitions, roles and responsibilities, and communications in an ODR process, for which the following text was proposed.[30]

"***Section V. ODR Definitions, Roles and Responsibilities, and Communications***

§25. Online dispute resolution, or 'ODR', is a 'mechanism for resolving disputes facilitated through the use of electronic communications and other information and communication technology'. The process may be implemented differently by different administrators of the process, and may evolve over time.[31]

§26. As used herein a 'claimant' is the party initiating ODR proceedings and the 'respondent' the party to whom the notice of proceedings is directed, in line with traditional, offline, alternative dispute resolution nomenclature. The 'individual that assists the parties in settling or resolving the dispute' is the 'neutral'.[32]

§27. ODR requires a technology-based intermediary. In other words, unlike offline alternative dispute resolution, an ODR process cannot be conducted on an ad hoc basis involving only the parties to a dispute and a neutral adjudicator (that is, without an administrator). Instead, to enable the use of technology to facilitate a dispute resolution process, an ODR process requires a system for generating, sending, receiving, storing, exchanging or otherwise processing communications. Such a system is referred to herein as an "ODR platform."[33]

42. It was agreed that the term "facilitate" in items 25 and 27 was used in a different sense from that in items 19 and 21 of the Proposal, and that, to avoid confusion, an alternative term would be found. The Working Group then proceeded with the consideration of items 28 to 32.

"*§28. An ODR platform must be administered and coordinated. The entity that carries out such administration and coordination is referred to herein as the 'ODR administrator.' The ODR administrator may be separate from or part of the ODR platform.*[34]

§29. In order to enable ODR communications, it is desirable that both the ODR administrator and the ODR platform should be specified in the dispute resolution clause.[35]

§30. The communications that may take place during the course of proceedings have been defined as 'any communication (including a statement, declaration, demand, notice, response, submission, notification or request) made by means of information

[29] A/CN.9/WG.III/WP.137, para. 12.
[30] Commentary and proposals made during the session are included under each relevant item of the Proposal.
[31] A/CN.9/WG.III/WP.137, para. 15.
[32] Ibid., para. 16.
[33] Ibid., para. 17.
[34] Ibid., para. 18.
[35] Ibid., para. 19.

generated, sent, received or stored by electronic, magnetic, optical or similar means.'[36]

§31. It is desirable that all communications in ODR proceedings take place via the ODR platform. Consequently, both the parties to the dispute, and the ODR platform itself, should have a designated 'electronic address'. The term 'electronic address' is also defined in other UNCITRAL texts.[37]

§32. To enhance efficiency it is desirable that the ODR administrator promptly:

(a) Acknowledge receipt of any communication by the ODR platform;

(b) Notify parties of the availability of any communication received by the ODR platform; and

(c) Keep the parties informed of the commencement and conclusion of different stages of the proceedings."[38]

43. A suggestion to delete the phrase "to enhance efficiency" did not gain support and the Working Group proceeded with the consideration of item 33.

"*§33. In order to avoid loss of time, it is desirable that a communication be deemed to be received by a party when the administrator notifies that party of its availability on the platform; deadlines in the proceedings would run from the time the administrator has made that notification. At the same time, the ODR administrator should be empowered to extend deadlines, in order to allow for some flexibility when appropriate.*"[39]

44. Subject to reconsideration of the word "facilitated" in items 25 and 27 of the Proposal, the Working Group agreed the Section as proposed.

6. Section VI of the Proposal

45. The Working Group then proceeded to consider the commencement of an ODR process, for which the following text was proposed.[40]

"***Section VI. Commencement of ODR proceedings***

§34. ODR proceedings may be deemed to have commenced when, following a claimant's communication of a notice to the ODR administrator, the ODR administrator notifies the respondent and the parties that the notice is available at the ODR platform.[41]

§35. In order to commence an ODR proceeding and to enable it to proceed in an administratively efficient manner, it is desirable that the notice contain:

(a) The name and 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 address 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) The claimant's preferred language of proceedings;

(f) The signature or other means of identification and authentication of the claimant and/or the claimant's representative;[42] *and*

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[36] Ibid., para. 20.
[37] Ibid., para. 21.
[38] Ibid., para. 22.
[39] Ibid., para. 24.
[40] Commentary and proposals made during the session are included under each relevant item of the Proposal.
[41] A/CN.9/WG.III/WP.137, para. 25.
[42] Ibid., para. 26.

(g) The location of the claimant."

46. It was suggested that sub-item (g) be deleted, on the basis that the Working Group had not come to consensus on the inclusion of this provision in such a notice (with reference to the Working Group reports A/CN.9/739, paras. 78-80, A/CN.9/795, para. 84, A/CN.9/833, para. 77, for example). On the other hand, it was recalled that the issue of location of the claimant had been discussed in the context of separate tracks of earlier draft Rules on ODR, and that agreed text on notice provisions included the location of the claimant (with reference to A/CN.9/801, para. 77, for example). It was suggested that this inclusion indicated that a consensus had been reached to include the location of the claimant.

47. It was noted, however, that there had been no clear understanding of what the term "location" might mean in the context of a single approach to an ODR process, which, it was suggested, indicated that clear consensus had not been reached.

48. Reference was also made to the mandate given to the Working Group, which, it was said, would allow the Working Group to build on issues in one Track of the earlier draft Rules upon which earlier consensus had been achieved in the Working Group.

49. It was added that the language proposed was not prescriptive and that the intention of the proposed inclusion of the location of the claimant was to provide practical rather than legal parameters for the administration of ODR claims.

50. It was noted, among other things, that the Working Group reports above set out no clear understanding in the Working Group on the meaning of location and so indicated that the issue had not achieved consensus. Accordingly, it was concluded that reference to the location of the claimant and therefore sub-item (g) would be deleted.

51. An alternative formulation of items 34 and 35 above was proposed as follows. It was explained that this formulation sought to set out the steps of the process and the time at which they should be taken:

First paragraph: "*The claimant shall communicate to the ODR administrator a notice when disputes arise*."

Second paragraph: "*The notice [should/could] contain the following:*

(a) The name and 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 address 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) The claimant's preferred language of proceedings; and

(f) The signature or other means of identification and authentication of the claimant and/or the claimant's representative."

Third paragraph: "*The ODR administrator shall promptly notify the respondent that the notice is available at the ODR platform.*"

Fourth paragraph: "*ODR proceedings may be deemed to have commenced when, following a claimant's communication of a notice to the ODR administrator, the ODR administrator notifies the respondent and the parties that the notice is available at the ODR platform.*"

52. Reference in this regard was made to paragraph 352 of the Commission report A/70/17 and the mandate set out therein. The first and third paragraphs of the alternative proposal were derived, it was clarified, from proposals made to the Working Group at earlier sessions; the second and fourth paragraphs reordered items 34 and 35 of the Proposal (and repeated their contents, save for a minor change to the chapeau to the second paragraph). It was emphasized that these provisions sought to explain, first, what the claimant should do when a dispute arose (that is, to send a notice to the ODR administrator), and that this step would commence the ODR process. Second, the provisions set out the contents of the notice, and

third, they identified what the ODR administrator should do upon receipt of that notice. The fourth element sought to determine when the proceeding commenced.

53. The structure of the proposal as so explained received support.

54. On the other hand, it was stated that the language and structure of the alternative proposal would be more reflective of prescriptive rules for an ODR process, particularly as compared with the Proposal regarding items 34 and 35, which, it was said, were facilitative, included explanations for the provisions, and had been designed to reflect the non-binding descriptive nature of the outcome document.

55. Another view was to combine item 34 of the Proposal with the second paragraph of the alternative proposal.

56. After discussion, it was suggested that the first two items of the Section could read as follows, and that this text could replace items 34 and 35 in the Proposal:

> First paragraph: "*In order to commence an ODR proceeding, it is desirable that the claimant provide to the ODR administrator a notice containing the following information:*
>
> *(a) The name and 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 address 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) The claimant's preferred language of proceedings; and*
>
> *(f) The signature or other means of identification and authentication of the claimant and/or the claimant's representative.*"
>
> Second paragraph: "*ODR proceedings may be deemed to have commenced when, following a claimant's communication of a notice to the ODR administrator, the ODR administrator notifies the respondent and the parties that the notice is available at the ODR platform.*"

57. After deciding to remove the superfluous words "*the respondent and*" from the second paragraph, this suggestion to replace items 34 and 35 was accepted.

58. It was queried whether the term "parties" should also be defined. In answer to that question, it was recalled that item 26 of the Proposal (see para. 41 above) explained that the parties comprised the claimant and respondent which, it was considered, would be sufficient for the purposes of the outcome document. The Working Group then proceeded with the consideration of item 36.

> "§36. *In order to enable a response to an ODR proceeding to proceed in an administratively efficient manner, it is desirable that the respondent's response to the notice should include:*
>
> *(a) The name and 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 grounds on which the claim is made;*
>
> *(c) Any solutions proposed to resolve the dispute;*
>
> *(d) The signature or other means of identification and authentication of the respondent and/or the respondent's representative;*
>
> *(e) Notice of any counterclaim containing the grounds on which the counterclaim is made;*[43] *and*
>
> *(f) The location of the respondent.*"

[43] A/CN.9/WG.III/WP.137, para. 28.

59. For reasons of consistency with the earlier decision regarding proposed sub-item 35(g), it was agreed that sub-item (f) would be deleted.

60. As regards proposed sub-item (b), it was queried whether an "electronic address" alone would be sufficient. In response, the discussions in the Working Group that had led to this provision were recalled.

61. It was proposed that the amendments agreed for item 34 should be reflected in the chapeau to item 36 as follows: "*It is desirable that the respondent communicate its response to the ODR administrator within a reasonable time of being notified of the availability of the claimant's notice on the ODR platform, and that the response include the following elements …*" (and continuing with sub-items (a) to (e) as proposed).

62. In connection with this suggestion, it was queried why the reference to a reasonable time frame was included in the chapeau. In response, it was explained that the reference would enable the effective application of item 38(b) of the Proposal (see para. 72 below).

63. As regards proposed sub-item (b), it was suggested that the sub-item should read as follows: "*A response to the claim made by the claimant and to the grounds on which the claim is made*". It was clarified that the Proposal reflected the earlier consensus of the Working Group that references in the notices of both the claimant and the respondent to the "grounds of claim" encompassed references to the claim and responses as well as to the grounds upon which they were made. Accordingly, it was considered that that additional text would not be necessary.

64. In conclusion, it was agreed that the chapeau to item 36 in the Proposal would read, "*It is desirable that the respondent communicate its response to the ODR administrator within a reasonable time of being notified of the availability of the claimant's notice on the ODR platform, and that the response include the following elements …*"; that sub-item (f) would be deleted and that item 36 would otherwise remain unchanged. The Working Group then proceeded with the consideration of item 37.

> "*§37. As much as is possible, it is preferable that both the notice of claim and response be accompanied by all documents and other evidence relied upon by each party, or contain references to them. In addition, to the extent that a claimant is pursuing any other legal remedies, it is desirable that such information also be provided with the notice.*"[44]

65. It was suggested that the evidential burden indicated by the reference to "*all documents and other evidence*" might be onerous, and that the phrase should be replaced by the alternative phrase "*the documents and other evidence*". It was noted, in response, that the reference had been included to encourage a single submission of all documents in the possession of either party upon which that party sought to rely. In addition, it was recalled that the item envisaged that any documents that were unavailable to a party could be produced through references to those documents in the notices themselves.

66. As regards the phrase "[i]n addition, to the extent that a claimant is pursuing any other legal remedies, it is desirable that such information also be provided with the notice," it was stated that provision of this information would contradict practice in one jurisdiction. Consequently, clarification why this element had been included was sought. In response, it was recalled that the purpose was to avoid multiple or parallel proceedings, an issue that had been discussed at some length in the Working Group, and so as to ensure full disclosure to this end.

67. In conclusion, it was agreed to leave item 37 as per the Proposal.

Additional proposal (A/CN.9/WG.III/WP.136)

68. The Working Group heard a presentation of A/CN.9/WG.III/WP.136. The submitting delegation proposed that additional text be included in items 35 (f) and 36 (d) of the Proposal. The text proposed was based on the text of draft Articles 4A and 4B in A/CN.9/WG.III/WP.136 (under the heading "Comment to the attention of the experts of Working Group III UNCITRAL "Online dispute resolution — ODR"), and it was suggested

[44] Report of Working Group III, (Vienna, 18-22 November 2013), A/CN.9/795, para. 92.

that reference should also be made to the contents of a UN-CEFACT document." The document, it was said, was named Recommendation for ensuring legally significant trusted trans-boundary electronic interaction and was available online at: www1.unece.org/cefact/platform/download/attachments/55378391/Rec+draft+v.0.91+08.09.15.pdf. It was added that references in the proposed text to "defendant" should be understood as references to "respondent" for the purposes of an ODR process.

69. It was recalled that the Working Group had not earlier reached consensus on this element of an ODR process and, in that context, it was observed that the existing mandate of the Working Group would not encompass a discussion of this proposal.

70. It was noted that the proposal raised issues of identification and authentication of (in this context) a claimant and a respondent respectively, which were issues that UNCITRAL's Working Group IV (Electronic Commerce) had addressed. The Secretariat was therefore requested to present the proposals set out in A/CN.9/WG.III/WP.136 to that Working Group for its consideration.

71. The Working Group agreed to a revised formulation of items 34 and 35 as noted above; to item 36 of the Proposal as revised and to item 37 of the Proposal.

7. Section VII of the Proposal

72. The Working Group then proceeded to consider the negotiation stage of an ODR process, for which the following text was proposed.[45]

> "***Section VII. Negotiation***
>
> *§38. The first stage of proceedings may commence following the communication of the respondent's response to the ODR platform and:*
>
> *(a) Notification thereof to the claimant, or*
>
> *(b) Failing a response, the lapse of a certain period of time after the notice has been communicated to the respondent.*[46]
>
> *§39. This first stage may be referred to as 'negotiation', comprising 'negotiation between the parties via the ODR platform'.*"[47]

73. It was suggested that the order of the items be reversed, so as to ensure consistency in presentation with Section VI above (Commencement of ODR proceedings).

74. A concern was raised that so doing might indicate that the negotiation stage was mandatory, contrary to the intended flexibility in the envisaged outcome document, and as set out in item 19 of the Proposal.

75. In response, it was stated that the phrasing of items 38 and 39 would not indicate that the negotiation stage was mandatory.

76. A further suggestion was for the definition set out in item 39 to be located together with other definitions (see, further, para. 22 above).

77. Two additional sub-items were proposed, as follows. It was explained that the intention was to expand the scope of Section VII so to set out all steps for the negotiation phase upon which the Working Group had previously reached consensus.

> First paragraph: "*The parties could settle their dispute by negotiation within a reasonable period of time of the commencement of the negotiation stage of proceedings.*"
>
> Second paragraph: "*The parties may agree to a one-time extension of the deadline for reaching settlement. However no such extension shall be for more than for a reasonable period of time.*"

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[45] Commentary and proposals made during the session are included under each relevant item of the Proposal.

[46] A/CN.9/WG.III/WP.137, para. 30.

[47] Ibid., para. 31.

78. In response to these suggestions, it was observed that the proposed language could be construed as being prescriptive, and that an alternative approach could be to state that it would be desirable for the ODR platform to issue guidelines on timelines and any appropriate extension.

79. After discussion, it was agreed that Section VII would read in its entirety as follows:

"*§38. The first stage may be a negotiation, conducted between the parties via the ODR platform.*

§39. The first stage of proceedings may commence following the communication of the respondent's response to the ODR platform and:

(a) Notification thereof to the claimant, or

(b) Failing a response, the lapse of a reasonable period of time after the notice has been communicated to the respondent."

§39bis. It is desirable that, if the negotiation does not result in a settlement within a reasonable period of time, the process proceeds to the next stage."

8. Section VIII of the Proposal

80. The Working Group then proceeded to consider the facilitated settlement stage of an ODR process, for which the following text was proposed.[48]

"***Section VIII. Facilitated settlement***

§40. The second stage of ODR proceedings may be facilitated settlement, whereby a 'neutral' individual is appointed and communicates with the parties to try to achieve a settlement.

§40bis. That stage may commence if negotiation via the platform fails for any reason (including non-participation or failure to reach a settlement within a reasonable period of time), or where one or both parties to the dispute request to move directly to the next stage of proceedings.[49]

§41. Upon commencement of the facilitated settlement stage of proceedings, it is desirable that the ODR administrator appoints a 'neutral' individual, and notifies the parties of that appointment, and certain details about the identity of the neutral.[50]

§42. In the facilitated settlement stage, it is desirable that the neutral communicates with the parties to try to achieve a settlement."[51]

81. After discussion, an additional item 42bis was proposed, as follows: "*If a facilitated settlement cannot be achieved within a reasonable period of time, the process may move to a final stage.*"

82. A proposal to include the phrase "*Subject to the agreement of the parties*" at the beginning of item 42bis did not gain support.

83. It was noted that item 42bis would apply where the parties in fact engaged in a facilitated settlement stage of an ODR proceeding, so that the provision would not prevent the parties from agreeing to bypass a facilitated settlement phase, if they so choose.

84. It was noted that the Working Group would consider whether to add any further reference to the final stage in item 42bis if and when it revisited item 22 of the Proposal.

85. The Working Group agreed the text of the proposed items 40-42bis, as amended.

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[48] Commentary and proposals made during the session are included under each relevant item of the Proposal.

[49] A/CN.9/WG.III/WP.137, para. 32.

[50] Ibid., para. 33.

[51] Ibid., para. 34.

9. Section IX of the Proposal

86. The Working Group then proceeded to consider the appointment and powers of the neutral in an ODR process, for which the following text was proposed.[52]

> "***Section IX. Appointment and powers of the neutral***
>
> "*§43. To enhance efficiency and reduce costs, it is preferable that the ODR administrator not appoint a neutral until a neutral is required for a dispute resolution process in accordance with the applicable rules of procedure. At the point in an ODR proceeding at which a neutral is required for the dispute resolution process, it is desirable that the ODR administrator 'promptly' appoint the neutral (i.e., generally at the commencement of the facilitated settlement stage of proceedings). Upon appointment, it is desirable that the ODR administrator promptly notify the parties of the name of the neutral and any other relevant or identifying information in relation to that neutral.*"[53]

87. It was clarified that the "applicable rules of procedure" referred to whatever rules the parties had agreed to use in the ODR proceedings concerned, and that the text would therefore be amended to refer to the "*agreed ODR rules*".

88. It was proposed that the following words in item 43 be deleted: "*To enhance efficiency and reduce costs, it is preferable that the ODR administrator not appoint a neutral until a neutral is required for a dispute resolution process in accordance with the applicable rules of procedure. At the point in an ODR proceeding at which a neutral is required for the dispute resolution process, …*". It was observed that this introductory language repeated points of general application in the process, and was therefore unnecessary.

89. Alternative views were that the proposed text in the Proposal should be retained.

90. Regarding the phrase "*[t]o enhance efficiency and reduce costs*", it was observed that an online dispute resolution process differed from a traditional (offline) process in which the neutral would generally be appointed at the outset, and so this phrase served to highlight the greater flexibility available in the online context (and the consequent possibility of minimizing costs). An alternative suggestion was that the objective of minimizing costs could be included as a general principle earlier in the document. In response, it was observed that the point merited emphasis in this item.

91. Regarding the phrase, "*it is preferable that the ODR administrator not appoint a neutral until a neutral is required for a dispute resolution process*", it was said that this statement again highlighted the possibility of minimizing costs. It was also suggested that a revised formulation, "*it is preferable that the ODR administrator appoint a neutral only when a neutral is required for a dispute resolution process*", would remove any unintended negative tone in the item.

92. Regarding the phrase, "*[a]t the point in an ODR proceeding at which a neutral is required for the dispute resolution process, …*" it was stated that this phrase provided context and would enable a clearer understanding of the remainder of the sentence as presented in the Proposal.

93. After discussion, it was agreed to replace the first sentence of item 43 in the Proposal with the following sentence: "*To enhance efficiency and reduce costs, it is preferable that the ODR administrator only appoint a neutral when a neutral is required for a dispute resolution process in accordance with the applicable ODR rules.*"

94. Subject to this amendment, the Working Group agreed the text of item 43 as it was presented in the Proposal and proceeded with the consideration of item 44.

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[52] Commentary and proposals made during the session are included under each relevant item of the Proposal.

[53] A/CN.9/WG.III/WP.137, para. 35.

"*§44. It is desirable that neutrals should have the relevant professional experience as well as dispute resolution skills to enable them to deal with the dispute in question. However, ODR neutrals need not be lawyers.*"[54]

95. It was observed that the relevant laws of national systems might prescribe requirements to practise as a lawyer and whether lawyers were allowed to act as ODR neutrals and that this formulation might contradict domestic provisions. Another view was that there was nothing in the outcome document that could contradict locally applicable law.

96. It was added that the first sentence alone would provide sufficient assurance, and that the second sentence was both unnecessary and could be interpreted as implying that ODR neutrals should not be lawyers.

97. In light of these points, it was stated that the second sentence should be deleted.

98. It was noted that reasons for retaining the second sentence included that disputes might focus on issues of fact rather than of law, that the decisions to be taken in an ODR process need not be of a judicial nature, and so as to minimize costs.

99. A discussion in the Working Group in 2010 was recalled: "There was consensus that conciliators or members of the arbitral tribunal ("neutrals") ought not necessarily to be lawyers, although they should be required to have relevant professional experience as well as dispute resolution skills to enable them to deal with the dispute in question".[55] It was also recalled that the Working Group had come to a general understanding that a neutral need not be a lawyer.

100. It was suggested that the second sentence could read "*However, ODR neutrals need not necessarily be lawyers*".

101. Further suggestions were that the second sentence could read "*ODR neutrals may include, but are not limited to, lawyers*"; "*Any legally-qualified professionals could be ODR neutrals*"; and "*However, subject to any professional regulation, ODR neutrals need not necessarily be lawyers*", and to refer to "*legally-qualified persons*" or "*qualified lawyers*", rather than to "*lawyers*".

102. After discussion, and noting the provision was permissive and not restrictive in nature, it was agreed that the second sentence of item 44 would read as follows: "*However, subject to any professional regulation, ODR neutrals need not necessarily be qualified lawyers*". The Working Group agreed the text of the first sentence of item 44 as per the Proposal.

103. An additional suggestion was to include in the introduction to the document a statement that "*These Technical Notes do not supplant or override applicable law*".

104. The Working Group then proceeded with the consideration of item 45.

"*§45. In respect of the process of appointment of a neutral, it is desirable that:*"

105. An alternative formulation for the chapeau was suggested, as follows:

"*With regard to the appointment and functions of neutrals, the following are desirable*:

(a) The neutral by accepting confirms that he or she has the time necessary to devote to the process;

(b) The neutral shall declare his or her impartiality and independence and disclose at any time any facts or circumstances that might give rise to likely doubts as to his or her impartiality or independence;

(c) The parties shall have a method for objecting to the appointment of a neutral;

(d) The ODR administrator shall make a determination as to whether the neutral shall be replaced;"

[54] Report of Working Group III, Vienna, 13-17 December 2010, A/CN.9/716, paras. 62-63.
[55] Ibid., para. 63.

106. It was suggested that the words "*In the event of an objection to an appointment of a neutral*" be at the beginning of the sentence, so as to clarify when the determination in question would be made.

> "*(e) There be only one neutral per dispute appointed at any time for reasons of cost efficiency;*
>
> *(f) A party may object to the neutral receiving information generated during the negotiation period; and*
>
> *(g) If the neutral resigns or has to be replaced during the course of the ODR proceedings, the ODR administrator will appoint a replacement subject to the same safeguards as set out during the appointment of the initial neutral.*"[56]

107. Subject to the inclusion of the amendments proposed to the chapeau and to sub-item (d), the Working Group agreed item 45.

108. In the light of the amendments made, it was agreed to revise the title of Section IX to read "*Appointment, powers and functions of the neutral*". The Working Group then proceeded with the consideration of item 46.

> "*46. In respect of the powers of the neutral, it is preferable that:*
>
> *(a) Subject to any Rules, the neutral may conduct the ODR proceedings in such a manner as he or she considers appropriate;*"

109. It was agreed to replace the words "*any Rules*" with the words "*any applicable ODR rules*" to ensure consistency throughout the outcome document.

> "*(b) The neutral shall conduct the proceedings without unnecessary delay or expense, shall provide a fair and efficient process for resolving disputes, and shall remain independent, impartial and treat both parties equally;*"

110. It was decided that sub-item (b) would read as follows, "*[t]he neutral shall avoid unnecessary delay or expense in the conduct of the proceedings and shall provide a fair and efficient process for resolving disputes*," and that an additional sub-item (b)bis would be included, as follows: "*The neutral shall remain independent, impartial and treat both parties equally throughout the proceedings*".

> "*(c) The neutral shall conduct proceedings based on the communications made during the proceedings;*"

111. It was observed that this sub-item referred to the entire ODR proceedings rather than to the negotiation stage as per item 45(f), and that these items should be aligned in scope. Accordingly, it was agreed that the sub-item be reworded as follows: "*The neutral shall conduct proceedings based on such communications as are before the neutral during the proceedings*".

> *"(d) The neutral may allow the parties to provide additional information in relation to the proceedings; and*
>
> *(e) The neutral has discretion to extend deadlines set out in any Rules*."[57]

112. It was agreed to refer to "*any applicable ODR rules*" as per sub-item (a) above. A suggestion that the sub-item be reworded to provide: "*The neutral has discretion to extend deadlines, subject to the applicable ODR rules*", did not gain support. It was recalled that the Working Group had earlier reached consensus on the principle that the neutral should have the discretion to extend deadlines for a reasonable time, and consequently that this provision reflected a core or fundamental principle of the process. It was also agreed that the words "*for a reasonable time*" be included in the sub-item, so that it would read as follows: "*The neutral has discretion to extend any deadlines set out in any applicable ODR rules for a reasonable time*".

113. Subject to the amendments agreed to sub-items (a), (b), (c) and (e), the Working Group agreed item 46 and proceeded with the consideration of item 47.

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[56] A/CN.9/WG.III/WP.137, para. 36.
[57] Ibid., para. 37.

"*§47. While the process for appointment of a neutral for an ODR process is subject to the same due process standards that apply to that process in an offline context, it may be desirable to use streamlined appointment and challenge procedures in order to address the need for ODR to provide a simple, time-, and cost-effective alternative to traditional approaches to dispute resolution.*"[58]

114. In response to a query, it was explained that the time periods in question should be expedited in the context of an ODR process (as compared with the UNCITRAL Arbitration Rules, for example), without prejudice to due process standards. Suggestions were made to remove the introductory words in the item, "*[w]hile the process for appointment of a neutral for an ODR process is subject to the same due process standards that apply to that process in an offline context*", on the basis that they were superfluous, and to replace the reference to "*time-effective*" with the word "*speedy*". After discussion, it was agreed to retain the item as proposed.

10. Section X of the Proposal

115. The Working Group then proceeded to consider the language used in an ODR process, for which the following text was proposed.[59]

"***Section X — Language***

§48. Technology tools available in ODR can offer a great deal of flexibility regarding the language used for the proceeding. Even where an ODR agreement or ODR rules specify a language to be used in proceedings, a party to the proceedings should be able to indicate in the notice or response whether it wishes to proceed in a different language so that the ODR administrator can identify other language options."[60]

116. It was queried why the words "that the parties may select", which had appeared in the equivalent text in A/CN.9/WG.III/WP. 137 were not included in the Proposal, on the basis that the missing language could be of significant importance to the parties in practice. In response, it was stated that the ODR administrator might not be able to operate in all languages that the parties might select, and that the missing language would be implicit in the item as proposed. After discussion, it was decided to include the words "*that the parties may select*", and the item was otherwise agreed as proposed.

11. Section XI of the Proposal

117. The Working Group then proceeded to consider the governance of an ODR process, for which the following text was proposed.[61]

"***Section XI — Governance***

§49. It is desirable for guidelines (and/or minimum requirements) to exist in relation to the conduct of ODR platforms and administrators.[62]

§50. ODR proceedings are subject to the same due process standards that apply to that process in an offline context, in particular independence, neutrality and impartiality."[63]

118. The Working Group agreed the Section as proposed.

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[58] Ibid., para. 38.

[59] Commentary and proposals made during the session are included under each relevant item of the Proposal.

[60] A/CN.9/WG.III/WP.137, para. 39.

[61] Commentary and proposals made during the session are included under each relevant item of the Proposal.

[62] A/CN.9/WG.III/WP.137, para. 40.

[63] Ibid., para. 41.

B. A/CN.9/WG.III/WP.137, paragraphs 42 and 43

119. As regards the suggestions in sub-paragraphs 42(a), (b) and (c), and paragraph 43 of the document A/CN.9/WG.III/WP.137, the Working Group decided that further provision in the draft outcome document would not be necessary, particularly in light of the limited mandate of the Working Group and the proposals made regarding the outcome document during the course of the session. In addition, and as regards the suggestion regarding confidentiality in paragraph 42(c), and the outstanding proposal to include confidentiality as a principle to be followed in the ODR process which was made earlier in the session (see paras. 29 and 30 above), the Working Group decided not to address confidentiality in the outcome document. The Working Group was urged, however, to bear the importance of confidentiality in mind when finalizing the outcome document.

C. Proposed additional text for item 22 of the Proposal and proposal for a new section, Section IX bis

120. The Working Group heard a proposal for additional text for item 22 of the Proposal (see paragraph 36 above), in the following terms: "*In that stage of proceeding, the ODR administrator may remind the parties, or set out for the parties, possible process options to choose.*"

121. The Working Group also heard a proposal for a new section, Section IX bis, in the following terms: "*If the neutral has not succeeded in facilitating the settlement, it is desirable that the ODR administrator, on the basis of information submitted by the parties, remind the parties of, or set out for the parties, the possible process options of final stage, and ensure that the parties are aware of the legal consequences of the choice of the process.*"

122. It was agreed to consider these proposals sequentially.

123. As regards the proposed addition to item 22, it was stated that this proposal went beyond the mandate of the Working Group as it sought to address the nature of the final stage of an ODR process, and further that the proposal sought to address an element of an ODR process upon which there had been no consensus.

124. In response, the proponents agreed that the mandate as set out in paragraph 352 of document A/70/17 required that the outcome document should exclude the nature of the final stage of the ODR process. However, the proponents stated that the reference to the "nature of the final stage" should be construed so as to exclude only a discussion of whether the final stage should be arbitration/non-arbitration. They added that paragraph 352 of document A/70/17 also reflected the Commission's agreement that the outcome document should build upon the consensus reached in earlier sessions. In the view of the proponents, the proposed addition discussed the role of the ODR administrator when facilitated settlement failed, and was necessary so as to complete the outcome document. In this regard, it was said, the proposal went no further than items 19-22 of the Proposal in terms of referring to the final stage. It was added that there had been consensus, when the two Tracks of earlier draft Rules were merged, that there would be a single track for third stage of the ODR process. For these reasons, the role of the administrator at this stage needed to be clarified.

125. In response, it was said that the substance of the proposed addition was already addressed in item 32(c) of the Proposal.

126. It was also said that a new Section IX bis was necessary as the introductory text of the Proposal referred to a number of approaches to an ODR process.

127. The Working Group did not complete its consideration of these proposals and deferred them to its next session.

D. Proposed revised introductory text for the outcome document

128. The Working Group heard a revised proposal for the introductory items of the outcome document, in the following terms:

"***I. Introduction***

Overview of ODR

§1. In tandem with the sharp increase of online cross-border transactions, there has been a need for mechanisms for resolving disputes which arise from such transactions.

§2. One such mechanism is online dispute resolution ('ODR'), which can assist the parties in resolving the dispute in a simple, fast, and flexible manner, without the need for physical presence at a meeting or hearing. ODR encompasses a broad range of approaches, including the potential for hybrid processes including both online and offline elements. As such, ODR represents significant opportunities for access to dispute resolution by buyers and sellers concluding cross-border commercial transactions, both in developed and developing countries.

Purpose of the Technical Notes[/Guidelines]

§3. The purpose of the Technical Notes [/Guidelines] is to foster the development of ODR and to assist ODR administrators, ODR platforms, neutrals, and the parties to ODR proceedings.

§4. The Technical Notes [/Guidelines] reflect approaches to ODR systems that embody principles of impartiality, independence, efficiency, effectiveness, due process, fairness, accountability and transparency.

§5. The Technical Notes [/Guidelines] are intended for use in disputes arising from cross-border low-value sales or service contracts concluded using electronic communications. They do not promote any practice of ODR as best practice.

Non-binding nature of the Technical Notes [/Guidelines]

§6. The Technical Notes [/Guidelines] are a descriptive document. They are not intended to be exhaustive or exclusive, nor are they suitable to be used as rules for any ODR proceeding. They do not impose any legal requirement binding on the parties or any persons and/or entities administering or facilitating an ODR proceeding, and do not imply any modification to any ODR rules that the parties may have selected."

129. The Working Group did not consider this proposal and deferred it to its next session.

E. Drafting instructions

130. In response to suggestions that the language in some items could be considered prescriptive, it was noted that the draft outcome document sought to distinguish between elements of the process which the Working Group considered as core or fundamental principles or steps, and other, more flexible, principles or steps. As regards the core or fundamental principles or steps (generally expressed using the word "shall" in the proposed text), it was suggested that these elements could be expressed in terms that it would be desirable for the neutral to be required to follow those principles and undertake those steps respectively. As regards other elements, it was observed that the document could be expressed in terms that it would be desirable for the neutral to be permitted to undertake or follow elements as appropriate.

131. The Working Group requested the Secretariat, in revising the draft outcome document:

(a) To ensure that the provisions in the outcome document were appropriately located;

(b) To ensure consistency in drafting between the chapeau and operative provisions in relevant items;

(c) To ensure consistency in drafting between the headings and text within the document; and

(d) To avoid unnecessary repetition.

B. Note by the Secretariat on online dispute resolution for cross-border electronic commerce transactions: submission by the Russian Federation

(A/CN.9/WG.III/WP.136)

[Original: English]

Contents

The Government of the Russian Federation has submitted to the Secretariat a document containing a vision and conceptual approaches regarding online dispute resolution for cross-border electronic commerce transactions. The document was submitted to the Secretariat prior to an earlier session of Working Group III (Online Dispute Resolution) but it is now to be made available to the Working Group. The text received by the Secretariat is reproduced as an annex to this note in the form in which it was received.

Annex

Vision and conceptual approaches to elaboration in specialized United Nations agencies and in relevant international organizations a family of recommendations on establishing and functioning of a trans-boundary trust space

Introduction

"Trans-boundary trust space" (hereinafter — TTS) is proposed to mean a combination of legal, **organizational and technical conditions recommended by relevant specialized United Nations agencies (departments) and** international organizations with the aim of ensuring trust (confidence in authenticity) in international exchange of electronic documents and data between electronically interacting parties (subjects).

"Electronically interacting parties (subjects)" is proposed to mean the entirety of public authorities, physical and legal persons interacting within relations arising from forming, sending, transmitting, receiving, storage and using electronic documents and data.

These proposals purpose to identify approaches and issues to be discussed in the context of development of a set of Recommendations on forming and functioning trans-boundary trust space (TTS Recommendations) in related United Nations organizations. It intends facilitating the building of technical, institutional and legal infrastructure for practical use of the TTS Recommendations.

Interested delegates and experts from state agencies and business are welcome to participate in this discussion.

Possible WTO role and contribution to TTS. The establishing of TTS will contribute to the facilitation and development of international trade and WTO attention to TTS issues will help to mobilize the support from governments and business to its practical implementation. Another area of concern is the lack of a coordination of work (and often of interoperability of final outputs) between numerous international and regional organizations (for example, ISO, ITU, UNECE/CEFACT, UNCITRAL, APEC, etc.) which are working on e-standards and related issues. The assigning to WTO a coordinating role in this process will make the international standardization in this area more efficient and effective.

Conceptual approaches

1. TTS Recommendations are proposed to be aimed to guarantee ensuring rights and legal interests of citizens and organizations under the jurisdiction of United Nations Member States while performing legally significant information transactions in electronic form using the Internet and other open ICT systems of mass usage.

2. The mentioned institutional guarantees are proposed to be ensured within business activity of specialized operators which:

- Provide users with a set of trusted ICT services;
- Operate within established legal regimes, which include but are not limited to restrictions imposed by processing of personal data.

3. It is proposed to give a description of different possible legal regimes:

- Based on international agreements (conventions) and/or on directly applicable international regulation;
- Based on commercial agreements and/or common trade practice;
- Without special international regulation.

Legal regimes can be additionally supported by traditional institutes (governmental authorities, judicial settlement, risk insurances, notary ship and others) through mutual recognition of electronic documents secured by trusted ICT services.

Established legal regimes can also provide for imposing special requirements on the material and financial support of the business activity of specialized operators in case of damage to their users, including cases of compromising personal data.

Issues of institutional guarantees and legal regimes for forming and functioning regional and global TTS-clusters as well as for functional services provided in the frames of these clusters are proposed to be considered in a separate UNCITRAL Recommendation.

4. It is proposed to give a description of the possible sets of trusted infrastructural ICT services in conjunction with the criticality of functional applications. The services and their available levels of trust can be determined by the operators of functional information systems dependent on threats, risks, agreed legal regimes and users' demands. In order to ensure required levels of trust the operators of functional information systems can operate in a neutral international environment defined by given legal regimes. It is proposed to describe organizational infrastructures necessary for establishing and maintaining the neutral international environment.

Common provisions on forming and functioning of regional and global TTS clusters, functional services provided in the frames of these clusters as well as sets of trusted infrastructural ICT services can be considered in the UNECE-UN/CEFACT "Recommendation for ensuring legally significant trusted trans-boundary electronic interaction".

Description of single trusted ICT-services can be a subject of technical standards and recommendations ITU, JTC-1, ETSI and others.

5. Sets of identification attributes can be defined by the legal regimes for the business activity of operators specialized in performing identification and functional operators and can be maintained by the related trusted ICT services. Operators' activity can be regulated by special organizational and technical requirements directed, besides others, on personal data protection.

Sets of identification attributes and identification procedures themselves can serve as the basis for the definition of the trust levels of identification schemes. The levels of trust of identification schemes can be of essence for regulation of interaction between different clusters of trust (see item 9).

6. It is proposed to describe the mechanisms of interaction of particular states and their international unions with other international formats in the frames of forming of a common TTS:

6.1. On the basis of accession to an existing legal regime, which ensures institutional guarantees to the subjects of electronic interaction:

- A complete accession of a state to an existing legal regime on the basis of international treaties and/or directly applicable international regulation, in which frames a task on forming a regional TTS has already been set or solved, including functional services provided in the frames of this TTS;

- A partial accession of a state to an existing legal regime on the basis of international treaties and/or directly applicable international regulation, in part of provisions on forming of regional and/or functional TTS;

6.2. On the basis of interaction between different international unions:

- In the first stage, a group of states creates an isolated regional TTS cluster, including functional TTS services provided in the frames of this TTS, ensuring institutional guarantees for the subjects of electronic interaction within the legal regime specified by these states;

- In the second stage, the protocols of trusted interaction with other international unions are specified as related to mutual recognition of different legal regimes. This mutual recognition shall regard to institutional guarantees and information security requirements appertaining to each of the international formats, possibly on the basis of an information security gateway (ISG) being operated in the frames of a special legal regime.

6.3. On the basis of interaction of a state with other states or international unions:

- In the first stage, a state creates an isolated national TTS cluster functioning in the frames of national legal regime specified by this state;

- In the second stage, the protocols of trusted interaction with other states and/or international unions are specified as related to mutual recognition of different legal regimes. This mutual recognition shall regard to institutional guarantees and information security requirements appertaining to these states and international formats, possibly on the basis of an information security gateway (ISG) being operated in the frames of a special legal regime.

7. It is proposed to describe cluster-forming mechanisms, similar to item 6, for legal regimes based on commercial agreements and/or common trade practice.

8. It is proposed to describe the mechanisms of forming of a global TTS based on integration of different clusters into a matrix formed according to the following characteristics:

- Functional services and regional scope;

- Different legal regimes and their modifications.

9. It is proposed to describe approaches to forming several types of information security gateways (ISG) as key elements of building a global TTS matrix.

The aim of creation of such gateways can be enabling of interaction between different clusters of the global TTS. Gateways forming can consider all the necessary aspects: legal, organizational and technological.

Approaches to forming typical information security gateways can take into account the existence of different possible levels of interaction between different TTS clusters. In particular, gateways forming can be done both: at only legal and organizational levels and at a complex level: legal, organizational and technical one.

Approaches to forming of typical information security gateways can regard usage of transition profiles describing and configuring transitions from one cluster to another. These transition profiles can consider the trust levels of the identification schemes used inside the interacting clusters, see item 5.

Description of several types of information security gateways (ISG) can be a subject of technical standards and recommendations ITU and JTC-1.

Summary

The problem of trans-boundary exchange of electronic documents is topical and is noted in global and regional declarations, such as:

- Promote research and cooperation enabling effective use of data and software in particular electronic documents and transactions including electronic means of

authentication and improve security methods (WSIS+10 Vision for WSIS Beyond 2015, C5. Building confidence and security in the use of ICTs, para. f.).

- Promote confidence and trust in electronic environments globally by encouraging secure cross border flows of information, including electronic documents and efforts to expand and strengthen the Asia-Pacific Information Infrastructure and to build confidence and security in the use of ICT (2012 APEC Leaders' Declaration, Vladivostok Declaration — Integrate to Grow, Innovate to Prosper).

There are several good practices of solving such a task in the world now:

- In the European Commission — on the basis of the Regulation of the European Parliament and of the Council on electronic identification and trust services for electronic transactions in the internal market (project — eIDAS[1]);
- In the Eurasian Economic Union — on the basis of the Treaty on the Eurasian Economic Union and of the Conception of using services and legally significant electronic documents in interstate informational interaction;[2]
- In the Asia Pacific Region — on the basis of PAN ASIAN e COMMERCE ALLIANCE (PAA).[3]

The global economy development needs, especially in crisis periods, demand an activation of integration processes in different economic and social areas including through the use of modern ICT-technologies based on innovations. These are the tasks the family of the TTS Recommendations proposed for development is aimed to solve.

Comment to attention of the experts of Working Group III UNCITRAL "Online dispute resolution — ODR"

The problem of identification of claimants and defendants in ODR can be solved in the context of the above proposed model (the model of forming and functioning of the trans-boundary trust space as a matrix, built of regional and global clusters, connected between each other and including the functional services provided in the frames of this TTS) as follows:

- One organizes a functional TTS cluster specialized in support of ODR procedures as regards to trans-boundary electronic commerce transactions;
- All the United Nations Member States can be involved in this cluster's geography;
- The functioning of this cluster is maintained by the business activity of a specialized operator or a group of related operators;
- The subject of the specialized operators' business activity can be provision of packages of trusted ID-services based on a set of ID-schemes adopted in the frames of electronic trade platforms;
- Legal regime for the specialized operators' business activity shall be established by agreements with trade platforms.

On the basis of the above stated the following amendments to ODR Procedural rules draft are proposed:

Article 4A, paragraph 4 (h) should be reworded as follows:

A signature or other means of identification and authentication of a claimant and/or the claimant's representative as set forth by the UN/CEFACT "Recommendation for ensuring legally significant trusted trans-boundary electronic interaction".

[1] http://ec.europa.eu/dgs/connect/en/content/electronic-identification-and-trust-services-eidas-regulatory-environment-and-beyond.

[2] www.eurasiancommission.org/docs/Download.aspx?IsDlg=0&print=1&ID=5713.

[3] www.paa.net/.

Article 4B, paragraph 2 (g) should be reworded as follows:

A signature or other means of identification and authentication of a defendant and/or the defendant's representative as set forth by the UN/CEFACT "Recommendation for ensuring legally significant trusted trans-boundary electronic interaction".

The addendum to Vision and conceptual approaches to elaboration in specialized UN agencies and in relevant international organizations a family of recommendations on establishing and functioning of a trans-boundary trust space

Common trust infrastructure for legally significant trans-boundary electronic interaction

White paper

Development purpose

The Internet has become a habitual tool for obtaining electronic services for individuals and entities of various states. The advantages of such services are evident but there is a number of organizational and legal issues, preventing their wide usage in those activity areas where users need a certain level of trust in these services. One of the main issues is **ensuring validity of e documents and legal significance of electronic interaction in general**. This problem is urgent on both the national level — within given jurisdictions, and the trans-boundary one — by interaction of participants relating to jurisdictions of different states. These issues were repeatedly considered at different international forums, including the United Nations (UN/CEFACT, UNCITRAL), as well as on the regional level — in the CIS, EU and APEC. But a satisfactory solution has not yet been found.

In order to enable a trusted trans-boundary electronic interaction, the RCC[4] experts initiated creation of the trans-boundary trust space (hereinafter — the TTS) based on the common trust infrastructure (hereinafter — the CTI). Its **primary objective is to provide trust services of different qualifications (basic, medium, high) to the CTI users in the process of their electronic interaction**. This will make it possible to attach legal significance to an electronic interaction at users' discretion regardless of their location and jurisdiction.

The TTS system is a fundamental, easily scalable platform providing a unified access to electronic trust services. Herewith, the existing electronic systems are taken into account, so the requirements to their updating for including into the TTS are expected to be minimal.

In the course of work on the TTS system, the CTI architecture was proposed, interconnections of its different components and their interaction with users were described, with projecting being carried out simultaneously in three aspects: legal, organizational and technological. The analysis of variants of practical realization and scripts of the CTI use allowed creating a list of documents necessary for a complete specification of the system.

The next step in promoting the new product, in our view, could be a discussion of the accumulated experience and knowledge with different partners (experts and organizations) interested in facilitating, simplifying trans-boundary electronic services and at the same time giving them legal validity.

There should also be developed sets of normative, organizational and technological documents ensuring the interoperability within the framework of a respective "trust domain"[5] (see chap. 4 § 3).

Further, there are plans to proceed to particular work involving forming the trans-boundary trust space, beginning with creation of international coordination bodies and the CTI architecture within the framework of a respective "trust domain", following which the practical realization of systems of legally significant trans-boundary electronic interaction will start.

Ensuring international trust: CTI Architecture

The development of the TTS is being carried out at three levels: legal, organizational and technological. A complex description allows correct functioning of the system as a whole and its single elements.

The CTI architecture is selected in such a way that it can be easily scaled. It broadens easily at any level of consideration due to the accession of new participants, such as new

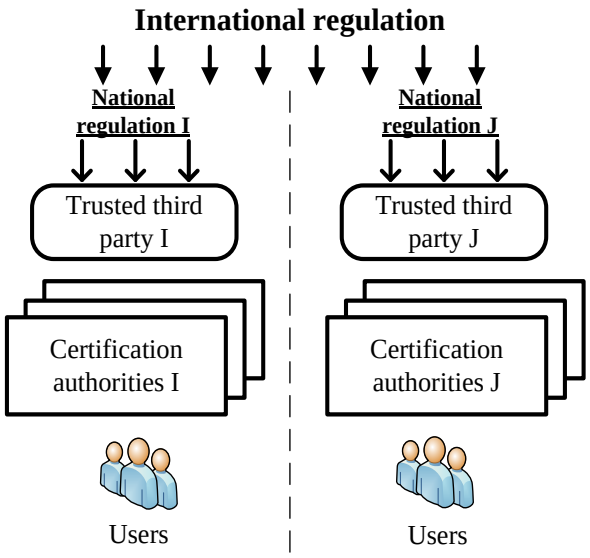
[4] The Regional Commonwealth in the field of communications. www.rcc.org.ru.
[5] Information and legal space using the same CTI.

jurisdictions, new supranational participants, new operators of trust services, and register systems.

Legal level

The TTS can be built on a single- or multi-domain basis. In the context of legal and organizational regulation, the multi-domain basis is the most complicated variant. The multi-domain system involves applying means of a trusted third party (hereinafter — TTP). Fig. 1 gives a general scheme of a legal regulation.

Figure 1
Legal regulation of trans-boundary trust space



Legal regulation of legally significant trans-boundary information interaction can be divided in two parts: international and national. The international legal regulation is carried out on the basis of the following types of documents:

- International treaties/agreements;
- Acts of different international organizations;
- International standards and regulations;
- Agreements between participants of trans-boundary information interaction on given issues;
- Model acts.

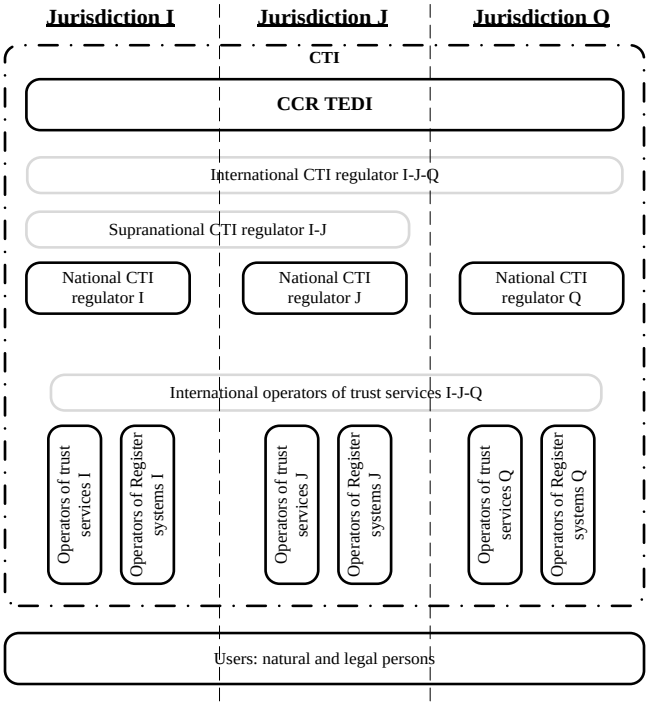
The national legal regulation is built on a complex of normative documents that are standard in each particular jurisdiction.

Organizational level

Mutual legally significant recognition of trust services provided under jurisdiction of various states is reached through creation and operation of the Coordination Council of Regulators of Trusted Electronic Data Interchange (hereinafter — CCR TEDI). The activity of this body is regulated by the CCR TEDI Statute which is to be recognized and signed by all its authorized members — that is the Regulation Bodies of the Electronic Data Interchange represented primarily by the National Regulators of the CTI.

The organizational regulation can be presented by the following diagram (see Fig. 2):

Figure 2
Organizational regulation of the trans-boundary trust space (optional elements are identified by the grey frame)



The CCR TEDI issues a number of documents interconnected with its Statute:

- Requirements for the CCR TEDI members, correspondence to which is a prerequisite for the full membership in the CCR TEDI;
- Guidelines on carrying out “shadow” supervision for admittance to the CCR TEDI and periodic mutual audit for maintaining voluntary membership in the CCR TEDI;
- Compliance criteria which are to be met by operators of the CTI services and operators of the register systems, and the methodology for applying these criteria;
- Scheme of estimation/verification of operators of the CTI services and operators of the register systems with respect to their meeting these criteria.

In the TTS, each jurisdiction is presented by the National CTI regulator (see Fig. 2, National CTI regulators I, J, Q) which regulates the activity of operators of the trust services and operators of the register systems within their jurisdiction.

For groups of states with high degree of integration (for example, EurAsEC or EU) there is the possibility of forming a Supranational CTI regulator (see. Fig. 2, Supranational CTI regulator I J). Thus, one Supranational CTI regulator I-J substitutes a group of National CTI regulators I and J.

The natural CTI scalability is enabled through the procedure for admitting new members to the CCR TEDI (new jurisdictions and supranational participants) and the scheme for verifying the operators of the CTI services and the operators of the register systems with respect to their meeting the Criteria issued by the CCR TEDI (new operators of the services and register systems).

If the CCR TEDI members (see below) have reached conditionally “medium” trust level, they can initiate creation of the International CTI regulator and International operators of the trust services (see. Fig. 2, International CTI regulator I J Q and International operators of the trust services I J Q). The International CTI regulator will coordinate interaction of international operators of the trust services and National CTI regulators (under the CCR TEDI Statute) and/or National CTI regulators.

In order to become a National operator of the trust service or an operator of the register system, a supplier of the respective services shall undergo accreditation with the National

CTI regulator of the same jurisdiction. International operators of the trust services shall undergo accreditation with the International CTI regulator. The requirements for accreditation of the operators of the trust services and the operators of the register systems, as well as the requirements to their activity are regulated by the Compliance Criteria issued by the CCR TEDI and possible national supplements issued by the respective regulator.

In the TTS, the users of electronic services can be both individuals and legal entities. The users select the necessary level of trust service qualification at their discretion or in an agreement.

The services are provided by the respective suppliers — the operators of the trust services. In some cases, the services can be provided by the operators of the register systems as well. The operators of the trust services and the operators of the register systems are integrated by the common trust infrastructure.

The trust services as the TTS elements can have different variants of realization depending on the level of trust between the participants of information interaction. For example, with conditionally "high" or "medium" level of mutual trust between the CCR TEDI members, it is efficient to use centralized international services applied according to the standards agreed upon. In case of conditionally "low" level of trust, the trust services are built according to the decentralized principle — national services in each state.

Technological level

There can be a great number of technological options for trust services' realization. The main requirement to the CTI elements is interoperability. Regulation at this level is carried out with application of different standards and instructions set forth by the CCR TEDI documents.

The technological functioning of the trust services can be demonstrated by verification of an electronic signature (hereinafter — ES) in the process of trans-boundary electronic interaction. For comparison, two variants of the CTI realization are given: the decentralized option — at conditionally "low" level of trust between the participants of information interaction (see Fig. 3) and the centralized option at "medium" level of trust between them (see Fig. 4).

Figure 3
ES verification within the framework of the TTS with "low" trust level (decentralized option)

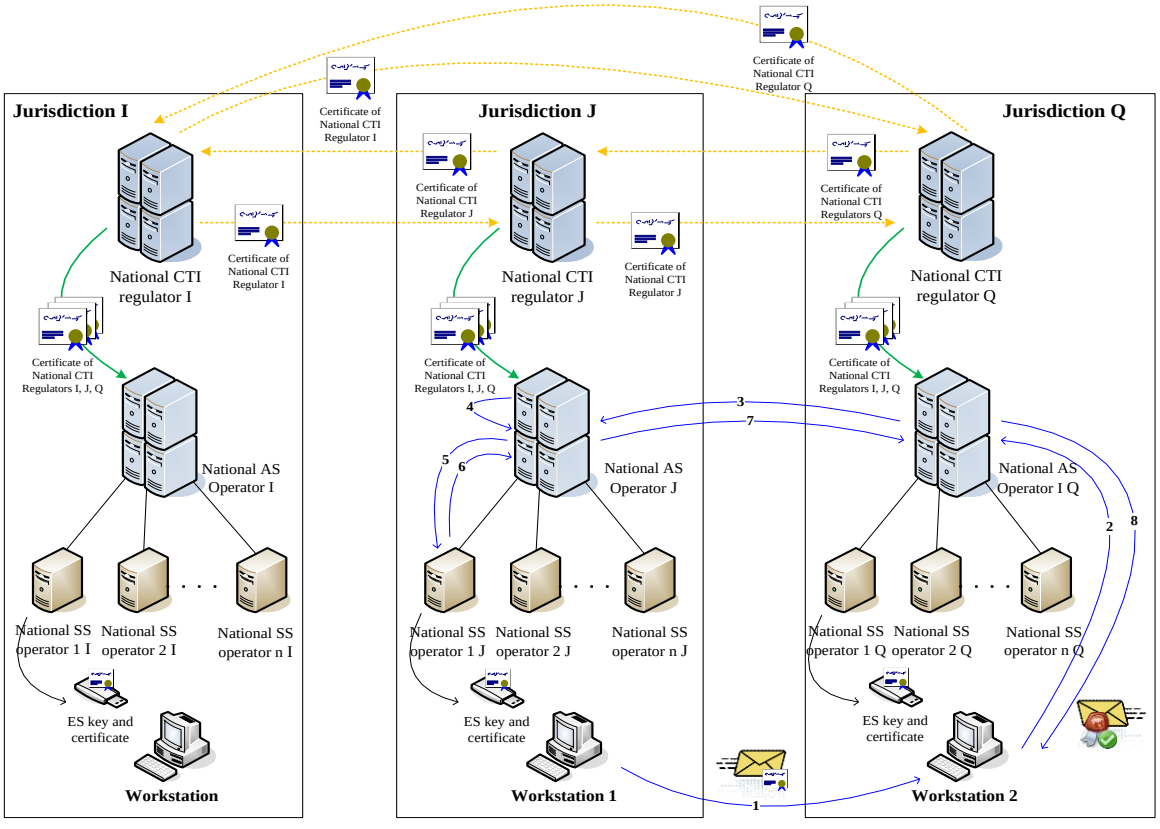


Figure 4
ES verification within the framework of the TTS with "medium" trust level (centralized option)

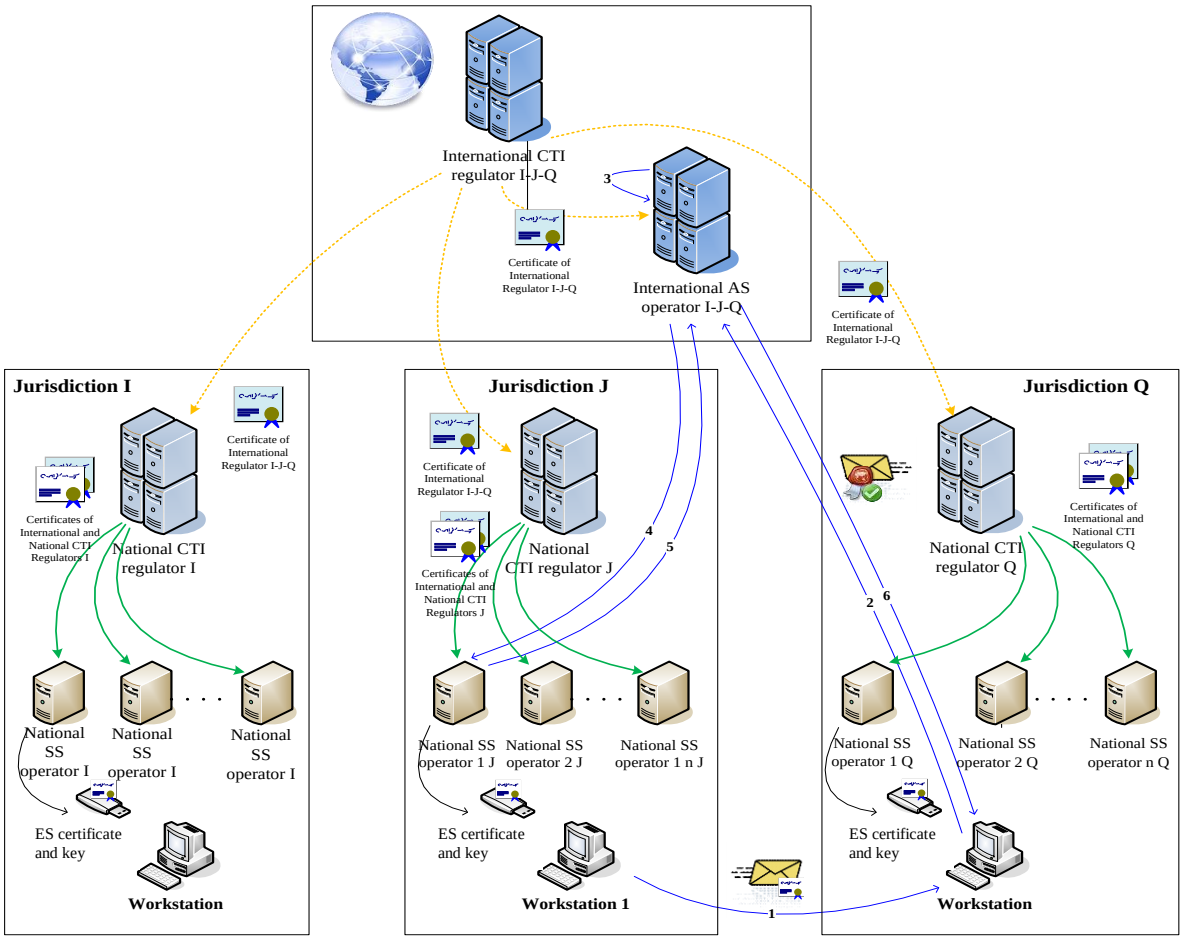


Table 1 shows the specifics of the decentralized and centralized CTI options. The ES verification procedure for the two variants of CTI realization is described in Table 2.

Table 1
CTI specifics for information interaction with "low" and "medium" level of trust

Low level of trust (Fig. 3)	Medium level of trust (Fig. 4)
1. Apostille services are provided by the National operators of apostille service (AS). 2. International organizations (operators and regulators) are unavailable. 3. The National Regulators interact directly, exchanging certificates among themselves (⇢). 4. The National Regulators provide the National operators of the trust services belonging to their jurisdiction with their certificate and the certificates of the National Regulators of other jurisdictions (→).	1. Apostille services are provided by the International operators AS. 2. International organizations present: the International CTI Regulator and the International operators of the trust services. 3. The National CTI Regulators interact only through the International CTI Regulator. Likewise, the National operators of the trust services interact through the respective International operator. 4. The International CTI Regulator provides the National operators of the trust services and the National CTI Regulators with the certificates in the centralized manner (⇢). 5. The National Regulators provide the National operators of the trust services belonging to their jurisdiction with their certificate and the International Regulator's certificate (→).

Table 2
Procedure for ES verification for the options with "low" and "medium" level of trust

Low level of trust (Fig. 3)	Medium level of trust (Fig. 4)
1. Individual/entity 1 sends the documents signed with ES in jurisdiction **J**, meanwhile selecting the necessary qualification level of the trust services in use provided by the CTI (basic, medium or high). 2. A request for verifying documents with ES of jurisdiction **J** is forwarded to the National operator of the apostille service (AS) belonging to jurisdiction **Q**. 3. A request for verifying documents is forwarded to the National AS operator belonging to jurisdiction **J**. 4. Mathematic verification of ES of jurisdiction **J** is carried out. 5/6. A request/response concerning certificate status is sent to the National operator of the signature service (SS) of jurisdiction **J**. 7. The National operator of the AS belonging to jurisdiction **Q** receives a receipt on the correctness of the ES of jurisdiction **J**. 8. The National AS operator of jurisdiction **Q** certifies the receipt and forwards it to individual/entity 2.	1. Individual/entity 1 sends the documents signed with ES in jurisdiction **J**, meanwhile selecting the necessary qualification level of the trust services in use provided by the CTI (basic, medium or high). 2. A request for verifying documents with ES of jurisdiction **J** is forwarded to International AS operator **I-J-Q**. 3. Mathematic verification of ES of jurisdiction **J** is carried out. 4/5. A request/response concerning certificate status is sent to the National operator of the signature service (SS) of jurisdiction **J**. 6. International AS operator **I-J-Q** certifies the receipt and forwards it to individual/entity 2.

Identification of claimants and defendants in online dispute resolution

In the context of above mentioned model of forming and functioning of the trans-boundary trust space as a matrix, built of connected between each other regional and global clusters, including the functional services provided in the frames of this TTS, the problem of identification of claimants and defendants in online dispute resolution (hereafter ODR) can be solved as follows:

- One organizes a functional TTS cluster specialized in support of ODR procedures as regards to trans-boundary electronic commerce transactions;
- All the United Nations Member States can be involved in this cluster's geography;
- The functioning of this cluster is maintained by the business activity of a specialized operator or a group of related operators;
- The subject of the specialized operators' business activity can be provision of packages of trusted ID-services based on a set of ID-schemes adopted in the frames of electronic trade platforms;
- Legal regime for the specialized operators' business activity shall be established by agreements with trade platforms.

Further steps

1. The next stage in promoting this development could be a discussion of the accumulated experience and knowledge with different partners (experts and organizations) interested in facilitating, simplifying trans-boundary electronic services and at the same time giving them legal validity.

Among such interested partners can be primarily political and economic.[6] The political formats already partially involved in this work area are both supranational organizations (for

[6] Other humanitarian formats can also be interested in this product, for example, in the field of law, the Hague conference on private international law, as well as in the area of medicine and education; however, in our view, such organizations are more likely to use the TTS already created than support its new product.

example, CIS, APEC, EU, SCO) and bilateral relations between some states. The economic formats interested in achieving this goal can be, for example, respective United Nations structures such as UNCEFACT/UNECE, UNCITRAL (Working groups III and IV), as well as UNECE, EEA, EurAsEC and others.

2. Further, there are plans to proceed to particular work involving forming the trans-boundary trust space, beginning with the creation of an international coordination body (Coordination Council of Regulators of Trusted Electronic Data Interchange (see Fig. 2). This Council shall adopt its Statute and other regulatory documents governing its activity (see chap. 3.2), determine a specific architecture of the Common Trust Infrastructure (CTI), a set of the CTI trust services to be provided and a possible level of their qualification (possibly, depending on jurisdictions of the operators providing these services).

The existing natural peculiarities (historical, cultural, political, economic, technical, etc.) of different world regions can lead to different formats creating "their own" coordination bodies (CCR TEDI) and CTI architectures according to the level of trust within each format and the natural peculiarities mentioned above.

Therefore, we assume that at the initial stages of this project there will not be a single "trust domain" for the whole planet (for example at a level of some United Nations body), but rather several "trust domains".[7]

3. After the CTI architecture is selected (in a respective "trust domain"), it will be possible to proceed to drafting a further set of organizational, normative and technological documents agreed upon within the framework of the CCR TEDI. The systematic character of this document set is determinable by the results in step 2. This way, interoperability within the framework of a respective "trust domain" will be ensured.

International organizations developing and harmonizing standards can make a significant contribution to the support of these projects.

4. Adopting this set of documents by the CCR TEDI members (in a respective "trust domain") will make it possible to proceed to the final stage of implementation of the systems of legally significant trans-boundary electronic interaction.

[7] Informational and legal space using the same CTI.

C. Note by the Secretariat on online dispute resolution for cross-border electronic commerce transactions: notes on a non-binding descriptive document reflecting elements and principles of an ODR process

(A/CN.9/WG.III/WP.137)

[Original: English]

Contents

I. Introduction

1. At the Commission's forty-eighth session (Vienna, 29 June-16 July 2015), it was agreed that any future text should build upon the progress achieved in the context of prior Working Group sessions and the Commission instructed Working Group III to continue its work towards elaborating a non-binding descriptive document reflecting elements of an ODR process, on which elements the Working Group had previously reached consensus, excluding the question of the nature of the final stage of the ODR process.[1]

2. This note consequently sets out (a) the principles of an online dispute resolution process on which the Working Group has expressed agreement as contained in the earlier drafts of ODR Rules considered by the Working Group; (b) the areas of the ODR process on which the Working Group has achieved consensus; and identifies (c) areas on which the Working Group may wish to confirm consensus.

II. Principles

3. The Working Group has consistently emphasized certain principles that underpin the content of the Rules, namely fairness, transparency, due process and accountability.[2]

4. The Working Group has revisited on multiple occasions the underlying purpose of its work in drafting procedural rules for ODR arising out of cross-border e-commerce transactions, namely to address the fact that traditional judicial mechanisms for legal

[1] *Official Records of the General Assembly, Seventieth Session, Supplement No. 17* (A/70/17), para. 352.

[2] See in particular A/CN.9/801, paras. 15 and 29; A/CN.9/WG.III/WP.128, paras. 17 et seq.; as well as submissions by the Government of Canada: A/CN.9/WG.III/WP.114; and the CILE: A/CN.9/WG.III/WP.115.

recourse do not offer an adequate solution for cross-border e-commerce disputes, and that a global online dispute resolution process could provide a solution.[3]

5. It has also been generally agreed that such a global system ought to be simple, fast and efficient, in order to be able to be used in a "real world setting",[4] including that it should not impose costs,[5] delays and burdens that are disproportionate to the economic value at stake.[6]

6. The Working Group has also observed the need for a global standard to accommodate evolution of ODR practice.[7] It has been generally agreed by the Working Group that in practice procedural rules for ODR would not necessarily be administered word for word by ODR administrators, but rather would be adapted, customized and improved upon by the private sector, similarly to practice in relation to the UNCITRAL Arbitration Rules.[8]

III. Stages of an ODR process

7. The Working Group has broadly agreed on the process of an online dispute resolution proceeding (save for the nature of a final stage of proceedings) which would take place pursuant to ODR Rules. That process consists of three stages: negotiation; facilitated settlement; and a third (final) stage.

8. As envisaged in the Working Group, the ODR process commences when a claimant submits a notice of claim through the ODR platform to the ODR administrator.[9] The ODR administrator informs the respondent of the existence of the claim and the claimant of the response.[10] The first stage of proceedings — a technology-enabled negotiation — commences, in which the claimant and respondent negotiate directly with one another through the ODR platform.[11]

9. If that negotiation process fails (i.e. does not result in a settlement of the claim), the process moves to a second, "facilitated settlement" stage (see, further, paras. 32-34 below). In that stage of proceedings, the ODR administrator appoints a neutral adjudicator (a "neutral"), who communicates with the parties in an attempt to reach a settlement.[12]

10. If facilitated settlement fails, a third and final stage of proceedings might commence, but the nature of that stage of proceedings, and the means of enforcement of any outcome, has not been agreed by the Working Group, and is expressly excluded from the scope of this Note.

IV. Scope of ODR process

11. The Working Group has agreed in principle that an ODR process should apply to disputes arising out of cross-border, low-value e-commerce transactions.[13] The term low-value has not been defined.[14] The Working Group has considered that an ODR

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[3] The original mandate to the Working Group was based, inter alia, on this notion: see A/65/17, para. 254.

[4] A/CN.9/801, para.14; A/CN.9/827, para. 44.

[5] The Working Group has specifically agreed that the fees of ODR proceedings themselves should be reasonable: see A/CN.9/WG.III/WP.133, draft article 17.

[6] A/65/17, para. 254. See also the Proposal by China as set out in A/CN.9/833 at para. 73.

[7] A/CN.9/801, para. 32.

[8] A/CN.9/827, para. 54; A/CN.9/795, para. 15. The Working Group has recognized that the process will be subject to applicable provisions of law: see A/CN.9/WG.III/WP.133, Draft article 1(3); A/CN.9/827, para. 68; and A/CN.9/WG.III/WP.119, para. 5.

[9] A/CN.9/WG.III/WP.133, Draft article 4A.

[10] A/CN.9/WG.III/WP.133, Draft article 4B.

[11] A/CN.9/WG.III/WP.133, Draft article 5. See, also, para. 32 below.

[12] A/CN.9/WG.III/WP.133, Draft article 6. See, also, the definition in para. 17 below.

[13] The language used by the Working Group has been "disputes arising out of cross-border, low-value transactions conducted by means of electronic communication." (A/CN.9/WG.III/WP.133, preamble, para. 1). This Working Paper refers simply to "low-value e-commerce transactions" for simplification of terminology.

[14] A/CN.9/795, paras. 25, 31-32; A/CN.9/739, para. 16. At its thirty-first session, the Working Group considered that it might consider "at a later stage" whether the terms "low-value" and "consumers"

process would apply to disputes arising out of both business-to-business as well as business-to-consumer transactions.[15]

12. It has been agreed that an ODR process may apply to disputes arising out of both sales and service contracts.[16]

13. The Working Group has agreed that parties to an e-commerce transaction should explicitly agree at the time of the transaction to be bound by an ODR process in the event that a dispute arises at a later stage.[17]

V. ODR definitions[18]

14. The Working Group has agreed on a number of definitions in relation to the parties to an online dispute resolution proceeding, as well as the technological components required for an online dispute resolution process.

15. The Working Group has defined online dispute resolution, or "ODR", as a "mechanism for resolving disputes facilitated through the use of electronic communications and other information and communication technology". [19] The Working Group has acknowledged that the process may be implemented differently by different administrators of the process, and may evolve over time.[20]

16. The Working Group has consistently referred respectively to a "claimant" and "respondent" as the party initiating ODR proceedings and the party to whom the notice of proceedings is directed, in line with traditional, offline, alternative dispute resolution nomenclature. The term the Working Group has agreed upon to define the "individual that assists the parties in settling or resolving the dispute" is the "neutral".

17. The Working Group has undertaken its work on the basis that ODR requires a technology-based intermediary. In other words, unlike offline alternative dispute resolution, an ODR process cannot be conducted on an ad hoc basis involving only the parties to a dispute and a neutral adjudicator (that is, without an administrator). Instead, to enable the use of technology to facilitate a dispute resolution process, an ODR process requires a system for generating, sending, receiving, storing, exchanging or otherwise processing communications. Such a system has been referred to in the Working Group as an "ODR platform."[21]

18. The Working Group has also proceeded on the premise that the ODR platform must be administered and coordinated. The entity that carries out such administration and coordination has been referred to by the Working Group as the "ODR administrator." The Working Group has observed that the ODR administrator may administer the platform, but alternatively may also be a separate entity[22] from the ODR platform.[23]

19. The Working Group has indicated that both the ODR administrator and the ODR platform should be specified in the dispute resolution clause that forms part of the contract between the parties at the time of the e-commerce transaction.[24] It has been said that such specification would increase transparency and accountability insofar as parties to a

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needed to be defined: A/CN.9/833, para. 34. See, also, A/CN.9/WG.III/WP.128, para. 36.

[15] *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17* (A/65/17), para. 257; A/CN.9/716, para. 14.

[16] A/CN.9/WG.III/WP.133, Draft article 1(1)(a); A/CN.9/801, para. 36; A/CN.9/795, para. 40.

[17] A/CN.9/WG.III/WP.133, Draft article 1(1)(a).

[18] A/CN.9/WG.III/WP.133, Draft article 2.

[19] A/CN.9/WG.III/WP.133, Draft article 2(1).

[20] A/CN.9/801, para. 32.

[21] A/CN.9/WG.III/WP.133, Draft article 2(3); A/CN.9/WG.III/WP.130, Draft article 2(3). The relevant draft article in A/CN.9/WG.III/WP.133 has not yet been considered by the Working Group; accordingly citations here and later in this Note refer to both Working Papers.

[22] The Working Group has not ruled out that these could be two separate legal entities.

[23] A/CN.9/WG.III/WP.133, Draft article 2(2); A/CN.9/WG.III/WP.130, Draft article 2(2).

[24] A/CN.9/WG.III/WP.133, Draft article 13.

transaction would have relevant information on the dispute at the time they agreed to the dispute resolution clause, rather than only at the time the dispute were to arise.[25]

20. The Working Group has defined the communications that may take place during the course of proceedings as "any communication (including a statement, declaration, demand, notice, response, submission, notification or request) made by means of information generated, sent, received or stored by electronic, magnetic, optical or similar means."[26]

VI. Communications

21. The Working Group has agreed that all communications in ODR proceedings must take place via the ODR platform.[27] Consequently, both the parties to the dispute, and the ODR platform itself, must have a designated "electronic address".[28] The term "electronic address" has been defined in line with other UNCITRAL texts.[29]

22. The Working Group has agreed that the ODR administrator must:

(a) Acknowledge receipt of any communication by the ODR platform;[30]

(b) Notify parties of the availability of any communication received by the ODR platform;[31]

(c) Keep the parties informed of the commencement and conclusion of different stages of the proceedings.[32]

23. The Working Group has agreed that the ODR administrator must make these notifications "promptly".[33]

24. The Working Group has proceeded on the basis that a communication is deemed to be received by a party when the administrator notifies that party of its availability on the platform;[34] deadlines in the proceedings run from the time the administrator has made that notification.[35]

VII. Commencement of ODR proceedings[36]

25. The Working Group has agreed that ODR proceedings are deemed to have commenced when, following a claimant's communication of a notice to the ODR administrator, the ODR administrator notifies the respondent and the parties that the notice is available at the ODR platform.[37]

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[25] A/CN.9/801, paras. 53 and 134; A/CN.9/WG.III/WP.133, Draft article 13; A/CN.9/WG.III/WP.130/Add.1, Draft article 13.

[26] A/CN.9/WG.III/WP.133, Draft article 2(7); A/CN.9/WG.III/WP.130, Article 2(7); A/CN.9/795, paras. 52-53.

[27] A/CN.9/WG.III/WP.133, Draft article 3(1).

[28] A/CN.9/WG.III/WP.133, Draft article 2(8) and Draft article 3(1).

[29] A/CN.9/801, paras. 57-59.

[30] A/CN.9/WG.III/WP.133, Draft article 3(3).

[31] A/CN.9/WG.III/WP.133, Draft article 3(4). The notifications would advise, for example, that notices from the claimant and/or responses are available on the ODR platform, such as those notices envisaged under A/CN.9/WG.III/WP.133, Draft article 4A(2); A/CN.9/WG.III/WP.130, Draft article 4A(2). See also A/CN.9/WG.III/WP.133, Draft articles 3, 4A and 4B, and 5.

[32] A/CN.9/WG.III/WP.133, Draft article 3(5); A/CN.9/795, para. 110. See A/CN.9/WG.III/WP.133, Draft article 12, in relation to notification of deadlines, which was not agreed by the Working Group.

[33] See, for example, A/CN.9/WG.III/WP.133, Draft article 3(3); A/CN.9/WG.III/WP.130, Draft article 3(3).

[34] A/CN.9/WG.III/WP.133, Draft article 3(2).

[35] A/CN.9/WG.III/WP.133, Draft article 3(2); A/CN.9/WG.III/WP.130, Draft article 3(2).

[36] See generally, A/CN.9/WG.III/WP.133, Draft articles 4A and 4B.

[37] A/CN.9/WG.III/WP.133, Draft article 4A(3).

26. The Working Group has agreed that the notice should contain:

(a) The name and 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 address 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) The claimant's preferred language of proceedings; and

(f) The signature or other means of identification and authentication of the claimant and/or the claimant's representative.[38]

27. The Working Group has considered, but not yet achieved consensus, as to whether information in addition to these areas ought to be included in the notice.[39]

28. The Working Group has also agreed that the respondent's response to the notice should include:

(a) The name and 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 grounds on which the claim is made; and

(c) Any solutions proposed to resolve the dispute; and

(d) The signature or other means of identification and authentication of the respondent and/or the respondent's representative.[40]

29. As with the notice of claim, the Working Group has considered, but not yet achieved consensus, as to whether additional information ought to be included in the response.[41]

VIII. Negotiation[42]

30. The Working Group has generally agreed that the first stage of proceedings commences following the communication of the respondent's response to the ODR platform and:

(a) Notification thereof to the claimant; or

(b) Failing a response, the lapse of a certain period of time after the notice has been communicated to the respondent.[43]

31. This first stage is "negotiation", which the Working Group has agreed comprises "negotiation between the parties via the ODR platform."[44]

IX. Facilitated settlement

32. If negotiation via the platform fails for any reason (including non-participation or failure to reach a settlement within a certain time period), or where one or both parties to the

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[38] A/CN.9/WG.III/WP.133, Draft article 4A(4); A/CN.9/WG.III/WP.130, Draft article 4A(4).

[39] Areas that remain under consideration include for example whether additional information may be provided by the claimant at the time it submits its notice, including information in support of its claim and information in relation to the pursuit of other legal remedies: A/CN.9/WG.III/WP.133, para. 15.

[40] As regards issues of language, see para. 43 below.

[41] See A/CN.9/WG.III/WP.133, Draft article 4B(2)(d)-(g). Areas that remain under consideration include for example whether additional information may be provided by the respondent at the time it submits its notice, including information in support of its response or its pursuit of other legal remedies: A/CN.9/WG.III/WP.133, para. 16.

[42] See generally A/CN.9/WP. 133, Draft article 5.

[43] A/CN.9/WG.III/WP.133, Draft article 5(1).

[44] A/CN.9/WG.III/WP.133, Draft article 5(2).

dispute request to move directly to the next stage of proceedings, the Working Group has agreed that the second, facilitated settlement stage of proceedings commences.[45]

33. Upon commencement of the facilitated settlement stage of proceedings, the ODR administrator appoints a "neutral" individual,[46] and notifies the parties of that appointment, and certain details about the identity of the neutral.[47]

34. In the "facilitated settlement" stage, the neutral communicates with the parties to try to achieve a settlement.[48]

X. Appointment and powers of the neutral

35. The Working Group has agreed that the ODR administrator should "promptly" appoint the neutral at the commencement of the facilitated settlement stage of proceedings. Upon appointment, the ODR administrator would promptly notify the parties of the name of the neutral any other relevant or identifying information in relation to that neutral.[49]

36. In respect of the process of appointment of a neutral, the Working Group has agreed:[50]

(a) That the neutral by accepting confirms that he or she has the time necessary to devote to the process;

(b) That the neutral shall declare his or her impartiality and independence and disclose at any time any facts or circumstances that might give rise to likely doubts as to his or her impartiality or independence;

(c) That the parties shall have a method for objecting to the appointment of a neutral;

(d) That the ODR administrator shall make a determination as to whether the neutral shall be replaced;

(e) That there shall be only one neutral per dispute appointed at any time;[51]

(f) That a party may object to the neutral receiving information generated during the negotiation period; and

(g) That if the neutral resigns or has to be replaced during the course of the ODR proceedings, the ODR administrator will appoint a replacement subject to the same safeguards as set out during the appointment of the initial neutral.[52]

37. In respect of the powers of the neutral, the Working Group has agreed:

(a) That subject to the Rules, the neutral may conduct the ODR proceedings in such a manner as he or she considers appropriate;

(b) The neutral shall conduct the proceedings without unnecessary delay or expense, shall provide a fair and efficient process for resolving disputes, and shall remain independent, impartial and treat both parties equally;

(c) The neutral shall conduct proceedings based on the communications made during the proceedings;

(d) The neutral may allow the parties to provide additional information in relation to the proceedings;

(e) The neutral has discretion to extend deadlines set out in the Rules.[53]

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[45] A/CN.9/WG.III/WP.133, Draft article 5(3) and Draft article 5(4).

[46] The Working Group has determined that a "neutral" must be a "physical person" rather than a "legal person": A/CN.9/795, para. 60.

[47] A/CN.9/WG.III/WP.133, Draft article 6(1).

[48] A/CN.9/WG.III/WP.133, Draft article 6(2).

[49] A/CN.9/WG.III/WP.133, Draft article 6(1); A/CN.9/WG.III/WP.130, Draft article 6(1); A/CN.9/795, para. 128; A/CN.9/801, para. 114.

[50] A/CN.9/WG.III/WP.133, Draft article 9.

[51] See A/CN.9/WG.III/WP.133, Draft article 6(1); A/CN.9/WG.III/WP.130, Draft article 6(1).

[52] A/CN.9/WG.III/WP.133, Draft article 10.

[53] A/CN.9/WG.III/WP.133, Draft article 11(5).

38. The Working Group has generally expressed agreement that the appointment and challenge procedures for neutrals should be simple and time-effective.[54]

XI. Language

39. The Working Group has not agreed on the basis for selecting the language of proceedings. However, it has agreed that even where an ODR agreement or ODR rules specify a language to be used in proceedings, a party to the proceedings should be able to indicate in the notice or response whether it wishes to proceed in a different language so that the ODR administrator can identify other language options that the parties may select.[55]

XII. Governance

40. The Working Group has broadly agreed that it is desirable for guidelines (and/or minimum requirements) to exist in relation to the conduct of ODR platforms and administrators.[56] However, the Working Group has not determined the content of those guidelines nor whether they ought to form part of a description of the process (see further below para. 42 (c)).[57]

41. The Working Group has also broadly agreed on the importance of independence, neutrality and impartiality of the neutral in the ODR process[58] and reference was made to the importance of a code of conduct in that context.[59] The appropriate professional skills and experience required of a neutral could also be addressed.

XIII. Additional areas on which the Working Group may wish to confirm consensus

42. The Working Group may wish to confirm consensus on additional areas that could be covered in the descriptive document, as guidelines on general points of principle or procedure.[60] For example:

(a) The Working Group may wish to address whether the above description of an ODR process is sufficient to reflect current practice in the ODR field; and also whether it is sufficiently flexible to evolve with changing practice in a technology-enabled field;[61]

(b) The Working Group may wish to address further whether such a process would apply globally and to all stakeholders within the ODR process (including ODR platforms, administrators and neutrals) or rather to the contractual parties to the transaction concerned only;[62] and

(c) The Working Group may wish to address further its earlier considerations as regards how and whether confidentiality, processing and transfer of information, data security, and archiving, should be addressed in a global description of an ODR process,[63] and on the responsibilities of the ODR platform and administrator for procedural issues including fairness, due process, transparency, accountability, neutral appointment or selection, and the performance capabilities of the ODR platform.[64]

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[54] A/CN.9/833, para. 63.

[55] A/CN.9/WG.III/WP.133, Draft article 15; A/CN.9/WG.III/WP.130/Add.1, Draft article 14. See also A/CN.9/WG.III/WP.128, para. 53; and A/CN.9/762, paras. 71, 74.

[56] A/CN.9/795, para. 57; A/CN.9/WG.III/WP.128, para. 4.

[57] A/CN.9/WG.III/WP.128, paras. 13-15; A/CN.9/WG.III/WP.133, preamble; A/CN.9/827, para. 26; A/CN.9/801, para. 113.

[58] A/CN.9/716, para. 66.

[59] A/CN.9/716, para. 67.

[60] See, e.g. A/CN.9/WG.III/WP.128.

[61] A/CN.9.801, paras. 14, 27-32.

[62] By application of the issues set out in A/CN.9/WG.III/WP.128, paras. 9-12.

[63] A/CN.9/795, para. 123; see also A/CN.9/WG.III/WP.128, paras. 33-35.

[64] See in particular A/CN.9/801, paras. 15 and 29; A/CN.9/WG.III/WP.128, paras. 17 et seq.; as well as submissions by the Government of Canada: A/CN.9/WG.III/WP.114; and the CILE:

43. The Working Group may also wish to confirm more detailed points of procedure: for example, as regards the ODR administrator, whether the ODR administrator could provide parties with an overview of the ODR process or processes, including neutral selection, the order and progression of the process (such as the status of all filings and communications that are available on the ODR platform) and costs; whether the location of the claimant could be included in the claimant's notice; whether the respondent's response could include the location of the respondent, notice of any counterclaim and the supporting evidence therefor, whether the respondent agrees with the language of proceedings provided by the claimant, or whether another language of proceedings is preferred. The Working Group may also wish to consider questions of supporting evidence, and procedures for appointment of the neutral and challenge procedures.

XIV. Next steps

44. The Working Group may wish to consider the scope and content of the above description of an ODR process. The Working Group may also wish to address:

(a) The style of such a document. First, how it should be described (such as Technical Notes) and, secondly, how the guidance should be phrased. For example, whether the principles and procedures should be prefaced with the words "the system may address", "it is desirable that", or another approach to reflect the flexibility that the Working Group has acknowledged is inherent in its approach;

(b) The extent to which the descriptive paragraphs should themselves be prefaced with a general statement of purpose and/or benefits of ODR proceedings;

(c) Whether a description of the UNCITRAL process in elaborating the eventual document should also be included.

A/CN.9/WG.III/WP.115.

D. Note by the Secretariat on online dispute resolution for cross-border electronic commerce transactions: submission by Israel

(A/CN.9/WG.III/WP.138)

[Original: English]

Contents

The Government of Israel has submitted to the Secretariat a document regarding draft provisions for Recommended Standards for ODR Administrators. The text received by the Secretariat is reproduced as an annex to this note in the form in which it was received.

Annex

Draft provisions for Recommended Standards for ODR Administrators

Further to the mandate given to UNCITRAL Working Group III at the 2015 Commission session, "[1] and building upon the notes submitted at that session,[2] the State of Israel submits the following draft provisions that could be included in a non-binding ODR instrument, for the Working Group's consideration. For the sake of convenience, the instrument will be referred to as the "Recommended Standards for ODR Administrators" (the "**ODR Recommended Standards**" (it can also be entitled "ODR Notes", if the Working Group so decides).

It is envisaged that the scope of the ODR Recommended Standards would be limited to the types of claims as agreed by the Working Group (non-delivery, late delivery, non-payment, etc., in low-value transactions), and that they would focus on transparency, independence, expertise, confidentiality and procedural fairness as key principles according to which ODR administrators should to govern themselves.

What follows are some draft illustrative provisions that could be included in such an instrument with respect to each of these key principles. The proposals herein are intended as a platform to facilitate a broader discussion and are not necessarily reflective of Israel's specific or definitive position on each item. Furthermore, they do not preclude the development of another instrument, such as a non-binding technical Note describing elements of an ODR process, consistent with the Working Group's mandate.

Transparency[3]

1. "It is recommended that the ODR administrator disclose its roster of neutrals and a short summary of their nationality and credentials. In addition, it is advisable to disclose any contractual relationship between the ODR administrator and a particular vendor, so that users of the service are informed of potential conflicts of interest."

2. "The ODR administrator may wish to publish anonymized data or statistics on its decisions, in order to enable parties to assess its overall record."

3. "All relevant information should be available on the ODR administrator's website in a user-friendly and accessible manner."

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[1] Report of the United Nations Commission on International Trade Law, Forty-eighth session (29 June-16 July 2015), A/70/17, para. 352.

[2] Notes by the State of Israel (A/CN.9/857), and by Columbia, Honduras and the United States (A/CN.9/858).

[3] Based on the UNCITRAL Secretariat's Note — Online dispute resolution for cross-border electronic commerce transactions: draft guidelines — A/CN.9/WG.III/WP.128, par.23-32.

Independence

4. "It would be advisable for the ODR administrator to adopt a code of ethics for its neutrals, in order to guide neutrals as to conflicts of interest and other rules of conduct."[4]

5. "It would be useful for the ODR administrator to adopt internal policies dealing with identifying and handling conflicts of interest."[5]

Expertise

6. "The ODR administrator may wish to implement comprehensive policies governing selection and training of neutrals."[6]

7. "An internal oversight/quality assurance process could help the ODR administrator to ensure that neutrals' decisions conform with the standards it has set for itself."

Confidentiality

8. "Adequate data protection measures and practices, covering inter alia the confidentiality of communications between the parties to the proceedings and the ODR administrator and neutral, are an important component of the ODR administrator's relationship with the parties and help foster a trusting environment for the ODR process occur."[7]

Procedural fairness

9. "The applicable rules surrounding the ODR process should be clear, straightforward and fair, with the different stages of the process being clearly delineated, and with expedited yet flexible time frames."

10. "The applicable rules would typically be expected to include provisions regarding the notification of commencement of proceedings, response and counterclaims, and the manner of providing evidence."[8]

11. "One or more model ODR clauses, for use by prospective parties, should be published on the ODR administrator's website, and the technical means by which the parties can signal their informed consent should be provided."

12. "Where relevant and feasible, the ODR administrator could offer mechanisms to (a) facilitate a settlement between the parties without the intervention of a neutral, (b) enable the parties to object to a neutral's appointment, and (c) appoint a replacement neutral.

13. It is recommended that the ODR administrator provide the ODR services in a language which the users can understand, to the extent feasible."

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[4] While no consensus was achieved in previous Working Group 3 regarding the adoption of a Code of Ethics per se, various iterations of the draft ODR Rules contemplated, in the preamble, the inclusion of "Guidelines and minimum requirements for neutrals".

[5] A/CN.9/WG.III/WP.128, par.18.

[6] A/CN.9/WG.III/WP.128, par.31.

[7] A/CN.9/WG.III/WP.128, par.33-35.

[8] Recent versions of the Draft ODR Rules (WP.133, WP.133/Add.1) contained detailed provisions regarding these matters, which achieved general consensus. While the proposed ODR Recommended Standards need not include detailed procedural provisions, certain key elements from these provisions could be incorporated as well.

E. Report of the Working Group on Online Dispute Resolution on the work of its thirty-third session (New York, 29 February-4 March 2016)

(A/CN.9/868)

[Original: English]

Contents

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] The Commission decided inter alia at that session 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 that it should report to the Commission at its forty-fifth session.[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 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] The Commission furthermore requested the Working Group to continue to explore a range of means of ensuring that online dispute resolution

[1] *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17* (A/66/17), para. 218.
[2] Ibid.
[3] Ibid., *Sixty-seventh Session, Supplement No. 17* (A/67/17), para. 79.
[4] Ibid.

outcomes were effectively implemented, including arbitration and possible alternatives to arbitration.[5]

4. At its forty-sixth[6] and forty-seventh[7] sessions, the Commission affirmed the decisions made at its forty-fifth session.

5. At its forty-eighth[8] session (Vienna, 29 June-16 July 2015), the Commission instructed Working Group III to continue its work towards elaborating a non-binding descriptive document reflecting elements of an ODR process, on which elements the Working Group had previously reached consensus, excluding the question of the nature of the final stage of the ODR process (arbitration/non-arbitration). It was also agreed that the Working Group would be given a time limit of one year or no more than two Working Group sessions, after which the work of the Working Group would come to an end, whether or not a result had been achieved.

6. A compilation of historical references regarding the consideration by the Commission of the work of the Working Group between 2000 and 2014 can be found in document A/CN.9/WG.III/WP.126, paragraphs 5-15.

II. Organization of the session

7. Working Group III (Online Dispute Resolution), which was composed of all States members of the Commission, held its thirty-third session in New York, from 29 February-4 March 2016. The session was attended by representatives of the following States members of the Working Group: Argentina, Armenia, Austria, Brazil, Bulgaria, Canada, China, Colombia, Czech Republic, Ecuador, El Salvador, Fiji, Germany, Greece, Honduras, Hungary, India, Indonesia, Israel, Italy, Japan, Mexico, Namibia, Pakistan, Philippines, Republic of Korea, Russian Federation, Singapore, Spain, Thailand, Turkey, United States of America and Venezuela (Bolivarian Republic of).

8. The session was also attended by observers from the following States: Egypt, Iraq, Libya, Netherlands, Romania, Saudi Arabia and Syrian Arab Republic.

9. The session was also attended by observers from the following Non-Member States and Entities: Holy See.

10. The session was also attended by observers from the European Union (EU).

11. The session was also attended by observers from the following intergovernmental organizations: World Intellectual Property Organization (WIPO).

12. The session was also attended by observers from the following non-governmental organizations: American Arbitration Association/International Centre for Dispute Resolution (AAA/ICDR), American Bar Association (ABA), Asia Pacific Regional Arbitration Group (APRAG), Centre de recherche en droit public (CRDP), Chartered Institute of Arbitrators (CIARB), China International Economic and Trade Arbitration Commission (CIETAC), China Society of Private International Law (CSPIL), European Law Students' Association (ELSA), Institute of International Commercial Law (Pace Law School) (IICL), International Technology Law Association (ITECHLAW), Internet Bar Organization (IBO), Jerusalem Arbitration Center (JAC), Law Association for Asia and the Pacific (LAWASIA), National Center for Information Technology and Dispute Resolution (NCITDR), New York State Bar Association (NYSBA).

13. The Working Group elected the following officers:

Chairman: Mr. Jeffrey Wah-Teck CHAN (Singapore)

Rapporteur: Mr. Isaias MEDINA (Venezuela)

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[5] Ibid.
[6] Ibid., *Sixty-eighth Session, Supplement No. 17* (A/68/17), para. 222.
[7] Ibid., *Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 140.
[8] Ibid., *Seventieth Session, Supplement No. 17* (A/70/17), para. 352.

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

(a) Annotated provisional agenda (A/CN.9/WG.III/WP.139);

(b) A note by the Secretariat on a draft outcome document reflecting elements and principles of an ODR process (A/CN.9/WG.III/WP.140).

15. The Working Group adopted the following agenda:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Consideration of the note on a draft outcome document reflecting elements and principles of an ODR process.
5. Other business.
6. Adoption of the report.

III. Deliberations and decisions

16. 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.140). The deliberations and decisions of the Working Group with respect to this item are reflected in chapter IV.

IV. Draft non-binding descriptive document reflecting elements and principles of an ODR process

Consideration of A/CN.9/WG.III/WP.140

Title and Section I

17. The Working Group decided to defer discussion on the title of the proposed outcome document and proposals for "Section I — Introduction" until later in the session, and to address the other outstanding issues in A/CN.9/WG.III/WP.140 sequentially.

Section II — Principles

18. It was recalled that the section should group all relevant principles in a logical manner.

19. As regards the bracketed text in paragraph 16, the importance of confidentiality in ODR proceedings was recalled. It was noted, in that context, that the proceedings might take place in conflict and other sensitive situations, and that reaching a resolution might require the full frankness of the parties. It was consequently suggested that the square brackets should be deleted, so that the phrase in square brackets would be included in the outcome document.

20. A proposal to address the security of ODR proceedings in part of the outcome document was also made, noting that the ODR process was Internet-based and could be vulnerable to hacking. It was suggested, in this regard, to expand the bracketed text to read, "The ODR administrator and ODR platform should adopt and implement appropriate confidentiality and other measures to ensure the security of the ODR process". Support was expressed for the proposal, emphasizing the particular importance of security in the context of ODR.

21. It was agreed that the concepts of confidentiality and security were linked and raised important issues for an ODR process. Objection was made to raising new issues at this stage of the process, however, particularly given the need to conclude deliberations on the outcome document at this session.

22. It was added that the proposed sentence would not be appropriate under the subheading "expertise". It was also recalled that the draft outcome document itself expressly stated that

its contents were not intended to be exhaustive. For these reasons, it was proposed that the sentence in square brackets should be deleted. Support was expressed for this proposal.

23. The Working Group recalled its decision at its previous session not to address confidentiality in the outcome document (A/CN.9/862, para. 119). Some delegations queried whether the Working Group's decision was also that the outcome document should avoid mention of confidentiality entirely, as the Working Group had also agreed to bear in mind the importance of the issue of confidentiality in the outcome document. It was added that failing to mention confidentiality might indicate that confidentiality was not an important issue, contrary to the stated position of the Working Group.

24. It was recalled that the Working Group had previously agreed the importance of standards for security of data exchange for ODR providers (A/CN.9/862, para. 82), and that data security was an important element of "confidentiality". It was also stated that the notion of "confidentiality" extended beyond data security, and that there was no consensus on the scope of the term itself.

25. After further discussion, it was agreed that the text in square brackets would be deleted, and that the issue of data security would be addressed in paragraph 26 of the outcome document, to be discussed later in the session. As regards other aspects of confidentiality, it was noted that the question of information passing between the parties and the neutral was already addressed in paragraph 47(f) of the draft outcome document, and that a reference to "confidentiality" might be included in Section I of the document or elsewhere in Section II, a point that would be addressed at a later time in the session.

26. It was also agreed to replace the words "neutrals' decisions" in paragraph 16 with a reference to the neutral itself, as the standards concerned would also refer to the neutral's action and conduct.

27. It was observed that paragraph 17 of the draft outcome document currently appeared under the heading "Expertise", and it was proposed that it would be better introduced under an additional subheading, namely "Consent". This proposal was accepted.

28. As regards paragraph 10, it was proposed that the term "contractual" be deleted, so as to avoid unnecessarily limiting the scope of the paragraph. This proposal was accepted.

29. As regards paragraph 11, it was proposed that the term "anonymized" be deleted, as some systems allowed names to be disclosed (under, for example, "naming and shaming" mechanisms). In response, the Working Group was urged not to delete the term "anonymized", because, it was said, there would be a risk of inappropriate disclosure of information about the parties, their transactions and the dispute concerned. In this regard, it was proposed that permission to publish data and statistics should expressly be subject to applicable principles of confidentiality. There was support for these proposals taken together and also recalling the earlier statements of the Working Group on similar issues (see para. 77 of A/CN.9/716). It was agreed that the words "consistent with the applicable principles of confidentiality" should be added to paragraph 11.

30. An alternative formulation to refer to the consent of the parties did not gain support.

31. It was also added that the proposed addition to paragraph 11 could also be regarded as addressing the outstanding issues relating to confidentiality (see, further, paras. 19-25 above). In response, it was objected that the issue of confidentiality was of a broader nature than publishing data or statistics, and a more general statement of principle should be included in the outcome document.

32. It was also proposed that the term "decisions", which might be construed too narrowly, be replaced with the term "outcomes". This proposal was accepted.

Section III — Stages of an ODR Process

Paragraph 21

33. As regards the first bracketed text in paragraph 21, it was agreed that a reference to the possibility of a third and final stage would be appropriate at this point in the draft outcome document. It was therefore agreed to delete the square brackets and include the text in the final outcome document.

34. As regards the second bracketed text in paragraph 21, it was recalled that there was no consensus on the nature of the third and final stage, and that the text concerned might therefore exceed the mandate given to the Working Group. It was added that the first sentence alone might provide sufficient comment on that final stage.

35. It was recalled that the mandate excluded "the question of the nature of the final stage of the ODR process" (A/70/17, para. 352). Nonetheless, the Working Group had proceeded on the basis that there would or could be a final stage if facilitated settlement failed, and that it might take different forms. The deliberations of the Working Group on a proposal to include the language now found in the second bracketed text at the previous session (A/CN.9/862, paras. 120-127) were also recalled, noting that the Working Group had deferred its consideration thereof.

36. It was observed that the second bracketed text was linked with bracketed language in paragraphs 44 and 53 of the draft outcome document.

37. It was stated that, in the absence of a facilitated settlement at the end of the second stage, the nature of the process would effectively require the ODR administrator to advise the parties of any further options available to them. It was also suggested that the neutral might undertake this role.

38. As the nature of the final stage would not be addressed in the outcome document, it was suggested that the better action would be not to include the second bracketed text of paragraph 21 of the draft outcome document. On the other hand, it was noted that the outcome document would be incomplete without any mention of the point at issue, though the point might be better located elsewhere, it was added.

39. It was consequently proposed that the second bracketed text could be replaced with the phrase, "in which case the ODR administrator or neutral may inform the parties of the nature of such stage". The proposal received support.

40. It was suggested that the word "nature" required greater precision. In response, it was noted that the word "nature" in this context carried the same meaning as its use in paragraph 352 of A/70/17.

41. It was agreed that the second bracketed language would be deleted from paragraph 21, and that the additional language in paragraph 39 above would be inserted in its place.

Section IV — Scope of ODR Process

Paragraph 26

42. Further to the Working Group's consideration of data security issues earlier in the session (see, further, para. 20 above), it was agreed to add the words "in a manner that ensures data security" at the end of the penultimate sentence of paragraph 26.

Section VIII — Facilitated settlement

Paragraph 44

43. It was queried whether this paragraph should remain in the light of the Working Group's decision on paragraph 21 (see para. 41 above). It was observed, in response, that to include the paragraph would be consistent with the presentation of the first stage of the process as described in paragraphs 37 to 39 of the draft outcome document, and that the reference to "a reasonable time" in the paragraph was helpful in describing the end of this stage of the process. In light of these matters, it was decided to remove the square brackets and to include the bracketed language in the outcome document.

Section X — Paragraph 53 of the draft outcome document

44. It was stated that this paragraph was unnecessary in light of the Working Group's decisions on paragraphs 21 and 44 of the draft outcome document (see paras. 41 and 43 above). It was added that the inclusion of the paragraph would exceed the limited mandate that the Commission had given to this Working Group, in particular as there was no consensus on the possible process options for the final stage of the process. Support for these views was expressed.

45. An alternative view was that the outcome document would be incomplete without further reference to the final stage, so that the scope of the paragraph and its inclusion as a separate section would be appropriate. It was added that the mere mention of the third stage would not contradict the limited mandate of this Working Group, and that to do so would assist users in understanding the scope of the ODR process as a whole. Support for these views was also expressed.

46. In this regard, it was suggested that a description of the types of process that might comprise the final stage could also be included to ensure completeness, but that any such description should not indicate preferences among those processes or address their legal consequences.

47. It was also suggested that the point could be addressed at the end of Section VIII or as a new section after Section VIII, perhaps by including the substance of the text added to paragraph 21 earlier in the session (see para. 41 above). This suggestion also received support.

48. After discussion, it was agreed that an additional provision addressing the final stage of the process would be included in the outcome document, to be located as a new Section VIII bis.

49. As regards the text for such a provision, three possible formulations were proposed:

(a) "The ODR administrator may inform the parties of the nature of the final stage";

(b) "While not addressing here the nature of the final stage of the ODR process (arbitration/non-arbitration), if facilitated settlement fails, a third and final stage might commence, in which case the ODR administrator may inform the parties of the nature of the final stage";

(c) To retain the language in paragraph 53 without the final phrase, so that it would read "If the neutral has not succeeded in facilitating the settlement, it is desirable that the ODR administrator, on the basis of information submitted by the parties, remind the parties of, or set out for the parties, the possible process options for the final stage".

50. Support was expressed for elements of these proposals, and the need to avoid reopening discussion on the nature of the final stage was re-emphasized. It was agreed that the provision should be descriptive and informative for users.

51. After discussion, it was agreed that the provision would read as follows, "If the neutral has not succeeded in facilitating the settlement, it is desirable that the ODR administrator or neutral informs the parties of the nature of the final stage, and of the form that it might take." In consequence, it was agreed that paragraph 53 and its introductory heading would be deleted from the draft outcome document. It was also agreed that the subtitle for the section would be "Final Stage".

Section I — Introduction

General remarks

52. The Working Group recalled that it had deferred its consideration of the two formulations for this Section to this session, and agreed to consider the individual parts of the two formulations together, as denoted by the subheadings in each formulation.

53. The first issue raised was the sequencing of the three parts of the Section. It was noted that the first formulation followed UNCITRAL's Notes on Organization of Arbitral Proceedings, and so could be retained; another view was that the second formulation would be more logical in the context of the ODR outcome document, and as the title of the document had yet to be finalized.

54. Following informal consultations, it was agreed that the Working Group would proceed to discuss the draft introduction on the basis of the second formulation as set out in document A/CN.9/WG.III/WP.140.

55. It was noted that reference was made to the title of the outcome document in several places in the draft introduction, and that the title remained to be agreed.

Section I — Overview of ODR

56. The subtitle "Overview of ODR" and the language of paragraph 1 of the second formulation were agreed.

57. It was proposed that an additional sentence be included after the first sentence of paragraph 2 of the second formulation, as follows: "Online dispute resolution is a mechanism for resolving disputes through which the full range of traditional forms of dispute resolution (including but not limited to negotiations, mediation, conciliation, arbitration, adjudication and expert determination) where applicable, are facilitated by the use of electronic communications, other information and communication technology".

58. There was support for the inclusion of some additional text in the paragraph.

59. Alternative formulations for the phrase "the full range of traditional forms of dispute resolution options", were also proposed, including that the words "the full range" be replaced with "a broad range", to refer to "modern" as well as to "traditional" forms and to refer to "dispute resolution", without qualification.

60. It was said that users of the outcome document, and particularly consumers in developing countries, would benefit from a brief description of the possible range of forms of ODR, as provided by the bracketed language.

61. It was also observed that ODR could encompass non-traditional forms of dispute resolution in addition to those described, and that the field was a developing one. It was therefore queried whether the proposed list was sufficiently comprehensive and would stand the test of time. In response, the non-exclusive nature of the list was emphasized, and it was said that the broad reference to electronic communications and other technologies would allow for developments in ODR.

62. A further view was that if the illustrative list in bracketed text included forms of ODR that were not mentioned or explained in the remainder of the outcome document, the result might be confusing, particularly for consumers. It was added that removing the list would by implication operate to include all possible forms of ODR. For these reasons, it was stated that the bracketed text should not be included.

63. On the other hand, support was expressed in favour of the inclusion of an illustrative list such as that in the bracketed text. There were proposals for additional forms of ODR to feature in such a list, including "ombudsmen", "complaints boards", and "conciliation". An additional view was that such a list should also include newer forms of ODR, such as blind bidding, reputational systems, consumer complaint systems and credit-card charge-backs.

64. A further proposal was to replace the proposed additional sentence with the following text, to be included after the word "approaches" in the second sentence: "and forms (including but not limited to negotiation, mediation, conciliation, arbitration, adjudication and expert determination)". It was also stated that this formulation, combined with the existing reference to "hybrid processes" in paragraph 2, would also encompass all relevant forms of communications and technologies. In response, it was added that an additional reference to a "broad range" or "full range" of forms would enhance the understanding of the user. Support for these two proposals, taken together, was expressed.

65. After consultation, it was proposed that the second sentence of paragraph 2 be amended to read as follows, "ODR encompasses a broad range of approaches and forms (including but not limited to conciliation, mediation, arbitration, ombudsmen, complaints boards, and others), including the potential for hybrid processes including both online and offline elements."

66. After further discussion, the prevailing view was that an illustrative list would be included in the revised second sentence of paragraph 2.

67. It was proposed that the illustrative list should include, in addition to the forms of ODR set out in paragraph 64 above, the terms "negotiation" and "facilitated settlement", as these forms were addressed in the draft outcome document. Support was expressed for this proposal.

68. It was also proposed that additional forms, such as those set out in paragraph 63 above, be included in the illustrative list. In response, it was queried whether all the forms enumerated were in fact forms of ODR, and it was added that inclusion of all the forms might make the list excessively long. Including such terms, it was also said, might be confusing for the user, particularly if the list did not distinguish between forms of ODR that were and were not addressed in the outcome document.

69. A further proposal to insert the words "modern" and "traditional" before the word "approaches", and to include the term "expert determination", did not gain support.

70. After discussion, it was decided that the forms "negotiation" and "facilitated settlement" would be added to those set out in paragraph 65 above. It was agreed that the illustrative list as it appeared in the outcome document would therefore comprise the forms of ODR set out in paragraph 65 above, together with the forms "negotiation" and "facilitated settlement". The Secretariat was instructed to insert the latter two forms at appropriate places in the illustrative list.

71. It was also proposed that the word "secure" be added in the first sentence of paragraph 2, so as to reflect the Working Group's decision to address data security in the draft outcome document made earlier in the session. Support was expressed for this proposal. Another view was that it was not necessary to add language in paragraph 2 as the matter was appropriately addressed elsewhere, and that the focus of this paragraph was different. It was decided to include the word "secure" as proposed.

Section I — Purpose of the Technical Notes

Paragraph 4

72. It was proposed that the word "confidentiality" be included in the paragraph, after the word "fairness".

73. The discussion of confidentiality earlier in the session was recalled, and it was stated that the matter had been addressed in the revisions to paragraphs 11 and 26 of the draft outcome document (see paras. 29 and 42 above). It was added that including the words "confidentiality" and "transparency" in the same paragraph would be confusing.

74. An alternative approach, it was suggested, would be to replace the words "due process standards" in paragraph 52 of the draft outcome document with the phrase "standards of confidentiality and due process". This proposal received support.

75. It was agreed to address the issue of confidentiality, as proposed, in paragraph 52, and consequently that paragraph 4 in the outcome document would remain as set out in the second formulation.

Conclusions as regards Section 1 — Introduction of the outcome document

76. There being no proposals to amend the subsection of the second formulation entitled "Non-binding Character of the Technical Notes" or to amend the proposed additional text in the second formulation, it was agreed to include the second formulation, as amended in paragraphs 70, 71 and 75 above, as the Introduction to the outcome document.

Title of the outcome document

77. It was proposed that the term "Guidelines" in the subheading of the introduction would be more accessible to potential users, and should be used as the title for the outcome document. Support was expressed for that proposal.

78. An alternative proposal was that the term should be "Technical Notes". It was said that this term had appeared in an earlier iteration of the draft outcome document, and better reflected the mandate of the Working Group. It was also stated that the term "Technical Notes" would avoid confusion with the different scope of other UNCITRAL texts including the word "Guide" in their title. It was added that there was no UNCITRAL document entitled "Guidelines", and that the term "Notes" had been used in another UNCITRAL text, the "UNCITRAL Notes on Organizing Arbitral Proceedings", whose scope, it was said, was similar to that of the draft outcome document. It was also observed that the term "Technical

Notes" would avoid any implication that the outcome document might include prescriptive rules. Support was also expressed for this proposal.

79. In addition, it was said that the use of the title "Technical Notes" in Chinese might lead to misunderstanding, in that there was no literal translation of the term in Chinese that would carry the intended meaning of "Technical Notes". While the use of the term "Technical Notes" might accurately reflect the contents of the outcome document in the English version, it was stated that the term "技术指引" should be used in the Chinese language version, so as to convey accurately the intended meaning of the title and content of the outcome document. It was also stated that the scope and intended use of the "UNCITRAL Notes on Organizing Arbitral Proceedings" were different from the draft outcome document.

80. The prevailing view was in favour of the use of the term "Technical Notes", and so that the outcome document would be entitled "Technical Notes on Online Dispute Resolution".

81. After hearing a concern that the term "Technical Notes" in Russian would also not convey that the outcome document included issues with a legal context, the Secretariat was instructed to ensure that the appropriate scope and meaning of the outcome document was reflected in the title of that document in all official languages.

82. It was confirmed that the outcome document would be entitled "Technical Notes on ODR", subject to the questions of language noted in paragraphs 79 and 81 above.

Final reading of the draft outcome document

83. The Working Group proceeded to conduct a final review of the draft outcome document. No further comments were made, other than as regards Section X — Language (paragraph 50 of the draft outcome document).

84. It was proposed that the phrase "it is desirable that the ODR administrator provide the ODR process in a language that the users can understand" be added in paragraph 50 of the outcome document, to replace the final phrase of the paragraph or as additional text elsewhere in the paragraph. The proposal received support.

85. Another view was that earlier discussions on the language provisions in the Working Group had not reached consensus on elements other than those set out in paragraph 50 of A/CN.9/WG.III/WP.140. It was added that an ODR system might also not be able to accommodate all languages. For these reasons, objection to the proposal was made.

86. After discussion, it was agreed that paragraph 50 would remain as set out in A/CN.9/WG.III/WP.140.

87. The Working Group agreed that the draft outcome document would be submitted to the Commission in the form set out in A/CN.9/WG.III/WP.140 as revised in the course of this session.

F. Note by the Secretariat on online dispute resolution for cross-border electronic commerce transactions: draft outcome document reflecting elements and principles of an ODR process

(A/CN.9/WG.III/WP.140)

[Original: English]

Contents

I. Introduction

1. At the Commission's forty-eighth session (Vienna, 29 June-16 July 2015), it was agreed that any future text should build upon the progress achieved in the context of prior Working Group sessions and the Commission instructed Working Group III to continue its work towards elaborating a non-binding descriptive document reflecting elements of an ODR process, on which elements the Working Group had previously reached consensus, excluding the question of the nature of the final stage of the ODR process.[1]

2. At its thirty-second session, the Working Group discussed a draft outcome document on the basis of several proposals made at that session.[2] Several proposals for specific parts or provisions of the outcome document remained to be discussed, and it was agreed to defer the consideration thereof to the next session.[3] It was also agreed, at the 32nd session, that the Working Group would finalize the draft outcome document at the next session.

3. This note consequently sets out the draft outcome document reflecting elements and principles of an ODR process as it stood at the end of the 32nd session. It also sets out outstanding issues to be further considered by the Working Group at its 33rd session.

II. Draft outcome document

4. At the 32nd session of the Working Group, it was agreed that the draft outcome document would contain nine sections as set out below. A proposed tenth section which appears at the end of the note between square brackets also remains to be discussed. Similarly, in each relevant section, the specific provisions which are identified as outstanding issues appear thereafter in square brackets.

5. It was also agreed that the eventual outcome document would commence with an introductory section. Two proposals for an introductory text were made and both are first reproduced below.

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[1] *Official Records of the General Assembly, Seventieth Session, Supplement No. 17* (A/70/17), para. 352.

[2] Report of the Working Group III, (Vienna, 30 November-4 December 2015), A/CN.9/862, paras. 15-19.

[3] Report of the Working Group III, (Vienna, 30 November-4 December 2015), A/CN.9/862, paras. 19, 30, 36, 127 and 129, in particular as regards the title of the document, the introductory text, items 18, 22, 42bis and section IX bis (now paras. 16, 21, 44 and draft Section X).

"**[Technical Notes on Online Dispute Resolution]**[4]

Section I — Introduction"

First formulation:[5]

"**[Purpose of Technical Notes**

1. The purpose of the Technical Notes is to foster the development of ODR as a form of dispute resolution by assisting the participants in an Online Dispute Resolution (ODR) system in the conduct of ODR proceedings.

2. The Technical Notes apply to the online resolution of disputes arising from cross-border low-value sales or service contracts concluded using electronic communications. Given that procedural styles and practices in ODR proceedings vary widely, the Technical Notes are intended to be of assistance regardless of the structure or framework of an ODR system.

3. The Technical Notes are intended to assist the full range of potential participants in an ODR system, including ODR administrators, ODR platforms, neutrals, and the parties to the dispute.

4. The Technical Notes reflect approaches to ODR systems that reflect principles of fairness, due process, transparency and accountability that are essential to any ODR system, but they are not intended to be an exhaustive or exclusive summary of approaches that incorporate such principles. The Technical Notes do not promote any practice of ODR as best practice.

Non-binding Character of the Technical Notes

5. The Technical Notes do not impose any legal requirement binding on the parties or any persons and/or entities administering or facilitating an ODR proceeding.

6. The Technical Notes are not suitable to be used as rules for any ODR proceeding, since they are only of a descriptive nature and do not establish any obligation on the parties or on persons and/or entities administering or facilitating an ODR proceeding to act in a particular manner. Accordingly, the use of the Technical Notes does not imply any modification to any ODR rules that the parties may have selected.

Overview of ODR

7. In tandem with the sharp increase of cross-border transactions concluded via the Internet, there has been extensive discussion regarding the use of information and communication technology tools for resolving disputes which arise from such online transactions.

8. One such tool is online dispute resolution ("ODR"), which has emerged as having the potential to provide a simple, fast, flexible and effective option for the resolution of such disputes, in particular when they relate to low-value transactions. ODR encompasses a broad range of approaches, including the potential for hybrid processes including both online and offline elements. ODR systems can be designed to facilitate communications in an efficient and user-friendly manner, in order to obtain an outcome without the need for physical presence at a meeting or hearing. ODR can provide a more cost-effective alternative to traditional approaches, the latter of which in some cases may be overly complex, costly and time-consuming in light of the nature and value of the dispute. As such, ODR represents significant opportunities for access to dispute resolution by buyers and sellers concluding cross-border commercial transactions, both in the developed and developing world.]"

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[4] Ibid., para. 19.

[5] The first formulation was contained in the Colombia/USA proposal (referred to as the "Proposal" in A/CN.9/862) and was agreed on a preliminary basis at the beginning of the 32nd session of the Working Group. See A/CN.9/862, paras. 19 and 20.

Second formulation:[6]

"[Overview of ODR

1. In tandem with the sharp increase of online cross-border transactions, there has been a need for mechanisms for resolving disputes which arise from such transactions.

2. One such mechanism is online dispute resolution ("ODR"), which can assist the parties in resolving the dispute in a simple, fast, and flexible manner, without the need for physical presence at a meeting or hearing. ODR encompasses a broad range of approaches, including the potential for hybrid processes including both online and offline elements. As such, ODR represents significant opportunities for access to dispute resolution by buyers and sellers concluding cross-border commercial transactions, both in developed and developing countries.

Purpose of the Technical Notes [/Guidelines]

3. The purpose of the Technical Notes [/Guidelines] is to foster the development of ODR and to assist ODR administrators, ODR platforms, neutrals, and the parties to ODR proceedings.

4. The Technical Notes [/Guidelines] reflect approaches to ODR systems that embody principles of impartiality, independence, efficiency, effectiveness, due process, fairness, accountability and transparency.

5. The Technical Notes [/Guidelines] are intended for use in disputes arising from cross-border low-value sales or service contracts concluded using electronic communications. They do not promote any practice of ODR as best practice.

Non-binding nature of the Technical Notes [/Guidelines]

6. The Technical Notes [/Guidelines] are a descriptive document. They are not intended to be exhaustive or exclusive, nor are they suitable to be used as rules for any ODR proceeding. They do not impose any legal requirement binding on the parties or any persons and/or entities administering or facilitating an ODR proceeding, and do not imply any modification to any ODR rules that the parties may have selected.]"

Additional proposed paragraph:

"[These Technical Notes do not supplant or override applicable law]"[7]

"Section II — Principles[8]

7. The principles that underpin any ODR process include fairness, transparency, due process and accountability.[9]

8. ODR may assist in addressing a situation arising out of cross-border e-commerce transactions, namely the fact that traditional judicial mechanisms for legal recourse may not offer an adequate solution for cross-border e-commerce disputes.

9. ODR ought to be simple, fast and efficient, in order to be able to be used in a "real world setting", including that it should not impose costs, delays and burdens that are disproportionate to the economic value at stake.

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[6] Report of the Working Group III, (Vienna, 30 November-4 December 2015), A/CN.9/862, paras. 25 and 128.

[7] Ibid., para. 103.

[8] For ease of reference, the numbering of the remainder of the draft outcome document follows on from the end of the second formulation of the introductory section.

[9] Report of the Working Group III, (Vienna, 30 November-4 December 2015), A/CN.9/862, para. 27.

Transparency

10. It is desirable to disclose any contractual relationship between the ODR administrator and a particular vendor, so that users of the service are informed of potential conflicts of interest.

11. The ODR administrator may wish to publish anonymized data or statistics on its decisions, in order to enable parties to assess its overall record.

12. All relevant information should be available on the ODR administrator's website in a user-friendly and accessible manner.

Independence

13. It is desirable for the ODR administrator to adopt a code of ethics for its neutrals, in order to guide neutrals as to conflicts of interest and other rules of conduct.

14. It is useful for the ODR administrator to adopt policies dealing with identifying and handling conflicts of interest.

Expertise

15. The ODR administrator may wish to implement comprehensive policies governing selection and training of neutrals.

16. An internal oversight/quality assurance process may help the ODR administrator to ensure that neutrals' decisions conform with the standards it has set for itself. [The ODR administrator should adopt and implement appropriate confidentiality measures.][10]

17. The ODR process should be based on the explicit and informed consent of the parties.

Section III — Stages of an ODR Process

18. The process of an online dispute resolution proceeding may consist of stages including: negotiation; facilitated settlement; and a third (final) stage.

19. The ODR process may commence when a claimant submits a notice of claim through the ODR platform to the ODR administrator. The ODR administrator informs the respondent of the existence of the claim and the claimant of the response. The first stage of proceedings — a technology-enabled negotiation — commences, in which the claimant and respondent negotiate directly with one another through the ODR platform.

20. If that negotiation process fails (i.e. does not result in a settlement of the claim), the process may move to a second, "facilitated settlement" stage (see paragraphs 40-44 below). In that stage of proceedings, the ODR administrator appoints a neutral (see para. 25 below), who communicates with the parties in an attempt to reach a settlement.[11]

[21. If facilitated settlement fails, a third and final stage of proceedings might commence.][12] [In that stage of proceeding, the ODR administrator may remind the parties, or set out for the parties, possible process options to choose.][13]

Section IV — Scope of ODR Process

22. An ODR process may be particularly useful for disputes arising out of cross-border, low-value e-commerce transactions. An ODR process may apply to disputes arising out of both a business-to-business as well as business-to-consumer transactions.

23. An ODR process may apply to disputes arising out of both sales and service contracts.

Section V — ODR Definitions, Roles and Responsibilities, and Communications

24. Online dispute resolution, or "ODR", is a "mechanism for resolving disputes through the use of electronic communications and other information and communication

[10] Ibid., para. 30.
[11] Ibid., para. 35.
[12] Ibid., para. 36.
[13] Ibid., para. 120 and 123-125.

technology". The process may be implemented differently by different administrators of the process, and may evolve over time.

25. As used herein a "claimant" is the party initiating ODR proceedings and the "respondent" the party to whom the notice of proceedings is directed, in line with traditional, offline, alternative dispute resolution nomenclature. A neutral is an individual that assists the parties in settling or resolving the dispute.[14]

26. ODR requires a technology-based intermediary. In other words, unlike offline alternative dispute resolution, an ODR process cannot be conducted on an ad hoc basis involving only the parties to a dispute and a neutral adjudicator (that is, without an administrator). Instead, to permit the use of technology to enable[15] a dispute resolution process, an ODR process requires a system for generating, sending, receiving, storing, exchanging or otherwise processing communications. Such a system is referred to herein as an "ODR platform".

27. An ODR platform should be administered and coordinated. The entity that carries out such administration and coordination is referred to herein as the "ODR administrator". The ODR administrator may be separate from or part of the ODR platform.

28. In order to enable ODR communications, it is desirable that both the ODR administrator and the ODR platform be specified in the dispute resolution clause.

29. The communications that may take place during the course of proceedings have been defined as "any communication (including a statement, declaration, demand, notice, response, submission, notification or request) made by means of information generated, sent, received or stored by electronic, magnetic, optical or similar means."

30. It is desirable that all communications in ODR proceedings take place via the ODR platform. Consequently, both the parties to the dispute, and the ODR platform itself, should have a designated "electronic address". The term "electronic address" is defined in other UNCITRAL texts.[16]

31. To enhance efficiency it is desirable that the ODR administrator promptly:

(a) Acknowledge receipt of any communication by the ODR platform;

(b) Notify parties of the availability of any communication received by the ODR platform; and

(c) Keep the parties informed of the commencement and conclusion of different stages of the proceedings.

32. In order to avoid loss of time, it is desirable that a communication be deemed to be received by a party when the administrator notifies that party of its availability on the platform; deadlines in the proceedings would run from the time the administrator has made that notification. At the same time, it is desirable that, the ODR administrator be empowered to extend deadlines, in order to allow for some flexibility when appropriate.

Section VI — Commencement of ODR proceedings

33. In order to commence an ODR proceeding, it is desirable that the claimant provide to the ODR administrator a notice containing the following information:

(a) The name and 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 address 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;

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[14] See footnote 11.

[15] Report of the Working Group III, (Vienna, 30 November-4 December 2015), A/CN.9/862, para. 42.

[16] The outcome document will cross refer to those texts.

(e) The claimant's preferred language of proceedings; and

(f) The signature or other means of identification and authentication of the claimant and/or the claimant's representative.

34. ODR proceedings may be deemed to have commenced when, following a claimant's communication of a notice to the ODR administrator, the ODR administrator notifies the parties that the notice is available at the ODR platform.[17]

35. It is desirable that the respondent communicate its response to the ODR administrator within a reasonable time of being notified of the availability of the claimant's notice on the ODR platform, and that the response include the following elements:

(a) The name and 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 grounds on which the claim is made;

(c) Any solutions proposed to resolve the dispute;

(d) The signature or other means of identification and authentication of the respondent and/or the respondent's representative; and

(e) Notice of any counterclaim containing the grounds on which the counterclaim is made.

36. As much as is possible, it is desirable that both the notice of claim and response be accompanied by all documents and other evidence relied upon by each party, or contain references to them. In addition, to the extent that a claimant is pursuing any other legal remedies, it is desirable that such information also be provided with the notice.

Section VII — Negotiation

37. The first stage may be a negotiation, conducted between the parties via the ODR platform.

38. The first stage of proceedings may commence following the communication of the respondent's response to the ODR platform and:

(a) Notification thereof to the claimant; or

(b) Failing a response, the lapse of a reasonable period of time after the notice has been communicated to the respondent.

39. It is desirable that, if the negotiation does not result in a settlement within a reasonable period of time, the process proceed to the next stage.

Section VIII — Facilitated settlement

40. The second stage of ODR proceedings may be facilitated settlement, whereby a neutral is appointed and communicates with the parties to try to achieve a settlement.

41. That stage may commence if negotiation via the platform fails for any reason (including non-participation or failure to reach a settlement within a reasonable period of time), or where one or both parties to the dispute request to move directly to the next stage of proceedings.

42. Upon commencement of the facilitated settlement stage of proceedings, it is desirable that the ODR administrator appoint a neutral, and notify the parties of that appointment, and provide certain details about the identity of the neutral.

43. In the facilitated settlement stage, it is desirable that the neutral communicate with the parties to try to achieve a settlement.

[17] Report of the Working Group III, (Vienna, 30 November-4 December 2015), A/CN.9/862, para. 57.

[44. If a facilitated settlement cannot be achieved within a reasonable period of time, the process may move to a final stage.][18]

Section IX — Appointment, powers and functions of the neutral

45. To enhance efficiency and reduce costs, it is preferable that the ODR administrator appoint a neutral only when a neutral is required for a dispute resolution process in accordance with any applicable ODR rules.[19] At the point in an ODR proceeding at which a neutral is required for the dispute resolution process, it is desirable that the ODR administrator "promptly" appoint the neutral (i.e., generally at the commencement of the facilitated settlement stage of proceedings). Upon appointment, it is desirable that the ODR administrator promptly notify the parties of the name of the neutral and any other relevant or identifying information in relation to that neutral.

46. It is desirable that neutrals have the relevant professional experience as well as dispute resolution skills to enable them to deal with the dispute in question. However, subject to any professional regulation, ODR neutrals need not necessarily be qualified lawyers.

47. With regard to the appointment and functions of neutrals, the following are desirable that:

(a) The neutral's acceptance of his or her appointment operates to confirm that he or she has the time necessary to devote to the process;

(b) The neutral be required to declare his or her impartiality and independence and disclose at any time any facts or circumstances that might give rise to likely doubts as to his or her impartiality or independence;

(c) The ODR system provides parties with a method for objecting to the appointment of a neutral;

(d) In the event of an objection to an appointment of a neutral, the ODR administrator be required to make a determination as to whether the neutral shall be replaced;

(e) There be only one neutral per dispute appointed at any time for reasons of cost efficiency;

(f) A party be entitled to object to the neutral receiving information generated during the negotiation period; and

(g) If the neutral resigns or has to be replaced during the course of the ODR proceedings, the ODR administrator be required to appoint a replacement, subject to the same safeguards as set out during the appointment of the initial neutral.

48. In respect of the powers of the neutral, it is desirable that:

(a) Subject to any applicable ODR rules,[20] the neutral be enabled to conduct the ODR proceedings in such a manner as he or she considers appropriate;

(b) The neutral be required to avoid unnecessary delay or expense in the conduct of the proceedings;

(c) The neutral be required to provide a fair and efficient process for resolving disputes;

(d) The neutral be required to remain independent, impartial and treat both parties equally throughout the proceedings;

(e) The neutral be required to conduct proceedings based on such communications as are before the neutral during the proceedings;

(f) The neutral be enabled to allow the parties to provide additional information in relation to the proceedings; and

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[18] Ibid., para. 84.

[19] Ibid., paras. 87 and 109. For consistency, the same expression is used in paragraphs 45 and 48 of the draft outcome document.

[20] Ibid., paras. 87 and 109. For consistency, the same expression is used in paragraphs 45 and 48 of the draft outcome document.

(g) The neutral be enabled to extend any deadlines set out in any applicable ODR rules for a reasonable time.

49. While the process for appointment of a neutral for an ODR process is subject to the same due process standards that apply to that process in an offline context, it may be desirable to use streamlined appointment and challenge procedures in order to address the need for ODR to provide a simple, time-, and cost-effective alternative to traditional approaches to dispute resolution.

Section X — Language

50. Technology tools available in ODR can offer a great deal of flexibility regarding the language used for the proceeding. Even where an ODR agreement or ODR rules specify a language to be used in proceedings, it is desirable that a party to the proceedings be able to indicate in the notice or response whether it wishes to proceed in a different language, so that the ODR administrator can identify other language options that the parties may select.

Section XI — Governance

51. It is desirable for guidelines (and/or minimum requirements) to exist in relation to the conduct of ODR platforms and administrators.

52. It is desirable that ODR proceedings be subject to the same due process standards that apply to that process in an offline context, in particular independence, neutrality and impartiality.

[Section X — …

53. If the neutral has not succeeded in facilitating the settlement, it is desirable that the ODR administrator, on the basis of information submitted by the parties, remind the parties of, or set out for the parties, the possible process options of final stage, and ensure that the parties are aware of the legal consequences of the choice of the process.]"[21]

[21] Ibid., para. 121.

G. Note by the Secretariat on online dispute resolution for cross-border electronic commerce transactions: Technical Notes on Online Dispute Resolution

(A/CN.9/888)

[Original: English]

Contents

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 confirmed that the work should include B2B and B2C transactions,[1] and should take account of issues of consumer protection.[2]

3. At its forty-fifth session (New York, 25 June-6 July 2012), the Commission agreed that the Working Group should also consider how the draft rules would respond to the needs of developing countries and those facing post-conflict situations.[3] The Commission also requested the Working Group to continue to explore a range of means of ensuring that online dispute resolution outcomes were effectively implemented, including arbitration and possible alternatives to arbitration.[4]

4. At its forty-eighth session (Vienna, 29 June-16 July 2015),[5] the Commission instructed Working Group III to elaborate a non-binding descriptive document reflecting elements of an online dispute resolution process, on which elements the Working Group had previously reached consensus, excluding the question of the nature of the final stage of the online dispute resolution process (arbitration/non-arbitration). It was also agreed that this work should not extend beyond two further Working Group sessions.

5. The Working Group continued its deliberations on a draft text entitled "Technical Notes on Online Dispute Resolution", in accordance with the Commission's instructions, at its thirty-second and thirty-third sessions (Vienna, 30 November-4 December 2015 and New York, 29 February-4 March 2016),[6] and has completed its consideration thereof.

6. This note contains the "Technical Notes on Online Dispute Resolution" which the Working Group submits to the Commission for its consideration and possible adoption (A/CN.9/868, para. 87).

II. Technical Notes on Online Dispute Resolution

Section I — Introduction

Overview of online dispute resolution

1. In tandem with the sharp increase of online cross-border transactions, there has been a need for mechanisms for resolving disputes which arise from such transactions.

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[1] *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17* (A/66/17), para. 218.

[2] Ibid.

[3] Ibid.

[4] Ibid.

[5] Ibid., *Seventieth Session, Supplement No. 17* (A/70/17), para. 352.

[6] A/CN.9/862 and A/CN.9/868.

2. One such mechanism is online dispute resolution ("ODR"), which can assist the parties in resolving the dispute in a simple, fast, flexible and secure manner, without the need for physical presence at a meeting or hearing. ODR encompasses a broad range of approaches and forms (including but not limited to ombudsmen, complaints boards, negotiation, conciliation, mediation, facilitated settlement, arbitration and others),[7] and the potential for hybrid processes comprising both online and offline elements. As such, ODR represents significant opportunities for access to dispute resolution by buyers and sellers concluding cross-border commercial transactions, both in developed and developing countries.

Purpose of the Technical Notes

3. The purpose of the Technical Notes is to foster the development of ODR and to assist ODR administrators, ODR platforms, neutrals, and the parties to ODR proceedings.

4. The Technical Notes reflect approaches to ODR systems that embody principles of impartiality, independence, efficiency, effectiveness, due process, fairness, accountability and transparency.

5. The Technical Notes are intended for use in disputes arising from cross-border low-value sales or service contracts concluded using electronic communications. They do not promote any practice of ODR as best practice.

Non-binding nature of the Technical Notes

6. The Technical Notes are a descriptive document. They are not intended to be exhaustive or exclusive, nor are they suitable to be used as rules for any ODR proceeding. They do not impose any legal requirement binding on the parties or any persons and/or entities administering or enabling an ODR proceeding, and do not imply any modification to any ODR rules that the parties may have selected.

Section II — Principles

7. The principles that underpin any ODR process include fairness, transparency, due process and accountability.

8. ODR may assist in addressing a situation arising out of cross-border e-commerce transactions, namely the fact that traditional judicial mechanisms for legal recourse may not offer an adequate solution for cross-border e-commerce disputes.

9. ODR ought to be simple, fast and efficient, in order to be able to be used in a "real world setting", including that it should not impose costs, delays and burdens that are disproportionate to the economic value at stake.

Transparency

10. It is desirable to disclose any relationship between the ODR administrator and a particular vendor, so that users of the service are informed of potential conflicts of interest.

11. The ODR administrator may wish to publish anonymized data or statistics on outcomes in ODR processes, in order to enable parties to assess its overall record, consistent with applicable principles of confidentiality.

12. All relevant information should be available on the ODR administrator's website in a user-friendly and accessible manner.

[7] The order of the list of approaches or forms in brackets is presented in increasing order of formality, reflecting the approach taken in the description of commonly-used, methods for settling disputes contained in UNCITRAL's Legislative Guide on Privately Financed Infrastructure Projects (2000), available at www.uncitral.org/uncitral/uncitral_texts/procurement_infrastructure.html. Furthermore, the terms are illustrative only, relative formality may vary from system to system, and relevant processes in some jurisdictions may be known by more than one of the terms contained in the list itself.

Independence

13. It is desirable for the ODR administrator to adopt a code of ethics for its neutrals, in order to guide neutrals as to conflicts of interest and other rules of conduct.

14. It is useful for the ODR administrator to adopt policies dealing with identifying and handling conflicts of interest.

Expertise

15. The ODR administrator may wish to implement comprehensive policies governing selection and training of neutrals.

16. An internal oversight/quality assurance process may help the ODR administrator to ensure that a neutral conforms with the standards it has set for itself.

Consent

17. The ODR process should be based on the explicit and informed consent of the parties.

Section III — Stages of an ODR Proceeding

18. The process of an ODR proceeding may consist of stages including: negotiation; facilitated settlement; and a third (final) stage.

19. The ODR proceeding may commence when a claimant submits a notice through the ODR platform to the ODR administrator (see section VI below). The ODR administrator informs the respondent of the existence of the claim and the claimant of the response. The first stage of proceedings — a technology-enabled negotiation — commences, in which the claimant and respondent negotiate directly with one another through the ODR platform.

20. If that negotiation process fails (i.e. does not result in a settlement of the claim), the process may move to a second, "facilitated settlement" stage (see paras. 40-44 below). In that stage of ODR proceedings, the ODR administrator appoints a neutral (see para. 25 below), who communicates with the parties in an attempt to reach a settlement.

21. If facilitated settlement fails, a third and final stage of ODR proceedings may commence, in which case the ODR administrator or neutral may inform the parties of the nature of such stage.

Section IV — Scope of ODR Process

22. An ODR process may be particularly useful for disputes arising out of cross-border, low-value e-commerce transactions. An ODR process may apply to disputes arising out of both a business-to-business as well as business-to-consumer transactions.

23. An ODR process may apply to disputes arising out of both sales and service contracts.

Section V — ODR Definitions, Roles and Responsibilities, and Communications

24. Online dispute resolution, or "ODR", is a "mechanism for resolving disputes through the use of electronic communications and other information and communication technology". The process may be implemented differently by different administrators of the process, and may evolve over time.

25. As used herein a "claimant" is the party initiating ODR proceedings and the "respondent" the party to whom the claimant's notice is directed, in line with traditional, offline, alternative dispute resolution nomenclature. A neutral is an individual that assists the parties in settling or resolving the dispute.

26. ODR requires a technology-based intermediary. In other words, unlike offline alternative dispute resolution, an ODR proceeding cannot be conducted on an ad hoc basis

involving only the parties to a dispute and a neutral (that is, without an administrator). Instead, to permit the use of technology to enable a dispute resolution process, an ODR process requires a system for generating, sending, receiving, storing, exchanging or otherwise processing communications in a manner that ensures data security. Such a system is referred to herein as an "ODR platform".

27. An ODR platform should be administered and coordinated. The entity that carries out such administration and coordination is referred to herein as the "ODR administrator". The ODR administrator may be separate from or part of the ODR platform.

28. In order to enable ODR communications, it is desirable that both the ODR administrator and the ODR platform be specified in the dispute resolution clause.

29. The communications that may take place during the course of proceedings have been defined as "any communication (including a statement, declaration, demand, notice, response, submission, notification or request) made by means of information generated, sent, received or stored by electronic, magnetic, optical or similar means."

30. It is desirable that all communications in ODR proceedings take place via the ODR platform. Consequently, both the parties to the dispute, and the ODR platform itself, should have a designated "electronic address". The term "electronic address" is defined in other UNCITRAL texts.

31. To enhance efficiency it is desirable that the ODR administrator promptly:

(a) Acknowledge receipt of any communication by the ODR platform;

(b) Notify parties of the availability of any communication received by the ODR platform; and

(c) Keep the parties informed of the commencement and conclusion of different stages of the proceedings.

32. In order to avoid loss of time, it is desirable that a communication be deemed to be received by a party when the administrator notifies that party of its availability on the platform; deadlines in the proceedings would run from the time the administrator has made that notification. At the same time, it is desirable that the ODR administrator be empowered to extend deadlines, in order to allow for some flexibility when appropriate.

Section VI — Commencement of ODR proceedings

33. In order to commence an ODR proceeding, it is desirable that the claimant provide to the ODR administrator a notice containing the following information:

(a) The name and 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 address 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) The claimant's preferred language of proceedings; and

(f) The signature or other means of identification and authentication of the claimant and/or the claimant's representative.

34. ODR proceedings may be deemed to have commenced when, following a claimant's communication of a notice to the ODR administrator, the ODR administrator notifies the parties that the notice is available at the ODR platform.

35. It is desirable that the respondent communicate its response to the ODR administrator within a reasonable time of being notified of the availability of the claimant's notice on the ODR platform, and that the response include the following elements:

(a) The name and 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 grounds on which the claim is made;

(c) Any solutions proposed to resolve the dispute;

(d) The signature or other means of identification and authentication of the respondent and/or the respondent's representative; and

(e) Notice of any counterclaim containing the grounds on which the counterclaim is made.

36. As much as is possible, it is desirable that both the claimant's notice and response be accompanied by all documents and other evidence relied upon by each party, or contain references to them. In addition, to the extent that a claimant is pursuing any other legal remedies, it is desirable that such information also be provided with the notice.

Section VII — Negotiation

37. The first stage may be a negotiation, conducted between the parties via the ODR platform.

38. The first stage of proceedings may commence following the communication of the respondent's response to the ODR platform and:

(a) Notification thereof to the claimant; or

(b) Failing a response, the lapse of a reasonable period of time after the notice has been communicated to the respondent.

39. It is desirable that, if the negotiation does not result in a settlement within a reasonable period of time, the process proceed to the next stage.

Section VIII — Facilitated settlement

40. The second stage of ODR proceedings may be facilitated settlement, whereby a neutral is appointed and communicates with the parties to try to achieve a settlement.

41. That stage may commence if negotiation via the platform fails for any reason (including non-participation or failure to reach a settlement within a reasonable period of time), or where one or both parties to the dispute request to move directly to the next stage of proceedings.

42. Upon commencement of the facilitated settlement stage of proceedings, it is desirable that the ODR administrator appoint a neutral, and notify the parties of that appointment, and provide certain details about the identity of the neutral.

43. In the facilitated settlement stage, it is desirable that the neutral communicate with the parties to try to achieve a settlement.

44. If a facilitated settlement cannot be achieved within a reasonable period of time, the process may move to a final stage.

Section IX — Final Stage

45. If the neutral has not succeeded in facilitating the settlement, it is desirable that the ODR administrator or neutral informs the parties of the nature of the final stage, and of the form that it might take.

Section X — Appointment, powers and functions of the neutral

46. To enhance efficiency and reduce costs, it is preferable that the ODR administrator appoint a neutral only when a neutral is required for a dispute resolution process in accordance with any applicable ODR rules. At the point in an ODR proceeding at which a neutral is required for the dispute resolution process, it is desirable that the ODR administrator "promptly" appoint the neutral (i.e., generally at the commencement of the facilitated settlement stage of proceedings). Upon appointment, it is desirable that the ODR administrator promptly notify the parties of the name of the neutral and any other relevant or identifying information in relation to that neutral.

47. It is desirable that neutrals have the relevant professional experience as well as dispute resolution skills to enable them to deal with the dispute in question. However, subject to any professional regulation, ODR neutrals need not necessarily be qualified lawyers.

48. With regard to the appointment and functions of neutrals, it is desirable that:

(a) The neutral's acceptance of his or her appointment operates to confirm that he or she has the time necessary to devote to the process;

(b) The neutral be required to declare his or her impartiality and independence and disclose at any time any facts or circumstances that might give rise to likely doubts as to his or her impartiality or independence;

(c) The ODR system provides parties with a method for objecting to the appointment of a neutral;

(d) In the event of an objection to an appointment of a neutral, the ODR administrator be required to make a determination as to whether the neutral shall be replaced;

(e) There be only one neutral per dispute appointed at any time for reasons of cost efficiency;

(f) A party be entitled to object to the neutral receiving information generated during the negotiation period; and

(g) If the neutral resigns or has to be replaced during the course of the ODR proceedings, the ODR administrator be required to appoint a replacement, subject to the same safeguards as set out during the appointment of the initial neutral.

49. In respect of the powers of the neutral, it is desirable that:

(a) Subject to any applicable ODR rules, the neutral be enabled to conduct the ODR proceedings in such a manner as he or she considers appropriate;

(b) The neutral be required to avoid unnecessary delay or expense in the conduct of the proceedings;

(c) The neutral be required to provide a fair and efficient process for resolving disputes;

(d) The neutral be required to remain independent, impartial and treat both parties equally throughout the proceedings;

(e) The neutral be required to conduct proceedings based on such communications as are before the neutral during the proceedings;

(f) The neutral be enabled to allow the parties to provide additional information in relation to the proceedings; and

(g) The neutral be enabled to extend any deadlines set out in any applicable ODR rules for a reasonable time.

50. While the process for appointment of a neutral for an ODR proceeding is subject to the same due process standards that apply to that process in an offline context, it may be desirable to use streamlined appointment and challenge procedures in order to address the need for ODR to provide a simple, time-, and cost-effective alternative to traditional approaches to dispute resolution.

Section XI — Language

51. Technology tools available in ODR can offer a great deal of flexibility regarding the language used for the proceeding. Even where an ODR agreement or ODR rules specify a language to be used in proceedings, it is desirable that a party to the proceedings be able to indicate in the claimant's notice or response whether it wishes to proceed in a different language, so that the ODR administrator can identify other language options that the parties may select.

Section XII — Governance

52. It is desirable for guidelines (and/or minimum requirements) to exist in relation to the conduct of ODR platforms and administrators.

53. It is desirable that ODR proceedings be subject to the same due process standards that apply to that process in an offline context, in particular independence, neutrality and impartiality.

IV. ELECTRONIC COMMERCE

A. Report of the Working Group on Electronic Commerce on the work of its fifty-second session (Vienna, 9-13 November 2015)

(A/CN.9/863)

[Original: English]

Contents

I. Introduction

1. At its forty-fourth session, in 2011, the Commission mandated Working Group IV to undertake work in the field of electronic transferable records.[1] 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.[2]

2. 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).

3. At its forty-fifth session, in 2012, 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.[3]

4. At its forty-sixth session (Vienna, 29 October-2 November 2012), the Working Group continued its examination of the various legal issues that arose during the life cycle of electronic transferable records (A/CN.9/761, paras. 24-89). At its forty-seventh session (New York, 13-17 May 2013), the Working Group had the first opportunity to consider the draft provisions on electronic transferable records. It was reaffirmed that the draft provisions should be guided by the principles of functional equivalence and technology neutrality, and should not deal with matters governed by the underlying substantive law (A/CN.9/768, para. 14).

5. At its forty-sixth session, in 2013, the Commission reaffirmed the mandate of the Working Group and agreed that work towards developing a legislative text in the field of electronic transferable records should continue.[4] It was further agreed that whether that work would extend to identity management, single windows and mobile commerce would be assessed at a future time.[5]

6. At its forty-eighth session (Vienna, 9-13 December 2013), the Working Group continued its work on the preparation of draft provisions on electronic transferable records. The Working Group also took into consideration legal issues related to the use of electronic transferable records in relationship with the Convention Providing a Uniform Law for Bills of Exchange and Promissory Notes (Geneva, 1930) and the Convention Providing a Uniform

[1] *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17* (A/66/17), para. 238.
[2] Ibid., para. 235.
[3] Ibid., *Sixty-seventh Session No. 17* (A/67/17), para. 90.
[4] Ibid., *Sixty-eighth Session, Supplement No. 17* (A/68/17), para. 230.
[5] Ibid., para. 313.

Law for Cheques (Geneva, 1931) (A/CN.9/797, paras. 109-112). At its forty-ninth session (New York, 28 April-2 May 2014), the Working Group continued its work on the preparation of draft provisions as presented in document A/CN.9/WG.IV/WP.128 and Add.1. At its forty-seventh session, in 2014, the Commission reaffirmed the mandate of the Working Group to develop a legislative text on electronic transferable records that would greatly assist in facilitating electronic commerce in international trade.[6]

7. At its fiftieth session (Vienna, 10-14 November 2014), the Working Group continued its work on the preparation of draft provisions as presented in document A/CN.9/WG.IV/WP.130 and Add.1. Subject to a final decision to be made by the Commission, the Working Group agreed to proceed with the preparation of a draft model law on electronic transferable records (A/CN.9/828, para. 23). At its fifty-first session (New York, 18-22 May 2015), the Working Group continued its work on the preparation of draft provisions as presented in document A/CN.9/WG.IV/WP.132 and Add.1.

8. At its forty-eighth session, in 2015, the Commission encouraged the Working Group to finalize the current work in order to submit its results at the Commission's forty-ninth session bearing in mind that an UNCITRAL model law on electronic transferable records would be accompanied by explanatory materials.[7]

II. Organization of the session

9. The Working Group, composed of all States members of the Commission, held its fifty-second session in Vienna from 9 to 13 November 2015. The session was attended by representatives of the following States members of the Working Group: Argentina, Austria, Belarus, Brazil, Canada, China, Colombia, Croatia, Czech Republic, Denmark, France, Germany, Honduras, India, Indonesia, Italy, Japan, Jordan, Kenya, Kuwait, Malaysia, Mauritania, Mexico, Pakistan, Paraguay, Philippines, Poland, Republic of Korea, Russian Federation, Singapore, Spain, Thailand, United States of America and Venezuela (Bolivarian Republic of).

10. The session was also attended by observers from the following States: Bangladesh, Belgium, Bolivia (Plurinational State of), Cyprus, Dominican Republic, Peru, Romania, Saudi Arabia, Slovakia, Sweden, Syrian Arab Republic and United Arab Emirates.

11. The session was also attended by observers from the European Union.

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

(a) *International non-governmental organizations*: Brazilian Chamber of Electronic Commerce (CAMARA-E.NET), Centre for Commercial Law Studies (Queen Mary, University of London) (CCLS), China International Economic and Trade Arbitration Commission (CIETAC), CISG Advisory Council, European Law Students' Association (ELSA), Inter-American Bar Association (IABA), International Air Transport Association (IATA), International Bar Association (IBA), International Center for Promotion of Enterprises (ICPE), International Federation of Freight Forwarders Associations (FIATA) and Law Association for Asia and the Pacific (LAWASIA).

13. The Working Group elected the following officers:

Chairperson: Ms. Giusella Dolores FINOCCHIARO (Italy)

Rapporteur: Mr. Aliaksandr ZAPOLSKI (Belarus)

14. The Working Group had before it the following documents: (a) Annotated provisional agenda (A/CN.9/WG.IV/WP.134); and (b) A note by the Secretariat entitled "draft Model Law on Electronic Transferable Records" (A/CN.9/WG.IV/WP.135 and Add.1).

15. The Working Group adopted the following agenda:

1. Opening of the session.

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[6] Ibid., *Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 149.
[7] Ibid., *Seventieth Session, Supplement No. 17* (A/70/17), para. 231.

2. Election of officers.
3. Adoption of the agenda.
4. Consideration of the draft Model Law on Electronic Transferable Records.
5. Technical assistance and coordination.
6. Other business.
7. Adoption of the report.

III. Deliberations and decisions

16. The Working Group engaged in discussions on the draft Model Law on Electronic Transferable Records on the basis of documents A/CN.9/WG.IV/WP.135 and Add.1. The deliberations and decisions of the Working Group 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

Draft article 1. Scope of application

17. It was recalled that the deliberations of the Working Group focused on provisions dealing with electronic transferable records functionally equivalent to paper-based transferable documents or instruments (A/70/17, para. 228). In light of that focus, it was proposed to delete paragraph 3 since it dealt with issues arising in connection with electronic transferable records existing only in an electronic environment. It was added that the current draft of that paragraph offered limited clarity and its interpretation could pose challenges. It was indicated that concerned jurisdictions could in any case exclude certain types of electronic transferable records from the scope of application of the law. It was also indicated that that provision could be considered again at a later stage, when reviewing the applicability of the draft Model Law to electronic transferable records existing only in an electronic environment.

18. In response, it was said that paragraph 3 provided needed guidance and flexibility to enacting States. It was added that the scope and operation of paragraph 3 depended on the definition of electronic transferable records and that its consideration should be postponed accordingly.

19. After discussion, the Working Group agreed to retain paragraph 3 in square brackets for further consideration.

Draft article 2. Exclusions

20. It was indicated that paragraph 1 constituted an application of the principle contained in draft article 1, paragraph 2, and could therefore be deleted. However, it was suggested that an explicit reference to consumer protection law could be added in draft article 1, paragraph 2, in order to clarify that point.

21. It was noted that paragraph 3 applied to cases in which the enacting jurisdiction was a party to the Convention Providing a Uniform Law for Bills of Exchange and Promissory Notes (Geneva, 1930) and to the Convention Providing a Uniform Law for Cheques (Geneva, 1931) (the “Geneva Conventions”) and considered those Conventions incompatible with the draft Model Law. It was indicated that the current text of paragraph 3 could be misread as inviting enacting States to exclude paper-based transferable documents or instruments of great practical importance. It was suggested that an open-ended list of exclusions would be more appropriate as it would encourage enacting States to selectively identify those paper-based transferable documents or instruments excluded from the scope of the law. It was also suggested that explanatory materials on exclusions from the scope of the law should refer to issues related to the Geneva Conventions.

22. After discussion, the Working Group agreed to: (i) delete draft article 2, paragraph 1; (ii) include the words "including any rule of law applicable to consumer protection" at the end of draft article 1, paragraph 2; (iii) retain the text of draft article 2, paragraph 2, as draft article 1, paragraph 4; (iv) delete draft article 2, paragraph 3; and (v) add the words ", and to […]" at the end of draft article 1, paragraph 4.

Draft article 12. Indication of time and place in electronic transferable records

23. The view was expressed that provisions on determination of time and place were not specific to electronic transferable records but contained in substantive law. Another view was expressed that the indication of time and place in electronic transferable records was already adequately addressed in draft article 10, subparagraph 1 (a). Moreover, it was indicated that paragraphs 2 and 3 were designed for contractual transactions. For those reasons, it was suggested that draft article 12 should be deleted.

24. It was noted that paragraph 1 was not technology neutral as it implied the use of a registry-based system and therefore was not adequate for the use of token-based or blockchain-based systems. It was suggested that that provision should be drafted in technology neutral terms. However, it was also suggested that the availability of specific technologies and methods, such as those used for time-stamping, should be taken into consideration when redrafting that provision. In response, it was added that caution should be exercised in drafting any new substantive rule.

25. Support was expressed for retaining draft provisions on the determination of place of business inspired by article 6 of the United Nations Convention on the Use of Electronic Communications in International Contracts (New York, 2005) (the "Electronic Communications Convention") and contained in A/CN.9/WG.IV/WP.135/Add.1, paragraph 5. However, it was noted that those provisions did not offer positive elements for the determination of the place of business and it was suggested that further elements should be provided. In response, it was indicated that positive elements were provided by paragraphs 2 and 3 or, alternatively, would be found in applicable substantive law, such as article 10 of the United Nations Convention on Contracts for International Sale of Goods, while the suggested draft provisions had only an enabling effect, clarifying that certain elements specific to the use of electronic means did not have, per se, conclusive evidentiary value.

26. After discussion, the Working Group agreed to: (i) retain paragraph 1 for future consideration; (ii) delete paragraphs 2 and 3; and (iii) include the draft provisions contained in A/CN.9/WG.IV/WP.135/Add.1, paragraph 5 in a separate article.

Draft article 18. Presentation

27. It was noted that the current draft presented certain challenges with respect to its operation as functional equivalent both for presentation and for surrender. It was further noted that that article did not adequately deal with instances when presentation took place for acceptance. It was added that the alternative text contained in A/CN.9/WG.IV/WP.135/Add.1, paragraph 31 did not provide sufficient guidance, and that it might be preferable to continue deliberations on the basis of a new provision containing a functional equivalence rule on demonstration of control.

28. The Working Group agreed to further discuss draft article 18 on the basis of the following draft provision:

> "Where the law requires the demonstration of possession of a paper-based transferable document or instrument, that requirement is met with respect to an electronic transferable record if a reliable method is used to demonstrate control of the electronic transferable record".

29. The view was expressed that the new text did not provide sufficient guidance on presentation as it actually did not relate to presentation, but rather to a consequence of possession, and should therefore be deleted. It was suggested that a provision on functional equivalence of presentation should instead be introduced in the draft Model Law based on draft article 18 as contained in A/CN.9/WG.IV/WP.135/Add.1.

30. The view was also expressed that the new text provided a functional equivalence rule that was already set forth in draft article 17, establishing exclusive control as functional equivalent of possession, and should therefore be deleted. It was suggested that the explanatory materials to the draft Model Law should clarify that draft article 17 would operate also with respect to presentation.

31. Another view was expressed that presentation as such did not require a functional equivalence rule, but that the steps needed for presentation, including demonstration of possession of the paper-based transferable document or instrument, required that rule. It was added that the new text of draft article 18 was useful in providing for all cases in which the law required demonstration of possession, including presentation.

32. It was further suggested that a provision on presentation should also refer to the functional equivalent of delivery of the paper-based transferable document or instrument. In response, it was noted that the functional equivalence rule of delivery of a paper-based transferable document or instrument already existed and consisted of the transfer of exclusive control on the electronic transferable record. It was added that a provision on delivery had been deleted from the draft Model Law (A/CN.9/834, paras. 31-33).

33. It was indicated that presentation was a necessary step in the life cycle of electronic transferable records and that the omission of a provision on presentation in the draft Model Law might pose practical challenges. In response, it was said that the system agreement would usually include provisions on the ability of control and the manner to indicate control, including those relevant for presentation.

34. It was explained that presentation could have a different meaning in the various jurisdictions and require different actions, such as provision of information, submission of a request for performance or acceptance and delivery of a transferable document or instrument. In that regard, it was noted that the draft Model Law already contained equivalence rules for several functions pursued by those actions, such as signature, written form and transfer of control. It was added that a core element of the concept of presentation was demonstration of possession of a paper-based transferable document or instrument, and that demonstration of control of an electronic transferable record was its functional equivalent (see para. 28 above).

35. A suggestion was to include the words “for presentation” after the words “transferable document or instrument” in the alternative text of draft article 18 contained in paragraph 28 above in order to better reflect its purpose.

36. After discussion, the Working Group agreed to delete draft article 18 and reflect the discussion on the core elements of presentation in the explanatory materials. The Working Group was of the view that presentation did not raise issues of functional equivalence in the context of the Model Law.

Draft article 11. General reliability standard

37. The Working Group started its deliberations by considering the following drafting proposal:

> “For the purposes of this Law, a method shall be considered reliable if it is:
>
> (1) As reliable as appropriate for the fulfilment of the function for which the method is being used, in the light of any relevant agreement, or, in the absence of such agreement, of all relevant circumstances, which may include:
>
> (a) The level of assurance of data integrity;
>
> (b) The ability to prevent unauthorized access to and use of the method;
>
> (c) The expertise and resources deployed in the setting up and continued administration of the method;
>
> (d) The regularity and extent of audit by an independent body, if any;
>
> (e) The existence of a declaration, if any, by a supervisory or accreditation body or voluntary scheme regarding the reliability of the method;
>
> (f) Information on past performance of the method;

(g) Any applicable industry standard;

(h) The maturity of the technology used and its proven ability to perform the relevant function; or

(2) Proven in fact to have fulfilled the function for which the method is being used, by itself or together with further evidence."

38. It was explained that that alternative draft gave prevalence to contractual agreements in assessing reliability in order to support developments in technology and business practices. It was also explained that the list of criteria for the determination of reliability was illustrative and non-exhaustive, and that it would find application only in absence of any contractual agreement.

Chapeau of the alternative proposal

39. It was indicated that the general reference to "for the purposes of this Law" contained in the chapeau was inappropriate since each article referring to the use of a reliable method pursued a different function. It was added that each reliability requirement associated with a function should be fulfilled separately. Accordingly, it was suggested that reference should be made to each specific article.

Paragraph 1 of the alternative proposal

40. Concerns were expressed that paragraph 1 gave excessive prevalence to contractual agreements that could lead to validation of a non-reliable standard. It was added that that result was undesirable since it could ultimately affect property, including that of third parties.

41. In response, it was indicated that contractual agreements should prevail over other factors when assessing reliability as parties were in the best position to assess risks and allocate resources. Reference was made to draft article 5 on party autonomy as a general provision enabling the parties to establish the desired level of reliability.

42. Support was expressed for including in the draft article a list of factors relevant in assessing reliability. However, concerns were expressed on several listed factors. In particular, it was noted that assurance of data integrity was an absolute notion that could not be expressed by reference to a level.

Paragraph 2 of the alternative proposal

43. It was explained that paragraph 2 aimed at preventing frivolous litigation by validating methods that had in fact achieved their function regardless of any abstract assessment of their reliability. In that light, broad support was expressed for the retention of paragraph 2.

Ex post and ex ante assessment of reliability

44. Consensus was expressed on the view that the draft provision should adopt a technology neutral approach and not a prescriptive one. It was further explained that, while the draft provision aimed at providing guidance on the assessment of the reliability standard in case of dispute ("ex post" reliability assessment), its content would necessarily also influence the design of the system ("ex ante" reliability assessment).

45. In light of the above considerations, the Working Group agreed to continue its deliberations on the basis of draft article 11 as contained in A/CN.9/WG.IV/WP.135 with (i) the incorporation of a reference to parties' agreement in paragraph 1; (ii) the deletion of the words "level of" in subparagraph 2 (a); and (iii) the retention of paragraph 2 of the alternative proposal as a new paragraph 3, as follows:

"1. 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, including any contractual agreement.

"2. In determining whether, or to what extent, a method is reliable [for the purposes of articles ...], regard may be had to the following factors:

(a) Assurance of data integrity;

(b) Ability to prevent unauthorized access to and use of the system;

(c) Quality of hardware and software systems;

(d) Regularity and extent of audit by an independent body;

(e) The existence of a declaration by a supervisory body, an accreditation body or a voluntary scheme regarding the reliability of the method;

(f) Any other relevant factor.

"3. A method shall be considered reliable if proven in fact to have fulfilled the function for which the method is being used, by itself or together with further evidence."

46. It was explained that the list of factors contained in paragraph 2 was illustrative and not exhaustive. It was added that caution should be exercised so that the list would not be interpreted as encouraging litigation.

The role of party agreement in assessing reliability

47. Concerns were expressed on the reference to party agreement contained in paragraph 1 of the alternative proposal. It was said that the use of paper-based transferable documents or instruments relied on objective elements such as possession, while the reference to party agreement introduced a subjective element that could interfere with functional equivalence rules, thus affecting, inter alia, singularity of claims. The concern was also expressed that party agreement could be used to circumvent requirements contained in substantive law or public policy provisions.

48. In that line, it was noted that the reliability of the system had to be determined in a uniform manner across the ecosystem, which could be achieved only by courts applying objective standards. It was added that subjective reliability standards could affect third parties that were not a party to any agreement on those standards. In view of those concerns, it was suggested that reference to party agreement should be deleted in order to improve third party protection and, ultimately, the appeal of electronic transferable records to the market.

49. In response, it was said that draft article 11 did not aim at affecting substantive rights or the validity of an electronic transferable record but only at allowing to address system standards contractually. It was added that the use of electronic transferable records involved the use of a system and the existence of a contractual agreement, and that parties not confident in the reliability of a system could refuse to use it. In response, it was noted that the existence of such agreement when using token-based or blockchain-based systems was not always evident.

50. The view was expressed that the contractual agreement should be only one of the elements relevant to determine the level of reliability. The view was also expressed that contractual agreements should be considered only when objective standards could not be satisfied. According to yet another view, objective and subjective standards for the assessment of reliability were not in contradiction but complementary since party agreement could complete and qualify objective standards.

Safety clause

51. It was indicated that the provision contained in paragraph 3 of the alternative proposal would provide additional certainty by discouraging frivolous litigation when a method had in fact fulfilled its function. It was clarified that the provision referred to fulfilment of the function in the specific case under dispute and did not aim at predicting reliability based on past performance of the method.

52. It was noted that paragraph 3 of the alternative draft proposal did not aim at establishing when a method was reliable, but was actually operating as an alternative to the assessment of the reliability of the method. It was suggested that the provision should be redrafted accordingly.

53. In light of the above comments, the following proposal was submitted for the consideration of the Working Group:

"1. For the purposes of articles […] the method referred to shall be:

(a) As reliable as appropriate for the fulfilment of the function for which the method is being used, in the light of all relevant circumstances, which may include:

(i) The operational rules governing the system;

(ii) The assurance of data integrity;

(iii) The ability to prevent unauthorized access to and use of the system;

(iv) The quality of hardware and software systems;

(v) The regularity and extent of audit by an independent body;

(vi) The existence of a declaration by a supervisory body, an accreditation body or a voluntary scheme regarding the reliability of the method;

(vii) Any applicable industry standard;

(viii) Any other relevant factor; or

(b) Proven in fact to have fulfilled the function by itself or together with further evidence.

"2. In the event of a dispute on method reliability between parties to a contract, regard shall be had to the agreement between the parties in so far as relevant."

54. The view was expressed that reference to each method and its respective function introduced a number of new standards, thus making the provision unnecessarily complex and difficult to interpret. In response, it was said that such reference actually clarified the operation of the draft provision, given that each reference to a reliable method contained in the draft Model Law referred to a different function, which had to be fulfilled individually.

55. It was suggested that a reference to "the purpose for which the information contained in the electronic transferable record was generated" should be inserted in the draft provision.

56. It was indicated that the reference to any applicable industry standard in subparagraph 1 (a)(vii) would allow keeping flexibility while providing guidance. It was added that those standards would have to be internationally recognized. Yet, it was responded that some standards might not be appropriate for certain types of transactions, for instance those involving consumers, and that therefore the qualifier "as appropriate" should be added. It was replied that, on the one hand, the application of consumer protection rules was not affected by the draft Model Law and, on the other hand, electronic transferable records were usually handled by highly-skilled professionals. Another view suggested referring to "industry best practices" instead.

57. With respect to the reference to operational rules in subparagraph 1 (a)(i), it was explained that those rules were usually contained in an operating manual whose application could be monitored by an oversight body and that, as such, did not have a purely contractual nature, although they could be included in an agreement between the system provider and the user. It was suggested that that reference should be limited to "operational rules on the assessment of reliability" so as not to refer to rules irrelevant for the draft provision.

Scope of paragraph on party autonomy

58. It was explained that paragraph 2 aimed at clarifying that parties could allocate liability arising from the use of a system by agreeing on the level of system reliability. It was also explained that the provision would ensure that parties would be bound by their agreements without affecting third parties. It was further clarified that paragraph 2 did not aim at interfering with substantive law, for instance by allowing validation of an otherwise invalid electronic transferable record through agreement of the parties on the use of an unreliable method.

59. In response, the concern was again expressed that paragraph 2 might be interpreted as introducing a separate subjective legal regime for electronic transferable records, and that that legal regime could be used to circumvent substantive law and provisions of mandatory application. It was added that the relation between paragraph 1, in particular the reference to

"the operational rules governing the system", and paragraph 2 was not clear. It was therefore suggested that paragraph 2 should be deleted.

60. A third view was that paragraph 2 was not useful, since it stated the obvious rule that any agreement on system reliability would be relevant among the parties to that agreement. It was noted that draft article 5 already allowed for concluding such an agreement.

61. It was noted that the reference to disputes in paragraph 2 was redundant and that the drafting technique was unusual. It was also noted that the only relevant disputes under paragraph 2 of the proposal were disputes relating to reliability of the method.

62. In light of the concerns expressed, a new draft of paragraph 2 was proposed:

> "For the purposes of assessing [the required level of] reliability between parties to an agreement, regard shall be had to such agreement in so far as relevant."

63. It was said that the new proposal did not address the concerns expressed in relation to the prevalence of party agreement and the introduction of subjective standards.

64. In light of the different views on the scope of paragraph 2, the Working Group agreed that the intended scope should be better clarified. It was suggested that the relation between paragraphs 1 and 2 be clarified as well.

Paragraph 1

65. The Working Group considered the following draft of paragraph 1:

> "1. For the purposes of articles […] the method referred to shall be:
>
> (a) As reliable as appropriate for the fulfilment of the function for which the method is being used, [in the light of the purpose for which the information contained in the electronic transferable record was generated and] in the light of all relevant circumstances, which may include:
>
> (i) The operational rules on the assessment of reliability governing the system;
>
> (ii) The assurance of data integrity;
>
> (iii) The ability to prevent unauthorized access to and use of the system;
>
> (iv) The quality of hardware and software systems;
>
> (v) The regularity and extent of audit by an independent body;
>
> (vi) The existence of a declaration by a supervisory body, an accreditation body or a voluntary scheme regarding the reliability of the method;
>
> (vii) Any applicable industry best practices; or
>
> (b) Proven in fact to have fulfilled the function agreed to by itself or together with further evidence."

66. It was explained that reference to "any other relevant factor" had been omitted from the list of factors since the words "which may include" sufficiently clarified that the list was not exhaustive and had an illustrative nature only. It was also explained that, depending on the final form of draft article 11, other articles referring to a reliable method, such as draft articles 9, 10 and 17, would be modified accordingly.

The purpose for which the information was generated

67. It was said that the words "all relevant circumstances" included the purpose for which the information contained in the electronic transferable record was generated, and that therefore the bracketed text in subparagraph 1 (a) should be deleted.

Operational rules

68. It was explained that the reference to rules on assessment of reliability aimed to clarify that only operational rules regarding the reliability of the system, and not operational rules in general, should be considered (see para. 57 above). It was suggested to replace the word "on" with "relevant to" to better specify which rules on reliability were relevant.

Data integrity

69. It was suggested that data integrity had a different nature than other listed factors, as it was a parameter of a functional equivalence rule and, as such, already contained in draft article 10. For that reason, it was added, its inclusion in draft article 11 would introduce a circular argument. In that light, it was suggested that the reference to data integrity be deleted.

70. In response, it was said that data integrity should be retained as draft article 11 served as a general reliability standard applicable also to draft articles that did not mention integrity. It was added that, due to the illustrative nature of the list of circumstances relevant for the assessment of reliability, neither retention nor deletion of the reference to data integrity would affect consideration of that element when relevant.

Any applicable industry best practices

71. With regard to "industry best practices", it was noted that reference to "industry standards" was preferable since those standards could be more easily ascertained. However, it was also noted that caution should be exercised in referring to industry standards, since that reference could lead to violating the principle of technology neutrality. It was therefore suggested that the reference to industry standards should be deleted.

Subparagraph 1 (b)

72. The view was expressed that subparagraph 1 (b) should be deleted as it introduced a standard assessing reliability based on past performance of the method. In response, it was explained that a similar rule was contained in article 9(3)(b)(ii) of the Electronic Communications Convention and had proven to be useful. In further response, it was said that the draft Model Law was different in scope from the Electronic Communications Convention and that technological developments since the adoption of that Convention should also be taken into account. In reply, it was indicated that, although the scope of the two texts was different, the purpose of the provision was the same, namely avoiding frivolous litigation, which was deemed particularly useful.

73. After discussion, the Working Group agreed with respect to paragraph 1 to: (i) delete the words "in the light of the purpose for which the information contained in the electronic transferable record was generated" in subparagraph (a); (ii) to replace the word "on" with "relevant to" in subparagraph (a)(i); (iii) retain the reference to "the assurance of data integrity" in subparagraph (a)(ii) with clarification in explanatory materials on its purpose and relation with other provisions; (iv) insert the word "industry standards" instead of "best practices" in subparagraph (a)(vii); and (v) retain subparagraph (b).

Paragraph 2

74. With respect to paragraph 2, in the alternative text provided in paragraph 62 above, it was indicated that a reference to contractual agreements could assist significantly when assessing the level of reliability of a method since those agreements often contained useful guidance on technical details. In that respect, reference was made to service level agreements. However, it was also suggested that paragraph 2 might be redundant, since draft article 5 already provided for party autonomy. It was also said that, if paragraph 2 was maintained, explanatory materials should clarify that the provision was simply an application of the fundamental contract law principle of party autonomy.

75. After discussion, there was broad consensus that the scope of paragraph 2 was limited to allocation of liability arising from an agreement on the reliability of the method. There was also broad consensus that paragraph 2 should not affect third parties. Broad consensus was further expressed that paragraph 2 should not affect mandatory substantive law provisions such as those relating to the validity of electronic transferable records.

76. On the basis of that shared understanding, the Working Group agreed to retain paragraph 2 in square brackets for further consideration.

Draft article 25. Non-discrimination of foreign electronic transferable records

77. The importance of legally enabling the cross-border use of electronic transferable records was stressed. It was noted that draft article 25 aimed at achieving that goal by

preventing discrimination on the basis of the geographic origin of the electronic transferable record, while, at the same time, respecting the application of relevant private international law rules.

78. It was indicated that the creation of a special private international law regime for electronic transferable records was not necessary, as the regime applicable to equivalent paper-based transferable documents or instruments would suffice. It was added that a dual private international law regime would not be desirable.

79. In response, it was noted that an electronic transferable record might be issued in a jurisdiction that did not recognize the use of electronic transferable records, and that recognition of its validity could be sought in a jurisdiction that allowed that use. In that case, it was added, it could be useful to permit recognition of the validity of the electronic transferable record in the latter jurisdiction, provided legal requirements set forth in that jurisdiction were met.

80. Reference was made to the possibility of introducing reciprocity standards in the cross-border recognition of electronic transferable records. Reference was also made to the practical relevance of trust frameworks and, in general, of third-party service providers in facilitating that cross-border recognition.

81. It was explained that one policy goal of the draft Model Law was to promote widespread use of electronic transferable records in business practice and that that goal could be achieved by enabling the cross-border use of electronic transferable records regardless of the number of jurisdictions enacting the draft Model Law.

82. After discussion, the Working Group decided to further consider draft article 25 at a future session.

Draft article 20. Amendment

83. It was suggested that the words “modification of information contained in” should replace the first occurrence of the words “amendment of” in draft article 20. In response, it was indicated that reference to “amendment of” was more accurate than reference to “modification of information contained in” and should be retained.

“readily”

84. It was suggested that the word “readily” should be deleted as it introduced a subjective standard and that reference to “identifiable” was sufficient. Concern was expressed that such requirement could impose excessive burden and cost on system operators.

85. In response, it was indicated that users should be able to easily identify the amended information in an electronic environment in a manner similar to the paper-based environment (A/CN.9/828, para. 88 and A/CN.9/WG.IV/WP.135/Add.1, para. 40).

86. A further view was that the insertion of a qualifier to “identifiable” was important, but that another term, such as “clearly”, “easily” or “obviously”, could be used to address the concerns expressed. It was also suggested to replace “identifiable” with “identified” to introduce an objective standard.

87. After discussion, the Working Group agreed to: (i) retain in draft article 20 the text contained in A/CN.9/WG.IV/WP.135/Add.1, para. 39; (ii) delete the word “readily”; and (iii) replace the word “identifiable” with “identified”.

Draft article 3. Definitions

“amendment”

88. It was noted that the term “amendment” occurred only in draft article 20, which contained a functional equivalence rule. In that light, the Working Group agreed to delete the definition of amendment.

“issuer”, “replacement” and “obligor”

89. The Working Group agreed to delete the definition of “issuer”, “replacement” and “obligor” since those terms no longer appeared in the draft Model Law.

"performance of obligation"

90. The Working Group agreed to delete the definition of "performance of obligation" since that definition was a matter of substantive law.

"electronic transferable record"

91. It was indicated that the definition of electronic transferable record contained in paragraph 30 of A/CN.9/WG.IV/WP.135 reflected the functional equivalent approach. It was added that the definition did not apply to electronic transferable records that existed only in an electronic environment, for which a different definition would be needed. It was indicated that the commentary to accompany the Model Law should state that the Model Law did not preclude the development and use of electronic transferable records that did not have a paper equivalent as those records would not be governed by the Model Law.

92. The Working Group agreed to retain the definition of electronic transferable record contained in paragraph 30 of A/CN.9/WG.IV/WP.135.

"paper-based transferable document or instrument"

93. As an editorial matter and in the English language only, it was agreed that the words "paper-based" should be deleted throughout the draft Model Law since the definition of transferable document or instrument sufficiently clarified that those documents or instruments were paper-based. The Secretariat was asked to verify in which other languages that deletion was possible in light of the terminology used.

94. The Working Group agreed to delete the indicative list of transferable documents or instruments from the definition of "transferable document or instrument" and to insert that list for illustrative purposes only in explanatory materials, which would also indicate that applicable substantive law would clarify which documents or instruments were transferable in the various jurisdictions.

95. The Working Group agreed to retain the word "indicated" outside square brackets in the definition of "transferable document or instrument".

"electronic record"

96. It was indicated that the definition of "electronic record" should reflect the composite nature of an electronic transferable record, which, in turn, was particularly relevant for the notion of "integrity" contained in paragraph 2 of draft article 10. For that purpose, it was suggested to retain the words "including, where appropriate, all information logically associated with or otherwise linked" outside the square brackets. It was also suggested to retain the word "not" outside the square brackets and to delete the word "subsequently", since the generation of metadata did not necessarily take place after the generation of a record, but could also precede it.

97. It was explained that the word "logically" in the definition of "electronic record" referred to computer software and not to human logic.

98. The Working Group agreed to retain the following definition of "electronic record":

> "electronic record" means information generated, communicated, received or stored by electronic means, including, where appropriate, all information logically associated with or otherwise linked together so as to become part of the record, whether generated contemporaneously or not.

"Control"

99. The Working Group considered the definition of "control" in conjunction with draft article 17 on control as a functional equivalent of possession.

100. It was indicated that there was no need to define "control" since that definition was implicit in draft article 17. It was added that the current definition of "control" was not in line with draft article 17. It was suggested that any useful element present in the definition of "control" could be incorporated in draft article 17.

101. It was stated that both control and possession were factual situations and that the person in control of an electronic transferable record was in the same position as the possessor of an equivalent transferable document or instrument. It was also stated that control could not affect or limit the legal consequences arising from possession and that those legal consequences would be determined by applicable substantive law. Broad consensus was expressed on those statements. It was further stated that parties could agree on the modalities for the exercise of possession, but not modify the notion of possession itself.

102. Based on that shared understanding, to be reflected in explanatory materials, the Working Group agreed to delete the definition of "control".

V. Other business

A. Future work

103. The Working Group recalled that, at its forty-eighth session, the Commission instructed the Secretariat to conduct preparatory work on identity management and trust services, cloud computing and mobile commerce, including through the organization of colloquia and expert group meetings, for future discussion at the Working Group level following the current work on electronic transferable records. It also recalled that the Commission asked the Secretariat to share the result of that preparatory work with Working Group IV, with a view to seeking recommendations on the exact scope, possible methodology and priorities for the consideration of the Commission at its forty-ninth session (A/70/17, para. 358).

104. Reference was made to the proposal submitted to the Commission at its forty-eighth session on possible future work related to identity management and trust services (A/CN.9/854). It was explained that laws and practices already existed in that area, and that their harmonization should be a matter of priority. It was added that it was particularly important to ensure inclusion of all regions, economic and legal systems and, for that reason, it was suggested that a colloquium should be organized to better define scope and methodology of the future work, with a view to reporting the findings to the Commission at its next session.

105. Reference was also made to the proposals submitted to the Commission for its consideration at its forty-seventh and forty-eighth sessions on possible future work related to cloud computing (A/CN.9/823 and A/CN.9/856). It was explained that those proposals relied on significant work already carried out at the national and international levels. Specific reference was made to the relevant recommendations contained in the UNCTAD Information Economy Report 2013 — The Cloud Economy and Developing Countries (UNCTAD/IER/2013) as a valuable starting point for future work. In that light, it was suggested that preparatory work should be carried out in an inclusive manner through informal expert consultations with a view to preparing a reference document on the nature of suggested work, the intended approach and tentative content for the consideration of the Commission at its next session.

106. The Working Group asked the Secretariat to provide support, within available resources, to the above proposals, including by exploring the possibility to hold a colloquium on legal issues related to identity management and trust services. It was noted that, in line with the decision of the Commission, the Working Group should prioritize the finalization of its current work on the draft Model Law on Electronic Transferable Records. In that light, the Working Group agreed that no colloquium should be held during the fifty-third session of the Working Group.

B. Technical assistance and other activities

107. With respect to technical assistance and other activities, it was said that the recently-adopted Protocol on the Legal Framework to Implement the ASEAN Single Window made specific reference to the Electronic Communications Convention as a relevant principle for transactions between national single windows in the ASEAN single

window environment. Furthermore, it was said that Chapter 14 (Electronic Commerce), Section 5.1 of the Trans-Pacific Partnership indicated that State parties to that treaty should maintain a legal framework governing electronic transactions consistent with the principles of the UNCITRAL Model Law on Electronic Commerce or the Electronic Communications Convention.

108. It was added that UNCITRAL continued to provide active contribution to the negotiation of a Regional Arrangement for the Facilitation of Cross-border Paperless Trade conducted at UN/ESCAP, and that technical assistance to legislative reform in the field of electronic commerce and paperless trade was being provided, in cooperation with UN/ESCAP, to the Republic of the Maldives.

B. Note by the Secretariat on a draft model law on electronic transferable records (A/CN.9/WG.IV/WP.135 and Add.1)

[Original: English]

Contents

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-sixth session (Vienna, 29 October-2 November 2012), broad support was expressed by the Working Group 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 final form of its work (A/CN.9/761, paras. 90-93).

3. At its forty-seventh session (New York, 13-17 May 2013), the Working Group began reviewing the draft provisions on electronic transferable records as provided in document A/CN.9/WG.IV/WP.122 and 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.

4. At its forty-eighth session (Vienna, 9-13 December 2013), the Working Group continued its consideration of the draft provisions as contained in document A/CN.9/WG.IV/WP.124 and Add.1.

5. At its forty-ninth session (New York, 28 April-2 May 2014), the Working Group continued its work on the preparation of draft provisions as presented in document A/CN.9/WG.IV/WP.128 and Add.1. The Working Group focused its discussion on concepts of original, uniqueness, and integrity of an electronic transferable record.

6. At its fiftieth session (Vienna, 10-14 November 2014), the Working Group continued its work on the preparation of draft provisions as presented in document A/CN.9/WG.IV/WP.130 and Add.1. Subject to a final decision to be made by the Commission, the Working Group agreed to proceed with the preparation of a draft model law on electronic transferable records (A/CN.9/828, para. 23). It was suggested that the draft Model Law should provide for both electronic equivalents of paper-based transferable documents or instruments and for transferable records that existed only in an electronic environment. It was agreed that priority should be given to the preparation of provisions dealing with electronic equivalents of paper-based transferable documents or instruments, and that those provisions should be subsequently reviewed and adjusted, as appropriate, to accommodate the use of transferable records that existed only in an electronic environment (A/CN.9/828, para. 30).

7. At its fifty-first session (New York, 18-22 May 2015), the Working Group continued its work on the preparation of the draft Model Law as presented in document A/CN.9/WG.IV/WP.132 and Add.1. The Working Group focused its discussion on the definitions of electronic transferable record, possession and control. Part II of this note

[1] *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17* (A/66/17), para. 238.

contains the draft provisions reflecting the deliberations and decisions of the Working Group during that session (A/CN.9/834, paras. 21-108).

II. Draft Model Law on Electronic Transferable Records

A. General

"**Draft article 1. Scope of application**

"1. This Law applies to electronic transferable records.

"2. Other than as provided for in this Law, nothing in this Law affects the application to an electronic transferable record of any rule of law governing a paper-based transferable document or instrument.

"[3. This Law applies to electronic transferable records other than as provided by [the law governing a certain type of electronic transferable record to be specified by the enacting State].]"

Remarks

8. Draft article 1 reflects the Working Group's deliberations at its forty-eighth session (A/CN.9/797, paras. 16-17).

9. Draft paragraph 2 sets forth the general principle that the draft Model Law does not affect substantive law applicable to paper-based transferable documents or instruments and to their electronic equivalents. This principle applies to each step of the life cycle of an electronic transferable record. For instance, it enables the issuance of an electronic transferable record to bearer when permitted under substantive law (A/CN.9/797, para. 65). It also allows changing the modalities for circulation of an electronic transferable record issued to bearer in an electronic transferable record to a named person and the reverse case ("blank endorsement") when permissible under substantive law (A/CN.9/828, para. 82).

10. Draft paragraph 3 aims at allowing the application of the draft Model Law also to electronic transferable records that exist only in an electronic environment without interfering with substantive law. In that respect, it should be noted that, in principle, electronic transferable records that are functional equivalent of paper-based transferable documents or instruments and electronic transferable records that exist only in an electronic environment may co-exist in the same jurisdiction. Hence, draft paragraph 3 would not be necessary in jurisdictions where those electronic transferable records do not exist (A/CN.9/797, para. 17).

11. However, the Working Group may wish to note that a law applicable to electronic transferable records that exist only in an electronic environment is likely to define its substantive scope of application. Moreover, the substantive law applicable to an electronic transferable record equivalent to a paper-based transferable document or instrument is defined by reference to that equivalent paper-based transferable document or instrument. The Working Group may wish to consider whether to retain draft paragraph 3 in light of those considerations.

"**Draft article 2. Exclusions**

"1. This Law does not override any rule of law applicable to consumer protection.

"2. This Law does not apply to securities, such as shares and bonds, and other investment instruments.

"3. [This Law does not apply to bills of exchange, promissory notes and cheques.]"

Remarks

12. Draft article 2 reflects the Working Group's deliberations at its forty-eighth session (A/CN.9/797, paras. 18-20).

13. The Working Group may wish to discuss whether draft paragraph 1 should be retained in light of the fact that draft article 1, paragraph 2, already indicates that the draft Model Law does not affect substantive law. In case it is retained, the Working Group may also wish to consider whether that draft provision should be placed elsewhere in the Model Law, for instance in draft article 1, as it may not constitute an exclusion from the scope of application of the law.

14. The term "securities" in draft paragraph 2 does not refer to the use of electronic transferable records as collateral and therefore the Model Law does not prevent the use of electronic transferable records for security rights purposes (A/CN.9/834, para. 73).

15. The term "investment instrument" is understood to include derivative instruments, money market instruments and any other financial product available for investment (A/CN.9/797, para. 19).

16. The Working Group may wish to confirm that shares and bonds are excluded from the scope of application of the Model Law also when considered negotiable instruments in the relevant jurisdictions.

17. Draft paragraph 3 reflects a view that certain paper-based transferable documents or instruments should be excluded from the scope of application of the Model Law in order to avoid conflicts with treaties such as the Convention Providing a Uniform Law for Bills of Exchange and Promissory Notes (Geneva, 1930) and the Convention Providing a Uniform Law for Cheques (Geneva, 1931) (the "Geneva Conventions") in jurisdictions where those treaties are in force (A/CN.9/797, paras. 20, 109-112; see also A/CN.9/WG.IV/WP.125).

18. The Working Group may wish to consider whether paragraph 3 should be retained in the draft Model Law to provide guidance to those jurisdictions that are parties to the Geneva Conventions as well as any other relevant conventions when they wish to enact the Model Law.

19. Alternatively, the Working Group may wish to consider whether draft paragraph 3 should be drafted as an open-ended exclusion clause along the following lines: "This Law does not apply to […]" to permit selective application of the Model Law in light of the features of the enacting jurisdiction. That approach could also provide additional flexibility in including in the list, if so wished, certain instruments or documents, such as letters of credit, whose legal status under the Model Law may be unclear.

"**Draft article 3. Definitions**

"For the purposes of this Law:"

Remarks

20. The definitions in draft article 3 have been prepared as a reference and should be examined in the context of the relevant draft articles. The terms are presented in the order they appear throughout the draft Model Law (A/CN.9/768, para. 34). Remarks for consideration by the Working Group have been placed after each definition. The Working Group may wish to review the draft definitions once the draft articles of the Model Law have been fully considered and the use of the defined terms ascertained (A/CN.9/828, para. 66).

21. All references to "holder" with respect to an electronic transferable record in the draft provisions have been deleted and replaced with "person in control" (A/CN.9/804, para. 85). The Working Group may wish to clarify in draft article 3 that a "person" may either be a natural or a legal person.

"*electronic transferable record*" means [an electronic record] [containing authoritative information] that entitles the person in control to claim the performance of the obligation [indicated] in the record and that is capable of transferring the right to performance of the obligation [indicated] in the record through the transfer of that record.

Remarks

22. The definition of "electronic transferable record" reflects the Working Group's deliberations at its forty-eighth (A/CN.9/797, paras. 21-28) and fifty-first (A/CN.9/834, paras. 23-26, 88 and 95-98 and 100) sessions.

23. The definition of "electronic transferable record" aims at covering both electronic transferable records that are equivalent to paper-based transferable documents or instruments and electronic transferable records that exist only in an electronic environment (A/CN.9/797, para. 23). The Working Group may wish to consider whether that definition should be reviewed in light of the decision to prepare on a priority basis provisions dealing with electronic equivalents of paper-based transferable documents or instruments.

24. The definition of "electronic transferable record" does not aim at affecting the fact that substantive law shall determine whether the person in control is the rightful person in control as well as the substantive rights of the person in control. It also does not aim at describing all the functions possibly related to the use of an electronic transferable record. For instance, an electronic transferable record may have an evidentiary value; however, the ability of that record to discharge that function will be assessed under law other than the draft Model Law.

25. The Working Group confirmed that certain documents or instruments, which are generally transferable, but whose transferability is limited due to other agreements, such as straight bills of lading, would not fall under this definition and that the draft Model Law should only focus on "transferable" documents (A/CN.9/797, paras. 27-28).

26. The words "[containing authoritative information]" were included for further consideration pursuant to a discussion on draft article 10 (A/CN.9/834, paras. 26 and 88) and should therefore be considered in conjunction with that draft article.

27. The Working Group may wish to consider whether the term "[indicated]" is appropriate or whether other terms such as "represented by", "incorporated", "specified" or "contained" (A/CN.9/797, para. 22) shall be used.

28. The Working Group may wish to take into account the definition of "electronic record" when considering the definition of "electronic transferable record" (see below, para. 74).

29. At the Working Group's fifty-first session different views were expressed with respect to the need of retaining the definition of "electronic transferable record" (A/CN.9/834, paras. 95-98). In particular, the view was expressed that an electronic record complying with the requirements set forth in draft article 10 would be an electronic transferable record functionally equivalent to the corresponding paper-based transferable document or instrument. Hence, a definition of electronic transferable record may not be necessary or may be limited to reference to the requirements set forth in draft article 10.

30. In the same line, at that session the following definition of electronic transferable record was suggested, containing a reference to the information requirement in a paper-based transferable document or instrument and the requirements set forth in draft article 10 (A/CN.9/834, para. 100):

> "*electronic transferable record*" [is an electronic record that contains all of the information that would make a paper-based transferable document or instrument effective and that complies with the requirements of article 10].

31. Different considerations could apply with respect to a definition of "electronic transferable records" applicable to electronic transferable records existing only in electronic form, which are to be discussed at a later stage.

> "*paper-based transferable document or instrument*" means a transferable document or instrument issued on paper that entitles the holder to claim the performance of the obligation [indicated] in the document or instrument and that is capable of transferring the right to performance of the obligation [indicated] in the document or instrument through the transfer of that document or instrument.
>
> Paper-based transferable documents or instruments include bills of exchange, cheques, promissory notes, [consignment notes,] bills of lading and warehouse receipts.

Remarks

32. The definition of "paper-based transferable document or instrument" reflects the Working Group's deliberations at its forty-eighth session (A/CN.9/797, paras. 21-28). It does not aim at affecting substantive law.

33. The Working Group may wish to consider whether the definition of paper-based transferable document or instrument should be retained in light of its substantive law implications.

34. The Working Group may wish to consider whether the indicative list of paper-based transferable documents or instruments, which is inspired by 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"), should be included in the definition of "paper-based transferable document or instrument" or in explanatory material (A/CN.9/768, para. 34 and A/CN.9/797, paras. 25-26), bearing also in mind the content of draft article 2, paragraph 3. The Working Group may also wish to consider whether to retain the reference to consignment notes, which are not transferable in certain jurisdictions.

> "*electronic record*" means information generated, communicated, received or stored by electronic means [, including, where appropriate, all information logically associated with or otherwise linked [together] [thereto] [to it] [so as to become part of the record], whether generated contemporaneously or [not] [subsequently]].

Remarks

35. The definition of "electronic record" is based on the definition of "data message" contained in the UNCITRAL Model Law on Electronic Commerce (1996) and in the Electronic Communications Convention. The bracketed text aims at highlighting the fact that information may be associated with the electronic transferable record at the time of issuance or thereafter (e.g., information related to endorsement) (A/CN.9/797, paras. 43-45). That bracketed text is also meant to clarify that some electronic records could, but do not need to, include a set of composite information (A/CN.9/797, para. 43). The Working Group may also wish to recall its discussion of "electronic record" with respect to draft article 10 (A/CN.9/828, para. 31).

> "*issuer*" means a person that issues, directly or with the assistance of a third party, an electronic transferable record.

Remarks

36. The Working Group may wish to consider deleting the definition of "issuer", which is not used in the draft Model Law after the deletion of draft provisions on issuance (A/CN.9/797, paras. 64-67) and on retention (A/CN.9/834, para. 77).

37. The words ", directly or with the assistance of a third party," aim at clarifying that when an electronic transferable record is issued by a third-party service provider upon the issuer's request, the third-party service provider is not considered an issuer under the draft provision (A/CN.9/768, para. 33).

> ["*control*" of an electronic transferable record means the [de facto power to deal with or dispose of that electronic transferable record] [power to factually deal with or dispose of the electronic transferable record] [control in fact of the electronic transferable record].]

Remarks

38. The draft definition of "control" has been placed in square brackets further to a decision of the Working Group at its fiftieth session made in conjunction with its consideration of draft article 17 on possession (A/CN.9/828, paras. 66-67). Draft article 17 aims at setting forth the requirements necessary to establish control as the functional equivalent of possession. In light of the fact that possession is a notion defined in substantive law, the Working Group may wish to consider whether a definition of "control" is necessary (A/CN.9/834, para. 83).

"*amendment*" means the modification of information contained in the electronic transferable record in accordance with the procedure set out in draft article 20.

Remarks

39. The Working Group may wish to consider deleting this definition in light of the fact that the term "amendment" occurs only in draft article 20, which, in turn, currently contains a functional equivalence rule. Moreover, defining the term "amendment" might be interpreted as having unintended substantive law implications.

"*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.

Remarks

40. The Working Group may wish to consider whether to retain this definition in light of its substantive law implications. The draft definition refers generally to the delivery of goods or the payment of a sum of money as mentioned in article 2, paragraph 2, of the Electronic Communications Convention (A/CN.9/761, para. 22). The term "performance of obligation" appears in the definitions of "electronic transferable record" and of "paper-based transferable document or instrument".

"*obligor*" means the person [indicated] in a paper-based transferable document or instrument or in an electronic transferable record as having the obligation to perform [the obligation contained in that document, instrument or record].

Remarks

41. The definition of "obligor" has been reviewed in order to further clarify that it has only descriptive value and that substantive law shall determine who the obligor is. The Working Group may wish to consider whether the definition of "obligor" should be retained in light of the fact that the notion may be defined under substantive law.

42. The term "obligor" currently appears only in draft article 18 on presentation. The Working Group may wish to consider the continued relevance of that draft definition in light of the final form of that article.

43. If the definition of "obligor" is retained, the Working Group may wish to consider whether the term "[indicated]" is appropriate or whether another term may be used (see para. 27 above).

"*replacement*" means substitution of an electronic transferable record for a paper-based transferable document or instrument or [vice versa] [conversely] [substitution of a paper-based transferable document or instrument for an electronic transferable record].

Remarks

44. The Working Group may wish to consider deleting the definition of the term "replacement" since that term no longer appears in the draft Model Law.

"**Draft article 4. Interpretation**

"1. 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 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

45. Draft article 4 is intended to draw the attention of courts and other authorities to the fact that domestic enactments of the Model Law should be interpreted with reference to their

international origin in order to facilitate uniform interpretation (A/CN.9/768, para. 35). Similar wording is found in article 3 of the UNCITRAL Model Law on Electronic Commerce and in article 4 of the UNCITRAL Model Law on Electronic Signature.

46. The words "This Law is derived from a model law of international origin" have been included pursuant to a decision made by the Working Group at its forty-seventh session, in order to emphasize that the law constituted an enactment of a model law with international origin (A/CN.9/768, para. 35). Those words do not appear in other UNCITRAL texts. Alternatively, the Working Group may wish to consider whether that language should be contained and the underlying notion be further developed in guidance materials.

47. The Working Group may wish to consider whether the words "[and the observance of good faith]" should be retained in light of the possible substantive law implications, and, in particular, of the relevance that the notion of good faith has in the substantive law of paper-based transferable documents or instruments. Reference to good faith is contained in several other UNCITRAL texts, including those on electronic commerce. Alternatively, the Working Group may wish to clarify whether that reference is intended as to good faith in the application of the law.

48. The notion of "general principles" contained in paragraph 2 has been used in several UNCITRAL texts. Article 7 of the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) ("CISG") is the provision containing that notion that has been most interpreted by case law.

49. The notion of "general principles" contained in draft paragraph 2 refers to the general principles of electronic communications (A/CN.9/797, para. 29), including those already stated in relevant UNCITRAL texts. In this line, the Working Group may wish to confirm that the fundamental principles of non-discrimination against electronic communications, technological neutrality and functional equivalence are general principles underlying the draft Model Law. Other general principles might be identified as the work of the Working Group progresses.

50. Some of the general principles underlying the CISG, such as party autonomy and good faith, may also be relevant to define the notion of general principles contained in the draft Model Law.

> "**Draft article 5. Party autonomy [and privity of contract]**
>
> "1. The parties may derogate from or vary by agreement the provisions of this Law [except articles 1, 2, 4, 5 paragraph 2, 6, 7, […]][, unless that agreement would not be valid or effective under applicable law].
>
> "2. Such an agreement does not affect the rights of any person that is not a party to that agreement."

Remarks

51. The Working Group highlighted the importance of party autonomy in the draft provisions (A/CN.9/797, para. 30) and, based on the general applicability of that principle, agreed to identify which draft articles could not be derogated from (A/CN.9/797, para. 32).

52. While party autonomy is a fundamental principle underpinning commercial law and UNCITRAL texts, the Working Group may wish to note that that principle has found some limits in its implementation in UNCITRAL texts on electronic commerce in order to avoid conflicts with rules of mandatory application, such as those on public policy. Article 4 of the UNCITRAL Model Law on Electronic Commerce and article 5 of the UNCITRAL Model Law on Electronic Signature provide examples of that approach. The words "[, unless that agreement would not be valid or effective under applicable law]", contained in article 5 of the UNCITRAL Model Law on Electronic Signature, have been inserted in draft article 5 of the Model Law to reflect that approach.

53. Alternatively, the possibility of derogating from or varying a provision of the draft Model Law could be indicated by inserting specific language, such as "unless otherwise agreed by the parties", in the provision that may be derogated from or varied by the parties.

"**Draft article 6. Information requirements**

"Nothing in this Law affects the application of any rule of law that may require a person to disclose its identity, place of business or other information, or relieves a person from the legal consequences of making inaccurate, incomplete or false statements in that regard."

54. The Working Group decided to retain draft article 6 with the understanding that it reminds parties of the need to comply with possible disclosure obligations that might exist under other law (A/CN.9/797, para. 33).

B. Provisions on electronic transactions

55. The Working Group at its forty-eighth session decided to retain draft articles 7-9 as a separate section (A/CN.9/797, para. 34). The Working Group may wish to review its decision in light of the final form of the draft Model Law as well as the content of those articles.

"**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 electronic form."

Remarks

56. Draft article 7 sets forth the principle of non-discrimination. At its forty-ninth session, the Working Group decided to retain draft article 7 in its current form (A/CN.9/804, para. 17, see also A/CN.9/768, para. 39).

"**Draft article 8. Writing**

"Where the law requires that information should be in writing, that requirement is met with respect to an electronic transferable record if the information contained therein is accessible so as to be usable for subsequent reference."

Remarks

57. Draft article 8 reflects the Working Group's deliberations at its forty-ninth session (A/CN.9/804, paras. 18-19). It establishes the requirements for the functional equivalence of the written form with respect to information contained in or related to electronic transferable records (A/CN.9/797, para. 37). The general rule on functional equivalence between electronic and written form should be contained in the law on electronic transactions (A/CN.9/797, para. 38). Draft article 8 refers to the notion of "information" instead of "communication" as not all relevant information might necessarily be communicated (A/CN.9/797, para. 37).

58. Pursuant to a decision of the Working Group at its fifty-first session, the explanatory material to the draft provisions will reflect the understanding that any legal requirement contained in the draft Model Law implies consequences for the case it is not met, making it not necessary to explicitly refer to those consequences (A/CN.9/834, paras. 43 and 46). Accordingly, the words "or provides consequences for the absence of a writing" have been deleted from draft article 10 and elsewhere throughout the draft Model Law since they are redundant.

59. At the forty-ninth session, it was suggested that draft article 8 might not be necessary as the fulfilment of the functional equivalence of the "writing" requirement was implied in the definition of "electronic transferable record" in draft article 3. In response, it was stated that a rule on the "writing" requirement was necessary in light of the other rules on functional equivalence contained in the draft provisions (A/CN.9/804, para. 18). The Working Group may wish to consider the desirability of maintaining draft article 8 in light of draft articles 10 and 11.

60. In case of law applicable to electronic transferable records existing only in electronic form, the Working Group may wish to confirm that the law governing those records should

set forth the same requirements contained in draft article 8, i.e. that information should be accessible so as to be usable for subsequent reference (A/CN.9/768, para. 42).

"**Draft article 9. Signature**

"Where the law requires a signature of a person, that requirement is met [with respect to] [in relation to] [by] 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 record; and

(b) The method used is either:

(i) As reliable as appropriate for the purpose for which the electronic record 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

61. Draft article 9 reflects the Working Group's deliberations at its forty-ninth session (A/CN.9/804, para. 20). It establishes the requirements for the functional equivalence of "signature" (ibid.) when substantive law either contains an explicit signature requirement or provides consequences for the absence of a signature (implicit signature requirement) (A/CN.9/797, para. 46; see also A/CN.9/834, para. 43). Draft article 9 is based on the text of article 9, paragraph 3, of the Electronic Communications Convention. The words "or provides consequences for the absence of a signature" have been deleted pursuant to a decision of the Working Group at its fifty-first session (A/CN.9/834, para. 46).

62. The reference in draft subparagraph (b)(i) to "as reliable as appropriate" is similar to that contained in article 9, paragraph 3, of the Electronic Communications Convention and is distinct from the references contained in other draft articles to a "reliable method". The Working Group may wish to clarify whether that reference is distinct from the reference to a method "as reliable as appropriate" contained in draft article 17 since that draft article deals with functional equivalence of possession, which is not discussed in the Electronic Communications Convention.

63. The explanatory note to the Electronic Communications Convention provides guidance on the content and operation of the notion of "reliability" in the context of article 9, paragraph 3, of that Convention.[2] The Working Group may wish to confirm that the guidance provided in that explanatory note would be appropriate in interpreting draft article 9, subparagraph (b)(i).

64. In that respect, the Working Group may wish to clarify whether the general reliability standard contained in draft article 11 would also apply to draft article 9, subparagraph (b)(i) (A/CN.9/804, para. 20).

65. Another option would be to include in draft article 9 text similar to the requirements set forth in article 6, paragraph 3, of the Model Law on Electronic Signatures, thus providing a specific reliability standard applicable only to draft article 9, subparagraph (b)(i). It should, however, be noted that the Working Group had already agreed that such "two-tier" approach would not be adopted in the draft provisions (A/CN.9/797, para. 40).

66. The Working Group may wish to consider whether the text of draft article 9 should better clarify that that provision applies to electronic transferable records only and not to other electronic records that are not transferable but are somehow related to an electronic transferable record. Alternative wording is suggested to that end. The words "with respect to" have been used in the chapeau of draft article 9. The words "in relation to" are used in article 9, paragraph 3, of the Electronic Communications Convention. The word "by" has

[2] United Nations, Explanatory note by the UNCITRAL secretariat on the United Nations Convention on the Use of Electronic Communications in International Contracts, New York, 2007, paras. 161-164.

been used in other UNCITRAL provisions on functional equivalence and may suggest a narrower application of draft article 9.

Remarks on "original"

67. After noting that the notion of "original" in the context of electronic transferable records was different from that adopted in other UNCITRAL texts (A/CN.9/797, para. 47) and that the main purpose of a functional equivalence rule for that notion in the context of electronic transferable records should be the prevention of multiple claims (A/CN.9/804, para. 21), the Working Group agreed that there was no need to include a functional equivalence rule for "original" in the draft provisions (A/CN.9/804, para. 40). It was explained that the goal of avoiding multiple claims in the context of electronic transferable records could be achieved through the notion of "control". It was further explained that the notion of "control" could identify both the person entitled to performance and the object of control (A/CN.9/804, para. 39).

C. Use of electronic transferable records

"Draft article 10. [Paper-based transferable document or instrument] [Operative electronic record] [Electronic transferable record]

"1. Where the law requires a paper-based transferable document or instrument, that requirement is met by an electronic record if:

(a) The electronic record contains the information that would be required to be contained in an equivalent paper-based transferable document or instrument; and

(b) A method is employed:

(i) That is as reliable as appropriate to identify that electronic record as the [authoritative] record constituting the electronic transferable record;

(ii) [To render] [That renders] that electronic record capable of being subject to control from its creation until it ceases to have any effect or validity; and

(iii) That is as reliable as appropriate, to retain the integrity of the electronic transferable record".

"2. The criteria for assessing integrity shall be whether information contained in the electronic transferable record, including any [authorized] change that arises from its creation until it ceases to have any effect or validity, has remained complete and unaltered apart from any change which arises in the normal course of communication, storage and display. 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."

Remarks

68. Draft article 10 has been recast in light of the Working Group's deliberations at its fifty-first session (A/CN.9/834, paras. 21-30, 85-94 and 99). The current text aims at combining the two prevalent approaches to avoid multiple claims for performance, i.e. "singularity" and "control" (A/CN.9/834, para. 86).

69. Draft article 10 aims to offer a functional equivalence rule for the use of paper-based transferable documents or instruments by setting forth the requirements to be met by an electronic record. The Working Group agreed to introduce draft article 10 in light of its discussions on the notion of uniqueness and its decision to delete a rule on uniqueness (A/CN.9/804, paras. 71 and 74). It was added that resorting to the notion of "control" would make it possible not to refer to the notion of "uniqueness", which posed technical challenges (A/CN.9/804, para. 38).

70. The Working Group agreed that reference to the definition of "electronic record" would suffice to provide for cases when, as it may happen in certain registry systems, there

might be data elements that, taken together, provided the information constituting the electronic transferable record, with no discrete record constituting the electronic transferable record (A/CN.9/828, para. 31).

71. The words "or provides consequences for its absence" have been deleted in draft paragraph 1 pursuant to a decision of the Working Group at its fifty-first session (A/CN.9/834, para. 46).

72. Subparagraph 1(a) states that the electronic record should contain the information required in a paper-based transferable document or instrument. The Working Group may wish to consider whether the word "equivalent" before the word "paper-based" could be misleading in view of the purpose of draft article 10 to provide a rule on functional equivalence. Alternative drafting, such as the use of the word "respective", might also be considered.

73. Subparagraph 1(b)(i) sets forth the requirement to identify an electronic record as the record containing the operative or authoritative information necessary to establish that record as an electronic transferable record. That requirement implements the "singularity" approach (A/CN.9/834, para. 86). The reliability standard contained in subparagraph 1(b)(i) should be assessed against general reliability standards (A/CN.9/828, para. 37).

74. The Working Group may wish to consider whether to retain the word "authoritative" to identify the electronic transferable record (A/CN.9/834, paras. 101-104) in light of the fact that information establishing the electronic record as an electronic transferable record is, by itself, authoritative and therefore that qualification might, on the one hand, be unnecessary and, on the other hand, have the unintended effect of fostering litigation on the meaning of the term "authoritative".

75. If the Working Group decides not to retain the word "authoritative", it may further wish to consider whether the provision might be further simplified as follows:

> "(i) That is as reliable as appropriate to identify that electronic record as the electronic transferable record;".

76. Subparagraph 1(b)(ii) sets forth the requirement that the electronic transferable record should be capable of being controlled from its creation until it ceases to have any effect or validity, particularly in order to allow for its transfer. That requirement implements the "control" approach (A/CN.9/834, para. 86). Subparagraph 1(b)(ii) is not subject to a reliability test as draft article 17 provides the reliability standard to assess the method used to establish control (A/CN.9/828, para. 38). The suggestion of using the words "that renders" instead of "to render" is meant to be purely editorial.

77. The draft provision reflects the view that an electronic transferable record might not necessarily be actually subject to control (A/CN.9/804, para. 61). This could happen, for instance, when a token-based electronic transferable record is lost.

78. With regard to paragraph 2, at its fiftieth session, the Working Group agreed to insert a provision on the assessment of the reliability standard for the notion of integrity (A/CN.9/828, para. 49). That provision indicates that an electronic transferable record retains integrity when any set of information related to legally relevant changes from its creation until it ceases to have any effect or validity (as opposed to changes of purely technical nature) remains complete and unaltered (A/CN.9/804, para. 29). It is inspired by article 8, paragraph 3, of the UNCITRAL Model Law on Electronic Commerce.

79. The Working Group may wish to consider whether the word "authorized" in draft paragraph 2 should be retained in light of its discussions on the desirability to record all or only selected changes, and on the difference between authorized and legitimate changes (A/CN.9/834, paras. 27-30; A/CN.9/828, paras. 42-44; A/CN.9/804, paras. 30-32).

80. The Working Group may wish to consider the definition of an electronic transferable record in draft article 3 in conjunction with its deliberations on draft article 10 (see paras. 22-31 above, and A/CN.9/834, paras. 95-100).

"**Draft article 11. General reliability standard**

"1. 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. In determining whether, or to what extent, a method is reliable [for the purposes of articles 10, 17 and …], regard may be had to the following factors:

(a) Level of assurance of data integrity;

(b) Ability to prevent unauthorized access to and use of the system;

(c) Quality of hardware and software systems;

(d) Regularity and extent of audit by an independent body;

(e) The existence of a declaration by a supervisory body, an accreditation body or a voluntary scheme regarding the reliability of the method;

(f) [Any agreement among the parties;]

(g) Any other relevant factor."

Remarks

81. Draft article 11 aims at providing a general reliability standard. At the Working Group's forty-ninth session, different views were expressed with respect to the desirability of inserting such provision (A/CN.9/804, paras. 41-49).

82. On the one hand, it was indicated that the draft provisions should provide general guidance on the meaning of reliability and set out the criteria for meeting that standard. It was added that, while party autonomy could suffice to establish reliability standards in closed systems, there was still a need for the draft provisions to set out reliability standards applicable to open systems. It was further mentioned that if a general reliability standard were to be included, it should be drafted in a manner mindful of technological neutrality (A/CN.9/804, para. 43).

83. Moreover, the inclusion of additional factors to assess reliability was suggested. Those factors related to: quality of staff; sufficient financial resources and liability insurance; existence of a notification procedure for security breaches and of reliable audit trails (A/CN.9/804, paras. 44-45).

84. However, at that session the view was also expressed that the existing and newly-suggested reliability factors were too detailed and that the provision was regulatory in nature. It was added that the adoption of such detailed requirements could impose excessive costs on business and ultimately hamper electronic commerce. It was further noted that those requirements could lead to increased litigation based on complex technical matters. It was suggested that a reference to reliable methods based on internationally accepted standards and practices should instead be inserted in the draft provisions (A/CN.9/804, para. 46).

85. In that same line, it was stated that the presence of a general reliability standard could hamper use of electronic transferable records as legal consequences of failure to meet those standards were not clear. It was further indicated that caution should be exercised so as not to make the draft provisions untenable in practice. It was also noted that there was no need for a general reliability standard as each draft article containing a reliability standard should include in itself a provision specific to that context (A/CN.9/804, para. 42).

86. In conclusion, the Working Group agreed to further consider draft article 11 as a possible general rule on system reliability. The Working Group also agreed to consider the adoption of specific standards for each draft provision referring to a reliable method (A/CN.9/804, para. 49).

87. At its fiftieth session, the Working Group agreed to incorporate in draft article 11 text providing general guidance on the reliability standard (A/CN.9/828, paras. 47 and 49). That language, inspired also by article 17, paragraph 4, of the UNCITRAL Model Law on Electronic Commerce, has been inserted as paragraph 1 of draft article 11.

88. Draft articles 10, on the information constituting the electronic transferable record, 12 on indication of time and place, 20 on amendment, 22 and 23 on change of medium, and 24 on division and consolidation refer to the use of a reliable method. The Working Group may wish to confirm that draft article 11 would suffice to assess the reliability of the various methods referred to in those draft articles.

89. In that respect, the Working Group may wish to consider whether the word "required" in paragraph 1 is adequate to describe the relation between the general reliability standard and the various provisions where that standard is relevant.

90. Draft articles 9 on signature, 10 with respect to integrity, and 17 on possession and control contain a specific standard for the assessment of reliability. The Working Group may wish to clarify the relation, if any, between the general reliability standard contained in draft article 11 and the specific reliability standards contained in those draft articles.

91. In case no relation between the general reliability standard contained in draft article 11 and the specific reliability standards contained in draft articles 9, 10 and 17 existed, the Working Group may wish to consider adopting language excluding those articles from the scope of application of the general reliability standards, for example, by adding the following statement at the beginning of draft article 11, paragraph 1: "Unless otherwise provided in this Law,".

92. The Working Group may wish to discuss whether subparagraph 2(a) should refer to data integrity in the system, to integrity of the electronic transferable record or to both, in light also of draft article 10.

93. The Working Group may also wish to discuss whether subparagraph 2(b) should refer to unauthorized access and use of the system or rather to unauthorized access and use of the method employed to establish control in light also of draft article 17. In that respect, the Working Group may wish to clarify the relation between the reference to a "system" contained in subparagraph 2(b) and the reference to "hardware and software systems" contained in subparagraph 2(c).

94. The Working Group may further wish to consider dealing with system reliability in the explanatory material discussing third-party service providers (A/CN.9/834, para. 78).

95. Draft subparagraph 2(f) was inserted to highlight the relevance of any agreement of the parties when assessing reliability.

(A/CN.9/WG.IV/WP.135/Add.1) (Original: English)

Note by the Secretariat on a draft model law on electronic transferable records

ADDENDUM

Contents

II. Draft Model Law on Electronic Transferable Records (*continued*)

C. Use of electronic transferable records (Articles 12-24)

"**Draft article 12. Indication of time and place in electronic transferable records**

"1. Where the law requires or permits the indication of time or place with respect to a paper-based transferable document or instrument, a reliable method shall be employed to indicate that time or place with respect to an electronic transferable record.

["2. An electronic transferable record is deemed to be dispatched at the place where the originator has its place of business and is deemed to be received at the place where the addressee has its place of business.

"3. This article applies notwithstanding that the place where the information system supporting an electronic address is located may be different from the place where the electronic transferable record is deemed to be received under paragraph 2.]"

Remarks

1. Draft article 12 reflects the Working Group's deliberations at its fifty-first session (A/CN.9/834, paras. 36-46). At that session, the Working Group took note that time and place of dispatch and receipt had different relevance for contract formation and management, and for the use of electronic transferable records and decided to review the draft provision accordingly (A/CN.9/834, para. 36).

2. At that session, the Working Group also noted that registry systems would record the relevant events in the life cycle of the electronic transferable record with time-stamping, thus determining time automatically. It was further noted that applicable law could allow parties to amend that automatic determination by agreement. Moreover, it was indicated that users of registry systems would agree to contractual rules containing a choice of applicable law. It was concluded that those elements reduced the practical relevance of determining time and place with respect to electronic transferable records (A/CN.9/834, para. 36). However, the Working Group may wish to note that the determination of time and place with respect to an electronic transferable record may occur otherwise in token-based systems.

3. Draft paragraph 1 refers to the words "or permits" in order to clarify its application to cases in which the law merely permits but not requires the indication of time or place with respect to a paper-based transferable document or instrument (A/CN.9/834, para. 42).

4. Draft paragraphs 2 and 3 are based on article 10 of the Electronic Communications Convention (A/CN.9/797, para. 61; see also A/CN.9/768, paras. 68-69), which, however, provides a rule on time of receipt and dispatch designed for the exchange of electronic communications and, in particular, for contract formation. In light of its deliberations at its fifty-first session (A/CN.9/834, paras. 36-46), and of the fact that substantive law is likely to contain provisions on time and place, the Working Group may wish to consider whether draft paragraphs 2 and 3 should be retained.

5. The Working Group may wish to consider whether the adoption of a provision relating to the irrelevance of the location of information systems for the determination of the place of business, when such determination is required by substantive law, would be desirable. The scope of such provision would be limited to clarifying that the location of an information system, or parts thereof, is not, as such, an indicator of a place of business. That clarification might be particularly useful in light of the likelihood that third-party service providers would use equipment and technology located in various jurisdictions. Such provision, based on article 6 of the Electronic Communications Convention, could read as follows:

"1. A location is not a place of business merely because that is:

(a) Where equipment and technology supporting an information system used by a party in connection with electronic transferable records are located; or

(b) Where the information system may be accessed by other parties.

2. The sole fact that a party makes use of an electronic address or other element of an information system connected to a specific country does not create a presumption that its place of business is located in that country."

6. Alternatively, the Working Group may wish to confirm whether the provisions relating to the irrelevance of the location of information systems for the determination of the place of business, and contained in other UNCITRAL texts on electronic commerce, could be relevant as general principles on which this Model Law is based under draft article 4, paragraph 2 of the Model Law.

"**Draft article 13. Consent to use an electronic transferable record**

"1. Nothing in this Law requires a person to use an electronic transferable record without that person's consent.

"2. The consent of a person to use an electronic transferable record may be inferred from the person's conduct."

Remarks

7. Draft article 13 reflects the Working Group's deliberations at its forty-eighth session (A/CN.9/797, paras. 62-63). The Working Group may wish to consider whether draft article 13 should be placed after draft article 5 on party autonomy.

"**Draft article 14. Issuance of multiple originals**

"1. Where the law permits the issuance of more than one original of a paper-based transferable document or instrument, this may be achieved with respect to electronic transferable records by issuance of multiple electronic transferable records.

"[2. Where the law requires the indication of the total number of multiple original paper-based transferable documents or instruments issued, the total number of multiple electronic transferable records issued shall be indicated in those multiple records.]"

Remarks

8. Draft article 14 reflects the Working Group's deliberations at its forty-eighth (A/CN.9/797, paras. 47 and 68) and fifty-first (A/CN.9/834, paras. 47-52) sessions. The possibility of issuing multiple originals of a paper-based transferable document or instrument exists in several fields of trade (A/CN.9/WG.IV/WP.124, para. 49) and is recognized in article 47, subparagraph 1(c) of the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (New York, 2008) (the "Rotterdam Rules"). Draft article 14 aims at enabling that possibility in an electronic environment (A/CN.9/834, para. 47), in line with a survey of existing practice that evidenced the use of multiple originals of electronic bills of lading.

9. An alternative approach to drafting paragraph 1, based on the general principle contained in draft article 1, paragraph 2, could focus on clarifying that:

> "Nothing in this Law precludes the issuance of multiple electronic transferable records."

10. The Working Group may wish to confirm that each electronic transferable record in a set of multiple electronic transferable records may be controlled by a different entity, if parties so agree.

11. Some of the functions pursued with the issuance and use of multiple paper-based transferable documents or instruments may be achieved in an electronic environment, especially if using a registry system, by attributing control on one electronic transferable record selectively to multiple entities. Based on the general principle contained in draft article 1, paragraph 2, the Model Law does not preclude control of an electronic transferable record by multiple entities, where allowed by substantive law.

12. Paragraph 2 has been redrafted pursuant to the Working Group's decision at its fifty-first session to limit its scope to cases where substantive law contained a requirement to indicate the number of multiple originals (A/CN.9/834, para. 51).

13. The Working Group may wish to consider whether a provision dealing with the co-existence of multiple originals issued on different media should be inserted in the draft Model Law.

> "**Draft article 15. Substantive information requirements of electronic transferable records**
>
> "Nothing in this Law requires additional [substantive] information for [the issuance of] an electronic transferable record beyond that required for [the issuance of] a paper-based transferable document or instrument."

Remarks

14. Draft article 15 reflects a decision of the Working Group at its forty-eighth session (A/CN.9/797, para. 73). It states that no additional substantive information is required for the issuance of an electronic transferable record than that required for a corresponding paper-based transferable document or instrument.

15. The Working Group may wish to consider whether to retain draft article 15 in light of the fact that the current text of draft article 10 sets forth that an electronic transferable record should contain all information contained in a paper-based document or instrument.

16. The Working Group may wish to consider whether draft article 15 contains a general rule applicable from the time of creation of the electronic transferable record until it ceases to have any effect or validity. In that case, the Working Group may wish to delete the reference to "the issuance of" as it might limit the scope of the draft article.

17. The Working Group may wish to also consider whether the word "substantive" should be included between the words "additional" and "information" to align the article with its title.

> "**Draft article 16. Additional information in electronic transferable records**
>
> "Nothing in this Law precludes the inclusion of information in an electronic transferable record in addition to that contained in a paper-based transferable document or instrument."

Remarks

18. Draft article 16 states that an electronic transferable record may contain information in addition to that contained in a paper-based transferable document or instrument. In particular, dynamic information, i.e. information that may change periodically or continuously based on an external source, may be included in an electronic transferable record due to its nature but not in a paper-based document or instrument (A/CN.9/768, para. 66, and A/CN.9/797, para. 73).

"**Draft article 17. [Possession] [Control]**

"1. Where the law requires the possession of a paper-based transferable document or instrument, that requirement is met with respect to an electronic transferable record if:

(a) A method is used to establish exclusive control of that electronic transferable record by a person and to reliably [identify] [establish] that person as the person in control; and

(b) The method used is either:

(i) As reliable as appropriate for the purpose for which the electronic transferable record was generated, in 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.

"2. Where the law requires transfer of possession of a paper-based transferable document or instrument, that requirement is met with respect to an electronic transferable record through the transfer of control over the electronic transferable record."

Remarks

19. Draft article 17 reflects the Working Group's deliberations at its forty-eighth (A/CN.9/797, para. 83), forty-ninth (A/CN.9/804, paras. 51-62 and 63-67), fiftieth (A/CN.9/828, paras. 50-56) and fifty-first (A/CN.9/834, paras. 34 and 35 and 91-94) sessions. It sets forth control of an electronic transferable record as the functional equivalent of possession of a paper-based transferable document or instrument.

20. The words "or provides consequences for the absence of possession" in draft paragraph 1 and "or provides consequences for the absence of transfer of possession" in draft paragraph 2 have been deleted pursuant to a decision of the Working Group at its fifty-first session (A/CN.9/834, para. 46).

21. With regard to draft paragraph 1(a), it was explained that reference to the person in control of the electronic transferable record does not imply that that person is also the rightful person in control of that record as this is for substantive law to determine (A/CN.9/828, para. 61) and that reference to the person in control does not exclude the possibility of having more than one person in control (A/CN.9/828, para. 63).

22. With respect to "identify", the Working Group may wish to note that the electronic transferable record in itself does not necessarily identify the person in control, but rather the method or system employed to establish control as a whole performs that function (A/CN.9/828, para. 63). Moreover, identification should not be understood as implying an obligation to name the person in control, as the draft Model Law allows for the issuance of electronic transferable records to bearer, which implies anonymity (A/CN.9/828, para. 51). However, anonymity for commercial law purposes may not preclude the possibility of identifying the person in control for other purposes, such as law enforcement.

23. With respect to "establish", the Working Group may wish to consider whether that word has substantive law implications.

24. Draft paragraph 2 sets forth that transfer of control over an electronic transferable record is the functional equivalent of delivery, i.e. transfer of possession, of a paper-based transferable document or instrument (A/CN.9/834, paras. 31-33).

25. The Working Group may also wish to consider whether "Control" would be an appropriate title for draft article 17 in light of its content.

26. The Working Group may also wish to consider whether draft article 17 should be placed consecutively after draft article 10 (A/CN.9/834, para. 92).

27. The Working Group may wish to clarify the relationship between draft article 17 and draft article 11, which contains a general reliability standard.

28. The Working Group may wish to refer to the draft definition of "control" in draft article 3 when considering draft article 17 (A/CN.9/828, para. 66 and A/CN.9/834, para. 83).

"**Draft article 18. Presentation**

"Where the law requires a person to present [for performance or acceptance] a paper-based transferable document or instrument, that requirement is met with respect to an electronic transferable record by the transfer of an electronic transferable record to the obligor, with endorsement if required[, for performance or acceptance]."

Remarks

29. Draft article 18 reflects the Working Group's deliberations at its fiftieth session (A/CN.9/828, para. 73). The words "or provides consequences for non-presentation" have been deleted pursuant to a decision of the Working Group at its fifty-first session (A/CN.9/834, para. 46).

30. Draft article 18 was intended to provide both for presentation and for surrender of a paper-based transferable document or instrument for its performance (A/CN.9/WG.IV/WP.124/Add.1, para. 12). However, presentation is not limited to requests for performance, but may extend to acceptance (see paragraph 33 below). Moreover, transfer of a paper-based transferable document or instrument may not be required for presentation, as the person in control requires performance or demands acceptance upon demonstration of its control of the paper-based transferable document or instrument, but does not transfer that document or instrument (see, for instance, article 24 of the Convention Providing a Uniform Law For Bills of Exchange and Promissory Notes, 1930).

31. In light of the above, the Working Group may wish to consider the following text of draft article 18:

"Where the law requires a person to present [for performance or acceptance] a paper-based transferable document or instrument, that requirement is met with respect to an electronic transferable record if a reliable method is used to present the electronic transferable record."

32. In that respect, the Working Group may wish to note that in existing electronic systems presentation of an electronic transferable record on a due date may be automatic, which is not possible in a paper-based environment.

33. The Working Group may wish to consider whether the words "for performance or acceptance" should be retained in light of the fact that under substantive law presentation could refer to a number of purposes, such as presentation of a bill of exchange for acceptance (A/CN.9/804, para. 78).

34. With regard to surrender of the electronic transferable record, the Working Group may wish to consider that the design of the system for electronic transferable records management may not require the transfer of control of an electronic transferable record to the obligor upon performance, especially in case of third-party registries. In that case, the registry operator may terminate and archive the electronic transferable record directly, upon confirmation of performance. In that regard, the Working Group may also wish to note its decision to delete a draft article on termination of electronic transferable records (A/CN.9/834, para. 68).

"**Draft article 19. Endorsement**

"Where the law requires or permits the endorsement in any form of a paper-based transferable document or instrument, that requirement is met with respect to an electronic transferable record if information [relating to the endorsement] [constituting endorsement] [indicating the intention to endorse] is [logically associated or otherwise linked to] [included in] that electronic transferable record and that information is compliant with the requirements set forth in articles 8 and 9."

Remarks

35. Draft article 19 reflects the Working Group's deliberations at its fiftieth session (A/CN.9/828, para. 80). The words "or provides consequences for the absence of endorsement" have been deleted pursuant to a decision of the Working Group at its fifty-first session (A/CN.9/834, para. 46).

36. The Working Group may wish to consider the substitution of the words "relating to the endorsement" with the words "indicating the intention to endorse" to better specify that the satisfaction of the generic requirements for writing and signature set forth in articles 8 and 9 should be accompanied by the expression of the intent to endorse. Another drafting option may use the words "constituting endorsement".

37. The Working Group may wish to further consider the use of the words "logically associated with or otherwise linked to" and "included in" in light of the considerations expressed at its fiftieth session (A/CN.9/828, paras. 78 and 80) as well as of the definition of "electronic record" in draft article 3, and with a view to providing guidance on their uniform use throughout the Model Law.

"**Draft article 20. Amendment**

"Where the law requires or permits the amendment of a paper-based transferable document or instrument, that requirement is met with respect to an electronic transferable record if a reliable method is employed for amendment of information in the electronic transferable record whereby the amended information is reflected in the electronic transferable record and is readily identifiable as such."

Remarks

38. Draft article 20 has been recast in light of the suggestions received at the Working Group's fiftieth session (A/CN.9/828, paras. 86 and 90). It aims at providing a functional equivalence rule for instances in which an electronic transferable record may be amended. The words "or provides consequences for the absence of an amendment" have been deleted pursuant to a decision of the Working Group at its fifty-first session (A/CN.9/834, para. 46).

39. Based on the consideration that readily identifiable amended information is necessarily reflected in the electronic transferable record, the Working Group may wish to consider whether the second part of draft article 20 may be drafted along the following lines:

"[…] if a reliable method is employed for amendment of information in the electronic transferable record so that the amended information is readily identifiable as such."

40. The word "readily" aims at introducing a stringent standard ensuring that users may easily distinguish amendments (A/CN.9/828, para. 88). This standard relates to the fact that amendments in a paper-based environments may be easy to identify due to the nature of that medium, while that may not be the case in an electronic environment. In that respect, the Working Group may wish to clarify that the draft article does not intend to introduce a new information requirement, which might contradict draft article 15.

"**Draft article 21. Reissuance**

"Where the law permits the reissuance of a paper-based transferable document or instrument, an electronic transferable record may be reissued."

Remarks

41. Draft article 21 reflects the Working Groups deliberations at its forty-eighth (A/CN.9/797, para. 104) and fiftieth (A/CN.9/828, para. 93) sessions. It indicates that, similar to paper-based transferable documents or instruments, electronic transferable records may be reissued where substantive law so permits, such as in case of loss or destruction of the original.

42. The Working Group may wish to consider whether draft article 21 should be retained due to its declaratory value, or it should be deleted as the possibility of reissuing an electronic transferable record is already available under draft article 1, paragraph 2.

"**Draft article 22. [Change of medium] [Replacement of a paper-based transferable document or instrument with an electronic transferable record]**

"1. A change of medium of a paper-based transferable document or instrument to an electronic transferable record may be performed if a method that is as reliable as appropriate for the purpose of the change of medium is used.

2. For the change of medium to take effect, the following requirements shall be met:

(a) The electronic transferable record shall include all the information contained in the paper-based transferable document or instrument; and

(b) A statement indicating a change of medium shall be inserted in the electronic transferable record.

3. Upon issuance of the electronic transferable record in accordance with paragraph 2, the paper-based transferable document or instrument ceases to have any effect or validity.

4. A change of medium in accordance with paragraphs 1 and 2 does not affect the rights and obligations of the parties."

Remarks

43. Draft article 22 has a substantive nature due to the fact that substantive law is unlikely to contain a rule on change of medium. It aims at satisfying two main goals, i.e., enabling change of medium without loss of information and ensuring that the replaced document or record would not further circulate (A/CN.9/828, para. 95).

44. Draft article 22 reflects the suggestions made at the Working Group's forty-eighth (A/CN.9/797, paras. 102-103), fiftieth (A/CN.9/828, para. 102) and fifty-first (A/CN.9/834, paras. 57-64) sessions. By omitting the reference to substantive legal notions such as "issuer", "obligor", "holder" and "the person in control", this approach aims at accommodating the variety of schemes used in the various paper-based transferable documents or instruments. Consequently, and in light also of the need to consent to the use of electronic means set forth in draft article 13, draft article 22 does not contain any reference to consent. Substantive law, including parties' agreement, would identify those parties whose consent is relevant for change of medium (A/CN.9/834, paras. 62).

45. The Working Group may wish to consider the following draft of paragraph 1, provided for editorial purposes only:

"An electronic transferable record may replace a paper-based transferable document or instrument if a method that is as reliable as appropriate for the purpose of the change of medium is used."

46. The requirements set forth in paragraph 2 (a) and (b) are concurrent. The legal consequence for non-compliance with any of them would be the invalidity of the change of medium (A/CN.9/834, para. 58).

47. Draft paragraph 3 sets forth that, when the change of medium has taken place, the paper-based transferable document or instrument ceases to have any effect or validity. This is necessary to avoid multiplicity of claims for performance.

48. Draft paragraph 4 is intended to clarify as a statement of law that the rights and obligations of the parties are not affected by the change of medium (A/CN.9/834, para. 61).

"**Draft article 23. [Replacement of an electronic transferable record with a paper-based transferable document or instrument]**

"1. A change of medium of an electronic transferable record to a paper-based transferable document or instrument may be performed if a method that is as reliable as appropriate for the purpose of the change of medium is used.

2. For the change of medium to take effect, the following requirements shall be met:

(a) The paper-based transferable document or instrument shall include all the information contained in the electronic transferable record; and

(b) A statement indicating a change of medium shall be inserted in the paper-based transferable document or instrument.

3. Upon issuance of the paper-based transferable document or instrument in accordance with paragraph 2, the electronic transferable record ceases to have any effect or validity.

4. A change of medium in accordance with paragraphs 1 and 2 does not affect the rights and obligations of the parties."

Remarks

49. Draft article 23 provides for the case of replacement of an electronic transferable record with a paper-based transferable document or instrument. Its content mirrors that of draft article 22 (A/CN.9/834, paras. 64). A survey of business practice indicates that such replacement is the more frequent case due to the fact that a party whose involvement was not envisaged at the time of the creation of the electronic transferable record does not wish or is not in a position to use electronic means.

50. Under certain national laws, the paper-based print-out of an electronic record may fall under the definition of electronic record. However, under draft article 23, a print-out of an electronic transferable record that does not meet the requirements of that draft article would have no effect as a paper-based transferable document or instrument replacing the corresponding electronic transferable record.

51. The Working Group may wish to consider the following draft of paragraph 1, provided for editorial purposes only:

"A paper-based transferable document or instrument may replace an electronic transferable record if a method that is as reliable as appropriate for the purpose of the change of medium is used."

"**Draft article 24. Division and consolidation of an electronic transferable record**

"1. [Where the law permits the division or consolidation of a paper-based transferable document or instrument, an electronic transferable record may be divided or consolidated if:

(a) A reliable method is used to divide or consolidate the electronic transferable record[; and

(b) The divided or consolidated electronic transferable record contains a statement identifying it as such].]

"2. [Upon division or consolidation, the pre-existing divided or consolidated electronic transferable records cease to have any effect or validity]."

Remarks

52. In light of the suggestions made at the Working Group's fiftieth session, draft article 24 has been recast as a more generic functional equivalence rule including certain elements of the previous draft article (A/CN.9/828, para. 104).

53. The Working Group may wish to consider whether draft paragraph 1 should be retained for declaratory purposes, or whether draft article 1, paragraph 2 might suffice to enable division and consolidation of electronic transferable records.

54. The Working Group may also wish to consider whether draft paragraph 1(b) introduces a substantive rule and, in that case, whether it is justified in light of the use of electronic means.

55. The Working Group may further wish to consider whether to retain draft paragraph 2, which introduces a substantive rule that may not be compatible with the law and practice of securitization. Alternatively, the Working Group may wish to clarify that substantive law shall determine the effect or validity of electronic transferable records after division or consolidation.

56. In considering the standards for assessing the reliability of the method used for division and consolidation of electronic transferable records, the Working Group may wish to refer to draft article 11, on a general reliability standard, and related considerations (A/CN.9/WG.IV/WP.132, paras. 65-77).

"**Third-party service providers**"

Remarks

57. The Working Group may wish to note that, pursuant to a decision at its fifty-first session (A/CN.9/834, para. 78), the subject of third-party service providers as set out in A/CN.9/WG.IV/WP.132/Add.1, paras. 75-78 would be addressed in explanatory materials or a guidance document.

D. Cross-border recognition of electronic transferable records (Article 25)

"**Draft article 25. Non-discrimination of foreign electronic transferable records**

"1. An electronic transferable record shall not be denied legal effect, validity or enforceability on the sole ground that it was issued or used [in a foreign State] [abroad] [outside [the enacting jurisdiction]] [, or that its issuance or use involved the services of a third party based, in part or wholly, [in a foreign State] [abroad] [outside [the enacting jurisdiction]]] [, if it offers a substantially equivalent level of reliability].

"2. Nothing in this Law affects the application of rules of private international law governing a paper-based transferable document or instrument to electronic transferable records."

Remarks

58. 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.[1] The Working Group also reiterated the importance of cross-border legal recognition of electronic transferable records (A/CN.9/761, paras. 87-89).

59. Draft article 25 aims at eliminating obstacles to cross-border recognition of an electronic transferable record arising exclusively from its electronic nature. The words "in a foreign State", "abroad" and "outside [the enacting jurisdiction]" are alternatives on how to refer to the foreign jurisdiction provided for the Working Group's consideration.

60. The Working Group may wish to clarify if under draft article 25 an electronic transferable record issued in a jurisdiction that does not permit the issuance and use of electronic transferable records, but otherwise compliant with substantive law requirements of that jurisdiction, could be recognized in another jurisdiction enacting draft article 25.

61. The Working Group may wish to consider whether a requirement of substantially equivalent level of reliability should be introduced in the draft provisions. The words ", if it offers a substantially equivalent level of reliability" are inspired by article 12, paragraph 3, of the UNCITRAL Model Law on Electronic Signatures.

62. Alternatively, the Working Group may wish to clarify that draft article 25 aims only at preventing the place of origin of the electronic transferable record from being a reason in itself to deny legal validity or effect to an electronic transferable record. However, in order to achieve legal validity or effect in a certain jurisdiction, an electronic transferable record

[1] *Official Records of the General Assembly, Sixty-seventh Session, Supplement No. 17* (A/67/17), para. 83.

of foreign origin would have to comply with the substantive law requirements of that jurisdiction.

63. Paragraph 2 reflects the Working Group's understanding that the draft Model Law should not displace existing private international law applicable to paper-based transferable documents or instruments (A/CN.9/768, para. 111).

C. Report of the Working Group on Electronic Commerce on the work of its fifty-third session (New York, 9-13 May 2016)

(A/CN.9/869)

[Original: English]

Contents

I. Introduction

1. At its forty-fourth session, in 2011, the Commission mandated Working Group IV 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 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).

3. At its forty-fifth session, in 2012, 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.[2]

4. At its forty-sixth session (Vienna, 29 October-2 November 2012), the Working Group continued its examination of the various legal issues that arose during the life cycle of electronic transferable records (A/CN.9/761, paras. 24-89). At its forty-seventh session (New York, 13-17 May 2013), the Working Group had the first opportunity to consider the draft provisions on electronic transferable records. It was reaffirmed that the draft provisions should be guided by the principles of functional equivalence and technology neutrality, and should not deal with matters governed by the underlying substantive law (A/CN.9/768, para. 14).

5. At its forty-sixth session, in 2013, the Commission reaffirmed the mandate of the Working Group and agreed that work towards developing a legislative text in the field of electronic transferable records should continue.[3]

6. At its forty-eighth session (Vienna, 9-13 December 2013), the Working Group continued its work on the preparation of draft provisions on electronic transferable records. The Working Group also took into consideration legal issues related to the use of electronic transferable records in relationship with 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) (A/CN.9/797, paras. 109-112). At its forty-ninth session (New York, 28 April-2 May 2014), the Working Group continued its work on the preparation of draft provisions as presented in document A/CN.9/WG.IV/WP.128 and Add.1.

7. At its forty-seventh session, in 2014, the Commission reaffirmed the mandate of the Working Group to develop a legislative text on electronic transferable records that would greatly assist in facilitating electronic commerce in international trade.[4]

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[1] *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17* (A/66/17), para. 238.

[2] Ibid., *Sixty-seventh Session, Supplement No. 17* (A/67/17), para. 90.

[3] Ibid., *Sixty-eighth Session, Supplement No. 17* (A/68/17), paras. 230 and 313.

[4] Ibid., *Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 149.

8. At its fiftieth session (Vienna, 10-14 November 2014), the Working Group continued its work on the preparation of draft provisions as presented in document A/CN.9/WG.IV/WP.130 and Add.1. Subject to a final decision to be made by the Commission, the Working Group agreed to proceed with the preparation of a draft model law on electronic transferable records (A/CN.9/828, para. 23). At its fifty-first session (New York, 18-22 May 2015), the Working Group continued its work on the preparation of draft provisions as presented in document A/CN.9/WG.IV/WP.132 and Add.1.

9. At its forty-eighth session, in 2015, the Commission encouraged the Working Group to finalize the current work in order to submit its results at the Commission's forty-ninth session bearing in mind that an UNCITRAL model law on electronic transferable records would be accompanied by explanatory materials.[5]

10. At its fifty-second session (Vienna, 9-13 November 2015), the Working Group continued its work on the preparation of draft provisions as presented in document A/CN.9/WG.IV/WP.135 and Add.1. The Working Group proceeded with its deliberations of the notions of electronic transferable records and of control as functional equivalent of possession as well as of a general reliability standard.

II. Organization of the session

11. The Working Group, composed of all States members of the Commission, held its fifty-third session in New York from 9 to 13 May 2016. The session was attended by representatives of the following States members of the Working Group: Armenia, Belarus, Brazil, China, Colombia, Côte d'Ivoire, Czech Republic, Ecuador, El Salvador, France, Germany, Honduras, India, Indonesia, Italy, Japan, Kenya, Kuwait, Namibia, Nigeria, Pakistan, Panama, Republic of Korea, Russian Federation, Singapore, Spain, Thailand, Turkey, Uganda, United States of America and Venezuela (Bolivarian Republic of).

12. The session was also attended by observers from the following States: Belgium, Iraq, Peru, Qatar, Senegal, Sudan, Sweden, Syrian Arab Republic, Tunisia and United Republic of Tanzania.

13. The session was also attended by observers from the Holy See and the European Union.

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

(a) *United Nations system*: World Bank;

(b) *Intergovernmental organizations*: Caribbean Court of Justice (CCJ), Organisation Maritime de l'Afrique de L'Ouest et du Centre (OMAOC);

(c) *International non-governmental organizations*: American Bar Association (ABA), CISG Advisory Council, European Law Students' Association (ELSA), International Federation of Freight Forwarders Associations (FIATA), International Technology Law Association (ITECHLAW) and Law Association for Asia and the Pacific (LAWASIA).

15. The Working Group elected the following officers:

Chairperson: Ms. Giusella Dolores FINOCCHIARO (Italy)

Rapporteur: Ms. Omotunde M. OKE (Nigeria)

16. The Working Group had before it the following documents: (a) Annotated provisional agenda (A/CN.9/WG.IV/WP.136); and (b) A note by the Secretariat entitled "Draft Model Law on Electronic Transferable Records" (A/CN.9/WG.IV/WP.137 and Add.1).

17. The Working Group adopted the following agenda:

1. Opening of the session.

[5] Ibid., *Seventieth Session, Supplement No. 17* (A/70/17), para. 231.

2. Election of officers.
3. Adoption of the agenda.
4. Consideration of the draft Model Law on Electronic Transferable Records.
5. Technical assistance and coordination.
6. Other business.
7. Adoption of the report.

III. Deliberations and decisions

18. The Working Group engaged in discussions on the draft Model Law on Electronic Transferable Records on the basis of documents A/CN.9/WG.IV/WP.137 and Add.1. The deliberations and decisions of the Working Group are reflected in chapter IV below. The Secretariat was requested to revise the draft provisions to reflect those deliberations and decisions.

IV. Draft Model Law on Electronic Transferable Records

Draft article 1. Scope of application

Paragraphs 3 and 4

19. It was recalled that paragraph 3 had been included in draft article 1 to clarify that certain documents that might be considered transferable in some jurisdictions did not fall under the scope of the Model Law. It was added that the list of excluded documents was open-ended to provide desired flexibility to enacting States, since there was no uniformity in national legislation with regard to defining documents or instruments as transferable.

20. It was recalled that, at its fifty-second session, the Working Group agreed that States parties to the Convention Providing a Uniform Law for Bills of Exchange and Promissory Notes (Geneva, 1930) and the Convention Providing a Uniform Law for Cheques (Geneva, 1931) (the "Geneva Conventions") could exclude under paragraph 3 the documents or instruments falling under the scope of the Geneva Conventions from the scope of application of the Model Law, thus avoiding potential conflicts between the Geneva Conventions and the Model Law (A/CN.9/863, paras. 21 and 22).

21. It was suggested to delete paragraph 4, since the open-ended exclusion list in paragraph 3 was viewed as sufficient to cover the issue addressed in paragraph 4. In response, it was said that the two paragraphs were different in scope, as paragraph 3 excluded documents or instruments that could not be issued in electronic form, while paragraph 4 dealt with the exclusion of electronic transferable records existing in a purely electronic environment.

22. It was explained that paragraph 4 aimed at allowing the application of the Model Law to electronic transferable records that existed only in an electronic environment on a residual basis as in case of conflict the Model Law would not prevail over the law applicable to electronic transferable records that existed only in an electronic environment. However, concerns were expressed on the desirability of extending general principles contained in the Model Law to laws of a different nature.

23. After discussion, the Working Group agreed that paragraph 4 should be deleted and that paragraph 3 should, in addition to the current text, contain a reference to documents and instruments falling under the scope of the Geneva Conventions in square brackets as well as a reference to the law governing electronic transferable records only existing in electronic form, also in square brackets.

Draft article 2. Definitions

"electronic transferable record"

24. The Working Group referred to its conclusion that certain documents or instruments, which were generally transferable, but whose transferability was limited due to other agreements, such as straight bills of lading, would not fall under the definition of "transferable document or instrument" and that the Model Law would therefore not apply to those documents or instruments (A/CN.9/797, paras. 27 and 28). The Working Group clarified that that statement should not be interpreted as preventing the issuance of those documents or instruments in an electronic system designed to handle electronic transferable records since that prohibition was likely to result in unnecessary multiplication of systems and increase of costs.

25. In light of the information requirements contained in draft article 9, the Working Group after discussion agreed that the definition of "electronic transferable record" should read: "'electronic transferable record' is an electronic record that complies with the requirements of article 9". The view was expressed that that definition should be reviewed upon completion of the consideration of all articles of the Model Law to evaluate its appropriateness for each instance where the defined term was used.

"transferable document or instrument"

26. A reference was made to article 965 of the Swiss Code of Obligations as a possible alternative source of inspiration for the definition of "transferable document or instrument".

27. The Working Group agreed to retain the definition with editorial modifications, so that it would read "'transferable document or instrument' means a document or instrument issued on paper that entitles the holder to claim the performance of the obligation indicated in the document or instrument and to transfer the right to performance of the obligation indicated in the document or instrument through the transfer of that document or instrument".

Draft article 3. Interpretation

28. It was noted that the principle of "good faith" was a general principle of international trade law contained in a number of UNCITRAL texts, including those on electronic commerce. It was added that the principle of "good faith" was not related to interpretation.

29. In response, it was indicated that the principle of good faith had a specific meaning with respect to transferable documents or instruments, which was distinct from the general principle of good faith in international trade law. It was added that, while other UNCITRAL texts on electronic commerce focused on contracts, the Model Law on Electronic Transferable Records focused on documents or instruments. For those reasons, it was suggested that reference to a principle of "good faith" in the Model Law was not appropriate.

30. After discussion, the Working Group agreed to delete the words "and the observance of good faith" in paragraph 1. It was understood that the principle of good faith as a general principle of international law could be included in the general principles on which the draft Model Law was based under paragraph 2.

General principles

31. The Working Group agreed that the general principles underlying the Model Law would be discussed at a future session.

Draft article 4. Party autonomy [and privity of contract]

Paragraph 1

32. Different views were expressed with respect to the content and purpose of draft article 4, paragraph 1.

33. It was indicated that party autonomy was a general principle of international trade law and that limiting party autonomy could hinder technological innovation and the development of new business practices. It was added that the implementation of the Model Law required a high level of flexibility, which had to be achieved through party autonomy.

34. In response, it was noted that party autonomy in other UNCITRAL texts, including those on electronic commerce, referred to derogations with respect to contracts, and that those derogations concerned only parties to those contracts, while derogations under the Model Law could have an impact also on third parties. It was added that mandatory provisions contained in substantive law applicable to transferable documents or instruments should apply also to electronic transferable records, and that it should not be possible to avoid application of those mandatory provisions by means of party autonomy.

35. In that line, it was indicated that an analysis of each provision of the Model Law was necessary in order to ascertain which ones could be derogated from or varied. It was said that draft article 12 was possibly one of those provisions. It was noted that draft article 10, paragraph 2, made reference to agreement as one circumstance relevant to assess reliability. It was added that draft article 13 was not relevant for that analysis, as it dealt with consent to the use of electronic transferable records, which was by definition voluntary.

36. The Working Group considered different drafting options.

37. It was suggested to identify the provisions that could be derogated from or varied in draft article 4, paragraph 1. The view was also expressed that the list of those provisions should be left blank so that each enacting jurisdiction could identify the relevant provisions, which could differ in the various jurisdictions.

38. Another suggestion was the deletion of draft article 4, paragraph 1 and the insertion of the words "Unless the parties agree otherwise" at the beginning of each non-mandatory provision.

39. Yet another suggestion referred to recasting draft article 4, paragraph 1, along the following lines: "The parties may derogate from or vary by agreement the provisions of this Law, unless that agreement would not be valid or effective under applicable law or would affect the rights of any person that is not a party to that agreement." It was explained that that suggestion was inspired by article 4 of the UNCITRAL Model Law on Electronic Commerce that limited party autonomy to contractual matters in a manner that did not affect third parties (see Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce (1996), paras. 44 and 45).

40. It was indicated that the identification of provisions of law of mandatory nature differed from jurisdiction to jurisdiction. Therefore, it was said that the text of draft article 4, paragraph 1 as contained in A/CN.9/WG.IV/WP.137, paragraph 35 should contain an open-ended list of provisions, so as to give flexibility to States.

41. The suggestion was also made to draft the provision so as to indicate that all articles of the Model Law were of mandatory application. Yet another view was that the Model Law should not be interpreted as allowing derogation of mandatory substantive law and, to that end, the alternative draft contained in paragraph 39 above was preferable.

42. After discussion, the Working Group agreed on the following draft of paragraph 1:

"The parties may derogate from or vary by agreement [provisions of this Law]."

43. The Working Group also agreed that explanatory materials would explain that the purpose of that paragraph was to enable States to identify which provisions could be derogated from.

Paragraph 2

44. The Working Group deferred the consideration of paragraph 2 to a future session.

Draft article 5. Information requirements

45. It was explained that draft article 5 referred to information relating to a person, while draft articles 15 and 16 referred to information contained in the electronic transferable record. It was further explained that the information requirements referred to in draft article 5 were contained in law other than the Model Law, such as regulatory requirements to prevent money-laundering. It was added that the obligation to comply with those information requirements would in any case arise under draft article 1, paragraph 2, and that draft article 5 contained a useful reminder.

46. The concern was raised that the reference to "other information" could be too broad and possibly conflict with draft article 15. In response, it was said that other law would specifically identify the required information, but that those requirements could change in light of their purpose and of available means, among others, and that therefore a certain level of flexibility in referring to them was desirable.

47. After discussion, the Working Group decided to retain draft article 5 unchanged.

Draft article 8. Signature

48. The Working Group considered the drafting options contained in draft article 8. It was indicated that the provision was meant to apply only to electronic transferable records and not to electronic records that were not transferable, though used in connection with electronic transferable records. For that reason, it was added, the use of the word "by" was preferable.

49. After discussion, the Working Group decided to retain the word "by" outside square brackets and to delete the words "[with respect to]" and "[in relation to]".

Draft article 9. [Electronic transferable record]

Paragraph 1

"equivalent"

50. The view was expressed that the word "equivalent" was necessary to clarify that an electronic transferable record required the same information contained in the transferable document or instrument of the same type. The words "corresponding" or "as having the same purpose" were suggested as alternative drafts. In response, it was indicated that the use of a qualifier was not necessary in view of the purpose of draft article 9 to provide a rule on functional equivalence. It was added that an electronic transferable record would necessarily contain the information identifying it as the functional equivalent of a transferable document or instrument, and that insertion of a further qualifier such as "equivalent" could create uncertainty.

51. After discussion, the Working Group agreed that an electronic transferable record should contain the same information as the transferable document or instrument of the same type. On the basis of that understanding, the Working Group agreed to delete the word "equivalent".

"authoritative"

52. It was recalled that paragraph 1 set forth the requirements for the functional equivalence between an electronic transferable record and a transferable document or instrument by combining the "control" and the "singularity" approaches (A/CN.9/834, para. 86). It was added that the word "authoritative" was necessary to identify the operative record that was transferable under the singularity approach, which was precisely the function pursued with subparagraph 1(b)(i). It was noted that the use of the word "authoritative" in domestic legislation did not seem to pose particular interpretative challenges. The use of the word "definitive" was suggested as an alternative draft.

53. In response, it was indicated that, while it was correct that draft article 9 was based on both the "control" and the "singularity" approaches, the purpose of the provision was to identify the electronic transferable record as opposed to other electronic records that were not transferable, and that that alone could suffice to express the singularity approach. It was added that the word "authoritative" created significant interpretative challenges, especially in certain languages. It was therefore suggested that all bracketed text in subparagraph 1(b)(i) should be deleted. In turn, it was indicated that, at least in certain languages, the resulting text did not provide sufficient clarity and actually introduced a circular argument.

54. After discussion, the Working Group confirmed that paragraph 1 was based on the singularity and the control approaches and that it was necessary to appropriately reflect both approaches in the draft provision. The Working Group also took note of the fact that drafting

challenges to reflecting accurately the singularity approach in subparagraph 1(b)(i) remained.

55. It was suggested that the word "only" should replace the word "authoritative" in order to adequately address linguistic challenges arising from the use of the word "the" to identify the electronic transferable record. However, the view was expressed that the word "only" was not acceptable since it implied the notion of "uniqueness" that the Working Group had, after extensive discussions, decided to abandon in favour of the concept of singularity. In response, the view was expressed that the word "only" merely referred to the concept that the electronic record would be identified as the operative electronic transferable record and was not to be understood as referring to the notion of uniqueness.

56. The Working Group recalled its agreement that draft article 9 was meant to combine the singularity and the control approaches (A/CN.9/834, para. 86). The Working Group recalled its previous discussions and deliberations on the notion of "uniqueness" (A/CN.9/804, paras. 38, 71 and 74; see also A/CN.9/834, paras. 22-26 and 86). It was also reiterated that the notion of "singularity" related to the reliable identification of the electronic transferable record that allowed requesting performance of the obligation indicated in it, so that multiple claims of the same obligation would be avoided.

57. Different alternatives were suggested to replace the word "authoritative" and overcome linguistic and interpretative challenges. Suggested words included: "definitive", "reliable", "primary", "necessary" and "required".

58. The Working Group confirmed its agreement that draft article 9 was meant to combine the singularity and the control approaches (A/CN.9/834, para. 86). It also confirmed that the word "the" in the English, French and Spanish languages was intended as a qualifier referring to the singularity approach.

59. Different proposals were made with respect to the text of draft article 9, paragraph 1(b)(i). Concerns were expressed that the word "only" could be interpreted as referring to the notion of uniqueness, which, as the Working Group had repeatedly indicated, was not relevant for the purposes of the Model Law. In response, it was said that the word "only" did not imply uniqueness, as it was precisely because more than one electronic record containing the information could exist, that there was a need to use the word "only". The Working Group decided not to use the word "only".

60. After discussion, the Working Group requested the Secretariat to identify adequate translations in all official languages for the words "to identify that electronic record as the electronic transferable record" which the Working Group had agreed upon in the English, French and Spanish languages.

Paragraph 2

"authorized"

61. It was indicated that paragraph 2 related to system integrity and that therefore that provision should refer to authorized changes, i.e. changes allowed by the system, but should not refer to legitimate changes, which presupposed a legal assessment. It was explained that an unauthorized change, for instance performed by a hacker, would necessarily compromise the integrity of the electronic transferable record.

62. After discussion, the Working Group agreed to retain the word "authorized" in paragraph 2.

Integrity

63. It was noted that the notion of integrity had been considered as an absolute one (A/CN.9/863, para. 42). In that respect, it was explained that the notion of integrity referred to a fact and, as such, was absolute or objective, i.e. either an electronic transferable record retained integrity or not. However, it was added, the reference to the reliable method used to retain integrity was relative or subjective, and the assessment of that method was subject to the general reliability standard contained in draft article 10.

64. The question was asked whether the reference to a reliable method contained in subparagraph (1)(b)(ii) was appropriate. In response, it was confirmed that that reference

was appropriate and that it referred to the reliability of the system used to render the electronic record capable of being subject to control.

65. It was noted that the last sentence of paragraph 2 was redundant since it repeated in part draft article 10(1)(a), a general provision on the assessment of the reliability standard applicable also to draft article 9.

66. After discussion, the Working Group agreed to retain subparagraph 1(b)(ii) without amendments and to delete the last sentence of paragraph 2.

Draft article 9 and electronic transferable records existing only in electronic form

67. It was asked whether an electronic transferable record existing only in electronic form could satisfy the requirements of draft article 9 and, thus, could fall under the definition of electronic transferable record contained in draft article 2. In response, it was said that, while an electronic transferable record existing only in electronic form could satisfy the requirements of draft article 9, paragraph 1(b), that record would need to define autonomously the information requirements and therefore would not satisfy the requirements of draft article 9, paragraph 1(a). It was added that, if an electronic transferable record did not define autonomously the information requirements, it would be functionally equivalent of the transferable document or instrument whose information requirements it satisfied, and therefore it would not be an electronic transferable record existing only in electronic form.

Title

68. Several suggestions were made with respect to the title of draft article 9. After discussion, the Working Group agreed on "transferable document or instrument" as an appropriate title, since it was in line with the drafting style used for other articles providing for a functional equivalent in the draft Model Law.

Draft article 10. General reliability standard

Subparagraph 1(a)

69. The Working Group agreed to replace the word "quality" with the word "security" in subparagraph 1(a)(iv) since quality did not lend itself easily to an objective assessment. It was added that the notion of security was more directly relevant for assessing the reliability of the method.

70. A suggestion was made to add a reference to "state of the art" in subparagraph 1(a)(vii) since it was a well-known term commonly referred to in commercial practice, but the Working Group decided not to do so.

Subparagraph 1(b)

71. It was suggested that the words "agreed to" should be deleted as the provision did not relate only to functions that had been agreed upon contractually. It was also suggested that the words "for which the method has been used" should replace the words "agreed to" to better clarify the scope of the provision. It was noted that that suggestion would further align subparagraph 1(b) with article 9, subparagraph 3(b)(ii) of the United Nations Convention on the Use of Electronic Communications in International Contracts (New York, 2005).

72. Another suggestion was that the word "necessary" should be included before the word "functions" and the words "elements of facts" should replace the word "evidence", but the Working Group decided not to do so.

73. After discussion, the Working Group agreed that the words "agreed to" should be deleted.

Paragraph 2

74. Different views were expressed with respect to paragraph 2.

75. It was indicated that the parties should not be allowed to derogate from the requirements set forth in draft article 10 for assessing the reliability of an electronic

transferable record. It was explained that admitting that contractual derogation would amount to introducing different standards for the assessment of reliability whose application would depend on the parties involved, and that that could result in inconsistent findings in respect of the validity of the electronic transferable record, and therefore affect third parties. It was added that party autonomy should be limited to allocation of liability under the limits set forth in applicable law (see also A/CN.9/863, para. 75). For those reasons, it was suggested that paragraph 2 should be deleted.

76. Another view was that paragraph 2 did not refer to the possibility for the parties to contractually agree on the validity of the electronic transferable record, but to agree on risk allocation. It was explained that, since agreement on risk allocation was possible under draft article 4, paragraph 2 was redundant and should be deleted. It was added that the assessment of the reliability of the electronic transferable record under a legislative objective standard and the allocation of risks among parties under an agreed subjective standard were actually complementary.

77. A third view was that paragraph 2 fulfilled a useful function by explicitly recognizing the importance of contractual agreements, especially when applicable to closed systems or reflecting industry standards. Thus, the provision supported technological innovation and the allocation of related risks. It was indicated that any party agreement on the level of reliability would not affect third parties. One proposal was that the reference to contractual agreements should be listed as one of the relevant circumstances under subparagraph 1(a).

78. After discussion, the Working Group agreed that the draft Model Law did not prevent parties from contractually allocating some liability. The Working Group agreed to delete paragraph 2.

Draft article 11. Indication of time and place in electronic transferable records

79. It was indicated that draft article 11 did not fulfil any useful function as it was not a functional equivalence rule and that it should be replaced by a provision offering actual guidance on the determination of time and place, possibly drafted following the approach adopted in article 10 of the Electronic Communications Convention.

80. In response, it was said that significant legal consequences were attached to the notions of time and place in the life-cycle of transferable documents and instruments. Hence, it was added, draft article 11 offered a useful reminder of the importance of indicating that information in electronic transferable records.

81. It was added that the reference to the use of a reliable method in indicating time pointed at the desirability of using trust services such as trusted time-stamping in the management of electronic transferable records.

82. After discussion, the Working Group agreed that draft article 11 should be retained with the square brackets deleted.

Draft article 12. [Location of parties] [Determination of place of business]

83. It was said that draft article 12 offered elements useful with respect to contractual exchanges, but not relevant with regard to electronic transferable records. In response, it was noted that the determination of place of business was relevant, in particular, for the cross-border use of electronic transferable records. It was explained that important legal consequences, such as determination of scope of application and of jurisdiction, were attached to the place of business.

84. It was indicated that parties would often agree on matters related to the place of business, but that the law could limit party autonomy in that respect. It was further indicated that a set of suppletive rules on the determination of the place of business could usefully complement parties' agreements.

85. It was noted that draft article 12 offered guidance only on elements not to be taken solely into consideration in order to ascertain the determination of the place of business. It was suggested to recast draft article 12 so that it would also provide positive elements for that determination.

86. In that line, an alternative draft of article 12 was suggested, based on article 10 of the Electronic Communications Convention:

"Draft article 12. Place of Dispatch and Receipt

1. An electronic transferable record is deemed to be dispatched at the place where the originator has its place of business and is deemed to be received at the place where the addressee has its place of business.

2. This article applies notwithstanding that the place where the information system supporting an electronic address is located may be different from the place where the electronic transferable record is deemed to be received under paragraph 1.

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

4. If a party has not indicated a place of business and has more than one place of business, then the place of business for the purposes of this Law is that which has the closest relationship to the electronic transferable record, having regard to the circumstances known to or contemplated by the parties at any time before or at the time of dispatch or receipt of the electronic transferable record.

5. If a natural person does not have a place of business, reference is to be made to the person's habitual residence.

6. A location is not a place of business merely because that is:

(a) Where equipment and technology supporting an information system used by a party in connection with electronic transferable records are located; or

(b) Where the information system may be accessed by other parties.

7. The sole fact that a party makes use of an electronic address or other element of an information system connected to a specific country does not create a presumption that its place of business is located in that country."

87. It was explained that the alternative draft did not aim at displacing existing rules but only at supplementing them with respect to the use of electronic means. It was added that offering such guidance was essential to enable cross-border use of electronic transferable records. Some support was expressed for that proposal.

88. However, it was also said that the proposal focused on the notions of dispatch and receipt that were applicable to contract formation but not to electronic transferable records, for which concepts such as the time of issuance, transfer and presentation were legally relevant. It was added that the application of the provision could lead to a multiplication of legally relevant locations, which introduced uncertainty and unpredictability.

89. It was further said that under the substantive law, a dispatch and receipt of an electronic transferable record could be an issuance or transfer of the electronic transferable record (depending on whether the person was the issuer or transferor). Therefore, it was relevant for draft article 12 to refer to notions of dispatch and receipt without referring to the substantive law notions.

90. It was explained that draft article 11 dealt satisfactorily with all matters relating to time and place relevant to the use of electronic transferable records. In response, it was indicated that draft article 11 referred to indication of time and place, while draft article 12, especially in its suggested new formulation, aimed at providing guidance on the determination of a location when electronic means were used.

91. With respect to the title of the provision, support was expressed for retaining the words "determination of place of business" since it best reflected the content of the article. The words "determination of location" were also suggested in order to encompass all possible references to determination of a location in connection with an electronic transferable record.

92. After discussion, the Working Group agreed to retain draft article 12 with the title "determination of place of business".

Draft article 13. Consent to use an electronic transferable record

93. It was suggested that consent was a matter pertaining to the general provisions of the draft Model Law and that draft article 13 should be positioned accordingly. It was also suggested that draft article 13 should be merged with draft article 6, thus following the structure of article 8 of the Electronic Communications Convention.

94. The Working Group agreed to merge draft article 13 with draft article 6.

Draft article 14. Issuance of multiple originals

95. Different views were heard on the desirability of recognizing the practice of issuing multiple originals in an electronic environment and on the relevance of that practice for business.

96. The view was expressed that the alternative draft of paragraph 1 contained in paragraph 12 of A/CN.9/WG.IV/WP.137/Add.1 was preferable as it was clearer. However, the view was also expressed that that alternative draft did not convey effectively that the law did not preclude the issuance of multiple authoritative copies of the same electronic transferable record.

97. It was indicated that paragraph 2 had become redundant since draft article 9, paragraph 1(a) already required that the electronic transferable record should contain an indication of the issuance of multiple originals whenever substantive law set forth that requirement.

98. The question was raised whether the draft Model Law should deal with the possibility of issuing simultaneously multiple originals in both electronic and paper form.

99. After discussion, the Working Group agreed to delete paragraph 2.

Draft article 15. [Substantive] information requirements of electronic transferable records

100. The Working Group agreed that draft article 15 should be deleted as redundant since the information requirements contained in draft article 9, paragraph 1(a) already satisfied its purpose.

Draft article 16. Additional information in electronic transferable records

101. A suggestion was made to delete draft article 16 as redundant in light of the information requirements contained in draft article 9, paragraph 1(a). In response, it was indicated that draft article 16 aimed to clarify that draft article 9 did not prevent the inclusion in an electronic transferable record of any additional information that might not be contained in a transferable document or instrument due to the different nature of the two media. Therefore, draft article 16 contained an additional element to draft article 9.

102. After discussion, the Working Group agreed to retain draft article 16 without modification.

Draft article 17. [Control]

Placement

103. The Working Group agreed to place draft article 17 consecutively after draft article 9 as the two articles were logically related.

Title

104. It was suggested to use the word “possession” as a title in line with the naming style used in the draft Model Law. In response, it was said that, although an exception to that naming style, the word “control” was preferable as it referred to a particularly relevant notion in the draft Model Law and therefore better highlighted the content of draft article 17.

105. The Working Group agreed to retain as title the word “control” outside the square brackets.

"identify" or "establish"

106. Support was expressed for retaining the word "identified" in subparagraph 1(b) since its clear meaning avoided substantive law implications associated with the word "establish". It was clarified that the word "identify" did not contain any obligation to name the person in control (see A/CN.9/828, para. 63).

107. Another suggestion was to use the word "demonstrate", since that word would best reflect the purpose of the provision to clearly indicate who the person in control was.

108. After discussion, the Working Group agreed to retain the word "identify" outside the square brackets in subparagraph 1(b).

"a person"

109. It was clarified that the word "person" in subparagraph 1(b) could refer to natural or legal persons. It was noted that, in practice, in most cases, a legal person would be in control.

110. The view was reiterated that reference to a person in control did not exclude the possibility of having more than one person exercising control (see also A/CN.9/828, para. 63).

Draft article 18. Endorsement

111. Different views were expressed with regard to draft article 18.

112. It was said that the words "included in" were sufficiently accurate for the purpose of the provision and should be retained, while the reference to "indicating the intention to endorse" was neither appropriate nor necessary.

113. In response, it was said that the words "included in" did not reflect the composite nature of an electronic transferable record and that the words "logically associated with or otherwise linked to so as to be included" should be used instead. It was replied that, in light of the definition of electronic record, the words "included in" should be understood as encompassing instances when the information was logically associated with or otherwise linked to the electronic transferable record.

114. After discussion, the Working Group agreed to retain the following draft of article 18 on the understanding that the words "included in" should be understood as encompassing instances when the information was logically associated with or otherwise linked to the electronic transferable record:

> "Where the law requires or permits the endorsement in any form of a transferable document or instrument, that requirement is met with respect to an electronic transferable record if the information required for the endorsement is included in the electronic transferable record and that information is compliant with the requirements set forth in articles 7 and 8."

Draft article 20. Reissuance

115. It was indicated that the reissuance of an electronic transferable record was a matter of substantive law and, as such, was already permitted under draft article 1, paragraph 2. Accordingly, the Working Group agreed to delete draft article 20 as redundant.

Draft article 21. Replacement of a transferable document or instrument with an electronic transferable record

Paragraph 1

116. It was said that the alternative draft contained in paragraph 40 of A/CN.9/WG.IV/WP.137/Add.1 was preferable since it avoided ambiguity by being drafted in the active voice. However, a concern was expressed that the word "replace" could be misinterpreted as referring to the notion of reissuance. In response, it was said that reissuance and change of medium were distinct concepts, and that draft article 21 clearly referred to the latter.

117. After discussion, the Working Group agreed to retain the draft of paragraph 1 contained in paragraph 40 of A/CN.9/WG.IV/WP.137/Add.1.

Paragraph 3

118. It was suggested to insert the words "shall be made inoperative and" before the word "ceases" to reflect that the transferable document or instrument could not be further transferred after change of medium. It was added that the suggested addition would leave sufficient flexibility to industry on the choice of the method to render the transferable document or instrument inoperative. In that respect, it was noted that a transferable document or instrument could fulfil other functions besides those typical of a transferable document or instrument, such as providing evidence of a contract for the carriage of goods and of receipt of the goods, and that those additional functions would continue to be fulfilled after the document or instrument had been made inoperative.

119. Another suggestion was to include in paragraph 3 a reference to paragraph 1 in order to clarify that the electronic transferable record had to be issued in accordance with both paragraphs 1 and 2.

120. After discussion, the Working Group agreed on the following draft of paragraph 3: "Upon issuance of the electronic transferable record in accordance with paragraphs 1 and 2, the transferable document or instrument shall be made inoperative and ceases to have any effect or validity."

Draft article 22. Replacement of an electronic transferable record with a transferable document or instrument

121. In light of the fact that draft article 22 mirrored the structure of draft article 21, the Working Group agreed that the modifications agreed upon with respect to draft article 21 should apply also to draft article 22.

122. The view was expressed that draft article 21 and 22 should be subject to party autonomy. In that line, it was suggested that, in case of deletion of draft article 4, the words "Unless the parties agree otherwise" should be added at the beginning of those two articles.

Draft article 23. Division and consolidation of an electronic transferable record

123. It was indicated that division and consolidation of an electronic transferable record were a matter of substantive law and, as such, permitted under draft article 1, paragraph 2. Accordingly, the Working Group agreed to delete draft article 23 as redundant.

Draft article 24. Non-discrimination of foreign electronic transferable records

Paragraph 1

124. It was indicated that paragraph 1 should provide solely a rule on non-discrimination of foreign electronic transferable records and that that goal could be achieved by the following draft:

> "An electronic transferable record shall not be denied legal effect, validity or enforceability on the sole ground that it was issued or used abroad".

125. It was recalled that paragraph 1 aimed exclusively at preventing that the place of issuance or of use of the electronic transferable record could be considered in themselves reasons to deny legal effect, validity or enforceability of an electronic transferable record (see A/CN.9/WG.IV/WP.137/Add.1, para. 55) and that it did not affect substantive law, including private international law. Thus, for instance, it was explained that paragraph 1 could not per se lead to the recognition of an electronic transferable record issued in a jurisdiction that did not recognize the legal validity of electronic transferable records.

126. The view was expressed that a provision on non-discrimination such as the suggested paragraph 1 did not suffice to actively promote cross-border use of electronic transferable records. It was added that explicit reference to a substantially equivalent level of reliability was necessary to achieve that goal as well as to encourage technological development. Another suggestion referred to the insertion of a reference to interoperability besides the one to the substantially equivalent level of reliability.

127. In the same line, it was noted that the alternative draft of paragraph 1 contained in paragraph 59 of A/CN.9/WG.IV/WP.137/Add.1 aimed to offer elements that went beyond establishing non-discrimination of foreign electronic transferable records and towards establishing mutual legal recognition. However, it was added, the impact of that draft was limited by its negative formulation.

128. After discussion, the Working Group agreed that paragraph 1 should aim to provide only for non-discrimination and should therefore be retained as follows: "An electronic transferable record shall not be denied legal effect, validity or enforceability on the sole ground that it was issued or used abroad." A proposal was made to include a reference to the substantially equivalent level of reliability in draft article 10, paragraph 2, but the proposal was not retained.

Paragraph 2

129. It was recalled that paragraph 2 reflected the Working Group's understanding that the draft Model Law should not displace private international law rules applicable to transferable documents or instruments (A/CN.9/768, para. 111). It was noted that, though the paragraph restated a principle already contained in article 1, paragraph 2 of the draft Model Law, its retention was desirable since private international law rules could be considered procedural rules and therefore the term "substantive law" could be interpreted as not including private international law.

130. It was explained that, since paragraph 1 referred only to non-discrimination while paragraph 2 related to private international law, the two paragraphs operated on different levels and did not interfere.

131. After discussion, the Working Group agreed to retain paragraph 2 without modification.

V. Other business

A. Future work

Identity management

132. One delegation expressed the intention to submit a proposal on identity management for the consideration of the Working Group at its next session, subject to confirmation by the Commission that identity management would be included on the agenda of the Working Group at that session. Delegations were invited to submit information on identity management with a view to facilitating consideration of the topic.

Cloud computing

133. The view was expressed that UNCITRAL work on cloud computing was desirable and urgent. In particular, it was said that the preparation of a guidance document on contractual aspects of cloud computing would promote the use of cloud computing services, which were in increasing demand. States were encouraged to share expertise on that issue in preparation of the future work of UNCITRAL.

B. Other matters

134. Concerns were expressed with regard to the use of informal consultations. In response, reference was made to the desirability of using informal consultations in order to maximize efficient use of conference time (A/CN.9/638, para. 22).

D. Note by the Secretariat on a draft model law on electronic transferable records (A/CN.9/WG.IV/WP.137 and Add.1)

[Original: English]

Contents

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-sixth session (Vienna, 29 October-2 November 2012), broad support was expressed by the Working Group 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 final form of its work (A/CN.9/761, paras. 90-93).

3. At its forty-seventh session (New York, 13-17 May 2013), the Working Group began reviewing the draft provisions on electronic transferable records as provided in document A/CN.9/WG.IV/WP.122 and 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.

4. At its forty-eighth session (Vienna, 9-13 December 2013), the Working Group continued its consideration of the draft provisions as contained in document A/CN.9/WG.IV/WP.124 and Add.1.

5. At its forty-ninth session (New York, 28 April-2 May 2014), the Working Group continued its work on the preparation of draft provisions as presented in document A/CN.9/WG.IV/WP.128 and Add.1. The Working Group focused its discussion on concepts of original, uniqueness, and integrity of an electronic transferable record.

6. At its fiftieth session (Vienna, 10-14 November 2014), the Working Group continued its work on the preparation of draft provisions as presented in document A/CN.9/WG.IV/WP.130 and Add.1. Subject to a final decision to be made by the Commission, the Working Group agreed to proceed with the preparation of a draft model law on electronic transferable records (A/CN.9/828, para. 23). It was agreed that priority should be given to the preparation of provisions dealing with electronic equivalents of paper-based transferable documents or instruments, and that those provisions should be subsequently reviewed and adjusted, as appropriate, to accommodate the use of transferable records that existed only in an electronic environment (A/CN.9/828, para. 30).

7. At its fifty-first session (New York, 18-22 May 2015), the Working Group continued its work on the preparation of the draft Model Law as presented in document A/CN.9/WG.IV/WP.132 and Add.1. The Working Group focused its discussion on the definitions of electronic transferable record, possession and control.

8. At its fifty-second session (Vienna, 9-13 November 2015), the Working Group continued its work on the preparation of draft provisions as presented in document A/CN.9/WG.IV/WP.134 and Add.1. In particular, the Working Group discussed the relation

[1] *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17* (A/66/17), para. 238.

between draft articles referring to a "reliable method" and a general reliability standard, as well as the elements relevant for assessing reliability, which include party agreement.

9. Part II of this note contains the draft provisions reflecting the deliberations and decisions of the Working Group during that session (A/CN.9/863, paras. 17-102).

II. Draft Model Law on Electronic Transferable Records

A. General

"**Draft article 1. Scope of application**

"1. This Law applies to electronic transferable records.

"2. Other than as provided for in this Law, nothing in this Law affects the application to an electronic transferable record of any rule of law governing a transferable document or instrument including any rule of law applicable to consumer protection.

"3. This Law does not apply to securities, such as shares and bonds, and other investment instruments, and to […].

"[4. This Law applies to electronic transferable records other than as provided by [the law governing a certain type of electronic transferable record to be specified by the enacting State].]"

Remarks

10. Draft article 1 reflects the Working Group's deliberations at its forty-eighth (A/CN.9/797, paras. 16 and 17) and fifty-second (A/CN.9/863, paras. 17-22) sessions. The words "paper-based" have been deleted, as an editorial matter, in paragraph 2 pursuant to a decision of the Working Group at its fifty-second session (A/CN.9/863, para. 93).

11. Paragraph 1 states the scope of application of the draft Model Law.

12. Paragraph 2 sets forth the general principles that the substantive law applicable to an electronic transferable record is identified by reference to the substantive law applicable to the equivalent transferable document or instrument and that the draft Model Law does not affect substantive law applicable to transferable documents or instruments. Those general principles apply to each step of the life cycle of an electronic transferable record. The reference to consumer protection law aims at clarifying that those principles should apply also in that respect (A/CN.9/863, paras. 20 and 22).

13. In application of paragraph 2, the issuance of an electronic transferable record to bearer is possible only when permitted under substantive law (A/CN.9/797, para. 65). Likewise, the modalities for circulation of an electronic transferable record issued to bearer in an electronic transferable record to a named person and the reverse case ("blank endorsement") may be changed only when permissible under substantive law (A/CN.9/828, para. 82).

14. Paragraph 3 was included pursuant to a decision of the Working Group at its fifty-second session (A/CN.9/863, para. 22). It clarifies that the draft Model Law does not apply to securities and other investment instruments. The term "securities" in paragraph 3 does not refer to the use of electronic transferable records as collateral and therefore the Model Law does not prevent the use of electronic transferable records for security rights purposes (A/CN.9/834, para. 73). The term "investment instrument" is understood to include derivative instruments, money market instruments and any other financial product available for investment (A/CN.9/797, para. 19).

15. Moreover, paragraph 3 includes an open-ended exclusion list that permits application of the draft Model Law according to the needs of each enacting jurisdiction. The insertion of an exclusion list aims at providing both flexibility and clarity on the scope of application of the Model Law. For instance, it would be possible to include in the exclusion list certain instruments or documents, such as letters of credit, which may be considered transferable documents or instruments in some jurisdictions but not in others. Similarly, State parties to the Convention Providing a Uniform Law for Bills of Exchange and Promissory Notes (Geneva, 1930) and the Convention Providing a Uniform Law for Cheques (Geneva, 1931)

(the "Geneva Conventions") (A/CN.9/797, paras. 109-112) may consider excluding the documents or instruments falling under the scope of the Geneva Conventions in order to avoid potential conflicts between those Conventions and the Model Law.

16. Electronic transferable records that are functional equivalent of transferable documents or instruments and electronic transferable records that exist only in an electronic environment may co-exist in the same jurisdiction. Draft paragraph 4 aims at allowing the application of the draft Model Law also to electronic transferable records that exist only in an electronic environment within the limits set forth in substantive law applicable to those electronic transferable records. Hence, the provision would not be necessary in jurisdictions where those records do not exist (A/CN.9/797, para. 17).

17. At its fifty-second session, the Working Group considered deleting paragraph 4 in view of concerns on its scope and limited clarity (A/CN.9/863, para. 17). However, support had also been expressed for retaining paragraph 4 as providing guidance and flexibility to States. At that session, it was agreed to postpone a decision on paragraph 4 since the content of that paragraph depended on the final form of the definition of electronic transferable record (ibid., paras. 18 and 19).

18. The Working Group may wish to consider whether to retain paragraph 4 in light of those considerations as well as of the fact that a law applicable to electronic transferable records that exist only in an electronic environment is likely to define its scope, including by reference to the draft Model Law. Therefore, the need to exclude electronic transferable records that exist only in an electronic environment from the scope of application of the draft Model Law would arise only if those electronic transferable records existed at the time of the enactment of the Model Law. However, in that case, the exclusion could be effectively addressed by indicating those electronic transferable records in the open-ended exclusion list contained in paragraph 3.

"**Draft article 2. Definitions**

"For the purposes of this Law:"

Remarks

19. The definitions in draft article 2 have been prepared as a reference and should be examined in the context of the relevant draft articles. The terms are presented in the order they appear throughout the draft Model Law (A/CN.9/768, para. 34). Remarks for consideration by the Working Group have been placed after each definition.

"*electronic transferable record*" [is an electronic record that contains all of the information that would [make a transferable document or instrument effective] [be required to be contained in an equivalent transferable document or instrument] and that complies with the requirements of article 9].

Remarks

20. The definition of "electronic transferable record" reflects the Working Group's deliberations at its forty-eighth (A/CN.9/797, paras. 21-28), fifty-first (A/CN.9/834, paras. 23-26, 88, 95-98 and 100) and fifty-second (A/CN.9/863, paras. 91 and 92) sessions.

21. The definition of "electronic transferable record" reflects the functional equivalent approach (A/CN.9/863, paras. 91 and 92) and aims at covering electronic transferable records that are equivalent to transferable documents or instruments. However, it does not cover electronic transferable records that exist only in an electronic environment, for which a different definition is needed (A/CN.9/863, para. 91; see also A/CN.9/797, para. 23), to be discussed at a later stage.

22. In that respect, it should be noted that the Model Law does not preclude the development and use of electronic transferable records that do not have a paper equivalent as those records would not be governed by the Model Law (A/CN.9/863, para. 91; see also paras. 16-18 above).

23. The definition of "electronic transferable record" does not aim at affecting the fact that substantive law shall determine whether the person in control is the rightful person in control

as well as the substantive rights of the person in control. Likewise, it does not aim at describing all the functions possibly related to the use of an electronic transferable record. For instance, an electronic transferable record may have an evidentiary value; however, the ability of that record to discharge that function will be assessed under law other than the draft Model Law.

24. The Working Group may wish to consider whether the words "be required to be contained in an equivalent transferable document or instrument" should be retained, as those words are used in draft article 9, paragraph 1(a). Alternatively, the Working Group may wish to consider whether reference to information is necessary in light of the fact that draft article 9, which is referred to in the draft definition, contains the same requirement.

25. The Working Group confirmed that certain documents or instruments, which are generally transferable, but whose transferability is limited due to other agreements, such as straight bills of lading, would not fall under the definition and that the draft Model Law should only focus on "transferable" documents (A/CN.9/797, paras. 27 and 28).

26. The Working Group may wish to take into account the definition of "electronic record" when considering the definition of "electronic transferable record" (see below, para. 30).

> "*transferable document or instrument*" means a transferable document or instrument issued on paper that entitles the holder to claim the performance of the obligation indicated in the document or instrument and that is capable of transferring the right to performance of the obligation indicated in the document or instrument through the transfer of that document or instrument.

Remarks

27. The definition of "transferable document or instrument" reflects the Working Group's deliberations at its forty-eighth (A/CN.9/797, paras. 21-28) and fifty-second (A/CN.9/863, paras. 93-95) sessions. It does not aim at affecting substantive law.

28. The Working Group may wish to note that, as an editorial matter, the words "paper-based" were deleted from the term "transferable document or instrument" in the English language version throughout the draft Model Law (A/CN.9/863, para. 93), since the definition of transferable document or instrument sufficiently clarified that those documents or instruments were paper-based. Upon consultation, the same words have been deleted in the Arabic, Chinese and Russian language versions of the Model Law, but not in the French and Spanish language versions. The Working Group may wish to confirm that editorial decision.

29. Applicable substantive law shall determine which documents or instruments are transferable in the various jurisdictions (A/CN.9/863, para. 94; see also paragraph 15 above). An indicative list of transferable documents or instruments, inspired by 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") includes: bills of exchange; cheques; promissory notes; consignment notes; bills of lading and warehouse receipts (A/CN.9/863, para. 94; see also A/CN.9/768, para. 34; A/CN.9/797, paras. 25 and 26). Cargo insurance certificates and air waybills may be additional examples of transferable documents or instruments.

> "*electronic record*" means information generated, communicated, received or stored by electronic means, including, where appropriate, all information logically associated with or otherwise linked together so as to become part of the record, whether generated contemporaneously or not.

Remarks

30. The definition of "electronic record" is based on the definition of "data message" contained in the UNCITRAL Model Law on Electronic Commerce (1996) and in the Electronic Communications Convention. The definition reflects the composite nature of an electronic transferable record, which, in turn, is particularly relevant for the notion of "integrity" contained in paragraph 2 of draft article 9 (A/CN.9/863, para. 96). It highlights the fact that information may be associated with the electronic transferable record at the time

of issuance or thereafter (e.g., information related to endorsement) and aims to clarify that some electronic records could, but do not need to, include a set of composite information (A/CN.9/797, paras. 43-45; see also A/CN.9/804, para. 71). The word "logically" refers to computer software and not to human logic (A/CN.9/863, para. 97).

"**Draft article 3. Interpretation**

"1. 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 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

31. Draft article 3 is intended to draw the attention of courts and other authorities to the fact that domestic enactments of the Model Law should be interpreted with reference to their international origin in order to facilitate uniform interpretation (A/CN.9/768, para. 35). Similar wording is found in article 3 of the UNCITRAL Model Law on Electronic Commerce and in article 4 of the UNCITRAL Model Law on Electronic Signature.

32. The words "This Law is derived from a model law of international origin" were included pursuant to a decision made by the Working Group at its forty-seventh session, in order to emphasize that the law constituted an enactment of a model law with international origin (A/CN.9/768, para. 35). Those words do not appear in other UNCITRAL texts. Alternatively, the Working Group may wish to consider whether that language should be retained and the underlying notion should be further developed in guidance materials.

33. The Working Group may wish to consider whether the words "[and the observance of good faith]" should be retained in light of the possible substantive law implications, and, in particular, of the existence of a specific notion of good faith in the law of transferable documents or instruments. Alternatively, the Working Group may wish to clarify whether that reference is intended as to the general notion of good faith in international trade (see also para. 35 below). Reference to good faith is contained in several other UNCITRAL texts, including article 3, paragraph 1 of the UNCITRAL Model Law on Electronic Commerce and article 4, paragraph 1 of the UNCITRAL Model Law on Electronic Signatures.

34. The notion of "general principles" contained in paragraph 2 has been used in several UNCITRAL texts. Article 7 of the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) ("CISG") is the provision containing that notion that has been most interpreted by case law.

35. The notion of "general principles" contained in paragraph 2 refers to the general principles of electronic communications (A/CN.9/797, para. 29), including those already stated in relevant UNCITRAL texts. In this line, the Working Group may wish to confirm that the fundamental principles of non-discrimination against electronic communications, technological neutrality and functional equivalence are general principles underlying the draft Model Law. Other general principles might be identified as the work of the Working Group progresses. For instance, the provisions in other UNCITRAL texts on electronic commerce relating to the irrelevance of the location of information systems for the determination of the place of business could be relevant as general principles on which the Model Law is based (see A/CN.9/WG.IV/WP.137/Add.1, para. 7). The notion of good faith in international trade could also be considered as a general principle relevant for the Model Law. The interpretation and application of the Model Law will further identify its general principles, in a manner akin to other UNCITRAL texts.

"**Draft article 4. Party autonomy [and privity of contract**]

"1. The parties may derogate from or vary by agreement the provisions of this Law [except articles […]][, unless that agreement would not be valid or effective under applicable law].

"2. Such an agreement does not affect the rights of any person that is not a party to that agreement."

Remarks

36. The Working Group highlighted the importance of party autonomy in the draft provisions (A/CN.9/797, para. 30) and, based on the general applicability of that principle, agreed to identify which draft articles could not be derogated from (A/CN.9/797, para. 32).

37. While party autonomy is a fundamental principle underpinning commercial law and UNCITRAL texts, the Working Group may wish to note that the principle has found some limits in its implementation in UNCITRAL texts on electronic commerce in order to avoid conflicts with rules of mandatory application, such as those on public policy. Article 4 of the UNCITRAL Model Law on Electronic Commerce and article 5 of the UNCITRAL Model Law on Electronic Signature provide examples of that approach. The words "[, unless that agreement would not be valid or effective under applicable law]", contained in article 5 of the UNCITRAL Model Law on Electronic Signature, have been inserted in draft article 4 of the Model Law to reflect that approach.

38. Alternatively, the possibility of derogating from or varying a provision of the draft Model Law could be indicated by inserting specific language, such as "unless otherwise agreed by the parties", in each provision that may be derogated from or varied by the parties.

39. Paragraph 2 was inserted to reflect the concerns of the Working Group that derogations and variations to the Model Law shall not affect third parties (A/CN.9/768, para. 36), in particular, by circumventing the principle of numerus clausus. The Working Group may wish to consider whether that draft provision is necessary in light of draft article 1, paragraph 2 of the Model Law.

"**Draft article 5. Information requirements**

"Nothing in this Law affects the application of any rule of law that may require a person to disclose its identity, place of business or other information, or relieves a person from the legal consequences of making inaccurate, incomplete or false statements in that regard."

40. The Working Group decided to retain draft article 5 with the understanding that it reminds parties of the need to comply with possible disclosure obligations that might exist under other law (A/CN.9/797, para. 33).

41. The Working Group may wish to consider draft article 5 in conjunction with draft articles 15 and 16, which also pertain to information requirements. The Working Group may further wish to consider whether those articles should be retained in light of draft article 1, paragraph 2 and of the possibility to provide guidance in explanatory materials.

B. Provisions on electronic transactions

42. The Working Group at its forty-eighth session decided to retain draft articles 6-8 as a separate section (A/CN.9/797, para. 34). The Working Group may wish to review its decision in light of the final form of the draft Model Law as well as the content of those articles.

"**Draft article 6. 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 electronic form."

Remarks

43. Draft article 6 sets forth the principle of non-discrimination. At its forty-ninth session, the Working Group decided to retain draft article 6 in its current form (A/CN.9/804, para. 17; see also A/CN.9/768, para. 39).

"**Draft article 7. Writing**

"Where the law requires that information should be in writing, that requirement is met with respect to an electronic transferable record if the information contained therein is accessible so as to be usable for subsequent reference."

Remarks

44. Draft article 7 reflects the Working Group's deliberations at its forty-ninth session (A/CN.9/804, paras. 18 and 19). It establishes the requirements for the functional equivalence of the written form with respect to information contained in or related to electronic transferable records (A/CN.9/797, para. 37). The general rule on functional equivalence between electronic and written form should be contained in the law on electronic transactions (A/CN.9/797, para. 38). Draft article 7 refers to the notion of "information" instead of "communication" as not all relevant information might necessarily be communicated (A/CN.9/797, para. 37).

45. Pursuant to a decision of the Working Group at its fifty-first session, the explanatory materials to the draft provisions will reflect the understanding that any legal requirement contained in the draft Model Law implies consequences for the case it is not met, making it not necessary to explicitly refer to those consequences (A/CN.9/834, paras. 43 and 46). Accordingly, the words "or provides consequences for the absence of a writing" have been deleted throughout the draft Model Law since they are redundant.

46. At the Working Group's forty-ninth session, it was suggested that draft article 7 might not be necessary as the fulfilment of the functional equivalence of the "writing" requirement was implied in the definition of "electronic transferable record" in draft article 2. In response, it was stated that a rule on the "writing" requirement was necessary in light of the other rules on functional equivalence contained in the draft provisions (A/CN.9/804, para. 18). The Working Group may wish to clarify the relationship between draft article 7 and draft article 9, setting forth information and integrity requirements for the functional equivalence of transferable documents or instruments.

47. In its future deliberations on a law applicable to electronic transferable records existing only in electronic form, the Working Group may wish to confirm that the law governing those records should set forth the same requirements contained in draft article 7, i.e. that information should be accessible so as to be usable for subsequent reference (A/CN.9/768, para. 42).

"**Draft article 8. Signature**

"Where the law requires a signature of a person, that requirement is met [with respect to] [in relation to] [by] an electronic transferable record if a reliable method is used to identify that person and to indicate that person's intention in respect of the information contained in the electronic record."

Remarks

48. Draft article 8 reflects the Working Group's deliberations at its forty-ninth (A/CN.9/804, para. 20) and fifty-second (A/CN.9/863, paras. 66 and 73) sessions. It establishes the requirements for the functional equivalence of "signature" (A/CN.9/804, para. 20) when substantive law either contains an explicit signature requirement or provides consequences for the absence of a signature (implicit signature requirement) (A/CN.9/797, para. 46; see also A/CN.9/834, para. 43).

49. The text of draft article 8, originally based on the text of article 9, paragraph 3, of the Electronic Communications Convention, reflects the changes made pursuant to the Working Group's decision at its fifty-second session with regard to draft article 10 on the general reliability standard (A/CN.9/863, paras. 66 and 73). Accordingly, the reliability of the method referred to in draft article 8 shall be assessed according to the general reliability standard contained in draft article 10.

50. The Working Group may wish to consider whether the text of draft article 8 should better clarify that that provision applies to electronic transferable records only and not to other electronic records that are not transferable but are somehow related to an electronic

transferable record. Alternative wording is suggested to that end. The words "with respect to" have been used in the chapeau of draft article 8. The words "in relation to" are used in article 9(3) of the Electronic Communications Convention. The word "by" has been used in other UNCITRAL provisions on functional equivalence and may suggest a narrower application of draft article 8.

Remarks on "original"

51. After noting that the notion of "original" in the context of electronic transferable records was different from that adopted in other UNCITRAL texts (A/CN.9/797, para. 47) and that the main purpose of a functional equivalence rule for that notion in the context of electronic transferable records should be the prevention of multiple claims (A/CN.9/804, para. 21), the Working Group agreed that there was no need to include a functional equivalence rule for "original" in the draft provisions (A/CN.9/804, para. 40). It was explained that the goal of avoiding multiple claims in the context of electronic transferable records could be achieved through the notion of "control". It was further explained that the notion of "control" could identify both the person entitled to performance and the object of control (A/CN.9/804, para. 39).

C. Use of electronic transferable records

"**Draft article 9. [Electronic transferable record]**

"1. Where the law requires a transferable document or instrument, that requirement is met by an electronic record if:

(a) The electronic record contains the information that would be required to be contained in an [equivalent] transferable document or instrument; and

(b) A reliable method is used:

(i) To identify that electronic record as the [authoritative] [record constituting the] electronic transferable record;

(ii) To render that electronic record capable of being subject to control from its creation until it ceases to have any effect or validity; and

(iii) To retain the integrity of the electronic transferable record."

"2. The criterion for assessing integrity shall be whether information contained in the electronic transferable record, including any [authorized] change that arises from its creation until it ceases to have any effect or validity, has remained complete and unaltered apart from any change which arises in the normal course of communication, storage and display. 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."

Remarks

52. Draft article 9 has been recast in light of the Working Group's deliberations at its fifty-first (A/CN.9/834, paras. 21-30, 85-94 and 99) and fifty-second (A/CN.9/863, paras. 66 and 73) sessions. The current text aims at combining the two prevalent approaches to avoid multiple claims for performance, i.e. "singularity" and "control" (A/CN.9/834, para. 86) and reflects the changes made pursuant to the Working Group's decision at its fifty-second session with regard to draft article 10 on the general reliability standard (A/CN.9/863, paras. 66 and 73). Accordingly, the reliability of the method referred to in draft article 9 shall be assessed according to the general reliability standard contained in draft article 10.

53. Draft article 9 intends to offer a functional equivalence rule for the use of transferable documents or instruments by setting forth the requirements to be met by an electronic record. The Working Group agreed to introduce draft article 9 in light of its discussions on the notion of uniqueness and its decision to delete a rule on uniqueness (A/CN.9/804, paras. 71 and 74). It was added that resorting to the notion of "control" would make it possible not to

refer to the notion of "uniqueness", which posed technical challenges (A/CN.9/804, para. 38).

54. The Working Group agreed that reference to the definition of "electronic record" would suffice to provide for cases when, as it may happen in certain registry systems, there might be data elements that, taken together, provided the information constituting the electronic transferable record, with no discrete record constituting the electronic transferable record (A/CN.9/828, para. 31).

55. Subparagraph 1(a) states that the electronic record should contain the information required in a transferable document or instrument. The Working Group may wish to consider whether the word "equivalent" before the words "transferable document or instrument" could be misleading in view of the purpose of draft article 9 to provide a rule on functional equivalence. Alternative drafting, such as the use of the words "respective" or "corresponding", may be considered.

56. Subparagraph 1(b)(i) sets forth the requirement to identify an electronic record as the record containing the operative or authoritative information necessary to establish that record as an electronic transferable record. That requirement implements the "singularity" approach (A/CN.9/834, para. 86).

57. The Working Group may wish to consider whether to retain the word "authoritative" to identify the electronic transferable record (A/CN.9/834, paras. 101-104) in light of the fact that information establishing the electronic record as an electronic transferable record is, by itself, authoritative and therefore that qualification might, on the one hand, be unnecessary and, on the other hand, have the unintended effect of fostering litigation on the meaning of the term "authoritative".

58. If the Working Group decides not to retain the word "authoritative", it may further wish to consider whether the provision might be further simplified by deleting the words "record constituting the".

59. Subparagraph 1(b)(ii) sets forth the requirement that the electronic transferable record should be capable of being controlled from its creation until it ceases to have any effect or validity, particularly in order to allow for its transfer. That requirement implements the "control" approach (A/CN.9/834, para. 86).

60. The draft provision reflects the view that an electronic transferable record might not necessarily be actually subject to control (A/CN.9/804, para. 61). This could happen, for instance, when a token-based electronic transferable record is lost.

61. With regard to paragraph 2, at its fiftieth session, the Working Group agreed to insert a provision on the assessment of the notion of integrity (A/CN.9/828, para. 49). That provision indicates that an electronic transferable record retains integrity when any set of information related to legally relevant changes (as opposed to changes of purely technical nature) remains complete and unaltered from the time of the creation of the electronic transferable record until it ceases to have any effect or validity (A/CN.9/804, para. 29). It is inspired by article 8, paragraph 3, of the UNCITRAL Model Law on Electronic Commerce.

62. The Working Group may wish to clarify the relation between the reference to the use of a reliable method to retain the integrity of the electronic transferable record contained in paragraph 1(b)(iii) and the reference to the criterion for assessing integrity contained in paragraph 2, in light also of the considerations expressed with respect to draft article 10(1)(a)(ii) (see below, para. 70).

63. In that respect, the Working Group may also wish to consider whether reference to "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" in paragraph 2 should be retained as the same notion is contained in draft article 10.

64. The Working Group may wish to consider whether the word "authorized" in draft paragraph 2 should be retained in light of its discussions on the desirability to record all or only selected changes and on the difference between authorized and legitimate changes (A/CN.9/834, paras. 27-30; A/CN.9/828, paras. 42-44 and A/CN.9/804, paras. 30-32).

65. The Working Group may wish to consider the definition of an electronic transferable record in draft article 2 in conjunction with its deliberations on draft article 9 (see paras. 20-26 above, and A/CN.9/834, paras. 95-100).

"**Draft article 10. General reliability standard**

"1. For the purposes of articles [8, 9, 11, 17, 19, 21, 22, 23] the method referred to shall be:

(a) As reliable as appropriate for the fulfilment of the function for which the method is being used, in the light of all relevant circumstances, which may include:

(i) The operational rules relevant to the assessment of reliability governing the system;

(ii) The assurance of data integrity;

(iii) The ability to prevent unauthorized access to and use of the system;

(iv) The quality of hardware and software systems;

(v) The regularity and extent of audit by an independent body;

(vi) The existence of a declaration by a supervisory body, an accreditation body or a voluntary scheme regarding the reliability of the method;

(vii) Any applicable industry standards; or

(b) Proven in fact to have fulfilled the function agreed to by itself or together with further evidence.

"[2. For the purposes of assessing [the required level of] reliability between parties to an agreement, regard shall be had to such agreement in so far as relevant.]"

Remarks

66. Draft article 10 reflects the deliberations of the Working Group at its forty-ninth (A/CN.9/804, paras. 41-49), fiftieth (A/CN.9/828, paras. 41-49), fifty-first (A/CN.9/834, paras. 66, 73 and 76) and fifty-second (A/CN.9/863, paras. 37-82) sessions.

67. Draft article 10 provides a general standard on the assessment of reliability. That standard applies throughout the Model Law whenever reference is made to a "reliable method". The provision, which is technology neutral (A/CN.9/863, para. 44), provides for a consistent standard to assess reliability throughout the draft Model Law. In that respect, it should be noted that each provision of the Model Law referring to the use of a reliable method aims at fulfilling a different function (A/CN.9/863, para. 54). Accordingly, the reference to "the purposes of articles" contained in the chapeau of draft article 10 aims to clarify that the assessment of the reliability of each relevant method should be carried out separately in light of the function specifically pursued with the use of that method (A/CN.9/863, para. 39).

Paragraph 1

68. Subparagraph 1(a) contains a list of circumstances to assist in the determination of the reliability in subparagraphs (i)-(vi). The words "which may include" are used to clarify that the list is not exhaustive and has an illustrative nature only (A/CN.9/863, paras. 46 and 66).

69. Subparagraph 1(a)(i) refers to "operational rules" that are usually contained in an operating manual whose application could be monitored by an oversight body and that, as such, may not have a purely contractual nature. The words "relevant to the assessment of" aim to clarify that only operational rules regarding the reliability of the system, and not operational rules in general, should be considered (A/CN.9/863, paras. 57 and 68).

70. Subparagraph 1(a)(ii) refers to the "assurance of data integrity" as an absolute notion, since data integrity cannot be expressed by reference to a level (A/CN.9/863, para. 42). The Working Group may wish to discuss whether subparagraph 1(a)(ii) should refer to data integrity in the system, to integrity of the electronic transferable record or to both, in light also of draft article 9. In that respect, the Working Group may wish to note that the reference

to integrity contained in subparagraph 1(a)(ii) operates as a general reliability standard applicable throughout the Model Law, while the reference to integrity contained in draft article 9 operates as a specific parameter in establishing functional equivalence for negotiable documents or instruments (A/CN.9/863, paras. 69 and 70).

71. The circumstances referred to in subparagraphs 1(a)(iv), (v) and (vi) are also referred to in article 10(b), (e) and (f) of the UNCITRAL Model Law on Electronic Signatures. The Working Group may wish to clarify whether the guidance provided on those provisions of the UNCITRAL Model Law on Electronic Signatures[2] could be useful also with respect to the corresponding provisions of the Model Law on Electronic Transferable Records.

72. The Working Group may also wish to discuss whether subparagraph 1(a)(iii) should refer to unauthorized access and use of the system or rather to unauthorized access and use of the method employed to establish control, also in light of the requirement relating to establishment of exclusive control contained in draft article 17. In that respect, the Working Group may also wish to clarify the relation between the reference to a "system" contained in subparagraph 1(a)(iii) and the reference to "hardware and software systems" contained in subparagraph 1(a)(iv).

73. The Working Group may wish to consider dealing with system reliability in the explanatory material discussing third-party service providers (A/CN.9/834, para. 78).

74. The reference to "any applicable industry standards" contained in subparagraph 1(a)(vii) shall not be interpreted so as to violate the principle of technology neutrality (A/CN.9/863, para. 71). In order to do so, those standards should be internationally recognized (A/CN.9/863, para. 56).

75. Subparagraph 1(b) provides a "safety clause" with the purpose of preventing frivolous litigation by validating methods that had in fact achieved their function regardless of any abstract assessment of their reliability (A/CN.9/863, para. 43). It refers to the fulfilment of the function in the specific case under dispute and does not aim at predicting reliability based on past performance of the method (ibid., para. 51). Thus, the legal mechanism contained in paragraph 2 shall operate as an alternative to that contained in paragraph 1 (ibid., para. 52). Article 9(3)(b)(ii) of the Electronic Communications Convention contains a rule similar to that set forth in paragraph 2.

Paragraph 2

76. Paragraph 2, which is an application of the principle of party autonomy, aims to highlight the relevance of any agreement of the parties when assessing reliability. It was explained that those agreements often contain useful guidance on technical details (A/CN.9/863, para. 74). It was added that reference to those agreements could be useful to provide legal recognition to developments in technology and business practices (ibid., para. 38).

77. The Working Group may wish to note that the scope of paragraph 2 is limited to the allocation of liability arising from an agreement on the reliability of the method. As such, the provision contained in paragraph 2 should not affect third parties or mandatory substantive law provisions such as those relating to the validity of electronic transferable records (A/CN.9/863, para. 75).

[2] United Nations, Guide to Enactment to the UNCITRAL Model Law on Electronic Signatures, New York, 2002, para. 147 and references therein.

(A/CN.9/WG.IV/WP.137/Add.1) (Original: English)

Note by the Secretariat on a draft model law on electronic transferable records

ADDENDUM

Contents

II. Draft Model Law on Electronic Transferable Records (*continued*)

C. Use of electronic transferable records (Articles 11-23)

"**Draft article 11. Indication of time and place in electronic transferable records**

["Where the law requires or permits the indication of time or place with respect to a transferable document or instrument, a reliable method shall be used to indicate that time or place with respect to an electronic transferable record."]

Remarks

1. Draft article 11 reflects the Working Group's deliberations at its fifty-first (A/CN.9/834, paras. 36-46) and fifty-second (A/CN.9/863, paras. 23-26) sessions.

2. At its fifty-first session, the Working Group took note that time and place of dispatch and receipt had different relevance for contract formation and management, and for the use of electronic transferable records and decided to review the draft provision accordingly (A/CN.9/834, para. 36). At that session, the Working Group also noted that registry systems would record the relevant events in the life cycle of the electronic transferable record with time-stamping, thus determining time automatically. It was further noted that applicable law could allow parties to amend that automatic determination by agreement. Moreover, it was indicated that users of registry systems would agree to contractual rules containing a choice of applicable law. It was concluded that those elements reduced the practical relevance of determining time and place with respect to electronic transferable records (A/CN.9/834, para. 36).

3. At its fifty-second session, it was noted that the determination of time and place with respect to an electronic transferable record might occur differently in registry-based and in other systems and that therefore a technology-neutral approach was necessary (A/CN.9/863, para. 24). In addition, different views were expressed on the merits of retaining the draft article (ibid., paras. 23-25). In support of its deletion, it was said that the determination of time and place were not specific to electronic transferable records but contained in substantive law. Moreover, it was explained that the reference in draft article 9 to the information "required to be contained in an equivalent transferable document or instrument" would adequately address any requirement to indicate time and place in electronic transferable records.

4. Draft article 11 contains the words "or permits" in order to clarify its application to cases in which the law merely permits, but does not require the indication of time or place with respect to a transferable document or instrument (A/CN.9/834, para. 42).

"**Draft article 12. [Location of parties] [Determination of place of business]**

"1. A location is not a place of business merely because that is:

(a) Where equipment and technology supporting an information system used by a party in connection with electronic transferable records are located; or

(b) Where the information system may be accessed by other parties.

"2. The sole fact that a party makes use of an electronic address or other element of an information system connected to a specific country does not create a presumption that its place of business is located in that country."

5. At its fifty-second session, the Working Group decided to include in the draft Model Law a provision on the determination of place of business inspired by article 6 of the United Nations Convention on the Use of Electronic Communications in International Contracts (New York, 2005) (the "Electronic Communications Convention") (A/CN.9/863, paras. 25 and 26). The scope of draft article 12 is limited to clarifying that the location of an information system, or parts thereof, is not, as such, an indicator of a place of business. That clarification might be particularly useful in light of the likelihood that third-party service providers would use equipment and technology located in various jurisdictions.

6. The Working Group may wish to confirm that further elements useful in determining the place of business should be found in applicable substantive law.

7. Alternatively, the Working Group may wish to consider whether the provisions relating to the irrelevance of the location of information systems for the determination of the place of business, which are contained in other UNCITRAL texts on electronic commerce, could be relevant as general principles on which the Model Law is based under draft article 3, paragraph 2.

8. Draft article 12 refers to the notion of place of business, which is defined in substantive law. The Working Group may wish to consider whether the location of the information system and the place where the information system could be accessed should be disregarded for the purpose of recognising the validity of the electronic form of the transferable record (see para. 59 below).

"**Draft article 13. Consent to use an electronic transferable record**

"1. Nothing in this Law requires a person to use an electronic transferable record without that person's consent.

"2. The consent of a person to use an electronic transferable record may be inferred from the person's conduct."

Remarks

9. Draft article 13 reflects the Working Group's deliberations at its forty-eighth session (A/CN.9/797, paras. 62 and 63). The Working Group may wish to consider whether draft article 13 should be placed after draft article 4 on party autonomy.

"**Draft article 14. Issuance of multiple originals**

"1. Where the law permits the issuance of more than one original of a transferable document or instrument, this may be achieved with respect to electronic transferable records by issuance of multiple electronic transferable records.

"[2. Where the law requires the indication of the total number of multiple original transferable documents or instruments issued, the total number of multiple electronic transferable records issued shall be indicated in those multiple records.]"

Remarks

10. Draft article 14 reflects the Working Group's deliberations at its forty-eighth (A/CN.9/797, paras. 47 and 68) and fifty-first (A/CN.9/834, paras. 47-52) sessions.

11. The possibility of issuing multiple originals of a transferable document or instrument exists in several fields of trade (A/CN.9/WG.IV/WP.124, para. 49) and is recognized in article 47, subparagraph 1(c) of the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (New York, 2008) (the "Rotterdam Rules"). Draft article 14 aims at enabling that possibility in an electronic environment (A/CN.9/834, para. 47), in line with a survey of existing practice that evidenced the use of

multiple originals of electronic bills of lading. The provision may be relevant also with respect to bills of exchange.

12. Under an alternative approach based on the general principle contained in draft article 1, paragraph 2, paragraph 1 could indicate that:

> "Nothing in this Law precludes the issuance of multiple electronic transferable records".

13. Some of the functions pursued with the issuance and use of multiple transferable documents or instruments may be achieved in an electronic environment, by attributing selectively to multiple entities control on one electronic transferable record. Based on the general principle contained in draft article 1, paragraph 2, the Model Law does not preclude control of an electronic transferable record by multiple entities, where allowed by substantive law.

14. The Working Group may wish to confirm that each electronic transferable record in a set of multiple electronic transferable records may be controlled by a different entity, if parties so agree.

15. Paragraph 2 has been redrafted pursuant to the Working Group's decision at its fifty-first session to limit its scope to cases where substantive law contained a requirement to indicate the number of multiple originals (A/CN.9/834, para. 51).

16. The Working Group may wish to consider whether a provision dealing with the co-existence of multiple originals issued simultaneously on different media should be inserted in the draft Model Law.

> "**Draft article 15. [Substantive] information requirements of electronic transferable records**
>
> "Nothing in this Law requires additional [substantive] information for [the issuance of] an electronic transferable record beyond that required for [the issuance of] a transferable document or instrument."

Remarks

17. Draft article 15 reflects a decision of the Working Group at its forty-eighth session to insert a provision dealing with substantive information requirements (A/CN.9/797, para. 73). It states that no additional substantive information is required for the issuance of an electronic transferable record than that required for a corresponding transferable document or instrument.

18. The Working Group may wish to clarify the relation between draft article 15 and draft article 9, which requires that an electronic record should contain all information contained in a transferable document or instrument in order to be an electronic transferable record functionally equivalent to that transferable document or instrument.

19. The Working Group may wish to consider whether draft article 15 contains a general rule applicable from the time of creation of the electronic transferable record until it ceases to have any effect or validity. In that case, the Working Group may wish to delete the reference to "the issuance of" as it might limit the scope of the draft article.

20. The Working Group may wish to also consider whether the word "substantive" should be included between the words "additional" and "information" to align the article with its title.

> "**Draft article 16. Additional information in electronic transferable records**
>
> "Nothing in this Law precludes the inclusion of information in an electronic transferable record in addition to that contained in a transferable document or instrument."

Remarks

21. Draft article 16 reflects a decision by the Working Group to clarify that, while draft article 15 of the Model Law does not impose any additional information requirement for electronic transferable records, it also does not prevent the inclusion in those records of additional information that may not be contained in a transferable document or instrument (A/CN.9/797, para. 73). Examples of such additional information include information that can be displayed only in electronic form or necessary due to technical reasons.

22. In particular, dynamic information, i.e. information that may change periodically or continuously based on an external source, may be included in an electronic transferable record due to its nature but not in a transferable document or instrument (A/CN.9/768, para. 66 and A/CN.9/797, para. 73). The price of a publicly-traded commodity and the position of a vessel are examples of such information.

"**Draft article 17. [Control]**

"1. Where the law requires the possession of a transferable document or instrument, that requirement is met with respect to an electronic transferable record if a reliable method is used:

(a) To establish exclusive control of that electronic transferable record by a person; and

(b) To [identify] [establish] that person as the person in control.

"2. Where the law requires or permits transfer of possession of a transferable document or instrument, that requirement is met with respect to an electronic transferable record through the transfer of control over the electronic transferable record."

Remarks

23. Draft article 17 reflects the Working Group's deliberations at its forty-eighth (A/CN.9/797, para. 83), forty-ninth (A/CN.9/804, paras. 51-62 and 63-67), fiftieth (A/CN.9/828, paras. 50-56), fifty-first (A/CN.9/834, paras. 34, 35 and 91-94) and fifty-second (A/CN.9/863, paras. 66 and 73) sessions. It sets forth control of an electronic transferable record as the functional equivalent of possession of a transferable document or instrument.

24. The Working Group may wish to note that, pursuant to a decision at its fifty-second session, the definition of "control" has been deleted from the draft Model Law as being implicit in draft article 17 (A/CN.9/863, para. 102). At that session, there was broad consensus on the statement that both control and possession were factual situations and that the person in control of an electronic transferable record was in the same position as the possessor of an equivalent transferable document or instrument. There was also broad consensus on the statement that control could not affect or limit the legal consequences arising from possession and that those legal consequences would be determined by applicable substantive law. At that session, it was further stated that parties could agree on the modalities for the exercise of possession, but not modify the notion of possession itself (ibid., para. 101).

25. With regard to paragraph 1, it was explained that reference to the person in control of the electronic transferable record does not imply that that person is also the rightful person in control of that record as this is for substantive law to determine (A/CN.9/828, para. 61). It was also explained that reference to the person in control does not exclude the possibility of having more than one person exercising control (A/CN.9/828, para. 63, and para. 13 above; see also para. 14 above, regarding the possibility of having different persons in control of each record in a set of multiple electronic transferable records). The Working Group may wish to clarify that a "person" may either be a natural or a legal person.

26. With respect to "identify", the Working Group may wish to note that the electronic transferable record in itself does not necessarily identify the person in control, but rather the method or system employed to establish control as a whole performs that function (A/CN.9/828, para. 63). Moreover, identification should not be understood as implying an

obligation to name the person in control, as the draft Model Law allows for the issuance of electronic transferable records to bearer, which implies anonymity (A/CN.9/828, para. 51). However, anonymity for commercial law purposes may not preclude the possibility of identifying the person in control for other purposes, such as law enforcement.

27. The Working Group may wish to consider whether the word "establish" has substantive law implications.

28. Paragraph 2 sets forth that transfer of control over an electronic transferable record is the functional equivalent of delivery, i.e. transfer of possession, of a transferable document or instrument (A/CN.9/834, paras. 31-33). It includes the words "or permits" in order to clarify its application to cases in which the law merely permits, but does not require transfer of possession of a transferable document or instrument.

29. The Working Group may wish to consider whether "Control" would be an appropriate title for draft article 17 in light of its content.

30. The Working Group may also wish to consider whether draft article 17 should be placed consecutively after draft article 9 (A/CN.9/834, para. 92).

"**Draft article 18. Endorsement**

"Where the law requires or permits the endorsement in any form of a transferable document or instrument, that requirement is met with respect to an electronic transferable record if information [relating to the endorsement] [constituting endorsement] [indicating the intention to endorse] is [logically associated with or otherwise linked to] [included in] that electronic transferable record and that information is compliant with the requirements set forth in articles 7 and 8."

Remarks

31. Draft article 18 reflects the Working Group's deliberations at its fiftieth session (A/CN.9/828, para. 80).

32. The Working Group may wish to consider substituting the words "relating to the endorsement" with the words "indicating the intention to endorse" to better specify that the satisfaction of the generic requirements for writing and signature set forth in draft articles 7 and 8 should be accompanied by the expression of the intent to endorse. The use of the words "constituting endorsement" may provide another drafting option.

33. The Working Group may wish to provide guidance on the use of the words "logically associated with or otherwise linked to" and "included in" throughout the draft Model Law, in light of the considerations expressed at its fiftieth session (A/CN.9/828, paras. 78 and 80) and of the draft definition of "electronic record" contained in draft article 2 (A/CN.9/WG.IV/WP.137, para. 30).

"**Draft article 19. Amendment**

"Where the law requires or permits the amendment of a transferable document or instrument, that requirement is met with respect to an electronic transferable record if a reliable method is used for amendment of information in the electronic transferable record so that the amended information is identified as such."

Remarks

34. Draft article 19 reflects the Working Group's deliberations at its fiftieth and (A/CN.9/828, paras. 86 and 90) and fifty-second (A/CN.9/863, paras. 83-87) sessions. It provides a functional equivalence rule for instances in which an electronic transferable record may be amended.

35. Draft article 19 sets forth an objective standard for the identification of amended information in an electronic environment in a manner similar to the paper-based environment (A/CN.9/828, paras. 86 and 87), as indicated by the use of the word "identified". The rationale for requesting the identification of the amended information lies in the fact that, while amendments may be easily identifiable in a paper-based environment due to the nature of that medium, that may not be the case in an electronic environment.

"**Draft article 20. Reissuance**

"Where the law permits the reissuance of a transferable document or instrument, an electronic transferable record may be reissued."

Remarks

36. Draft article 20 reflects the Working Group's deliberations at its forty-eighth (A/CN.9/797, para. 104) and fiftieth (A/CN.9/828, para. 93) sessions. It indicates that electronic transferable records may be reissued where substantive law so permits, such as in case of loss or destruction of the original. Thus, the draft article presupposes the prior existence of an electronic transferable record for its reissuance.

37. The Working Group may wish to consider whether draft article 20 should be retained due to its declaratory value, or it should be deleted as the possibility of reissuing an electronic transferable record is already available under draft article 1, paragraph 2.

"**Draft article 21. Replacement of a transferable document or instrument with an electronic transferable record**

"1. A change of medium of a transferable document or instrument to an electronic transferable record may be performed if a reliable method for the change of medium is used.

2. For the change of medium to take effect, the following requirements shall be met:

(a) The electronic transferable record shall include all the information contained in the transferable document or instrument; and

(b) A statement indicating a change of medium shall be inserted in the electronic transferable record.

3. Upon issuance of the electronic transferable record in accordance with paragraph 2, the transferable document or instrument ceases to have any effect or validity.

4. A change of medium in accordance with paragraphs 1 and 2 does not affect the rights and obligations of the parties."

Remarks

38. Draft article 21 has a substantive nature due to the fact that substantive law is unlikely to contain a rule on change of medium. It aims at satisfying two main goals, i.e., enabling change of medium without loss of information and ensuring that the replaced transferable document or instrument would not further circulate (A/CN.9/828, para. 95).

39. Draft article 21 reflects the suggestions made at the Working Group's forty-eighth (A/CN.9/797, paras. 102 and 103), fiftieth (A/CN.9/828, para. 102), fifty-first (A/CN.9/834, paras. 57-64) and fifty-second (A/CN.9/863, paras. 66 and 73) sessions. By omitting the reference to substantive legal notions such as "issuer", "obligor", "holder" and "the person in control", this approach aims at accommodating the variety of schemes used in the various transferable documents or instruments. Consequently, and in light also of the need to consent to the use of electronic means set forth in draft article 13, draft article 21, does not contain any reference to consent. Substantive law, including parties' agreement, would identify those parties whose consent is relevant for the change of medium (A/CN.9/834, para. 62).

40. The Working Group may wish to consider the following draft of paragraph 1, provided for editorial purposes only:

"An electronic transferable record may replace a transferable document or instrument if a reliable method for the change of medium is used."

41. The requirements set forth in paragraph 2 (a) and (b) are concurrent. The legal consequence for non-compliance with any of them would be the invalidity of the change of medium and, consequently, of the electronic transferable record (A/CN.9/834, para. 58).

42. Draft paragraph 3 sets forth that, when the change of medium has taken place, the transferable document or instrument ceases to have any effect or validity. This is necessary to avoid multiple claims for performance. In that respect, a transferable document or instrument may be destroyed or otherwise invalidated on the wrong assumption of the validity of the electronic transferable record replacing it. In that case, the Working Group may wish to confirm that substantive law would apply to the reissuance of the transferable document or instrument, or, alternatively, that the electronic transferable record shall be issued in compliance with draft article 21.

43. Draft paragraph 4 is intended to clarify as a statement of law that the rights and obligations of the parties are not affected by the change of medium (A/CN.9/834, para. 61).

> "**Draft article 22. Replacement of an electronic transferable record with a transferable document or instrument**
>
> "1. A change of medium of an electronic transferable record to a transferable document or instrument may be performed if a reliable method for the change of medium is used.
>
> 2. For the change of medium to take effect, the following requirements shall be met:
>
> (a) The transferable document or instrument shall include all the information contained in the electronic transferable record; and
>
> (b) A statement indicating a change of medium shall be inserted in the transferable document or instrument.
>
> 3. Upon issuance of the transferable document or instrument in accordance with paragraph 2, the electronic transferable record ceases to have any effect or validity.
>
> 4. A change of medium in accordance with paragraphs 1 and 2 does not affect the rights and obligations of the parties."

Remarks

44. Draft article 22 provides for the replacement of an electronic transferable record with a transferable document or instrument. Its content mirrors that of draft article 21 (A/CN.9/834, para. 64). A survey of business practice indicates that such replacement is the more frequent case due to the fact that a party whose involvement was not envisaged at the time of the creation of the electronic transferable record does not wish or is not in a position to use electronic means.

45. Under certain national laws, the paper-based print-out of an electronic record may fall under the definition of electronic record. However, under draft article 22, a print-out of an electronic transferable record that does not meet the requirements of that draft article would have no effect as a transferable document or instrument replacing the corresponding electronic transferable record.

46. Draft paragraph 3 sets forth that, when the change of medium has taken place, the electronic transferable record ceases to have any effect or validity. This is necessary to avoid multiple claims for performance. In that respect, an electronic transferable record may be destroyed or otherwise invalidated on the wrong assumption of the validity of the transferable document or instrument replacing it. In that case, the Working Group may wish to confirm that, where substantive law allows, the electronic transferable record shall be reissued in compliance with draft article 20, or, alternatively, that the transferable document or instrument shall be issued in compliance with draft article 22.

47. The Working Group may wish to consider the following draft of paragraph 1, provided for editorial purposes only:

> "A transferable document or instrument may replace an electronic transferable record if a reliable method for the change of medium is used."

"**Draft article 23. Division and consolidation of an electronic transferable record**

"[1. Where the law permits the division or consolidation of a transferable document or instrument, an electronic transferable record may be divided or consolidated if:

(a) A reliable method is used to divide or consolidate the electronic transferable record[; and

(b) The divided or consolidated electronic transferable record contains a statement identifying it as such].]

"[2. Upon division or consolidation, the pre-existing divided or consolidated electronic transferable records cease to have any effect or validity.]"

Remarks

48. In light of the suggestions made at the Working Group's fiftieth session, draft article 23 has been recast as a more generic functional equivalence rule including certain elements of the previous draft article (A/CN.9/828, para. 104).

49. The Working Group may wish to consider whether paragraph 1 should be retained for declaratory purposes, or whether draft article 1, paragraph 2 might suffice to enable division and consolidation of electronic transferable records.

50. The Working Group may also wish to consider whether subparagraph 1(b) introduces a substantive rule and, in that case, whether it is justified in light of the use of electronic means.

51. The Working Group may further wish to consider whether to retain draft paragraph 2, which introduces a substantive rule that may not be compatible with the law and practice of securitization. Alternatively, the Working Group may wish to clarify that substantive law shall determine the effect or validity of electronic transferable records after division or consolidation.

D. Cross-border recognition of electronic transferable records (Article 24)

"**Draft article 24. Non-discrimination of foreign electronic transferable records**

"1. An electronic transferable record shall not be denied legal effect, validity or enforceability on the sole ground that it was issued or used [abroad] [outside [the enacting jurisdiction]] [, or that its issuance or use involved the services of a third party based, in part or wholly, [abroad] [outside [the enacting jurisdiction]]] [, if it offers a substantially equivalent level of reliability].

"2. Nothing in this Law affects the application to electronic transferable records of rules of private international law governing a transferable document or instrument."

Remarks

52. 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.[1] The Working Group also stressed the importance of cross-border legal recognition of electronic transferable records (A/CN.9/761, paras. 87-89 and A/CN.9/863, para. 77).

53. At the Working Group's fifty-second session, several views were expressed on the draft article. On the one hand, there was the desire not to displace existing private international law rules and to avoid the creation of a dual regime with a special set of provisions for electronic transferable records. On the other hand, there was awareness of the importance of aspects relating to the international use of the Model Law for its success and expression of the desire to favour the cross-border application of the Model Law regardless of the number of enactments (A/CN.9/863, paras. 77-82).

[1] *Official Records of the General Assembly, Sixty-seventh Session, Supplement No. 17* (A/67/17), para. 83.

54. In that line, the Working Group may wish to confirm that the promotion of the international use of the Model Law should be pursued with respect to issues of validity related to the electronic form of the transferable record, while issues of substantive law, including private international law aspects thereof, should not be affected by the Model Law.

55. Paragraph 1 aims at eliminating obstacles to cross-border recognition of an electronic transferable record arising exclusively from the place of origin or of use of the electronic transferable record. In other words, paragraph 1 aims to prevent that the place of origin or of use of the electronic transferable record could be considered in themselves reasons to deny legal validity or effect to an electronic transferable record. The words "abroad" and "outside [the enacting jurisdiction]" are editorial alternatives on how to refer to a jurisdiction other than the enacting one. In considering those alternatives, the Working Group may wish to keep in mind the needs of States comprising more than one territorial unit.

56. At the Working Group's fifty-second session, it was noted that an electronic transferable record might be issued in a jurisdiction that did not recognise the use of electronic transferable records, and that recognition of its validity could be sought in a jurisdiction that allowed that use. In that case, it was added, it could be useful to permit recognition of the validity of the electronic transferable record in the latter jurisdiction, provided legal requirements set forth in that jurisdiction were met (A/CN.9/863, para. 79).

57. Hence, the Working Group may wish to confirm that under paragraph 1 an electronic transferable record issued or used in a jurisdiction that does not allow the issuance and use of electronic transferable records, and that otherwise complies with the requirements of applicable substantive law, could be recognized in a jurisdiction enacting the Model Law.

58. At the Working Group's fifty-second session, reference was also made to the possibility of introducing reciprocity standards in the cross-border recognition of electronic transferable records (A/CN.9/863, para. 80). In that respect, the Working Group may wish to consider whether a requirement of substantially equivalent level of reliability should be introduced in the draft provisions. The words "if it offers a substantially equivalent level of reliability" are inspired by article 12, paragraph 3, of the UNCITRAL Model Law on Electronic Signatures.

59. Alternatively, the Working Group may wish to consider the following alternative draft of paragraph 1, based on the notion of irrelevance of the place of issuance and use of electronic transferable records, as well as of the location of information systems or of the place where those systems may be accessed. The scope of the proposed alternative draft of paragraph 1 is limited to validity issues relating to the electronic nature of the record. That approach could be particularly appropriate in light of the distributed nature of block-chain-based systems and of the difficulty of determining their exact geographic location.

> "In determining whether, or to what extent, an electronic transferable record is legally effective, valid or enforceable because of its electronic form, no regard shall be had:
>
> (a) To the location where the electronic transferable record is issued or used;
>
> (b) To the location of the information system, or parts thereof, used in connection with the electronic transferable record; or
>
> (c) To the location where the information system used in connection with the electronic transferable record may be accessed."

60. Paragraph 2 reflects the Working Group's understanding that the draft Model Law should not displace existing private international law applicable to transferable documents or instruments (A/CN.9/768, para. 111). This paragraph restates a general principle already contained in article 1, paragraph 2 of the draft Model Law. The Working Group may wish to consider retaining paragraph 2 in light of the fact that private international law rules are often considered procedural rules and that therefore the term "substantive law" could be interpreted as not including private international law.

61. In order to achieve broader cross-border use of electronic transferable records, the Working Group may also wish to consider positively promoting their recognition under private international law by adopting a provision along the following lines:

> "When the rules of private international law lead to the application of a law that does not recognize the issuance and use of electronic transferable records because of their form, this Law shall apply."

62. The effect of the proposed provision would be to displace rules of private international law that do not allow for the recognition of electronic transferable records due to their electronic form only. It does not aim at permitting the issuance and use of electronic transferable records that do not comply with substantive law requirements, as determined by applicable private international law rules. The draft provision would be applicable as lex fori or, where possible, as law chosen by the parties.

63. The Working Group may wish to note that the words "When the rules of private international law lead to the application of a law" are found in article 1(1)(b) CISG and that judicial precedents on the interpretation and application of those words could provide useful guidance also in the context of the draft Model Law.

V. INSOLVENCY LAW

A. Report of the Working Group on Insolvency Law on the work of its forty-eighth session (Vienna, 14-18 December 2015)

(A/CN.9/864)

[Original: English]

Contents

I. Introduction

A. Facilitating the cross-border insolvency of multinational enterprise groups

1. At its forty-fourth session (December 2013), Working Group V (Insolvency Law) agreed to continue its work on cross-border insolvency of multinational enterprise groups by developing provisions on a number of issues, some of which would extend the existing provisions of the UNCITRAL Model Law on Cross-Border Insolvency (the Model Law) and part three of the UNCITRAL Legislative Guide on insolvency law (the Legislative Guide) and involve reference to the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation (A/CN.9/798, para. 16). Discussion of those issues commenced at the forty-fifth session of Working Group V (April 2014) (A/CN.9/803), and continued at the forty-sixth (December 2014) (A/CN.9/829) and forty-seventh sessions (May 2015) (A/CN.9/835).

B. Directors' obligations in the period approaching insolvency: enterprise groups

2. At its forty-fourth session, the Working Group had also agreed on the importance of addressing the obligations of directors of enterprise group companies in the period approaching insolvency, given that there were clearly difficult practical problems in this area and that solutions would be of great benefit to the operation of efficient insolvency regimes (A/CN.9/798, para. 23). At the same time, the Working Group noted that there were issues

that needed to be considered carefully so that solutions would not hinder business recovery, make it difficult for directors to continue to work to facilitate that recovery, or influence directors to prematurely commence insolvency proceedings. In light of those considerations, the Working Group agreed that it would be helpful to have the next steps taken informally in an expert group, whose task would be to examine how part four of the Legislative Guide could be applied in the enterprise group context and to identify any additional issues (such as conflicts between a director's duty to its own company and the interests of the group, as well as issues of governing law) that might need to be addressed. The informal expert group reported back in the second half of 2014 with a draft text for consideration by the Working Group at its forty-sixth session (A/CN9/WG.V/WP.125). That draft text was considered at the forty-sixth (A/CN.9/829, paras. 12 to 32) and forty-seventh (A/CN.9/835, paras. 13 to 22) sessions.

3. The report of the forty-seventh session of the Working Group indicated that a new draft of the text addressing the obligations of directors of enterprise group companies in the period approaching insolvency would be prepared for consideration at its forty-eighth session (A/CN.9/835, para. 13). That draft has not yet been prepared on the basis that more progress needed to be made on the work on facilitating the cross-border insolvency of multinational enterprise groups before it was possible to identify how the draft text on directors' obligations might need to be adjusted to ensure consistency. Depending on the progress made during the forty-eighth session of the Working Group, it was noted that it might be possible to provide that new draft text for its forty-ninth session.

C. Recognition and enforcement of insolvency-derived judgements

4. At its forty-fourth session (December 2013), Working Group V had further agreed (A/CN.9/798, para. 30) that it should seek at an appropriate time a mandate from the Commission to commence work on the recognition and enforcement of insolvency-derived judgements, which had been discussed at the colloquium held in conjunction with the forty-fourth session in December 2013 (A/CN.9/815). At its forty-fifth session, the Working Group agreed (A/CN.9/803, para. 39(b)) that it should seek that mandate from the Commission at its forty-seventh session (2014). At that session, the Commission agreed that, in addition to the two topics concerning treatment of enterprise groups in insolvency, Working Group V's other priority should be to develop a model law or model legislative provisions to provide for the recognition and enforcement of insolvency-derived judgements, which was said to be an important area for which no explicit guidance was contained in the UNCITRAL Model Law on Cross-Border Insolvency. The Commission approved a mandate in accordance with those terms (A/69/17, para. 155). The Working Group commenced its deliberations on the topic at its forty-sixth session (December 2014) (A/CN.9/829) and continued them at its forty-seventh session (May 2015) (A/CN.9/835).

II. Organization of the session

5. Working Group V, which was composed of all States members of the Commission, held its forty-eighth session in Vienna from 14-18 December 2015. The session was attended by representatives of the following States Members of the Working Group: Algeria, Argentina, Armenia, Austria, Brazil, Canada, China, Colombia, Croatia, Czech Republic, Denmark, El Salvador, France, Germany, Greece, Indonesia, Israel, Italy, Japan, Kenya, Kuwait, Malaysia, Mexico, Namibia, Poland, Republic of Korea, Russian Federation, Singapore, Spain, Switzerland, Thailand, Turkey, Uganda, 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: Bolivia (Plurinational State of), Chile, Cyprus, Dominican Republic, Lebanon, Luxembourg, Netherlands, Peru, Republic of Moldova, Slovakia, Sudan, Tunisia and United Arab Emirates.

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*: World Bank;

(b) *Invited international non-governmental organizations*: American Bar Association (ABA), European Law Students Association (ELSA), Fondation pour le Droit Continental (FDC), INSOL Europe, INSOL International, International Bar Association (IBA), International Insolvency Institute (III), International Women's Insolvency and Restructuring Confederation (IWIRC), Islamic Development Bank (ISDB), Law Association for Asia and the Pacific (LAWASIA), Moot Alumni Association (MAA), New York City Bar Association (NYCBAR), and Union Internationale des Avocats (UIA).

9. The Working Group elected the following officers:

Chairman: Mr. Carlos SÁNCHEZ MEJORADA Y VELASCO (Mexico)

Rapporteur: Ms. Michal ELBAZ (Israel)

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

(a) Annotated provisional agenda (A/CN.9/WG.V/WP.132);

(b) A note by the Secretariat on facilitating the cross-border insolvency of multinational enterprise groups: key principles (A/CN.9/WG.V/WP.133);

(c) A note by the Secretariat on facilitating the cross-border insolvency of multinational enterprise groups: revised draft legislative provisions (A/CN.9/WG.V/WP.134); and

(d) A note by the Secretariat on the cross-border recognition and enforcement of insolvency-derived judgements (A/CN.9/WG.V/WP.135).

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) facilitating the cross-border insolvency of multinational enterprise groups; and (b) the recognition and enforcement of insolvency-derived judgements.
5. Other business.
6. Adoption of the report.

III. Deliberations and decisions

12. The Working Group commenced its deliberations on the cross-border insolvency of multinational enterprise groups on the basis of documents A/CN.9/WG.V/WP.128 (recalling that articles 8 to 18 had not been considered at the forty-seventh session), A/CN.9/WG.V/WP.133 and A/CN.9/WG.V/WP.134, followed by the recognition and enforcement of insolvency-derived judgements on the basis of document A/CN.9/WG.V/WP.135. The deliberations and decisions of the Working Group on these topics are reflected below.

IV. Facilitating the cross-border insolvency of multinational enterprise groups

A. Key principles of a regime to address insolvency in the context of enterprise groups

13. The Working Group commenced its discussion of this topic on the basis of the principles contained in document A/CN.9/WG.V/WP.133.

14. A new principle was proposed for insertion before principle 1 along the following lines:

> "The principles that follow are each subject to two fundamental underpinning principles:
>
> "(a) The jurisdiction of the courts in the State in which the centre of main interests (COMI) of an enterprise group member is located is [and remains] unaffected; and
>
> "(b) The principles do not replace or interfere with any process or procedure (including any permission, consent or approval) required by the jurisdiction in which the COMI of an enterprise group member is located, in respect of that enterprise group member's participation [to any extent] in a group solution."

15. The Working Group approved the additional principle as proposed. It was observed that the new principle would cover some issues raised in connection with other principles, for example, the requirements for participation in the coordination process as contemplated in principle 5.

16. The Working Group approved principles 1 to 8 with the following observations. It was noted that the reference to refusing the commencement of proceedings in paragraph 5 might not be possible in all jurisdictions, as it would be dependent upon domestic law. Use of the words "rather than substantive" in principle 3 should be deleted and the word "exclusively" should be added before the word "procedural".

17. Noting that substantive consolidation had been discussed in part three of the Legislative Guide, it was suggested that it should also be discussed in the cross-border context and any reasons for not including it in this draft text as a possible tool in resolving cross-border insolvency should be explained.

18. Having approved the principles, the Working Group considered how to approach the draft text on enterprise groups contained in documents A/CN.9/WG.V/WP.128 (articles 8 to 18) and WP.134. A proposal was made that the various topics contained in those documents could be divided into five main areas, the first three of which would form a set of basic provisions with the fourth and fifth being supplemental for those States wishing to go beyond the first three. The first topic, for example, could address coordination and cooperation as set out in draft articles 9 to 18 of A/CN.9/WG.V/WP.128. The second topic could include the elements needed for the development of a group solution involving multiple entities and approval of that solution, as well as voluntary participation in the solution, and obtaining relief to support that solution. The third topic could cover the use of synthetic proceedings in lieu of commencing non-main proceedings. The fourth and fifth supplemental topics could address the use of synthetic proceedings in lieu of commencing main proceedings and approval of the group solution on a more streamlined basis that assessed whether the interests of creditors of the affected group member were adequately protected by that solution.

19. Endorsing that general approach, the Working Group agreed to first consider articles 9 to 18 of A/CN.9/WG.V/WP.128.

B. Draft legislative provisions on the cross-border insolvency of enterprise groups (A/CN.9/WG.V/WP.128)

1. Cooperation with foreign courts and foreign representatives

Article 9. Cooperation and direct communication between a court of this State and foreign courts or foreign group member representatives

20. There was general support in the Working Group for article 9 as drafted.

Article 10. Cooperation to the maximum extent possible under article 9

21. There was general support in the Working Group for article 10 as drafted, with the following comments:

(a) Some preference was expressed in favour of deleting the square brackets in paragraph (c) and retaining the text "participating in a group insolvency solution", although it was noted that consistency with the definition of that phrase needed to be maintained;

(b) An additional paragraph might be added to the draft article to address cooperation among courts on how to allocate and provide for the costs associated with cross-border cooperation; and

(c) A cross reference to the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation might be added to the draft article.

Article 11. Conditions applicable to cross-border communication involving courts

22. There was support in the Working Group for the deletion of draft article 11 on the basis that it was already contained in part three of the Legislative Guide and was more appropriate to that text than a model law.

Article 12. Effect of communication under article 9

23. There was some support for deleting draft article 12 as covering issues not addressed in the Model Law; however, there was also support for retaining it on the basis that it facilitated common understanding about the effect of communication. In that regard, it was noted that in jurisdictions less familiar with cross-border cooperation, there was uncertainty as to the effect of this type of communication, and that retaining draft article 12 could facilitate effective implementation of this text. It was agreed that the draft article would be retained for further consideration.

Article 13. Coordination of hearings and Article 14. Cooperation and direct communication between the […] and foreign courts and foreign group member representatives

24. There was general support in the Working Group for articles 13 and 14 as drafted.

Article 15. Cooperation to the maximum extent possible under article 14

25. There was general support in the Working Group for article 15 as drafted, with the following comments:

(a) Some preference was expressed in favour of deleting the square brackets in paragraph (d) and retaining the text "participating in a group insolvency solution"; and

(b) The language of article 27(d) of the Model Law, i.e. "agreements concerning the coordination of proceedings" should be used in paragraph (b) in place of "cross-border insolvency agreement".

26. It was noted that the draft text did not contain a draft article 16.

Article 17. Authority to enter into cross-border insolvency agreements

27. There was general support in the Working Group for article 17 as drafted, but it was suggested that the title and the substance of draft article 17 should incorporate the language of article 27(d) of the Model Law, i.e. "agreements concerning the coordination of proceedings" in place of "cross-border insolvency agreement".

Article 18. Appointment of a single or the same insolvency representative

28. Subject to giving some consideration in the next draft of the text to the use of the phrase "a single or the same insolvency representative" to provide greater clarity, there was general support in the Working Group for article 18 as drafted.

Article 8. Protection of creditors and other interested persons

29. The Working Group recalled that it had not considered draft article 8 at its previous session (as noted above in para. 12). There was general support for article 8 as drafted.

2. Coordination of concurrent proceedings (A/CN.9/WG.V/WP.128, section D)

30. There was some agreement that the draft model law may need to incorporate provisions addressing issues covered by articles 28 to 32 of the Model Law. At this stage, however, the Working Group was not clear what might be required and noted that this matter should be reverted to in future discussions.

C. Draft legislative provisions on the cross-border insolvency of enterprise groups (A/CN.9/WG.V/WP.134)

31. The Working Group next considered the revisions made to articles 1 to 7 of the draft text based on the conclusions reached at its forty-seventh session (A/CN.9/835, paras. 23-46).

Article 2. Definitions

32. Some support was expressed in favour of retaining Variant 2 of paragraphs (h) "foreign group proceeding" and (i) "enterprise group insolvency solution". It was felt that those variants better reflected the desire to focus on recognition of the coordinating proceeding.

Article 3. Recognition of a foreign group proceeding

33. The following proposals were made in respect of draft article 3:

(a) There was support for the proposal that the words in subparagraph 3(a) "that court has not prohibited participation of that group member in the" should be deleted and that the second sentence should end as follows: "any approval which may be required under the domestic law of the State of the opening of proceedings for the participation in the [foreign group proceeding] [enterprise group insolvency solution] has been obtained";

(b) That in the same subparagraph, the word "proposed" be added before the phrase "enterprise group insolvency solution";

(c) That in the same subparagraph, it might be clarified whether the words "subject to insolvency proceedings" referred to insolvency proceedings that had already commenced and it was proposed that some consideration might need to be given as to whether this subparagraph was consistent with principle 4 of A/CN.9/WG.V/WP.133; and

(d) That subparagraph 3(b) should also require a statement identifying all members of the enterprise group.

Article 5. Decision to recognize a foreign group proceeding

34. The following proposals and observations were made in respect of draft article 5:

(a) It was questioned whether the phrase "subject to any applicable public policy exception" in paragraph 1 was necessary; it was noted that the answer to that question might be resolved by the form that the draft text ultimately took;

(b) That subparagraph 1(i) could be deleted on the basis that it repeated elements of the definition of "foreign group proceeding";

(c) That since subparagraphs 1(g) and (h) were generally supported, the square brackets around them could be deleted and the text retained, with attention to consistency with the discussion at subparagraph 40(d) below; and

(d) That paragraph 1 bis should be deleted on the basis that it overlapped with the definition of "foreign group proceeding".

35. In respect of subparagraph 1(f), some concern was expressed that it revealed an overall problem with the drafting, given the definition that had been agreed for "foreign group proceeding" in draft article 2. Because of that change, the meaning of draft article 5 had been altered and, in particular, subparagraph 1(f) was somewhat circular in that it repeated elements of that definition. In addition, subparagraph 1(f) referred to other types of proceeding, for example, those commenced on the basis of the presence of assets in the jurisdiction, which would not be recognizable under the Model Law, but which may nevertheless be a necessary part of a group solution. An issue to be considered was therefore whether there should be a departure in the group context from the Model Law approach of recognizing proceedings on the basis of COMI or establishment. In considering those other types of proceedings, and the manner in which they might be involved in the group solution, it was suggested that it would be important to resolve the function of a group proceeding in achieving that group solution. For example, if the group proceeding was to simply coordinate negotiation of that solution, it would not supplant the COMI as a basis for commencement of proceedings in respect of a group member.

Article 6. Relief that may be granted upon application for recognition of a foreign group proceeding

36. There was general support in the Working Group for article 6 as drafted, with the following comments:

(a) It was agreed that the word "appropriate" should be added to the chapeau before the words "relief of a provisional nature";

(b) In respect of subparagraphs 1(a) and (b), some support was expressed in favour of retaining the words in square brackets, and also in favour of deleting those words. Those who preferred to retain the text in square brackets agreed that the word "procedural" was not necessary and could be deleted. After discussion, it was agreed that the square bracketed text should be deleted as being inappropriate for inclusion in a text to be enacted as domestic law. It was observed that the relief that might be granted under draft article 6 was discretionary and that, in any event, the court could only order relief that it was permitted to order under domestic law. It was also observed that that idea should be expressed clearly in any commentary or guide to enactment prepared for the draft text;

(c) In respect of subparagraph 1(d), support was also expressed in favour of its deletion on the basis of its potential to conflict with subparagraph 1(b), and on the basis of the potential for loss of value through the continuation of funding, which was contrary to the focus on preservation measures in draft article 6(1) and might create problems if recognition was subsequently denied. It was observed, however, that continuation of funding could be critical to achieving a successful reorganization and the provision should thus be retained. After discussion, it was agreed that subparagraph 1(d) should be retained, with the addition of the words "subject to any appropriate safeguards the receiving court may apply";

(d) It was agreed that subparagraph 1(e) should be deleted as being too broad and not consistent with the urgency required for provisional relief; and

(e) Some support was expressed in favour of retaining the text in both sets of square brackets in paragraph 4. Another suggestion was to replace that text with the words "a proceeding in the court located at the COMI of a group member participating in the group solution".

Article 7. Recognition of a foreign group proceeding

37. There was general support in the Working Group for article 7 as drafted, with the following comments:

(a) As noted in respect of draft article 6 above (see subpara. 36(b)), the square bracketed text in subparagraphs 1(a) and (b) should be deleted; and

(b) It was agreed that the phrase "Where the funding group member is participating in the group coordination plan, and where permitted by relevant laws [of the receiving court]" should be inserted in subparagraph 1(h).

D. Proposal in respect of the cross-border insolvency of enterprise groups

38. In keeping with the general approach endorsed in paragraphs 18 and 19 above, the Working Group considered the detail of a proposal by Switzerland, the United Kingdom, the United States and INSOL Europe. Having considered the topic of coordination and cooperation as contained in articles 9 to 18 of A/CN.9/WG.V/WP.128, there was general agreement that the proposal provided a viable way forward, separating the more contentious issues from those which were more amenable to broad agreement. It was noted that the proposal should not be considered as complete, since it included policy statements and legislative texts, and might generally require further elaboration and refinement. The Working Group discussed the specific elements of the proposal as set out below.

39. The first article considered was as follows:

"**Article A — Definitions**

"(1) 'Group Member' means an enterprise that has a separate legal identity and that is interconnected, by control or significant ownership, with one or more other enterprises.

"(2) 'Group Representative' means a person or body who is appointed pursuant to Article B(3) and who is responsible for seeking to develop a Group Solution.

"(3) 'Group Solution' means a set of proposals adopted in a Planning Proceeding:

"(a) For the reorganization, sale, or liquidation of all or some of the operations or assets of more than one Group Member;

"(b) That would be likely to add to the overall combined value of the Group Members involved; and

"(c) That must be approved, insofar as the proposals relate to a particular Group Member, in the jurisdiction in which that Group Member has its centre of main interests.

"(4) 'Planning Proceeding' means a proceeding:

"(a) That is a main proceeding for a Group Member that would be a necessary and integral part of a Group Solution;

"(b) In which a Group Representative has been appointed;

"(c) In which there is a reasonable prospect of developing a Group Solution; and

"(d) In which one or more additional Group Members are participating for the purpose of attempting to develop a Group Solution."

40. The following suggestions were made with respect to the drafting of the definitions:

(a) To the extent that the definitions reflected those included in other UNCITRAL insolvency texts, including part three of the Legislative Guide, care should be taken to ensure consistency;

(b) With respect to paragraph 1, since the word "enterprise" could refer to a single entity or something broader, the definition should be along the lines of "a separate legal entity that is a member of an enterprise group";

(c) The chapeau of paragraph 3 should include the text "a proposal or set of proposals…"; and

(d) With respect to subparagraphs 3(b) and 4(c), a more objective test should be used along the lines of "the purpose of which would be to enhance the overall combined value of the group members involved" and "the purpose of which would be to develop a group solution" respectively.

41. The next article considered was:

"**Article B — Participation by Group Members in an Insolvency Proceeding in this State; Appointment of a Group Representative**

"(1) Subject to paragraph (2), if an insolvency proceeding has been commenced in this State for a Group Member whose centre of main interests is located in this State, any other Group Member (whether solvent or insolvent) may participate in that proceeding for the purpose of attempting to develop a Group Solution.

"(2) An insolvent Group Member whose centre of main interests is in another State may not participate in a proceeding under paragraph (1) if a court in that other State precludes it from so doing.

"(3) If one or more Group Members participate in a proceeding under paragraph (1), the court may appoint a Group Representative, who may then seek recognition from foreign courts and may seek to participate in any foreign proceeding related to a participating Group Member."

42. The following suggestions were made with respect to the drafting of the article:

(a) Paragraph 1 should distinguish between solvent and insolvent group members because they were governed by different legislative frameworks; the interests of creditors of solvent entities were different to those of an insolvent entity; different considerations would apply as between liquidation and reorganization as to the participation in a group solution of solvent and insolvent entities; and

(b) Paragraph 3 should clarify on whose behalf the group representative was acting in seeking recognition.

43. The next article considered was:

"**Article C — Recognition of a Proceeding Occurring in Another State as a Planning Proceeding**

"A Group Representative appointed in a foreign proceeding may seek to have that proceeding recognized in this State as a Planning Proceeding. Recognition shall be granted by the court if the criteria in Article A(4) are met."

44. It was suggested that it should be clarified that the State referred to in article C was the receiving State and not the originating State in which the group representative had been appointed.

45. The next article considered was:

"**Article D — Participation by Group Representative and Available Relief**

"(1) Upon recognition of a foreign proceeding as a Planning Proceeding under Article C, the Group Representative may participate in any proceedings in this State related to Group Members that are participating in the Planning Proceeding.

"(2) To the extent needed to preserve the possibility of developing a Group Solution, the court may, at the request of the Group Representative, grant the following relief with respect to the assets or operations of any insolvent Group Member that is participating in the Planning Proceeding in this State:

"(a) Staying execution against the Group Member's assets;

"(b) Suspending the right to transfer, encumber, or otherwise dispose of any assets of the Group Member;

"(c) Suspending the proceedings temporarily to allow for the development of a Group Solution;

"(d) Staying the commencement or continuation of individual actions or individual proceedings concerning the Group Member's assets, rights, obligations, or liabilities;

"(e) Entrusting the administration or realization of all or part of the Group Member's assets located in this State to the Group Representative or another person designated by the court, in order to protect and preserve the value of assets that, by their nature or

because of other circumstances, are perishable, susceptible to devaluation, or otherwise in jeopardy;

"(f) Providing for the examination of witnesses, the taking of evidence, or the delivery of information concerning the Group Member's assets, affairs, rights, obligations, or liabilities; and

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

46. The following suggestions were made with respect to the drafting of the article:

(a) There needed to be consistency between the proceedings being recognized and the debtors in respect of whose assets relief might be granted, and further consideration of whether the relief should be automatic or discretionary upon recognition, bearing in mind the distinction between articles 20 and 21 of the Model Law;

(b) Appropriate safeguards for creditors should be considered;

(c) In respect of article D(1), thought might need to be given to the situation where a group member from the receiving State was participating in the planning proceeding, but no local proceeding had been commenced in the receiving State;

(d) Consideration should be given to adding, where relevant, the words "in this State" if the relief in article D(2) was intended to have merely territorial rather than universal effect;

(e) Identification or specification of the receiving and originating jurisdictions in respect to the COMI of relevant debtors needed to be clearer; and

(f) In respect of article D(2)(e), the restriction of relief to perishable and other assets in jeopardy was thought to be too narrow.

47. The next article considered was:

"**Article E — Approval of Local Elements of a Group Solution**

"(1) If a proposed Group Solution is developed in the Planning Proceeding, and the Group Representative submits to the court in this State the portion of the Group Solution affecting an insolvent Group Member whose centre of main interests is in this State, the court shall submit the relevant portion of the Group Solution to the approval process in [*cross-reference to relevant provisions in domestic insolvency law*].

"(2) If the approval process pursuant to paragraph (1) results in approval of the portion of the Group Solution affecting the Group Member, the court shall confirm and implement those elements relating to assets or operations in this State."

48. The following suggestions were made with respect to the drafting of the article:

(a) In respect of article E(1), the group representative should submit the entire group solution to the court in the receiving State and the approval process could then be limited to the relevant local elements of that solution; and

(b) A reference to establishment should also be included in article E(1) to cover the situation where a group solution affected creditors in a jurisdiction in which the group member participating in that solution only had an establishment.

49. The next articles considered were:

"**Article F — Use of Synthetic Non-Main Proceedings**

"(1) To facilitate the treatment of claims that could otherwise be brought by creditors in a non-main proceeding in another State, a foreign representative or Group Representative appointed in this State may commit to, and the court in this State may approve, providing those creditors with the treatment in this State that they would have received in a non-main proceeding in that other State.

"(2) A court in this stage may stay or decline to open a non-main proceeding if a foreign representative or Group Representative from another State in which a main proceeding is pending has made a commitment under paragraph (1)."

"**Article G — Use of Synthetic Main Proceedings**[1]

"(1) To facilitate the treatment of claims that would otherwise be brought by creditors in a proceeding in another State, a foreign representative or Group Representative appointed in this State may commit to, and the court in this State may approve, providing those creditors with the treatment in this State that they would have received in a proceeding in that other State.

"(2) A court in this stage may stay or decline to open a main proceeding if a foreign representative or Group Representative from another State in which a proceeding is pending has made a commitment under paragraph (1)."

50. The following suggestions were made with respect to the drafting of the articles, noting that article F formed part of the basic provisions and article G was a supplemental provision:

(a) The word "synthetic" should be deleted from the heading of article F and a more appropriate term identified;

(b) Article F should be supplemented by appropriate provisions on the protection of creditors such as draft article 8 above (see para. 29) (and article 22 of the Model Law);

(c) The meaning of the term "treatment" in both articles should be clarified, i.e. whether it referred to the ranking of claims or to some other matter; and

(d) That article F should be regarded as a supplemental rather than a basic provision. To address that concern, it was proposed that articles F(1) and G(1) should be considered to be basic provisions, as they simply addressed the type of treatment that creditors might be offered, and that the reference in article F(1) to "non-main proceeding" be adjusted to "proceeding"; article G(1) as currently drafted could then be deleted. Articles F(2) and G(2) would then address the more controversial issue of the power of the court to decline to commence main or non-main proceedings; whether that should be considered to be a basic or supplemental provision would require further consideration.

51. The next article considered was:

"**Article H — Additional Relief**

"(1) If, upon recognition of a Planning Proceeding pursuant to Article C, the court is satisfied that the interests of creditors of affected Group Members would be adequately protected in the Group Coordination Proceeding, the court, in addition to granting any relief described in Article D, may stay or decline to open insolvency proceedings in this State relating to Group Members participating in the Planning Proceeding.

"(2) Notwithstanding Article E(1), if, upon submission of a proposed Group Solution by the Group Representative, the court is satisfied that the interests of creditors of the affected Group Member are adequately protected in the Planning Proceeding, the court

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[1] Articles G and H were proposed as supplemental components described by the following text:

"The supplemental components, which would be additional options, would go a step further. They would permit a court to use synthetic proceedings for a group member whose COMI was in a different jurisdiction. They would also allow a court to provide additional relief — staying or declining to open proceedings, as well as approving the relevant portion of a group solution without submitting it to the applicable approval procedures under local law — if the court determined that creditors would be adequately protected.

"Use of the optional provisions might result in a group member's insolvency being handled in a manner that was not consistent with the prior expectations of creditors and other third parties that the legal entity would be subject to normal proceedings in its COMI jurisdiction. As a consequence, departing from that basic principle (COMI) should be limited to exceptional circumstances, namely to cases where the benefit in terms of efficiency largely outweighed the negative effect on creditors' expectations in particular and legal certainty in general. This would only appear to be justified:

- In jurisdictions where courts traditionally held a large degree of discretion and flexibility in the handling of insolvency proceedings,
- Where the group in question was closely integrated and therefore the benefit of synthetic proceedings in lieu of main proceedings (at the COMI) was obvious, and
- Where the use of the proceedings under Articles A to G (if available) could not achieve a similar result."

may approve the relevant portion of the Group Solution and grant any relief described in Article D that is necessary for its implementation."

52. The following suggestions were made with respect to the drafting of the article:

(a) There should be consideration of the extent to which the ability to recognize and enforce a group solution might go beyond what was possible pursuant to the relief provisions of the Model Law and the manner in which article H(2) might raise issues related to the model law being developed on recognition and enforcement of insolvency-related judgements; and

(b) It was clarified that articles F and G were intended to operate independently of a group solution and thus in a situation where there was no agreement on a planning proceeding.

53. At the end of the discussion, given the support expressed by the Working Group for the group solution discussed during the deliberations, the Secretariat was requested to prepare a draft text for consideration at a future session based upon the principles contained in A/CN.9/WG.V/WP.133, and the text in A/CN.9/WG.V/WP.128 and WP.134, as well as the articles and structure of the proposal outlined above in paragraphs 18 and 38 to 52. That draft should take into account the conclusions and agreements reached at the current session of the Working Group.

V. Cross-border recognition and enforcement of insolvency-related judgements

54. The Working Group commenced its discussion of this topic on the basis of the draft model law on the recognition and enforcement of insolvency-related judgements contained in document A/CN.9/WG.V/WP.135 (draft model law).

Article 1. Scope of application

55. The Working Group recalled its agreement concerning the need to take into consideration existing international and regional instruments, as well as those under development, in order to avoid overlap and to ensure that there were no gaps in terms of the scope of application of the draft model law. It was noted that that view was also reflected by the Commission at its forty-eighth session (A/70/17, para. 236). The Working Group agreed that those considerations should continue to be borne in mind in its ongoing deliberations.

56. In pursuit of that objective, it was proposed that the following text should be inserted in draft article 1:

"x. This [law] shall not apply to a judgement where there is a Treaty [in force] concerning the recognition or enforcement of civil and commercial judgements (whether concluded before or after [this law] comes into force), and that Treaty applies to the judgement.

"y. A judgement is to be treated for the purposes of paragraph x as falling within the class of judgements to which a Treaty applies:

"(i) even where the particular judgement is not enforceable under the Treaty because of the particular circumstances of the case; and

"(ii) whether or not the State has adopted the Treaty."

57. While the proposal received some support, a number of reservations were also expressed, particularly in respect of the content of paragraph (y). Some were of the view that it was unusual for an UNCITRAL instrument to state that its provisions would apply in a State other than the enacting State. Others did not agree with that interpretation of the proposed text.

58. After discussion, there was support in the Working Group for Variant 1 of draft article 1, for retaining paragraph 2 of the draft article, and with respect to the proposal outlined above, to provide a revised text based on the issues discussed in the Working Group

and exploring other possible drafting options to reflect the intent of that proposal. Support was also expressed in favour of retaining Variant 3.

Additional text to address concerns about article 1, Variant 1

59. After further discussion and recalling that the Working Group had expressed a preference for the retention of Variant 1, a concern was expressed that subparagraph 1(1)(b) might lead to a conflict of laws, as it seemed to suggest that recognition and enforcement of insolvency-related judgements in a foreign State could be governed by the law of the originating State. The following text for a new article was proposed: "In the event of a conflict between the application of this law and the law of the State where the judgement was rendered, the provisions of this law prevail."

60. There was some acknowledgement of the difficulty that was identified. It was explained, however, that the purpose of subparagraph 1(1)(b) was simply to authorize the recognition and enforcement of an insolvency-related judgement in a foreign State in much the same way as article 1(1)(b) of the Model Law authorized assistance to be sought in a foreign State in connection with a proceeding under the law of the enacting State. On that basis, Variant 1 of draft subparagraph 1(1)(b) would not give rise to a conflict of law situation. Reference was also made to article 5 of the Model Law (which is repeated in this draft text — see para. 71 below) and it was suggested that, for greater clarity, the text of the heading of that article might be used to replace subparagraph 1(1)(b). A further proposal to remedy the perceived difficulty was to add the words "in this State" to the chapeau of Variant 1 of article 1. After discussion, it was agreed that if the intent was analogous to article 1 of the Model Law, the suggestion to use the heading of draft article 5 of the current text as a substitute for draft subparagraph 1(1)(b) might provide a solution. In that case, however, it was suggested that draft subparagraph 1(1)(b) would not be needed because article 5 of the draft text would be sufficient. The Working Group agreed that the issue would require further consideration.

Article 2. Definitions

(a) "Foreign proceeding"

61. The Working Group was generally in agreement with paragraph (a) as drafted. Support was specifically expressed in favour of retaining the text "including an interim proceeding," and deleting the brackets around it.

(c) "Judgement"

62. The three issues raised with respect to the definition were the inclusion of the word "final", the reference to administrative decisions, and the inclusion of provisional measures. A number of concerns were expressed with respect to the use of the word "final", and the manner in which it might be interpreted under domestic law in different States. There was support both in favour of and against the use of the term. A proposal to resolve that issue that focussed on the enforceability of the judgement in the originating jurisdiction received some support. It was noted that the concept of enforceability was used in other international instruments.

63. Concerns expressed with respect to administrative decisions included the nature of the bodies that might issue decisions and whether the parties to the dispute had been given an opportunity to be heard before the decision was made. A proposal was made to limit administrative decisions that were enforceable under this text to those that would have the same effect as court judgements under the law of the originating State. That proposal received some support. A different proposal was to delete any reference to administrative decisions.

64. As to the inclusion of provisional measures, a number of delegations expressed concern on their inclusion on the basis that they were merely interim orders and might be changed by the originating court. Another concern related to differences between the types of relief that might be ordered by an originating court and those that might be available as relief in the receiving State; where the former were much broader than the latter, the receiving court might be unable to recognize and enforce the order. In that regard, it was

noted that relief granted under the Model Law was subject to the provisions of local law, e.g. articles 20 (2) and 22 (2). A different view was that provisional measures might be of particular importance in insolvency, particularly where they were of a protective or conservatory nature. It was suggested that some of the concerns expressed might better be addressed under draft article 10, or by qualifying provisional measures by reference to those enforceable under the laws of the originating State.

65. After discussion, it was agreed that in respect of each of the issues outlined above, since the Working Group could not reach agreement on how to reconcile the different views, the existing text should remain in square brackets. The Secretariat was requested to explore possible solutions including approaches adopted by the Hague Conference, such as that of equivalent effect, as included in article 13 of the text emanating from the fifth session of the Hague Conference working group on the judgements project (October 2015).

(d) "Insolvency-related judgement"

66. The prevailing view was that Variant 1 of the chapeau was preferred over Variant 2, noting that the reference to "insolvency estate" could be defined by reference to paragraph 12 (t) of the glossary of the Legislative Guide. No comments were expressed with respect to subparagraphs (i), (iii), and (iv).

67. With respect to subparagraph (ii), it was suggested that the words "and assets" should be added after the word "sums". That proposal received some support. A second proposal was to limit the subparagraph to those cases where the obligations arose after the commencement of insolvency proceedings. It was agreed that that proposal would need further consideration.

68. Support was expressed in favour of Variant 1 of subparagraph (v). In respect of subparagraph (vi), one view expressed was that it raised the same concerns as noted above with respect to provisional measures. It was suggested in respect of subparagraph (vii) that UNCITRAL's work on secured transactions should be cross-referenced. Further suggestions concerned subparagraphs (viii) and (xiii), which were said to be currently drafted too broadly and should be limited to judgements that would otherwise be enforceable under this instrument. In terms of subparagraph (ix), support was expressed for retention of the subparagraph with the addition of the words "that could be pursued by or on behalf of the insolvency estate". In relation to subparagraphs (x) to (xii), although it was proposed that those provisions should be deleted on the basis that they were covered by the Model Law, it was noted that there might be situations where that was not the case (such as where the foreign proceeding was no longer pending), and they should be retained in the text. There was support for the latter view on the additional basis that it was not entirely clear whether such provisions were covered by the Model Law.

69. After discussion, a preference was expressed in favour of Variant 1 of the chapeau and of Variant 1 of subparagraph (v). It was agreed that subparagraphs (ii), (vi) to (ix) and (xiii) required some revision as discussed above, and that subparagraphs (x) to (xii) should be retained. There was broad support for deleting subparagraph (xiv).

Possible additions to draft article 2

70. After discussion, the Working Group agreed to retain Variant 3 of paragraph (f), to retain paragraph (e) and to delete paragraphs (g) and (h).

Articles 3 to 7

71. Although some reservations were expressed with respect to the need for article 5, support was nonetheless expressed in favour of retaining draft articles 3 to 7.

Article 8. Recognition and enforcement of an insolvency-related judgement

72. Support was expressed in favour of retaining Variant 2, with the following adjustment to paragraph 1: a comma should be inserted at the end of the first sentence, followed by insertion of "including by way of defence." The second sentence could then be deleted. In subparagraph 1 (b), the reference to finality should be aligned with the revised definition of "judgement". Some support was expressed in favour of deleting paragraph 3.

73. The view was expressed that subparagraph 2 (c) was not needed because only notice of the application for recognition and enforcement was required to support that application. Notice relating to the originating proceeding could be requested by the judge if proper notification of that proceeding was contested.

74. It was suggested that the words "as required by the law of the State of recognition" be added after the word "evidence" in subparagraph 2 (d).

75. Reference was made to paragraph 3 of the notes section following draft article 8, which quoted from paragraph 4 of the preliminary draft text emanating from the Hague Conference working group on the judgements project dealing with the question of postponement. Support was expressed in favour of including that concept in the draft text.

Article 9. Decision to recognize and enforce an insolvency-related judgement

76. Concerns were raised as to the intent of paragraph (f). A view was expressed that the purpose was not to provide for review of the foreign judgement itself, but rather of the proceedings in which the judgement was issued, and in particular, whether those proceedings would be manifestly contrary to the public policy of the receiving State. Concerns were also expressed, however, that that could be read as contradictory to the purpose of the draft instrument. A related concern was that refusal of recognition under the Model Law on technical grounds should not be a ground for refusing recognition of a judgement emanating from those proceedings. It was proposed that the chapeau of article 9 be simplified to read "An insolvency-related judgement shall be recognized and enforced provided:".

77. It was proposed that public policy concerns might best be addressed by incorporating an article along the lines of article 6 of the Model Law. That article would replace paragraph (f) and article 10 paragraph (d) and resolve any question of the party with the burden of proving that recognition of the judgement would be manifestly contrary to public policy. That proposal received some support, and a proposal for text was made later in the session (see para. 81 below).

Article 10. Grounds to refuse recognition of an insolvency-related judgement

78. The Working Group supported revision of the chapeau of article 10 to read: "Recognition and enforcement of an insolvency-related judgement may be refused if:".

Paragraph (a)

79. Some support was expressed in favour of retaining the first part of the provision dealing with the possible review of the judgement and deleting the second part relating to lack of enforceability in the originating State because of such a review. An alternative view was also expressed that the later phrase of the provision in respect of lack of enforceability was the more important aspect of the provision and should be retained. That view received some support. In addition, some support was also expressed in favour of adding some provision for the protection of creditors and other stakeholders along the lines of article 22 of the Model Law, although it was noted that such a proposal had relevance to the text as a whole rather than simply with respect to paragraph (a). It was also noted that the draft text emanating from the Hague Conference working group on the judgements project provided for postponement or refusal of recognition in the event that the judgement was subject to review. It was suggested that that approach might be followed in the current text (see para. 75). After discussion, it was agreed to retain paragraph (a) for further consideration.

Paragraph (b)

80. One proposal was that paragraph (b) should be deleted because it required the receiving court to pass judgement on certain aspects of the proceedings in the originating State. A concern expressed related to the meaning of the word "notice" but in response, it was observed that not only was this provision commonly found in similar international instruments, but that the 1965 Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (articles 15 and 16) might assist in interpreting this provision. After discussion, paragraph (b) was retained for further consideration.

Paragraphs (c), (d) and (e)

81. It was noted that if an article dealing with a general public policy exception were included in the text, paragraphs (d) and (e) could be deleted. After further consideration, it was proposed that the following provision based upon article 6 of the Model Law and paragraph (e) could be added: "Nothing in this law prevents this court from refusing to take an action governed by this law if the action would be manifestly contrary to public policy [or] [including] the fundamental principles of procedural fairness of the State." That proposal was supported as a basis for further consideration. A suggestion that the word "and" should be used instead of the words in square brackets was not supported on the basis that public policy included both procedural and substantive fairness. Paragraph (c) was retained for further consideration.

Paragraphs (f) and (g)

82. It was observed that since all judgements were "binding", that word could be deleted from the text. It was noted that an article along the lines of article 22 of the Model Law may also have some application to paragraphs (f) and (g). There was some support for also deleting the word "final" on the basis that the decision on enforcement should not be delayed in order to wait for the prior or earlier judgement to become final. After discussion, paragraphs (f) and (g) were retained for further consideration.

Paragraph (h)

83. There was support in the Working Group for the retention of Variant 1 of paragraph (h).

Paragraph (i)

84. Various concerns were expressed with respect to different elements of Variants 1, 2 and 3, although some preference was expressed for Variant 3. Concerns expressed included the use of the terms "unreasonable or unfair" in Variants 1 and 2, and introduction of the use of the term "centre of main interests" in Variant 3. It was pointed out that the use of that term might be problematic for States that had not enacted the Model Law. Several revisions were proposed, but after discussion, there was agreement that those three variants should be deleted. It was noted that the list of factors recently proposed in the context of the Hague Conference working group on the judgements project was not required in this text.[2]

85. Two proposals for a new paragraph (i) were made; the Working Group agreed to retain them in square brackets for future consideration. The first proposal was: "(i) The judgement was not rendered by a court in the State of the debtor's centre of main interests or by a court which would have had jurisdiction in accordance with the law of the requested State concerning recognition and enforcement of the foreign judgement." The second proposal was: "(i) The judgement was not rendered by a court that: (a) [for Model Law enacting States: was supervising a main proceeding regarding the insolvency of the party against whom the judgement was issued;] (b) exercised jurisdiction based on the consent of the party against whom the judgement was issued; (c) exercised jurisdiction on a basis on which the receiving court could have exercised jurisdiction under its own law; or (d) exercised jurisdiction on a basis that was not inconsistent with the law of the receiving court." Although there was stronger support for the second proposal, the Working Group agreed to retain both for further consideration. The view was expressed that future discussion on the matter should be linked to the discussion on scope as set out in draft articles 1 and 2.

86. A further proposal was made to include an additional paragraph in draft article 10 as follows: "The judgement adversely affects the interests of creditors and other interested parties in this State who did not, directly or through an appropriate representative, participate in the foreign proceedings, and who could not reasonably be expected to have participated in such proceedings." Support was expressed for that proposal, although it was noted that if it was limited to local creditors only, the provision would be too narrow; the Working

[2] See the text emanating from the 5th meeting, October 2015.

Group's attention was drawn to article 22 of the Model Law and paragraph 198 of the Guide to Enactment and Interpretation.

Paragraph (j)

87. It was observed that paragraph (j) could be deleted as having already been addressed by article 8.

VI. Other business

88. The Working Group was advised that a meeting of the open-ended informal group established to consider the feasibility of developing a convention on international insolvency issues and to study adoption of the Model Law (A/CN.9/798, para. 19) had taken place. Several papers were presented for consideration and comment, and the work to be undertaken was further discussed. A further meeting of the informal group will be convened during the forty-ninth session of the Working Group in New York (2 to 6 May 2016).

B. Note by the Secretariat on insolvency law: facilitating the cross-border insolvency of multinational enterprise groups: key principles

(A/CN.9/WG.V/WP.133)

[Original: English]

Contents

Introduction

1. At its forty-fourth session in December 2013, following a three-day colloquium, the Working Group agreed to continue its work on the cross-border insolvency of multinational enterprise groups[1] by developing provisions on a number of issues that would extend the existing articles of the UNCITRAL Model Law on Cross-Border Insolvency (UNCITRAL Model Law) and part three of the UNCITRAL Legislative Guide on Insolvency Law (UNCITRAL Legislative Guide), as well as involving reference to the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation. While the Working Group considered that those provisions might, for example, form a set of model provisions or a supplement to the existing UNCITRAL Model Law, it noted that the precise form they might take could be decided as the work progressed. The Working Group considered this topic at its forty-fifth (April 2014), forty-sixth (December 2014) and forty-seventh (May 2014) sessions.

2. This note sets forth a number of basic principles that might be helpful to the Working Group in structuring its discussion of the topic and considering how it should progress. These principles establish possible building blocks for a draft text with annotations explaining each principle and providing further information.

I. Key principles of regime to address insolvency in the context of enterprise groups

Background

3. In the group context, it may be desirable in order to resolve group financial difficulties to develop a coordinated insolvency solution encompassing some or all group members, the common purpose of which would be the reorganization or sale as a going concern of the whole or part of the business or assets of one or more of the members of the enterprise group that would, or would be likely to, either maintain or add value to the enterprise group as a whole or to those members of the enterprise group participating in the group solution. A group solution should be a flexible concept that may be achieved in different ways, depending on the circumstances of the specific group, its structure, business model, degree and type of integration between group members, incidence of financial difficulty in the enterprise group and so forth. It may involve several different approaches for different parts of an enterprise group, such as a combination of liquidation and reorganization proceedings, but may not require proceedings to be commenced for all participating group members; there may be other ways of dealing with creditor claims (see below).

[1] *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17* (A/65/17), para. 259 (a); A/CN.9/763, paras. 13-14; *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17* (A/68/17), para. 326.

Principle 1

If required or requested to address the insolvency of an enterprise group member, insolvency proceedings may be commenced. When proceedings are not required or requested, there is no obligation to commence such proceedings.

4. This principle recognizes that in the group context, it might not always be necessary to commence proceedings for every group member, but that commencement of proceedings should not be restricted where they are required or requested. It does not address the status of those proceedings i.e. main or non-main, or the place in which such proceedings might be commenced, but those points might be further elaborated in the text.

5. As noted in the recast EC Insolvency Regulation 1346/2000 (Regulation (EU) 2015/848 of the European Parliament and of the Council)[2] (the recast EIR) non-main insolvency proceedings can serve different purposes, besides the protection of local interests. Cases may arise in which the insolvency estate of the debtor is too complex to administer as a unit, or the differences in the legal systems concerned are so great that difficulties may arise from the extension of effects deriving from the law of the State of the commencement of proceedings to the other States where the assets are located. For that reason, the insolvency representative in the main insolvency proceedings may request the commencement of non-main insolvency proceedings where the efficient administration of the insolvency estate so requires. However, non-main insolvency proceedings may hamper the efficient administration of the insolvency estate, especially in the group context where there might be numerous non-main proceedings. Therefore, there may be situations in which the court seized of a request to commence non-main insolvency proceedings might be able, at the request of the insolvency representative in the main insolvency proceedings, to postpone or refuse the commencement of such proceedings to preserve the efficiency of the main proceedings, provided the interests of creditors and other stakeholders are protected (see for example, the recast EIR, article 36).

Principle 2

When it is proposed that an enterprise group solution be developed for some or all of the members of an enterprise group, that solution will require coordination as between group members and may be developed through a coordinating proceeding.

6. Coordination of the various proceedings may be required to achieve a group solution. There may be several ways of achieving the desired level of coordination. One approach may be to identify one of the insolvency proceedings already commenced with respect to a group member as a coordination proceeding to provide a focal point for leading the coordination and cooperation between those group members involved in negotiating and developing the group solution. Where proceedings for more than one group member are commenced in the same jurisdiction (e.g. because multiple group members have their centre of main interests (COMI) in that jurisdiction), that jurisdiction may provide a natural coordination point.

7. It might be noted that the Working Group has previously recognized, in the context of part three of the Legislative Guide, the value of one entity taking a lead role in cooperation (see A/CN.9/WG.V/WP.114, paras. 10-12). That issue was subsequently addressed in 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.

8. Another approach might be that taken by the recast EIR, which makes provision for the commencement of group coordination proceedings. These voluntary proceedings are additional to the separate insolvency proceedings commenced for individual group members and can be requested by an insolvency representative appointed in any of the group member proceedings. The request should specify the essential elements of the coordination, in particular an outline of the coordination plan, a proposal as to who should be appointed as a coordinator and an outline of the estimated costs of the coordination (art. 61.3). Recital 57 of the recast EIR provides that group coordination proceedings should always strive to

[2] Adopted by the Council on 12 March 2015, available from: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2015.141.01.0019.01.ENG; Recitals 40-41 (last visited 21/09/2015).

facilitate the effective administration of the insolvency proceedings of the group members, and to have a generally positive impact for the creditors. The court requested to commence such proceedings should make an assessment of those criteria prior to opening group coordination proceedings and has to be satisfied that the proceedings are appropriate and that no creditor is financially disadvantaged (art. 63). The recast EIR sets out in some detail the manner in which coordination proceedings will operate.[3]

Principle 3

Adopting the approach of recommendation 250, enterprise group members might designate one of the insolvency proceedings commenced (or to be commenced) with respect to group members participating in the group solution to function as the coordinating proceeding, the role of which would be procedural, rather than substantive. A proviso might be that the coordinating proceeding should be a proceeding taking place in a State that is the COMI of at least one of the group members that is a necessary and integral part of the enterprise group solution.

9. Issues relevant to the designation of a coordinating proceeding might include: the criteria for identifying the coordinating proceeding, by whom the identification should be made and the means of reaching agreement on identification; recognition of that agreement in all relevant States; identification of the role to be played by the coordinating proceeding; and whether coordination should be initiated and led by the court responsible for conduct of the coordinating proceeding or by the relevant insolvency representative.

Principle 4

1. The court located in the COMI (the COMI court) of an enterprise group member participating in a group solution can authorize the insolvency representative appointed in insolvency proceedings taking place in the COMI to seek: (i) to participate and be heard in a coordinating proceeding taking place in another jurisdiction, and (ii) recognition by the coordinating court of the proceeding in the COMI jurisdiction; and

2. The coordinating court can receive such a request for recognition.

10. Where a coordinating proceeding is taking place in one State, an insolvency representative appointed in related proceedings (i.e. concerning another group member) in a different State may need authorization to participate in the coordination proceedings and to be able to seek recognition of those proceedings, consistent with article 5 of the Model Law and recommendation 239 of part three of the Legislative Guide. The coordinating court may also need appropriate authorization to receive such applications.

Principle 5

Participation in the coordination process would be voluntary for those group members whose COMI is located in a jurisdiction different to that of the coordinating proceeding. For those group members whose COMI is located in the same jurisdiction as the coordinating proceeding, the recommendations of part three of the Legislative Guide on Insolvency Law with respect to joint application and procedural coordination could apply. Solvent members of the enterprise group may participate in a coordination process without such participation implying a submission to the jurisdiction of a domestic or foreign insolvency court or to the applicability of domestic or foreign insolvency laws.

11. The coordination process is intended to be entirely voluntary for all relevant group members. Those members not seeking to participate could be reorganized or liquidated individually. Participation of solvent group members is in keeping with the recognition in part three of the Legislative Guide that such participation may be a necessary part of a financial solution for an enterprise group and is thus based upon recommendation 238.

[3] Recast EIR, articles 61-77.

Principle 6

Creditors and stakeholders of each enterprise group member participating in the group solution would vote in their own jurisdiction on the treatment they are to receive under the group reorganization plan according to the applicable domestic law.

12. This principle preserves the rights of creditors and other stakeholders to vote on the specific treatment they are to be accorded under the group plan, in accordance with the relevant applicable law. A coordinated group plan may comprise a number of parts applicable to different group members and, accordingly, approval would occur member by member with respect to the part applying to each member. If, under the law applicable in each member's jurisdiction, only creditors whose rights are affected by a plan are required to vote on it, then only those creditors would vote. That law would also apply to the voting mechanism, including use of classes, and the majorities required for approval. To approve a plan across multiple group members, a number of issues may need to be considered, including applicable majorities across group members, what is to happen to group members that do not approve the plan and so forth.

Principle 7

Following approval of the group reorganization plan by relevant creditors and stakeholders, each COMI court would have jurisdiction to deal with the group reorganization plan in accordance with domestic law.

13. In addition to the approval process, national law would apply to confirmation and implementation of the reorganization plan.

Principle 8

The insolvency representative appointed in the proceeding designated as the coordinating proceeding should have a right of access to the proceedings in each COMI court to be heard on issues related to implementation of the group reorganization plan.

14. This principle builds upon recommendation 239 and the coordination and cooperation recommendations 240-242 and 246 of part three of the Legislative Guide.

C. Note by the Secretariat on insolvency law: facilitating the cross-border insolvency of multinational enterprise groups: revised draft legislative provisions

(A/CN.9/WG.V/WP.134)

[Original: English]

Contents

I. Introduction

At its forty-fourth session in December 2013, following a three-day colloquium, the Working Group agreed to continue its work on the cross-border insolvency of multinational enterprise groups[1] by developing provisions on a number of issues that would extend the existing provisions of the UNCITRAL Model Law on Cross-Border Insolvency (UNCITRAL Model Law) and part three of the UNCITRAL Legislative Guide on Insolvency Law (UNCITRAL Legislative Guide), as well as involving reference to the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation. While the Working Group considered that those provisions might, for example, form a set of model provisions or a supplement to the existing UNCITRAL Model Law, it noted that the precise form they might take could be decided as the work progressed. The Working Group considered this topic at its forty-fifth (April 2014), forty-sixth (December 2014) and forty-seventh (May 2015) sessions.

[1] *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17* (A/65/17), para. 259 (a); A/CN.9/763, paras. 13-14; *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17* (A/68/17), para. 326.

2. This note by the Secretariat implements the revisions to draft articles 1-7 of the text set forth in A/CN.9/WG.V/WP.128 that were requested by the Working Group at its forty-seventh session (A/CN.9/835, paras. 23-46). The notes to the revisions indicate the origin of the revisions and include some observations by the Secretariat on drafting and substance.

II. Draft legislative provisions on the cross-border insolvency of enterprise groups

Article 2. Definitions

A. Draft provisions

For the purposes of these provisions:

(a)-(g) (*as set forth in A/CN.9/WG.V/WP.128*)

(h) "Foreign group proceeding" means

Variant 1 (as set forth in A/CN.9/WG.V/WP.128)

a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of a debtor that is a member of an enterprise group are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation in [the context of] an enterprise group insolvency solution;[2]

Variant 2

[a collective judicial or administrative proceeding, including an interim proceeding, commenced pursuant to a law relating to insolvency in a foreign State that is the centre of main interests of at least one member of an enterprise group and in which an enterprise group insolvency solution (of which the foreign group proceeding is a necessary and integral part), is being developed and coordinated];

(i) "Enterprise group insolvency solution" means

Variant 1 (as set forth in A/CN.9/WG.V/WP.128)

a proposal for coordinated reorganization, sale as a going concern or liquidation (of the whole or part of the business or assets) of two or more members of an enterprise group that would, or would be likely to, either maintain or add value to the enterprise group as a whole or to those group members. An enterprise group insolvency solution may be coordinated through a proceeding in a State that is the centre of main interests of at least one enterprise group member;

Variant 2

[*First sentence remains the same as in variant 1*]. [An enterprise group insolvency solution shall be coordinated through one or more [foreign group] proceeding[, each commenced in a State that is the centre of main interests of at least one enterprise group member and each of which is a necessary and integral part of that solution]];

B. Notes

Subparagraph (h) — foreign group proceeding

1. Variant 2 of subparagraph (h) reflects a proposal made at the forty-seventh session (A/CN.9/835, para. 36). The rationale of the revision was to focus on recognition of the coordinating proceeding; proceedings pending for individual group members could be recognized under the Model Law and it was suggested that no further provisions were required for that purpose.

[2] Based on Model Law, art. 2, subpara. (a).

Subparagraph (i) — enterprise group insolvency solution

2. Variant 2 of subparagraph (i) reflects a proposal made at the forty-seventh session (A/CN.9/835, para. 36). As noted above in paragraph 1, the rationale of the revision was to focus on recognition of the coordinating proceeding; proceedings pending for individual group members could be recognized under the Model Law and no further provisions were required for that purpose. While it was suggested that subparagraphs (h) and (i) should both contain the same elements, as presently drafted there is no connection between foreign group proceeding and an enterprise group insolvency solution and the definitions are somewhat complex. A simpler drafting solution might be to refer in subparagraph (i) to an enterprise group solution being coordinated through a foreign group proceeding, and rely on the definition of a foreign group proceeding to contain the elements of COMI and the "necessary and integral" connection between the foreign group proceeding and the group solution.

Article 3. Recognition of a foreign group proceeding[3]

A. Draft provisions

1. A foreign group member representative[4] may apply to the court for recognition of a foreign group proceeding.

2. An application for recognition shall be accompanied by:

(a) A certified copy of the decision commencing the foreign group proceeding and appointing the foreign group member representative; or

(b) A certificate from the foreign court affirming the existence of the foreign group proceeding and of the appointment of the enterprise group member representative; or

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

3. An application for recognition shall also be accompanied by:

(a) Evidence that [each group member sought to be represented in [a foreign group proceeding] [an enterprise group insolvency solution] has agreed to participate in that [proceeding] [solution]. Where such a group member is subject to insolvency proceedings in the court of its centre of main interests, evidence shall be procured that that court has not prohibited participation of that group member in the [foreign group proceeding] [enterprise group insolvency solution];]

[(b) A statement identifying all foreign proceedings commenced in respect of enterprise group members participating in the [foreign group proceeding] [enterprise group insolvency solution] that are known to the foreign group member representative.]

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

B. Notes

1. At the forty-seventh session, various proposals were made for amendments to paragraph 3 (A/CN.9/835, paras. 32-35). Since one of the proposals (A/CN.9/835, para. 33) was to move the substantive elements of draft article 3, subparagraphs 3 (a) to (c) to draft article 5, those subparagraphs are now set forth in draft article 5, subparagraphs 1 (g) to (i) below. Amendments proposed to those subparagraphs are reflected in draft article 5.

2. A proposal to add a new subparagraph (d) to draft article 3, paragraph 3 (A/CN.9/835, para. 35) is reflected as a new subparagraph (a). It might be noted that the draft text proposed at the forty-seventh session refers to "participation in a foreign group proceeding", as if that type of proceeding related to multiple group members. However, since the definition of "foreign group proceeding" refers to a proceeding relating to a single group member, it may

[3] Ibid., art. 15.

[4] As appropriate, the following articles that refer to the foreign group member representative could also apply to an enterprise group committee representative, where such a committee was formed.

be more appropriate in subparagraphs (a) and (b) to use the words "enterprise group insolvency solution" which have been included in square brackets.

3. A proposal to add to draft article 3 a provision along the lines of article 15, paragraph 3 of the Model Law (A/CN.9/835, para. 33) is reflected in draft article 3, subparagraph 3 (b).

Article 4. Presumptions concerning recognition[5]

Notes

On the basis that the draft text is being developed as an addendum to the Model Law, it was suggested draft article 4 was not required (A/CN.9/835, para. 37) and accordingly it is not repeated in this draft.

Article 5. Decision to recognize a foreign group proceeding[6]

A. Draft provisions

1. [Subject to any applicable public policy exception,][7] a foreign group proceeding shall be recognized if:

(a) [deleted];

(b) [deleted];

(c) The application meets the requirements of article 3, paragraph 2;

(d) The application has been submitted to the court referred to in article ...;[8]

(e) [deleted];

[(f) The foreign group proceeding was commenced on the basis of the centre of main interests or establishment of the foreign group member or (if permissible under the laws of the enacting State) any other basis, including the presence of assets of the foreign group member or voluntary submission by the foreign group member to the jurisdiction of the court of the foreign State];

[(g) An enterprise group insolvency solution is being developed for the whole or a part of the enterprise group;[9]

(h) There is a reasonable prospect of developing an enterprise group insolvency solution; and

(i) The foreign group proceeding is [a necessary and integral part of] [is participating in] the enterprise group insolvency solution.]

[1*bis*. The foreign group proceeding shall be recognized:

(a) As a foreign main group proceeding if it is taking place in the State where the debtor has the centre of its main interests; or

(b) As a foreign non-main group proceeding if the debtor has an establishment in the foreign State within the meaning of article 2, subparagraph (f) of the Model Law.]

2. An application for recognition of a foreign group proceeding shall be decided upon at the earliest possible time.

3. Recognition may be modified or terminated if it is shown that the grounds for granting it were fully or partially lacking or have ceased to exist.

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[5] Model Law, art. 16.

[6] Model Law, art. 17.

[7] It may be appropriate to include in the draft text an article along the lines of art. 6 of the Model Law.

[8] It may be appropriate to include in the draft text an article along the lines of art. 4 of the Model Law.

[9] Details of the evidence required to satisfy these requirements could be developed as substantive provisions or included in any commentary or guide to enactment accompanying the text.

4. For the purposes of paragraph 3, the foreign group member representative shall inform the court of changes in the status of the foreign group proceeding[, the status of the enterprise group solution] or in the status of their own appointment occurring after the application for recognition is made.[10]

B. Notes

Paragraph 1

1. Subparagraphs 1 (a) and (b) of draft article 5 have been deleted following a suggestion at the forty-seventh session that they were not required as the issues they addressed were covered by the proposed revision to the definition of "foreign group proceeding" (A/CN.9/835, para. 38).

2. As suggested at the forty-seventh session, a new subparagraph 1 (f) has been inserted in draft article 5, paragraph 1 (A/CN.9/835, para. 38). Although receiving some support, reservations were expressed with respect to the reference to presence of assets as a basis for commencement or recognition of insolvency proceedings. It might be noted that presence of assets is not recommended in the Legislative Guide as a basis for commencement of proceedings (see footnote to Legislative Guide recommendation 7). It might also be noted that the Guide to Enactment and Interpretation of the Model Law on Cross-Border Insolvency discusses use of the "presence of assets" standard in the context of article 28 and commencement of local proceedings after recognition of a foreign main proceeding (paras. 224-227). Adoption of a wider basis for jurisdiction (i.e. "or any other basis") might require the definitions of this draft text to be reconsidered.

3. As suggested at the forty-seventh session, the substantive elements of draft article 3, paragraph 3 (i.e. subparagraphs (a) to (c)) have been moved to draft article 5 (A/CN.9/835, para. 33). They are now reflected in subparagraphs 1 (g) to (i) of draft article 5 and have been revised as proposed. The content of the previous draft of subparagraph (e) would no longer be relevant and has been deleted.

*Paragraph 1*bis

4. This paragraph reflects a suggestion at the forty-seventh session (A/CN.9/835, para. 38) to include a new paragraph specifying recognition as either main or non-main proceedings, consistent with article 17, subparagraphs 2 (a) and (b) of the Model Law.

5. The need for paragraph 1*bis* may depend on whether the draft text is to be an addendum to the Model Law or free-standing. Moreover, if the regime is to include recognition as a non-main proceeding, the definitions in draft article 2 might need to be reconsidered.

Paragraph 4

6. This paragraph reflects a suggestion at the forty-seventh session (A/CN.9/835, para. 38) to include a reference to changes in the status of the group insolvency solution.

Article 6. Relief that may be granted upon application for recognition of a foreign group proceeding[11]

A. Draft provisions

1. From the time of filing an application for recognition until the application is decided upon, the court may, at the request of the foreign group member representative, where relief is urgently needed to protect the assets of the enterprise group member subject to a foreign group proceeding or the interests of the creditors, grant relief of a provisional nature, including:

(a) [Where permitted by relevant [procedural] laws,] staying execution against the enterprise group member's assets;

[10] Based on the Model Law, art. 18.
[11] Based on the Model Law, art. 19.

(b) [Where permitted by relevant [procedural] laws,] staying the commencement or continuation of insolvency proceedings in this State with respect to the enterprise group member;

(c) Entrusting the administration of all or part of the enterprise group member's assets located in this State to the foreign group member representative or another person designated by the court, in order to protect and preserve the value of assets that, by their nature or because of other circumstances, are perishable, susceptible to devaluation or otherwise in jeopardy;

[(c)*bis* Entrusting the realization of all or part of the enterprise group member's assets located in this State to the foreign group member representative or another person designated by the court in order to protect and preserve the value of assets that, by their nature or because of other circumstances, are perishable, susceptible to devaluation or otherwise in jeopardy];

(d) Recognizing existing arrangements concerning the funding of enterprise group members participating in the group insolvency solution where the funding entity is located in this State and authorizing the continued provision of finance under those funding arrangements;

(e) Any relief mentioned in article 7, paragraph 1.

2. [*Insert provisions of the enacting State relating to notice.*]

3. Unless extended under article 7, subparagraph 1 (g), the relief granted under this article terminates when the application for recognition is decided upon.

4. The court may refuse to grant relief under this article if such relief would interfere with the administration of a [foreign group proceeding] [group insolvency solution].

B. Notes

Subparagraphs 1 (a) and (b)

1. Following a suggestion made at the forty-seventh session to accommodate situations in which it might be problematic for the court to stay execution, or commencement or continuation of insolvency proceedings, subparagraphs 1 (a) and (b) refer to what is permitted under applicable law (A/CN.9/835, para. 45); the Working Group may wish to consider whether a specific reference to "procedural" law is required. The same amendment has been made to draft article 7, subparagraphs 1 (a) and (b).

*Subparagraph 1 (c)*bis

2. Subparagraph (c)*bis* reflects a proposal at the forty-seventh session to treat administration and realization of assets separately (A/CN.9/835, para. 43). The same revision is also reflected in draft article 7, subparagraph 1(a). The Working Group may wish to consider whether a distinction should be made between realization of some or substantially all of the debtor's assets.

Article 7. Relief that may be granted upon recognition of a foreign group proceeding[12]

A. Draft provisions

1. Upon recognition of a foreign group proceeding, where necessary to protect the assets of the enterprise group member or the interests of creditors and facilitate the implementation of a group insolvency solution, the court may, at the request of the foreign group member representative, grant any appropriate relief, including:

(a) [Where permitted by relevant [procedural] laws], staying the commencement or continuation of individual actions or individual proceedings concerning the assets, rights, obligations or liabilities of the enterprise group member;

[12] This article is based upon arts. 20 and 21 of the Model Law, with some additions.

(b) [Where permitted by relevant [procedural] laws,] staying the commencement or continuation of insolvency proceedings in this State with respect to the enterprise group member to enable a group insolvency solution to be developed;

(c) Staying execution against the assets of the enterprise group member;

(d) Suspending the right to transfer, encumber or otherwise dispose of any assets of the enterprise group member, except where authorized by the court;

(e) Entrusting the administration of all or part of the assets of the enterprise group member located in this State to the enterprise group member representative or another person designated by the court;

[(e)*bis* Entrusting the realization of all or part of the assets of the enterprise group member located in this State to the enterprise group member representative or another person designated by the court;]

(f) Providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the assets, affairs, rights, obligations or liabilities of the enterprise group member;

(g) Extending any provisional relief granted;

(h) Recognizing existing arrangements concerning the funding of enterprise group members participating in the group insolvency solution and authorizing the continued provision of finance under those funding arrangements where the funding entity is located in this State;

(i) Subject to article 8, approving treatment in the foreign group proceeding of the claims of creditors located in this State; or

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

2. Upon recognition of a foreign group proceeding the court may, at the request of the foreign group member representative, entrust the distribution of all or part of the assets of the enterprise group member located in this State to the foreign group member representative or another person designated by the court, provided that the court is satisfied that the interests of creditors in this State are adequately protected.

B. Notes

Draft article 7 has been revised to be consistent with draft article 6 as indicated in the notes to draft article 6.

D. Note by the Secretariat on insolvency law: cross-border recognition and enforcement of insolvency-related judgements

(A/CN.9/WG.V/WP.135)

[Original: English]

Contents

Introduction

1. At its forty-seventh session (2014), the Commission gave Working Group V (Insolvency Law) a mandate to develop a model law or model legislative provisions to provide for the recognition and enforcement of insolvency-related judgements.

2. At its forty-sixth session in December 2014, Working Group V (Insolvency Law) considered a number of issues relevant to the development of a legislative text on the recognition and enforcement of insolvency-related judgements, including the types of judgements that might be covered, procedures for recognition and grounds to refuse recognition. The Working Group agreed that the text should be developed as a stand-alone instrument, rather than forming part of the UNCITRAL Model Law on Cross-Border Insolvency (the Model Law),[1] but that the Model Law provided an appropriate context for the new instrument.

[1] A/CN.9/829, paras. 60 and 74.

3. At its forty-seventh session, the Working Group considered the first draft of a model law to be given effect through enactment by a State (A/CN.9/WG.V/WP.130). The content and structure of the draft text drew upon the Model Law, as suggested by the Working Group at its forty-sixth session (A/CN.9/829, para. 63) and sought to give effect to the conclusions of the Working Group at its forty-sixth session relating to the types of judgement to be included (A/CN.9/829, paras. 54 to 58), procedures for obtaining recognition and enforcement (A/CN.9/829, paras. 65 to 67) and the grounds for refusal of recognition (A/CN.9/829, paras. 68 to 71).

4. At its forty-seventh session, the Working Group had a preliminary exchange of views on articles 1 to 10 of the draft text and made a number of proposals with respect to the drafting (A/CN.9/835, paras. 47-69); articles 11 and 12 were not reached due to lack of time. The Working Group's proposals are reflected as additional variants and square bracketed text in the draft provisions set forth below. Only those draft articles for which revisions were proposed are included in this draft; the text of omitted articles remains the same as set forth in A/CN.9/WG.V/WP.130. The text of each draft article is followed by notes which indicate the source of the revision and offer additional explanation.

5. Issues not addressed by the current draft text that the Working Group may wish to consider include: the treatment of judgements arising in what might be considered competing insolvency proceedings (see A/CN.9/829, para. 75) and termination or variation of recognition (see Model Law article 17, para. 4).

Draft model law on the recognition and enforcement of insolvency-related judgements

Article 1. Scope of application

A. Draft provisions

Variant 1 (as set forth in A/CN.9/WG.V/WP.130)

1. This Law applies where:

(a) Recognition and enforcement of an insolvency-related judgement is sought in this State by a foreign representative or other person entitled to seek enforcement of such a judgement in connection with a foreign proceeding; or

(b) Recognition and enforcement of an insolvency-related judgement is sought in a foreign State in connection with a proceeding under the law of this State.

Variant 2

1. [This Law applies to the recognition and enforcement of an insolvency-related judgement on the application of a foreign representative or other person entitled to seek recognition and enforcement of such a judgement.]

Variant 3

1. [This Law applies to the recognition and enforcement of an insolvency-related judgement given in a proceeding taking place in a State that is different to the State of execution.]

2. This Law does not apply to [...].

B. Notes

Variants 2 and 3 of paragraph 1 were proposed at the forty-seventh session (A/CN.9/835, paras. 51-52). Since some support was expressed in favour of retaining subparagraph 1 (b), it is included as part of variant 1 for further consideration. No comments were made with respect to paragraph 2 dealing with possible exclusions from the application of the draft text, so it is retained as drafted for consideration.

Article 2. Definitions

A. Draft provisions — subparagraphs (a)-(c)

For the purposes of this Law:

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

(b) "Foreign representative" (*as set forth in A/CN.9/WG.V/WP.130*);

(c) "Judgement" means any [final] judicial or administrative decision, whatever it may be called, including a decree or order, and a determination of costs and expenses provided that the determination related to a judicial or administrative decision,[2] and any decision ordering [provisional] or [protective [and conservatory] measures].[3]

B. Notes

Subparagraph (a)

1. This definition is based on the Model Law, article 2, subparagraph (a). Suggestions were made at the forty-seventh session that this definition should be aligned with that of the corresponding term in the Model Law (A/CN.9/835, para. 54). The elements omitted in the previous version have now been included in square brackets. As some support was expressed in favour of retaining the words "or were", the square brackets have been deleted.

Subparagraph (c)

2. At the forty-seventh session (A/CN.9/835, para. 56) some support was expressed in favour of requiring the judgement to be final, although it was noted that that would be inconsistent with the inclusion of provisional or protective measures. Concerns were also expressed with respect to the inclusion of administrative decisions and provisional measures. It was noted however, that deleting administrative decisions might create a gap in some jurisdictions. It was also suggested that the only provisional measures that should be included were protective or conservatory measures.

3. It might be noted that draft article 3, paragraph 1 of the preliminary draft text emanating from the fourth meeting of the Hague Conference on Private International Law (the Hague Conference) working group on the judgements project (February 2015) does not require a judgement to be final; the draft text includes, in draft article 4, subparagraph 4 provision for postponement of recognition where a judgement is subject to review. It does exclude interim measure of protection:[4]

> "In this Convention, 'judgement' means any decision on the merits given by a court, whatever it may be called, including a decree or order, and a determination of costs or expenses by the court (including an officer of the court), provided that the determination relates to a decision on the merits which may be recognized or enforced under this Convention. An interim measure of protection is not a judgement."

4. It may also be noted that Article 32 of the recast EC Insolvency Regulation 1346/2000[5] (Regulation (EU) 2015/848 of the European Parliament and of the Council) (the recast EIR)

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[2] This definition is taken from the Convention of 30 June 2005 on Choice of Court Agreements (2005 Hague Convention), art. 4.

[3] This last phrase relating to provisional measures is taken from the draft global judgements convention prepared by The Hague Conference on Private International Law, 2001 version, art. 23.

[4] The preliminary draft text emanating from the fourth meeting (February 2015) of the Hague Conference on Private International Law's working group on the judgements project, available at www.hcch.net/upload/wop/gap2015pd07b_en.pdf (last visited 21/09/2015).

[5] Adopted by the Council on 12 March 2015, available from: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2015.141.01.0019.01.ENG (last visited 21/09/2015). The recast EIR will enter into force in June 2017.

provides for recognition of judgements relating to preservation measures taken after the request for the commencement of insolvency proceedings or in connection with it:

"*Article 32. Recognition and enforceability of other judgements*

"1. Judgements handed down by a court whose judgement concerning the opening of proceedings is recognized in accordance with Article 19 and which concern the course and closure of insolvency proceedings, and compositions approved by that court, shall also be recognized with no further formalities. Such judgements shall be enforced in accordance with Articles 39 to 44 and 47 to 57 of Regulation (EU) No. 1215/2012.

"The first subparagraph shall also apply to judgements deriving directly from the insolvency proceedings and which are closely linked with them, even if they were handed down by another court.

"The first subparagraph shall also apply to judgements relating to preservation measures taken after the request for the opening of insolvency proceedings or in connection with it.

"2. The recognition and enforcement of judgements other than those referred to in paragraph 1 of this Article shall be governed by Regulation (EU) No. 1215/2012 provided that that Regulation is applicable."

5. Paragraphs 21 and 22 of document A/CN.9/WG.V/WP.126 indicate the judgements that have been held to fall within[6] and outside[7] the provisions of article 32.

C. Draft provisions — subparagraph (d) — *article 2 continued*

(d) "Insolvency-related judgement" means

Chapeau — variant 1

[a judgement that is closely related to a foreign proceeding and was issued after the commencement of that proceeding. A judgement is presumed to be "closely related to a foreign proceeding"[8] if it has an effect upon the insolvency estate of the debtor and either: (i) is based on a law relating to insolvency; or (ii) due to the nature of its underlying claims, would not have been issued without the commencement of the foreign proceeding.[9] An insolvency-related judgement would include any equitable relief, including the establishment of a constructive trust, provided in that judgement or required for its enforcement. Insolvency-related judgements may include, [inter alia,] judgements concerning any of the following matters:]

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[6] For example, judgements held to fall within article 32 have included: avoidance actions, insolvency law-related lawsuits on the personal liability of directors and officers; lawsuits concerning the priority of a claim; disputes between an insolvency representative and debtor on inclusion of an asset in the insolvency estate; approval of a reorganization plan; discharge of residual debt; actions on the insolvency representative's liability for damages, if exclusively based on the carrying out of the insolvency proceedings; action by a creditor aiming at the nullification of an insolvency representative's decision to recognize another creditor's claim; and claims by an insolvency representative based on specific insolvency law privilege.

[7] For example, judgements held to fall outside article 32 have included: actions by and against an insolvency representative which would have been possible also without the insolvency proceedings; criminal proceedings in connection with insolvency; an action to recover property in the possession of the debtor; an action to determine the legal validity or amount of a claim pursuant to general laws; claims by creditors with a right for segregation of assets; claims by creditors with a right for separate satisfaction (secured creditors); and an avoidance action filed not by an insolvency representative, but by a legal successor or assignee.

[8] The recast EIR uses the phrase "actions which derive directly from the insolvency proceedings and are closely linked with them" (recital 35). The recital notes that "these actions should include avoidance actions and actions concerning obligations that arise in the course of the insolvency proceedings, such as advance payment for the costs of the proceeding. In contrast, actions for the performance of obligations under a contract concluded by the debtor prior to the opening of the proceedings do not derive directly from the proceedings."

[9] The draft article might indicate that for the purposes of this model law, an insolvency-related judgement would not include a judgement imposing a criminal penalty.

Chapeau — variant 2

[*First sentence remains the same as variant 1*]. A judgement is presumed to be "closely related to a foreign proceeding" if it has an effect upon the insolvency estate of the debtor, [such as reducing the value of the estate or upsetting the principle of equitable treatment of creditors]. Insolvency-related judgements may include, [inter alia,] judgements concerning any of the following matters:]

(i) Turnover of property of the insolvency estate;

(ii) Sums due to the insolvency estate;

(iii) Sale of assets by the insolvency estate;

(iv) Requirements for accounting related to the insolvency proceeding;

(v) *Variant 1 (as set forth in A/CN.9/WG.V/WP.130)*

Overturn of transactions involving the debtor or assets of the insolvency estate that have the effect of either reducing the value of the estate or upsetting the principle of equitable treatment of creditors;[10]

Variant 2 (as set forth in A/CN.9/WG.V/WP.130)

Resolution of actions to avoid or otherwise render ineffective acts detrimental to creditors,[11] including undervalued transactions, preferential transactions and transactions intended to defeat, delay or hinder the ability of creditors to collect claims where the effect of the transaction was to put assets beyond the reach of creditors or potential creditors or to otherwise prejudice the interests of creditors;[12]

(vi) Modification or enforcement of a stay of actions in a foreign proceeding;[13]

(vii) Validity of a secured claim;

(viii) A cause of action pursued by a creditor with approval of the court, based on [an insolvency] [a foreign] representative's decision not to pursue that cause of action;

(ix) Liability of a director in the period approaching insolvency;[14]

(x) Confirmation of a plan of reorganization or liquidation or approval of a [composition] [voluntary restructuring agreement];

(xi) The discharge of a particular debt;

(xii) Recognition of the discharge of a debtor;

(xiii) [A cause of action [related to insolvency] pursued by the party to whom it has been assigned by the foreign representative in accordance with the applicable law]; and

(xiv) [Any judgement related to insolvency that is not enforceable under another instrument].

D. Notes

Subparagraph (d), chapeau variant 1

6. Variant 1 of the chapeau reflects a suggestion made at the forty-seventh session (A/CN.9/835, para. 57) to delete the words "and legal basis" in subparagraph (d) (ii) of draft article 2, and include the words "inter alia" in the last sentence of subparagraph (d). It was

[10] The wording of this variant is based on the UNCITRAL Legislative Guide on Insolvency Law, rec. 87.

[11] The wording of this variant is based on the UNCITRAL Model Law on Cross-Border Insolvency, art. 23.

[12] This wording is taken from the Legislative Guide, rec. 87.

[13] Some consideration might be given to the issue of possible overlap with provisions of the Model Law, such as art. 22, para. 3.

[14] See Legislative Guide, part four dealing with the obligations of directors of a company in the period approaching insolvency, recs. 255, 259 and 260.

noted that the statement included in footnote 9 concerning judgements imposing a criminal penalty could be included in any guide to enactment prepared for this draft text.

Subparagraph (d), chapeau variant 2

7. Variant 2 of the chapeau reflects a proposal made at the forty-seventh session (A/CN.9/835, para. 57) to simplify the chapeau of the draft definition. Variant 2 also includes language from variant 1 of subparagraph (d) (v) of draft article 2, to explain the phrase "effect upon the insolvency estate of the debtor".

Subparagraph (d) (ii)

8. At the forty-seventh session (A/CN.9/835, para. 58) various suggestions were made with respect to the subparagraphs of the definition of "insolvency-related judgement", including deleting subparagraph (d) (ii) on the ground that any judgement arising from a contractual dispute concerning sums owed under the contract should be enforceable under general rules rather than under this model law. However, "sums due to the insolvency estate" is somewhat ambiguous as to scope. It might cover, for example, sums due other than under contract, such as tort claims or sums recovered under an avoidance action (which may or may not be covered by subparagraph (v)). It is retained for further consideration.

Subparagraph (d) (vi) and (vii)

9. At the forty-seventh session (A/CN.9/835, para. 58) suggestions made with respect to the subparagraphs of the definition of "insolvency-related judgement", included deleting subparagraphs (d) (vi) and (d) (vii) on the grounds that those matters were closely related to the question of recognition of foreign proceedings under the Model Law. While that may be the case in some jurisdictions, it may not necessarily be the case in all jurisdictions that have enacted legislation based on the Model Law, as previously noted in A/CN.9/829, paragraph 58. Including those types of judgement in this text may be helpful for States that have not enacted the Model Law. The relationship between this text and the Model Law and issues that might need to be considered in enacting this text could perhaps be more effectively addressed in a guide to enactment of this text, than in the substance of its provisions.

Subparagraph (d) (x)

10. At the forty-seventh session (A/CN.9/835, para. 58) suggestions made with respect to the subparagraphs of the definition of "insolvency-related judgement" included deleting subparagraph (d) (x) on the grounds that that matter was closely related to the question of recognition of foreign proceedings under the Model Law, as noted above with respect to subparagraphs (vi) and (vii). The same considerations as notes above in paragraph 9 might be applicable to subparagraph (d) (x).

Subparagraph (d) (xii)

11. For the same reasons as cited above with respect to subparagraphs (d) (vi), (vii) and (x), it was suggested at the forty-seventh session (A/CN.9/835, para. 58) that subparagraph (xii) should also be deleted. It might be recalled however, that specific mention of the need to include the substance of subparagraphs (d) (x) and (xii) was made at both the forty-fourth and forty-sixth sessions of the Working Group (A/CN.9/798, para. 28 and A/CN.9/829, para. 60 respectively). Accordingly, the Working Group may wish to further consider those subparagraphs before agreeing to their deletion.

Subparagraphs (d) (xiii) and (xiv)

12. Two new subparagraphs (d) (xiii) and (xiv) have been added to reflect suggestions made at the forty-seventh session (A/CN.9/835, paras. 59 and 60).

Possible additions to draft article 2

A. Draft provisions

[(e) "Foreign court" means a judicial or other authority competent to control or supervise a foreign proceeding];

(f) ["Proceeding" means

Variant 1: [a judicial contest to determine and enforce legal rights];

Variant 2: [any action involving or carried out by a court of law];

Variant 3: [procedures and hearings before a court or administrative body that performs a judicial function];

[(g) "Recognition" means to [acknowledge] [confirm] the existence, validity or legality of an insolvency-related judgement];

[(h) "Enforcement" means to compel observance of a recognized insolvency-related judgement by the judgement debtor. [Note for guide: not all judgements will require enforcement to be effective.]]

B. Notes

Additional definition (e)

1. Inclusion of additional definitions was proposed at the forty-seventh session (A/CN.9/835, paras. 54 and 63(d)). The definition of "foreign court" is the same as the definition of that term in the Model Law and is limited to the court with jurisdiction over insolvency proceedings. As currently drafted, this term is only used in the definition of "foreign proceeding" and in draft article 10, subparagraph (i) of the draft model law.

Additional definitions (f), (g) and (h)

2. Inclusion of these additional terms was also proposed at the forty-seventh session (A/CN.9/835, paras. 54 and 63(d)). The definition of "proceeding" includes various alternatives the Working Group may wish to consider. The term is used in the draft text in the context of the phrase "foreign proceeding" and the "proceeding" in which the insolvency-related judgement was given.

3. The definitions of "recognition" and "enforcement" seek to clarify that while recognition is required in order to enforce a foreign insolvency-related judgement, not all recognized judgements will require enforcement to be effective. Accordingly, the definition of "enforcement" goes beyond what might be required to make the judgement effective in the recognizing State and focuses on compelling compliance with, or observance of, the judgement by the judgement debtor.

Article 3. International obligations of this State

Article 4. Competent court or authority

Article 5. Authorization to seek enforcement of an insolvency-related judgement in a foreign State

Article 6. Additional assistance under other laws

Article 7. Interpretation

Notes on articles 3-7

Articles 3-7 of the draft model law set forth in A/CN.9/WG.V/WP.130 are essentially the same as articles 3-7 of the Model Law and are not repeated in this working paper. The Working Group made no comments on those articles at its forty-seventh session (A/CN.9/835, para. 61); should it wish to include articles along these lines in the draft model law they can be added at a later stage.

Article 8. Recognition and enforcement of an insolvency-related judgement[15]

A. Draft provisions

Variant 1 (as set forth in A/CN.9/WG.V/WP.130)

1. A foreign representative or other person entitled under the law of the State in which the insolvency-related judgement was given to seek enforcement of that judgement may request the court in this State to recognize and enforce that judgement.[16]

2. A party seeking recognition and enforcement of an insolvency-related judgement shall provide:

(a) A copy of the insolvency-related judgement;

(b) A certified statement of whether the insolvency-related judgement is a final judgement or, if not, the identification of the appellate court where any appeal is pending, and the status of the appeal;

(c) Evidence that the party against whom relief is sought received notice of the proceeding in which the insolvency-related judgement was issued and had an opportunity to be heard prior to the issue of the judgement; and

(d) Evidence that the party against whom relief is sought was provided notice of the request in this State for recognition and enforcement of the insolvency-related judgement.

Variant 2

[1. A foreign representative or other person entitled under the law of the State in which the judgement was given to seek enforcement of an insolvency-related judgement may request the court in this State to recognize and enforce that judgement. A judgement may be enforced by pleading the rights created or recognized by the judgement by way of defence. A party seeking recognition and enforcement of an insolvency-related judgement shall provide:]

(a) A [certified] copy of the insolvency-related judgement;

(b) A certified statement of the [final character of the] insolvency-related judgement;

(c) [*Same as for variant 1 above*]; and

(d) [*Same as for variant 1 above*].

2. The court may require translation of documents supplied in support of recognition of the insolvency-related judgement into an official language of this State.

3. The court is entitled to presume that documents submitted in support of a request for recognition of the insolvency-related judgement are authentic, whether or not they have been legalized.

B. Notes

1. The revisions to draft article 8 were proposed at the forty-seventh session (A/CN.9/835, paras. 62-63). Variant 2 of paragraph 1 incorporates the substance of footnote 16 to variant 1 of paragraph 1 and merges paragraphs 1 and 2 of variant 1. In subparagraph 1 (a) of variant 2, the copy of the judgement to be provided should be a "certified" copy, consistent with article 15, subparagraph 2 (a) of the Model Law.

2. Draft subparagraph 1 (b) of variant 2 has been revised to indicate that the insolvency-related judgement should be a final judgement. The references in subparagraph 2 (b) of variant 1 to an appeal and the details of that appeal have been deleted. An alternative means of addressing that issue of finality, should the Working Group decide that only final judgements are to be covered by the draft text, might be to include finality as a requirement in the definition of "insolvency-related judgement".

3. An alternative approach to the issue of finality might be to consider the approach of draft article 4, paragraphs 3 and 4 of the preliminary draft text emanating from the fourth

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[15] This draft article is based on art. 15 of the Model Law, paras. 1, 2 and 4. Draft para. 4 of this article is based on art. 16, para. 2 of the Model Law.

[16] An insolvency-related judgement may also be raised as a defence to an action concerning the same matter/claim in the enacting or another State.

meeting (February 2015) of the Hague Conference working group on the judgements project:[17]

> "3. A judgement shall be recognized only if it has effect in the State of origin, and shall be enforced only if it is enforceable in the State of origin.
>
> "4. Recognition or enforcement may be postponed or refused if the judgement is the subject of review in the State of origin or if the time limit for seeking ordinary review has not expired. A refusal does not prevent a subsequent application for recognition or enforcement of the judgement. In such cases, the court addressed may also make enforcement conditional on the provision of such security as it shall determine."

4. Draft paragraphs 2 and 3 (previously 3 and 4) of draft article 8 are unchanged from the previous draft set forth in A/CN.9/WG.V/WP.130.

Article 9. Decision to recognize and enforce an insolvency-related judgement[18]

A. Draft provisions

An insolvency-related judgement shall be recognized and may, upon recognition, be enforced without review of the merits of the judgement provided:

(a) [deleted];

(b) The person seeking enforcement of the insolvency-related judgement is a person within the meaning of article 2, subparagraph (b)[19] or another person entitled to seek enforcement of the judgement under article 8, paragraph 1;

(c) The requirements of article 8, paragraph [..] are met;

(d) The court from which recognition is sought is the court referred to in article [..];

(e) Article 10 does not apply; and

(f) [Where recognition of the underlying foreign proceeding [is] [has been] sought, it has not been refused on the ground that such recognition would be manifestly contrary to public policy.]

B. Notes

The revisions to draft article 9 reflect suggestions made at the forty-seventh session (A/CN.9/835, para. 64). Subparagraph (a) has been deleted as redundant. The cross reference in subparagraph (c) will be to the paragraph of draft article 8 setting forth the conditions for recognition. A new subparagraph (f) has been added to align the result under this text with the result under the Model Law, so that recognition of an insolvency-related judgement is dependent upon recognition of the underlying insolvency proceedings not having been refused on public policy grounds under article 6 of the Model Law. An alternative means of addressing that issue might be to include it as a ground for refusal of recognition under draft article 10.

Article 10. Grounds to refuse recognition of an insolvency-related judgement[20]

A. Draft provisions

The court may decline to recognize an insolvency-related judgement if the party against whom relief is sought demonstrates that:

(a) The insolvency-related judgement is subject to review in the originating State or the time limit for seeking review has not expired and the originating State would not enforce the insolvency-related judgement because of the availability of such review;

(b) The party against whom the proceeding giving rise to the insolvency-related judgement was instituted:

(i) Was not notified of the institution of that proceeding in sufficient time and in such a manner as to enable a defence to be arranged, unless the party entered an

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[17] The draft text is available as indicated in footnote 4 above.

[18] This draft article is based on art. 17 of the Model Law.

[19] That is, the foreign representative.

[20] These grounds are based upon those discussed and agreed upon at the Working Group's forty-sixth session (A/CN.9/829, paras. 68-71).

appearance and presented their case without contesting notification in the originating court, provided that the law of the originating State permitted notification to be contested; or

(ii) Was notified of the institution of that proceeding in a manner that is incompatible with fundamental principles of this State concerning service of documents;

(c) The insolvency-related judgement was obtained by fraud in connection with a matter of procedure;

(d) Recognition and enforcement of the [content of the] insolvency-related judgement would be manifestly contrary to the public policy of this State;

(e) The proceeding in which the insolvency-related judgement was issued was manifestly contrary to the fundamental principles of procedural fairness of this State;

(f) The insolvency-related judgement is inconsistent with a prior [final, binding] judgement given in this State in a dispute between the same parties;

(g) The insolvency-related judgement is inconsistent with an earlier [final, binding] judgement given in another State involving the same parties, provided that the earlier judgement fulfils the conditions necessary for its recognition in this State;

(h) *Variant 1 (as set forth in A/CN.9/WG.V/WP.130)*

Recognition and enforcement of the insolvency-related judgement would interfere with the administration of the debtor's insolvency proceedings[21] or would be inconsistent with a stay or other order entered in insolvency proceedings in this or another State;

(h) *Variant 2*

[Recognition of the insolvency-related judgement has been refused by a judgement given in the State where the foreign proceeding has commenced, or if no judgement on recognition has been given in that State, the court from which recognition is sought determines that the insolvency-related judgement is not susceptible of recognition under the laws of the State where the foreign proceeding commenced;]

(i) *Variant 1 (as set forth in A/CN.9/WG.V/WP.130)*

The party against whom the proceeding giving rise to the insolvency-related judgement was instituted did not consent to the exercise of jurisdiction in that proceeding and the foreign court exercised jurisdiction over that party solely on a basis that was unreasonable or unfair. A basis of jurisdiction is not unreasonable or unfair solely because it is not an acceptable basis of jurisdiction for courts in this State;

(i) *Variant 2 (as set forth in A/CN.9/WG.V/WP.130)*

The party against whom the proceeding giving rise to the insolvency-related judgement was instituted did not consent to the exercise of jurisdiction in that proceeding and the foreign court exercised jurisdiction over that party solely on one of the following grounds:

(i) The presence of that party's property in the jurisdiction of the foreign court, when the property is unrelated to the insolvency-related judgement;

(ii) The nationality of a different party; or

(iii) Any other basis that was unreasonable or unfair; a basis of jurisdiction is not unreasonable or unfair solely because it is not an acceptable basis of jurisdiction for courts in this State;

(i) *Variant 3*

[Where the party against whom recognition is sought is the debtor in the proceedings giving rise to the insolvency-related judgement, if such proceedings were not initiated at the

[21] At the forty-sixth session, it was suggested that this ground might be included as an alternative to restricting recognition to judgements emanating from proceedings that might be regarded as main or non-main proceedings (A/CN.9/829, para. 70).

debtor's centre of main interests. In all other cases, where the judgement party did not have its centre of main interests in, or where it did not consent to the exercise of the jurisdiction of, the State in which the insolvency-related judgement was given.]

[(j) The requirements of article 8, paragraph [..] have not been met].

B. Notes

Subparagraphs (c), (d) and (e)

1. At the forty-seventh session (A/CN.9/835, para. 68), it was proposed that the potential overlap between subparagraphs (c), (d) and (e) should be addressed. On the basis that subparagraph (d) is the most broadly framed and might be interpreted as including the elements of both subparagraphs (c) and (e), those two subparagraphs might be deleted and only subparagraph (d) retained; the content of subparagraphs (c) and (e) might be reflected in any guide to enactment of the draft instrument. It might be noted that subparagraph (d), which uses the phrase from article 6 of the Model Law "manifestly contrary to the public policy of this State" has been augmented by a reference to enforcement of the "content of" the insolvency-related judgement as requested.

2. It might be noted that draft article 5, subparagraphs 1 (b) and (c) of the preliminary draft text emanating from the fourth meeting (February 2015) of the Hague Conference working group on the judgements project retains the essence of subparagraph (c) of draft article 10 above as a separate ground for refusal and combines subparagraphs (d) and (e) of draft article 10, providing that recognition or enforcement might be refused if:

"(b) The judgement was obtained by fraud in connection with a matter of procedure;

"(c) Recognition or enforcement would be manifestly incompatible with the public policy of the requested State, including situations where the specific proceedings leading to the judgement were incompatible with fundamental principles of procedural fairness of that State;"[22]

3. It might be further noted that Article 33 of the recast EIR provides:

"Any Member State may refuse to recognize insolvency proceedings opened in another Member State or to enforce a judgement handed down in the context of such proceedings where the effects of such recognition or enforcement would be manifestly contrary to that State's public policy, in particular its fundamental principles or the constitutional rights and liberties of the individual."[23]

Subparagraphs (f) and (g)

4. Subparagraphs (f) and (g), as proposed at the forty-seventh session (A/CN.9/835, para. 68), require the earlier judgements, with which the insolvency-related judgement for which recognition is sought might be inconsistent, to be final and binding.

5. It might be noted that the preliminary draft text emanating from the fourth meeting of the Hague Conference working group on the judgements project includes grounds the same as set forth above in draft subparagraphs (f) and (g),[24] but does not specifically require the earlier judgements to be final.

Subparagraph (h)

6. As proposed at the forty-seventh session (A/CN.9/835, para. 67), a new variant 2 of subparagraph (h) has been added. Variant 1 of subparagraph (h) focuses more broadly on interference with existing insolvency proceedings or inconsistency with a stay or other order granted in those proceedings. Variant 2 focuses more specifically on refusal of recognition

[22] The text is available as indicated in footnote 4 above.

[23] The text is available as indicated in footnote 5 above.

[24] The draft text is available as indicated in footnote 4 above: see draft article 5, subparagraphs 1(d) and (e): "(d) the [defendant] [person against whom the judgement was rendered] expressly consented to the jurisdiction of the court of origin in the course of the proceedings in which the judgement was given; (e) [the judgement ruled on a contractual obligation and the [defendant] [person against whom the judgement was rendered] intentionally engaged in frequent or significant activity in the State of origin related to the obligation at issue".

in the commencing State or, in the absence of a judgement on the matter in that State, a determination by a court in another State (in which recognition of the judgement is sought) that the insolvency-related judgement was not susceptible of recognition under the laws of the commencing State.

Subparagraph (i)

7. A new variant 3 of subparagraph (i) has been added as proposed at the forty-seventh session (A/CN.9/835, para. 67). While the proposal to add that variant received some support, the report of the forty-seventh session indicates (A/CN.9/835, para. 66) that "serious reservations as to its inclusion were expressed, in particular, that a blanket refusal to recognize on the basis that the insolvency-related judgement did not emanate from the debtor's centre of main interests would be too restrictive to be useful in practice."

8. It might be noted that the preliminary draft text emanating from the fourth meeting (February 2015) of the Hague Conference working group on the judgements project provides for recognition of judgements arising in States where the judgement debtor has a branch, agency or other establishment provided the claim giving rise to the judgement arose out of the activities of that branch, agency or establishment (art. 5 (3) (c). Subparagraphs (3) (e) and (f) of draft article 5 provide:

> "(e) [The judgement ruled on a contractual obligation and the [defendant] [person against whom the judgement was rendered] intentionally engaged in frequent or significant activity in the State of origin related to the obligation at issue;
>
> "(f) The judgement ruled on a contractual obligation and it was rendered by a court in the State in which performance of that contractual obligation by [defendant] [the person against whom the judgement was rendered] occurred, or in which the parties to the contract agreed that it should occur. This agreement should derive from the provisions of the contract. This shall not apply if the contractual obligation consists of a payment of money, unless such payment constituted the main obligation of the contract;]"[25]

Subparagraph (j)

9. New subparagraph (j), proposed at the forty-seventh session (A/CN.9/835, para. 68) reflects the ground included in the Model Law, article 17, subparagraph 1 (c) that permits denial of recognition where the application fails to satisfy the specified evidentiary requirements.

[25] The draft text is available as indicated in footnote 4 above.

E. Report of the Working Group on Insolvency Law on the work of its forty-ninth session (New York, 2-6 May 2016)

(A/CN.9/870)

[Original: English]

Contents

Introduction

A. Facilitating the cross-border insolvency of multinational enterprise groups

1. At its forty-fourth session (December 2013), the Working Group agreed to continue its work on cross-border insolvency of multinational enterprise groups[1] by developing provisions on a number of issues, some of which would extend the existing provisions of the UNCITRAL Model Law on Cross-Border Insolvency and part three of the UNCITRAL Legislative Guide on Insolvency Law and involve reference to the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation. The Working Group discussed this topic at its forty-fifth (April 2014) (A/CN.9/803), forty-sixth (December 2014) (A/CN.9/829), forty-seventh (May 2015) (A/CN.9/835) and forty-eighth (December 2015) (A/CN.9/864) sessions and continued its deliberations at the forty-ninth session as indicated in this report.

B. Recognition and enforcement of insolvency-derived judgements

2. At its forty-seventh session (2014), the Commission approved a mandate for Working Group V to develop a model law or model legislative provisions providing for the recognition and enforcement of insolvency-derived judgements. The Working Group discussed this topic at its forty-sixth (December 2014) (A/CN.9/829), forty-seventh (May 2015) (A/CN.9/835) and forty-eighth (December 2015) (A/CN.9/864) sessions and continued its deliberations at the forty-ninth session as reflected in this report.

[1] A/CN.9/763, paras. 13-14; A/CN.9/798, para. 16; see the mandate given by the Commission at its forty-third session (2010): *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17* (A/65/17, para. 259(a)).

C. Obligations of directors of enterprise group companies in the period approaching insolvency

3. At its forty-fourth session, the Working Group agreed on the importance of addressing the obligations of directors of enterprise group companies in the period approaching insolvency, given that there were clearly difficult practical problems in that area and that solutions would be of great benefit to the operation of efficient insolvency regimes (A/CN.9/798, para. 23). At the same time, the Working Group noted that there were issues that needed to be considered carefully so that solutions would not hinder business recovery, make it difficult for directors to continue to work to facilitate that recovery, or influence directors to prematurely commence insolvency proceedings. In light of those considerations, the Working Group agreed that an examination of how part four of the Legislative Guide could be applied in the enterprise group context and identification of additional issues (e.g. conflicts between a director's duty to its own company and the interests of the group) would be helpful (A/CN.9/798, para. 23). The Working Group discussed this topic at its forty-sixth (December 2014) (A/CN.9/829) and forty-seventh (May 2015) (A/CN.9/835) sessions and continued its deliberations at the forty-ninth session as reported below.

II. Organization of the session

4. Working Group V, which was composed of all States members of the Commission, held its forty-ninth session in New York from 2 to 6 May 2016. The session was attended by representatives of the following States Members of the Working Group: Algeria, Argentina, Armenia, Austria, Canada, China, Czech Republic, Denmark, Ecuador, El Salvador, France, Germany, Greece, Honduras, India, Indonesia, Israel, Italy, Japan, Kenya, Mexico, Namibia, Nigeria, Panama, Philippines, Poland, Republic of Korea, Russian Federation, Singapore, Spain, Switzerland, Thailand, Turkey, Uganda, United Kingdom of Great Britain and Northern Ireland and United States of America.

5. The session was attended by observers from the following States: Albania, Chile, Cyprus, Dominican Republic, Iraq, Libya, Netherlands, Sweden and Syrian Arab Republic.

6. The session was also attended by observers from the European Union and the Holy See.

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

(a) *Organizations of the United Nations system*: World Bank;

(b) *Invited international non-governmental organizations*: American Bar Association (ABA), European Law Students Association (ELSA), Fondation pour le Droit Continental (FDC), INSOL Europe, INSOL International, Inter-Pacific Bar Association (IPBA), International Bar Association (IBA), International Insolvency Institute (III), International Women's Insolvency and Restructuring Confederation (IWIRC), Law Association for Asia and the Pacific (LAWASIA), New York City Bar Association (NYCBAR) and Union Internationale des Avocats (UIA).

8. The Working Group elected the following officers:

Chairman: Wisit Wisitsora-At (Thailand)

Rapporteur: Anna-Letu Haitembu (Namibia)

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

(a) Annotated provisional agenda (A/CN.9/WG.V/WP.136);

(b) A note by the Secretariat on facilitating the cross-border insolvency of multinational enterprise groups: summary (A/CN.9/WG.V/WP.137);

(c) A note by the Secretariat on facilitating the cross-border insolvency of multinational enterprise groups: compilation of principles and draft articles (A/CN.9/WG.V/WP.137/Add.1);

(d) A note by the Secretariat on the cross-border recognition and enforcement of insolvency-derived judgements (A/CN.9/WG.V/WP.138);

(e) A note by the Secretariat on directors' obligations in the period approaching insolvency: enterprise groups (A/CN.9/WG.V/WP.139); and

(f) A proposal by the United States on the cross-border recognition and enforcement of insolvency-derived judgements (A/CN.9/WG.V/WP.140).

10. 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) facilitating the cross-border insolvency of multinational enterprise groups; (b) the recognition and enforcement of insolvency-derived judgements; and (c) directors' obligations in the period approaching insolvency.
5. Other business.
6. Adoption of the report.

III. Deliberations and decisions

11. The Working Group commenced its deliberations on the cross-border insolvency of multinational enterprise groups on the basis of documents A/CN.9/WG.V/WP.137 and A/CN.9/WG.V/WP.137/Add.1, followed by the recognition and enforcement of insolvency-derived judgements on the basis of documents A/CN.9/WG.V/WP.138 and A/CN.9/WG.V/WP.140 and directors' obligations in the period approaching insolvency on the basis of A/CN.9/WG.V/WP.139. The deliberations and decisions of the Working Group on these topics are reflected below.

IV. Facilitating the cross-border insolvency of multinational enterprise groups (A/CN.9/WG.V/WP.137 and Add.1)

Draft legislative provisions on the cross-border insolvency of enterprise groups

Chapter 1. General provisions

12. In respect of article 1, the Working Group noted that a provision on scope would be drafted for future consideration and that the material contained in the introduction to document A/CN.9/WG.V/WP.137/Add.1 could be included.

Principles 1 bis and 1

13. The Working Group stressed the importance of including those principles in the draft text. Various suggestions were made as to how they might be included, such as in a preamble or as draft articles. After discussion, it was agreed that principles 1 bis and 1 should be redrafted as articles for future consideration, taking into account the Working Group's discussion and conclusions on the remainder of the text.

Article 2. Definitions

14. The Working Group noted that the definitions in paragraphs (a) to (c) were taken from part three of the Legislative Guide on Insolvency Law ("Legislative Guide") and were included in working paper A/CN.9/WG.V/WP.137/Add.1 for information; if not ultimately required in the draft text, they could be deleted at a later stage. There was general support in the Working Group for retaining the more comprehensive definition reflected in variant 2 of paragraph (d), but it was noted that including a reference to "a separate legal entity" was potentially inconsistent with the definition in paragraph (a), and particularly with the words

"regardless of its legal form." To address that inconsistency, it was proposed that the definition should be revised along the following lines: "'Enterprise group member' means an enterprise as defined in paragraph (a), which forms part of an enterprise group as set out in paragraph (b)." That proposal was widely supported.

15. It was noted that, although some concerns were expressed with respect to the meaning of the terms "control or significant ownership", the Working Group had previously decided in the context of part three of the Legislative Guide that those terms did not require further clarification.

16. In respect of paragraph (e), there was support for variant 1 with the following revisions:

(a) Retaining the text contained in square brackets and deleting the brackets;

(b) Deleting the phrase "in this State"; and

(c) Replacing the phrase "other group members" with "one or more group members."

17. The Secretariat was requested to redraft paragraph (e) along the following lines: "'Group Representative' means a person or body, including one appointed on an interim basis, authorized to act as a representative of a planning proceeding in which one or more other group members are participating for the purpose of developing a group insolvency solution."

18. In reference to paragraph (f), the Working Group supported variant 1 with a revision to the first subparagraph changing "more than one group member" to "one or more group members."

19. Regarding paragraph (g), the Working Group expressed its support for variant 2. It was suggested that some clarification of the meaning of "main proceeding" was required. It was also suggested that the text from footnote 15 could be added, although a number of reservations were expressed on the basis that it might be difficult to sufficiently substantiate whether additional group members were likely to participate. After discussion, the Working Group did not support the addition of the text from footnote 15.

Chapter 2. Cooperation and coordination

Article 9. Cooperation and direct communication between a court of this State and foreign courts or group representatives

20. The Working Group agreed that a reference to the foreign representative should also be added to both paragraphs of draft article 9 to make the provision more comprehensive. After discussion, support was also expressed in favour of deleting all text in square brackets in paragraph 2.

Article 10. Cooperation to the maximum extent possible under article 9

21. A proposal to delete the phrase "participating in a [planning proceeding] [group insolvency solution]" from paragraphs (c) and (d) was supported. However, a proposal to delete the phrase "to facilitate the implementation of a group insolvency solution" in paragraph (g) was not supported.

Article 12. Effect of communication under article 9

22. Although there was support for the deletion of draft article 12, after discussion it was agreed that it should be retained with a view to further discussing possible modification at a future session. One delegation suggested that the meaning of the word "compromise" in subparagraph (a) be clarified. It was stated that it could be understood as a debt reduction or, alternatively, as a modification of the courts' usual practice.

Article 13. Coordination of hearings

23. It was noted that the substance of draft article 13 was explained in paragraphs 38 to 40 of Chapter III of part three of the Legislative Guide. Support was expressed for the

provision as drafted. One delegation expressed the view that hearing coordination with a foreign court could include joint hearings.

Article 14. Cooperation and direct communication between [group representatives] and foreign courts

24. The Working Group agreed to the article as drafted, with the addition of a reference to the foreign representative in addition to the group representative.

Article 15. Cooperation to the maximum extent possible under article 14

25. There was support in the Working Group for the deletion of the phrase "participating in a [planning proceeding] [group insolvency solution]" from paragraphs (a) and (d). A proposal to delete the phrase "to facilitate the implementation of a group insolvency solution" in paragraph (b) was not supported. In paragraph (e), the Working Group agreed to retain the phrase "a group insolvency solution" and remove the square brackets around it, and to delete the alternative phrase "[reorganization plans]". A general observation was made that in revising the draft provisions, there should be consistency in the references to "development and implementation of a group insolvency solution." The Working Group took note of a concern raised that the text should not inadvertently exclude a group representative from any communication taking place between courts and foreign representatives, and agreed that appropriate safeguards might be developed for future consideration.

Article 17. Authority to enter into agreements concerning the coordination of proceedings

26. It was observed that the use of the phrase "agreement concerning the coordination of proceedings" (based upon article 27(d) of the Model Law on Cross-Border Insolvency) ("Model Law") was included in this iteration of the draft article following a suggestion at the previous session of the Working Group that it should replace the phrase "cross-border insolvency agreements". There was agreement that the relationship of the final text to the Model Law would determine how those agreements should be described.

Article 18. Appointment of a single [or the same] insolvency representative

27. After discussion, the Working Group agreed that rather than choosing one of the words in square brackets, draft article 18 should instead refer to both "appointment and recognition" as well as to "administer and coordinate". It was further agreed to retain the reference to "a single [or the same]" for further consideration, and to retain the phrase "where a group insolvency solution is being developed" without the square brackets. Although it was acknowledged that the requirement that the insolvency representative must be qualified for appointment in each of the relevant States might be difficult to satisfy, it was decided that that proviso in paragraph 1 should nevertheless be retained as drafted.

Chapter 3. Facilitating the development and recognition of a group insolvency solution

A. Provisions relevant to a State in which a planning proceeding commences

Article B. Participation by enterprise group members in an insolvency proceeding in this State; appointment of a group representative

28. In response to concerns raised in respect of the inclusion of a reference to solvent entities, it was suggested that an explanation clarifying what the participation of solvent entities might mean should be elaborated. There was agreement that such participation could not substantively modify the rights of creditors of solvent entities, nor that it would subject the solvent entity to the insolvency law. Neither did the inclusion of solvent entities in draft article B imply that the solvent entity would need to apply for commencement of insolvency proceedings in order to participate in a planning proceeding. It was suggested that the following proposals would make that understanding more explicit:

(a) Adding text along the following lines: "Participation of solvent group members does not imply that such members would be subject to the insolvency law.";

(b) Describing the participation of solvent members as purely procedural; and

(c) Avoiding the use of the word "participation" with respect to solvent entities and instead specifying their rights, such as with respect to the planning proceeding, e.g. the right to appear and to be heard, and to be involved in negotiations.

29. It was recalled that further clarification of the issues outlined in the paragraph above was already contained in footnote 4 of document A/CN.9/WG.V/WP.137, which referred to part three of the Legislative Guide, paragraphs 11 to 14 and 152, as well as recommendation 238. After discussion, there was support for permitting solvent group members to be involved in the development of a group insolvency solution. To the extent that the proposals outlined in the paragraph above did not completely resolve the concerns raised, it was agreed that the Working Group could return to this matter; the Secretariat was requested to prepare text reflecting those concerns for future consideration by the Working Group.

30. In respect of the two variants of paragraph 3, some support was expressed in favour of variant 1 as providing more concise text than variant 2. Support was also expressed in favour of variant 2 since it more closely tracked the text of article 5 of the Model Law. After discussion, it was agreed that both variants would be retained for future consideration. One delegation suggested that in variant 2, it would be necessary to distinguish the meaning of "participation by the group representative" and the meaning of "participation by the group members".

Principle 4, paragraph 2 and principle 5, sentence 2

31. There was agreement on the substance of the principles, but as the Working Group had not yet agreed on the form of the text being developed, it was not possible at this stage to determine whether the principles should be redrafted as substantive provisions or should be included in commentary.

Article D. Relief available to a planning proceeding in this State

32. Concerns were expressed as to the scope of article D, paragraph 2 and its relationship to articles 6 and 7. It was observed that the goal of article D, paragraph 2 was to enable the planning proceeding court to make the orders necessary to support the development of a group insolvency solution. Articles 6 and 7, on the other hand, related to recognition of the planning proceeding in other States, and the relief that those States might provide to support the development of the group insolvency solution through the planning proceeding.

33. One proposal to clarify the scope of article D, paragraph 2 was to move the phrase "in this State" from the end of the chapeau to be inserted following the phrase "assets or operations". That change would have the effect of focusing on what a court in that jurisdiction could do to support the development of a group insolvency solution through that State, including making orders with respect to the assets in that State of debtors with a centre of main interests ("COMI") in another State. There was support in the Working Group for that proposal.

34. A further proposal was to add a new paragraph 3 along the following lines: "Concerning the assets or operations of an enterprise group member with a COMI in another State, relief under this article may only be granted if this is not incompatible with the laws of that State." With respect to that proposal, it was observed that in the event of a conflict between an order issued by the planning proceeding court and an order issued by the court of the State in which the affected debtor had its COMI, the practical solution could be that the COMI court declined to recognize or enforce the order of the planning proceeding court. That approach would preserve the pre-eminence of the COMI principle as reflected in draft article 1 bis. In addition, it was recalled that the definition of a planning proceeding already reflected the Working Group's agreement that a planning proceeding related only to group members that were not precluded by their COMI court from participating in that proceeding (as defined in article 2(g)). With respect to the issue of preclusion, it was noted that a court could at any time prevent a group member with its COMI in the State of that court from participating in a planning proceeding in another jurisdiction. It was suggested that article D, paragraph 2 should be read in the context of the definition of a "planning proceeding". In addressing the scope of article D, the view was expressed that care should be taken to ensure

that the approach to relief taken in this instrument was not inconsistent with the provisions on relief and coordination of proceedings in the Model Law.

35. Although some reservations were expressed about various subparagraphs of article D, paragraph 2, it was agreed that the Working Group would consider those issues in greater detail at a future session.

36. After discussion, the Secretariat was requested to revise article D, paragraph 2 taking into account the considerations noted above.

B. Provisions relevant to a State in which recognition of a planning proceeding is sought

Article 3. Recognition of a planning proceeding

37. The Working Group agreed to the following revisions to draft article 3:

(a) To retain references to "a planning proceeding" rather than to a "group insolvency solution";

(b) To retain variant 1 of paragraph 3 and to delete variant 2; and

(c) To add an additional subparagraph (c) along the following lines: "A statement to the effect that the group member has its COMI in the jurisdiction where the planning proceeding is taking place and that that proceeding is likely to result in added overall combined value for the enterprise group." It was recalled that the latter element was a reflection of the definition of "group insolvency solution" in draft article 2(f).

Principle 4, paragraph 1

38. Since no clear view emerged in the Working Group as to whether principle 4, paragraph 1 should be retained, deleted or redrafted as an article, it was decided to retain it for further consideration, with the addition of the word "planning" before the word "court" in subparagraph (ii).

Article 6. Relief that may be granted upon application for recognition of a foreign proceeding

39. Although a proposal was made to delete draft article 6 as being redundant in light of draft article D, it was observed that since draft article 6 related to the provision of interim relief in the context of a recognition application, it might therefore address issues not covered by article D, paragraph 2. After discussion, it was agreed that draft article 6 should be retained for further consideration in the context of a revised version of the draft instrument.

40. A proposal was made to add text after the phrase "at the request of the group representative" in the chapeau (of both draft articles 6 and 7) along the following lines: "and the group member for which relief was sought"; that suggestion did not receive support.

41. A proposal to retain in paragraph 1(d) the reference to "planning proceeding" rather than "group insolvency solution" was supported. It was also agreed that the phrase in square brackets at the end of paragraph 1(d) relating to safeguards should be retained.

Article 5. Decision to recognize a planning proceeding

42. Reservations were expressed with respect to the need for subparagraph 1(f) and it was agreed that it could be deleted. A proposal was made to place paragraphs 3 and 4 in a separate provision on the basis that they did not deal specifically with the issue of recognition.

Article 7. Relief that may be granted upon recognition of a planning proceeding

43. A concern regarding the relationship between draft articles 6, 7 and D was reiterated (see para. 32 above). To address that concern it was proposed that the three provisions could be merged, although it was again pointed out that the three articles might apply to different situations. It was noted that, to some extent, the answer to that concern might relate to the form of the final text.

44. It was observed that the current draft of article 7 did not distinguish between granting relief with respect to those debtors subject to the planning proceeding and group members participating in that proceeding, and noted that there may be some difference in the relief that might be granted to those group members in the context of recognition of the planning proceeding.

45. In response to a concern about the ability of the recognizing court to grant the relief provided in draft paragraph 1(f) in accordance with the applicable law, it was suggested that that question might be addressed in the same manner as under the Model Law, i.e. by way of a single article along the lines of article 3 of the Model Law.

46. The Working Group agreed on the substance of draft article 7 and that it should be retained for further discussion in the context of the revised version of the draft instrument.

Article D. Participation of a group representative in a proceeding in this State

47. Although some support was expressed in favour of adding to the draft provision the text suggested in footnote 43 of document A/CN.9/WG.V/WP.137/Add.1, there was also support for an alternative proposal to qualify the proceedings in which the group representative could participate along the lines of "that are relevant to development and implementation of a group insolvency solution." In response to those proposals, it was recalled that a distinction was made in the Model Law between participation under article 12 and intervention under article 24. There was agreement that the group representative should be able to participate in insolvency proceedings in accordance with article 12 of the Model Law, but some concern as to intervention under article 24. It was explained that in the Model Law context, the foreign representative could act on behalf of the debtor and therefore the ability to intervene under article 24 was appropriate. Under draft article D, paragraph 1, however, the group representative acted only on behalf of the planning proceeding, and unless the group representative and the foreign representative were the same person, a power of intervention might not be appropriate for the group representative. The Working Group agreed that the issue required further consideration.

Article 8. Protection of creditors and other interested persons

48. In response to a suggestion that the draft article should identify the entity whose creditors were being referred to, it was suggested that that would depend on what the relief granted related to. That issue might be born in mind for future consideration. The Working Group generally agreed with the content of draft article 8.

Article E. Approval of local elements of a group insolvency solution

49. In respect of the approval of a group insolvency solution under draft article E, the Working Group agreed that the group insolvency solution developed in the planning proceeding would require approval by other relevant courts, that the group representative should submit the group insolvency solution to relevant courts for approval, that the entire group insolvency solution should be provided to the court in the approving State, but that approval might relate only to the portion relevant to the creditors in that State. It was acknowledged that the approval process might vary in different States, depending on the requirements of local law — for example, in some States it might be approved by creditors, while in others it might be approved by the court. The Working Group agreed that the draft article should be clarified to reflect that understanding.

Principle 8

50. The Working Group agreed to retain the content of principle 8 and to reassess it in the context of a future iteration of the text.

Chapter 4. Treatment of foreign claims in accordance with applicable law

Articles F and G. Commitment to and approval of the treatment of foreign claims in accordance with applicable law: non-main and main proceedings

51. After a preliminary discussion of draft articles F and G, there was some general acceptance of the draft text, although different views were expressed as to how the

provisions might be interpreted and whether any additional safeguards might be required. One suggestion in that regard was that the relevant safeguards in the recast of the European Insolvency Regulation[2] might provide some guidance. It was agreed that both paragraphs of draft articles F and G might be developed in tandem, since they were substantially similar. It was also suggested that paragraph 2 of draft articles F and G might need to be further considered in the context of the decisions made with respect to draft articles 7, paragraph 1 and D, paragraph 2. Finally, in the absence of clear indication that this article provided an exception to insolvency laws (for example, priority rights) some raised the issue of whether article F, as currently drafted, was sufficient to allow insolvency representatives to commit to foreign creditors that their treatment would not be worse than they would have received had local proceedings commenced.

V. Cross-border recognition and enforcement of insolvency-related judgements (A/CN.9/WG.V/WP.138)

Article 1. Scope of application

52. The Working Group expressed a preference in favour of variant 2 of draft article 1. A proposal to delete the phrase "of execution" at the end of paragraph 1 and substitute "where recognition and enforcement are sought" received support.

Article 2. Definitions

(a) "Foreign proceeding"

53. There was agreement to retain paragraph (a) as well as to delete the square brackets and retain the text contained in them, acknowledging that that definition was based on the definition in article 2(a) of the Model Law.

(b) "Foreign representative"

54. The Working Group approved the definition of "foreign representative" as drafted.

(c) "Judgement"

55. After detailed discussion, the Working Group agreed to delete all references to provisional or protective and conservatory measures. A preference was expressed in favour of variant 2 of paragraph (c). With respect to the inclusion of decisions issued by administrative authorities, the Working Group agreed to further consider focusing on the nature of the decision rather than the body issuing it; it was recalled that the Model Law and the Legislative Guide both referred to bodies competent under the insolvency law to supervise proceedings and issue decisions relating to those proceedings. Focusing on the nature of the decision would also facilitate inclusion of decisions that were issued by what might be considered administrative authorities in some States, but which nevertheless might be reviewed and approved by a court, and in some cases related to proceedings that had been recognized under the Model Law. The Secretariat was requested to prepare a revised text based upon those considerations.

(d) "Insolvency-related judgement"

56. The Working Group considered this definition on the basis of documents A/CN.9/WG.V/WP.138 and A/CN.9/WG.V/WP.140. Some support was expressed in favour of the drafting approach adopted in WP.140. There was agreement that "insolvency-related judgements" were judgements that were closely related to foreign proceedings and were issued after commencement of those proceedings. With respect to the draft definition in WP.138, reservations were expressed with respect to the presumption in the second sentence of the chapeau, although support was expressed in favour of the substance of that sentence. Concerning the chapeau in WP.140, there was agreement that there should be some language expressing the relationship between this and other instruments, but that that might be

[2] Regulation (EU) No. 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast).

addressed in a separate article rather than in the definition. Some support was expressed in favour of the approach in WP.140 of specifying that insolvency-related judgements included judgements determining a series of issues.

57. With respect to those issues, some preference was expressed in favour of the approach of WP.140, although concerns were raised as to whether all of the issues listed in draft article 2 (d) of WP.138 had been included in the draft of article 2 (d) proposed in WP.140. In that regard, it was clarified in particular that draft article 2, subparagraph (d)(vii) of WP.138 was not included in WP.140 because of concerns about maintaining consistency with other relevant instruments. In respect of draft article 2, subparagraphs (d)(viii) and (xiii) of WP.138, a proposal was made to combine them into a single subparagraph in the draft definition. There was support in favour of and against retaining the phrase in square brackets in subparagraph (d)(ii). It was explained that draft article 2, subparagraph (d)(v) of WP.140 proposed a compromise which would include both options A and B in the draft text for enacting States to choose the appropriate one.

58. The Secretariat was requested to prepare a single text, possibly with variants, based upon both documents and taking into account the issues outlined above for consideration at a future session of the Working Group.

(e) "Foreign court"

59. The Working Group approved the definition of "foreign court" as drafted.

(f) "Proceeding"

60. The Working Group agreed to delete the definition of "proceeding" but to note that the language relating to an "administrative authority that performs a judicial function" might be useful in respect of other provisions.

Article 3 and 3 bis. International obligations of this State

61. A number of observations and proposals were made with respect to draft articles 3 and 3 bis. They included:

(a) A proposal that the following text be added: "This Law would not apply to judgements or insolvency-related judgements which are governed by any treaty in force or other form of agreement to which both enacting and receiving States are party.";

(b) To delete the phrase "insolvency-related" in draft article 3 bis;

(c) To delete paragraph 2(b);

(d) To replace:

(i) Paragraph 1 of 3 bis with: "This Law shall not apply to a judgement which is covered by the subject-matter scope of the Hague Convention of 30 June 2005 on Choice of Court Agreements and [*insert the name of any convention on the recognition and enforcement of judgements that might result from the Hague Conference on Private International Law's working group on the judgements project ("HCCH judgements project")*]"; and

(ii) Paragraph 2 of 3 bis with: "A judgement is to be treated for the purposes of paragraph 1 of this article as covered by the subject-matter scope of the said Conventions: (a) even where the particular insolvency-related judgement is not enforceable under either of the Conventions because of the particular circumstances of the case; and (b) where the receiving State has adopted the treaty.";

(e) A preference was expressed in favour of drafting based upon the final clause of the first sentence of the chapeau of article 2, subparagraph (d) in WP.140; and

(f) To add text along the following lines to the end of paragraph 1 of 3 bis: "or where the provisions on recognition and enforcement of insolvency proceedings apply to that judgement."

62. In assessing the above proposals, support was expressed in favour of (b), (c) and (f), while strong reservations were expressed in respect of (d)(i). The Working Group agreed to

retain both draft articles 3 and 3 bis, with deletion of the phrase "insolvency-related", deletion of subparagraph 2(b) of 3 bis, and inclusion in square brackets of the text in proposal (f) above.

Article 3 ter. Conflict between the law of this State and the law of the State in which the insolvency-related judgement was issued

63. Given the decision it made in respect of draft article 1, the Working Group agreed to delete draft article 3 ter.

Article 4. Competent court or authority

64. The Working Group approved the substance of draft article 4.

Article 5. Authorization to seek enforcement of an insolvency-related judgement in a foreign State

65. A proposal to replace the phrase "to act in a foreign State on behalf of a proceeding under [identify laws of the enacting State relating to insolvency]" with the words "to seek recognition and enforcement of an insolvency-related judgement" received support.

Article 6. Additional assistance under other laws

66. Although there was some support for deleting the phrase at the end of the draft article "under other laws of this State", after discussion the prevailing view was that the article should be retained as drafted.

Article 6 bis. Public policy exception

67. Various proposals were made in respect of draft article 6 bis. One was to delete the word "manifestly" on the basis that it might set too high a standard for refusal. In response, it was pointed out that "manifestly contrary to public policy" was a phrase found in many international texts and that to delete it in this context would create uncertainty and raise questions of interpretation. The prevailing view was that "manifestly" should be retained. There was general support for retaining "including" rather than "[or]" and for deleting the square brackets around the word. Although there was some support for deleting the phrase "of this State" at the end of the provision in order to encourage a broader interpretation of procedural fairness without referring to national law, the prevailing view was that that phrase should be retained. After discussion, the Working Group agreed to retain article 6 bis as amended above and to remove the square brackets around it.

Article 7. Interpretation

68. The Working Group approved the substance of draft article 7.

Article 7 bis. Effect and enforceability of an insolvency-related judgement in the State in which it was issued

69. Although there was some support for the deletion of draft article 7 bis, there was support for retaining it on the basis that it represented a compromise reached in the Working Group to focus on the enforceability of a judgement rather than its finality. It was agreed that draft article 7 bis should be retained and the square brackets around it removed. A suggestion to merge draft article 7 bis with draft article 8 bis was widely supported.

Article 8. Application for recognition and enforcement of an insolvency-related judgement

70. The Working Group agreed that paragraph 1 should refer to recognition and enforcement of an insolvency-related judgement, and that the word "certified" in subparagraph 2(a) should be retained and the square brackets around it removed.

71. It was further agreed that in subparagraph 2(b) the focus should be on the enforceability of the judgement. As to the text of that subparagraph, there were suggestions that the word "information" might be too broad and might be replaced with a requirement

for evidence or a reliable statement. Concerns were expressed that the requirement to provide information on time limits for seeking review might prove costly for the applicant and was therefore not desirable. The Secretariat was requested to provide a revision of subparagraph 2(b) taking into account those considerations.

Article 8 bis. Postponement or refusal of recognition and enforcement

72. There was broad agreement in the Working Group that draft article 8 bis should be retained and, as noted above, merged with draft article 7 bis. Noting the content of footnote 24, it was agreed that the sentence proposed should be included in the draft article to permit conditional recognition and enforcement of an insolvency-related judgement.

Article 9. Decision to recognize and enforce an insolvency-related judgement

73. The Working Group approved the substance of draft article 9, with the understanding that the cross references might need to be updated in accordance with decisions made at this session, and that references to "recognitions and enforcement" should be made consistent throughout the document.

Article 10. Grounds to refuse recognition of an insolvency-related judgement

74. With respect to paragraphs (a) and (b), a question was raised as to how they related to some of the provisions already discussed, in particular draft articles 6 bis and 8 bis. The Working Group agreed that those paragraphs should be retained and considered in the context of a future iteration of the text. The Working Group approved the substance of paragraphs (c) to (g) as drafted.

75. With respect to paragraph (h), a question was raised as to the sequence in which the events referred to occurred and how it would be interpreted, for example, if the insolvency proceeding referred to commenced following recognition but before enforcement of the insolvency-related judgement. It was agreed that that issue might need further consideration by the Working Group in light of a future iteration of the text.

76. The Working Group considered paragraphs (i) and (j) on the basis of documents A/CN.9/WG.V/WP.138 and A/CN.9/WG.V/WP.140. After discussion, it was agreed as follows:

(a) Paragraph (i)(i)(2) in WP.140 relating to judgements on directors' obligations should be included in the draft instrument;

(b) The word "express" should be added before "consent" in paragraph (i)(ii); and

(c) There was a preference for paragraph (j) as drafted in WP.140.

77. The Secretariat was requested to prepare a revised text of draft article 10 containing new variants of paragraphs (i) and (j) based upon those comments, as well as including paragraph (k) of WP.140.

Article 10 bis. Equivalent effect

78. Noting that draft article 10 bis was based on article 13 of the text emanating from the fifth meeting of the HCCH judgements project and that it might be useful to include in the draft text, the Working Group agreed to retain draft article 10 bis and remove the square brackets around the text.

Article 11. Protection of creditors and other interested persons

79. The Working Group agreed to consider this draft article in the context of a future iteration of the text.

Article 12. Severability

80. The Working Group agreed to retain draft article 12 and to remove the square brackets around the text.

81. In response to a suggestion to add a new provision along the lines of article 12 of the HCCH judgements project, it was observed that that issue might be partly addressed by draft article 1, but could be further considered in the context of a revised text.

Article 13. Provisional relief

82. The Working Group agreed to retain draft article 13. It was noted that the following observations might need to be considered in preparing a revised text:

(a) Including a reference to the party who might request that relief;

(b) The procedure for obtaining relief, including whether there would be a hearing and requirements for notice (noting the content of draft article 13(2)); and

(c) The need for additional examples including orders not addressed to any particular party but rather in respect of assets.

83. At the conclusion of its deliberations on cross-border recognition and enforcement of insolvency-related judgements, the Working Group requested the Secretariat to prepare a revised version of the draft instrument for consideration at a future session.

Article H

84. After discussion, there was general acceptance to retain draft article H for further review, perhaps considering the relationship between the relief provided in that article and draft articles 7 and D, as also noted above in respect of draft articles F and G.

85. At the conclusion of its discussion of document A/CN.9/WG.V/WP.137/Add.1, the Secretariat was requested to prepare a set of draft model provisions that addressed both the inbound and the outbound elements of the draft instrument; the question of whether those provisions would be included in any addendum to the Model Law or the Legislative Guide would be considered at a future date.

VI. Obligations of directors of enterprise group companies in the period approaching insolvency (A/CN.9/WG.V/WP.139)

86. The Working Group noted the revisions to the text provided in document A/CN.9/WG.V/WP.139 and agreed to keep it under consideration pending further development of the work on enterprise group insolvency. A number of specific drafting suggestions were made, including that:

(a) Recommendations 269 and 270 should use the same phrase as recommendation 255 “from the point in time referred to in recommendation 257” rather than referring to “in the period approaching insolvency”;

(b) Recommendation 267 (a) should replace the word “director” with a reference to the person specified in recommendation 258;

(c) The words in square brackets at the end of recommendation 268 (b) should be moved to 268 (f) to include in that subparagraph a consideration of whether formal proceedings should be commenced;

(d) The commentary should include a reference to the instrument being developed on enterprise groups and suggest that directors be encouraged to have reference to it;

(e) The last sentence of paragraph 7 of the commentary should include material explaining who might benefit from the safeguards, such as creditors and other stakeholders; and

(f) The square brackets in paragraphs 10 and 27 of the commentary could be removed.

VII. Other business

87. Noting the importance of micro, small and medium-sized enterprise (MSME) insolvency and the wide support expressed in the Working Group for work to be undertaken on that topic, the Working Group agreed to recommend that the Commission clarify, at its forty-ninth session, the mandate given at its forty-seventh session[3] to Working Group V as follows:

> "Working Group V is mandated to develop appropriate mechanisms and solutions, focusing on both natural and legal persons engaged in commercial activity, to resolve the insolvency of MSMEs. While the key insolvency principles and the guidance provided by the UNCITRAL Legislative Guide on Insolvency Law should be the starting point for discussions, the Working Group should aim to tailor the mechanisms already provided in the Legislative Guide to specifically address MSMEs and develop new and simplified mechanisms as required, taking into account the need for those mechanisms to be equitable, fast, flexible and cost efficient. The form the work might take should be decided at a later time based on the nature of the various solutions that were being developed."

88. The Working Group was advised that a meeting of the open-ended informal group established to consider the feasibility of developing a convention on international insolvency issues and to study adoption of the model law (A/CN.9/798, para. 19) had taken place. A list of issues to frame the preparation of a report to the Working Group was outlined. Participants at the meeting were requested to advise the Secretariat at their earliest convenience of their interest in contributing to the development of that study. The Secretariat will provide updates on progress with the development of that study as appropriate.

[3] *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 156.

F. Note by the Secretariat on insolvency law: facilitating the cross-border insolvency of multinational enterprise groups: summary

(A/CN.9/WG.V/WP.137 and Add.1)

[Original: English]

Contents

I. Introduction

1. This note provides a summary of how the three sets of provisions contained in the following documents work in combination: (a) the key principles for facilitating the cross-border insolvency of multinational enterprise groups (A/CN.9/WG.V/WP.133); (b) the draft legislative provisions on the cross-border insolvency of enterprise groups (arts. 8-18 from A/CN.9/WG.V/WP.128 and arts. 2-7 from A/CN.9/WG.V/WP.134); and (c) the joint proposal made at the forty-eighth session of Working Group V (A/CN.9/864, paras. 38-53). The combined provisions are organized into chapters according to the structure agreed by the Working Group at its forty-eighth session.[1]

2. Accordingly, chapters 1 to 4 are the core provisions, which address scope and definitions; coordination and cooperation; facilitating the development, recognition and implementation of a group insolvency solution; and the treatment of foreign claims in main proceedings in accordance with the law applicable to those claims (so-called "synthetic proceedings").[2]

3. Chapter 5 contains supplemental provisions, which address the effect of the treatment of creditor claims in a foreign insolvency proceeding referred to in paragraph 2 on the relief that may be ordered in a creditor's home State, as well as an approach to approval of a group insolvency solution based on adequate protection of creditors. The proposal notes (A/CN.9/864, para. 49, footnote 1) that those provisions, which would be optional for a State to enact, would go a step further than the core provisions. They would permit a court in one jurisdiction to use so-called "synthetic proceedings" for a group member whose centre of main interests (COMI) is located in a different jurisdiction. They would also allow a court to provide additional relief — staying or declining to commence insolvency proceedings, as well as approving the relevant portion of a group insolvency solution without submitting it

[1] See A/CN.9/864, para. 18.

[2] The term "synthetic proceedings" is not used in the draft articles set forth in A/CN.9/WG.V/WP.137/Add.1. What is referred to is the substance of what transpires when that approach is used, for example, commitment to and approval of the treatment of foreign claims in proceedings in this State in accordance with the law applicable to those claims.

to the applicable approval procedures under local law — if the court determined that creditors would be adequately protected.

4. The proposal further notes that the use of the supplemental provisions might result in a group member's insolvency being handled in a manner that was not consistent with the prior expectations of creditors and other third parties, i.e. that the group member would be subject to normal insolvency proceedings in its COMI jurisdiction. As a consequence, departing from that basic principle of proceedings commenced on the basis of COMI should be limited to exceptional circumstances, namely to cases where the benefit in terms of efficiency largely outweigh any negative effect on creditors' expectations in particular and legal certainty in general. That would only appear to be justified:

(a) In jurisdictions where courts traditionally hold a large degree of discretion and flexibility in conducting insolvency proceedings;

(b) Where the enterprise group in question was closely integrated and therefore the benefit of so-called "synthetic proceedings" in lieu of main proceedings (conducted at the COMI) was obvious; and

(c) Where the use of the proceedings under articles A to G (if available), could not achieve a similar result.

5. Within chapters 3 to 5, the provisions have been divided into two categories. Category A provisions would be required in the State in which the main or planning proceeding commences in order to facilitate the development of a group insolvency solution through that proceeding (this might be referred to as the originating State). These provisions are of the kind that might be added to the national insolvency law of that State and reflect some of the elements of part three, chapter II of the Legislative Guide. Category B provisions would be required to facilitate cross-border recognition of that planning proceeding and implementation of a group insolvency solution in another State (this might be referred to as the receiving State). These are provisions that might be added to a cross-border recognition regime, such as provided by the Model Law. The provisions in chapter 2 on cooperation and coordination are largely based upon the provisions of the Model Law and part three, chapter III of the Legislative Guide. As such, the enacting State could be both an originating and a receiving State, depending on the circumstances.

6. Document A/CN.9/WG.V/WP.137/Add.1 contains the substantive provisions referred to in the summary, organized in accordance with the agreed structure.

7. The summary refers to the following fact scenario:

> Debtors 1 to 4 are all members of an enterprise group. Debtors 1 and 2 have their COMIs in State A. Insolvency proceedings commence in State A for debtors 1 and 2. Debtor 3 has its COMI in State B and debtor 4 has its COMI in State C.

II. Summary of the combined draft provisions on facilitating the cross-border insolvency of multinational enterprise groups

Chapter 1. General provisions

1. Principles 1 bis and 1.

2. Article 1. Scope.

3. Definitions.

Chapter 2. Coordination and cooperation

Articles 9-18 (A/CN.9/WG.V/WP.128)

4. The courts can coordinate and cooperate with each other, with a group representative (GR) and any foreign representative[3] of a group member participating in a planning proceeding (for the purpose of developing the group insolvency solution); the GR and foreign representatives can also cooperate and coordinate between themselves and with the courts.

Chapter 3. Facilitating the development and implementation of a group insolvency solution

A. Provisions relevant to the State in which a planning proceeding commences (i.e. State A concerning debtors 1 and 2)

5. Debtors 3 and 4 can "participate"[4] in a planning proceeding[5] commenced in State A for debtors 1 and 2 in order to develop a group insolvency solution,[6] provided the courts in States B and C [permit] [do not preclude] that "participation",[7] see below paragraph 10.

6. When debtors 3 and 4 are participating in the planning proceeding in State A, the court in State A can appoint a GR to represent that proceeding[8] and authorize the GR:

(a) To seek recognition of the planning proceeding commenced in State A in a foreign State (e.g. States B and C);[9] and

(b) To participate in any proceedings relating to debtors 3 and 4 taking place in a foreign State (e.g. States B and C),[10] including where those proceedings relate to approval of the group insolvency solution.[11]

7. In the planning proceeding in State A relating to debtors 1 and 2, the recommendations of part three of the Legislative Guide on joint application (rec. 199) and procedural coordination (recs. 202-210) might apply.[12]

8. The court in State A can order relief affecting the assets of debtors participating in the planning proceeding in State A (i.e. debtors 3 and 4) to support the development of the group insolvency solution through that proceeding.[13]

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[3] As defined in UNCITRAL Model Law on Cross-Border Insolvency, art. 2(d).

[4] The notion of "participation" may need to be explained, since much of substance in the draft text arises from participation in the proceedings in State A. Two distinctions may need to be made between the type of group member participating (i.e. solvent or insolvent) and what they are actually participating in — the planning proceeding or the negotiation of the group insolvency solution. Participation by a solvent group member should be voluntary (see Legislative Guide, part three, paras. 11-14 and 152, rec. 238) and in many cases that member may only need to participate in the negotiation of the group insolvency solution (rather than the planning proceeding in State A), to which they would be contractually bound. Where participation relates to the planning proceeding, it raises issues of the approvals that are required in each case, as well as the concerns previously raised (A/CN.9/835, para. 27) with respect to the standing of solvent and insolvent group members to appear and be heard in the proceedings in State A, as well as submission to the jurisdiction of the courts of State A and the relevance of art. 10 of the Model Law. The issue of participation, particularly where it arises in the period approaching insolvency of a group member has implications for the duties of directors of insolvent group members that might need to be considered in the text being developed on that issue.

[5] As defined in art. 2, para. (g) in A/CN.9/WG.V/WP.137/Add.1.

[6] Art. B, para. 1; principles 2, 3 and 5.

[7] Principle 1 bis (b); principle 4, para. 1(i); art. B, para. 2.

[8] Art. B, para. 3.

[9] Art. B, para. 3.

[10] Art. B, para. 3; since the GR appears to have no legal relationship to debtors 3 and 4, participation in the proceedings in States C and/or D, could be based upon recognition of the planning proceeding in State A (see art. D, para. 1 and art. 12 of the Model Law).

[11] Principle 8.

[12] Principle 5.

[13] Art. D, para. 2; this relief appears to relate only to the assets etc. of foreign debtors that are located in or subject to the jurisdiction of State A (see comment in respect of art. D, para. 2 in

9. The court in State A can receive a request for recognition of any proceedings taking place in a foreign State (e.g. States B and C) concerning debtors participating in the planning proceeding in State A (e.g. these could be non-main proceedings with respect to debtors 1 and 2, and main or non-main proceedings with respect to debtors 3 and 4).[14]

B. Provisions relevant to the State in which recognition of a planning proceeding is sought (i.e. States B and C)

10. Courts in States B and C can [permit] [not preclude] "participation" of debtors 3 and 4 in a planning proceeding in State A where a group insolvency solution is to be developed.[15]

11. Courts in States B and C can authorize an insolvency representative appointed in proceedings relating to participating debtors (e.g. debtors 3 and/or 4) to seek recognition of those proceedings in State A.[16]

12. A GR can apply for recognition in States B and C (and other States as relevant) of the planning proceeding in State A.[17] Recognition shall be granted if the specified requirements are met.

13. After an application for recognition has been made in States B and C, interim relief relating to the assets (located in States B and C) of debtors 1 and 2 is available to assist that proceeding[18] and, following recognition, additional relief can be granted.[19]

14. In granting, modifying or terminating the relief referred to in paragraph 13, the interests of creditors and other interested persons are to be adequately protected.[20]

15. Upon recognition of the planning proceeding, the GR can participate in any proceeding taking place in States B and C relating to debtors 3 and 4 on the basis that they are participating in the proceedings in State A.[21]

16. Once a group insolvency solution is developed in State A, the GR submits the solution to the courts of States B and C, which are then responsible for submitting the parts affecting debtors 3 and 4 to the relevant approval process and implementation.[22]

A/CN.9/WG.V/WP.137/Add.1).

[14] Principle 4, para. 2 — this relief might be covered by provisions of the Model Law, if enacted in State A.

[15] Principle 4, para. 1(i); art. B, para. 2. It may be preferable to draft this provision as permissive, rather than preclusive. If the enacting legislation does not authorize such participation, following an approach similar to art. 5 of the Model Law, the court may be requested to provide that permission (it may be noted that some States, in enacting art. 5 of the Model Law, have adopted that approach and require the court to approve a representative seeking assistance in a foreign State).

[16] Principle 4, para. 1(ii) — this is probably covered by the Model Law, as would be acceptance of that request for recognition in State A (see para. 9 above and principle 4, para. 2 in A/CN.9/WG.V/WP.137/Add.1).

[17] Art. C; art. 3.

[18] Art. 6.

[19] Art. 7. Arts. 6 and 7 currently appear to be limited to protecting the assets etc. of the group member that is "subject to a foreign proceeding"; in the scenario above that would be the assets of debtors 1 and 2 that are located in States B and C; it does not appear to relate to the assets of participating debtors 3 or 4. The relief provided by art. D, para. 2 (see para. 8 above) appears to relate to relief that might be granted by the court of State A with respect to assets of participating debtors 3 and 4 that might be located in State A where the planning proceeding is taking place. As currently drafted, it appears not to apply to the relief that might be available to the GR with respect to the assets located in States B and C of debtors 3 or 4 that might be required to assist the development of the group insolvency solution. Art. H, paras. 1 and 2 seem to refer to such relief being available at the time of approval of the group insolvency solution in States B and C. If art. D is to apply in States A, B and C with respect to the assets of debtors 1-4, some revision of the drafting might be required to clarify that point.

[20] Art. 8.

[21] Art. D, para. 1; Participation by the GR in any insolvency proceedings relating to debtors 1 and 2 taking place elsewhere might be covered, following recognition, by art. 12 of the Model Law.

[22] Art. E; principles 6 and 7.

17. The GR has a right of access to the proceedings in States B and C to be heard on issues related to implementation of the group insolvency solution.[23]

Chapter 4. Treatment of foreign claims in accordance with applicable law[24]

18. A foreign representative or GR may commit to, and the court may approve, treatment of any foreign claims in proceedings in this State in accordance with the treatment[25] they would receive in any foreign non-main proceeding under the applicable foreign law.[26]

19. The court in this State may stay or decline to commence a non-main proceeding in this State where a commitment in accordance with paragraph 18 has been made by a foreign representative or a GR in the relevant foreign proceeding.[27]

Chapter 5. Supplemental provisions[28]

20. The commitment in paragraph 18 may also be made with respect to the treatment a claim would receive in a foreign main proceeding.[29]

21. The court in this State may stay or decline to commence a main proceeding where a commitment in accordance with paragraph 18 has been made by a foreign representative or a GR in the relevant foreign proceeding.[30]

22. As a variation upon the approval process in paragraph 16, the courts in States B and C can approve the relevant portion of the group insolvency solution relating to debtors 3 and 4 and grant appropriate relief of the type referred to in article D, paragraph 2, if satisfied that the interests of creditors of the affected group members (i.e. debtors 3 and 4) are adequately protected in the planning proceeding.[31]

23. After recognizing the planning proceeding in State A, the courts in States B and C can, provided the interests of creditors of affected group members (i.e. debtor 3 and 4) are protected in the planning proceeding, order relief of the kind referred to in article D, paragraph 2 and stay or decline to commence any proceedings in States B and C concerning debtors 3 and 4 respectively.[32]

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[23] Principle 8.

[24] The ch. 4 provisions are not limited to cases where a group insolvency solution is being developed through a planning proceeding.

[25] The standard for that treatment, which focuses on the priority accorded under the applicable foreign law, might be that the creditors should be no worse off under that treatment than they would have been if non-main proceedings had commenced. This issue was previously discussed in the Working Group, see A/CN.9/803, paras. 17 and 21(b), and A/CN.9/829, para. 41.

[26] Art. F, para. 1 as proposed (see A/CN.9/864, para. 48).

[27] Art. F, para. 2 as proposed (see A/CN.9/864, para. 48). It might be noted, however, that a proposal made at the forty-eighth session (A/CN.9/864, para. 50(d)) suggested that art. F. para. (2) should be considered a supplemental rather than a core provision. Accordingly, arts. F, para. 1 and G, para. 1 could be combined as a core provision, while arts. F, para. 2 and G, para. 2 should be supplemental provisions. This proposal is reflected as a variant in A/CN.9/WG.V/WP.137/Add.1, footnote 50.

[28] A separate scope provision for chapter 5 could be drafted and include the material currently reproduced in paras. 3 and 4 of the introduction to this note.

[29] Art. G, para. 1 as proposed (see A/CN.9/864, para. 48).

[30] Art. G, para. 2 as proposed (see A/CN.9/864, para. 48); principle 1. Previous discussion in the Working Group referred to the court taking such action on the basis of certain considerations, e.g. after balancing the interests of the global group against protecting the interests of local creditors (see A/CN.9/803, para. 28).

[31] Art. H, para. 2.

[32] Art. H, para. 1; principle 1.

(A/CN.9/WG.V/WP.137/Add.1) (Original: English)

Note by the Secretariat on insolvency law: facilitating the cross-border insolvency of multinational enterprise groups: compilation of principles and draft articles

ADDENDUM

Contents

I. Introduction

1. The provisions set out below are arranged in accordance with the structure agreed at the forty-eighth session (A/CN.9/864, para. 18). There is some overlap between the content of the three texts that are merged below, but the original numbering of each article or principle is retained to indicate the origin of each provision; renumbering can be undertaken at a later stage. Where more than one article addresses the same issue they have been merged, while principles that are reflected in the content of articles appear in footnotes to those articles. Principles that address issues not covered by the articles are included in the text; the Working Group may wish to consider whether the substance of those principles should be reflected in draft legislative provisions. The drafting of the principles and the numbered articles has been revised to ensure consistent use of terminology such as "planning proceeding", rather than "coordinating proceeding".

II. Draft legislative provisions on facilitating the cross-border insolvency of multinational enterprise groups

Chapter 1. General provisions

Article 1. Scope [*to be drafted*][1]

Principle 1 bis[2]

The principles that follow are each subject to two fundamental underpinning principles:

(a) The jurisdiction of the courts in the State in which the centre of main interests (COMI) of an enterprise group member is located remains unaffected; and

(b) The principles do not replace or interfere with any process or procedure (including any permission, consent or approval) required by the jurisdiction in which the COMI of an enterprise group member is located, in respect of that enterprise group member's participation [to any extent] in a group insolvency solution.

Principle 1

If required or requested to address the insolvency of an enterprise group member, insolvency proceedings may be commenced. When proceedings are not required or requested, there is no obligation to commence such proceedings.

[1] The material contained in the paragraphs 3 and 4 of the Introduction in A/CN.9/WG.V/WP.137 could be included in the scope provision.

[2] Principle 1bis is taken from A/CN.9/864, para. 14.

Article 2. Definitions[3]

For the purposes of these provisions:

(a) "Enterprise" means any entity, regardless of its legal form, that is engaged in economic activities and may be governed by the insolvency law;[4]

(b) "Enterprise group" means two or more enterprises that are interconnected by control or significant ownership;[5]

(c) "Control" means the capacity to determine, directly or indirectly, the operating and financial policies of an enterprise;[6]

(d) "Enterprise group member" means

Variant 1: [an enterprise referred to in subparagraph (a)];[7]

Variant 2: [an enterprise that has a separate legal identity and that is interconnected, by control or significant ownership, with one or more other enterprises];[8]

(e) "Group Representative" means

Variant 1: a person or body, [including one appointed on an interim basis], authorized to act as a representative of a proceeding commenced in this State in respect of an enterprise group member whose centre of main interests is located in this State and in which other group members are participating for the purpose of developing a group insolvency solution;[9]

Variant 2: [a person or body who is appointed pursuant to article B, paragraph 3 and who is responsible for seeking to develop a group insolvency solution];[10]

(f) "Group insolvency solution" means

Variant 1: [a set of proposals adopted in a planning proceeding:

(a) For the reorganization, sale, or liquidation of some or all of the operations or assets of more than one group member;

(b) That would be likely to add to the overall combined value of the group members involved; and

(c) That must be approved, insofar as the proposals relate to a particular group member, in the jurisdiction in which that group member has its centre of main interests];[11]

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[3] The variants set forth below are suggested as a means of simplifying and clarifying the drafting of the various proposals that have been made. They are not intended to introduce new material for consideration.

[4] Use of this definition from the Legislative Guide, part three was agreed by the Working Group at its forty-fifth session (A/CN.9/803, para. 16). This definition and the definitions of "enterprise group" and "control" are included for the information of the Working Group; if not required in this text, they can be deleted at a later stage.

[5] Use of this definition from the Legislative Guide, part three was agreed by the Working Group at its forty-fifth session (A/CN.9/803, para. 16).

[6] This definition is found in the Legislative Guide, part three, glossary, para. 4(c).

[7] Variant 1 of subpara. (d) is taken from A/CN.9/WG.V/WP.128.

[8] Variant 2 of subpara. (d) is taken from Art. A, para. 1 as set forth in A/CN.9/864, para. 39. This variant repeats elements of the definitions of "enterprise" and "enterprise group" as those terms appear in part three of the Legislative Guide, which are included at subparas. (a) and (b). This definition might thus be revised in accordance with variant 1 or as "an enterprise that is a member of an enterprise group".

[9] Variant 1 of subpara. (e) is taken from A/CN.9/WG.V/WP.134.

[10] Variant 2 of subpara. (e) is taken from Art. A, para. 2 as set forth in A/CN.9/864, para. 39. This person need not necessarily be authorized to administer the assets etc. of the debtors with their COMI in the commencing State and an insolvency representative (IR) may be appointed in those proceedings.

[11] Variant 1 of subpara. (f) is taken from art. A, para. 3; subparagraph (c) is a substantive requirement covered by article E and thus may not need to be part of the definition.

Variant 2: [a proposal or set of proposals developed in a planning proceeding to enhance the overall combined value of two or more enterprise group members through the reorganization, sale, or liquidation of some or all of the operations or assets of those group members.][12]

(g) "Planning proceeding" means

Variant 1: a proceeding:

(a) That is a main proceeding for an enterprise group member that would be a necessary and integral part of a group insolvency solution;

(b) In which a group representative has been appointed;

(c) In which there is a reasonable prospect of developing a group insolvency solution; and

(d) In which one or more additional group members are participating for the purpose of attempting to develop a group insolvency solution.[13]

Variant 2: [a main proceeding commenced in respect of an enterprise group member that is[14] a necessary and integral part of a group insolvency solution, in which one or more additional group members are participating[15] for the purpose of developing a group insolvency solution and in which a group representative has been appointed.]

Chapter 2. Cooperation and coordination[16]

Article 9. Cooperation and direct communication between a court of this State and foreign courts or group representatives

1. [In the matters referred to in article 1,] the court shall cooperate to the maximum extent possible with foreign courts or group representatives, either directly or through a [*insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State*] or other person appointed to act at the direction of the court to facilitate the development and implementation of a group insolvency solution.

2. The court is entitled to communicate directly with, or to request information or assistance directly from, foreign courts or group representatives concerning members of the same enterprise group [participating in a [planning proceeding] [group insolvency solution]] and in particular with respect to implementation of a group insolvency solution and the roles of the respective courts when such a solution is to be implemented.

Article 10. Cooperation to the maximum extent possible under article 9

Cooperation to the maximum extent possible for the purposes of article 9 may be implemented by any appropriate means, including:

(a) Communication of information by any means considered appropriate by the court;

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[12] Variant 2 of subpara. (f) is a drafting proposal by the Secretariat.

[13] Variant 1 of subpara. (g) is taken from art. A, para. 4 as set forth in A/CN.9/864, para. 39.

[14] Variant 2 of subpara. (g) is a drafting proposal by the Secretariat. This variant provides that the group member "is" a "necessary and integral part" of the group insolvency solution, rather than using the phrase "would be" a necessary and integral part, which suggests an indeterminate time in the future.

[15] Although it may be more flexible to provide for future participation by group members by addition of the words "or are likely to participate", art. B, para. 3 currently requires that one or more additional group members be participating in the main proceeding before the group representative can be appointed.

[16] These articles of chapter 2 have been revised to take account of some elements of the regime proposed in chapters 3-4; further revisions may be required as those chapters are further developed to include, for example, foreign representatives of enterprise group members participating in a group insolvency solution in addition to the group representative. Such an addition might be relevant, in the context of the fact situation given above in para. 7 of A/CN.9/WG.V/WP.137 to include any insolvency representatives appointed to administer the liquidation or reorganization of debtors 3 and 4 in States B and C.

(b) Participation in communication with the foreign court or group representative;

(c) Coordination of the administration and supervision of the affairs of the enterprise group members participating in a [planning proceeding] [group insolvency solution];

(d) Coordination of concurrent foreign proceedings commenced with respect to enterprise group members participating in a [planning proceeding] [group insolvency solution];

(e) Appointment of a person or body to act at the direction of the court;

(f) Approval of the treatment of the claims of creditors of the enacting State in a foreign proceeding;[17]

(g) Approval of agreements concerning the coordination of proceedings to facilitate the implementation of a group insolvency solution;

(g) bis Cooperation among courts as to how to allocate and provide for the costs associated with cross-border cooperation and communication;[18] and

(h) [*The enacting State may wish to list additional forms or examples of cooperation*].

Article 11. *Deleted*

Article 12. Effect of communication under article 9[19]

Participation by a court in communication pursuant to article 9, paragraph 2 does not imply:

(a) A compromise or waiver by the court of any powers, responsibilities or authority;

(b) A substantive determination of any matter before the court;

(c) A waiver by any of the parties of any of their substantive or procedural rights;

(d) A diminution of the effect of any of the orders made by the court;

(e) Submission to the jurisdiction of other courts participating in the communication; or

(f) Any limitation, extension or enlargement of the jurisdiction of the participating courts. Each court is entitled at all times to exercise its independent jurisdiction and authority with respect to matters presented to it and the conduct of the parties appearing before it.

Article 13. Coordination of hearings

1. The court may conduct a hearing in coordination with a foreign court.

2. The substantive and procedural rights of parties and the jurisdiction of each court may be safeguarded by reaching agreement on the conditions to govern the coordinated hearings.

3. Notwithstanding the coordination of hearings, each court remains responsible for reaching its own decision on the matters before it.

Article 14. Cooperation and direct communication between [group representatives] and foreign courts

1. [In the matters referred to in article 1,] the [group representative] shall, in the exercise of its functions and subject to the supervision of the court, cooperate to the maximum extent possible with foreign courts and foreign representatives [of enterprise group members] to facilitate the development and implementation of a group insolvency solution.

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[17] This subparagraph will need to be aligned with whatever decision is taken with respect to draft art. F, in particular the application of that article in circumstances where there is no planning proceeding.

[18] Subparagraph (g) bis has been added as suggested at the forty-eighth session: A/CN.9/864, para. 21(b).

[19] Support was expressed at the forty-eighth session (A/CN.9/864, para. 23) in favour of both deleting and retaining draft art. 12, but it was ultimately agreed that it should be retained in the text for further consideration.

2. The [group representative] is entitled, in the exercise of its functions and subject to the supervision of the court, to communicate directly with or to request information or assistance directly from foreign courts and foreign representatives.

Article 15. Cooperation to the maximum extent possible under article 14

For the purposes of article 14, cooperation to the maximum extent possible may be implemented by any appropriate means, including:

(a) Sharing and disclosure of information concerning enterprise group members participating in a [planning proceeding] [group insolvency solution], provided appropriate arrangements are made to protect confidential information;

(b) Negotiation of agreements concerning the coordination of proceedings to facilitate the implementation of a group insolvency solution;

(c) Allocation of responsibilities between the group representative and foreign representatives;

(d) Coordination of the administration and supervision of the affairs of the enterprise group members participating in a [planning proceeding] [group insolvency solution]; and

(e) Coordination with respect to the proposal and negotiation of [reorganization plans] [a group insolvency solution].

Article 17. Authority to enter into agreements concerning the coordination of proceedings

An agreement concerning the coordination of proceedings may be entered into to facilitate the implementation of a group insolvency solution.

Article 18. Appointment of a single [or the same] insolvency representative[20]

1. The court may coordinate with foreign courts with respect to the [appointment] [recognition] of a single [or the same] insolvency representative to [administer] [coordinate] insolvency proceedings concerning members of the same enterprise group in different States [where a group insolvency solution is being developed], provided that the insolvency representative is qualified for appointment in each of the relevant States.

2. To the extent required by applicable law, the insolvency representative is subject to the supervision of each appointing court.

[20] The intent of this article as originally drafted was to facilitate cooperation and coordination by appointing the same person as insolvency representative to all relevant group members in different States (provided that person was appropriately qualified) (see Legislative Guide, part three, chap. II, paras. 142-144). In the context of the regime proposed in chapters 3-4, however, this article might need to be revised or omitted, as a different approach is contemplated. Chapter 3 provides for appointment in the State of the COMI of one or more group members (in the fact situation provided in para. 7 of A/CN.9/WG.V/WP.137, debtors 1 and 2 in State A) of a group representative that can represent the State A proceedings in other States as required for the purposes of developing a group insolvency solution. It is not contemplated that foreign courts would cooperate with the court of State A in making that appointment, as the group representative represents only the proceedings in State A. That person, or another person, may be appointed to administer the reorganization or liquidation of debtors 1 and 2 in State A; that issue is not addressed by the provisions in chapter 3. For the purposes of developing a group insolvency solution, the group representative appointed in State A may not need to be appointed in other States provided the substance of chapters 3-4 is available, i.e. recognition, participation, standing, relief and so forth. Cooperation and coordination between the courts, other insolvency representatives and the group representative is addressed in the other articles of this chapter.

Chapter 3. Facilitating the development and recognition of a group insolvency solution

A. Provisions relevant to a State in which a planning proceeding commences (i.e. State A concerning debtors 1 and 2)

Article B. Participation by enterprise group members in an insolvency proceeding in this State; appointment of a group representative[21]

1. Subject to paragraph 2, if an insolvency proceeding has commenced in this State for an enterprise group member whose centre of main interests is located in this State, any other group member (whether solvent or insolvent)[22] may participate in that proceeding for the purpose of attempting to develop a group insolvency solution.

2. An insolvent enterprise group member whose centre of main interests is in another State may not participate in a proceeding under paragraph 1 if a court in that other State precludes it from so doing.[23]

3. *Variant 1*: If one or more enterprise group members participate in a proceeding under paragraph 1, the court may appoint a group representative, who may then seek recognition from foreign courts and may seek to participate in any foreign proceeding related to a participating group member.[24]

Variant 2: If one or more enterprise group members participate in a proceeding referred to in paragraph 1 of this article, the court may appoint a group representative. The group representative is authorized to act in a foreign State on behalf of that proceeding and to participate in any foreign proceeding relating to the enterprise group members participating in the [group insolvency solution] [planning proceeding], as permitted by the applicable foreign law.[25]

Principle 4, paragraph 2

The court can receive a request for recognition of the type referred to in paragraph 1 of this principle.[26]

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[21] Art. B, para. 1 gives effect to Principles 2, 3 and 5. Principle 2: "When it is proposed that a group insolvency solution be developed for some or all of the members of an enterprise group, that solution will require coordination as between group members and may be developed through a planning proceeding.";
Principle 3: "Adopting the approach of recommendation 250, enterprise group members might designate one of the insolvency proceedings commenced (or to be commenced) with respect to group members participating in the group solution to function as a coordinating proceeding, the role of which would be exclusively procedural, rather than substantive. A proviso might be that a coordinating proceeding should be a proceeding taking place in a State that is the COMI of at least one of the enterprise group members that is a necessary and integral part of the enterprise group solution."; and
Principle 5, sentences 1 and 3: "1. Participation in the coordination process would be voluntary for those group members whose COMI is located in a jurisdiction different to that of the planning proceeding.
3. Solvent members of the enterprise group may participate in a coordination process without such participation implying a submission to the jurisdiction of a domestic or foreign insolvency court or to the applicability of domestic or foreign insolvency laws." (see art. 10 of the Model Law).

[22] The use of the word "insolvent" should be understood as distinguishing those group members that may be subject to insolvency proceedings in accordance with recommendations 15 and 16 of the Legislative Guide, from those group members not so subject that may be described as "solvent". See footnote 4 of A/CN.9/WG.V/WP.137. See also Legislative Guide, part three, rec. 238, which stresses the voluntary nature of participation by solvent group members.

[23] Para. 2 is taken from art. B, para. 2 as set forth in A/CN.9/864, para. 41. See footnote 15 of A/CN.9/WG.V/WP.137 on possibility of using permissive language in this draft para.

[24] Variant 1 of para. 3 is taken from art. B, para. 3 as set forth in A/CN.9/864, para. 41.

[25] Variant 2 of para. 3 is a drafting proposal by the Secretariat that seeks to clarify the different elements of variant 1, drawing upon art. 5 of the Model Law.

[26] See principle 4, para. 1 below.

Principle 5, sentence 2

For those group members whose COMI is located in the same jurisdiction as the planning proceeding, the recommendations of part three of the Legislative Guide on Insolvency Law with respect to joint application and procedural coordination could apply.

Article D. Relief available to a planning proceeding in this State

2. To the extent needed to preserve the possibility of developing a group insolvency solution, the court may, at the request of the group representative, grant the following relief with respect to the assets or operations of any insolvent enterprise group member that is participating in the planning proceeding in this State:[27]

(a) Staying execution against the enterprise group member's assets;

(b) Suspending the right to transfer, encumber, or otherwise dispose of any assets of the enterprise group member;

(c) Suspending the proceedings[28] temporarily to allow for the development of a group insolvency solution;

(d) Staying the commencement or continuation of individual actions or individual proceedings concerning the enterprise group member's assets, rights, obligations, or liabilities;

(e) Entrusting the administration or realization of all or part of the enterprise group member's assets located in this State to the group representative or another person designated by the court, in order to protect and preserve the value of assets that, by their nature or because of other circumstances, are perishable, susceptible to devaluation, or otherwise in jeopardy;

(f) Providing for the examination of witnesses, the taking of evidence, or the delivery of information concerning the enterprise group member's assets, affairs, rights, obligations, or liabilities; and

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

B. Provisions relevant to a State in which recognition of a planning proceeding is sought

Article 3. Recognition of a planning proceeding

1. A group representative appointed in a planning proceeding may apply for recognition of that proceeding [in this State].[29]

2. An application for recognition shall be accompanied by:

(a) A certified copy of the decision commencing the planning proceeding and appointing the group representative; or

(b) A certificate from the foreign court affirming the existence of the planning proceeding and of the appointment of the group representative; or

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[27] See footnote 19 of A/CN.9/WG.V/WP.137. As currently drafted, the scope of this draft article is unclear. The chapeau appears to refer to the State in which the planning proceeding is taking place and it has thus been included in the category A provisions. It may also be relevant to the category B provisions. In that case, revision of the drafting might clarify that point and arts. D, 6 and 7 will need to be rationalized to avoid repetition and overlap.

[28] It may be desirable to add further language to clarify which proceeding subpara. 2(c) refers to — the planning proceeding or other proceedings that might be taking place in the State with respect to participating foreign debtors (e.g. for debtors 3 and 4 in State A).

[29] Para. 1 of art. 3 incorporates art. C as set forth in A/CN.9/864, para. 43.

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

3. An application for recognition shall also be accompanied by:[30]

(a) *Variant 1*: Evidence that [each group member sought to be represented in [a foreign proceeding] [a group insolvency solution]] has agreed to participate in that [proceeding] [solution]. Where such a group member is subject to insolvency proceedings[31] in the court of its centre of main interests, evidence shall be procured that any approval which may be required under the domestic law of the State of the commencement of proceedings for the participation in the [foreign proceeding] [proposed enterprise group insolvency solution] has been obtained;

(a) *Variant 2*: Evidence that an insolvent enterprise group member participating in the [planning proceeding] [foreign proceeding] whose centre of main interests is not in the State in which the planning proceeding commenced has [obtained permission to participate] [not been precluded from participating] in that proceeding in accordance with article B, paragraph 2;

[(b) A statement identifying all members of the enterprise group and all proceedings commenced in respect of enterprise group members participating in the [group insolvency solution] [planning proceeding] that are known to the group representative.][32]

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

Principle 4, paragraph 1

The court located in the COMI (the COMI court) of an enterprise group member participating in a group insolvency solution can authorize the insolvency representative appointed in insolvency proceedings taking place in the COMI to seek:

(i) To participate and be heard in a planning proceeding taking place in another jurisdiction; and

(ii) Recognition by the court of the proceeding in the COMI jurisdiction.

Article 6. Relief that may be granted upon application for recognition of a foreign proceeding

1. From the time of filing an application for recognition until the application is decided upon, the court may, at the request of the group representative, where relief is urgently needed to protect the assets of the enterprise group member subject to a [foreign proceeding] [planning proceeding] or the interests of the creditors, grant appropriate relief of a provisional nature, including:

(a) Staying execution against the enterprise group member's assets;

(b) Staying the commencement or continuation of insolvency proceedings in this State with respect to the enterprise group member;

(c) Entrusting the administration of all or part of the enterprise group member's assets located in this State to the group representative or another person designated by the

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[30] Variant 1 of subpara. 3 (a) reflects drafting suggestions made at the forty-eighth session (A/CN.9/864, para. 33(a)). Variant 2 of subpara. 3 (a) has been prepared by the Secretariat. Subpara. 3 (a) may not be required on the basis that a group representative cannot be appointed in a planning proceeding unless group members have been permitted to participate in that proceeding in accordance with art. B, para. 2. In other words, the court appointing the group representative has already considered the question of permission. Thus, all that may be required for recognition is that the group representative satisfies the other requirements of art. 3, paras. 2, 3 and 4.

[31] The words "subject to insolvency proceedings" are used throughout the Legislative Guide, part three to refer to those group members for which insolvency proceedings have commenced.

[32] Subpara. 3 (b) includes drafting suggestions made at the forty-eighth session (A/CN.9/864, para. 33(d)).

court, in order to protect and preserve the value of assets that, by their nature or because of other circumstances, are perishable, susceptible to devaluation or otherwise in jeopardy;

[(c) bis Entrusting the realization of all or part of the enterprise group member's assets located in this State to the group representative or another person designated by the court in order to protect and preserve the value of assets that, by their nature or because of other circumstances, are perishable, susceptible to devaluation or otherwise in jeopardy];

(d) Recognizing existing arrangements concerning the funding of enterprise group members participating in the [group insolvency solution] [planning proceeding] where the funding entity is located in this State and authorizing the continued provision of finance under those funding arrangements[, subject to any appropriate safeguards the court may apply].[33]

(e) Deleted.[34]

2. [*Insert provisions of the enacting State relating to notice*.]

3. Unless extended under article 7, subparagraph 1 (g), the relief granted under this article terminates when the application for recognition is decided upon.

4. The court may refuse to grant relief under this article if such relief would interfere with the administration of a [group insolvency solution] [planning proceeding] [proceeding located in the COMI of an enterprise group member participating in the group insolvency solution].[35]

Article 5. Decision to recognize a planning proceeding

1. [Subject to any applicable public policy exception,] a planning proceeding shall be recognized if:

(a) and (b) Deleted;

(c) The application meets the requirements of [article 3, paragraphs ...] [is a planning proceeding within the meaning of article 2, paragraph (g)];[36]

(d) The application has been submitted to the court referred to in article ...;

(e) Deleted;

[(f) The foreign proceeding was commenced on the basis of the centre of main interests or establishment of the foreign group member or (if permissible under the laws of the enacting State) any other basis, including the presence of assets of the foreign group member or voluntary submission by the foreign group member to the jurisdiction of the court of the foreign State].[37]

(g), (h) and (i) Deleted.[38]

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[33] The additional text at the end of subpara. 1(d) was suggested at the forty-eighth session (A/CN.9/864, para. 36(c)). If the Working Group decides to retain art. 8 as drafted, para. 2 of that article would obviate the need to include those additional words in art. 6, subpara. 1(d). In principle support for including a provision of this nature on post commencement finance was expressed at the forty-fifth and forth-sixth sessions (A/CN.9/803, para. 30 and A/CN.9/829, para. 49 respectively). As drafted, subpara. 1(d) would apply both to post-application and post-commencement finance. This provision might need to be aligned with draft art. 7, para. (h).

[34] Subpara. 1(e) has been deleted following agreement at the forty-eighth session (A/CN.9/864, para. 36(d)).

[35] The additional text at the end of art. 6, para. 4 was suggested at the forth-eighth session (A/CN.9/864, para. 36(e)).

[36] Art. 5, para. 1 (c) incorporates art. C.

[37] It was acknowledged at the forty-eighth session that the drafting of subpara. 1(f) gave rise to numerous concerns (A/CN.9/864, para. 35) and thus required further consideration. It has been retained in the revised draft text only to remind the Working Group of the need to discuss the issue of whether to depart in this draft text from the Model Law approach of recognizing proceedings only on the basis of COMI or establishment.

[38] Although there was agreement at the forty-eighth session to retain subparas. 1(g) and (h), they have been deleted from the revised draft text, as they repeated elements of the definition of "planning proceeding". Para. (i) has been deleted following a suggestion at the forty-eighth session (A/CN.9/864, para. 34(b)).

2. An application for recognition of a [foreign proceeding] [planning proceeding] shall be decided upon at the earliest possible time.

3. Recognition may be modified or terminated if it is shown that the grounds for granting it were fully or partially lacking or have ceased to exist.

4. For the purposes of paragraph 3, the group representative shall inform the court of changes in the status of the [group insolvency solution] [planning proceeding] or in the status of their own appointment occurring after the application for recognition is made.

Article 7. Relief that may be granted upon recognition of a planning proceeding

1. Upon recognition of a planning proceeding, where necessary to protect the assets of the enterprise group member[39] or the interests of creditors and to facilitate the development of a group insolvency solution, the court may, at the request of the group representative, grant any appropriate relief, including:

(a) Staying the commencement or continuation of individual actions or individual proceedings concerning the assets, rights, obligations or liabilities of the enterprise group member;[40]

(b) Staying the commencement or continuation of insolvency proceedings in this State with respect to the enterprise group member;

(c) Staying execution against the assets of the enterprise group member;

(d) Suspending the right to transfer, encumber or otherwise dispose of any assets of the enterprise group member, except where authorized by the court;

(e) Entrusting the administration of all or part of the assets of the enterprise group member located in this State to the group representative or another person designated by the court;

[(e) bis Entrusting the realization of all or part of the assets of the enterprise group member located in this State to the group representative or another person designated by the court;]

(f) Providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the assets, affairs, rights, obligations or liabilities of the enterprise group member;

(g) Extending any provisional relief granted;

(h) [When a group member located in this State is providing funding to other group members and is participating in the [group insolvency solution] [planning proceeding]], and [where permitted by relevant laws [of the receiving State]], recognizing existing arrangements concerning the funding of enterprise group members participating in the [group insolvency solution] [planning proceeding] and authorizing the continued provision of finance under those funding arrangements;[41]

(i) Subject to article 8, approving treatment in the foreign proceeding of the claims of creditors located in this State;[42] or

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

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[39] The drafting of some elements of art. 7 might need to specify which group members are being referred to — those in respect of which the planning proceeding commenced (i.e. that have their COMI in the State in which the planning proceeding commenced) or those participating in the planning proceeding that might have their COMI in the receiving State or both in some circumstances. Cf. art. 7, para. 2 and use of the words "in this State", also see footnote 27 above and footnote 19 of A/CN.9/WG.V/WP.137 relating to art. D, para. 2.

[40] It might be noted that art.7, subparas. 1 (a) and (b) overlap with draft art. H, para. 1.

[41] Additional language in art. 7, subpara. 1 (h) was agreed at the forty-eighth session (A/CN.9/864, para. 37(b)). This subpara. and art. 6, subpara. 1 (d) might need to be aligned.

[42] Art. 7, subpara. 1 (i) may need to be aligned to art. F, para. 1 and art. G, para. 1 noting that those articles are intended to apply irrespective of whether or not there is a planning proceeding.

2. Upon recognition of a planning proceeding the court may, at the request of the group representative, entrust the distribution of all or part of the assets of the enterprise group member located in this State to the group representative or another person designated by the court, provided that the court is satisfied that the interests of creditors in this State are adequately protected.

Article D. Participation of a group representative in a proceeding in this State

1. Upon recognition of a planning proceeding, the group representative may participate in any proceedings[43] in this State concerning enterprise group members that are participating in the planning proceeding.

Article 8. Protection of creditors and other interested persons[44]

1. In granting or denying relief under article 6 or 7, or in modifying or terminating relief under paragraph 3 of this article, the court must be satisfied that the interests of the creditors and other interested persons, including the debtor, are adequately protected.

2. The court may subject relief granted under article 6 or 7 to conditions it considers appropriate.

3. The court may, at the request of the group representative or a person affected by relief granted under article 6 or 7, or at its own motion, modify or terminate such relief.

Article E. Approval of local elements of a group insolvency solution[45]

1. If a proposed group insolvency solution is developed in the planning proceeding, and the group representative submits to the court in this State[46]

Variant 1: the portion of the group insolvency solution affecting an insolvent group member whose centre of main interests [or establishment][47] is in this State, the court shall submit the relevant portion of the group insolvency solution to the approval process in [*refer to the relevant provisions in domestic insolvency law*].[48]

Variant 2: that group insolvency solution, the court shall submit the relevant portion of the group insolvency solution affecting an insolvent group member whose centre of main interests [or establishment] is in this State to the approval process in [*refer to the relevant provisions in domestic insolvency law*].[49]

2. If the approval process [pursuant to] [referred to in] paragraph 1 results in approval of the portion of the group insolvency solution affecting the enterprise group member, the court shall confirm and implement those elements relating to assets or operations in this State.

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[43] Are the proceedings referred to in this para. only insolvency proceedings? If so, the words "[*identify the laws of the enacting State relating to insolvency*]" might be added.

[44] There was general support at the forty-eighth session for inclusion of an article along the lines of art. 8 as drafted. The Working Group may wish to note that art. 8 may overlap with other articles, including art. H, para. 2.

[45] Art. E, para. 1 gives effect to principle 6: "Creditors and stakeholders of each enterprise group member participating in the group solution would vote in their own jurisdiction on the treatment they are to receive under the group reorganization plan according to the applicable domestic law." Art. E, para. 2 gives effect to principle 7: "Following approval of the group reorganization plan by relevant creditors and stakeholders, each COMI court would have jurisdiction to deal with the group reorganization plan in accordance with domestic law."

[46] The Working Group may wish to consider whether this article should clarify whether recognition of the planning proceeding is required for submission of the group insolvency solution to the foreign court.

[47] The reference to "establishment" is included in art. E (paras. 1 and 2) in accordance with a suggestion made at the forty-eighth session (A/CN.9/864, para. 48(b)).

[48] Variant 1 reflects art. E as proposed at the forty-eighth session (A/CN.9/864, para. 47).

[49] Variant 2 gives effect to the proposal at the forty-eighth session (A/CN.9/864, para. 48(a)) that the whole of the group insolvency solution should be submitted to the court, with the approval process applying only to the relevant local elements.

Principle 8

The insolvency representative appointed in the proceeding designated as the planning proceeding is entitled to apply directly to a court in this State to be heard on issues related to implementation of the group insolvency solution.

Chapter 4. Treatment of foreign claims in accordance with applicable law[50]

Article F. Commitment to and approval of the treatment of foreign claims in accordance with applicable law: non-main proceedings

1. To facilitate the treatment of claims that could otherwise be brought by creditors in a non-main proceeding in another State, a foreign representative or group representative appointed in this State may commit to, and the court in this State may approve, providing those creditors with the treatment in this State that they would have received in a non-main proceeding in that other State.

2. A court in this State may stay or decline to open a non-main proceeding if a foreign representative or group representative from another State in which a main proceeding is pending has made a commitment under paragraph 1.

Chapter 5. Supplemental provisions[51]

Article G. Commitment to and approval of the treatment of foreign claims in accordance with applicable law: main proceedings

1. To facilitate the treatment of claims that would otherwise be brought by creditors in a proceeding in another State, a foreign representative or group representative appointed in this State may commit to, and the court in this State may approve, providing those creditors with the treatment in this State that they would have received in a proceeding in that other State.

2. A court in this State may stay or decline to open a main proceeding if a foreign representative or group representative from another State in which a proceeding is pending has made a commitment under paragraph 1.

Article H. Additional relief

1. If, upon recognition of a planning proceeding, the court is satisfied that the interests of creditors of affected enterprise group members would be adequately protected in the planning proceeding, the court, in addition to granting any relief described in article D, may

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[50] The provisions as set out in arts. F and G are not limited to cases where a group solution is being developed through a planning proceeding. Article F is part of the core provisions; article G is part of the supplemental provisions. They are presented as originally proposed at the forty-eighth session (A/CN.9/864, para. 49). However, a proposal made at the forty-eighth session to redraft the provisions (A/CN.9/864, para. 50) would result in the following, with art. F being based on the first paras. of arts. F and G. Whether the two paras. of art. G, as revised, should be considered to be core or supplemental provisions may, as noted, require further consideration:

"*Article F*.

"A foreign representative or group representative appointed [in this State] may commit to, and the court [in this State] may approve, providing creditors with claims that could otherwise be brought in a proceeding in another State with the treatment in this State that they would have received had a proceeding commenced in that other State."

"*Article G*.

"1. A court in this State may stay or decline to open a non-main proceeding if a foreign representative or group representative from another State in which a main proceeding is pending has made a commitment under article F.

"2. A court in this State may stay or decline to open a main proceeding if a foreign representative or group representative from another State in which a proceeding is pending has made a commitment under article F."

[51] As noted above in the introduction to A/CN.9/WG.V/WP.137, articles G and H are supplemental components, which would be additional options for a State to enact, and would go a step further than the core provisions.

stay or decline to open insolvency proceedings in this State relating to enterprise group members participating in the planning proceeding.[52]

2. Notwithstanding article E, paragraph 1, if, upon submission of a proposed group insolvency solution by the group representative, the court is satisfied that the interests of creditors of the affected enterprise group member are adequately protected in the planning proceeding, the court may approve the relevant portion of the group insolvency solution and grant any relief described in article D that is necessary for implementation of the group insolvency solution.

[52] The type of additional relief referred to in art. H, para. 1 is potentially covered by art. 7, subparas. 1 (a) and (b), albeit available at a different time of the proceedings. The two articles may need to be aligned. Relief to support the group insolvency solution may come too late to be meaningful if it is only available following submission of that group solution for approval.

G. Note by the Secretariat on insolvency law: cross-border recognition and enforcement of insolvency-related judgements

(A/CN.9/WG.V/WP.138)

[Original: English]

Contents

Introduction

1. At its forty-seventh session (2014), the Commission gave Working Group V (Insolvency Law) a mandate to develop a model law or model legislative provisions to provide for the recognition and enforcement of insolvency-related judgements.

2. At its forty-sixth session in December 2014, Working Group V (Insolvency Law) considered a number of issues relevant to the development of a legislative text on the recognition and enforcement of insolvency-related judgements, including the types of judgements that might be covered, procedures for recognition and grounds to refuse recognition. The Working Group agreed that the text should be developed as a stand-alone instrument, rather than forming part of the UNCITRAL Model Law on Cross-Border Insolvency (the Model Law), but that the Model Law provided an appropriate context for the new instrument.

3. At its forty-seventh session, the Working Group considered the first draft of a model law to be given effect through enactment by a State (A/CN.9/WG.V/WP.130). The content

and structure of the draft text drew upon the Model Law, as suggested by the Working Group at its forty-sixth session (A/CN.9/829, para. 63) and sought to give effect to the conclusions of the Working Group at its forty-sixth session relating to the types of judgement to be included (A/CN.9/829, paras. 54 to 58), procedures for obtaining recognition and enforcement (A/CN.9/829, paras. 65 to 67) and the grounds for refusal of recognition (A/CN.9/829, paras. 68 to 71).

4. At its forty-seventh session, the Working Group had a preliminary exchange of views on draft articles 1 to 10 of the text and made a number of proposals with respect to the drafting (A/CN.9/835, paras. 47-69); draft articles 11 and 12 of that text were not reached due to lack of time and are included in this note as draft articles 12 and 13.

5. At its forty-eighth session, the Working Group considered a revised version of the draft text, which reflected the decisions and proposals made at the forty-seventh session (A/CN.9/WG.V/WP.135). The following text reflects the proposals and decisions made at the forty-eighth session (A/CN.9/864, paras. 54-87). Notes to the draft articles are set forth in footnotes.

Draft model law on the recognition and enforcement of insolvency-related judgements

Article 1. Scope of application[1]

Variant 1

1. This Law applies where:

(a) Recognition and enforcement of an insolvency-related judgement is sought in this State by a foreign representative or other person entitled to seek enforcement of such a judgement in connection with a foreign proceeding; or

(b) *Variant 1* [Recognition and enforcement of an insolvency-related judgement is sought in a foreign State in connection with a proceeding under the law of this State.]

(b) *Variant 2* [Authorization to seek [recognition and] enforcement of an insolvency-related judgement in a foreign State [is [requested] [required]].[2]

2. This Law does not apply to [...].

Variant 3

1. [This Law applies to the recognition and enforcement of an insolvency-related judgement issued in a proceeding taking place in a State that is different to the State of execution.]

2. This Law does not apply to [...].

Article 2. Definitions

For the purposes of this Law:

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

(b) "Foreign representative" means a person or body, including one appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the

[1] Variants 1 and 3 of draft art. 1 have been retained in accordance with a decision at the forty-eighth session (A/CN.9/864, para. 58). The text proposed at the forty-eighth session (A/CN.9/864, para. 56) for addition to draft art. 1 appears below as art. 3 bis. The second text proposed at the forty-eighth session (A/CN.9/864, para. 59) for addition to draft art. 1 appears below as art. 3 ter.

[2] Variant 2 of draft art. 1, para. (b) is based on the heading of draft art. 5 of this text as proposed at the forty-eighth session (A/CN.9/864, para. 60). Draft art. 5, which repeats art. 5 of the Model Law, provides the necessary authorization, should it be required.

liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding;

(c) "Judgement" means

Variant 1[3] any judicial or administrative decision, whatever it may be called, including a decree or order, a determination of costs and expenses provided that the determination related to a judicial or administrative decision, and any decision ordering [provisional] [or] [protective [and conservatory]] measures.

Variant 2 [any decision, whatever it may be called, issued by a court or administrative authority, provided an administrative decision has the same effect as a decision issued by a court. For the purposes of this definition, a decision includes a decree or order, and a determination of costs and expenses by the court [provided that the determination relates to a decision that may be recognized or enforced under this Law,] and any decision ordering [provisional] [or] [protective [and conservatory]] measures].

(d) "Insolvency-related judgement" means [a judgement that is closely related to a foreign proceeding and was issued after the commencement of that proceeding. A judgement is presumed to be "closely related to a foreign proceeding" if it has an effect upon the insolvency estate[4] of the debtor and either is based on a law relating to insolvency or, due to the nature of its underlying claims, would not have been issued without the commencement of the foreign proceeding.

An insolvency-related judgement would include any equitable relief, including the establishment of a constructive trust, provided in that judgement or required for its enforcement. Insolvency-related judgements may include, [inter alia,] judgements concerning any of the following matters:][5]

(i) Turnover of property of an insolvency estate;

(ii) Sums and assets due to an insolvency estate [pursuant to an obligation arising after the commencement of the foreign proceeding];[6]

(iii) Sale of assets by an insolvency estate;

(iv) Requirements for accounting related to a foreign proceeding;

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[3] Variant 1 of draft art. 2, para. (c) remains as drafted in A/CN.9/WG.V/WP.135. Variant 2 of para. (c) includes an additional phrase in square brackets that has been added to address the concern expressed about the inclusion of administrative decisions unless they have the same effect as a judicial decision (A/CN.9/864, paras. 62-63). The concern with respect to effect and enforceability of a judgement in the State in which it was issued is addressed in draft art. 10 bis. Administrative decisions were included in para. (c) for the same reason as administrative authorities were included in the Model Law i.e. that in some States, administrative authorities, rather than the courts, are competent to control or supervise a foreign proceeding. Accordingly, omitting any reference to such authorities or the decisions they issue might create a gap for some States (see A/CN.9/835, para. 56). Variant 2 also includes additional language (the proviso in the second sentence) to reflect changes made to the definition of the term "judgement" in the draft text emanating from the fifth session (October 2015) of the Hague Conference on Private International Law's working group on the judgements project (art. 3, subpara. 1(b)) (available from www.hcch.net/en/projects/legislative-projects/judgments/recent-developments). Reference to the decision being made "on the merits" (language that is included in the Hague draft) has not been included in para. (c); it was not initially included in the definition contained in the first draft of the instrument (A/CN.9/WG.V/WP.130), but was an element of the chapeau of draft
art. 9 relating to recognition and enforcement, which should take place "without review of the merits of the judgement". Those words have been deleted in accordance with a proposal at the forty-eighth session (A/CN.9/864, para. 76) to simplify the chapeau of art. 9. References to provisional measures are retained in both variants for further consideration (note art. 7 bis).

[4] "Insolvency estate" is defined in the Legislative Guide, Introduction, para. 12 (t) as meaning: "assets of the debtor that are subject to the insolvency proceedings."

[5] Variant 1 of the chapeau of draft art. 2, para. (d) as set forth in A/CN.9/WG.V/WP.135 has been retained; variant 2 has been deleted (A/CN.9/864, para. 69).

[6] Draft art. 2, subpara. (d) (ii) has been revised in accordance with A/CN.9/864, paras. 67, 69. The draft language in square brackets reflects a proposal to limit the article to cover only post-commencement obligations, rather than pre- and post-commencement obligations. The Working Group agreed that proposal required further consideration (A/CN.9/864, para. 65).

(v) Overturn of transactions involving the debtor or assets of an insolvency estate that have had the effect of either reducing the value of the estate or upsetting the principle of equitable treatment of creditors;[7]

(vi) Modification or enforcement of a stay of actions in a foreign proceeding;[8]

(vii) Validity [and effectiveness] of a secured claim;[9]

(viii) A cause of action pursued by a creditor with approval of the court,[10] based on [an insolvency] [a foreign] representative's decision not to pursue that cause of action [where any judgement arising from that action would otherwise be enforceable under this Law];[11]

(ix) Liability of a director in the period approaching insolvency [that could be pursued by or on behalf of an insolvency estate];[12]

(x) Confirmation of a plan of reorganization or liquidation or approval of a [composition] [voluntary restructuring agreement] [in a foreign proceeding];

(xi) The discharge of a particular debt;

(xii) Recognition of the discharge of a debtor;[13] and

(xiii) [A cause of action [related to insolvency] pursued by a party to whom it has been assigned by a foreign representative in accordance with the applicable law] [where any judgement arising from that action would otherwise be enforceable under this Law].

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

(f) "Proceeding" means procedures and hearings before a court or administrative authority that performs a judicial function.[14]

[Article 3. International obligations of this State[15]

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

[Article 3 bis. International obligations of this State[16]

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[7] Draft art. 2, subpara. (d) (v) reflects variant 1 as set forth in A/CN.9/WG.V/WP.135; variant 2 has been deleted (A/CN.9/864, para. 69).

[8] Draft 2, subpara. (d) (vi) was noted as raising the same issues as the references to provisional measures (see A/CN.9/864, para. 68 and the last sentence of footnote 3 above).

[9] The language in square brackets added to draft art. 2, subpara. (d) (vii) responds to a suggestion made at the forty-eighth session (A/CN.9/864, para. 68) and more accurately reflects the terminology of the UNCITRAL Legislative Guide on Secured Transactions, making it clear that effectiveness between parties and against third parties is covered. A reference to the relevant chapters of the Legislative Guide on Secured Transactions — Ch II, paras. 1-71 and Ch. III, paras. 1-74 — will be included in a footnote to the final text.

[10] It may be appropriate to add language clarifying which court is being referred to e.g. the foreign court in which the foreign insolvency proceeding commenced.

[11] The additional language in square brackets in draft art. 2, subparas. (d) (viii) and (xiii) reflects proposals made at the forty-eighth session (A/CN.9/864, para. 68) to qualify the otherwise broad language of these subparas. Subpara. (d) (xiv) has been deleted (A/CN.9/864, para. 69).

[12] The additional language in square brackets in draft art. 2, subpara. (d) (ix) reflects a proposal made at the forty-eighth session (A/CN.9/864, paras. 68, 69).

[13] Draft art. 2, subparas. (d) (x)-(xii) remain for further consideration; in response to a suggestion at the forty-eighth session that they should be deleted because they were covered by the Model Law, it was suggested that there may be situations in which they are not so covered (A/CN.9/864, para. 68).

[14] The definition in draft art. 2, para. (f) is based on variant 3 of A/CN.9/WG.V/WP.135; variants 1 and 2 have been deleted. Additional definitions in draft art. 2, paras. (g) "recognition" and (h) "enforcement" have also been deleted (see A/CN.9/864, para. 70).

[15] Draft art. 3 repeats art. 3 of the Model Law; the Working Group agreed to retain arts. 3-7 of the Model Law in this text (A/CN.9/864, para. 71).

[16] Draft art. 3 bis was proposed at the forty-eighth session of the Working Group (A/CN.9/864, para. 56). The words "insolvency-related" have been added to limit the application of the article to the specific subject matter of the draft text.

1. This [Law] shall not apply to an insolvency-related judgement where there is a treaty [in force] concerning the recognition or enforcement of civil and commercial judgments (whether concluded before or after [this Law] comes into force), and that treaty applies to the insolvency-related judgement.

2. An insolvency-related judgement is to be treated for the purposes of paragraph 1 of this article as falling within the class of judgments to which a treaty applies:

(a) Even where the particular insolvency-related judgement is not enforceable under the treaty because of the particular circumstances of the case; and

(b) Whether or not the State has adopted the treaty.]

[Article 3ter. Conflict between the law of this State and the law of the State in which the insolvency-related judgement was issued[17]

In the event of a conflict between the application of this Law and the law of the State where the insolvency-related judgement was issued, the provisions of this Law prevail.]

Article 4. Competent court or authority[18]

The functions referred to in this Law relating to recognition and enforcement of insolvency-related judgements shall be performed by [*specify the court, courts, authority or authorities competent to perform those functions in the enacting State*].

Article 5. Authorization to seek enforcement of an insolvency-related judgement in a foreign State

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

Article 6. Additional assistance under other laws

Nothing in this Law limits the power of a court or a [*insert the title of the person or body administering a reorganization or liquidation under the law of the enacting State*] to provide additional assistance to a foreign representative under other laws of this State.

[Article 6 bis. Public policy exception[19]

Nothing in this Law prevents the court from refusing to take an action governed by this Law if the action would be manifestly contrary to public policy [or] [including] the fundamental principles of procedural fairness of this State.]

Article 7. Interpretation

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

[Article 7 bis. Effect and enforceability of an insolvency-related judgement in the State in which it was issued[20]

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[17] Draft art. 3 ter was proposed at the forty-eighth session (A/CN.9/864, para. 59) to address concerns relating to the effect of draft art. 1, subpara. 1(b).

[18] Draft art. 4, which is based on art. 4 of the Model Law, has been revised for consistency with the subject matter of this draft instrument. The footnote to art. 4 of the Model Law has been omitted.

[19] Draft art. 6 bis has been added in accordance with a proposal at the forty-eighth session (A/CN.9/864, paras. 77, 81) and replaces draft arts. 9, para. (f) and 10, paras. (d) and (e), which have been deleted in this version. Although the draft is reproduced as proposed, it may be appropriate to delete the word "or" and retain the word "including" to clarify that fundamental principles of procedural fairness can be considered as part of public policy.

[20] The addition of draft art. 7 bis was suggested at the forty-eighth session to address the issue of finality of a judgement and the inclusion of administrative decisions and provisional measures under draft art. 2, para. (c) (A/CN.9/864, paras. 62-65). It is based on art. 4, para. 3 of the text emanating from the fifth meeting (October 2015) of the Hague Conference on Private International

An insolvency-related judgement shall be recognized and enforced only if it has effect and is enforceable in the State in which it was issued.]

Article 8. Application for recognition and enforcement of an insolvency-related judgement[21]

1. A foreign representative or other person entitled under the law of the State in which the judgement was issued to seek enforcement of an insolvency-related judgement may apply to the court in this State for recognition and enforcement of that judgement, including by way of defence.

2. An application for recognition and enforcement of an insolvency-related judgement shall be accompanied by:

(a) A [certified] copy of the insolvency-related judgement;

(b) [A certified statement of the [final character of the] insolvency-related judgement;] [Information relating to any current review of the insolvency-related judgement, including whether any notice of intended appeal has been received, the time limit (if any) for seeking review has expired in the State in which it was issued, and whether the judgement is enforceable in the State in which it was issued];[22]

(c) *Deleted*;

(d) Evidence [as required by the law of this State][23] that the party against whom relief is sought was provided notice of the application in this State for recognition and enforcement of the insolvency-related judgement.

23. The court may require translation of documents supplied in support of the application for recognition and enforcement of the insolvency-related judgement into an official language of this State.

34. The court is entitled to presume that documents submitted in support of the application for recognition and enforcement of the insolvency-related judgement are authentic, whether or not they have been legalized.

[Article 8 bis. Postponement or refusal of recognition and enforcement[24]

Law's working group on the judgements project (available as indicated in footnote 3). Inclusion of this draft article may necessitate additions to draft art. 8, e.g. a requirement to provide any documents necessary to establish that the judgement has effect or, where applicable, is enforceable in the State in which it was issued (see Hague working group text, art. 11, para. 1 (c)).

[21] This version of draft art. 8 is based upon the decision of the Working Group at its forty-eighth session (A/CN.9/864, para. 72) to retain variant 2 and delete variant 1.

[22] The requirement for the foreign insolvency-related judgement to be final and binding that was initially included in draft arts. 2, para. (c) and 10, paras. (f) and (g) has now been deleted; arts. 2 bis and 2 ter address aspects of that requirement. Accordingly, in order to align art. 8, para. 2 with the definition of judgement as proposed by the Working Group (A/CN.9/864, para. 72), the first words in square brackets in para. (b) could be deleted. However, in view of new art. 8 bis, it may be appropriate to require that some information be provided to the receiving court as to whether the judgement is currently subject to review, whether any notice of intended appeal has been received, whether the time limit (if there is one) for seeking review has expired in the State of issue and whether it is enforceable in the State of issue. Language to that effect has been added for consideration.

[23] The addition of the words in square brackets to art. 8, subpara. 2 (d) was suggested at the forty-eighth session (A/CN.9/864, para. 74).

[24] Following a suggestion made at the forty-eighth session (A/CN.9/864, paras. 75 and 79), draft art. 8 bis repeats the first two sentences of art. 4, para. 4 of the text emanating from the fifth meeting (October 2015) of the Hague Conference on Private International Law's working group on the judgements project. The last sentence of art. 4, para. 4 of that Hague Conference text includes the following language — "In such cases, the court addressed may also make enforcement conditional on the provision of such security as it shall determine." The Working Group may wish to consider whether that language is required in this text and if so, whether it should apply both to recognition and enforcement. The Working Group may also wish to consider the need to align this draft article with whatever language is adopted for draft art. 8, para. 2(b).

1. Recognition and enforcement may be postponed or refused if the insolvency-related judgment is the subject of review in the State in which it was issued or if the time limit for seeking ordinary review in that State has not expired.

2. A refusal under paragraph 1 does not prevent a subsequent application for recognition and enforcement of the judgment.]

Article 9. Decision to recognize and enforce an insolvency-related judgement

An insolvency-related judgement shall be recognized and enforced provided:

(a) *Deleted*;

(b) The person seeking enforcement of the insolvency-related judgement is a person within the meaning of article 2, subparagraph (b) or another person entitled to seek enforcement of the judgement under article 8, paragraph 1;

(c) The requirements of article 8, paragraph 2 are met;

(d) The court from which recognition is sought is the court referred to in article 4; and

(e) Articles 8 bis and 10 do not apply.[25]

Article 10. Grounds to refuse recognition of an insolvency-related judgement

Recognition and enforcement of an insolvency-related judgement may be refused if:

(a) The insolvency-related judgement is subject to review in the originating State or the time limit for seeking review has not expired and the originating State would not enforce the insolvency-related judgement because of the availability of such review;[26]

(b) The party against whom the proceeding giving rise to the insolvency-related judgement was instituted:

(i) Was not notified of the institution of that proceeding in sufficient time and in such a manner as to enable a defence to be arranged, unless the party entered an appearance and presented their case without contesting notification in the originating court, provided that the law of the originating State permitted notification to be contested; or

(ii) Was notified of the institution of that proceeding in a manner that is incompatible with fundamental principles of this State concerning service of documents;

(c) The insolvency-related judgement was obtained by fraud in connection with a matter of procedure;

(d) and (e) *Deleted*[27]

(f) The insolvency-related judgement is inconsistent with a prior judgement issued in this State in a dispute involving the same parties;

(g) The insolvency-related judgement is inconsistent with a prior judgement issued in another State involving the same parties, provided that the earlier judgement fulfils the conditions necessary for its recognition in this State;

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[25] Draft art. 9, para. (f), which provided that the insolvency-related judgement could be recognized and enforced unless recognition of the proceeding in which the judgement was issued had been refused on public policy grounds, has been deleted (A/CN.9/864, para. 77) and a general article along the lines of art. 6 of the Model Law included as draft art. 6 bis.

[26] The Working Group agreed to retain draft art. 10, para. (a) (A/CN.9/864, para. 79); since this issue is now addressed by draft art. 8 bis, para. (a) may not be required.

[27] Draft art. 10, paras. (d) and (e) have been deleted as agreed (A/CN.9/864, paras. 77 and 81) and replaced by draft art. 6 bis.

(h) Recognition and enforcement of the insolvency-related judgement would interfere with the administration of the insolvency proceedings or would be inconsistent with a stay or other order entered in insolvency proceedings in this or another State;[28]

[(i) *New variant 1*:[29] The insolvency-related judgement was not issued by a court in the State of the [judgement] debtor's centre of main interests or by a court which would have had jurisdiction in accordance with the law of this State concerning recognition and enforcement of the insolvency-related judgment.]

[(i) *New variant 2*: The insolvency-related judgement was not issued by a court that:

[(i) For Model Law enacting States: Was supervising a foreign main proceeding regarding the insolvency of the [party against whom the judgement was issued] [judgement debtor];]

(ii) Exercised jurisdiction based on the consent of the [party against whom the judgement was issued] [judgement debtor];

(iii) Exercised jurisdiction on a basis on which [a receiving court could have exercised jurisdiction under its own law] [a court in this State could have exercised jurisdiction]; or

(iv) Exercised jurisdiction on a basis that was [not inconsistent] [consistent] with the law of this State.]

[(j) The insolvency-related judgement adversely affects the interests of creditors and other interested persons in this State who did not, directly or through an appropriate representative, participate in the foreign proceeding, and who could not reasonably be expected to have participated in the foreign proceeding.][30]

[Article 10 bis. Equivalent effect[31]

1. An insolvency-related judgment recognized or enforceable under this Law shall be given the same effect it has in the State in which it was issued.

2. If the insolvency-related judgment provides for relief that is not available under the law of this State, that relief shall, to the extent possible, be adapted to relief that is equivalent to, but does not exceed, the effect it has under the law of the State in which it was issued.]

[Article 11. Protection of creditors and other interested persons[32]

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[28] Draft art. 10, para. (h) is based upon variant 1 as set forth in A/CN.9/WG.V/WP.135. Variant 2 has been deleted (A/CN.9/864, para. 83).

[29] Previous variants 1, 2 and 3 of draft art. 10, para. (i) as contained in A/CN.9/WG.V/WP.135 have been deleted. The new variants 1 and 2 reflect proposals made at the forty-eighth session (A/CN.9/864, paras. 84-86).

[30] The previous version of draft art. 10. para. (j) has been deleted and a new para. (j) added in accordance with a proposal at the forty-eighth session (A/CN.9/864, para. 86) to address a concern that if the provision were to be limited to local creditors (i.e. creditors in the enacting State) it might to be narrow. It may be of assistance to note art. 11 of the Model Law and the Guide to Enactment and Interpretation, para. 198, which indicates the inadvisability of limiting such a provision to local creditors and the difficulties of crafting a definition of such creditors without discriminating against certain creditors on the basis of, for example, place of business or nationality.

[31] The addition of draft art. 10 bis was suggested at the forty-eighth session to address various concerns about differences that might occur between the relief available under the law of the originating State and that available under the law of the receiving State (A/CN.9/864, paras. 64-65).

[32] As requested by the Working Group (A/CN.9/864, para. 79), draft art. 11 is based upon art. 22, para. 1 of the Model Law, with some modification to be consistent with the subject matter of this draft instrument. The draft art. reflects the basic principle of art. 22, para. 1, without providing for (i) the imposition of conditions on recognition and enforcement, or (ii) the court to modify or terminate recognition or enforcement (that is, art. 22, paras. 2 and 3). If this draft art. is to be retained, the Working Group may wish to consider the scope of such a safeguard — whether it should apply generally to all insolvency-related judgements as drafted, or be limited to specific judgements referred to in draft art. 2.

In recognizing and enforcing an insolvency-related judgement under article 9, the court must be satisfied that the interests of the creditors and other interested persons, including the judgement debtor, are adequately protected.]

[Article 12. Severability[33]

Recognition and enforcement of a severable part of an insolvency-related judgement shall be granted where recognition and enforcement of that part is applied for, or only part of the judgement is capable of being recognized and enforced under this Law.]

Article 13. Provisional relief[34]

1. From the time recognition and enforcement of an insolvency-related judgement is sought until a decision is made, the court may grant relief of a provisional nature where relief is urgently needed, including:

(a) Staying the disposition of any assets of any party or parties against whom the insolvency-related judgement has been issued; or

(b) Granting other legal or equitable relief, as appropriate, within the scope of the insolvency-related judgement.

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

3. Unless extended by the court, relief granted under this article terminates when a decision on recognition and enforcement of the insolvency-related judgement is made.

[33] Draft art. 12 is based on art. 14 of the draft emanating from the fifth session (October 2015) of the Hague Conference on Private International Law's working group on the judgements project. It was previously included in A/CN.9/WG.V/WP.130 as art. 11, but not considered at the forty-seventh session for lack of time. It is included in this draft for the Working Group's consideration.

[34] Draft art. 13 was previously included in A/CN.9/WG.V/WP.130 as art. 12, but not considered at the forty-seventh session for lack of time. It is included in this draft for the Working Group's consideration.

H. Note by the Secretariat on insolvency law: directors' obligations in the period approaching insolvency: enterprise groups

(A/CN.9/WG.V/WP.139)

[Original: English]

Contents

Introduction

1. Part three of the UNCITRAL Legislative Guide on Insolvency Law deals with the treatment of enterprise groups in insolvency and provides background on the nature of enterprise groups; reasons for conducting business through enterprise groups; what constitutes an enterprise group by reference to concepts such as ownership and control; and regulation of enterprise groups. Part four of the Legislative Guide addresses the obligations of directors in the period approaching insolvency, discussing issues associated with directors' obligations in that period and, in particular, the rationale for imposing obligations specific to that period by way of the operation of insolvency, rather than corporate, law. Neither part addresses the specific issues that might affect the obligations of directors who perform that function for one or more enterprise group members.

2. At its forty-fourth session (December 2013), the Working Group agreed on the importance of addressing the obligations of directors of enterprise group companies in the period approaching insolvency, given that there were clearly difficult practical problems in that area and that solutions would be of great benefit to the operation of efficient insolvency regimes. At the same time, the Working Group noted that possible solutions needed to be considered carefully so that they did not hinder business recovery, make it difficult for directors to continue to work to facilitate that recovery, or influence directors to prematurely commence insolvency proceedings. In light of those considerations, the Working Group agreed that an examination of how part four of the Legislative Guide could be applied in the enterprise group context and identification of additional issues (e.g. conflicts between a director's obligations to its own company and the interests of the group) would be helpful.

3. Deliberations on this topic commenced at the Working Group's forty-sixth session (December 2014) on the basis of a draft prepared by the Secretariat following consultation with an informal expert group as requested by the Working Group (A/CN.9/WG.V/WP.125) and continued at its forty-seventh session (May 2015) on the basis of a revised draft (A/CN.9/WG.V/WP.129).

4. This note has been prepared by the Secretariat on the basis of the deliberations and conclusions of the Working Group at its forty-seventh session (A/CN.9/835, paras. 13-21). Set out below are revisions to draft recommendations 267 to 270 and the accompanying

commentary. Proposed additions and revisions to the commentary are included in square brackets, with explanations as appropriate included in the footnotes.

UNCITRAL Legislative Guide on Insolvency Law, part four: Directors' obligations in the period approaching insolvency — enterprise groups

Introduction and purpose of this section

1. This second section of part four builds upon recommendations 255 to 266 of the first section, which address the obligations of directors of an individual company in the period approaching insolvency. Focusing on the nature of the obligations and the steps that might be taken to discharge those obligations (as established in recommendations 255 and 256), this section proposes how those recommendations could be revised for application in the context of enterprise groups. Recommendations 257 to 266 of the first section of part four continue to apply in the enterprise group context as drafted, however cross references in those recommendations to recommendations 255 and 256 should be read for the purposes of this additional section as references to recommendations 267 and 268.

2. Additional recommendations (recommendations 269 and 270) have been added to this section to address the situation where a director is appointed to, or holds a managerial or executive position in, more than one group member and conflicts arise in discharging the obligations owed to the different members.

3. This section uses the same terminology as other parts of the Legislative Guide. To provide orientation to the reader, this section should be read in conjunction with part three and the first section of part four.

I. Background

4. The first section of part four of the Legislative Guide considers the obligations of directors of individual companies in the period approaching insolvency, providing information on how those obligations are treated under current laws. While some jurisdictions have developed provisions to impose obligations on directors in the period approaching insolvency, the relative advantages and disadvantages of such regimes remain the subject of debate.[1] The first section of part four underlines the need for early action to be taken when businesses face financial difficulty in order to avoid rapid decline and to facilitate rescue and reorganization. It also notes that while there has been an appropriate refocusing of insolvency laws in many countries towards increasing the options for that early action to be taken, there has been little corresponding attention paid to creating appropriate incentives for directors to use those options.[2] The first section encourages the development of appropriate incentives by identifying, for incorporation in the law relating to insolvency, the basic obligations a director of an enterprise may have in the period approaching insolvency and the steps that might be taken to discharge those obligations. Those obligations would become enforceable only when insolvency proceedings have commenced.

5. In the enterprise group context, the issue of directors' obligations in the period approaching insolvency does not appear to be clearly or widely addressed by national legislation. While the concept of enterprise groups has been considered and developed in many jurisdictions, the question of the obligations of directors of one or more members of those enterprise groups remains somewhat uncertain.[3]

6. Part three of the Legislative Guide, which addresses the insolvency treatment of enterprise groups, notes that enterprise groups are often characterized by varying degrees of economic integration (from highly centralized to relatively independent) and types of

[1] Legislative Guide, part four, chap. I, paras. 8-10.
[2] Ibid., para. 6.
[3] A/CN.9/WG.V/WP.115, para. 40, which outlines the manner in which a number of different jurisdictions address this issue.

organizational structure (vertical or horizontal) that create complex relationships between group members and may involve different levels of ownership and control. Those factors, together with adherence to the single entity principle and the widespread lack of any explicit acknowledgement of the group reality in the legislation applicable to individual group members, raise a number of issues for directors of enterprise group members. Adherence to the single entity principle typically requires directors to promote the success and pursue the interests of the company they direct, respecting the limited liability of that company and ensuring that its interests are not sacrificed to those of the enterprise group, irrespective of the interests of the group as a whole, the position of the director's company in the group structure, the degree of independence or integration among group members and the incidence of ownership and control. But where that company's business is part of an enterprise group and reliant, at least to some extent, on other group members for the provision of vital functions (e.g. financing, accounting, legal services, suppliers, markets, management direction and decision-making or intellectual property), addressing the financial difficulties of that company in isolation is likely to be difficult, if not, in some cases, impossible. [Indeed, adhering to a strictly narrow interpretation of the director's obligations may bring about the failure that it is hoped to avoid.] Part three discusses in some detail the current economic reality of enterprise groups and, in the context of insolvency, the impact of treating enterprise group members as unrelated entities on resolving the financial difficulties of some group members or of the group more widely.[4]

7. The requirement to act in the interests of the directed company may be further complicated in the group context when a director of one group member performs that function or holds a managerial or executive position in other group members. In such a situation, it may be difficult for the director to separately identify the interests of each of those group members and treat them in isolation. [Moreover, the interests of those group members may be affected by the possibly competing economic goals or needs of other group members and those of the enterprise group collectively. The short and long term implications for the interests of the different group members may need to be assessed, which may involve accepting, even if only in the short term, some detriment to the interests of individual group members in order to achieve a longer term benefit for the enterprise group to which those individual members belong. Where a group insolvency solution is pursued, it is reasonable that some safeguards would apply.][5]

8. Some examples of situations in which the interests of individual group members may be affected by those of the group more widely may include where one group member is a key supplier, or provides finance to another group member or acts as a guarantor for finance provided by an external lender to another group member, in an attempt to keep the group as a whole afloat, including its own business; where one group member agrees to transfer its business or assets or surrender a business opportunity to another group member or to contract with that member on terms that could not be considered commercially viable, but where to do so may ultimately benefit the business of group member agreeing to the transfer; 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.

9. Such considerations might be relevant in the period approaching insolvency, when greater control and coordination of the groups' activities may be required to maximize efficiency and design solutions to resolve the financial difficulties of the group as a whole or for some of its parts. At that time, there may also be more opportunities for advantage to be taken of more vulnerable and dependent group members in order to benefit other members, such as through transfers of assets, diversion of business opportunities and use of those group members to conduct more risky transactions or activities or to absorb losses and bad assets.

10. To address the best interests of the directed group member, a director may require a degree of flexibility to weigh the various competing interests and act for the benefit of other group members or the group as a whole where that action coincides with the best interests of the directed member. To the extent that the course of action a director chooses to follow in such circumstances is reasonable and directed to avoiding insolvency or minimizing its

[4] Legislative Guide, part three, chap. I.

[5] The changes to this paragraph address some of the concerns expressed at the forty-seventh session, A/CN.9/835, para. 17.

impact on the directed group member, they should not be liable for breach of their obligations. [Where having weighed the competing interests of the directed group members, the course of action chosen gives rise to a conflict between the obligations the director owes to those different group members, that conflict should be disclosed to the affected group members. Resolving such a conflict might require mediation or negotiation of the opposing interests.]

11. While, as noted above, few laws address directors' obligations in the enterprise group context, 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 powers for the benefit of their own group member or members, some jurisdictions may permit directors to have regard, for example, to the direct or derivative commercial benefits accruing to that group member from pursuing a particular course of action 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, however, collective benefit is not a sufficient justification by itself [for acts judged to be prejudicial to creditors.] 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 course of action taken and to consider the position of their group member's unsecured creditors, particularly where that member's solvency might be affected. The latter consideration is of particular importance where the transaction is a guarantee or security for a loan to another group member, [especially where the survival of that other group member is not critical to the solvency of the group member giving the guarantee or security].

12. Other jurisdictions have allowed directors of group companies to act in the interests of the overall group when certain conditions are met, such as that the group has a [structure that affords group members some influence in the overall decisions]; 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. Under those laws, for the director to avoid liability, the group member should not be insolvent at the time the director acts, nor should it become insolvent by virtue of that action.

13. This section identifies the extent to which a director of an enterprise group member may take account of considerations beyond the group member they direct in fulfilling their obligations in the period approaching insolvency and the safeguards that should apply. Those considerations will, to a greater or lesser extent, reflect aspects of the economic reality of the enterprise group. This section proposes principles for inclusion in the law concerning the obligations of directors of enterprise group companies in the period approaching insolvency. These 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 insolvency law (outlined in part one, chapter I, paragraphs 1-14 and recommendation 1) through early action and appropriate behaviour by directors, it is also acknowledged that there are threats and pitfalls for entrepreneurs that may result from overly draconian rules.

14. This section does not deal with the liability of directors under criminal law, company law or tort law. It focusses only on those obligations that may be included in the law relating to insolvency and become enforceable once insolvency proceedings commence.

II. Elements of the obligations of directors of enterprise group companies in the period approaching insolvency

A. The nature of the obligations

15. The underlying rationale of imposing obligations on directors in the proximity of insolvency is addressed in the first section of part four, paragraphs 1 to 7, and remains equally applicable in the enterprise group context. The obligations of directors of a group

member continue to be the same basic obligations as established in recommendation 255, but provision might be made to permit the broader context of the economic reality of the enterprise group to be taken into account in determining the steps that should be taken by a director to avoid liability for breach of those obligations. Relevant factors to be considered might include the position of the enterprise group member in the enterprise group, the degree of integration between enterprise group members (as mentioned in recommendation 217 of part three) and the possibility of maximizing value in the group by designing a solution to the group's financial difficulties that includes the whole group or some of its parts. Such solutions may require a director of a group member in financial difficulty to take steps that may appear, at first glance, to be detrimental to that group member, but that will ultimately achieve a better result for it and ensure the continuation of its business and maximization of its value. Taking those same steps in circumstances where they are not likely to benefit the group member in financial difficulty may expose directors to liability for failure to discharge their obligations reasonably.

16. One consideration for directors evaluating the steps to be taken to address the group member's financial difficulties is the impact of those steps on creditors of that group member, especially when wider group interests are to be accommodated. Recommendation 255 requires directors to have due regard to the interests of creditors, as well as of other stakeholders of the group member. The interests of creditors may be safeguarded by establishing a "no worse off" standard — i.e. that creditors will be no worse off under the steps that are taken than they would have been had those steps not been taken.[6]

17. The first section of part four discusses the types of steps that a director might reasonably be expected to take in order to address financial difficulty, avoid the onset of insolvency and, where it is unavoidable, to minimize its impact (see part four, chap. II, para. 5). Those steps would continue to be relevant in the group context and might be supplemented by additional steps, depending on the factual situation, that might effectively require some degree of mutual assistance and cooperation with other group members. Those additional steps might be affected by the position of the group member in the enterprise group and require consideration of whether more value might be preserved or created by assisting the implementation of a solution for the enterprise group as a whole or some of its parts, than by taking steps that relate only to the individual group member. Consideration might be given to assessing the directed member's obligations, both financial and legal, to other group members; the transactions that should (or should not) be entered into with other group members; possible sources and availability of finance [(both in the period approaching insolvency and once formal proceedings commence)],[7] including its provision by the directed group member to other group members; and the impact of possible solutions, whether limited to the directed group member or involving the group more widely, on creditors and other stakeholders of the directed group member. A director might also consider taking steps to organize informal negotiations with creditors, such as voluntary restructuring negotiations, with a view to devising a solution for the enterprise group as a whole or some of its parts where that will benefit the directed group member.

18. Where insolvency is unavoidable and formal proceedings are to be commenced, a director might consider the court in which those proceedings should commence, particularly when there is a possibility of making a joint application with other group members and procedurally coordinating those proceedings, as discussed in part three.[8]

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[6] The Working Group may wish to consider whether there is a need for the safeguards provided in this draft text and the draft being developed on cross-border insolvency of enterprise groups to be consistent. See for e.g., draft art. 8, A/CN.9/WG.V/WP.137/Add.1, which refers to adequate protection of creditors in the context of developing a group insolvency solution. See also the purpose clause for recommendations 267-268 and recommendation 267 below.

[7] The language in parentheses has been added to broaden the issues to be considered beyond the period after proceedings commence (reflected by the current drafting and use of the phrase "post-commencement finance") to include finance that might be required in the period approaching insolvency before the group member commences formal proceedings, as well as once formal proceedings have been applied for and subsequently commenced. This would include both post-application and post-commencement finance, as discussed in the Legislative Guide, part three. The same change is reflected in rec. 268, para. 1(b).

[8] Legislative Guide, part three, recs. 202-210.

Recommendations 267-268

Purpose of legislative provisions

The purpose of these provisions addressing the obligations of those responsible for making decisions concerning the management of an enterprise group member that arise when insolvency is imminent or unavoidable is:

(a) To protect the legitimate interests of creditors and other stakeholders of the enterprise group member;

(b) To ensure that those responsible for making decisions concerning the management of an enterprise group member are informed of their roles and responsibilities in those circumstances;

(c) To recognize the impact of the enterprise group member's position in the enterprise group upon the manner in which the group member should be managed to address its imminent or unavoidable insolvency and the obligations of those responsible for making decisions concerning the management of that group member, including in situations where they are also responsible for making decisions concerning the management of other group members; and

(d) To permit an enterprise group member to be managed, where appropriate, in a manner that will maximize value in the enterprise group by promoting approaches to resolve insolvency for the enterprise group as a whole or for some of its parts, whilst taking reasonable steps to ensure that the creditors of that group member and its other stakeholders are no worse off than if that group member had not been managed so as to promote such approaches to resolution.

Paragraphs (a)-(d) should be implemented in a way that does not:

(a) Unnecessarily adversely affect successful business reorganization of the enterprise group member, taking into account the possible benefit of maximizing the value of the enterprise group and promoting an insolvency solution for the enterprise group as a whole or some of its parts, the position of the group member in the enterprise group and the degree of integration between group members;

(b) Discourage participation in the management of companies, particularly those experiencing financial difficulty; or

(c) Prevent the exercise of reasonable business judgement or the taking of reasonable commercial risk.

Contents of legislative provisions

The obligations

267. (a) The law relating to insolvency should specify that the obligations established in recommendation 255 will apply to a director of a company that is a member of an enterprise group.

(b) Insofar as not inconsistent with those obligations, the director of an enterprise group member may take reasonable steps to promote a solution that addresses the insolvency of the enterprise group as a whole or some of its parts. In so doing, the director may take into account the possible benefits of maximizing the value of the enterprise group as a whole, whilst taking reasonable steps to ensure that the creditors of the group member and its other stakeholders are no worse off than if that group member had not been managed so as to promote such a solution.

Reasonable steps for the purposes of recommendation 267

268. For the purposes of recommendation[s] 255 and 267, and to the extent not inconsistent with the obligations of the director to the group member of which they are director reasonable steps in the enterprise group context might include, in addition to the steps outlined in recommendation 256:

(a) Evaluating the current financial situation of the enterprise group member and of the enterprise group to consider whether more value might be preserved or created by considering a solution for the enterprise group as a whole or some of its parts;

(b) Considering the financial and other obligations of the group member to other enterprise group members, whether transactions should be entered into with other enterprise group members, and possible sources and availability of finance, [including when formal proceedings are to be commenced];[9]

(c) Evaluating whether the enterprise group member's creditors and other stakeholders would be better off under an insolvency solution for the enterprise group as a whole or some of its parts;

(d) Assisting the implementation of an insolvency solution for the group as a whole or some of its parts;

(e) Holding and participating in informal negotiations with creditors, such as voluntary restructuring negotiations,[10] where organized for the enterprise group as a whole or some of its parts; and

(f) Where formal insolvency proceedings are to be commenced, considering the court in which they should be commenced, whether a joint application[11] with other relevant enterprise group members is possible or appropriate and whether proceedings should be procedurally coordinated.[12]

B. Identifying the parties who owe the obligations

19. In the enterprise group context, identifying those responsible for management decisions may be more complex than in the case of a single company. Various layers of management and influence can affect the affairs of any single group member and the manner in which it conducts its business, particularly in the vicinity of insolvency. Such influence may undermine the ability of the directors of a group member to take appropriate steps to address the financial difficulties of the directed member or involve that member in the financial difficulties of other group members, to the detriment of the creditors of the directed group member. This may occur in numerous circumstances, such as where the boards of two or more members consist of substantially the same persons; where the majority of the board of one group member is nominated by another group member, which is in a position of control; where one group member controls the management and financial decision-making of the group; or 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.

20. There may also be some enterprise groups in which it is difficult to identify the precise boundaries between group members because management responsibilities across different boards are blurred. In addition, relevant executives and decision makers may be employed by group members several steps removed from the group member in question and the separate identity and liability of that group member may be generally disregarded in the daily business of the group. In such situations, serious issues may arise as to the obligations of such persons with respect both to the actual business conducted by the group member in question and to the group member by which they are employed.

21. Persons that might be considered to be a director in the group context could include another group member or the director of another group member, including a shadow director[13] of that other group member. While some laws do not permit a group member to be formally appointed as a director of another group member, such a group member might nevertheless be regarded as a shadow director of that other member when it exercises influence over or directs its activities.

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[9] See footnote 7 for an explanation of this revision.
[10] Legislative Guide, part one, chap. II, paras. 2-18.
[11] Ibid., part three, recs. 199-201.
[12] Ibid., part three, recs. 202-210.
[13] Ibid., part four, footnote 11 to para. 13.

22. Paragraphs 13 to 16 of the first section of part four discuss the parties who owe the obligations discussed above. Recommendation 258 adopts a broad formulation, providing that it should include any person formally appointed as a director or exercising factual control and performing the functions of a director. Paragraph 15 of the commentary notes the types of function that may be expected to be performed by such a person. Those considerations would also be applicable in the enterprise group context discussed in this part.

C. Conflict of obligations

23. It may often be the case in enterprise groups that a director performs that function or holds a management or executive position in more than one group member, whether as a result of the ownership and control structure of the group, the alliances between group members, family ties across the group or some other aspect of the manner in which the business or businesses of the group are organized.[14] Whatever the reason, a director who sits on the boards of, [or has managerial responsibility for,] a number of different group members may face, in the period approaching insolvency, potential conflicts between the obligations owed to those different group members as they attempt to identify the course of action most likely to preserve value and provide the best solution to the financial difficulties of each group member. The nature and complexity of the conflict may relate to the position of the directed entities in the group hierarchy, the related degree of integration between group members, and the incidence of control and ownership. Where a director sits on the boards of the parent and controlled group members, for example, that director needs to be able to demonstrate that any transaction involving the parent took into account, and was fair and reasonable to, the controlled group member.

24. In addition, the interests of the directed group members may be closely intertwined with the enterprise group more widely, requiring the economic reality of the group as a whole to be considered. In such circumstances, steps that may be regarded as detrimental to a company operating as a stand-alone entity may be reasonable when considered in that broader context. The business of a subsidiary, for example, may be generally dependent on the business of the group more widely and it may be appropriate for that subsidiary to provide funding in the short term for other members in order to keep that wider business operating and ultimately save the business of the subsidiary itself.

25. Directors facing such a conflict might be expected to act reasonably and take adequate and appropriate steps to address the situation. That might require a director, depending on the factual situation, to identify the nature and extent of the conflict in accordance with applicable law and determine how it might be addressed. It may be sufficient in some circumstances for the director to disclose relevant information regarding the conflict, including its nature and extent, to the affected boards of directors, while in other circumstances wider disclosure to creditors and other stakeholders, including the boards of directors of other group members, may be reasonable. Such disclosure may be sufficient to support the director's continuing integrity and any lack of the impartiality or independence required can be assessed against the circumstances disclosed.

26. It may be appropriate in some circumstances for the director to refrain from participating in any decisions relating to the conflict that are to be taken by the affected boards or attending meetings at which related issues are to be discussed [and for this to be recorded as a deliberate approach agreed with fellow directors, as opposed to an act of omission.] Appointment of additional or substitute board members may be possible in some cases and, if the conflict cannot be resolved, the director may consider, as a last resort, resigning from one or other of the affected boards. That might potentially include resignation from the board of an insolvent or a solvent group member. While that option of resignation may free the director of the dilemma, it simultaneously neglects the larger problem and may exacerbate the situation, especially in the period approaching insolvency, if it leaves the affected group member or members without the expertise necessary to address their financial difficulties. As noted in the first section of part four, resignation from the board will not 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 or that they had failed

[14] See Legislative Guide, part three, chap. I, paras. 6-15.

to take reasonable steps to minimize losses to creditors in the face of impending insolvency.[15]

27. [Good corporate governance that supports analyses of the situations of the respective group members giving rise to the conflict and records the reasons for the action taken may be critical to the director in discharging obligations with respect to the conflict. A policy on corporate governance does not, however, replace or limit obligations owed by directors to the group member or members. It offers indicia as to what steps are considered reasonable to manage the conflict. Different corporate governance policies and standards between the members of an enterprise group can also lead to conflicting solutions and outcomes, which need to be carefully reviewed and assessed by directors.][16]

Recommendations 269-270

Purpose of legislative provisions

The purpose of provisions on conflict of obligations is to address the situation where a director of one enterprise group member holds that position or a management or executive position in another or other enterprise group members, whether the parent or a controlled group member. That situation may give rise, in the period approaching insolvency, to a conflict between the obligations owed to the different group members, which may have an impact upon the steps to be taken to discharge those obligations.

Contents of legislative provisions

Conflict of obligations

269. The law relating to insolvency should address the situation where, in the period approaching insolvency, a director of an enterprise group member who holds that position or a management or executive position in another or in other enterprise group members has a conflict between the obligations owed in relation to the creditors and other stakeholders of those different group members.

Reasonable steps for the purposes of recommendation 269

270. The insolvency law may specify that a director faced with such conflicting obligations should take reasonable steps to manage those conflicts. Reasonable steps may include:

(a) Obtaining advice to establish the nature and extent of the different obligations;

(b) Identifying the parties to whom the conflict of obligations must be disclosed and disclosing relevant information, including, in particular, the nature and extent of the conflict;

(c) Identifying when the director should not (i) participate in any decision by the boards of directors of any of the relevant group members on the matters giving rise to such conflicts, or (ii) be present at any board meeting at which such issues are to be considered;

(d) Seeking the appointment of an additional director when the conflicting obligations cannot be reconciled; and

(e) As a last resort, where there is no alternative course of action available, resigning from the relevant board(s) of directors.

[15] Legislative Guide, part four, chap. II, para. 27.

[16] Revisions to this paragraph seek to address concerns expressed at the forty-seventh session (A/CN.9/835, para. 18) and include some additional suggested text.

I. Note by the Secretariat on insolvency law: cross-border recognition and enforcement of insolvency-related judgements: proposal by the United States of America

(A/CN.9/WG.V/WP.140)

[Original: English]

Contents

The Government of the United States of America has submitted to the Secretariat of the United Nations Commission on International Trade Law (UNCITRAL) the following proposal in order to provide the Working Group with additional information for its deliberations. The text of the proposal is reproduced as an annex to this note in the form in which it was received by the Secretariat, with formatting changes.

Annex

Proposals by the United States of America for articles 2 and 10 of the draft model law on the recognition and enforcement of insolvency-related judgements

1. The United States would like to thank the Secretariat for its latest version of the draft model law on the recognition and enforcement of insolvency-related judgments, A/CN.9/WG.V/WP.138, which very helpfully builds on the progress made during the Working Group's discussions in December 2015 and sets forth a number of options for the Working Group's consideration.

2. During the previous session, two issues led to some of the most difficult discussions: the scope of the new model law (i.e., which types of judgments would be encompassed) and how it would interact with the Model Law on Cross-Border Insolvency. The United States would like to propose two pieces of new text that seek to find common ground on these issues and provide a potential path forward.

A. Definition of insolvency-related judgment: scope of Model Law and interaction with existing Model Law

3. The first piece of text is a new version of article 2, paragraph (d) (the definition of "insolvency-related judgment") that would provide States with two options for implementing the model law — a broader approach and a narrower approach — depending on their policy preferences regarding the scope of the law. This new text also simplifies the definition in order to allow easier discussion of any controversial issues (e.g., by reorganizing the list of types of judgments and shortening the chapeau), and clarifies that a judgment is not covered by the model law if an applicable treaty to which the State is a party governs its recognition and enforcement.

"**Article 2.**

"(d) Insolvency-related judgment" means a judgment that is closely related to a foreign proceeding and was issued after the commencement of that proceeding, but does not include any judgment for which recognition and enforcement is governed by an applicable treaty to which this State is a party. Insolvency-related judgments include, inter alia, judgments determining whether:

(i) An asset is part of, should be turned over to, or was properly disposed of by the insolvency estate;

(ii) A transaction involving the debtor or assets of the insolvency estate should be overturned because it upset the principle of equitable treatment of creditors or improperly reduced the value of the estate;

(iii) A representative of the debtor is liable for action taken when the debtor was insolvent or in the vicinity of insolvency;

(iv) A plan of reorganization or liquidation should be confirmed, a discharge of the debtor or of a debt should be recognized, or a voluntary restructuring agreement should be approved; or

(v) [Option A: other sums are owed to or by the debtor or estate;]

[Option B: other sums are owed to or by the debtor or estate, and the cause of action arose after debtor entered insolvency proceedings];

including instances in which the cause of action was pursued by (a) a creditor with approval of the court, based on an insolvency representative's decision not to pursue that cause of action, or (b) the party to whom it has been assigned by an insolvency representative in accordance with the applicable law."

4. The text divides insolvency-related judgments into five categories.[1] The fifth category is broader than the first four, as it seeks to encompass other judgments that would affect the size of the insolvency estate. Some delegations have taken the position that otherwise-applicable rules for recognition and enforcement of non-insolvency-related judgments — rather than this model law — should apply to this fifth category unless the judgment in question was based on a cause of action arising after insolvency. By contrast, other delegations have taken the position that the judgments in this category are very important for the insolvency estate even if the underlying cause of action arose before insolvency, and thus that this model law should provide for their recognition and enforcement. The United States strongly believes that the broader approach, reflected in Option A, would be more appropriate.[2] However, the divided views in the Working Group suggest that States may need to have two options for implementation of this aspect. States could select one of the two options based on their policy preferences and on how their pre-existing law on the recognition and enforcement of judgments would interact with the draft model law.

5. The proposed text also reduces the overlap with the existing Model Law on Cross-Border Insolvency, as some delegations have expressed strong concerns about such overlap. "Modification or enforcement of a stay" is not included as a category of insolvency-related judgments, as this type of cooperation during ongoing insolvency proceedings is a central component of the existing Model Law; thus, the existing Model Law should be enacted as the framework to govern these issues. However, other categories of judgments are retained, even though the existing Model Law could in some situations enable recognition and enforcement of many judgments, including those in category (iv). Even if a State declines to enact the existing Model Law or has construed it not to cover judgments within the scope of category (iv), recognition and enforcement of the final results of those proceedings should still fall within the scope of this new model law.

B. Exceptions to recognition and enforcement: jurisdictional issues and interaction with existing Model Law

6. The second piece of text proposed consists of some additions to Article 10 — in particular, amendments to article 10, subparagraph (i)(i) (variant 2) and new proposals for

[1] The text proposed here does not address judgments concerning the validity and effectiveness of a secured claim. It may be appropriate to cover such judgments. However, in doing so, the Working Group would likely need to consider a new exception for article 10, to permit refusal of recognition and enforcement if the judgment does not originate from a court that is competent to adjudicate such issues with respect to the property in question. Such a provision may be very difficult to draft, particularly while seeking to maintain consistency with existing instruments.

[2] In fact, we believe there would be merit in including relevant judgments even if they were issued prior to the commencement of insolvency proceedings, in order to facilitate the collection of assets for the estate. However, given the wide range of views in the Working Group, we are not proposing to broaden the definition in that respect.

article 10, paragraphs (j) and (k) (in place of the existing article 10, paragraph (j) and Article 11).

"**Article 10.**

Recognition and enforcement of an insolvency-related judgment may be refused if:

[(a)-(h) unchanged]

"(i) The insolvency-related judgment was not issued by a court that:

(i) [For States that have enacted the existing Model Law: was supervising a main proceeding regarding the insolvency of

(1) The party against whom the judgment was issued, or

(2) A debtor for which the party against whom the judgment was issued was serving as a director, if the judgment was based on that party's conduct as a director, including breach of fiduciary duty,

or by another court in the State where such a main proceeding occurred;]

(ii) Exercised jurisdiction based on the consent of the party against whom the judgment was issued;

(iii) Exercised jurisdiction on a basis on which a court in this State could have exercised jurisdiction; or

(iv) Exercised jurisdiction on a basis that was not inconsistent with the law of this State;

"(j) The judgment falls within Article 2, subparagraph (d)(iv) and the interests of creditors and other interested persons, including the debtor, were not adequately protected in the proceeding in which the judgment was issued;

"*[For States that have enacted the existing Model Law:*

"*(k) The judgment was not issued in a proceeding that has been, or could have been, recognized under [Article 17 of the existing Model Law], unless the judgment is related solely to assets that were located in the State of origin at the time the proceeding was commenced.]*"

7. Article 10 provides a list of situations in which recognition and enforcement can be denied; article 10, paragraph (i) in particular permits refusal of recognition and enforcement if the originating court exercised jurisdiction (over the party against whom the judgment was issued) on grounds other than those listed. This proposed text includes two changes to article 10, subparagraph (i)(i) (variant 2), which is a clause that is only intended for enactment in States that have already implemented the existing Model Law. First, the addition of article 10, subparagraph (i)(i)(2) addresses situations in which a judgment is issued against a director of an insolvent company by a court in that company's COMI jurisdiction. As long as such a judgment was based on the director's conduct as a director, the court's exercise of jurisdiction would not provide grounds for refusal. Second, a new clause at the end of article 10, subparagraph (i)(i) clarifies that recognition and enforcement should not be refused for jurisdictional reasons solely because the judgment came from a different court in the COMI State, rather than from the specific court that was actually supervising the main proceeding.

8. Next, the new proposed article 10, paragraph (j) would take the place of both the existing article 10, paragraph (j) and Article 11 but would only apply to judgments falling within article 2, subparagraph (d)(iv) as proposed above — i.e., judgments determining whether "a plan of reorganization or liquidation should be confirmed, a discharge of the debtor or of a debt should be recognized, or a voluntary restructuring agreement should be approved." Such judgments directly affect the rights of creditors and other stakeholders, and thus their interests should have been taken into account in the proceeding where the judgment originated. For other types of insolvency-related judgments that simply resolve bilateral disputes between two parties, although creditors and other stakeholders are often affected, any such effects are only indirect (e.g., via the judgment's effect on the size of the

estate). In those instances, permitting a judgment debtor to resist recognition and enforcement by citing third-party interests could unnecessarily generate opportunities for wasteful relitigation. For example, if a court in jurisdiction A determines that the debtor owns a particular asset and issues a judgment against a local creditor resolving that ownership dispute, and the insolvency representative then seeks to enforce that judgment in jurisdiction B, the creditor should not be able to resist enforcement in B by raising arguments about the interests of other creditors and stakeholders.

9. Finally, the new proposed article 10, paragraph (k) would address another issue related to overlap with the existing Model Law (for States in which that Model Law has also been enacted). In some situations, it may be useful for the insolvency representative to seek recognition and enforcement of a judgment from a jurisdiction in which the debtor had neither its COMI nor an establishment. For example, in the hypothetical situation described above, the debtor may have had neither its COMI nor an establishment — only the disputed assets — in jurisdiction A. The proceeding in which that judgment was issued could not have been recognized under the existing Model Law, even though recognition and enforcement of the resulting judgment may still be useful. By facilitating the recognition and enforcement of such judgments, this model law could help address this limitation in the existing Model Law and enable the recovery of additional assets for the estate. At the same time, a limitation is needed to help ensure that the existing Model Law framework is not undermined by the recognition and enforcement of judgments resolving issues that ought to have been addressed by a court in a COMI or establishment State. The proposed article 10, paragraph (k) would permit a court to deny recognition or enforcement if the judgment did not relate only to assets in jurisdiction A, while still allowing recognition and enforcement of some judgments that do not come from main or non-main proceedings.

VI. SECURITY INTERESTS

A. Report of the Working Group on Security Interests on the work of its twenty-eighth session (Vienna, 12-16 October 2015)

(A/CN.9/865)

[Original: English]

Contents

I. Introduction

1. At its present session, Working Group VI (Security Interests) continued its work on the preparation of a model law on secured transactions (the "draft Model Law"), pursuant to a decision taken by the Commission at its forty-fifth session (New York, 25 June-6 July 2012).[1] At that session, the Commission agreed that, upon its completion of the UNCITRAL Guide on the Implementation of a Security Rights Registry (the "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 UNCITRAL Legislative Guide on Secured Transactions (the "Secured Transactions Guide") and consistent with all texts prepared by UNCITRAL on secured transactions, including the United Nations Convention on the Assignment of Receivables in International Trade (the "Assignment Convention"), the Supplement on Security Rights in Intellectual Property (the "Intellectual Property Supplement") and the UNCITRAL Guide on the Implementation of a Security Rights Registry (the "Registry Guide").[2]

2. At its twenty-third session (New York, 8-12 April 2013), the Working Group 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).

3. At its forty-sixth session (Vienna, 8-26 July 2013), the Commission 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

[1] *Official Records of the General Assembly, Sixty-seventh Session, Supplement No. 17* (A/67/17), para. 105.

[2] Ibid.

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.[3] After discussion, the Commission confirmed the mandate it had given to Working Group VI in 2012 (see para. 1 above).[4] The Commission also agreed that whether that work would include security interests in non-intermediated securities would be assessed at a future time.[5]

4. At its twenty-fourth session (Vienna, 2-6 December 2013), the Working Group considered a note by the Secretariat entitled "Draft Model Law on Secured Transactions" (A/CN.9/WG.VI/WP.57 and Add.1 and 2) and requested the Secretariat to revise the draft Model Law to reflect the deliberations and decisions of the Working Group (A/CN.9/796, para. 11). At its twenty-fifth session (New York, 31 March-4 April 2014), the Working Group continued its work based on a note by the Secretariat entitled "Draft Model Law on Secured Transactions" (A/CN.9/WG.VI/WP.57/Add.2-4 and A/CN.9/WG.VI/WP.59 and Add.1) and requested the Secretariat to revise the draft Model Law to reflect the deliberations and decisions of the Working Group (see A/CN.9/802, para. 11). The Working Group also decided to recommend to the Commission that the draft Model Law address security rights in non-intermediated securities along the lines agreed upon by the Working Group at that session (see A/CN.9/802, para. 93).

5. At its forty-seventh session (New York, 7-18 July 2014), the Commission expressed its satisfaction for the considerable progress achieved by the Working Group in its work and requested the Working Group to expedite its work so as to complete the draft Model Law, including certain definitions and provisions on non-intermediated securities, and to submit it to the Commission for adoption together with a guide to enactment as soon as possible.[6]

6. At its twenty-sixth session (Vienna, 8-12 December 2014), the Working Group considered a note by the Secretariat entitled "Draft Model Law on Secured Transactions" (A/CN.9/WG.VI/WP.61 and Add.1-4) and requested the Secretariat to revise the draft Model Law to reflect the deliberations and decisions of the Working Group (see A/CN.9/830, para. 12). At its twenty-seventh session (New York, 20-24 April 2015), the Working Group considered a note by the Secretariat entitled "Draft Model Law on Secured Transactions" (A/CN.9/WG.VI/WP.63 and Add.1-4) and requested the Secretariat to revise the draft Model Law to reflect the deliberations and decisions of the Working Group (see A/CN.9/836, para. 13).

7. At its forty-eighth session (Vienna, 29 June-16 July 2015), the Commission considered and approved in principle article 26 of chapter IV (on the registry system) of the draft Model Law and articles 1 to 29 of the draft Registry Act (see A/CN.9/852). At that session, the Commission also agreed that a draft guide to enactment should be prepared and referred that task to the Working Group.[7]

II. Organization of the session

8. The Working Group, which was composed of all States members of the Commission, held its twenty-eighth session in Vienna from 12 to 16 October 2015. The session was attended by representatives of the following States members of the Working Group: Algeria, Austria, Brazil, Canada, China, Colombia, Croatia, Czech Republic, France, Germany, India, Indonesia, Iran (Islamic Republic of), Italy, Japan, Kenya, Kuwait, Mexico, Pakistan, Panama, Philippines, Republic of Korea, Russian Federation, Spain, Switzerland, Thailand, Turkey, United States of America and Venezuela (Bolivarian Republic of).

9. The session was attended by observers from the following States: Bolivia (Plurinational State of), Cyprus, Dominican Republic, Ghana, Lebanon, Luxembourg,

[3] Ibid., *Sixty-eighth Session, Supplement No. 17* (A/68/17), para. 193.
[4] Ibid., para. 194.
[5] Ibid., para. 332.
[6] Ibid., *Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 163.
[7] Ibid., para. 216.

Portugal, Qatar, Slovakia, United Arab Emirates and Viet Nam. The session was also attended by observers from the Holy See and the European Union.

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

(a) *United Nations system*: World Bank;

(b) *International non-governmental organizations invited by the Commission*: American Bar Association (ABA), Commercial Finance Association (CFA), EU Federation for Factoring and Commercial Finance (EUF), Factors Chain International (FCI), International Bar Association, International Factors Group (IFG), International Insolvency Institute (III), Law Association for Asia and the Pacific (LAWASIA), Moot Alumni Association (MAA) and National Law Centre for Inter-American Free Trade (NLCIFT).

11. The Working Group elected the following officers:

Chairperson: Ms. Kathryn SABO (Canada)

Rapporteur: Ms. Diana MUÑOZ (Mexico)

12. The Working Group had before it the following documents: A/CN.9/WG.VI/WP.64 (Annotated Provisional Agenda) and A/CN.9/WG.VI/WP.65 and Add.1-4 (Draft Model Law on Secured Transactions) and A/CN.9/WG.VI/WP.66 and Add.1-4 (Draft Guide to Enactment).

13. 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. Draft Model Law on Secured Transactions.
5. Draft Guide to Enactment of the draft Model Law on Secured Transactions.
6. Other business.
7. Adoption of the report.

III. Deliberations and decisions

14. The Working Group considered notes by the Secretariat entitled “Draft Model Law on Secured Transactions” (A/CN.9/WG.VI/WP.65 and Add.2 and 4). The deliberations and decisions of the Working Group are set forth below in chapter IV. The Secretariat was requested to revise the draft Model Law and the draft Guide to Enactment to reflect the deliberations and decisions of the Working Group.

IV. Draft Model Law on Secured Transactions

A. Chapter I. Scope of application and general provisions (A/CN.9/WG.VI/WP.65)

Article 1. Scope of application

15. The Working Group agreed that no type of outright transfer of receivables needed to be excluded explicitly from the scope of the draft Model Law. It was widely felt that States that wished to exclude any type of transaction or asset could do so under subparagraph 3(f). It was also agreed that, to provide guidance to States in that regard, the draft Guide to

Enactment should give a couple of examples (e.g. outright transfers of receivables for collection purposes or as part of a sale of the business out of which they arose).

16. With respect to subparagraph 3(d), the Working Group agreed that, to avoid interfering with other law governing netting agreements, all types of netting agreements, rather than only close-out netting agreements, should be excluded.

17. With respect to subparagraph 3(e), the Working Group agreed that it should be deleted. It was widely felt that, in view of the broad definition of the term "financial contract" (see art. 2, subpara. (l)), subparagraph 3(d) was sufficient to cover also payment rights arising under or from foreign exchange transactions addressed in subparagraph 3(e).

18. With respect to paragraph 5, the Working Group agreed that, to avoid creating questions of interpretation, it should be aligned more closely with article 4, paragraph 4 of the Assignment Convention.

19. Subject to the above-mentioned changes, the Working Group adopted article 1.

Article 2. Definitions and rules of interpretation

"Acquisition security right"

20. It was agreed that, to simplify and shorten the definition of the term "acquisition security right", the words "an obligation incurred or credit otherwise provided" could be replaced by the words "other credit extended". It was also agreed that that definition should be revised to ensure that only a security right securing an obligation to pay credit actually used for the acquisition of an asset would be afforded the special priority status that an acquisition security right would have under the draft Model Law.

"Bank account"

21. It was agreed that the term "bank" was too narrow to cover all relevant institutions and should thus be replaced by words along the following lines: "financial institution authorised to receive deposits from the public", "an institution to be specified by the enacting State" or "by a bank as defined in [another law to be specified by the enacting State]" and "[any institution to be specified by the enacting State]".

22. It was also agreed that the words "other than a securities account" that appeared within square brackets in the definition of the term "bank account" could also be deleted on the understanding that the draft Guide to Enactment would clarify that the draft Model Law did not apply to the right to payment of funds credited to a securities account. Alternatively, it was suggested, article 1, subparagraph 3(c), should be revised to also exclude securities accounts. Finally, it was agreed that, as the type of bank account to be covered might differ from State to State, the second and the third sentences of the definition of the term "bank account" should be deleted and discussed as examples in the draft Guide to Enactment.

"Competing claimant"

23. Diverging views were expressed as to whether both the chapeau and the list of types of competing claimant should be retained in the definition of the term "competing claimant". After discussion, it was agreed that, at least for educational reasons, both the chapeau and the list of types of competing claimant should be retained.

24. As to the formulation of that definition, it was agreed that: (a) the words "in conflict" that appeared in the chapeau should be replaced with the words "in competition"; (b) the words "whether as an original encumbered asset or proceeds" that appeared in parenthesis in subparagraph (i) were redundant and should thus be deleted, while the draft Guide to Enactment could discuss the matter addressed by those words; (c) the words "such as a judgement creditor or" that appeared in subparagraph (ii) should be deleted so that it would be left to the enacting State to specify the types of creditor that might have a right in the same encumbered assets, while the draft Guide to Enactment could give examples; and (d) for reasons of consistency with the articles in which those words were used (e.g. arts. 29 and 30), the words "or other transferee" that appeared in subparagraph (iv) within square brackets should be retained outside square brackets.

“Consumer goods”

25. To ensure that goods used incidentally for personal, family or household purposes would not be treated as consumer goods in the draft Model Law, the Working Group agreed that reference should be made to such goods being “primarily” used for such purposes and thus the word “primarily” that appeared within square brackets in the definition of the term “consumer goods” within square brackets should be retained outside square brackets. The Working Group also agreed that reference should be made in that definition to “the” grantor, rather than to “a” grantor (in the definitions of the terms “equipment” and “inventory” as well).

“Debtor of the receivable”

26. Diverging views were expressed as to whether a different term should be used to avoid confusing the “debtor of the receivable” with the “debtor” of the secured obligation. After discussion, for reasons of consistency with the Assignment Convention and the Secured Transactions Guide, it was agreed that the term “debtor of the receivable” should be retained as it was. At the same time, it was agreed that, to make the distinction between those terms sufficiently clear, reference should be made in the definition of the term “debtor of the receivable” to the payment of an “encumbered receivable” or “a receivable that was subject to a security right”.

“Encumbered asset”

27. As the definitions of the terms “tangible asset” and “intangible asset” referred to movable assets, it was agreed that the term “movable” in the definition of the term “encumbered asset” was redundant and should thus be deleted (in the definition of the term “future asset” as well).

“Equipment”

28. It was agreed that all the bracketed wording contained in the definition of the term “equipment” (“other than inventory”, “primarily” and “or intended to be used”) added clarity and should thus be retained. It was also suggested that, to avoid having to exclude in the definition of the term “equipment” the types of reified intangible asset that were included in the definition of the term “tangible asset”, reference should be made to “goods” rather than to tangible assets (in the definitions of the terms “inventory”, “mass or product” and “tangible asset” as well). However, it was noted that the term goods was not always understood in the same way in all legal systems. The drafting was therefore referred to the Secretariat.

“Independent undertaking”

29. It was agreed that, in line with the approach taken in the definition of the term “independent undertaking” in the Secured Transactions Guide, the definition of that term in the draft Model Law should also refer to commercial letters of credit. Noting that the term “independent undertaking” was used in article 1, subparagraph 3(a), and in article 13, option A, paragraph 2, the Working Group agreed that, depending on its decision with respect to article 13, the matter could be addressed in article 1, subparagraph 3(a), and the definition of that term could be deleted (see para. 60 below).

“Insolvency representative”

30. It was suggested that, to cover situations in which the insolvent debtor remained in possession of the insolvency estate, reference should also be made in the definition of the term “insolvency representative” to the supervision (and not only to the administration) of reorganization or liquidation proceedings by the insolvency representative. It was agreed that that point should be addressed in the definition or in the draft Guide to Enactment in a way that would be consistent with the Secured Transactions Guide and the UNCITRAL Legislative Guide on Insolvency Law (the “Insolvency Guide”).

"Inventory"

31. It was agreed that, as inventory could not be held partly for sale or lease in the ordinary course of business and partly for other purposes, the reference to the primary purpose of the grantor holding inventory that appeared in the definition of the term "inventory" could be deleted. It was also agreed that the draft Guide to Enactment should clarify that, in States that treated a lease of goods as a licence, reference should also be made in that definition to a "licence" of goods.

"Money"

32. It was agreed that the word "currently" that appeared in the definition of the term "money" should be deleted and the draft Guide to Enactment should explain that that word was deleted as redundant, since, if currency was not "currently authorized" as "legal tender", it would not qualify as "legal tender".

"Netting agreement"

33. Recalling its decision with respect to article 1, subparagraph 3(d) (see para. 16 above), the Working Group agreed that the term to be defined should be "netting agreement", rather than "close-out netting agreement" and thus the words "close-out" that appeared within square brackets in the definition of the term "netting agreement" should be deleted.

"Notification of a security right in a receivable"

34. It was agreed that the second sentence of the definition of the term "notification of a security right in a receivable" contained a substantive rule and should thus be moved to the relevant article (i.e. art. 56). Diverging views were expressed as to whether what was left of that definition should also be moved to the relevant article. After discussion, it was agreed that it should be retained in article 2 as a definition or rule of interpretation. As to the form of a notification of a security right in a receivable, the Working Group noted that, since the term "notice" was defined as a communication in writing and the term "notification of a security right in a receivable" was defined as a particular type of notice, a notification of a security right should be in writing.

"Possession"

35. It was agreed that the reference to "actual possession" in the definition of the term "possession" was sufficient to exclude deemed or constructive possession from the concept of "possession". It was also agreed that the reference to possession being "physical" that appeared within square brackets in the definition of the term possession was redundant, as only tangible assets could be subject to possession, and should thus be deleted.

"Priority"

36. The Working Group agreed that the definition of the term "priority" should be revised to read along the lines of article 5, subparagraph (g), of the Assignment Convention and thus to refer to the right (not just the economic benefit) of a person (not just a secured creditor) in preference to the right of a competing claimant.

"Proceeds"

37. Diverging views were expressed with respect to whether the definition of the term "proceeds" should be limited to proceeds received by the grantor and not extend to proceeds received, for example, by a transferee of the original encumbered asset. In support of that approach, it was stated that, without that limitation, the rights of third-party transferees would be unduly prejudiced, as they would have no way of finding out that the assets were proceeds of another asset in which somebody else had a security right, at least where the proceeds were cash proceeds and thus a security right in such proceeds would be effective against third parties without the registration of an amendment notice (see art. 17, para. 1). It was also observed that the rights of the secured creditor of the transferor would be sufficiently protected in any case, as, subject to limited exceptions (see, for example, art. 29, paras. 2 and 3), the security right would typically follow the asset in the hands of any

transferee and any other person that would obtain a right in the asset from the transferee. In opposition to that limitation of the concept of "proceeds", it was stated that, with that limitation, even where the transferee of an encumbered asset acquired the asset subject to a security right, it could sell the asset and keep the proceeds. It was also observed that, in any case, the limitation of the concept of "proceeds" would not be necessary to protect transferees that were already protected under other provisions of the draft Model Law. After discussion, it was agreed that, while the definition of the term "proceeds" should be retained as it was, the draft Guide to Enactment should explain the possible impact of that definition and ways to avoid a prejudice to third-party transferees that were not otherwise protected by other provisions of the draft Model Law.

"Receivable"

38. It was agreed that the reference to "a right to receive the proceeds under an independent undertaking" that appeared in the definition of the term "receivable" should be deleted, as under article 1, subparagraph 3(a), the draft Model Law did not apply to that type of asset. It was also agreed that a reference to non-intermediated securities that gave rise to rights to payment (i.e. debt securities) should also be made in the definition of the term "receivable" so that they would also be excluded from the scope of the term "receivable".

"Right to receive the proceeds under an independent undertaking"

39. In view of the fact that the draft Model Law did not apply to any rights arising from an independent undertaking (see para. 38 above), the Working Group agreed that the definition of the term "right to receive the proceeds under an independent undertaking" should be deleted.

"Secured obligation"

40. With respect to the wording in the definitions of the terms "grantor", "secured creditor", "secured obligation", "security agreement" and "security right" dealing with outright transfers of receivables, it was agreed that two alternative formulations should be prepared; one that would deal with the issue in one provision that would be placed in article 1; and another in which the relevant wording should be retained in each relevant definition, but in a more streamlined way to provide, for example, that the term "secured creditor" meant: (a) a creditor that had a security right; and (b) a transferee in an outright transfer of receivable.

41. Subject to the above-mentioned changes, the Working Group adopted article 2.

Article 3. International obligations of this State

42. In view of the diverging approaches followed from State to State with respect to the hierarchy between treaty obligations and domestic law of a State, the Working Group agreed that article 3 should be deleted and the matter addressed therein left to other law of the enacting State. It was also agreed that the draft Guide to Enactment could give examples of approaches followed by various States with respect to the hierarchy between national law rules and international obligations of a State.

Article 4. Party autonomy

43. The Working Group noted that article 4 was based on article 6 of the Assignment Convention and recommendation 10 of the Secured Transactions Guide. With respect to paragraph 1, it was agreed that it should be revised to ensure: (a) clarity, as the provisions referred to therein did not provide explicitly that they were mandatory law rules; (b) the list of mandatory law rules contained therein would be complete and accurate; and (c) the ability of competing claimants to enter into a subordination agreement would not be impaired.

44. Diverging views were expressed as to whether paragraph 2 should be retained, as it appeared to set out the general principle of contract law that an agreement between two parties could not affect the rights of third parties. After discussion, it was agreed that paragraph 2 should be retained, since the draft Model Law dealt also with relationships in which an agreement between two parties (e.g. the grantor and the secured creditor) might

have or appear to have an impact on the rights of third parties (e.g. the debtor of the receivable). For reasons of simplicity and consistency with the provisions on which article 4 was based, it was also agreed that the word "negatively" that appeared within square brackets in paragraph 2 should be deleted.

45. Subject to the above-mentioned changes, the Working Group adopted article 4.

Article 5. General standards of conduct

46. It was agreed that subparagraph 2(a) was not necessary and should thus be deleted, as article 4 already stated that the rule embodied in paragraph 1 could not be waived unilaterally or varied by agreement. It was also agreed that subparagraph 2(b) should be deleted, as, in the case of an outright transfer of a receivable without recourse against the transferor: (a) the transferee still had towards the debtor of the receivable the obligation to comply with the standards of conduct set forth in paragraph 1; and (b) it was obvious that the transferor had no remaining right or obligation. Subject to those changes, the Working Group adopted article 5.

47. In the discussion, the Working Group considered whether a provision should be added to deal with the interpretation of, and the filling of gaps, in the draft Model Law. After discussion, the Working Group agreed that such a provision should be added at the end of chapter I. The Working Group also agreed that the matter could be discussed in the draft Guide to Enactment by reference to the harmonization effect of an UNCITRAL model law and the key objectives and fundamental policies of the draft Model Law (see A/CN.9/WG.VI/WP.66, paras. 37-40, 44 and 45).

B. Chapter II. Creation of a security right (A/CN.9/WG.VI/WP.65)

Article 6. Security agreement

48. It was agreed that: (a) the heading of article 6 should be revised to better reflect its content; (b) paragraphs 3 and 4 should be merged for the conditions set forth in paragraph 3(b) through (e) to apply only to written security agreements and for paragraph 3(a) to apply to both written and oral security agreement; and (c) no reference should be made in paragraph 5 to control. With respect to the last matter, while diverging views were expressed, it was agreed that, whether control was automatic or achieved by way of a control agreement, it was not equivalent to possession (which provided a warning to third parties that the grantor's rights in the encumbered asset might not be unencumbered) or to a written security agreement (that had to satisfy the requirements of paragraph 3). It was also agreed that the draft Guide to Enactment would make clear that formal words were not necessary to create a security right. Subject to those changes, the Working Group adopted article 6.

49. In the discussion, the suggestion was made that a provision should be added, perhaps in the chapter of the draft Model Law on enforcement, to effectuate the policy embodied in article 6, subparagraph 3(e), with respect to the maximum amount for which the security right might be enforced. After discussion, the Working Group agreed to consider that suggestion when it had the opportunity to discuss the chapter on enforcement.

Article 7. Obligations that may be secured

50. After discussion, the Working Group adopted article 7 unchanged.

Article 8. Assets that may be encumbered

51. The Working Group noted that subparagraphs (c) and (d) dealt with the description of encumbered assets, a matter addressed in article 9. However, it agreed that those provisions should be retained because of their importance and the fact that their adoption would introduce significant changes to many legal systems. After discussion, the Working Group adopted article 8 unchanged.

Article 9. Description of encumbered assets

52. It was agreed that, to align the wording of article 9 more closely with that of article 8, subparagraph (c), the word "generic" should be added before the word "category" in paragraph 2. Subject to that change, the Working Group adopted article 9.

53. In the discussion, it was noted that, pursuant to the changes to article 6 (see para. 48 above), article 9 would only apply to a written security agreement.

Article 10. Proceeds and proceeds in the form of funds commingled with other funds

54. It was agreed that: (a) the heading of article 10 should be revised to reflect more closely its contents (e.g. "right to proceeds and commingled funds"); (b) paragraph 1 embodied the very important principle that a security right in an asset extended to its proceeds and should thus be separated from paragraphs 2-4, which dealt with commingled funds and could be combined in a new paragraph; (c) in the new paragraph, the wording of paragraph 2 should be revised to read along the following lines: "notwithstanding the fact that proceeds in the form of funds are not identifiable as a result of commingling with other assets of the same type, the security right extends to the commingled assets"; and (d) in the new paragraph, the wording of paragraph 3 should be revised to read along the following lines: "the security right in the commingled assets is limited to …" (and thus avoid any confusion with the optional wording, which refers to the maximum monetary amount and which is contained in art. 6, para. 3 (e)). Subject to those changes, the Working Group adopted article 10.

Article 11. Tangible assets commingled in a mass or product

55. Diverging views were expressed as to whether the same rules should apply to tangible assets when they were commingled in a mass or in a product. One view was that a rule along the lines of recommendation 22 of the Secured Transactions Guide should apply to both masses and products where there were no competing rights, while paragraph 4 was sufficient to apply to situations where there were competing rights. Another view was that, to deal with commodity price fluctuations, paragraph 2 with the first set of bracketed words should apply to masses and paragraph 3 with the second set of bracketed words should apply to products. After discussion, the Working Group requested the Secretariat to prepare two options reflecting the views expressed for further consideration. With respect to paragraph 4, the Working Group agreed that it should be retained outside square brackets. Subject to those changes, the Working Group adopted article 11.

Article 11bis. Extinction of a security right

56. As a matter of policy, it was agreed that, even if the balance in a revolving credit account was temporarily zero, a security right should not be extinguished as long as there was a further commitment by the secured creditor to extend credit. However, as a matter of drafting, diverging views were expressed as to how that policy should be reflected in article 11bis. One view was that, for reasons of legal certainty, the principle that full payment of all secured obligations should result in the extinction of a security right should not be diluted with references to any other issue. It was stated that issues relating to revolving credit arrangements could be discussed in the draft Guide to Enactment. Another view was that revolving credit arrangements were extremely important and thus article 11bis should avoid giving the impression that the security right could be extinguished while the secured creditor had an open commitment to extend further credit. It was observed that, in the absence of the proviso in article 11bis, it would not be clear that it covered conditional secured obligations.

57. After discussion, it was agreed that article 11bis should be revised to provide that a security right would be extinguished only upon full payment or other satisfaction of all present and future secured obligations, including conditional obligations. It was also agreed that the draft Guide to Enactment would clarify that the reference to future, including conditional, secured obligations was intended to address the obligation of a secured creditor to extend further credit on the basis of revolving credit agreements.

58. Subject to the above-mentioned changes, the Working Group adopted article 11bis.

Article 12. Contractual limitations on the creation of a security right

59. It was agreed that: (a) for reasons of clarity in the text and consistency with article 9 of the Assignment Convention and recommendation 24 of the Secured Transaction Guide, on which article 12 was based, paragraphs 1 and 2 should be revised to refer only to contractual limitations on the creation of a security right in a receivable; (b) the last set of bracketed words in paragraph 2 should be retained outside square brackets; and (c) in subparagraph 4 (d), the first set of bracketed words should be revised to avoid repetition of elements already contained in the definition of the term "netting agreement" (see art. 2, subpara. (w)) and retained outside square brackets, while the second bracketed set of words should be deleted. Subject to those changes, the Working Group adopted article 12.

Article 13. Personal or property rights securing or supporting payment or other performance of an encumbered receivable or other intangible asset, or negotiable instrument

60. It was agreed that paragraph 1 of option A and paragraph 2 of option B should be retained, while paragraph 2 of option A and paragraphs 3-5 of option B should be deleted and the matters addressed therein should be discussed in the draft Guide to Enactment. It was also agreed that the draft Guide to Enactment should explain that the rule in article 12 applied to contractual limitations on the creation of a security right not only in a receivable but also in personal or property rights securing payment or other performance of a receivable or other intangible asset, or negotiable instrument (see rec. 25, subpara. (d), of the Secured Transactions Guide). Subject to those changes, the Working Group adopted article 13.

61. In view of its decision to limit article 12 to receivables, the Working Group agreed that the article implementing recommendation 26 of the Secured Transactions Guide, which dealt with contractual limitations on the creation of a security right in a right to payment of funds credited to a bank account and which had been deleted, should be reinstated (see A/CN.9/830, para. 63).

Article 14. Negotiable documents and tangible assets covered

62. It was agreed that article 14 or the definition of the term "possession" contained in article 2 should be revised to address situations in which the issuer of a negotiable document held the document through various persons responsible to perform various parts of a multimodal transport contract. It was also agreed that the heading of article 14 (and all articles with the same heading) should be reviewed to ensure that it accurately reflected its contents. Subject to those changes, the Working Group adopted article 14.

Article 15. Tangible assets with respect to which intellectual property is used

63. The Working Group adopted article 15 unchanged.

C. Chapter III. Effectiveness of a security right against third parties (A/CN.9/WG.VI/WP.65)

Article 16. General methods for achieving third-party effectiveness

64. It was agreed that the reference to specialized registration in article 16 should be deleted and the matter discussed in the draft Guide to Enactment in order to ensure coordination between the Registry foreseen in the draft Model Law and existing, well-functioning specialized registration systems relating to assets to which the draft Model Law applied (e.g. intellectual property). It was also agreed that article 16 should be revised to clarify that possession was a third-party effectiveness method only for security rights in tangible assets. Subject to those changes, the Working Group adopted article 16.

65. In the discussion, a number of suggestions were made. One suggestion was that article 16 should be revised to refer to all methods of third-party effectiveness. Another suggestion was that reference should be made to notation on an invoice as method of third-party effectiveness of outright transfers of receivables. There was no sufficient support for those suggestions.

Article 17. Proceeds

66. A number of suggestions were made. One suggestion was that the order of paragraphs 1 and 2 should be reversed. Another suggestion was that the words "without any further action by the grantor or the secured creditor" should be replaced by words along the following lines: "automatically when the proceeds arise". There was no sufficient support for those suggestions. After discussion, the Working Group adopted article 17 unchanged.

Article 18. Changes in the method for achieving third-party effectiveness

67. It was agreed that paragraph 1 should be deleted, as its thrust was already reflected in paragraph 2. Subject to that change, the Working Group adopted article 18.

Article 19. Lapse in third-party effectiveness

68. It was agreed that article 19 should be revised to read along the following lines: "If the third-party effectiveness of a security right lapses, it may be re-established, but the security right is effective against third parties only as of that time". Subject to those changes, the Working Group adopted article 19.

Article 20. Impact of a transfer of an encumbered asset

69. It was agreed that the principle of the *droit de suite* of a security right embodied in article 20 was sufficiently addressed in article 29, and thus article 20 should be deleted.

Article 21. Continuity in third-party effectiveness upon a change of the applicable law to this Law

70. It was agreed that, under paragraph 1, the security right remained effective against third parties under the law of the enacting State, if: (a) the third-party effectiveness requirements of the law of the enacting State were satisfied within a short period of time (e.g. 60-90 days); and (b) at that time, the security right was effective against third parties under the law of the State whose law was previously applicable (i.e. its third-party effectiveness had not lapsed). In addition, it was agreed that the draft Guide to Enactment should explain the policy of article 21. Moreover, it was agreed that article 21 should be retained in the third-party effectiveness chapter and not moved to the conflict-of-laws chapter, as it dealt with continuity of third-party effectiveness (even if the issue arose as a result of a change of applicable law). Subject to any changes necessary to clarify its policy, the Working Group adopted article 21.

Article 22. Acquisition security rights in consumer goods

71. It was agreed that article 22 should be revised to include two options. The first option should provide that, upon its creation, an acquisition security right in the goods would be automatically effective against third parties except buyers of consumer goods. The second option should provide for the automatic third-party effectiveness of an acquisition security right in consumer goods, but only if the value of the consumer goods was below a low amount to be specified by the enacting State. Subject to those changes, the Working Group adopted article 22.

Article 23. Rights to payment of funds credited to a bank account

72. The Working Group adopted article 23 unchanged and agreed that the issue of how a secured creditor might become the account holder should be discussed in the draft Guide to Enactment.

Article 24. Negotiable documents and tangible assets covered

73. It was agreed that, as in the chapeau of articles 23 and 25, the word "also" should be inserted in paragraph 2 to ensure that registration was always available as a general method of third-party effectiveness. Subject to that change, the Working Group adopted article 24.

Article 25. Uncertificated non-intermediated securities

74. It was agreed that subparagraph (a) should be revised to clarify that the two methods for achieving third-party effectiveness were alternatives for the enacting State to choose from. Subject to that change, the Working Group adopted article 25.

D. Chapter V. Priority of a security right (A/CN.9/WG.VI/WP.65/Add.2)

Article 27. Competing security rights

75. The Working Group agreed that, in view of their importance, article 27, paragraph 1, and article 28 should be merged and form the first article of the chapter on priority. It was also agreed that paragraphs 2 to 8 should be set forth separately. The Working Group also agreed that paragraph 2 that appeared within square brackets should be retained outside square brackets, properly revised to read along the following lines: "Subject to article 27, priority among competing security rights created by different grantors in the same encumbered asset is determined according to the order of third-party effectiveness". In response to a statement that paragraph 3 might not be accurate, as a change in the method of third-party effectiveness could change the order of priority, it was noted that, by definition, asset-specific rules would modify the general rules in each chapter. It was agreed that that matter could usefully be clarified in the draft Guide to Enactment. Subject to those changes, the Working Group adopted article 27.

Article 28. Competing security rights in the case of advanced registration

76. It was agreed that option A should be retained, as it was clearer and simpler than option B, and moved to article 27 as paragraph 2, while option B should be deleted. Subject to those changes, the Working Group adopted option A unchanged.

Article 29. Rights of buyers or other transferees, lessees or licensees of an encumbered asset

77. The suggestion was made that paragraphs 4, 5, 7 and 8 should refer to "goods" rather than to "tangible assets", as the latter term included negotiable instruments and other similar reified intangible assets (see art. 2, subpara. (kk)), to which those paragraphs should not apply. While it was agreed that those paragraphs should not apply to those types of asset, it was widely felt that that change was not necessary, since the relevant asset-specific rules addressed those matters and, by definition, modified general rules like that contained in article 29. It was also agreed that the draft Guide to Enactment should clarify that the words "buyer or other transferee, lessee or licensee" included donees. After discussion, the Working Group adopted article 29 unchanged.

Article 30. Rights of buyers or other transferees, lessees or licensees of an encumbered asset in the case of specialized registration

78. In view of its decision on article 16 (see para. 64 above), the Working Group agreed that article 30 should be deleted and the matters addressed therein discussed in the draft Guide to Enactment.

Article 31. Rights of the insolvency representative

79. It was agreed that, while all of article 31 dealt with insolvency law issues, paragraph 1 should be retained because of its importance, while paragraphs 2 and 3 should be deleted. It was also agreed that the matters addressed in paragraphs 2 and 3 should be discussed in the draft Guide to Enactment, to also highlight with appropriate references to the Secured Transactions Guide and the Insolvency Guide, the need for the enacting State to coordinate its secured transactions and insolvency laws. It was also agreed that the title of article 31 should be modified to reflect its content. Subject to those changes, the Working Group adopted article 31.

Articles 32, 38-44

80. The Working Group adopted articles 32, 38-44 unchanged.

Article 33. Rights of judgement creditors

81. It was agreed that paragraph 2 should be aligned more closely with recommendation 84 of the Secured Transactions Guide and refer to an "extension" rather than to a "disbursement" of credit and to the notification being received by the secured creditor. Subject to those changes, the Working Group adopted article 33.

Articles 34-37

82. It was agreed that articles 34-37 should be revised to: (a) clearly describe the types of asset that were subject to each rule; (b) refer to consumer goods being used "primarily" for personal, family or household purposes; and (c) refer to the need for registration to occur "not later than" a specified number of days after delivery of the goods (rather than "within", which might be read as precluding registration before delivery). Subject to those changes, the Working Group adopted articles 34-37.

Article 45. Intellectual property

83. It was agreed that the words that appeared within square brackets in article 45 should be retained. Subject to that change, the Working Group adopted article 45.

Article 46. Non-intermediated securities

84. It was agreed that option A of paragraph 5 should be retained, as it was clearer than option B, while option B should be deleted. Subject to that change, the Working Group adopted article 46.

E. Chapter VIII. Conflict of laws (A/CN.9/WG.VI/WP.65/Add.4)

85. The Working Group agreed that the draft Guide to Enactment should explain that the conflict-of-laws rules should apply without a prior determination that the laws of different States would be involved in any particular case. It was widely felt that requiring a determination as to whether a situation involved a choice of laws would create uncertainty because a court might view the issue as involving a choice of laws, while another court might treat the issue differently.

Articles 78, 84, 86 and 89

86. The Working Group adopted articles 78, 84, 86 and 89 unchanged.

Article 79. Law applicable to a security right in a tangible asset

87. In view of its decision with respect to specialized registration issues (see para. 64 above), the Working Group agreed that the words "subject to paragraph 4, the" that appeared within square brackets in paragraph 3, and paragraph 4 as a whole, should be deleted, while the rules contained therein should be discussed in the draft Guide to Enactment. It was also agreed that the words contained in parenthesis in paragraph 5 should be deleted as the types of asset referred to therein (e.g. negotiable instruments) would not be captured by the expression "tangible assets in transit or to be exported". Subject to those changes, the Working Group adopted article 79.

Article 80. Law applicable to a security right in an intangible asset

88. It was widely felt that article 80 appropriately addressed the issue of the law applicable to the creation of a security right, which was a matter of property law, and not the mutual rights and obligations of the parties, which was a matter of contract law and subject to party autonomy (see art. 78). Thus, it was agreed that articles 78 and 80 were consistent with articles 28 and 30 of the Assignment Convention and recommendations 208 and 216 of the

Secured Transactions Guide. After discussion, the Working Group adopted article 80 unchanged.

Article 81. Law applicable to a security right in receivables arising from a sale or lease of or a transaction secured by immovable property

89. It was agreed that paragraph 1 should be deleted, as it simply reiterated the rule embodied in article 80, and paragraph 2 should be revised to: (a) begin with the words "Notwithstanding article 80"; and (b) to refer to the priority of a security right in a receivable that was "registrable" (rather than registered) in the immovable property registry. It was widely felt that, with that change, for article 81 to apply, it would not be necessary to determine that: (a) the law governing the immovable property registry permitted registration with respect to security rights for third-party effectiveness and priority purposes; and (b) a competing claimant did in fact register in the immovable property registry. Subject to those changes, the Working Group adopted article 81.

Article 82. Law applicable to the enforcement of a security right

90. Diverging views were expressed as to the law applicable to the enforcement of a security right in a tangible asset under subparagraph (a). One view was that the words "the relevant act" of enforcement should be retained outside square brackets, as enforcement involved various acts that could take place in different States. As a result, repossession of an asset could take place in, and be subject to the law of, one State, while the sale of the asset could take place in, and be subject to the law of, another State. Another view was that those words should not be added to subparagraph (a), as enforcement could not commence in one State and continue in another State. In that connection, it was suggested that subparagraph (a) should state more clearly the applicable law and thus refer to the law of the State in which a tangible asset was located. There was support for that suggestion. However, to have time to consider the matter carefully and avoid unnecessarily changing the rule in recommendation 218, subparagraph (a), on which article 82, subparagraph (a), was based, the Working Group agreed that article 82 should be revised to include two options that would read along the following lines: "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] [the encumbered asset is located at the time of commencement of enforcement], except as provided in article 93". Subject to those changes, the Working Group adopted article 82.

Article 83. Law applicable to security rights in proceeds of an encumbered asset

91. Diverging views were expressed as to whether the rule in article 83 should be retained in its present formulation. One view was that the bifurcated rule of article 83 might lead to difficulties in cases where the law governing creation provided that a security right in proceeds was automatically effective against third parties (e.g. art. 17, para. 1), while the law governing third-party effectiveness and priority provided that, for a security right in proceeds to be effective against third parties, a new registration was necessary (e.g. art. 17, para. 2). Another view was that the rule in article 83 was appropriate, as paragraph 2 would only come into play only if a security right had been effectively created in accordance with the law applicable under paragraph 1. As a result, it was stated, if the proceeds were in the form of receivables, under paragraph 2, the law applicable would be the law governing the third-party effectiveness and priority of a security right in receivables as originally encumbered assets (i.e. art. 80). After discussion, the Working Group agreed that the matter should be discussed in the draft Guide to Enactment and adopted article 83 unchanged. The Working Group also agreed that the draft Guide to Enactment should explain that article 83 addressed the issue of the law applicable to proceeds derived from a disposition of an encumbered asset outside the context of the enforcement, while article 82 dealt with the law applicable to proceeds derived from a disposition of an encumbered asset pursuant to enforcement proceedings.

Article 85. Relevant time for determining location

92. It was agreed that paragraph 2 should be revised to refer to rights of competing secured creditors being "created and made effective against third parties", and to the rights of all other competing claimants being "established". Diverging views were expressed as to

whether the rule in article 85 would be appropriate where there was a change in the location of an encumbered asset or the grantor after the creation of a security right or even after the commencement of enforcement proceedings. In that regard, it was observed that, while a change in the location of an encumbered asset or the grantor was envisaged in various articles, article 85 should not give the impression that enforcement proceedings that were commenced in one State could continue in another State. In response, it was pointed out that the new rule proposed for article 82, subparagraph (a), might be sufficient to address the issue arising as a result of a change of location of an encumbered asset or the grantor. After discussion, subject to the above-mentioned change to paragraph 2, the Working Group adopted article 85, on the understanding that it would consider further the matter of the application of article 85 in the case of a change in the location of an encumbered asset or the grantor.

Article 87. Overriding mandatory rules and public policy (*ordre public*)

93. It was agreed that article 11, paragraph 5, of the Hague Principles on Choice of Law in International Commercial Contracts (the "Hague Principles"), which dealt with the public policy and mandatory law exception in the case of arbitral proceedings should also be added to article 87, in view of the importance of arbitration proceedings, the need to include all paragraphs of article 11 and the fact that UNCITRAL had endorsed the Hague Principles. It was also agreed that paragraph 5 should be revised to read along the following lines: "This article does not permit a court to displace the provisions of this chapter dealing with the law applicable to the third-party effectiveness and priority of a security right". Subject to those changes, the Working Group adopted article 87.

Article 88. Impact of commencement of insolvency proceedings on the law applicable to a security right

94. It was agreed that paragraph 1 should be revised to read along the following lines: "The commencement of insolvency proceedings relating to the grantor does not displace the law applicable to a security right under the provisions of this chapter". It was also agreed that paragraph 2 should be deleted, as it addressed matters referred to the *lex fori concursus* under insolvency law, and the matters addressed therein should be discussed in the draft Guide to Enactment. Subject to those changes, the Working Group adopted article 88.

Article 90. Law applicable to a security right in a right to payment of funds credited to a bank account

95. It was agreed that the draft Guide to Enactment should explain that, where a bank offered its services only through an online connection, for the purpose of option A of article 90, its branch or office should be considered as being located in the jurisdiction specified by law for regulatory and other purposes (e.g. court jurisdiction and anti-money-laundering laws).

Article 91. Law applicable to the third-party effectiveness of a security right in certain types of asset by registration

96. It was agreed that article 91 should be simplified so that it would apply to the third-party effectiveness of a security right by registration under the law of the grantor's location, whether or not such registration had in fact taken place. It was also agreed that article 91 should be revised to be made applicable also to negotiable documents and certificated non-intermediated securities. Subject to those changes, the Working Group adopted article 91.

Articles 92 and 94

97. The Working Group adopted articles 92 and 94 unchanged.

Article 93. Law applicable to a security right in non-intermediated securities

98. Diverging views were expressed as to the option or options of article 93 that were preferable and should be retained. After discussion, it was agreed that all options should be retained for further consideration. It was also agreed that a variant should be prepared for

paragraph 2 of option A, to refer effectiveness of a security right in debt securities against the issuer to the law governing the securities.

F. Chapter IX. Transition (A/CN.9/WG.VI/WP.65/Add.4)

Articles 95 and 97

99. The Working Group adopted articles 95 and 97 unchanged.

Article 96. Transitional application of this Law

100. It was agreed that, in the definition of the term "prior law" and where else necessary (e.g. art. 99), alternatives should be prepared to address situations in which the prior law was not the law of the enacting State but the law of another State applicable by virtue of the conflict-of-laws rules of the enacting State. It was also agreed that the definition of the term "prior security right" should be revised to refer to security rights covered by a security agreement entered into before the entry into force of the new law, to provide the benefits of the transition rules even to security rights in assets produced or acquired by the grantor after the entry into force of the new law. Subject to those changes, the Working Group adopted article 96.

Article 98. Creation of a prior security right

101. It was agreed that paragraph 2 should be revised to avoid the repetition of elements already addressed in the definition of the term "prior security right". Subject to that change, the Working Group adopted article 98.

Articles 99 and 100

102. Subject to any changes necessary to ensure that security rights created and made effective against third parties under a prior law other than a prior law of the enacting State would benefit from the transition rules, the Working Group adopted articles 99 and 100.

Article 101. Entry into force of this Law

103. It was agreed that options A to C should be replaced by wording within square brackets leaving the matter addressed in article 101 to each enacting State. It was also agreed that all options should be discussed in the draft Guide to Enactment, with particular emphasis on the essence of option C, namely the need to link the entry into force of the new law with the time the Registry would become operational.

V. Future work

104. The Working Group noted that its next session was scheduled to take place in New York from 8 to 12 February 2016. The Working Group also noted that, while completing the draft Model Law at its next session was difficult, it was possible and every effort should be made for the Working Group to achieve that result. The Working Group also noted that, in order to complete the draft Guide to Enactment, it might need to request the Commission for an additional 1 session or 2 sessions.

B. Note by the Secretariat on a draft model law on secured transactions (A/CN.9/WG.VI/WP.65 and Add.1-4)

[Original: English]

Contents

Chapter I. Scope of application and general provisions

Article 1. Scope of application

1. This Law applies to security rights in movable assets.

2. With the exception of articles 66-76, this Law applies to outright transfers of receivables.

3. Notwithstanding paragraph 1, this Law does not apply to security rights in:

(a) The right to request payment under or to receive the proceeds of an independent undertaking;

(b) Intellectual property in so far as this Law is inconsistent with [the enacting State to specify its law relating to intellectual property];[1]

(c) Intermediated securities;

(d) Payment rights arising under or from financial contracts governed by [close-out] netting agreements, except a payment right arising upon the termination of all outstanding transactions;

(e) Payment rights arising under or from foreign exchange transactions; and

(f) [The enacting State to set out other types of asset it wishes to exclude, such as those that are subject to specialized secured transactions and asset-based registration regimes under other law to the extent that that other law governs matters addressed in this Law].[2]

[4. This Law does not apply to security rights in proceeds of encumbered assets if the proceeds are a type of asset that is outside the scope of this Law to the extent that [the enacting State to specify any other law] applies to security rights in those types of asset and governs the matters addressed in this Law.]

5. [Nothing in this Law affects the application of] [This Law is subject to] laws relating to the protection of parties to transactions made for personal, family or household purposes.

6. [Nothing in this Law overrides a provision of any other law that limits the creation or enforcement of a security right in, or the transferability of, specific types of asset, with the exception of a provision that limits the creation or enforcement of a security right in or the transferability of an asset on the sole ground that it is a future asset, or a part or undivided interest in an asset].

[*Note to the Working Group: The Working Group may wish to consider whether certain types of outright transfers of receivables that are often excluded from the scope of secured transactions laws in several jurisdictions should also be excluded from the scope of the draft Model Law or at least discussed in the Guide to Enactment. In this regard the Working Group may wish to consider the following possible exclusions*:

(a) Outright transfers of receivables as part of a sale of a business out of which they arose, unless the seller remains in apparent control of the business after the sale: the reason for this exclusion is that the potential that the transferor will be able to mislead other buyers of the receivables is very limited unless the old owner remains in apparent control of the business. Whether this exclusion is necessary will depend on whether the Working Group considers that a transfer of receivables incidental to the sale of all the assets of a business may be interpreted as a transfer of receivables subject to the draft Model Law;

(b) Outright transfers of receivables made solely to facilitate the collection of the receivables for the transferor: the reason for this exclusion is that the transferee in this type of transaction effectively acts as an agent of the transferor and not as an independent

[1] This provision may not be necessary if the enacting State has coordinated, or has otherwise addressed the relationship between this Law and any secured transactions provisions of its law relating to intellectual property.

[2] If the enacting State decides to introduce any other exception(s), they should be limited and set out in the Law in a clear and specific way.

transferee capable of asserting priority over another transferee, a result that may follow from the general rules of agency in the enacting State;

(c) Outright transfers of a single receivable (or negotiable instrument) made in whole or in partial satisfaction of a pre-existing indebtedness: the reason for this exclusion is that a transferee might not think of having to register such a transaction or otherwise conform to the provisions of the draft Model Law. On the other hand, this exclusion could undermine the certainty and transparency sought to be achieved through otherwise incorporating the outright transfer of even a single receivable within the registration and priority rules of the draft Model Law;

(d) Outright transfers of an unearned right to payment under a contract to a person who is to perform the transferor's obligations under the contract: the reason for this exclusion is that the transferee takes the place of the transferor and thus there is no risk of deception of third parties as to who is entitled to receive payment. On the other hand, this type of transaction would seem to involve a novation of the contract and not a simple transfer of a right to payment and therefore would fall within the scope of the draft Model Law in any event;

(e) Outright transfer of present or future wages, salary, pay, commission, or any other compensation for labour or personal services of an employee: the reason for this exclusion is that such transfers are typically prohibited by other law. Thus, if they are excluded, they should be excluded only to the extent they are actually prohibited by other law of the enacting State. However, their exclusion may not be necessary as the draft Model Law preserves legal prohibitions to the transferability of or the creation of a security right in an asset under other law in any event (see art. 1, para. 6);

(f) Outright transfers for the general benefit of creditors of the transferor: in many common law jurisdictions, an assignment for the general benefit of creditors operates as an alternative to formal insolvency proceedings or as a device for commencing voluntary insolvency proceedings. Thus, the Guide to Enactment may need to state that enacting States that follow this approach may need to clarify that the draft Model Law does not apply to such transfers;

(g) Outright transfers of a right to damages in tort: the reason for this exclusion is that the transfer of tort claims is often prohibited by law, as these claims are personal or because of concerns that their use as security for credit may increase tort actions and insurance costs or interfere with the rights of the victims of torts. In this regard, it should be noted, that, unlike the United Nations Convention on the Assignment of Receivables in International Trade *(the "*Assignment Convention*") that applies only to contractual receivables, the draft Model Law applies to all types of receivables, including a prospective award of damages in a tort claim, a right to payment under a settlement contract pertaining to a tort claim and to proceeds of a damages claim that are deposited into a bank account. Accordingly, such an exclusion may be left to each enacting State rather than included in the Model Law;*

(h) Outright transfers of an interest in or claim under a contract of insurance: the reason for this exclusion is that such transactions may be adequately covered by existing law of the enacting State. However, such an exclusion could have a negative impact on the availability of credit on the basis of insurance policy proceeds and would run counter to the policy of the Secured Transactions Guide*, which defines "proceeds" as to include insurance policy proceeds.*

With respect to subparagraph 3(d), the Working Group may wish to note that, unlike recommendation 4, subparagraph (d), of the Secured Transactions Guide *which refers to "netting", subparagraph 3(d) refers to "close-out netting". The Working Group may wish to note that the Guide to Enactment will explain that this change of wording is necessary to ensure that transactions relating to set off even between two sellers of goods with trade claims and counter-claims would not be inadvertently excluded (see A/CN.9/830, para. 20).*

With respect to subparagraph 3(e), the Working Group may wish to consider whether the exclusion of payment rights arising under or from financial contracts governed by [close-out] netting agreements in subparagraph 3(d) is sufficient to cover also payment rights arising under or from foreign exchange transactions addressed in subparagraph 3(e)

and, if so, whether subparagraph 3(e) should be deleted. The Working Group may wish to consider subparagraphs 3(d) and (e) together with the definitions of the terms "financial contract" and "[close-out] netting" in article 2, which are based on the definitions of those terms contained in article 5 of the Assignment Convention.

With respect to paragraph 6, the Working Group may wish to consider the bracketed wording, which is intended to ensure that statutory limitations to the transferability of future assets, parts of and undivided interests in assets is overridden by the draft Model Law (see also recommendation 23 of the Secured Transactions Guide, *which has not been reflected in any article of the draft Model Law).*]

Article 2. Definitions and rules of interpretation

For the purposes of this Law:

(a) "Acquisition secured creditor" means a secured creditor that has an acquisition security right;

(b) "Acquisition security right" means a security right in a tangible asset (other than money, negotiable instruments, negotiable documents and certificated non-intermediated securities), intellectual property or the rights of a licensee under a licence of intellectual property 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 it [to the extent the credit is in fact applied for that purpose];

[*Note to the Working Group: The Working Group may wish to consider the wording within square brackets in this definition, which is intended to ensure that a security right qualifies as an acquisition security right only if the credit provided for the purpose of acquiring the encumbered asset is in fact used for that purpose. The Working Group may also wish to consider whether it is redundant to refer to "an obligation incurred or credit otherwise provided" or whether it is sufficient to simply refer to "other credit extended". The Working Group may further wish to consider whether the Guide to Enactment should explain that, where a security right secures obligations in addition to the credit extended and used for the purpose of acquiring the encumbered asset, it is an ordinary security right to the extent of those additional obligations*.]

(c) "Bank account" means an account[, other than a securities account,] maintained by a bank, to which funds may be credited or debited. The term includes a checking or other current account, as well as a savings or time deposit account. The term does not include a right against the bank to payment evidenced by a negotiable instrument;

[*Note to the Working Group: The Working Group may wish to consider the bracketed text in this definition, which is intended to draw a clear distinction from a securities account in which funds are routinely credited or debited when transactions relating to securities credited to those accounts are settled. Alternatively, this distinction may be explained in the Guide to Enactment, which can explain that, to underline this distinction, the draft Model Law defines the term "securities account" as "an account maintained by an intermediary to whom securities may be credited or debited" and the term "securities" in a manner that clearly excludes funds. The Working Group may further wish to consider whether it is appropriate to retain the second sentence of this definition since the terms "checking or other current account" and "savings or time deposit account" are business terms rather than legal terms and therefore may not be used in all enacting States or have the same meaning in all enacting States. These terms may instead be used in the Guide to Enactment as examples*.]

(d) "Certificated non-intermediated securities" means non-intermediated securities represented by a certificate that:

(i) Provides that the person entitled to the securities is the person in possession of the certificate; or

(ii) Identifies the person entitled to the securities;

(e) "Competing claimant" means a creditor of a grantor or other person with rights in an encumbered asset that may be in conflict with the rights of a secured creditor in the same encumbered asset. The term includes:

(i) Another secured creditor of the grantor that has a security right in the same encumbered asset (whether as an original encumbered asset or proceeds);

(ii) Another creditor of the grantor that has a right in the same encumbered asset, such as a judgement creditor or [the enacting State to specify creditors that have a right in the encumbered asset under other law];

(iii) The insolvency representative in insolvency proceedings in respect of the grantor; or

(iv) A buyer [or other transferee], lessee or licensee of the encumbered asset;

[*Note to the Working Group: The Working Group may wish to note that the text in square brackets in subparagraph (e)(iv) has been included to align this definition with the formulation of other articles (see, for example, arts. 29 and 30). The Working Group may also wish to note that, if the bracketed text is to be retained, its position may have to be reconsidered as in some jurisdictions lessees and licensees are considered transferees. In addition, the Working Group may wish to note that the term "judgement creditor" is defined in article 33 and consider whether that definition should be rather included in article 2*.]

(f) "Consumer goods" means goods [primarily] used or intended to be used by a grantor for personal, family or household purposes;

[*Note to the Working Group: The Working Group also may wish to add the word "primarily" to this definition to cover the case where goods are used by the grantor for both business and personal purposes in which event the primary use would determine whether they qualify as consumer goods. The Working Group may also wish to consider whether the definitions of the terms "equipment" and "inventory" should also be revised to refer to tangible assets "*primarily used or intended to be used *…"*.]

(g) "Control agreement":

(i) With respect to uncertificated non-intermediated securities means an agreement in writing among the issuer, the grantor and the secured creditor, according to which the issuer agrees to follow instructions from the secured creditor with respect to the securities without further consent from the grantor; and

(ii) With respect to rights to payment of funds credited to a bank account means an agreement in writing among the depositary bank, the grantor and the secured creditor, according to which the depositary bank agrees to follow instructions from the secured creditor with respect to the payment of funds credited to the bank account without further consent from the grantor;

(h) "Debtor" means a person that owes payment or other performance of a secured obligation, whether or not that person is the grantor of the security right securing payment or other performance of that obligation. The term includes a secondary obligor such as a guarantor of a secured obligation, and a transferor in an outright transfer of a receivable;

(i) "Debtor of the receivable" means a person that owes payment of a receivable. The term includes a guarantor or other person secondarily liable for payment of the receivable;

(j) "Encumbered asset" means a tangible or intangible movable asset that is subject to a security right. The term includes a receivable that is the subject of an outright transfer;

(k) "Equipment" means a tangible asset [other than inventory] [primarily] used [or intended to be used] by a grantor in the operation of its business;

(l) "Financial contract" means any spot, forward, future, option or swap transaction involving interest rates, commodities, currencies, equities, bonds, indices or any other financial instrument, any repurchase or securities lending transaction, and any other transaction similar to those transactions entered into in financial markets and any combination of those transactions;

(m) "Future asset" means a tangible or intangible movable asset, which does not exist or which the grantor does not have rights in or the power to encumber at the time the security agreement is concluded;

(n) "Grantor" means a person that creates a security right to secure either its own obligation or that of another person. The term includes the transferee of an encumbered asset and the transferor in an outright transfer of a receivable;

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

[*Note to the Working Group: The Working Group may wish to note that this definition is based on the definition contained in article 2, paragraph (1), of the* United Nations Convention on Independent Guarantees and Stand-by Letters of Credit.]

(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 types of movable asset other than tangible assets. The term includes receivables, rights to the performance of obligations other than receivables, rights to payment of funds credited to a bank account, and uncertificated non-intermediated securities;

(r) "Inventory" means tangible assets [primarily] held by a grantor for sale or lease in the ordinary course of the grantor's business. The term includes raw and semi-processed materials (work-in-process);

(s) "Knowledge" means actual 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) "Money" means currency currently authorized as legal tender by any State. The term does not include funds credited to a bank account or negotiable instruments;

[*Note to the Working Group: The Working Group may wish to note that the term "money", whose definition is based on a definition contained in the* Secured Transactions Guide, *is intended to include not only the national currency of the enacting State but also foreign currency. The Working Group may wish to consider deleting the word "currently" in this definition as redundant (since if currency is not "currently authorized" as "legal tender", then it would not qualify as "legal tender"). The Working Group may also wish to consider deleting the second sentence of the definition since rights to payment of funds credited to a bank account and negotiable instruments are recognized as distinct concepts in the draft Model Law and thus it is already clear that the concept "money" does not include them. All these matters may be usefully discussed in the Guide to Enactment*.]

(v) "Non-intermediated securities" means securities other than securities credited to a securities account or rights in securities resulting from the credit of securities to a securities account;

(w) "[Close-out netting] [Netting] agreement" means an agreement between two or more parties that provides for one or more of the following:

(i) The net settlement of payments due in the same currency on the same date whether by novation or otherwise;

(ii) Upon the insolvency or other default by a party, the termination of all outstanding transactions at their replacement or fair market values, conversion of such

sums into a single currency and netting into a single payment by one party to the other; or

(iii) The set-off of amounts calculated as set forth in subparagraph (ii) under two or more netting agreements;

(x) "Notice" means a communication in writing;

(y) "Notification of a security right in a receivable" means a notice by the grantor or the secured creditor informing the debtor of the receivable that a security right has been created in the receivable. A notification of the security right may include a payment instruction;

[*Note to the Working Group: The Working Group may wish to note that the requirement for the identification of the encumbered receivable and the secured creditor that was included in a previous version of this definition (and in this definition in the* Secured Transactions Guide*), was moved to article 56, paragraph 1, as it states a substantive rule on the effectiveness of a notification of a security right, a matter that is already addressed in article 56, paragraph 1. The Working Group may wish to consider whether the second sentence of this definition also states a substantive rule and should be moved to article 56*.]

(z) "Possession" means the actual [physical] possession of a tangible asset by a person or its representative, or by an independent person that acknowledges holding it for that person;

(aa) "Priority" means the right of a secured creditor to derive the economic benefit of its security right in an encumbered asset in preference to a competing claimant;

(bb) "Proceeds" means whatever is received in respect of an encumbered asset. The term includes what is received as a result of sale or other disposition or collection, lease or licence of an encumbered asset, civil and natural fruits, insurance proceeds, claims arising from defects in, damage to or loss of an encumbered asset, and proceeds of proceeds;

[*Note to the Working Group: The Working Group may wish to consider whether the definition of the term "proceeds" should be limited to proceeds received by the grantor, and not extend to proceeds received, for example, by a transferee of the original encumbered asset. A different approach could potentially prejudice a third party that acquired proceeds from a transferee and had no means of knowing or finding out that the asset was the proceeds of an asset in which somebody held a security right (e.g. grantor sells the encumbered asset, a green widget, to X who then trades it in for a blue widget and then sells the blue widget to Y. Y has no means of knowing or finding out that the blue widget is subject to a security right created by the grantor/transferor).*]

(cc) "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;

(dd) "Right to receive the proceeds under an independent undertaking" means the right to receive a payment due, a draft accepted or deferred payment incurred or another item of value, in each case to be paid or delivered by the guarantor/issuer, confirmer or nominated person giving value for a draw under an independent undertaking. The term also includes the right to receive payment in connection with the purchase by a negotiating bank of a negotiable instrument or a document under a complying presentation. The term does not include:

(i) The right to draw under an independent undertaking; or

(ii) What is received upon honour of an independent undertaking;

[*Note to the Working Group: The Working Group may wish to note that the definition of this term is included here only for the purposes of the articles in which this term is used, that is, article 1, subparagraph 3(a), under which the right to receive the proceeds is excluded from the scope of the draft Model Law, and article 1, paragraph 4, under which the proceeds of an excluded type of asset are also excluded*.]

(ee) "Secured creditor" means a creditor that has a security right. The term includes a transferee in an outright transfer of a receivable;

(ff) "Secured obligation" means an obligation secured by a security right. The term does not apply to outright transfers of receivables;

(gg) "Security agreement" means an agreement, regardless of whether the parties have denominated it as a security agreement, between a grantor and a secured creditor that creates a security right. The term also includes an agreement for the outright transfer of a receivable;

(hh) "Securities" means:

[(i)] An obligation of an issuer or any share or similar right of participation in an issuer or in the enterprise of an issuer that:

a. Is one of a class or series, or by its terms is divisible into a class or series; [and]

b. Is of a type dealt in or traded on a recognized market, or is issued as a medium for investment [and

(ii) The enacting State to specify any additional rights that should qualify as securities even if they do not satisfy the requirements expressed in subparagraphs (i) a. and (i) b.;]

(ii) "Securities account" means an account maintained by an intermediary to which securities may be credited or debited;

[*Note to the Working Group: The Working Group may wish to note that this definition is derived from article 1, subparagraph (c), of the Unidroit Convention on Substantive Rules for Intermediated Securities (the "Geneva Securities Convention")*.]

(jj) "Security right" means a property right in a movable asset that is created by an agreement to secure payment or other performance of an obligation, regardless of whether the parties have denominated it as a security right, and regardless of the type of asset, the status of the grantor or secured creditor, or the nature of the secured obligation. The term also includes the right of the transferee in an outright transfer of a receivable;

(kk) "Tangible asset" means all types of tangible movable asset. The term includes money, negotiable instruments, negotiable documents and certificated non-intermediated securities;

(ll) "Uncertificated non-intermediated securities" means non-intermediated securities not represented by a certificate.

Article 3. International obligations of this State

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

[*Note to the Working Group: The Working Group may wish to note that, at its twenty-sixth session, it agreed that this article should be based on article 3 of the UNCITRAL Model Law on Cross-Border Insolvency or on article 38 of the Assignment Convention (see A/CN.9/830, para. 17). However, the latter provision, which refers only to international agreements and to agreements that specifically govern a transaction governed by the* Assignment Convention*, contains a rule of hierarchy among international agreements (the specific prevails over the general text) rather than a domestic law rule dealing with the prevalence of international treaties over domestic law. To explicitly preserve the application of regional law (e.g. EU directives), the Working Group may also wish to consider including in this article a second paragraph that could read along the following lines: "This Law does not affect the application of the rules of a Regional Economic Integration Organization, whether adopted before or after this Law" (see art. 26(6) of the Hague Convention on Choice of Court Agreements of 30 June 2005). Alternatively, the Guide to Enactment could explain that article 3 is sufficient to cover rules of a regional organization*.]

Article 4. Party autonomy

1. Except as otherwise provided in articles [5, 6, 9, 33-36, 48, 49, 66, paragraph 4, and 79-94], the provisions of this Law may be derogated from or varied by agreement.

2. An agreement referred to in paragraph 1 does not [negatively] affect the rights or obligations of any person that is not a party to the agreement.

[*Note to the Working Group: The Working Group may wish to consider whether paragraph 2 should rather refer to a negative effect or modification of third-party rights, as an agreement may have an indirect effect on or benefit to third-party rights (e.g. a subordination agreement). The Working Group may also wish to consider whether article 47, subparagraph (d) (trade usages and practices), should be placed in this article (see note to article 47).*]

Article 5. General standards of conduct

1. A person must exercise its rights and perform its obligations under this Law in good faith and in a commercially reasonable manner.

2. The general standards of conduct set forth in paragraph 1:

(a) Cannot be waived unilaterally or varied by agreement; and

(b) Do not apply to an outright transfer of a receivable without recourse to the transferor.

[*Note to the Working Group: The Working Group may wish to consider whether subparagraph 2(a) is necessary given that article 4 already states that the rule embodied in this article cannot be waived unilaterally or varied by agreement. The Working Group may also wish to note that subparagraph 2(b) has been added pursuant to a decision by the Working Group, because, in an outright transfer of a receivable without recourse to the grantor (transferor), the grantor (transferor) has no remaining interest in the receivable that could be protected by a limitation on the way in which the secured creditor (transferee) could collect the receivable (see A/CN.9/836, para. 78). The Working Group may also wish to consider whether at the end of this chapter a new provision should be added to deal with the interpretation of the Model Law taking into account its international origin and the need to promote uniformity in its application and gap filling by reference to the principles on which the Model Law is based or, in the absence of such principles, in conformity with the law applicable by virtue of the conflict-of-laws rules of the forum (see, for example, art. 7 of the Assignment Convention, art. 7 of the CISG, art. 8 of the UNCITRAL Model Law on Cross-Border Insolvency, art. 3 of the UNCITRAL Model Law on Electronic Commerce, art. 4 of the UNCITRAL Model Law on Electronic Signatures, and art. 2A of the UNCITRAL Model Law on International Commercial Arbitration).*]

Chapter II. Creation of a security right

A. General rules

Article 6. Security agreement

1. A security right is created by a security agreement that satisfies the requirements of paragraphs 2 to 5, provided that the grantor has rights in the asset to be encumbered or the power to encumber it.

2. A security agreement may provide for the creation of a security right in a future asset, but the security right in that asset is created only at the time when the grantor acquires rights in it or the power to encumber it.

3. A security agreement must:

(a) Provide for the creation of a security right;

(b) Identify the secured creditor and the grantor;

(c) Describe the secured obligation;

(d) Describe the encumbered assets as provided in article 9[; and

(e) Indicate the maximum monetary amount for which the security right may be enforced].[3]

4. Except as provided in paragraph 5, a security agreement must be [the enacting State should specify whether the security agreement must be "concluded in" or "evidenced by" a writing] that satisfies the requirements of paragraph 3 and is signed by the grantor.

5. A security agreement may be oral if the secured creditor has possession [or control] of the encumbered asset.

[*Note to the Working Group: The Working Group may wish to consider whether the requirements set out in paragraph 3 apply only to situations in which a written security agreement is required (i.e. they do not apply to possessory security rights where an oral security agreement is permitted). In this regard, the Working Group may wish to note that, in the case of oral security agreements: (a) requirements (a)-(c) are already covered by paragraph 1 of this article insofar as it refers to the creation of a "security right" and requires a "security agreement", as defined in the draft Model Law; and (b) requirements (d) and (e) by their very nature are inapplicable to the situation where an oral security agreement is permitted because, where there is possession: (i) there is no need for a description that identifies the encumbered asset adequately since the very fact of possession satisfies the description requirement; and (ii) the requirement to agree to a maximum amount to be secured is inapplicable since this requirement is practically capable of being satisfied only if there is a written agreement. If the Working Group decides to delete paragraph 2, paragraph 3 should be revised to read along the following lines: "… a writing that: (a) identifies the secured creditor and the grantor; (b) describes the secured obligation; (c) describes the encumbered assets as provided in article 9; [and] (d) is signed by the grantor[; and (e) indicates the maximum monetary amount for which the security right may be enforced"*.]

Article 7. Obligations that may be secured

A security right may secure any type of obligation, present or future, determined or determinable, conditional or unconditional, fixed or fluctuating.

Article 8. Assets that may be encumbered

A security right may encumber:

(a) Any type of movable asset, including future assets;

(b) Parts of assets and undivided rights in movable assets;

(c) Generic categories of movable assets; and

(d) All of a grantor's movable assets.

[*Note to the Working Group: The Working Group may wish to consider whether subparagraphs (c) and (d) should be retained. Subparagraphs (c) and (d) deal with the description of the encumbered assets, a matter that is addressed in article 9; and subparagraph (d) may already be covered by subparagraph (a), which refers to both present and future assets*.]

[Article 9. Description of encumbered assets

1. The assets encumbered or to be encumbered must be described in the security agreement in a manner that reasonably allows their identification.

[3] The enacting State may wish to include this subparagraph in the draft Model Law if it determines that an indication of the maximum monetary amount for which the security right may be enforced would be helpful to facilitate lending from another creditor.

2. A description that indicates that the encumbered assets consist of all of the grantor's movable assets, or of all of the grantor's movable assets within a particular category satisfies the standard in paragraph 1.]

[*Note to the Working Group: The Working Group may wish to consider the question whether this article should apply only to written agreements. The Working Group may also wish to note that, in view of their importance, the requirements for the description of encumbered assets have been moved from article 6, subparagraph 3(d), to this new article, and aligned with article 12 of the registry-related provisions*.]

Article 10. Proceeds and proceeds in the form of funds commingled with other funds

1. A security right in an asset extends to its identifiable proceeds.

2. Notwithstanding paragraph 1, where proceeds in the form of funds credited to a bank account or money are commingled with other assets of the same kind the security right extends to the commingled assets.

3. Subject to paragraph 4, the maximum amount [of the secured obligation] for which the security right in the commingled assets may be enforced is limited to the value of the proceeds immediately before they were commingled.

4. If at any time after the commingling, the value of the balance credited to the bank account or of the commingled money is less than the value of the proceeds immediately before they were commingled, the obligation secured by the security right that is enforceable against the commingled assets in accordance with paragraph 2 is limited to the lowest value between the time when the proceeds were commingled and the time the security right in the proceeds is claimed.

[*Note to the Working Group: The Working Group may wish to consider whether the Guide to Enactment should explain that, if new proceeds are deposited after the account or pool of money is depleted below the value of the proceeds originally deposited or contributed, then one would need to reapply the lowest intermediate balance rule in paragraph 4 to these later proceeds (i.e. the amount of each proceeds claim must be assessed separately)*.]

Article 11. Tangible assets commingled in a mass or product

1. A security right in a tangible asset that is commingled in a mass of assets of the same kind or product extends to the mass or product.

2. A security right that continues in a mass in accordance with paragraph 1 is limited to the value of [the mass in the same proportion as the encumbered assets and the assets not encumbered contributed to value of the mass] [the quantity of the encumbered asset that became part of the mass].

3. A security right that continues in a product in accordance with paragraph 1 is limited to the value of [the product in the same proportion as the encumbered assets and the assets not encumbered contributed to value of the product] [the encumbered assets immediately before they became part of the product].

[4. Where more than one security right continues in the same mass or product and each was a security right in a separate tangible asset at the time of commingling, the secured creditors are entitled to share in the mass or product according to the ratio that the obligation secured by each security right bears to the sum of the obligations secured by all security rights.]

[*Note to the Working Group: The Working Group may wish to note that: (a) different rules are provided in this article for masses (para. 2) and products (para. 3); (b) paragraph 2 is intended to express more clearly the policy articulated in the* Secured Transactions Guide *(chap. II, paras. 90-92) and thus to account for the fluctuation in the price of commodities; (c) paragraph 3 reflects the rule in recommendation 22 of the* Secured Transactions Guide*; and (d) paragraph 4 has been added to more closely align this article with recommendations 22 and 91 of the* Secured Transactions Guide. *The Working Group may wish to consider the policy and the formulation of paragraphs 2 and 3. The Working Group may also wish to*

consider whether the second bracketed text in paragraphs 2 and 3 is sufficient to address situations in which: (a) the quantity, for example, of oil in the tank at the time of enforcement is less than the encumbered quantity of oil; and (b) because of a worsening in market conditions, the value of the product is less than the value of the encumbered asset.]

Article 11bis. Extinction of a security right

A security right is extinguished upon full payment or other satisfaction of the secured obligation[, provided that there is no further commitment by the secured creditor to extend credit secured by the encumbered assets.]

[*Note to the Working Group: The Working Group may wish to note that this article has been added at the end of chapter II pursuant to a decision by the Working Group (see A/CN.9/836, paras. 20 and 24). The Working Group may wish to note that reference to the extinction of a security right is made in article 49 (obligation of a secured creditor to return an encumbered asset), and article 21, subparagraph 2(c) of the registry-related provisions (compulsory registration of an amendment or cancellation notice). The Working Group may wish to consider whether article 69 (grantor's right to terminate enforcement) should also refer to the extinction of a security right, rather than to full payment of the secured obligation*.]

B. Asset-specific rules

Article 12. Contractual limitations on the creation of a security right

1. A security right in a receivable or other intangible asset, negotiable instrument or right to payment of funds credited to a bank account is effective as between the grantor and the secured creditor and as against the debtor of the receivable or other intangible asset, the obligor under a negotiable instrument, or the depositary bank notwithstanding an agreement limiting in any way the grantor's right to create a security right entered into between the initial or any subsequent grantor and:

(a) The debtor of the receivable or other intangible asset, the obligor under the negotiable instrument or the depositary bank; or

(b) Any subsequent secured creditor.

2. Nothing in this article affects any obligation or liability of the grantor for breach of the agreement referred to in paragraph 1, but the other party to the agreement may not avoid the contract giving rise to [the receivable or other intangible asset, negotiable instrument or right to payment of funds credited to a bank account] [the encumbered asset] or the security agreement on the sole ground of the breach of that agreement[, or raise against the secured creditor any claim it may have as a result of such a breach against the grantor, as provided in article 58, paragraph 2].

3. A person that is not a party to the agreement referred to in paragraph 1 is not liable for the grantor's breach of the agreement on the sole ground that it had knowledge of the agreement.

4. This article applies only to receivables:

(a) Arising from a 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 a 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) Arising upon [net settlement of payments due pursuant to a netting agreement involving more than two parties] [the termination of all outstanding transactions].

[*Note to the Working Group: The Working Group may wish to note that this article, which is based on recommendation 24 of the* Secured Transactions Guide*, which in turn is based on article 9 of the* United Nations Convention on the Assignment of Receivables in

International Trade *(the "*United Nations Assignment Convention*"), has been revised to address contractual limitations on the creation of a security right in assets in addition to receivables, namely other intangible assets, negotiable instruments and rights to payment of funds credited to a bank account (see A/CN.9/830, paras. 59-63). The Working Group may wish to consider the two sets of bracketed wording in paragraph 4(d) (the first set is based on rec. 24, subpara. (c)(iv) of the* Secured Transactions Guide*, while the second set is based on art. 1, subpara. 3(d) of the draft Model Law).*]

Article 13. Personal or property rights securing or supporting payment or other performance of an encumbered receivable or other intangible asset, or negotiable instrument

Option A

1. A secured creditor with a security right in a receivable or other intangible asset, or a negotiable instrument has the benefit of any personal or property right that secures or supports payment or other performance of the encumbered asset without any further action by either the grantor or the secured creditor.

2. If the right referred to in paragraph 1 is an independent undertaking, the security right automatically extends to the right to receive the proceeds of, but not the right to draw under, the independent undertaking.

Option B

1. A security right in a receivable or other intangible asset, or a negotiable instrument extends to any personal or property right that secures or supports payment or other performance of the encumbered asset that is transferable without a new act of transfer.

2. If the right referred to in paragraph 1 of this article is transferable only with a new act of transfer, the grantor is obliged to create a security right in it in favour of the secured creditor.

[3. This article does not affect a right in immovable property that under other law is transferable separately from the obligation that the right in the immovable property secures.]

4. Paragraph 1 does not affect any duties of the grantor to the debtor of the receivable or other intangible asset, or the obligor of the negotiable instrument.

5. To the extent that the automatic effects of paragraph 1 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 that is not covered in this Law.

[*Note to the Working Group: The Working Group may wish to consider alternatives A and B of paragraphs 1 and 2 of this article. Alternative A reflects the thrust of recommendation 25 of the* Secured Transactions Guide*, while alternative B reflects the thrust of article 10 of the* Assignment Convention *(rather than rec. 25). Under alternative B, the security right extends automatically to accessory security or supporting rights, while with respect to independent rights, the grantor is obliged to create a security right in them in favour of the secured creditor. Thus, there is no inconsistency with article 1, subparagraph 3(a), and there is no need to also include the full text of recommendation 127 of the* Secured Transactions Guide *to protect the rights of a guarantor/issuer, confirmer or nominated person of an independent undertaking. If alternative A were preferred, the Working Group may wish to consider whether the thrust of recommendation 127 (which has not been included in the draft Model Law as it does not apply to the right to receive the proceeds under an independent undertaking), should also be included in this article to avoid any adverse impact on the rights of a guarantor/issuer, confirmer or nominated person of an independent undertaking. The Working Group may wish to consider whether paragraph 4 should be retained in view of the fact that articles 56, 63 and 64 have been included in the draft Model Law so as to ensure that the rights of the debtor of an encumbered receivable and the obligor of an encumbered negotiable instrument under other law are protected. In this connection, the Working Group may wish to note that there is no provision equivalent to articles 60, 63 and 64 to preserve the rights of an obligor of an intangible asset other than a receivable*.]

Article 14. Negotiable documents and tangible assets covered

A security right in a negotiable document extends to the tangible asset covered by the document, provided that the issuer of the negotiable document is in possession of the asset[, directly or indirectly,] at the time the security right in the document is created.

[*Note to the Working Group: The Working Group may wish to consider whether the bracketed wording, which comes from recommendation 28 of the* Secured Transactions Guide, *should be retained*.]

Article 15. Tangible assets with respect to which intellectual property is used

A security right in a tangible asset with respect to which intellectual property is used does not extend to the intellectual property and a security right in the intellectual property does not extend to the tangible asset.

Chapter III. Effectiveness of a security right against third parties

A. General rules

Article 16. General methods for achieving third-party effectiveness

A security right in an asset is effective against third parties if:

(a) A notice with respect to the security right is registered in the general security rights registry (the "Registry") [or in any specialized registry or title certificate to be specified by the enacting State];[4] or

(b) The secured creditor has possession of that asset.

Article 17. Proceeds

1. If a security right in an asset is effective against third parties, a security right in any proceeds of that asset is effective against third parties without any further action by the grantor or the secured creditor if the proceeds are in the form of money, receivables, negotiable instruments or rights to payment of funds credited to a bank account.

2. If a security right in an asset is effective against third parties, a security right in any type of proceeds of that asset other than the types of proceeds referred to in paragraph 1 is effective against third parties:

(a) For [a short period of time to be specified by the enacting State] days after the proceeds arise; and

(b) Thereafter, if the security right in the proceeds is made effective against third parties by one of the methods applicable to the relevant type of encumbered asset referred to in this chapter before the expiry of the time period provided in subparagraph (a).

Article 18. Changes in the method for achieving third-party effectiveness

1. A security right made effective against third parties by one of the methods provided in this chapter may subsequently be made effective against third parties by any other method applicable to the relevant type of encumbered asset.

2. A security right that is effective against third parties remains effective against third parties despite a change in the method for achieving third-party effectiveness, provided that there is no time when the security right is not effective against third parties.

Article 19. Lapse in third-party effectiveness

1. If third-party effectiveness of a security right lapses, it may be re-established by any of the methods applicable to the relevant encumbered asset provided in this chapter.

[4] An enacting State may wish to implement this provision if it has a specialized registration system.

2. If the third-party effectiveness of a security right is re-established under paragraph 1, the security right is effective against third parties only as of the time its third-party effectiveness is re-established.

Article 20. Impact of a transfer of an encumbered asset

Except as provided in article 27 [of the registry-related provisions], a security right in an asset remains effective against third parties even if the asset is sold or otherwise transferred, leased or licensed.

[*Note to the Working Group: The Working Group may wish to consider whether the rule that a security right follows an encumbered asset in the hands of a transferee fits more in the chapter on third-party effectiveness (impact on registration; see art. 27 of the registry-related provisions) and in the chapter on priority (authorization of the transfer by the secured creditor or transfer in the ordinary course of business of the transferor; see art. 29, paras. 2 to 8)*.]

Article 21. Continuity in third-party effectiveness upon a change of the applicable law to this Law

1. If a security right is effective against third parties under the law of another State and this Law becomes applicable as a result of a change in the location of the encumbered asset or the grantor, whichever determines the applicable law under the provisions of chapter VIII, the security right remains effective against third parties under this Law for [a short period of time to be specified by the enacting State] days after the change and, thereafter, only if the third-party effectiveness requirements of this Law are satisfied before the expiry of that time period.

2. If the security right remains effective against third parties under paragraph 1, the time of third-party effectiveness is the time when it was achieved under the law of the other State.

[*Note to the Working Group: The Working Group may wish to consider whether this article should be placed in chapter VIII of the draft Model Law (conflict-of-laws). The Working Group may also wish to consider whether paragraph 2 of this article should also be inserted in articles 18 and 19 to explicitly state what is implied in those articles*.]

Article 22. Acquisition security rights in consumer goods

An acquisition security right in consumer goods is effective against third parties upon its creation without any further action by the grantor or the secured creditor.

B. Asset-specific rules

Article 23. Rights to payment of funds credited to a bank account

A security right in a right to payment of funds credited to a bank account may also be made effective against third parties by:

(a) The creation of the security right in favour of the depositary bank;

(b) The conclusion of a control agreement; or

(c) The secured creditor becoming the account holder.

[*Note to the Working Group: The Working Group may wish to consider whether this article should address the question of how a secured creditor may become the account holder (e.g. by changing the name in the account of the grantor or by debiting the account of the grantor and crediting the account of the secured creditor). Alternatively, the matter may be addressed in the Guide to Enactment*.]

Article 24. Negotiable documents and tangible assets covered

1. If a security right in a negotiable document is effective against third parties, the security right that extends to the asset covered by the document in accordance with article 14 is also effective against third parties.

2. During the period when a negotiable document covers an asset, a security right in the asset may be made effective against third parties by the secured creditor's possession of the document.

3. A security right in a negotiable document that was made effective against third parties by the secured creditor's possession of the document remains effective against third parties for [a short period of time to be specified by the enacting State] after the negotiable document has been relinquished to the grantor or other person for the purpose of ultimate sale or exchange, loading or unloading, or otherwise dealing with the assets covered by the negotiable document.

Article 25. Uncertificated non-intermediated securities

A security right in uncertificated non-intermediated securities may also be made effective against third parties by:

(a) The notation of the security right or entry of the name of the secured creditor in the books maintained by or on behalf of the issuer for the purpose of recording the name of the holder of the securities; or

(b) The conclusion of a control agreement.

(A/CN.9/WG.VI/WP.65/Add.1) (Original: English)

Note by the Secretariat on a draft model law on secured transactions

ADDENDUM

Contents

Chapter IV. The registry system

Article 26. Establishment of a public registry

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 accordance with [the legislative instrument or instruments to be specified by the enacting State (including the "registry-related provisions" set forth below)].

[*Note to the Working Group: The Working Group may wish to consider the name and the placement of the registry-related provisions in the draft Model Law. If they are included in this chapter, article 26 should be deleted as it is exactly the same as article 1 of the registry-related provisions, which was added pursuant to a decision by the Commission (A/70/17, para. 172). If, however, they are included in an annex (or part II) of the draft Model Law (for the enacting State to decide whether to include it in its secured transactions law, a separate act, decree, regulation or other act, or a combination thereof), both articles 26 of the draft Model Law and article 1 of the draft registry-related provisions may need to be retained.*]

Registry-related provisions

Section A. General provisions

[Article 1. Establishment of a public registry

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 accordance with [the legislative instrument or instruments to be specified by the enacting State (including the "registry-related provisions" set forth below)].]

Article 2. Definitions

(a) "Address" means:

(i) A physical address or a post office box number, city, postal code and State; or

(ii) An electronic address;

(b) "Amendment" means a modification with respect to information contained in a previously registered notice to which the amendment relates;

[(c) "Cancellation" means the removal from the public registry record of all information contained in a previously registered notice to which the cancellation relates;]

(d) "Designated field" means the space on the prescribed registry notice form designated for entering the specified type of information;

(e) "Law" means the law of the enacting State governing security rights in movable assets;

(f) "Notice" means a communication in writing (paper or electronic) to the Registry of information with respect to a security right. The term includes an initial notice, an amendment notice and a cancellation notice;

(g) "Registrant" means the person who submits the prescribed registry notice form to the Registry;

(h) "Registrar" means the person appointed 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 record;

(j) "Registration number" means a unique number assigned to an initial notice by the Registry and permanently associated with that notice and any related notice;

(k) "Registry" means [the enacting State's] system for receiving, storing and making accessible to the public information about security rights in movable assets; [and]

(l) "Registry record" means the information in all registered notices stored by the Registry; it consists of the record that is publicly accessible (public registry record) and the record that has been removed from the public registry record and archived (registry archives)[; and

(m) "Regulation" means the body of rules adopted by the enacting State with respect to the Registry, whether these rules are found in administrative guidelines or the Law].

[*Note to the Working Group: The Working Group may wish to note that: (a) if a State implements the registry-related provisions in the draft Model Law, it will need to include these definitions in article 2 of the draft Model Law; (b) the definition of the term "cancellation" appears within square brackets, since a cancellation in a State that chooses the "open drawer approach" of option B of article 31, paragraph 1, would not result in the removal of the registered information from the public registry record; (c) the definition of the term "Law" would be needed only if a State decided not to include all of the registry-related provisions in its secured transactions law; and (d) the term "Regulation" appears within square brackets (in subparas. (h) and (m)), since two of the options presented to States are to insert all of the registry-related provisions in their secured transactions law or in a separate law, in which case they would not need this definition. The Working Group may wish to consider whether an additional definition should be added along the following lines: "Registered notice means a notice after the information in the notice has been entered into the public registry record". In addition, the Working Group may wish to consider the placement in the text of the clarification that, if the Registry is operated by a governmental entity, it can exercise the supervisory functions foreseen in the registry-related provisions (e.g. art. 6, para. 2, art. 13, para. 2, art. 28, and art. 34, para. 2), while otherwise these functions should only be exercised by the governmental authority supervising the private entity operating the Registry. Moreover, the Working Group may wish to consider whether the notes to each defined term in the* Registry Guide *should also be included either in this article (or in article 2 of the draft Model Law) or in the Guide to Enactment.*]

Article 3. Grantor's authorization for registration

1. Registration of an initial notice is ineffective unless authorized by the grantor in writing.

2. Registration of an amendment notice that adds encumbered assets not included in the security agreement [or increases the maximum amount for which the security right to which the registration relates may be enforced][1] is ineffective unless authorized by the grantor in writing.

[1] This provision will be necessary if the enacting State implements article 6, subparagraph 3 (e), of the draft Model Law.

3. [With the exception of an amendment notice under article 27, registration] [2] [Registration] of an amendment notice that adds a grantor is ineffective unless authorized by the additional grantor in writing.

4. Authorization may be given before or after registration of a notice.

5. A written security agreement is sufficient to constitute authorization by the grantor for the registration of a notice.

6. The Registry may not require evidence of the existence of the grantor's authorization.

[*Note to the Working Group: The Working Group may wish to consider whether paragraph 6 is necessary, since paragraph 4 provides that the grantor's authorization may be given even after registration. The Working Group may also wish to note that, in line with recommendations 71 of the* Secured Transactions Guide *and the* Registry Guide *(see para. 101), paragraph 5 provides that authorization must be given by the grantor in writing. In this connection, the Working Group may wish to consider whether a new paragraph should be added to provide that possession by the secured creditor pursuant to an oral security agreement also constitutes sufficient authorization by the grantor.*]

Article 4. One notice sufficient for security rights under multiple security agreements

The registration of a single notice may relate to security rights created by the grantor under one or more than one security agreement [between the parties identified in the registered notice] [with the same secured creditor].

[*Note to the Working Group: The Working Group may wish to consider the two sets of words in square brackets in this article. The first contains the text agreed upon at the Commission session (see A/70/17, para. 171). However, where the name of the representative of the secured creditor is entered in the notice, the security agreement will not be "between the parties identified in the notice". The second set of* bracketed words *is intended to address this problem in a way that would be consistent with recommendation 68 of the* Secured Transactions Guide*, on which this article is based and which refers to an agreement "between the same parties" (same issue in article 5; see A/70/17, para. 173).*]

Article 5. Advance registration

A notice may be registered before the creation of a security right or the conclusion of a security agreement [between the parties identified in the notice] [to which the notice relates].

Section B. Access to registry services

Article 6. Public access

1. Any person may submit a notice to the Registry, if that person:

   (a) Uses the prescribed notice form; [and]

   (b) Identifies itself in the prescribed manner[; and

   (c) Has paid or arranged to pay the prescribed fee].[3]

2. A person that submits an amendment or cancellation notice must also [satisfy the secure access requirements to be specified by the Registry].

3. Any person may submit a search request to the Registry, if that person:

   (a) Uses the prescribed search request form[; and

   (b) Has paid or arranged to pay the prescribed fee].[4]

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[2] This wording will be necessary if the enacting State implements option A or option B of article 27 below.

[3] This provision will be necessary if the enacting State implements option A of article 34 below.

[4] This provision will be necessary if the enacting State implements option A of article 34 below.

4. If access is refused, the Registry must communicate the reason to the registrant or searcher without delay.

Article 7. Rejection of the registration of a notice or a search request

1. The Registry must reject the registration of a notice if:

(a) No information is entered in one or more of the required designated fields; or

(b) The information entered in a required designated field is not legible[; or

(c) An amendment notice that seeks to extend the period of effectiveness of a registration is not submitted within the period referred to in article 15, paragraph 2].[5]

2. The Registry must reject a search request if:

(a) No information is entered in one of the fields designated for entering a search criterion; or

(b) If the information entered in a required designated field is not legible.

3. Except as provided in paragraph 1 or 2, the Registry may not reject the registration of a notice or a search request.

4. If the registration of a notice or a search request is rejected, the Registry must communicate the reason to the registrant or searcher without delay.

Article 8. No verification by the Registry

The Registry must maintain information about the registrant's identity submitted in accordance with article 6, subparagraph 1 (b), but may not require verification of that information, or conduct any scrutiny of the content of a notice or search request.

Section C. Registration of a notice

Article 9. Information required in an initial notice

An initial notice must contain the following information in the relevant designated field:

(a) The identifier and address of the grantor [and any additional information that the enacting State may decide to require to be entered to assist in uniquely identifying the grantor] in accordance with article 10;

(b) The identifier and address of the secured creditor or its representative in accordance with article 11; [and]

(c) A description of the encumbered assets in accordance with article 12;

[(d) The period of effectiveness of the registration in accordance with article 15];[6] and

[(e) A statement of the maximum amount for which the security right to which the registered notice relates may be enforced.][7]

Article 10. Grantor identifier

1. Where the grantor is a natural person, the identifier of the grantor is the name of the grantor, as it appears in [the relevant official document in the order in which it should be used to determine the grantor's name to be specified by the enacting State].

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[5] This provision will be necessary if the enacting State implements option B or option C of article 15, paragraph 2, below.

[6] This provision will be necessary, if the enacting State implements option B or option C of article 15 below.

[7] This provision will be necessary if the enacting State includes in its law article 6, subparagraph 3 (e), of the draft Model Law.

2. [The enacting State should specify which components of the grantor's name determined in accordance with paragraph 1 must be entered in the notice].

3. [The enacting State should specify the way in which the grantor's name is determined if the name is legally changed after the issuance of the relevant document referred to in paragraph 1.]

4. Where the grantor is a legal person, the grantor identifier is the name of the grantor that appears in [the most recent document, law or decree to be specified by the enacting State] constituting the legal person.

5. [The enacting State should specify whether additional information must be entered in the notice in special cases, such as where the grantor is subject to insolvency proceedings, a trustee, or a representative of the estate of a deceased person.]

Article 11. Secured creditor identifier

1. Where the secured creditor is a natural person, the secured creditor identifier is the name of the secured creditor or its representative as it appears in [the relevant official document in the order in which it should be used to determine the secured creditor's name to be specified by the enacting State].

2. Where the secured creditor is a legal person, the secured creditor identifier is the name of the secured creditor or its representative that appears in [the most recent document, law or decree to be specified by the enacting State] constituting the legal person.

3. [The enacting State should specify whether additional information must be entered in the notice in special cases, such as where the secured creditor is subject to insolvency proceedings, a trustee, or a representative of the estate of a deceased person.]

Article 12. Description of encumbered assets

1. The assets encumbered or to be encumbered must be described in a notice in a manner that reasonably allows their identification.

2. A description that indicates that the encumbered assets consist of all of the grantor's movable assets, or of all of the grantor's movable assets within a particular category, satisfies the standard in paragraph 1.

Article 13. Language of information in a notice

1. With the exception of the names and addresses of the grantor and the secured creditor or its representative, the information contained in a notice must be expressed in [the language or languages to be specified by the enacting State].

2. The information contained in a notice must be expressed in the character set prescribed and publicized by the Registry.

Article 14. Time of effectiveness of the registration of a notice

1. The registration of an initial or amendment notice is effective from the date and time when the information in the notice is entered into the registry record so as to be accessible to searchers of the public registry record.

2. The Registry must enter information in an initial or amendment notice into the registry record without delay after the notice is submitted and in the order in which each notice was submitted.

3. The Registry must record the date and time when the information in an initial or amendment notice is entered into the registry record so as to be accessible to searchers of the public registry record.

Option A[8]

4. The registration of a cancellation notice is effective from the date and time when the information in the notice to which it relates is no longer accessible to searchers of the public registry record.

Option B[9]

4. The registration of a cancellation notice is effective from the date and time when the information in the notice is entered into the registry record so as to be accessible to searchers of the public registry record.

Option A[10]

5. The Registry must record the date and time when the information in the initial or amendment notice to which a cancellation notice relates is no longer accessible to searchers of the public registry record.

Option B[11]

5. The Registry must record the date and time when the information in a cancellation notice is entered into the registry record so as to be accessible to searchers of the public registry record.

Article 15. Period of effectiveness of the registration of a notice

Option A

1. The registration of an initial notice is effective for [a period of time to be specified by the enacting State].

2. The period of effectiveness of the registration of an initial notice may be extended within [a period of time to be specified by the enacting State] before its expiry by the registration of an amendment notice providing for an extension.

3. The period of effectiveness of the registration of an initial notice may be extended more than once.

4. The registration of an amendment notice in accordance with paragraph 2 extends the period of effectiveness for the period referred to in paragraph 1 beginning from the time the current period would have expired if the amendment notice had not been registered.

Option B

1. The registration of an initial notice is effective for the period of time indicated by the registrant in the designated field of the notice.

2. The period of effectiveness of the registration of an initial notice 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.

3. The period of effectiveness of the registration of an initial notice may be extended more than once.

4. The registration of an amendment notice in accordance with paragraph 2 extends the period of effectiveness for the period indicated in the amendment notice beginning from the time the current period would have expired if the amendment notice had not been registered.

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[8] This provision will be necessary, if the enacting State implements option A or option B of article 22 below.

[9] This provision will be necessary, if the enacting State implements option C or option D of article 22 below.

[10] This provision will be necessary, if the enacting State implements option A of paragraph 4 of this article.

[11] This provision will be necessary, if the enacting State implements option B of paragraph 4 of this article.

Option C

1. The registration of an initial notice is effective for the period of time indicated by the registrant in the designated field of the notice, not exceeding [a maximum period of time to be specified by the enacting State].

2. The period of effectiveness of the registration of an initial notice may be extended within [a period to be specified by the enacting State] before its expiry by the registration of an amendment notice that indicates in the designated field a new period not exceeding the maximum period of time referred to in paragraph 1.

3. The period of effectiveness of the registration of an initial notice may be extended more than once.

4. The registration of an amendment notice in accordance with paragraph 2 extends the period of effectiveness for the period specified in the amendment notice beginning from the time the current period would have expired if the amendment notice had not been registered.

Article 16. Obligation to send a copy of a registered notice

1. Without delay after the registration of a notice, the Registry must send to the person identified in the notice as the secured creditor at its address set forth in the notice a copy of the information in a registered notice, indicating: (a) the date and time when the registration became effective; and (b) the registration number assigned to the notice.

2. Within [a short period to be specified by the enacting State] after the person identified in a registered notice as the secured creditor receives a copy of the information in the notice in accordance with paragraph 1, that person must send it to the person identified in the notice as the grantor:

(a) At the address set forth in the notice; or

(b) If that person knows that the address has changed, at the most recent address known to that person or an address reasonably available to that person.

[3. Failure of the person identified in a registered notice as the secured creditor to meet the obligation under paragraph 2 may result only in [an amount of nominal penalties to be specified by the enacting State] and any damages resulting from that failure that may be proven.]

[4.] Upon request by the person identified in a registered notice as the grantor, the Registry must provide the information about the registrant's identity obtained under article 6, subparagraph 1 (b).

[*Note to the Working Group: The Working Group may wish to note that paragraphs 3 and 4 have been added pursuant to a decision by the Commission (A/70/17, paras. 188 and 189).*]

Section D. Amendments and cancellations

Article 17. Right to register an amendment or cancellation notice

1. Subject to paragraph 2, the person identified in a registered initial notice as the secured creditor may register an amendment or cancellation notice relating to that notice.

2. Upon registration of an amendment notice changing the person identified in a registered initial notice as the secured creditor, only the person identified in the amendment notice as the secured creditor may register an amendment or cancellation notice.

Article 18. Information required in an amendment notice

1. An amendment notice must contain in the relevant designated field:

(a) The registration number; and

(b) The information to be added, deleted or changed.

2. An amendment notice may relate to one or more than one item of information in a notice.

Article 19. Global amendment of secured creditor information

Option A

The person identified in multiple registered notices as the secured creditor may register a single amendment notice to amend its identifier, its address or both, if the name, address or both of that person change or the secured obligation is assigned.

Option B

[The enacting State may wish to specify a way for the Registry to amend the identifier, address or both of the person identified as the secured creditor in multiple registered notices upon the request of that person where its name, address or both change or the secured obligation is assigned.]

Article 20. Information required in a cancellation notice

A cancellation notice must contain in the designated field the registration number assigned by the Registry to the registered initial notice to which the cancellation relates.

Article 21. Compulsory registration of an amendment or cancellation notice

1. The secured creditor must register an amendment notice if:

(a) The registered notice to which it relates contains information that exceeds the scope of the grantor's authorization; or

(b) The security agreement to which the registered notice relates has been revised to delete some encumbered assets or to reduce the maximum amount indicated in the registered notice and the grantor has not otherwise authorized the registration of a notice containing that revised information.

2. The secured creditor must register a cancellation notice if:

(a) The registration of an initial notice was not authorized by the grantor;

(b) The registration of an initial notice was authorized by the grantor but the authorization has been withdrawn and no security agreement has been concluded; or

(c) The security right to which the notice relates has been extinguished.

3. [In a case falling within subparagraphs 1 (a) and (2) (a), the] [The] secured creditor may not charge or accept any fee or expense for complying with its obligation.

4. If any of the conditions set out in paragraph 1 or 2 are met, the grantor is entitled to request the secured creditor in writing to register an amendment or cancellation notice and the secured creditor may not charge or accept any fee or expense.

5. If the secured creditor does not comply with the grantor's written request referred to in paragraph 4 within [a short period to be specified by the enacting State] after its receipt, the grantor is entitled to seek the registration of an amendment or cancellation notice through [a summary judicial or administrative procedure to be specified by the enacting State].

6. An amendment or cancellation notice in accordance with paragraph 4 is registered by

Option A

the Registry without delay upon receipt of the notice with a copy of the relevant order.

Option B

[the judicial or administrative officer to be specified by the enacting State] without delay upon the issuance of the relevant order with a copy of the order.

Article 22. Amendment or cancellation notices not authorized by the secured creditor

Option A

The registration of an amendment or cancellation notice is effective regardless of whether it is authorized by the person identified in the registered initial [or amendment] notice as the secured creditor.

Option B

1. Subject to paragraph 2, the registration of an amendment or cancellation notice is effective regardless of whether it is authorized by the person identified in the registered initial [or amendment] notice as the secured creditor.

2. The unauthorized registration of an amendment or cancellation notice does not affect the priority of the security right to which it relates as against the right of a competing claimant [which arose before the registration and] over which the security right had priority before the registration.

Option C

The registration of an amendment or cancellation notice is ineffective unless authorized by the person identified in the registered initial [or amendment] notice as the secured creditor.

Option D

1. Subject to paragraph 2, the registration of an amendment or cancellation notice is ineffective unless authorized by the person identified in the registered initial [or amendment] notice as the secured creditor.

2. The unauthorized registration of an amendment or cancellation notice is nonetheless effective as against a competing claimant whose right was acquired in reliance on a search of the registry record made after the registration of the amendment or cancellation notice, provided that it did not have knowledge that the registration was unauthorized at the time it acquired its right.

Section E. Searches

Article 23. Search criteria

A search of the public registry record may be conducted according to:

(a) The identifier of the grantor; or

(b) The registration number assigned to the initial notice.

Article 24. Search results

1. Upon submission of a search request, the Registry must provide a search result that indicates the date and time when the search was performed and:

Option A

(a) Sets forth all information in each registered notice that contains information matching the search criterion exactly; or

(b) Indicates that no registered notice contains information matching the search criterion exactly.

Option B

(a) Sets forth all information in each registered notice that contains information matching the search criterion:

(i) exactly; or

(ii) where the search criterion is the grantor identifier, closely [under criteria to be specified by the enacting State];

(b) Indicates that no registered notice contains information matching the search criterion:

(i) exactly; or

(ii) where the search criterion is the grantor identifier, closely [under criteria to be specified by the enacting State].

2. Upon request by a searcher, the Registry must issue an official search certificate indicating the search result.

3. A written search result that purports to have been issued by the Registry is proof of its contents in the absence of evidence to the contrary.

Section F. Errors and post-registration changes

Article 25. Registrant errors in required information

1. An error in the grantor identifier entered in a notice does not render the registration of the notice ineffective if the notice would be retrieved by a search of the registry record using the grantor's correct identifier as the search criterion.

[2. An error in the grantor identifier entered in a notice does not render the registration of the notice ineffective if the notice would be retrieved as a close match [under criteria to be specified by the enacting State] by a search of the registry record using the grantor's correct identifier as the search criterion, unless the error would seriously mislead a reasonable searcher.]

[3.] An error in the grantor identifier entered in a notice does not render the registration of the notice ineffective with respect to other grantors correctly identified in the notice.

[4.] An error in required information other than the grantor's identifier entered in a notice does not render the registration ineffective unless the error would seriously mislead a reasonable searcher.

[5.] An error in the description of an encumbered asset in a notice does not render the registration of the notice ineffective with respect to other encumbered assets sufficiently described.

[6.] Notwithstanding paragraph 4, an error in the period of effectiveness of registration[12] or the maximum amount for which the security right may be enforced entered in a notice,[13] does not render the notice ineffective, except to the extent it seriously misled third parties that relied on the information set out on the notice.

Article 26. Post-registration change of grantor identifier

1. If the grantor's identifier changes after a notice is registered and the secured creditor registers an amendment notice indicating the new identifier of the grantor within [a short period of time to be specified by the enacting State] after the change but before the expiry of the period of effectiveness of the registered notice, the security right to which the notice relates remains effective against third parties and retains whatever priority it had over the rights of competing claimants before the change.

2. If the secured creditor registers an amendment notice after the expiration of the time period indicated in paragraph 1 or does not register an amendment notice at all:

(a) A 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 the

[12] This provision will be necessary, if the enacting State implements option B or option C of article 15 above.

[13] This provision will be necessary, if the enacting State implements article 9, subparagraph (e), above.

registration of the amendment notice has priority over the security right to which the amendment notice relates; and

(b) A person that buys, leases or licenses the encumbered asset after the change in the grantor's identifier but before the registration of the amendment notice acquires its rights free of the security right to which the amendment notice relates.

Article 27. Post-registration transfer of an encumbered asset

Option A

1. If a security right in an encumbered asset has been made effective against third parties by registration of a notice and the encumbered asset is transferred to a transferee that acquires its rights subject to the security right under article 29, the security right remains effective against third parties and retains whatever priority it had over the rights of competing claimants before the transfer, provided that the secured creditor registers an amendment notice adding the transferee's identifier and address as a new grantor within [a short period of time to be specified by the enacting State] after the secured creditor acquires knowledge of the transfer.

2. If the secured creditor registers an amendment notice after the expiration of the time period indicated in paragraph 1 or does not register an amendment notice at all:

(a) A security right created by the transferee with respect to which a notice is registered or which is otherwise made effective against third parties after the transfer but before the registration of the amendment notice has priority over the security right to which the amendment notice relates; and

(b) A person that buys, leases or licenses the encumbered asset after its transfer but before the registration of the amendment notice acquires its rights free of the security right to which the amendment notice relates.

3. A security right in intellectual property that has been made effective against third parties by registration of a notice remains effective against third parties and retains its priority notwithstanding a transfer of the encumbered asset covered by the notice.

4. In the case of successive transfers of an encumbered asset, paragraphs 1, 2 and 3 apply to the last transfer.

Option B

1. If a security right in an encumbered asset has been made effective against third parties by registration of a notice and the encumbered asset is transferred to a transferee that acquires its rights subject to the security right under article 29, the security right remains effective against third parties and retains whatever priority it had over the rights of competing claimants before the transfer, provided that the secured creditor registers an amendment notice adding the transferee's identifier and address as a new grantor within [a short period of time to be specified by the enacting State] after the transfer.

2. If the secured creditor registers an amendment notice after expiration of the time period indicated in paragraph 1 or does not register an amendment notice at all:

(a) A security right created by the transferee with respect to which a notice is registered or which is otherwise made effective against third parties after the transfer but before the registration of the amendment notice has priority over the security right to which the amendment notice relates; and

(b) A person that buys, leases or licenses the encumbered asset after its transfer but before the registration of the amendment notice acquires its rights free of the security right to which the amendment notice relates.

3. A security right in intellectual property that has been made effective against third parties by registration of a notice remains effective against third parties and retains its priority notwithstanding a transfer of the encumbered asset covered by the notice.

4. In the case of successive transfers of an encumbered asset, paragraphs 1, 2 and 3 apply to the last transfer.

Option C

1. A security right in an encumbered asset that has been made effective against third parties by registration of a notice remains effective against third parties and retains its priority notwithstanding a transfer of the encumbered asset covered by the notice.

2. In the case of successive transfers of an encumbered asset, paragraph 1 applies to the last transfer.

[*Note to the Working Group: The Working Group may wish to note that the article dealing with the post-registration transfer of intellectual property has been added to options A and B of this article as paragraph 3 (it is not necessary in option C, as this option adopts the same rule for all types of asset). The Working Group may also wish to note that a new paragraph has been added to all options in this article to address successive transfers pursuant to a decision by the Commission (see A/70/17, para. 209).*]

Section G. Organization of the Registry and the registry record

Article 28. Appointment of the registrar

The [the appropriate executive, ministerial or other authority to be specified by the enacting State] is authorized to appoint and dismiss the registrar, and determine the registrar's duties.

Article 29. Organization of information in registered notices

1. The Registry must assign a unique registration number to a registered initial notice and associate all registered amendment or cancellation notices that contain that number with the initial notice.

2. The Registry must organize the registry record so that the information in a registered initial notice and in any associated registered notice can be retrieved:

Option A[14]

(a) As an exact match by a searcher of the registry record that uses the identifier of the grantor or the registration number assigned to the initial notice as the search criterion;

Option B[15]

(a) As an exact match by a searcher of the registry record that uses the identifier of the grantor or the registration number assigned to the initial notice as the search criterion, or as a close match by a searcher of the registry record that uses the identifier of the grantor as the search criterion; and

Option A[16]

(b) By the person identified in multiple notices as the secured creditor that uses its identifier or the registration number assigned to the initial notice as the search criterion.

Option B[17]

(b) By the Registry that uses the identifier of the person identified in multiple notices as the secured creditor or the registration number assigned to multiple initial notices as the search criterion.

3. Upon registration of an amendment or cancellation notice, the Registry may not amend or delete information contained in any associated registered notice, and the registration of

[14] This provision will be necessary, if the enacting State implements option A of article 24, paragraph 1, above.
[15] This provision will be necessary, if the enacting State implements option B of article 24, paragraph 1, above.
[16] This provision will be necessary, if the enacting State implements option A of article 19 above.
[17] This provision will be necessary, if the enacting State implements option B of article 19 above.

an amendment or cancellation notice does not result in the amendment or deletion of information in any associated notice.

Article 30. Integrity of information in the registry record

1. Except as provided in articles 31 and 32, the Registry may not amend or delete information contained in the registry record.

2. The Registry must preserve information contained in the registry record and reconstruct in the event of loss or damage.

Article 31. Removal of information from the public registry record and archival

Option A

Upon the expiry of the period of effectiveness of the registration of a notice in accordance with article 15 or upon registration of a cancellation notice in accordance with article 20 or 21, the Registry must remove information in a registered notice from the public registry record.

Option B

1. The Registry must remove information in a registered notice from the public registry record only upon the expiry of the period of effectiveness of the registration of a notice in accordance with article 15.

2. The Registry must archive information removed from the public registry record in accordance with paragraph 1 for [a period at least co-extensive with its prescription period for disputes arising from a security agreement to be specified by the enacting State] in a manner that enables the information to be retrieved by the Registry in accordance with article 29.

[*Note to the Working Group: The Working Group may wish to note that option B of paragraph 1 is intended to accommodate the "open-drawer approach", in which, unless a registered notice expired, all information in the public registry record would be available to searchers and the Registry would not have the authority to do anything but accept, retain and disclose all information (see A/70/17, para. 213).*]

Article 32. Correction of errors by the Registry

1. Without delay after discovering that it made an error or omission in entering into the registry record the information contained in a notice submitted for registration or erroneously removed from the registry record information contained in a registered notice, the Registry must

Option A

register a notice to correct the error or omission, or restore the erroneously removed information, and send a copy of the information in the registered notice to the person identified in the notice as the secured creditor.

Option B

inform the person identified in the registered notice as the secured creditor so as to enable that person to register a notice to correct the error or omission or restore the erroneously removed information.

2. The registration of a notice referred to in paragraph 1 is effective

Option A

as of the time the information in the notice becomes accessible to searchers of the registry record.

Option B

as of the time the information in the notice becomes accessible to searchers of the registry record, except that the security right to which the notice relates has the priority it would otherwise have had over the right of a competing claimant but for the Registry's error or omission or the Registry's erroneous removal of the information.

Option C

as of the time it would have been effective if the error or omission had never been made or the information had never been erroneously removed.

Option D

as of the time it would have been effective if the error or omission had never been made or the information had never been erroneously removed, except that the security right to which the notice relates is subordinate to the right of a competing claimant that acquired a right in the encumbered asset in reliance on a search of the public registry record made before the notice was registered, provided the competing claimant did not have knowledge of the error or omission or the erroneous removal of the information at the time it acquired its right.

[*Note to the Working Group: The Working Group may wish to note that, in accordance with a decision of the Working Group, this article has been aligned with revised article 22 on amendment or cancellation notices that are not authorized by the secured creditor (see A/CN.9/836, para. 106). However, the Working Group may also wish to note that the issue of the impact of notices correcting Registry errors on the effectiveness and priority of the security right to which the correction relates as against intervening third-party rights is different than the issue addressed in article 22. The Working Group may thus wish to consider that: (a) paragraph 1 should be retained so as to ensure that the Registry is authorized to correct its errors; and (b) paragraph 2 should be deleted, as it may not be possible to come up with a set of alternative rules equivalent to the set of options reflected in article 22. If this approach were adopted, a notice registered to correct a registry error or omission (or to restore erroneously removed information) would take effect only as of the time the information in the notice becomes searchable (in accordance with the general rule reflected in article 14). As a result, the secured creditor that was the victim of the Registry's error might find itself subordinated to a competing claimant that acquired a right in the encumbered asset before the registry record was corrected. In that event, its only recourse would be to claim compensation against the Registry subject to any limitation on the liability of the Registry under article 33. The Working Group may also wish to consider the application of article 32 where the enacting State adopts the "open-drawer approach" contained in option A of article 31, paragraph 1.*]

Article 33. Limitation of liability of the Registry

Option A

Any liability that the Registry may have under other law is limited for loss or damage caused by:

(a) An error or omission in a search result issued to a searcher or in a copy of a registered notice sent to the secured creditor [up to a maximum amount to be specified by the enacting State]; [and]

(b) An error or omission in entering or failing to enter information in the registry record or in erroneously removing information from the registry record [up to a maximum amount to be specified by the enacting State];

(c) A failure of the Registry to send a copy of the registered notice to the person identified in the notice as the secured creditor in accordance with article 16, paragraph 1 and article 32, paragraph 1; and

(d) The provision of false or misleading information to a registrant or searcher.

Option B

Any liability that the Registry may have under other law for loss or damage caused by an error or omission in the administration or operation of the Registry is limited to [a maximum amount to be specified by the enacting State].

Option C

The Registry is not liable for loss or damage caused to a person by an error or omission in the administration or operation of the Registry.

[*Note to the Working Group: The Working Group may wish to consider the options presented in this article. If the Working Group decides to retain option A, the Working Group may wish to consider whether the limitation of liability up to a maximum amount should be placed in the chapeau of option A for it to apply to all of the subparagraphs of option A.*]

Article 34. Registry fees

Option A

1. The Registry may charge [the fees at cost-recovery level or lower to be specified by the enacting State] for [the services to be specified by the enacting State].

2. The Registry must publicize its fee schedule, which it may modify from time to time.

3. The Registry may enter into an account agreement with any person to facilitate the registration process, including the payment of registry fees.

Option B

The Registry may not charge any fee for its services.

(A/CN.9/WG.VI/WP.65/Add.2) (Original: English)

Note by the Secretariat on a draft model law on secured transactions

ADDENDUM

Contents

Chapter V. Priority of a security right

A. General rules

Article 27. Competing security rights

1. Subject to articles 28-37, priority among competing security rights created by the same grantor in the same encumbered asset is determined according to the order of third-party effectiveness.

[2. Priority among competing security rights created by different grantors in the same encumbered asset is determined according to the order of third-party effectiveness[, provided that, upon transfer of the encumbered asset, the secured creditor of each grantor complies with the requirements of article 27, option A or B, [of the registry-related provisions] to preserve the third-party effectiveness and priority of its security right].]

[3.] 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 period during which the security right is not effective against third parties.

[4.] The priority of a security right in the proceeds of an encumbered asset is the same as the priority of the security right in that asset.

[5.] If two or more security rights in the same tangible asset continue in a mass or product as provided in article 11, 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.

[6.] 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.

[7.] For the purposes of paragraph [6], the maximum value of a security right is the lesser of the value determined in accordance with article 11 and the amount of the secured obligation.

[8.] 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.

[*Note to the Working Group: The Working Group may wish to consider paragraph 2, which has been added within square brackets to deal with priority conflicts among security rights granted by different grantors (i.e. the grantor and successive transferees of the same encumbered asset). In this connection, the Working Group may wish to note that paragraph 2 may need to be coordinated with articles 18 and 19. The Working Group may also wish to note that paragraph 4 has been revised to deal with the priority of a security right in the proceeds of an encumbered asset, rather than with the time of third-party effectiveness, as recommendation 100 of the* Secured Transactions Guide*, on which it was originally based. The Working Group may also wish to consider whether paragraphs 5 and 6 of this article will need to be coordinated further with article 11*.]

Article 28. Competing security rights in the case of advance registration

Option A

The priority of a security right with respect to which a notice has been registered in the Registry before the conclusion of a security agreement or, in the case of a security right in a future asset, before the grantor acquires rights in the asset or the power to encumber it, is determined according to the time of registration.

Option B

[For the purposes of articles 27, paragraph 1, 30, paragraph 1 and 33, paragraph 1, […] in] [In] the case of a security right with respect to which a notice has been registered in the Registry before the conclusion of a security agreement or, in the case of a security right in a future asset, before the grantor acquires rights in the asset or the power to encumber it, the time of registration is treated as the time of third-part effectiveness [, provided that is there is no period after the time of registration in which there is neither registration nor third-party effectiveness].

[*Note to the Working Group: The Working Group may wish to note that this article has been included in the draft Model Law pursuant to a decision by the Working Group (see A/CN.9/830, para. 86) and consider the options offered. The Working Group may also wish to consider the heading and the scope of this article (that is, whether it should apply also in the case of competing security rights or also in the case of a priority conflict between a security right and the rights of a transferee of an encumbered asset (art. 30, para. 1) or a judgement creditor (art. 33, para. 1).*]

Article 29. Rights of buyers or other transferees, lessees or licensees of an encumbered asset

1. If an encumbered asset is sold or otherwise transferred, leased or licensed and a security right in that asset is effective against third parties at the time of the sale or other transfer, lease or licence, a buyer or other transferee, lessee or licensee acquires its rights subject to the security right except as provided in this article.

2. A buyer or other transferee of an encumbered asset acquires its rights free of the security right, if the secured creditor authorizes a sale or other transfer of the asset free of the security right.

3. The rights of a lessee or licensee 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 encumbered asset sold in the ordinary course of the seller's business acquires its rights free of the security right, provided that, at the time of the conclusion of the sale agreement, 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 encumbered asset leased in the ordinary course of the lessor's business are not affected by the security right, provided that, at the time of the conclusion of the lease agreement, the lessee does not have knowledge that the lease violates the rights of the secured creditor under the security agreement.

6. Subject to the rights of a secured creditor with a security right in intellectual property in accordance with article 45, the rights of a non-exclusive licensee of an intangible encumbered asset licensed in the ordinary course of the licensor's business are not affected by the security right, provided that, at the time of the conclusion of the licence agreement, the licensee does not have knowledge that the licence violates the rights of the secured creditor under the security agreement.

7. If a buyer or other transferee of a tangible encumbered asset acquires its rights free of a security right, any subsequent buyer or other transferee also acquires its rights free of that security right.

8. If the rights of a lessee of a tangible encumbered asset or licensee of an intangible encumbered asset are not affected by the security right, the rights of any sub-lessee or sub-licensee are also unaffected by that security right.

[*Note to the Working Group: The Working Group may wish to consider whether it is sufficiently clear that exceptions to the rule in paragraph 1 apply only to buyers or other transferees, lessees or licensees for value, and not to donees or other gratuitous transferees, is sufficiently clear or whether the matter should be explicitly clarified in this article or in the Guide to Enactment (see* Secured Transactions Guide*, chap. V, para. 89).*]

Article 30. Rights of buyers or other transferees, lessees or licensees of an encumbered asset in the case of specialized registration[18]

1. A security right in an asset that is made effective against third parties by registration in [the enacting State to specify the specialized registry or title certificate, if any] has priority over a security right in the same asset which is made effective against third parties by any other method.

2. If an encumbered asset is sold or otherwise transferred, leased or licensed and, at the time of the sale or other transfer, lease or licence, a security right in that asset is effective against third parties by registration in [the enacting State to specify the specialized registry or title certificate, if any], the buyer or other transferee, lessee or licensee acquires its rights subject to the security right, except as provided in paragraphs 2-8 of article 29.

3. If a security right in an asset that may be made effective against third parties by registration in [the enacting State to specify the specialized registry or title certificate, if any],

[18] This rule is an example for the consideration of enacting States that have a specialized registration regime.

has not been made effective against third parties by such registration, a buyer or other transferee acquires its rights free of the security right and a lessee's or licensee's rights are unaffected by the security right.

[*Note to the Working Group: The Working Group may wish to note that the heading of this article does not reflect the contents of paragraph 1 and to consider whether: (a) the heading should be adjusted; or (b) paragraph 1 should be included in article 28, and paragraphs 2 and 3 should be included in article 29.*]

Article 31. Rights of the insolvency representative

[1.] A security right that is effective against third parties under this Law at the time of the commencement of insolvency proceedings with respect to the grantor remains effective against third parties and retains the priority it had before the commencement of the insolvency proceedings, unless another claim has priority pursuant to [the enacting State to specify its insolvency law].

[[2.] If a security right is effective against third parties at the time of commencement of insolvency proceedings with respect to the grantor, the secured creditor is entitled to take any action necessary to maintain the third-party effectiveness and priority the security right had before commencement of the insolvency proceedings.

[3.] An acquisition security right that is effective against third parties by the registration of a notice in the Registry after the commencement of insolvency proceedings with respect to the grantor and within the period specified in article 34, subparagraph (a)(ii), has the priority under this Law that it acquires as a result of such registration.]

[*Note to the Working Group: The Working Group may wish to note that paragraph 1 is based on recommendation 4 of the* UNCITRAL Legislative Guide on Insolvency Law *and recommendations 238 and 239 of the* Secured Transactions Guide, *paragraph 2 is based on recommendation 238 of the* Secured Transactions Guide *(see A/CN.9/830, para. 87) and paragraph 3 is intended to state explicitly what is implicit in paragraph 1 of this article and article 34. As these recommendations refer to what the insolvency law should provide, the Working Group may wish to consider whether this article should be deleted*.]

Article 32. Preferential claims

The following claims arising by operation of other law have priority over a security right that is effective against third parties but only up to [the enacting State to specify the amount for each category of claim]:

(a) […];

(b) […].[19]

Article 33. Rights of judgement creditors

1. Subject to the rights of acquisition secured creditors in accordance with article 36, the rights of an unsecured creditor that has obtained a judgement or provisional order ("judgement creditor") have priority over a security right, if, before the security right is made effective against third parties, the judgement creditor [has taken the steps to be specified by an enacting State for a judgement creditor to acquire rights in the encumbered asset or to refer to the relevant provisions of other law with respect to judgements or provisional court orders].

2. The priority of the rights of the judgement creditor referred to in paragraph 1 does not extend to credit disbursed by the secured creditor:

(a) Within [the enacting State to specify a short period of time, such as 30 days] from the time the judgement creditor notified the secured creditor that it had taken the steps referred to in paragraph 1; 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

[19] The enacting State will not need this article if it does not have any preferential claims.

commitment was made before the judgement creditor notified the secured creditor that it had taken the steps referred to in paragraph 1.

[*The Working Group may wish to consider whether the judgement creditor should have priority under paragraph 2 only if the secured creditor received the notification and, if so, whether this matter should be clarified in paragraph 2 of this article, another article for the receipt rule to apply throughout the draft Model Law or in the Guide to Enactment*.]

Article 34. Non-acquisition security rights competing with acquisition security rights[20]

Option A[21]

1. Except as provided in article 30 with respect to a security right that is made effective against third parties by registration in [the enacting State to specify the specialized registry or title certificate, if any]:

(a) An acquisition security right in an asset other than inventory, consumer goods, intellectual property or rights of a licensee under a licence of intellectual property, held by the grantor [primarily] for sale or licence in the ordinary course of the grantor's business or used or intended to be used by the grantor [primarily] for personal, family or household purposes, has priority over a competing non-acquisition security right created by the grantor, provided that:

(i) The acquisition secured creditor is in possession of or has acquired the asset; or

(ii) A notice with respect to the acquisition security right is registered in the Registry within [a short period of time to be specified by the enacting State] after the grantor obtains possession of or acquires the asset;

(b) An acquisition security right in inventory, intellectual property or rights of a licensee under a licence of intellectual property, held by the grantor [primarily] for sale or licence in the ordinary course of the grantor's business has priority over a competing non-acquisition security right created by the grantor, provided that:

(i) The acquisition secured creditor is in possession of or has acquired the asset; or

(ii) Before the grantor obtains possession of or acquires the asset:

a. A notice with respect to the acquisition security right is registered in the Registry; and

b. A notice that is sent by the acquisition secured creditor is received by the non-acquisition secured creditor that has registered a notice in the Registry with respect to a security right created by the grantor in an asset of the same kind, stating that the acquisition secured creditor has or intends to acquire an acquisition security right and describing the asset sufficiently to enable the non-acquisition secured creditor to identify the asset that is the object of the acquisition security right; and

(c) An acquisition security right in consumer goods, intellectual property or rights of a licensee under a licence of intellectual property, used or intended to be used by the grantor [primarily] for personal, family or household purposes, has priority over a competing non-acquisition security right created by the grantor in the same asset.

2. A notice that is sent in accordance with subparagraph 1(b)(ii)b., may cover acquisition security rights under multiple transactions between the same parties without the need to

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[20] This section includes the unitary-approach recommendations of the *Secured Transactions Guide*. If a State prefers to adopt the non-unitary approach recommendations, it may wish to consider implementing instead recommendations 187-202 of the *Secured Transactions Guide*.
[In particular, States may wish to consider doing so if they have implemented regional legislation along the Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions (the "Late Payment Directive"), article 9 of which, provides that "Member States shall provide in conformity with the applicable national provisions designated by private international law that the seller retains title to goods until they are fully paid for if a retention of title clause has been expressly agreed between the buyer and the seller before the delivery of the goods".]

[21] A State may adopt option A or option B of this article.

identify each transaction and is sufficient only for security rights in assets of which the grantor obtains possession or which the grantor acquires within [a period of time to be specified by the enacting State] after the notice is received.

Option B

Except as provided in article 30:

(a) An acquisition security right in an asset other than consumer goods, intellectual property or rights of a licensee under a licence of intellectual property, used or intended to be used by the grantor [primarily] for personal, family or household purposes, has priority as against a competing non-acquisition security right created by the grantor, provided that:

(i) The acquisition secured creditor is in possession of or acquires the asset; or

(ii) A notice with respect to the acquisition security right is registered in the Registry within [a short period of time to be specified by the enacting State] after the grantor obtains possession of or acquires the asset; and

(b) An acquisition security right in consumer goods, intellectual property or rights of a licensee under a licence of intellectual property, used or intended to be used by the grantor [primarily] for personal, family or household purposes, has priority over a competing non-acquisition security right created by the grantor in the same asset.

[*Note to the Working Group: The Working Group may wish to note that subparagraph 1(b)(ii)b. of option A refers to a notice received by an earlier registered inventory financier*.]

Article 35. Competing acquisition security rights

1. Subject to paragraph 2, the priority between competing acquisition security rights is determined according to article 27.

2. An acquisition security right of a seller or lessor, or a licensor of intellectual property, that was made effective against third parties within the period specified in article 34, subparagraph (a)(ii), has priority over a competing acquisition security right of a secured creditor other than a seller or lessor, or a licensor of intellectual property.

Article 36. Acquisition security rights competing with the rights of judgement creditors

An acquisition security right that is made effective against third parties within the period specified in article 34, subparagraph (a)(ii), has priority over the rights of a judgement creditor that would otherwise have priority under article 32.

Article 37. Acquisition security rights in proceeds[22]

Option A

1. A security right in proceeds of an asset other than inventory, consumer goods, intellectual property or rights of a licensee under a licence of intellectual property, held by the grantor [primarily] for sale or licence in the ordinary course of the grantor's business or used or intended to be used by the grantor [primarily] for personal, family or household purposes, has the same priority as the acquisition security right in that asset.

2. A security right in proceeds of inventory, intellectual property or rights of a licensee under a licence of intellectual property, held by the grantor [primarily] for sale or licence in the ordinary course of the grantor's business, has the same priority as the acquisition security right in that asset, except where the proceeds take the form of receivables, negotiable instruments, or rights to payment of funds credited to a bank account.

3. A security right in proceeds has the same priority as the security right in that asset, provided that the acquisition secured creditor notifies non-acquisition secured creditors that,

[22] A State may adopt option A of this article, if it adopts option A of article 34, or option B of this article if it adopts option B of article 34.

before the proceeds arose, the acquisition secured creditor registered a notice with respect to assets of the same kind as the proceeds in the Registry.

Option B

Notwithstanding article 34, the priority of an acquisition security right in a tangible asset, intellectual property or rights of a licensee under a licence of intellectual property that is effective against third parties does not extend to its proceeds.

Article 38. Subordination

1. A person may at any time subordinate its priority under this Law in favour of any existing or future competing claimant without the need for the beneficiary to be a party to the subordination.

2. Subordination does not affect the rights of competing claimants other than the person subordinating its priority and the beneficiary of the subordination.

[*Note to the Working Group: The Working Group may wish to consider: whether: (a) a subordination agreement has to be in writing or may also be oral; (b) the Guide to Enactment should explain whether, if third-party effectiveness of the security right has been established by registration of a notice, an amendment notice may be registered to reflect the new order of priority; and (c) the rule that an agreement cannot affect third parties (art. 4, para. 2) is not enough to cover unilateral subordination and thus paragraph 2 of this article is necessary and should be retained*.]

Article 39. Future advances, future encumbered assets and maximum amount

1. Subject to the rights of judgement creditors under article 32, the priority of a security right extends to all secured obligations, including obligations incurred after the security right became effective against third parties.

2. The priority of a security right covers all encumbered assets described in a notice registered in the Registry, irrespective of whether they are acquired by the grantor or come into existence before or after the time of registration.

[3. The priority of the security right is limited to the maximum amount set out in the notice registered in the Registry.][23]

Article 40. Irrelevance of knowledge of the existence of a security right

Knowledge of the existence of a security right on the part of a secured creditor does not affect its priority under this Law.

B. Asset-specific rules

Article 41. Negotiable instruments

1. A security right in a negotiable instrument that is made effective against third parties by possession of the instrument has priority over a security right in the instrument that is made effective against third parties by registration of a notice in the Registry.

2. A buyer or other consensual transferee of an encumbered negotiable instrument acquires its rights free of the security right that is made effective against third parties by registration of a notice in the Registry if the buyer or other consensual transferee:

(a) Qualifies as a protected holder [the enacting State may wish to use any other term used in its law]; or

[23] This provision will be necessary if the enacting State implements articles 6, subparagraph 3(e), and 9, subparagraph (e) [of the registry-related provisions].

(b) Takes possession of the negotiable instrument and gives value [the enacting State may wish to use any other term used in its law] without knowledge that the sale or other transfer is in violation of the rights of the secured creditor under the security agreement.

Article 42. Rights to payment of funds credited to a bank account

1. A security right in a right to payment of funds credited to a bank account that is made effective against third parties by the secured creditor becoming the account holder has priority over a competing security right that is made effective against third parties by any other method.

2. A security right in a right to payment of funds credited to a bank account with respect to which the secured creditor is the depositary bank has priority over a competing security right made effective against third parties by any method other than by the secured creditor becoming the account holder.

3. A security right in a right to payment of funds credited to a bank account that is made effective against third parties by a control agreement has priority over a competing security right other than a security right of the depositary bank or a security right that is made effective against third parties by any method other than by the secured creditor becoming the account holder.

4. The order of priority among competing security rights in a right to payment of funds credited to a bank account that are made effective against third parties by the conclusion of control agreements is determined on the basis of the time of conclusion of the control agreements.

5. A depositary bank's right under other law to set off obligations owed to it by the grantor against the grantor's right to payment of funds credited to a bank account maintained with the depositary bank has priority as against a security right in the right to payment of funds credited to the bank account, except a security right that is made effective against third parties by the secured creditor becoming the account holder.

6. A transferee of funds from a bank account pursuant to a transfer initiated or authorized by the grantor acquires its rights free of a security right in the right to payment of funds credited to the bank account, unless the transferee has knowledge that the transfer violates the rights of the secured creditor under the security agreement.

7. Paragraph 6 does not adversely affect the rights of transferees of funds from bank accounts under [the enacting State to specify the relevant law].

Article 43. Money

1. A transferee that obtains possession of money that is subject to a security right acquires its rights free of the security right, unless that person has knowledge that the transfer violates the rights of the secured creditor under the security agreement.

2. This article does not adversely affect the rights of persons in possession of money under [the enacting State to specify the relevant law].

Article 44. Negotiable documents and tangible assets covered

1. Subject to paragraph 2, a security right in a tangible asset made effective against third parties by possession of the negotiable document covering that asset has priority over a competing security right made effective against third parties by any other method.

2. Paragraph 1 does not apply to a security right in a tangible asset other than inventory if the security right of the secured creditor not in possession of the negotiable document was made effective against third parties before the earlier of:

(a) The time that the asset became covered by the negotiable document; and

(b) The time of conclusion of an agreement between the grantor and the secured creditor in possession of the negotiable document providing for the asset to be covered by a negotiable document so long as the asset became so covered within [a short period of time to be specified by the enacting State] from the date of the agreement.

3. A transferee of an encumbered negotiable document under [the enacting State to specify the relevant law under which certain transferees of negotiable documents acquire their rights free of competing claims] acquires its rights free of a security right in the negotiable document and the tangible assets covered thereby that is made effective against third parties by registration of a notice in the Registry or by possession of the documents or the assets covered thereby.

Article 45. Intellectual property

Article 29, paragraph 6, does not affect any rights that a secured creditor may have [as an owner or licensor of intellectual property] under [the relevant law relating to intellectual property to be specified by the enacting State].

Article 46. Non-intermediated securities

1. A security right in certificated non-intermediated securities made effective against third parties by the secured creditor's possession of the certificate has priority over a competing security right by the same grantor in the same securities made effective against third parties by registration of a notice in the Registry.

2. A security right in uncertificated non-intermediated securities made effective against third parties by a notation of the security right or registration of the name of the secured creditor as the holder of the securities in the books maintained for that purpose by or on behalf of the issuer has priority over a security right in the same securities made effective against third parties by any other method.

3. A security right in uncertificated non-intermediated securities made effective against third parties by the conclusion of a control agreement has priority over a security right in the same securities made effective against third parties by registration of a notice in the Registry.

4. The order of priority among competing security rights in uncertificated non-intermediated securities that are made effective against third parties by the conclusion of control agreements is determined on the basis of the time of conclusion of the control agreements.

Option A

5. This article does not adversely affect the rights of holders of non-intermediated securities under [the enacting State to specify the relevant law relating to the transfer of securities].

Option B

5. A buyer or other consensual transferee of encumbered non-intermediated securities under [the enacting State to specify the relevant law relating to the transfer of securities] acquires its rights free of the security right.

(A/CN.9/WG.VI/WP.65/Add.3) (Original: English)

Note by the Secretariat on a draft model law on secured transactions

ADDENDUM

Contents

Chapter VI. Rights and obligations of the parties and third-party obligors

Section I. Mutual rights and obligations of the parties to a security agreement

A. General rules

Article 47. Source of mutual rights and obligations of the parties

The mutual rights and obligations of the parties to a security agreement are determined by:

(a) The provisions of this chapter;

(b) The provisions of other law relating to the mutual rights and obligations of the parties to an agreement;

(c) The terms and conditions set forth in the security agreement, including any rules or general conditions referred to therein; and

(d) Any usage to which the parties to the security agreement have agreed [implicitly or explicitly] and any practices they have established between themselves.

[*Note to the Working Group: The Working Group may wish to consider whether this article needs to be retained. Subparagraphs (a) and (b) refer to the application of the provisions of this and other laws and may thus be self-evident. Subparagraph (c) deals with party autonomy, which is already covered in article 4. Subparagraph (d) may be placed in article 4 on party autonomy. If this article is retained, the Working Group may wish to consider the hierarchy among the sources of the rights and obligations of the parties, or leave the matter to domestic contract law*.]

Article 48. Obligation of a person in possession to exercise reasonable care

A grantor or secured creditor in possession of an encumbered asset must exercise reasonable care to preserve the asset and its value.

[*Note to the Working Group: In addition, the Working Group may wish to consider whether this article or the Guide to Enactment should address the duty to take reasonable care where the encumbered assets would be intangible (e.g. a right to payment) by referring to the discussion of this matter in the* Secured Transactions Guide *(see chap. VI, paras. 30 and 70-72).*]

Article 49. Obligation of a secured creditor to return an encumbered asset [or to register an amendment or cancellation notice]

Upon extinction of a security right in an encumbered asset, the secured creditor in possession must return it to the grantor [and the secured creditor not in possession must register an amendment or cancellation notice as provided in article 21, subparagraph 1 (b) or 2 (c), of the registry-related provisions].

[*Note to the Working Group: The Working Group may wish to consider whether the bracketed words in this article should be retained. If those words are retained, this article or the Guide to Enactment should explain that, if the security right in one asset (but not in all) is extinguished, the secured creditor must register an amendment notice. If the security right in all encumbered assets is extinguished, the secured creditor must register a cancellation notice. In addition, the Working Group may wish to consider whether this or another article should address the issue of release of control (or generally every method of third-party effectiveness). Moreover, the Working Group may wish to note that, pursuant to its decision, a new article (art. 11bis) has been added at the end of chapter II of the draft Model Law to address the extinction of a security right (see A/CN.9/836, para. 20).*]

Article 50. Right of a secured creditor to use, be reimbursed for expenses and inspect an encumbered asset

1. A secured creditor in possession of an encumbered asset has the right:

(a) To be reimbursed reasonable expenses it incurs for the preservation of the asset and its value in accordance with article 48;

(b) To make reasonable use of the asset and apply the revenues it generates to the payment of the secured obligation.

2. A secured creditor not in possession has the right to inspect an encumbered asset in the possession of the grantor or another person.

[*Note to the Working Group: The Working Group may wish to consider whether paragraph 2 should be retained, as it is a matter that would be typically addressed in the security agreement. The Working Group may wish to introduce in this section of the draft Model Law or in the third-party effectiveness chapter (as the methods of third-party effectiveness do not disclose sufficient information about a security right) an article that would give to the grantor a right to demand information from the secured creditor with regard to the security right (the secured obligation or the encumbered asset). This article would also have to deal with the question whether: (a) the secured creditor would have an obligation to respond within a certain period of time; (b) what would be the grantor's remedy if the secured creditor did not respond within that time period; and (c) the secured creditor is entitled to charge a fee for expenses incurred in providing the requested information. This article could read along the following lines*

Article X. Grantor's right to obtain information

1. A grantor is entitled to request the secured creditor to provide information with regard to the secured obligation or the encumbered assets.

2. Within [a short period of time to be specified by the enacting State] days after receipt of a request for information, a secured creditor [other than a buyer of receivables] must send to the grantor:

(a) An authenticated statement of account; and

(b) An authenticated approval or correction of the list of encumbered assets.

3. A grantor is entitled without charge to one response to a request during [a time period to be specified by the enacting State].

4. The secured creditor may require payment of a charge not exceeding [a nominal amount to be specified by the enacting State] for each additional response.

The Working Group may also wish to consider whether a third-party creditor (e.g. competing secured creditor or judgement creditor) should also have the same right to

request information. In this regard, the Working Group may wish to note that, under article 63, paragraph 1, a depositary bank does not have to respond to such requests.]

B. Asset-specific rules

Article 51. Representations of the grantor of a security right in a receivable

1. The grantor represents at the time of conclusion of the security agreement that:

(a) The grantor has not previously created a security right in the receivable in favour of another secured creditor; and

(b) The debtor of the receivable does not and will not have any defences or rights of set-off.

2. The grantor does not represent that the debtor of the receivable has, or will have, the ability to pay.

Article 52. Right of the grantor or the secured creditor to notify the debtor of the receivable

1. The grantor or the secured creditor or both may give the debtor of the receivable notification of the security right and a payment instruction, but after notification of the security right has been received by the debtor of the receivable only the secured creditor may send a payment instruction.

2. Notification of a security right or of a payment instruction sent in breach of an agreement between the grantor and the secured creditor is not ineffective for the purposes of article 58, but nothing in this article affects any obligation or liability of the party in breach for any damages arising as a result of the breach.

Article 53. Right of the secured creditor to payment of a receivable

1. As between the grantor and the secured creditor, whether or not notification of the security right has been sent, the secured creditor is entitled:

(a) To retain the proceeds of any payment made to the secured creditor and tangible assets returned to the secured creditor in respect of the encumbered receivable;

(b) To the proceeds of any payment made to the grantor and also to any tangible assets returned to the grantor in respect of the encumbered receivable; and

(c) To the proceeds of any payment made to another person and tangible assets returned to such person in respect of the encumbered receivable, if the right of the secured creditor has priority over the right of that person.

2. The rights of the secured creditor in accordance with paragraph 1 are limited to the value of the secured obligation.

Article 54. Right of the secured creditor to preserve encumbered intellectual property

If so agreed between the grantor and the secured creditor, the secured creditor is entitled to [the enacting State to specify the steps necessary to preserve encumbered intellectual property].

[*Note to the Working Group: Noting that article 54 deals with the right of the secured creditor as against the grantor to take steps that are typically taken by an owner of intellectual property (e.g. to renew registrations or pursue infringers), the Working Group may wish to consider whether the draft Model Law or the Guide to Enactment should address the question whether a patent registry should be obliged to accept a notice from a secured creditor or whether a secured creditor would be considered by a court as having the right to pursue infringers*.]

Section II. Rights and obligations of third-party obligors

A. Receivables

Article 55. Protection of the debtor of the receivable

1. Except as otherwise provided in this Law, the creation of a security right in a receivable does not affect the rights and obligations of the debtor of the receivable, including the payment terms contained in the contract giving rise to the receivable, without its consent.

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.

Article 56. Notification of a security right in a receivable

1. Notification of a security right in a receivable or a payment instruction is effective when received by the debtor of the receivable if it reasonably identifies the encumbered receivable and the secured creditor and is in a language that is reasonably expected to inform the debtor of the receivable about its contents.

2. It is sufficient if a notification of the security right or a payment instruction is in the language of the contract giving rise to the receivable.

3. Notification of a security right in a receivable or a payment instruction may relate to receivables arising after notification.

4. Notification of a subsequent security right in a receivable constitutes notification of all prior security rights.

Article 57. Discharge of the debtor of the receivable by payment

1. Until the debtor of the receivable receives notification of a security right in a receivable, it is discharged by paying in accordance with the original contract.

2. After the debtor of the receivable receives notification of a security right in a receivable, subject to paragraphs 3-8, it is discharged only by paying the secured creditor or, if otherwise instructed in the notification or subsequently by the secured creditor in a writing received by the debtor of the receivable, in accordance with the payment instruction.

3. If the debtor of the receivable receives more than one payment instruction relating to a single security right of the same receivable created by the same grantor, it is discharged by paying in accordance with the last payment instruction received from the secured creditor before payment.

4. If the debtor of the receivable receives notification of more than one security right in the same receivable created by the same grantor, 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 security rights in the same receivable, it is discharged by paying in accordance with the notification of the last of such subsequent security rights.

6. If the debtor of the receivable receives notification of the security right in 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 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 a security right in a receivable from a [subsequent secured creditor] [a secured creditor that acquires its right from the initial

or any other secured creditor], it is entitled to request the secured creditor to provide within a reasonable period of time adequate proof that the security right created by the initial grantor to the initial secured creditor and any intermediate security right have been created and, unless the secured creditor does so, the debtor of the receivable is discharged by paying in accordance with this article as if it had not received notification of the security right.

9. Adequate proof of a security right referred to in paragraph 8 includes but is not limited to any writing emanating from the grantor and indicating that a security right has been created.

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.

[*Note to the Working Group: The Working Group may wish to consider the bracketed sets of words in paragraph 8, noting that the second set of words is intended to explain the meaning of the term "subsequent secured creditor" (see art. 2, subpara. (b) of the* Assignment Convention *and the definition of the term "subsequent assignment" in the* Secured Transactions Guide.]

Article 58. Defences and rights of set-off of the debtor of the receivable

1. Unless otherwise agreed in accordance with article 59, in a claim by the secured creditor against the debtor of the receivable for payment of the encumbered receivable, the debtor of the receivable may raise against the secured creditor:

(a) In the case of a contractual receivable, all defences and rights of set-off arising from the contract giving rise to the receivable, or any other contract that was part of the same transaction, of which the debtor of the receivable could avail itself as if the security right had not been created and the claim were made by the grantor; and

(b) Any other right of set-off that was available to the debtor of the receivable at the time it received notification of the security right.

2. Notwithstanding paragraph 1, the debtor of the receivable may not raise as a defence or right of set-off against the grantor breach of an agreement referred to in article 12, paragraph 2, limiting in any way the initial or subsequent grantor's right to create the security right.

Article 59. Agreement not to raise defences or rights of set-off

1. Subject to paragraph 3, the debtor of the receivable may agree with the grantor in a writing signed by the debtor of the receivable not to raise against the secured creditor the defences and rights of set-off referred to in article 58.

2. The agreement referred to in paragraph 1 may be modified only by an agreement in a writing signed by the debtor of the receivable and its effectiveness against the secured creditor is determined by article 60, paragraph 2.

3. The debtor of the receivable may not waive defences arising from fraudulent acts on the part of the secured creditor or based on the incapacity of the debtor of the receivable.

Article 60. Modification of the original contract

1. An agreement concluded before notification of a security right in a receivable created by a security agreement between the grantor and the debtor of the receivable that affects the secured creditor's rights is effective as against the secured creditor, and the secured creditor acquires corresponding rights.

2. An agreement concluded after notification of a security right in a receivable created by a security agreement between the grantor and the debtor of the receivable that affects the secured creditor's rights is ineffective as against the secured creditor unless:

(a) The secured creditor consents to it; or

(b) The receivable is not fully earned by performance and either the modification is provided for in the contract giving rise to the receivable or, in the context of that contract, a reasonable secured creditor would consent to the modification.

3. Paragraphs 1 and 2 do not affect any right of the grantor or the secured creditor arising from breach of an agreement between them.

Article 61. Recovery of payments made by the debtor of the receivable

The failure of the grantor or, in the case of an outright transfer of a contractual receivable, the transferor of the receivable to perform the contract giving rise to a receivable does not entitle the debtor of the receivable to recover from the secured creditor a sum paid by the debtor of the receivable to the grantor or the secured creditor.

B. Negotiable instruments

Article 62. Rights as against the obligor under a negotiable instrument

The rights of a secured creditor that has a security right in a negotiable instrument as against the person obligated on the negotiable instrument are determined by [the enacting State to specify the relevant law relating to negotiable instruments].

C. Rights to payment of funds credited to a bank account

Article 63. Rights as against the depositary bank

1. The creation of a security right in a right to payment of funds credited to a bank account does not affect the rights and obligations of the bank with which that bank account is maintained without its consent, nor does it obligate the depositary bank to provide any information about that bank account to third parties.

2. Any rights of set-off that the depositary bank may have are not affected by any security right that the bank may have in a right to payment of funds credited to a bank account maintained with the bank.

D. Negotiable documents and tangible assets covered

Article 64. Rights as against the issuer of a negotiable document

The rights of a secured creditor that has a security right in a negotiable document as against the issuer of the document or any other person obligated on the document are determined by [the enacting State to specify the relevant law relating to negotiable documents].

E. Non-intermediated securities

Article 65. Rights as against the issuer of a non-intermediated security

The rights of a secured creditor that has a security right in non-intermediated securities as against the issuer of the securities are determined by [the enacting State to specify the relevant law relating to the obligations of the issuer of non-intermediated securities].

Chapter VII. Enforcement of a security right

A. General rules

Article 66. Post-default rights

1. After the failure of the debtor to pay or otherwise perform the secured obligation (“default”), the grantor and the secured creditor are entitled to exercise:

(a) Any right under the provisions of this chapter; and

(b) Any other right provided in the security agreement or any other law, except to the extent it is inconsistent with the provisions of this Law.

2. The exercise of one post-default right does not prevent the exercise of another post-default right, except to the extent that the exercise of one right makes the exercise of another right impossible.

3. 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 secured obligation, and the exercise of a post-default right with respect to the secured obligation does not prevent the exercise of a post-default right with respect to an encumbered asset.

4. The grantor and any other person that owes payment or other performance of the secured obligation may not waive unilaterally or vary by agreement any of its rights under the provisions of this chapter before default.

[*Note to the Working Group: The Working Group may wish to consider whether the definition of the term "default", which is included in this article, should instead be included in article 2 (see A/CN.9/836, para. 47)*.]

Article 67. Methods of exercising post-default rights

1. The secured creditor may exercise its post-default rights by application to [a court or other authority to be specified by the enacting State] or without such an application.

2. The exercise of the secured creditor's post-default rights by application to [a court or other authority to be specified by the enacting State] is determined by [the rules to be specified by the enacting State].

3. The exercise of the secured creditor's post-default rights without application to [a court or other authority to be specified by the enacting State] is determined by the provisions of this chapter.

Article 68. Relief for non-compliance

Option A

If a secured creditor does not comply with the provisions of this chapter, the debtor, the grantor or any other interested person

Option B

If a secured creditor does not comply with the provisions of this chapter, the debtor, the grantor or any competing claimant

Option C

Any person whose rights are affected by the non-compliance of another person with the provisions of this chapter

is entitled to apply for relief to [a court or other authority to be specified by the enacting State], including relief in the form of [the enacting State to specify expeditious proceedings].

[*Note to the Working Group: The Working Group may wish to consider the options reflected in this article (see A/CN.9/836, para. 54). If the Working Group retains option A, it may wish to consider whether in this article or in article 2 the term "interested person" should be defined. Alternatively the Guide to Enactment could give examples of interested persons referring to 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. If the Working Group decides to retain option B, it may wish to note that the term "competing claimant" is defined (see art. 2, subpara. (e)). If the Working Group decides to retain option C, it may wish to consider whether this wording should be used in other articles in this chapter as well*.]

Article 69. Right of affected persons to terminate enforcement

1. Any person whose rights are affected by the enforcement process in accordance with the provisions of this chapter is entitled to terminate the enforcement process by paying or

otherwise performing the secured obligation in full, including the reasonable cost of enforcement.

2. The right of termination of the enforcement process may be exercised until the asset is sold or otherwise disposed of, acquired or collected by the secured creditor or until the conclusion of an agreement by the secured creditor for that purpose.

[3. Where the encumbered asset is leased or licensed by the secured creditor, the right of termination of the enforcement process may still be exercised subject to the rights of the lessee or licensee.]

[*Note to the Working Group: The Working Group may wish to consider paragraph 3, which has been included within square brackets in this article pursuant to a decision by the Working Group (see A/CN.9/836, para. 57). In this connection the Working Group may wish to note that paragraph 3 is intended to address the grantor's right in the residual value of the encumbered asset*.]

Article 70. Right of the higher-ranking secured creditor to take over enforcement

1. Notwithstanding commencement of enforcement by another secured creditor or a judgement creditor, a secured creditor whose security right has priority over that of the enforcing secured creditor or judgement creditor is entitled to take over the enforcement process at any time before the asset is sold or otherwise disposed of, or acquired by the secured creditor or until the conclusion of an agreement by the secured creditor for that purpose.

[2. Where the encumbered asset is leased or licensed by the secured creditor, the right of the higher-ranking secured creditor to take over the enforcement process may still be exercised subject to the rights of the lessee or licensee.]

[3][2]. The right of the higher-ranking secured creditor to take over the enforcement process includes the right to enforce by any method available to a secured creditor under this Law.

[*Note to the Working Group: The Working Group may wish to consider paragraph 2, which appears within square brackets and is intended to clarify that the senior secured creditor may take over enforcement even after the encumbered asset is leased or licensed but subject to the rights of a lessee or licensee to whom the enforcing secured creditor leased or licensed the encumbered asset*.]

Article 71. Right of the secured creditor to possession of an encumbered asset

1. Subject to the rights of a person with a superior right to possession, after default, the secured creditor is entitled to obtain possession of an encumbered asset by applying to a [court or other authority to be specified by the enacting State].

2. The secured creditor is also entitled to obtain possession of an encumbered asset without applying to a court or other authority if all of the following conditions are satisfied:

(a) The grantor has consented in the security agreement to the secured creditor obtaining possession without applying to a [court or other authority to be specified by the enacting State];

(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 [after the expiry of the period of time indicated in paragraph 3]; and

(c) At the time the secured creditor attempts to obtain possession of the encumbered asset, the grantor or any other person in possession of the encumbered asset does not object.

[3. The secured creditor is not entitled to obtain possession of an encumbered asset under paragraph 2 before the expiry of [a short period of time to be specified by the enacting State].]

[4.] The notice referred to in subparagraph 2 (b) need not be given if the encumbered asset is perishable, [or] may decline in value speedily [or is in the form of certificated non-intermediated securities].

[5.]

Option A

If a higher-ranking secured creditor is in possession of the encumbered asset other than for the purpose of pursuing enforcement, a lower-ranking secured creditor is entitled to obtain possession of the asset.

Option B

If a higher-ranking secured creditor is in possession of the encumbered asset, a lower-ranking secured creditor is not entitled to obtain possession of the asset.

[*Note to the Working Group: The Working Group may wish to consider whether the words "all of the following conditions are satisfied" in paragraph 2 are necessary. In addition, the Working Group may wish to consider whether the grantor and any person in possession of the encumbered asset may object to the secured creditor obtaining possession within the period provided for in subparagraph 3. Moreover, the Working Group may wish to consider paragraph 3, which appears within square brackets and is intended to provide that the secured creditor may obtain possession of the encumbered asset only after the expiry of a short period of time (as para. 3 appears within square brackets, the reference to it in subpara. 2 (b) also appears within square brackets). Furthermore, the Working Group may wish to consider paragraph 5. The rationale underlying option A is that, if the lower-ranking secured creditor did not have the right to obtain possession of an encumbered asset from a higher-ranking secured creditor, the higher-ranking secured creditor in possession without an interest to enforce its security right could delay or preclude enforcement (the result of article 70 is that, if the higher-ranking secured creditor enforces its security right, it does not need to relinquish possession to a lower-ranking secured creditor). The justification for option B is that: (a) if the higher-ranking secured creditor had to relinquish possession, its security right could cease to be effective against third parties and thus lose its priority status; and (b) if the encumbered asset was disposed of by the lower-ranking secured creditor, it could diminish in value*.]

Article 72. Right of the secured creditor to dispose of an encumbered asset

1. After default, a secured creditor is entitled to sell or otherwise dispose of, lease, or license an encumbered asset by applying or without applying to a [court or other authority to be specified by the enacting State].

2. If a secured creditor decides to exercise the right provided in paragraph 1 by applying to a [court or other authority to be specified by the enacting State], the method, manner, time, place and other aspects of the sale or other disposition, lease or licence are determined by [the rules to be specified by the enacting State].

3. A secured creditor that exercises the right provided in paragraph 1 without applying to a [court or other authority to be specified by the enacting State] may select the method, manner, time, place and other aspects of the sale or other disposition, lease or licence, including whether to sell or otherwise dispose of, lease or license encumbered assets individually, in groups or altogether.

4. If a secured creditor decides to sell or otherwise dispose of, lease or license an encumbered asset without applying to a [court or other authority to be specified by the enacting State], it must give notice of its intention to:

(a) The grantor and the debtor;

(b) Any person with rights in the encumbered asset that notifies in writing the secured creditor of those rights, at least [a short period of time to be specified by the enacting State] before the notice is received by the grantor;

(c) Any other secured creditor that registered a security right notice with respect to the encumbered asset, at least [a short period of time to be specified by the enacting State] before the notice is received by 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 at least [a short period of time to be specified by the enacting State] before the sale or other disposition, lease or licence takes place and must contain a description of the encumbered assets, a statement of the amount required to satisfy the secured obligation including interest and a reasonable estimate of the cost of enforcement, a reference to the right of any person whose rights may be affected by the enforcement process to terminate the enforcement process as provided in article 69 and a statement of the date after which the encumbered asset will be sold or otherwise disposed of, leased or licensed, the time and place of a public disposition, and the manner of the intended disposition.

6. The notice must be in a language that is reasonably expected to inform its recipients about its contents.

7. It is sufficient if the notice to the grantor is in the language of the security agreement.

8. 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.

Article 73. Right of the secured creditor to distribute the proceeds of a disposition of an encumbered asset

1. If a secured creditor decides to exercise the right provided in article 72 by applying to a [court or other authority to be specified by the enacting State], the distribution of the proceeds of sale or other disposition of, lease or licence of an encumbered asset is determined by [the rules to be specified by the enacting State], but in accordance with the priority provisions of this Law.

2. If a secured creditor decides to exercise the right provided in article 72 without applying to a [court or other authority to be specified by the enacting State]:

(a) [Subject to the rights of holders of preferential claims under article 45,] 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 2 (c), 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 its claim, to the extent of the amount of that claim, and remit any balance remaining 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 pay the surplus to [a competent judicial or other authority or to a public deposit fund to be specified by the enacting State] for distribution in accordance with the provisions of this Law on priority.

3. [Whether the secured creditor decides to exercise the right provided in article 72 by applying or without applying to a [court or other authority to be specified by the enacting State, a] [A] debtor remains liable for any shortfall owing after application of the net proceeds of enforcement to the secured obligation.

[*Note to the Working Group: The Working Group may wish to consider the bracketed words in paragraph 3*.]

Article 74. Right of the secured creditor and the grantor to propose the acquisition of an encumbered asset by the secured creditor

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 secured creditor must send the proposal to:

(a) The grantor and the debtor;

(b) Any person with rights in the encumbered asset that has notified in writing the secured creditor of those rights, at least [a short period of time to be specified by the enacting State] before the proposal is received by the grantor;

(c) Any other secured creditor that registered a security right notice with respect to the encumbered asset, at least [a short period of time to be specified by the enacting State] before the proposal is received by 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, including interest and the cost of enforcement, and the amount of the obligation that is proposed to be satisfied by acquiring the encumbered asset, describe the encumbered asset, refer to the right of the debtor or the grantor to terminate the enforcement process as provided in article 69, and state the date after which the encumbered asset will be acquired by the secured creditor.

4. The secured creditor acquires the encumbered asset as provided in paragraph 1:

(a) In the case of a proposal for the acquisition of the encumbered asset in full satisfaction of the secured obligation, unless the secured creditor receives an objection in writing from any person entitled to receive such a proposal within [a short period of time to be specified by the enacting State] after the proposal is received by the grantor; and

(b) In the case of a proposal for the acquisition of the encumbered asset in partial satisfaction of the secured obligation, only if the secured creditor receives the affirmative consent of each addressee of the proposal in writing within [a short period of time to be specified by the enacting State] after the proposal is received by the grantor.

5. The grantor may make a proposal in accordance with paragraph 1 and, if the secured creditor accepts it, the secured creditor must proceed as provided in paragraphs 2-4.

Article 75. Rights acquired in an encumbered asset

1. If a secured creditor sells or otherwise disposes of an encumbered asset by applying to a [court or other authority to be specified by the enacting State], the buyer or other transferee acquires the asset [the enacting State to specify whether the buyer or other transferee acquires its rights subject to or free of any rights].

2. If a secured creditor leases or licenses an encumbered asset by applying to a [court or other authority to be specified by the enacting State], a lessee or licensee is entitled to the benefit of the lease or licence during its term, except as against creditors with rights that have priority over the right of the enforcing secured creditor.

3. If a secured creditor sells or otherwise disposes of an encumbered asset without applying to a [court or other authority to be specified by the enacting State], a buyer or other transferee acquires the grantor's right in the asset free of the rights of the enforcing secured creditor and any competing claimant, except the rights that have priority over the security right of the enforcing secured creditor.

4. If a secured creditor leases or licenses an encumbered asset without applying to a [court or other authority to be specified by the enacting State], a lessee or licensee is entitled to the benefit of the lease or licence during its term, except as against creditors with rights that have priority over the right of the enforcing secured creditor.

5. If a secured creditor sells or otherwise disposes of, leases or licenses the encumbered asset not in accordance with the provisions of this chapter, a buyer or other transferee, lessee, or licensee of the encumbered asset acquires the rights or benefits described in paragraphs 1 and 2, provided that [it had no knowledge of a violation of the provisions of this chapter that materially prejudiced the rights of the grantor or another person].

[*Note to the Working Group: The Working Group may wish to consider whether the bracketed text in paragraph 5 should be retained outside square brackets*.]

B. Asset-specific rules

Article 76. Collection of payment under a receivable, negotiable instrument, right to payment of funds credited to a bank account or non-intermediated security

1. After default, a secured creditor with a security right in a receivable, negotiable instrument, right to payment of funds credited to a bank account or non-intermediated security is entitled to collect payment from the debtor of the receivable, obligor under the negotiable instrument, depositary bank or issuer of the non-intermediated security.

2. The secured creditor may exercise the right to collect under paragraph 1 even before default with the consent of the grantor.

3. A secured creditor exercising the right to collect under paragraph 1 or 2 is also entitled to enforce any personal or property right that secures or supports payment of the encumbered asset.

4. If a security right in a right to payment of funds credited to a bank account has been made effective against third parties by registration of a notice, the secured creditor is entitled to collect or otherwise enforce its security right only pursuant to an order of a court, unless the depositary bank agrees otherwise.

5. The right of the secured creditor to collect under paragraphs 1 to 4 is subject to articles 55-61.

Article 77. Collection of payment under a receivable by an outright transferee

In the case of an outright transfer of a receivable, the transferee is entitled to collect the receivable before or after default of the transferor.

(A/CN.9/WG.VI/WP.65/Add.4) (Original: English)

Note by the Secretariat on a draft model law on secured transactions

ADDENDUM

Contents

Chapter VIII. Conflict of laws[1]

A. General rules

[*Note to the Working Group: The Working Group may wish to consider when the conflict-of-laws rules should apply. One approach would be to apply the conflict-of-laws rules of the forum whether or not a situation involves a choice between the laws of different States. A reason to follow this approach might be that requiring a determination as to whether a situation involves a choice of laws would create uncertainty because a court may view the issue as involving a choice of laws, while another court may see the issue differently. In addition, the conflict-of-laws rules should apply in any case, as they are also the rules that provide whether the applicable law is the domestic law of the forum or a foreign law. Another approach would be to apply the conflict-of-laws rules in all cases involving a choice between the laws of different States. Under this approach, the conflict-of-laws rules would apply, unless there was absolutely no element in the facts of a case that might require a decision as to which of two or more laws might be applicable; any foreign element would trigger the applicability of the conflict-of-laws rules. This approach could ensure a relatively broad application of the conflict-of-laws rules but also result in uncertainty as to their application. Yet another approach would be to require always or only in the particular circumstances that additional specified criteria be met for the conflict-of-laws rules to apply. Under such an approach, the application of the conflict-of-laws rules could be limited and uncertain.*]

Article 78. Law applicable to the mutual 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, the law governing the security agreement.

Article 79. Law applicable to a security right in a tangible asset

1. Except as provided in paragraphs 2 to 5 and article 93, the law applicable to the creation, effectiveness against third parties 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 priority of a security right in a tangible asset covered by a negotiable document made effective against third parties by possession of the 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.

3. [Subject to paragraph 4, the] [The] law applicable to the creation, third-party effectiveness and priority of 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.

4. If ownership of a [motor vehicle, ship, aircraft or similar tangible asset to be specified by the enacting State] is registered in a specialized registry or noted on a title certificate, and a notice with respect to a security right in that asset may be registered in that registry or noted on that certificate], the law applicable to the creation, third-party effectiveness and priority of the security right in a tangible asset is the law of the State under whose authority the registry is maintained or the certificate is issued.

5. Subject to paragraph 3, a security right in a tangible asset (other than a negotiable instrument, negotiable document or certificated non-intermediated security) that is in transit at the time of its putative creation or intended to be relocated to a different State than the State in which it is located at the time of the putative 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 the putative creation of the security right or under the law of the State of the asset's ultimate destination, provided that the asset reaches that State within [a short

[1] Depending on its legal tradition and drafting conventions, the enacting State may incorporate the conflict-of-laws provisions in its secured transactions law (at the beginning or at the end of it) or in a separate law (civil code or other law).

period of time to be specified by the enacting State] after the time of the putative creation of the security right.

[*Note to the Working Group: The Working Group may wish to note that paragraph 1, which is based on recommendation 203 of the* Secured Transactions Guide, *reflects the generally acceptable* lex situs *(or* lex rei sitae*) approach. The Working Group may also wish to note that paragraph 2, which is based on recommendation 206 of the* Secured Transactions Guide, *addresses the question whether the law applicable to the priority of a security right in tangible assets covered by a negotiable document that was made effective against third parties by possession of the document should be the* lex situs *of the assets or the document. This rule is the logical consequence of article 44, under which a security right in tangible assets covered by a negotiable document that was made effective against third parties by possession of the document has priority over a competing security right made effective by another method (e.g. by possession of the assets or registration of a notice in the Registry in the State of the grantor's location).*

In addition, the Working Group may wish to consider the bracketed text in paragraph 3, which is intended to ensure that, if mobile goods are subject to the specialized registration system referred to in paragraph 4, paragraph 4 would apply. In addition, the Working Group may wish to note that paragraph 4 has been revised to be aligned more closely with recommendation 205, on which it is based, and address the points made in the Secured Transactions Guide *(see chap. X, paras. 37 and 38). In particular, the Working Group may wish to note that the need for a special rule seems limited to title registries and title certificates. If a State has a specialized registry for notices of security rights and other encumbrances, but which does not also serve as a title registry (in which initial ownership and outright sales can be recorded, for example), the general conflict-of-laws rules can handle the matter and, if those rules point to the law of a State that has such a registry, the substantive law of that State will tell a secured creditor to register in that registry rather than the general security rights registry of the State. However, the Working Group may wish to consider that paragraph 4 should be deleted, because: (a) there are few specialized title registrations systems that permit the registration of a notice of a security right for third-party effectiveness purposes; (b) to the extent that there are such specialized title registrations systems and a notice of a security right may be registered in the specialized title registry of more than one State, paragraph 4 would not work well; and (c) to the extent that such specialized registration is based on an international convention, of which the enacting State is a party, article 3 (international obligations of the enacting State) would be sufficient to preserve the application of the convention.*

Moreover, the Working Group may also wish to consider whether in this provision (and in other provisions in this chapter that include a reference to the location of the encumbered asset or the grantor), explicit reference should be made to article 85, which indicates the relevant time for determining the location of the encumbered asset or the grantor. Alternatively, such a reference may be included in the Guide to Enactment, which could also explain that the provisions of the draft Model Law, in particular those contained in the same chapter, should be read together.

The Working Group may also wish to consider whether: (a) paragraph 5 is a conflict-of-laws rule rather than a substantive rule of the receiving State like article 21; and (b) the wording in parenthesis is necessary, as negotiable instruments, negotiable documents and certificated non-intermediated securities are normally not captured by the expression "tangible asset in transit or to be exported".]

Article 80. Law applicable to a security right in an intangible asset

Except as provided in articles 81 and 90-93, 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 81. Law applicable to a security right in receivables arising from a sale or lease of or a transaction secured by immovable property

1. The law applicable to the creation, effectiveness against third parties and priority of a security right in a receivable arising from a sale or lease of, or a transaction secured by, immovable property is the law of the State in which the grantor is located.

2. Notwithstanding paragraph 1, the law applicable to the priority of a security right in a receivable arising from a sale or lease of, or a transaction secured by, immovable property as against the right of a competing claimant that is registered in the immovable property registry, in which rights in the relevant immovable property are registered, is the law of the State under whose authority the immovable property registry is maintained, provided that under that law registration is relevant to the priority of the security right in the receivable.

[*Note to the Working Group: The Working Group may wish to note that, while this article reflects recommendation 209 of the* Secured Transactions Guide *(see also chap. X, para. 54), the rule in paragraph 1 is the same as the general rule in article 80. The Working Group may thus wish to consider whether paragraph 1 should be deleted and paragraph 2 be amended to read as follows: "Notwithstanding article 80, in the case of a security right in a receivable arising from a sale or lease of, or a transaction secured by, immovable property, the law applicable to the priority of the security right in the receivable as against the right of a competing claimant that is registered in the immovable property registry in which rights in the relevant immovable are registered is the law of the State under whose authority the immovable property registry is maintained". The Working Group may wish to note that this rule would apply only if: (a) the State under the authority of which the immovable property registry was organized required registration by a competing claimant for triggering the application of a different priority rule for security rights in such receivables; and (b) a competing claimant did in fact register in the immovable property registry. The Working Group may wish to reconsider these requirements as they add complexity to the rule in this article.*]

Article 82. Law applicable to the enforcement of a security right

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 [the relevant act of] enforcement takes place, except as provided in article 93; and

(b) In an intangible asset is the law applicable to the priority of the security right, except as provided in articles 90, 92 and 93.

[*Note to the Working Group: The Working Group may wish to consider the text within square brackets in subparagraph (a), which is intended to clarify that enforcement may involve several distinct acts (e.g. notice of default, notice of the secured creditor's intent to obtain possession of an encumbered asset without applying to a court or other authority, disposition of an encumbered asset, and distribution of the proceeds of disposition) that may take place in different States (see A/CN.9/802, para. 105). For example, a secured creditor may take possession of the encumbered assets in one State, dispose of them in a second State, and distribute the proceeds of disposition in a third State. Alternatively, the matter may be discussed or explained in the Guide to Enactment*.]

Article 83. Law applicable to a security right in proceeds of an encumbered asset

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.

[*Note to the Working Group: The Working Group may wish to note that, if the original encumbered asset is inventory, which is sold, and the purchase price is paid into a bank account: (a) under paragraph 1, the law applicable to the question of whether the secured*

creditor automatically acquires a security right in the right to payment of the funds credited to a bank account as proceeds of the original encumbered inventory would be the law of the location of the inventory; and (b) under paragraph 2, the law applicable to the third-party effectiveness and priority of any security right in the proceeds would be the law applicable to the right to payment of funds credited in the bank account. The Working Group may wish to consider whether this type of bifurcated rule may lead to difficulties in cases where the law governing creation recognizes a broad automatic proceeds rule whereas the law governing third-party effectiveness and priority recognizes no or only a very limited automatic proceeds right. In addition, the Working Group may wish to consider whether the text of this article should be revised to make it clear that it is dealing only with the law applicable to proceeds derived from the original encumbered assets as a result of a disposition by the grantor or other event prior to default, whereas article 82, subparagraph (a), deals with the law applicable to the distribution of proceeds derived from a disposition of the encumbered assets pursuant to post-default enforcement proceedings.]

Article 84. Meaning of "location" of the grantor

For the purposes of the provisions of this chapter, the grantor is located:

(a) In the State in which it has its place of business, if any;

(b) If the grantor has a place of business in more than one State, in the State in which the central administration of the grantor is exercised; and

(c) If the grantor does not have a place of business, in the State in which the grantor has his or her habitual residence.

Article 85. Relevant time for determining location

1. Except as provided in paragraph 2, references to the location of the encumbered asset or of the grantor in the provisions of this chapter refer:

(a) For creation issues, to the location at the time of the putative creation of the security right; and

(b) 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 are created and made effective against third parties before a change in the location of the asset or the grantor, references in the provisions of this chapter 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.

[*Note to the Working Group: The Working Group may wish to consider whether paragraph 2, which is based on recommendation 220 of the* Secured Transactions Guide, *is correct in referring to "the rights of all competing claimants" having been "created and made effective against third parties before a change in the location of the asset or grantor". It would seem that this language only works for competing claimants that are competing secured creditors, and not for competing claimants that are outright transferees, judgement creditors or the grantor's insolvency representative. In addition, the Working Group may wish to note that, under a combined application of articles 82 and 85: (a) enforcement of a security right in a tangible asset would seem to be referred to the law of the State in which enforcement takes place (i.e. in most instances, the law of the State in which the asset is located) at the time of enforcement; (b) enforcement of a security right in an intangible asset would seem to be referred to the law governing priority (i.e. for receivables, the law of the State in which the grantor is located) at the time the issue arises; and (c) if the location changed after enforcement commenced, the relevant location would be the location at the time enforcement commenced. In addition, the Working Group may wish to consider whether this article produces the appropriate result where there is a change of location of the encumbered assets or the grantor after the creation of a security right or after the beginning of enforcement proceedings. For example, in the case of a change in the location of a tangible asset after the creation of a security right in it and thus a change to the law applicable to enforcement, the secured creditor's right to repossess the asset without applying to a court or other authority may be limited or regulated differently. In this regard,*

the Working Group may wish to take into account that: (a) a rule providing that the relevant time for determining the location of a tangible asset for enforcement issues should be the time of the putative creation of the security right might be inconsistent with article 82, subparagraph (a); (b) article 21 of the draft Model Law clearly contemplates that there could be a change in the applicable law; and (c) article 85, paragraph 2, deals with the issue for all claimants whose rights arose before the change.]

Article 86. Exclusion of *renvoi*

A reference in the provisions of this chapter to "the law" of a State as the law applicable to an issue refers to the law in force in that State other than its rules of private international law.

Article 87. Overriding mandatory rules and public policy (*ordre public*)

1. The provisions of this chapter do not prevent a court from applying overriding mandatory provisions of the law of the forum that apply irrespective of the law applicable under the provisions of this chapter.

2. The law of the forum determines when a court may or must apply or take into account overriding mandatory provisions of another law.

3. A court may only exclude the application of a provision of the law applicable under the provisions of this chapter if and to the extent that the result of such application would be manifestly incompatible with fundamental notions of public policy (*ordre public*) of the forum.

4. The law of the forum determines when a court may or must apply or take into account the public policy (*ordre public*) of a State other than the State the law of which would be applicable under the provisions of this chapter.

5. This article does not permit the application of the provisions of the law of the forum [or another State] to the third-party effectiveness and priority of a security right.

[*Note to the Working Group: The Working Group may wish to note that, pursuant to a decision by the Working Group (see A/CN.9/802, para. 106), articles 86 and 87 of the draft Model Law have been revised to be aligned with articles 8 and 11 of the Hague Principles on Choice of Law in International Commercial Contracts (the "Hague Principles). In addition, the Working Group may wish to consider whether article 11, paragraph 5, of the Hague Principles, which deals with the public policy and mandatory law exception in the case of arbitral proceedings should also be added to this article. Moreover, the Working Group may wish to consider whether paragraph 5 of this article, which is based on recommendation 222, subparagraph (c), of the* Secured Transactions Guide*, should be revised to clarify that the forum State may not displace the provisions of the law applicable to third-party effectiveness and priority, and apply its own provisions or the provisions of another State (unless the forum law or the law of another State is the law applicable under the provisions of this chapter). "This approach is justified by the need to achieve certainty with respect to the law applicable to third-party effectiveness and priority. The same approach is followed in articles 23, paragraph 2, 30, paragraph 2, and 31 of the* Assignment Convention*. It is also followed in article 11, paragraph 3, of The Hague Securities Convention" (see* Secured Transactions Guide*, chap. X, para. 79). In this regard, the Working Group may wish to consider an alternative formulation of paragraph 5 along the following lines: "This article does not permit a court to displace the provisions of this chapter dealing with the law applicable to the third-party effectiveness and priority of a security right", or "This article does not permit the overriding application of the provisions of the law of the forum or another State, the law of which is applicable under the provisions of this chapter, that relate to the third-party effectiveness and priority of a security right".*]

Article 88. Impact of commencement of insolvency proceedings on the law applicable to a security right

1. Subject to paragraph 2, the law applicable to a security right under the provisions of this chapter applies notwithstanding the commencement of insolvency proceedings relating to the grantor.

2. The application of the law applicable to a security right under the provisions of this chapter is subject to the application of the insolvency law of the State in which insolvency proceedings are commenced to the treatment of security rights in the grantor's insolvency.

[*Note to the Working Group: In view of the fact that the draft Model Law does not deal with insolvency law issues (or the law applicable in the case of the grantor's insolvency), the Working Group may wish to consider whether this article, which is based on recommendation 223 of the* Secured Transactions Guide*, should be retained. If the Working Group decides that this article should be deleted, the matters addressed therein could be discussed in the Guide to Enactment as matters for other law of the enacting State. If the Working Group decides that this article should be retained, it may wish to consider whether paragraph 2 should be deleted, as: (a) while the second sentence of recommendation 223, on which paragraph 2 is based, is appropriate for a guide, it may not be sufficiently specific for a model law; and (b) the scope of paragraph 2, as revised to be included in a model law, may be broader than the second sentence of recommendation 223. If paragraph 2 is deleted, the Guide to Enactment could explain the impact of the application of the law applicable to insolvency (i.e., the* lex fori concursus*) on the law applicable to the validity, enforceability and priority of a security right (see* Secured Transactions Guide*, rec. 223, and chap. X, paras. 80-82, and* Insolvency Guide*, rec. 31, and part two, para. 88).*]

B. Asset-specific rules

Article 89. Law applicable to the relationship of third-party obligors and secured creditors

The law applicable to the relationship between the grantor of a security right in a receivable, negotiable instrument or negotiable document and the debtor of the receivable, the obligor under the negotiable instrument or the issuer of the negotiable document is the law applicable to:

(a) The relationship between the debtor of the receivable, the obligor under the instrument or the issuer of the document and the holder of a security right in the receivable, instrument or document;

(b) The conditions under which a security right in the receivable, instrument or document may be invoked against the debtor of the receivable, the obligor under the instrument or the issuer of the document, including whether an agreement limiting the grantor's right to create a security right may be asserted by the debtor of the receivable, the obligor under instrument or the issuer of the document; and

(c) Whether the obligations of the debtor of the receivable, the obligor under the instrument or the issuer of the document have been discharged.

[*Note to the Working Group: The Working Group may wish to note that this article is based on recommendation 217 of the* Secured Transactions Guide *(see chap. X, paras. 62 and 63) and article 29 of the* Assignment Convention.]

Article 90. Law applicable to a security right in a right to payment of funds credited to a bank account

1. Subject to article 91, the law applicable to the creation, effectiveness against third parties, priority and enforcement of a security right in a right to payment of funds credited to a bank account, as well as to the rights and obligations between the depositary bank and the secured creditor, is

Option A[2]

the law of the State in which the bank with which the account is maintained has its place of business.

2. If the bank has places of business in more than one State, the law applicable is the law of the State in which the branch maintaining the account is located.

[2] A State may adopt option A or B of this article.

Option B

the law of the State expressly stated in the account agreement as the State whose law governs the account agreement or, if the account agreement expressly provides that another law is applicable to all such issues, that other law.

2. The law of the State determined pursuant to paragraph 1 applies only if the depositary bank has, at the time of the conclusion of the account agreement, an office in that State that is engaged in the regular activity of maintaining bank accounts.

3. If the applicable law is not determined pursuant to paragraph 1 or 2, the applicable law is to be determined pursuant to [the enacting State to insert here the default rules based on article 5 of the Hague Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary].

[*Note to the Working Group: The Working Group may wish to note that this article is based on recommendation 210 of the* Secured Transactions Guide. *The Working Group may wish to consider whether option A or the Guide to Enactment should clarify that a branch (or office) of a bank should be considered as being located in a particular jurisdiction irrespective of whether the bank offers its branch services through physical offices or only through an online connection accessible electronically by customers located in that jurisdiction. In this connection, the Working Group may wish to take into account that a bank must have a physical presence or legal address in a jurisdiction for regulatory and other purposes (anti-money-laundering laws, Foreign Account Tax Compliance Act, court jurisdiction, etc.).*]

Article 91. Law applicable to the third-party effectiveness of a security right in certain types of asset by registration

If the law of the State in which the grantor is located recognizes registration of a notice as a method for achieving effectiveness against third parties of a security right in a negotiable instrument or in a right to payment of funds credited to a bank account, the law of that State is the law applicable to the issue of whether third-party effectiveness has been achieved by registration under the laws of that State.

[*Note to the Working Group: The Working Group may wish to consider whether this article, which is based on recommendation 211 of the* Secured Transactions Guide, *should be retained. In this regard, the Working Group may wish to note that the effect of this rule would be that, if the State in which the grantor is located recognizes registration of a notice as a method of third-party effectiveness, a secured creditor would have the option of achieving third-party effectiveness by registration under the law of the State in which the grantor is located (art. 91) or under the law of the State in which the instrument is located (art. 79, para. 1). However, the Working Group may wish to consider that this result may have unintended consequences. For example, a potential competing claimant will need to review the law of the grantor's location to determine if registration is a method for achieving third-party effectiveness and then search in the registries of two different States in order to determine whether there is a security right in the instrument that is effective against third parties. If the Working Group decides that this article should be retained, it may wish to consider whether it should apply only to negotiable instruments and rights to payment of funds credited to bank accounts or also to other types of asset (e.g. tangible assets covered by a negotiable document, the third-party effectiveness of a security right in which would be determined by the location of the document).*]

Article 92. Law applicable to a security right in intellectual property

1. The law applicable to the creation, effectiveness against third parties and priority of a security right in intellectual property is the law of the State in which the intellectual property is protected.

2. A security right in intellectual property may also be created under the law of the State in which the grantor is located and may also be made effective under that law against third parties other than another secured creditor, a transferee or a licensee.

3. The law applicable to the enforcement of a security right in intellectual property is the law of the State in which the grantor is located.

Article 93. Law applicable to a security right in non-intermediated securities

Option A

1. Subject to paragraph 2:

(a) The law applicable to the creation, effectiveness against third parties and priority of a security right in certificated non-intermediated securities is the law of the State in which the certificate is located; and

(b) The law applicable to the enforcement of a security right in certificated non-intermediated securities is the law of the State in which [the relevant act of] enforcement takes place.

2. The law applicable to the effectiveness of a security right in certificated non-intermediated securities against the issuer is the law of the State under which the issuer is constituted.

3. The law applicable to the creation, effectiveness against third parties, priority and enforcement of a security right in uncertificated non-intermediated securities, as well as to its effectiveness against the issuer, is the law of the State under which the issuer is constituted.

Option B

The law applicable to the creation, effectiveness against third parties, priority and enforcement of a security right in non-intermediated securities, as well as to its effectiveness against the issuer, is the law of the State under which the issuer is constituted.

Option C

1. The law applicable to the creation, effectiveness against third parties, priority and enforcement of a security right in non-intermediated equity securities, as well as to its effectiveness against the issuer, is the law under which the issuer is constituted.

2. The law applicable to the creation, the effectiveness against third parties, the priority and the enforcement of a security right in non-intermediated debt securities, as well as to its effectiveness against the issuer, is the law governing the securities.

[*Note to the Working Group: The Working Group may wish to consider the above-mentioned options. Option A provides separate rules for certificated and uncertificated securities and, with respect to certificated securities, different rules for the various matters (which are rules similar to those applicable to tangible assets; see articles 79, para. 1, and 82, subpara. (a)). In particular with respect to certificated securities, this approach has the advantage of flexibility but also the disadvantage of uncertainty as it may lead to inconsistencies and overlaps. For example, to the extent that a clear distinction cannot be drawn among those matters, they may be referred to the law of the issuer's constitution rather than the law of the certificate's location. However, this is an issue that may arise with respect to other types of intangible asset, such as receivables, where, under article 80, the law of the grantor's location applies to creation, effectiveness against third parties and priority, while, under article 89, the law applicable to the receivable applies to the relationship between the debtor of the receivable and the secured creditor. Thus, the Working Group may wish to consider concluding that this allocation of applicable law is sound or addressing this concern in the draft Model Law or the Guide to Enactment also with respect to other types of intangible asset. In addition, by referring the creation, third-party effectiveness and priority of a security right in certificated securities to the law of the certificate's location, option A makes it possible for the secured creditor to manipulate the law applicable to third-party effectiveness and priority under option A (but presumably not creation in light of article 85) by moving the certificate from one country to another. Again, this concern would also arise with respect to other types of tangible asset in which the secured creditor has physical possession, whether they embody a claim against a third party (such as negotiable instruments and negotiable documents) or not (e.g. precious metals).*

Moreover, with respect to uncertificated securities, option A has the advantage that only one rule would apply to all issues and refer to one and the same law (which would be different from the law applicable to other types of intangible asset). It has, however, the disadvantage that it does not draw a distinction between equity securities (with respect to which, for the effectiveness of a security right against an issuer, the law of the State of the constitution of the issuer is appropriate) and debt securities (with respect to which, the law governing the securities may be more appropriate). A variant of option A might be to limit the application of paragraph 2 to equity securities and add a new paragraph for debt securities along the following lines: "The law applicable to the effectiveness of a security right in non-intermediated debt securities against the issuer is the law governing the securities" (while deleting the reference to the effectiveness against the issuer from current paragraph 3). Alternatively, this new paragraph may track the language of, or be addressed in, article 89. In this regard, the Working Group may wish to note that the issuer of securities is treated as a third-party obligor in the draft Model Law and the effectiveness of a security right as against third parties obligors is addressed in article 89 (with the exception of effectiveness as against a depositary bank, which is addressed in article 90).

Option B provides one single rule that would apply to both certificated and uncertificated securities and to all issues (creation, effectiveness against third parties, priority and enforcement, as well as the effectiveness of a security right against the issuer). This approach eliminates the risks of inconsistencies or overlaps between the law of the State of issuer's constitution and another law that the conflict-of-laws rules of the forum may designate for other issues (e.g. the law of the location of the certificate for the priority of a security right in certificated non-intermediated securities). In addition, referring to only one law for all issues provides greater certainty, as some matters (e.g. limitations on the transfer of securities under corporate law) may be viewed as being relevant not only to the effectiveness of the security right against the issuer but also to its creation and its enforcement. Moreover, by not referring to the law of the location of the certificate with respect to certificated securities, option B prevents the person in possession from manipulating the designation of the applicable law by moving the certificate from one country to another. The disadvantage of option B, however, is that it departs from the lex situs *rule for the creation, effectiveness against third parties and priority of a security right in certificated securities. Thus, the conflict-of-laws rules for certificated securities would then be different from those applicable to other intangible assets that have been assimilated for certain purposes to tangible assets (under article 79, the creation, effectiveness against third parties and priority of a security right in negotiable documents or instruments are governed by the law of the location of the document or instrument). Another disadvantage of option B is that it does not differentiate between equity and debt securities and thus refers even security rights in debt securities to the law of the State under which the issuer is constituted, which may not always be appropriate.*

Option C retains option B for equity securities (whether certificated or uncertificated) but refers to a different rule for debt securities (whether certificated or uncertificated), that is, the law of the State governing the securities. The justification for that approach is that, if the issuer has selected a law other than the law of the State of its constitution as the governing law of the securities, that other law should also be the law applicable to security right matters. The benefit of this approach is that one single law would govern all matters relating to debt securities, which would avoid the risks of inconsistencies arising from different laws being applicable to the various issues. The disadvantage of option C, however, is that the distinction between equity securities and debt securities may be blurred in certain circumstances (e.g. convertible securities). In addition, while option C focusses on the contractual nature of debt securities, which are analogous to receivables in that respect, it would not be consistent with the conflict-of-laws rule on the creation, effectiveness against third parties and priority of a security right in a receivable (under article 80, in the case of a receivable, the law of the State in which the grantor is located would govern those issues). As debt securities are receivables in a generic sense (monetary obligations), then a variation of option C would be to apply to debt securities the same conflict-of-laws rule as for receivables.]

Article 94. Law applicable in the case of a multi-unit State

1. If the law applicable to an issue is the law of a multi-unit State, subject to paragraph 3, references to the law of a multi-unit State are to the law of the relevant territorial unit and, to the extent applicable in that unit, to the law of the multi-unit State itself.

2. The relevant territorial unit referred to in paragraph 1 is to be determined on the basis of the location of the grantor or of the encumbered asset, or otherwise under the provisions of this chapter.

3. If 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.

Chapter IX. Transition

Article 95. Amendment and repeal of other laws

1. [The laws to be specified by the enacting State] are repealed.

2. [The laws to be specified by the enacting State] are amended as follows [the text of amendments to be specified by the enacting State].

Article 96. Transitional application of this Law

1. For the purposes of this chapter:

(a) "Prior law" means [the law to be specified by the enacting State] that was in force immediately before the entry into force of this Law; and

(b) "Prior security right" means a right created in accordance with prior law before the entry into force of this Law that is a security right within the meaning of this Law and to which this Law would have applied if it had been in force at the time when the security right was created.

2. Except as otherwise provided in this chapter, this Law applies to all security rights within its scope, including prior security rights.

[*Note to the Working Group: The Working Group may wish to consider the question of whether "prior law" could be only the law of the enacting State or also the law of another State applicable by virtue of the conflict-of-laws rule of the forum State. In this regard, the Working Group may wish to take into account that the provisions of the transition chapter (and any other chapter of this Law) will be triggered only if the law of the enacting State is the applicable law. The Working Group may also wish to note that the term "this Law" in paragraph 2 includes the provisions of the conflict-of-laws chapter of "this Law".*]

Article 97. Inapplicability of this Law to actions commenced before the entry into force of this Law

1. Prior law applies to a matter that is the subject of proceedings before a court or arbitral tribunal commenced before the entry into force of this Law.

2. If enforcement of a prior security right commenced before the entry into force of this Law, the enforcement may continue under the prior law.

[*Note to the Working Group: The Working Group may wish to note that this article has been revised to be aligned more closely with recommendation 229 of the* Secured Transactions Guide*, on which it is based. As a result, even though article 96, paragraph 2, provides that new law applies, a secured creditor that has already begun enforcement on the date of the entry into force of the new law has the option to continue enforcement under the rules of prior law (but may, instead, comply with the new rules). This is important if, for example, the new rules are clearer or more useful, in which case the secured creditor would decide not to exercise the option and, instead, proceed under the new rules.*]

Article 98. Creation of a prior security right

1. Prior law determines whether a prior security right was created before the entry into force of this Law.

2. A prior security right that was created under prior law remains effective between the parties notwithstanding that its creation did not comply with the creation requirements of this Law.

Article 99. Third-party effectiveness of a prior security right

1. A prior security right that was effective against third parties under prior law continues to be effective against third parties under this Law until the earlier of:

(a) The time it would have ceased to be effective against third parties under prior law; and

(b) The expiration of [a period of time to be specified by the enacting State] after the entry into force of this Law.

2. A written agreement between the grantor and the secured creditor creating or providing for a prior security right entered into before the entry into force of this Law is sufficient to constitute authorization by the grantor for the registration of a notice after the entry into force of this Law.

3. If the third-party effectiveness requirements of this Law are satisfied before the third-party effectiveness of a prior security right ceases in accordance with paragraph 1, the security right continues to be effective against third parties under this Law from the time when it was made effective against third parties under prior law.

4. If the third-party effectiveness requirements of this Law are not satisfied before the third-party effectiveness of a prior security right ceases in accordance with paragraph 1, the prior security right is effective against third parties only from the time it is made effective against third parties under this Law.

Article 100. Priority of a prior security right

1. The time to be used for determining priority of a prior security right is the time it became effective against third parties or, in the case of advance registration, became the subject of a registered notice under prior law.

2. The priority of a prior security right is determined by prior law if:

(a) The security right and the rights of all competing claimants arose before the entry into force of this Law; and

(b) The priority status of none of these rights has changed since the entry into force of this Law.

3. The priority status of a security right has changed only if:

(a) It was effective against third parties at the time when this Law entered into force, in accordance with article 99, paragraph 1, and ceased to be effective against third parties as provided in article 99, paragraph 4; or

(b) It was not effective against third parties under prior law at the time when this Law entered into force, and became effective against third parties under this Law.

[*Note to the Working Group: The Working Group may wish to note that, based on recommendations 232-234 of the* Secured Transactions Guide, *this article refers to situations in which prior law applies to the priority of a prior security right.*]

Article 101. Entry into force of this Law

This Law enters into force

Option A

on [a date to be specified by the enacting State in this Law].

Option B

[…] months [after a date to be specified by the enacting State].

Option C

on [a date to be specified by the enacting State in a decree to be issued once the Registry is operational.]

[*Note to the Working Group: The Working Group may wish to note that this article has been revised to be aligned more closely with the* Secured Transactions Guide *(see rec. 228 and chap. XI, paras. 4-6). The Working Group may also wish to note that the Guide to Enactment will: (a) refer in this regard to the discussion in the* Secured Transactions Guide *(see chap. XI, paras. 4-6); (b) explain that the expression "date on which the Law enters into force" means the date on which the Law begins to apply to transactions within its scope; and (c) explain that this article may be introduced at the beginning or the end of this Law.*]

C. Note by the Secretariat on a draft guide to enactment of the draft model law on secured transactions

(A/CN.9/WG.VI/WP.66 and Add.1-4)

[Original: English]

Contents

I. Purpose of the Guide to Enactment

1. In preparing and adopting the [draft] UNCITRAL draft Model Law on Secured Transactions (the "Model Law"), the United Nations Commission on International Trade Law ("UNCITRAL" or the "Commission") was mindful of the fact that the Model Law would be a more effective tool for States modernizing their legislation and organizations assisting States, if background and explanatory information were provided to executive and legislative branches of Government to assist in their consideration of the Model Law for enactment ("Guide to Enactment").[1]

2. In addition, the Commission was aware that in the preparation of the Model Law it was assumed that the Model Law would be accompanied by such a guide. For example, it was decided in respect of a number of issues not to settle them in the Model Law but to address them in the Guide so as to provide guidance to States enacting the Model Law. So, the Guide also addresses or clarifies matters that were not settled in the Model Law but were referred to the Guide.[2]

3. The Commission agreed that the Guide to Enactment should be prepared and referred that task to the Working Group. In addition, the Commission agreed that the Guide to Enactment: (a) should be as short as possible; (b) include cross references to the Secured Transactions Guide and the other texts of the Commission on secured transactions; (c) focus on giving guidance to legislators rather than users of the text; (d) explain the thrust of each provision or section of the Model Law and any difference with the corresponding recommendations of the Secured Transactions Guide or the provisions of another UNCITRAL text on secured transactions; (e) give guidance to States with respect to matters referred to them and in particular explain each option offered in various articles of the Model Law to assist enacting States in choosing one of the options offered.[3]

4. The Commission was also aware of the likelihood that the Model Law would be used in a number of States with limited familiarity with the type of secured transaction covered by in the Model Law. So, the Guide, much of which is drawn from the *travaux préparatoires* of the Model Law, is also intended to be helpful to other users of the text, such as judges, arbitrators, practitioners and academics.

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[1] *Official Records of the General Assembly, Seventieth Session, Supplement No. 17* (A/70/17) para. 215.
[2] Ibid.
[3] Ibid., para. 216.

5. The information presented in this Guide is intended to briefly explain the thrust of each provision or section of the Model Law and its relationship with the corresponding recommendation(s) of the UNCITRAL Legislative Guide on Secured Transactions (the "Secured Transactions Guide") or other UNCITRAL texts on secured transactions, including the Supplement on Security Rights in Intellectual Property (the "Intellectual Property Supplement"). With respect to security rights in receivables, the recommendations of the Secured Transactions Guide and thus the provisions of the Model Law are based on the United Nations Convention on the Assignment of Receivables in International Trade (the "Assignment Convention"). The provisions of the Model Law dealing with the security rights registry (the "Registry") are also based on the UNCITRAL Guide on the Implementation of a Security Rights Registry (the "Registry Guide").

6. Mindful of the fact that the Secured Transactions Guide contains extensive commentary, the Commission decided that the Guide to Enactment should nevertheless be prepared. The reason was that the commentary of the Secured Transactions Guide had a different structure and did not contain a straightforward discussion of each recommendation but rather a discussion of the comparative advantages and disadvantages of various workable approaches with the recommendation being set out as a conclusion of that discussion. At the same time, as mentioned above, to avoid repetition, the Commission agreed that the draft Guide to Enactment should not repeat, but rather incorporate by reference, those comments contained in the Secured Transactions Guide that could assist in explaining a provision of the Model Law.

7. The Guide to Enactment was prepared by the Secretariat pursuant to the request of the Commission and is based on the considerations of the Working Group and the Commission. [It was considered and approved in principle by the Working Group at its twenty-eighth and twenty-ninth sessions (see […] respectively) and by the Commission at its forty-ninth session (see […]).]

II. Purpose and origin of the Model Law

A. Purpose of the Model Law

8. The Model Law is designed to assist States in implementing the recommendations of the Secured Transactions Guide, the Intellectual Property Supplement and the Registry Guide with respect to security rights in movable assets. The overall objective of those texts and the Model Law is to promote low-cost credit by enhancing the availability of secured credit (see Secured Transactions Guide, rec. 1, subpara. (a)). Like all those texts, the Model Law is intended to be useful to States that do not currently have efficient and effective secured transactions laws, as well as to States that already have workable laws but wish to modernize their laws and harmonize them with the laws of other States whose secured transactions laws are generally consistent with the recommendations of those texts (see Secured Transactions Guide, Introduction, para. 1).

9. The provisions of the Model Law are based on the recommendations of the Secured Transactions Guide, including the Intellectual Property Supplement. The provisions of the Model Law dealing with the security rights registry (the "Registry") are also based on the Registry Guide. The provisions of the Model Law on security rights in receivables are based on the recommendations of the Secured Transactions Guide, which in turn are based on the Assignment Convention.

B. Background

10. At its first session, in 1968, the Commission included the topic of security interests in goods in its future work programme.[4] At its third session in, 1970, the Commission discussed the topic and decided to request the Secretary-General to: (a) invite Governments to submit

[4] Ibid., *Twenty-third Session, Supplement No. 16* (A/7216), paras. 40-48.

information on security interests in goods; (b) make that information available to the Commission; and (c) prepare a study on conditional sales of goods and trust receipts.[5]

11. At its eighth session, in 1975, the Commission considered a note by the Secretariat entitled "Study on security interests" with an annex entitled "Legal principles governing security interests" (A/CN.9/102) and decided to request the Secretary-General to: (a) complete the study by including the law of additional countries; (b) continue the feasibility study on the possible scope of uniform rules on security interests in goods and, for this purpose, consult with interested international organizations and trade and financial institutions; and (c) submit a progress report to the Commission.[6]

12. At its tenth session, in 1977, the Commission considered two notes by the Secretariat entitled "Study on security interests" (A/CN.9/130 and A/CN.9/131) and a third note entitled "Note by the Secretariat on article 9 of the Uniform Commercial Code of the United States of America" (A/CN.9/132), and requested the Secretary-General to: (a) submit to the Commission a further report on the feasibility of preparing a uniform text on security interests and on its possible content; and (b) carry out further work on the subject in consultation with interested international organizations and banking and trading institutions.[7]

13. At its twelfth session, in 1979, the Commission considered a note by the Secretariat entitled "Security interests: feasibility of uniform rules to be used in the financing of trade" (A/CN.9/165) and requested the Secretariat to prepare a report setting out the issues to be considered in the preparation of uniform rules on security interests.[8]

14. At its thirteenth session, in 1980, the Commission considered a note by the Secretariat entitled "Security interests: issues to be considered in the preparation of uniform rules" (A/CN.9/186) and decided that no further work should be carried out and the subject should no longer be accorded priority as "the world-wide unification of the law of security interests in goods, for the reasons brought out in the discussions, was in all likelihood unattainable".[9] The main reason mentioned for this decision was that "the subject was too complex and for there to be reasonable expectations that uniform rules might be developed" because: (a) the concepts of security interests and title retention were understood differently in various legal systems and it would be difficult for many legal systems to make the adjustments necessary to accommodate the different concepts; and (b) the topic of security interests was closely connected with other areas of law, such as bankruptcy law, which would have to be unified or harmonized for the proposed model law to be effective.[10] At that session, a number of suggestions were made. One suggestion was that the Commission might wish to await the outcome of the work on retention of title by the Council of Europe and on factoring by the International Institute for the Unification of Private Law ("Unidroit"), before it undertook work of its own. Another suggestion was that, if further work were to be undertaken in the future, emphasis should be placed on the practical problems in respect of security interests in international trade.[11]

15. Developments in the years that followed made possible the work of the Commission on secured transactions. More concretely, in 1984, the European Committee on Legal Cooperation (CDCJ) decided to defer its work to a future session work on a draft Convention on Simple Reservation of Title.[12] The Committee considered that two issues needed to be studied further, namely the publicity to be given to the reservation of title (written form or registration) and the treatment of the reservation of title in the case of the buyer's insolvency.[13]

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[5] Ibid., *Twenty-fifth Session, Supplement No. 17* (A/8017), paras. 139-145.
[6] Ibid., *Thirtieth Session, Supplement No. 17* (A/10017), paras. 48-63.
[7] Ibid., *Thirty-second Session, Supplement No. 17* (A/32/17), para. 37.
[8] Ibid., *Thirty-fourth Session, Supplement No. 17* (A/34/17), paras. 49-54.
[9] Ibid., *Thirty-fifth Session, Supplement No. 17* (A/35/17), para. 28.
[10] Ibid., para. 26.
[11] Ibid., para. 27.
[12] The draft Convention is contained in document CDCJ (83) 36, item 6. The decision is reflected in document CDCJ (84) 55, para. 59. However, work was adjourned indefinitely (see A/CN.9/475, para. 10).
[13] Ibid., para. 57.

16. In 1988, at a diplomatic conference held in Ottawa, States adopted the Unidroit Convention on International Factoring (Ottawa, 28 May 1988).[14]

17. In 1997, the Commission adopted the UNCITRAL Model Law on Cross-Border Insolvency, which is designed to assist States to equip their insolvency laws with a modern legal framework to more effectively address insolvency proceedings concerning debtors that have 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.

18. In 2001, the Commission adopted the Assignment Convention, dealing with security interests in, and outright transfers of, receivables in international trade. In that year, a diplomatic conference held in Cape Town adopted the Convention on International Interests in Mobile Equipment and the Aircraft Protocol. In 2004, the Commission adopted the UNCITRAL Legislative Guide on Insolvency Law, which provides a comprehensive statement of the key objectives and principles that should be reflected in a State's insolvency laws. As all this work set the stage for further work, in 2007, the Commission adopted the UNCITRAL Legislative Guide on Secured Transactions, the overall objective of which is to promote low-cost credit by enhancing the availability of secured credit. Subsequently, the Commission adopted further texts on insolvency[15] and security interests,[16] making possible the preparation of a model law on secured transactions.[17]

C. Preparatory work and adoption

19. At its fortieth session in 2007, the Commission decided that, after completion of the Secured Transactions Guide, future work should be undertaken with a view to preparing a supplement to the Guide dealing with security rights in certain types of securities (i.e. non-intermediated securities), taking into account work by other organizations, in particular Unidroit.[18]

20. At its fourteenth and fifteenth sessions, Working Group VI (Security Interests) had a preliminary discussion about its future work programme. During those sessions, several suggestions were made, including the following: (a) a supplement to the Guide dealing with security rights in securities not covered by the Unidroit Convention on Substantive Rules for Intermediated Securities (Geneva, 2009; the "Unidroit Securities Convention"); (b) a legislative guide on registration of security rights in general security rights registries; (c) a model law on secured transactions based on the recommendations of the Guide; (d) a contractual guide on secured transactions; and (e) a contractual guide on intellectual property licensing (see A/CN.9/667, para. 141, and A/CN.9/670, paras. 123-126, respectively).

21. At its forty-second session, in 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, respectively). At that session, the Commission agreed that: (a) the Secretariat could hold an international colloquium early in 2010 with broad participation of experts from Governments, international organizations and the private sector; and (b) the Commission would be in a better position to consider and make a decision on the future work programme of the Working Group at its forty-third session on the basis of a note by the Secretariat.[19]

22. At its sixteenth and seventeenth sessions, Working Group VI engaged in a preliminary discussion of its future work programme (A/CN.9/685, para. 96, and A/CN.9/689, paras. 59-61). At the seventeenth session of the Working Group, some support was expressed for work on regulations on registration of security rights and a model law on secured transactions based on the recommendations of the Guide. With regard to a supplement to the Guide on security rights in certain types of securities, it was observed that

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[14] www.unidroit.org/instruments/factoring.

[15] See www.uncitral.org/uncitral/en/uncitral_texts/insolvency.html.

[16] See www.uncitral.org/uncitral/en/uncitral_texts/security.html.

[17] For security interests texts prepared by UNCITRAL, Unidroit and the Hague Conference, see www.uncitral.org/uncitral/en/uncitral_texts/security/2011UNCITRAL_HCCH_Unidroit_texts.html.

[18] *Official Records of the General Assembly, Sixty-second Session, Supplement No. 17* (A/62/17 (Part I)), paras. 147 and 160.

[19] Ibid., *Sixty-fourth session, Supplement No. 17* (A/64/17), paras. 313-320.

that work would have to be limited to non-intermediated securities in view of the work done by Unidroit and the Hague Conference on intermediated securities (see the Unidroit Securities Convention and the Convention on the Law Applicable to Certain Rights in respect of Securities held with an Intermediary; The Hague, 2006; the "Hague Securities Convention").

23. In accordance with the decision of the Commission at its forty-second session, an international colloquium on secured transactions was held in Vienna from 1 to 3 March 2010. The purpose of the colloquium was to obtain the views and advice of experts with regard to possible future work in the area of security interests. Approximately 100 experts from governments, international organizations and the private sector participated in this three-day event. The papers submitted for the international colloquium are available on the UNCITRAL website.[20] The following topics were discussed at the colloquium: (a) security rights in non-intermediated securities; (b) registration of security rights in movable assets; (c) security rights in movable assets: a model law; (d) rights and obligations of the parties to a security agreement; and (e) intellectual property licensing (A/CN.9/702 and Add.1).

24. At its forty-third session, in 2010, the Commission had before it a note by the Secretariat on possible future work in the area of security interests (A/CN.9/702 and Add.1). The Commission agreed that four issues related to secured transactions law listed in document A/CN.9/702, paragraph 2(a)-(d), were interesting (non-intermediated securities, registration of security rights, a model law and a contractual guide on secured transactions) and should be retained on its future work agenda.[21] At the same time, in view of the limited resources available to it, the Commission agreed that it could not undertake work on all four issues at the same time and that, as a result, it should set priorities. In that regard, there was general agreement that priority should be given to work on registration of security rights in movable assets. At that session, the Commission decided that Working Group VI should be entrusted with the preparation of a text on registration of security rights in movable assets as a matter of priority. It was also agreed that other topics, such as security rights in non-intermediated securities, a model law based on the recommendations of the Guide and a text dealing with the rights and obligations of the parties should be retained in the future programme of Working Group VI for further consideration by the Commission at a future session on the basis of notes to be prepared by the Secretariat within the limits of existing resources.[22] With respect to intellectual property licensing, the Commission requested the Secretariat to prepare a study, within existing resources, that would identify specific topics and discuss the desirability and feasibility of the Commission preparing a legal text with a view to removing specific obstacles to international trade in the context of intellectual property licensing practices.[23]

25. At its forty-fifth session, in 2012, the Commission decided that, upon its completion of the Registry Guide, Working Group VI should undertake work to prepare a simple, short and concise model law on secured transactions based on the Secured Transactions Guide and consistent with all texts prepared by UNCITRAL on secured transactions.[24] At that session, the Commission noted that the Working Group, at its twenty-first session, had agreed to propose to the Commission that the Working Group should develop a model law on secured transactions based on the general recommendations of the Secured Transactions Guide and consistent with all the texts prepared by UNCITRAL on secured transactions. It was also noted that the Working Group had agreed to propose to the Commission that the topic of security rights in non-intermediated securities should be retained on its work agenda and be considered at a future session (A/CN.9/743, para. 76).[25]

26. Recalling that, at its forty-third session, in 2010, the Commission had agreed that the topics mentioned above should be retained on the programme of the Working Group for further consideration, the Commission considered the proposals of the Working Group. It

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[20] www.uncitral.org/uncitral/en/commission/colloquia/3rdint.html. Selected articles were published in the Uniform Law Review, NS-Vol. XV, 2010-2.

[21] *Official Records of the General Assembly, Sixty-fifth session, Supplement No. 17* (A/65/17), para. 264.

[22] Ibid., para. 268.

[23] Ibid., para. 273.

[24] Ibid., *Sixty-seventh Session, Supplement No. 17* (A/67/17), para. 105.

[25] Ibid., para. 101.

was widely felt that a simple, short and concise model law on secured transactions could usefully complement the Secured Transactions Guide and would be extremely useful in addressing the needs of States and in promoting implementation of the Secured Transactions Guide. While a concern was expressed that a model law might limit the flexibility of States to address the local needs of their legal traditions, it was generally viewed that a model law could be drafted in a sufficiently flexible manner to adapt to various legal traditions. Moreover, there was support for the idea that a model law could greatly assist States in addressing urgent issues relating to access to credit and financial inclusion, in particular for small and medium-sized enterprises.[26]

27. As to the topic of security rights in non-intermediated securities, it was widely felt that the topic merited further consideration. The Commission noted that non-intermediated securities, in the sense of securities other than those credited to a securities account, that were used as security for credit in commercial finance transactions were excluded from the scope of the Secured Transactions Guide (see recommendation 4, subparas. (c)-(e) of the Guide), the Unidroit Securities Convention and the Hague Securities Convention.[27]

28. At its twenty-third session, in 2013, Working Group VI 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).

29. At its forty-sixth session, in 2013, the Commission 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 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.[28] The Commission also agreed that whether that work would include security interests in non-intermediated securities would be assessed at a future time.[29]

30. The Working Group continued its work at its twenty-fourth session, in 2013, and at its twenty-fifth session, in 2014, on the basis of notes prepared by the Secretariat entitled "Draft Model Law on Secured Transactions" (A/CN.9/WG.VI/WP.57 and Add.1-4, and A/CN.9/WG.VI/WP.59 and Add.1). The reports of the Working Group on its work at those sessions are contained in documents A/CN.9/796 and A/CN.9/802. At its twenty-fifth session, the Working Group also decided to recommend to the Commission that the draft Model Law address security rights in non-intermediated securities (see A/CN.9/802, para. 93).

31. At its forty-seventh session, in 2014, the Commission expressed its satisfaction for the considerable progress achieved by the Working Group in its work and requested the Working Group to expedite its work so as to complete the draft Model Law, including certain definitions and provisions on non-intermediated securities (see A/CN.9/811), and to submit it to the Commission for adoption together with a guide to enactment as soon as possible.[30]

32. The Working Group continued its work at its twenty-sixth session, in 2014, and at its twenty-seventh session, in 2015, on the basis of notes prepared by the Secretariat entitled "Draft Model Law on Secured Transactions" (A/CN.9/WG.VI/WP.61 and Add.1-3, and A/CN.9/WG.VI/WP.63 and Add.1-4). The reports of the Working Group on its work at those sessions are contained in documents A/CN.9/830 and A/CN.9/836.

33. At its forty-eighth session, in 2015, the Commission considered and approved the substance of article 26 of chapter IV of the Model Law and articles 1-29 of the draft Registry

[26] Ibid., paras. 102 and 103.
[27] Ibid., para. 104.
[28] Ibid., *Sixty-eighth Session, Supplement No. 17* (A/68/17), para. 193.
[29] Ibid., para. 332.
[30] Ibid., *Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 163.

Act.[31] At that session, the Commission also agreed that a guide to enactment of the Model Law should be prepared and referred that task to the Working Group.[32]

34. The Working Group continued its work at its twenty-eighth session, in 2015, and completed it at its twenty-ninth session, in 2016, on the basis of notes prepared by the Secretariat entitled "Draft Model Law on Secured Transactions" (A/CN.9/WG.VI/WP.65 and Add. 1-4) and "Draft Guide to Enactment" (A/CN.9/WG.VI/WP.66 and Add. 1-4). The reports of the Working Group on its work at those sessions are contained in documents […].

35. In preparation for the forty-ninth session of the Commission, the text of the draft Model Law as approved by Working Group VI was circulated to all Governments and to interested international organizations for comment. At that session, the Commission had before it the reports of the Working Group on its twenty-eighth and twenty-ninth sessions, the comments received from Governments (A/CN.9/[…]), as well as the Model Law and the draft Guide to Enactment prepared by the Secretariat (A/CN.9/[…]). At that session, the Commission […].

36. After consideration of the Model Law and the draft Guide to Enactment, the Commission adopted the following decision:

[…].

III. The Model Law as a tool for harmonizing laws

37. The Model Law is in the form of a legislative text that is recommended to States for incorporation into their national law. Unlike an international convention, model legislation does not require the State enacting it to notify the United Nations or other States that may have also enacted it. However, States are strongly encouraged to inform the UNCITRAL secretariat of any enactment of the new Model Law (or any other model law resulting from the work of UNCITRAL).

38. In incorporating the text of model legislation into its legal system, a State may wish to consider modifying or leaving out some of its non-fundamental provisions. In the case of a convention, the possibility of changes being made to the uniform text by the States parties (normally referred to as "declarations") is much more restricted; trade law conventions in particular usually either totally prohibit declarations or allow only very few, specified ones. The flexibility inherent in model legislation is particularly desirable in those cases where it is likely that the State would wish to make various modifications to the uniform text before it would be ready to enact it as national law. Some modifications may be expected, in particular when the uniform text is closely related to the national court and procedural system. This, however, also means that the degree of, and certainty about, harmonization achieved through model legislation is likely to be lower than in the case of a convention.

39. However, this relative disadvantage of model legislation may be balanced by the fact that the number of States enacting model legislation is likely to be higher than the number of States adhering to a convention. In order to achieve a satisfactory degree of harmonization and certainty, it is recommended that States make as few changes as possible in incorporating the new Model Law into their legal systems and that they take due regard of its basic principles, including the unitary and functional approach to secured transactions, party autonomy and the international origin of the Model Law. In general, in enacting the Model Law, it is advisable to adhere as much as possible to the uniform text in order to make the national law as transparent and familiar as possible for foreign users of the national law. The Model Law is sufficiently flexible in providing options and leaving a number of matters to States.

40. While it is recommended that the Model Law should be implemented in one law, depending on its legal tradition and drafting conventions, the registry-related provisions may be incorporated in the secured transactions law, in another law, decree, regulation or another

[31] Ibid., *Seventieth Session, Supplement No. 17* (A/70/17), para. 214.
[32] Ibid., para. 216.

act adopted by a legislative or executive body, or a combination thereof. Similarly, the conflict-of-laws provisions may be incorporated in the secured transactions law (at the beginning or at the end of it) or in a separate law (civil code or other law).

IV. Main features of the Model Law

A. Relationship of the Model Law with the secured transactions texts of UNCITRAL

41. The Secured Transactions Guide, including the Intellectual Property Supplement, and the Registry Guide contain detailed commentary and recommendations on all issues to be addressed in a modern law on secured transactions. However, they are long texts and States will need assistance in implementing their recommendations. Thus, the Model Law was prepared to complement those texts and to assist States in implementing their recommendations.

42. The Model Law reflects the policies embodied in the recommendations of those texts. The difference in the formulation between a provision of the Model Law and the relevant recommendation is due to the legislative nature of the Model Law. Where there is a difference, it is explained in the remarks to the relevant provision of the Model Law below.

43. For reasons explained below, the Model Law also addresses matters that were not addressed in the Secured Transactions Guide (e.g. security rights in non-intermediated securities) or were not addressed in a recommendation of the Registry Guide (e.g. the effectiveness of amendment or cancellation notices that have not been authorized by the secured creditor). At the same time, the Model Law does not address matters that were addressed in the Secured Transactions Guide (e.g. security rights in the right to receive the proceeds under an independent undertaking).

B. Key objectives and fundamental policies of the Model Law

44. The overall objective of the Model Law is the same as that of the Secured Transactions Guide, that is, to promote low-cost credit by enhancing the availability of secured credit (see rec. 1 and Introduction, paras. 43-59). The fundamental policies of the Model Law are the same as those of the Secured Transactions Guide (see Introduction, paras. 60-72). In enacting the Model Law, States may wish to consider issues of harmonization with existing law, legislative method, drafting technique and post-enactment acculturation (see Introduction, paras. 73-89).

45. Depending on its drafting method and technique, the enacting State may wish to consider including the key objectives of the Model Law in a preamble or other statement of objectives of the law. That statement could be used for the purpose of the interpretation of, and the filling of gaps in, the Model Law.

[*Note to the Working Group: The Working Group may wish to consider the suggestion made in the note to article 5 about a new rule on the interpretation of the Model Law.*]

V. Assistance from the UNCITRAL secretariat

A. Assistance in drafting legislation

46. In the context of its training and assistance activities, the UNCITRAL secretariat assists States with technical consultations for the preparation of legislation based on the Model Law. The same assistance is brought to Governments considering legislation based on other UNCITRAL model laws (i.e. the UNCITRAL Model Law on Cross-Border Insolvency, the UNCITRAL Model Law on International Commercial Arbitration, the UNCITRAL Model Law on International Commercial Conciliation, the UNCITRAL Model Law on Electronic Commerce, the UNCITRAL Model Law on Electronic Signatures, the

UNCITRAL Model Law on International Credit Transfers and the UNCITRAL Model Law on Public Procurement) or considering adhesion to one of the international trade law conventions prepared by UNCITRAL (e.g. the Assignment Convention).

47. Further information concerning the Model Law and other model laws and conventions developed by UNCITRAL, may be obtained from the UNCITRAL secretariat at the address below:

International Trade Law Division, Office of Legal Affairs
United Nations
Vienna International Centre
P.O. Box 500
A-1400 Vienna, Austria
Telephone: (+43-1) 26060-4060 or 4061
Telecopy: (+43-1) 26060-5813
Electronic mail: uncitral@uncitral.org
Internet home page: www.uncitral.org

B. Information on the interpretation of legislation based on the Model Law

48. The UNCITRAL secretariat welcomes comments concerning the Model Law and the Guide, as well as information concerning enactment of legislation based on the Model Law. Once enacted, the Model Law will be included in the CLOUT information system, which is used for collecting and disseminating information on case law relating to the conventions and model laws that have emanated from the work of UNCITRAL. The purpose of the system is to promote international awareness of the legislative texts formulated by UNCITRAL and to facilitate their uniform interpretation and application. The UNCITRAL secretariat publishes, in the six official languages of the United Nations, abstracts of decisions and makes available, against reimbursement of copying expenses, the decisions on the basis of which the abstracts were prepared. The system is explained in a user's guide that is available from the UNCITRAL secretariat in hard copy (A/CN.9/SER.C/GUIDE/1) and on the above-mentioned Internet home page of UNCITRAL.

VI. Article-by-article remarks

Chapter I. Scope of application and general provisions

Article 1. Scope of application

49. Article 1 is based on recommendations 1-7 of the Secured Transactions Guide (see chap. I, paras. 1-4). It is intended to set out the various types of transaction and asset covered by the Model Law (see art. 1, paras. 1-4), as well as to clarify the relationship between the Model Law and other law (see art. 1, paras. 5 and 6). Generally, the Model Law has the same comprehensive scope of application as the Secured Transactions Guide and applies to all property rights in any type of movable asset, such as equipment, inventory and receivables, which is created by an agreement to secure payment or other performance of an obligation (see art. 1, para. 1, and definition of the term "security right" in art. 2, subpara. (jj)). However, there are a few differences between the scope of the Model Law and the scope of the Secured Transactions.

50. Like the Secured Transactions Guide, the Model Law applies to outright transfers of receivables (see art. 1, para. 2). The main reasons for this approach are that outright transfers of receivables take place in the context of financing transactions and it is difficult to determine at the outset of a transaction whether an assignment will be held to be an outright or a security assignment (see Secured Transactions Guide, Chap. I, paras. 25-31). [However, unlike the Secured Transactions Guide, the Model Law excludes from its scope certain types of outright transfers of receivables.]

[*Note to the Working Group: Depending on the decision of the Working Group, this paragraph may need to be deleted or revised to refer to the relevant reasons for the exclusion of certain types of outright transfer of receivables (see art. 1, Note to the Working Group).*]

51. In addition, unlike the Secured Transactions Guide, the Model Law excludes from its scope security rights in the right to receive the proceeds under an independent undertaking (see art. 1, subpara. 3(a)). The reason is that financing practices relating to independent undertakings are subject to special rules. In any case, States interested in addressing those practices in their general secured transactions law can always implement the relevant recommendations of the Secured Transactions Guide (recs. 27, 50, 107, 127, 176 and 212).

52. Moreover, unlike the Secured Transactions Guide, the limitation as to the application of the Model Law to security rights in intellectual property (see art. 1, subpara. 3(b)) may not be necessary if the enacting State has already coordinated or otherwise addressed the relationship between the Model Law and its law relating to intellectual property.

53. Also, unlike the Secured Transactions Guide, the Model Law does not exclude from its scope security rights in non-intermediated securities (see art. 1, subpara. 3(c)). The reason is that such securities are part of commercial finance transactions and are not addressed in any other international trade law text.

54. [Finally, the Model Law excludes payment rights under or from financial contracts governed by "close-out netting agreements", rather than "netting agreements", to ensure that transactions relating to set off [even between two sellers of goods with trade claims] and counter-claims would not be inadvertently excluded (see art. 1, subpara. 3(d)).]

[*Note to the Working Group: The Working Group may wish to note that the bracketed text may have to be deleted or revised, depending on its decision with respect to the bracketed words in article 1, subparagraph 3(d) (see Note to the Working Group).*]

55. While consistent with the policy of recommendation 7 of the Secured Transactions Guide, subparagraph 3(f), adds a condition to further exclusions, that is, that other law governs matters addressed in the Model Law. The reason for this approach is to avoid inadvertently creating gaps in the law. In addition, subparagraph 3(f), provides guidance to States as to possible exclusions, referring to types of asset, such as ships and aircraft, that are subject to specialized secured transactions and asset-based registration regimes.

56. Similarly, while paragraph 4, is formulated somehow differently from recommendation 6 of the Secured Transactions Guide, there is no policy difference between the two rules. The policy may be explained as follows. In the case of a security right in an asset covered by the Model Law, the security right extends to its identifiable proceeds (see art. 10, para. 1). This rule applies even if the proceeds are of a type that is outside the scope of the Model Law (such as intermediated securities) except if a security right in those securities is subject to other law.

57. Paragraph 5, which is a reformulation of the rule in recommendation 2, subparagraph (b), of the Secured Transactions Guide, is intended to preserve the application of consumer protection law. For example, under consumer-protection law, it may not be possible to create a security right in all present and future assets, employment benefits, at least up to a certain amount, or necessary household items of a consumer. Enacting States that do not have a developed consumer-protection law may need to consider whether enactment of the Model Law should be accompanied by the enactment of such special protections for consumers. It should also be noted that the Model Law already includes certain consumer-specific rules. For example, under article 22, an acquisition security right in consumer goods is effective against third parties upon its creation.

58. In line with recommendation 18 of the Secured Transactions Guide, paragraph 6 is intended to preserve limitations to the creation or the enforceability of a security right in certain types of asset (such as employment benefits) that are based on other law (statutory or case law), if any. At the same time, it is intended to ensure that such limitations based on the sole ground that an asset is a future asset or a part or undivided interest in an asset are overridden (see art. 8, paras. (a) and (b)). However, paragraph 6 does not apply to contractual limitations (negative pledge agreements). The Model Law overrides explicitly contractual limitations with respect to receivables or other intangible assets, negotiable instruments or rights to payment of funds credited to a bank account (see art. 12). With respect to other

types of asset, contractual limitations are overridden implicitly to the extent that the Model Law allows the owner of an asset to create a security right in that asset, even if the security or other agreement expressly restricts that right. The Model Law does not condition the creation, third-party effectiveness or priority of a security right in an asset on the grantor having the right to encumber it (art. 6, para. 1, refers only to the "power to encumber").

59. Finally, unlike the Secured Transactions Guide, the Model Law does not apply to attachments to movable assets or immovable property. Thus, the Model Law does not include a provision along the lines of recommendation 5, which provides that, while the law recommended in the Secured Transactions Guide does not apply to immovable property, it does apply to attachments to immovable property. Enacting States are encouraged to include in their enactments of the Model Law provisions based on the relevant recommendations of the Secured Transactions Guide (see recs. 21, 25, 43, 48, 87, 88, 164, 165, 184, 195 and 196).

Article 2. Definitions and rules of interpretation

60. Article 2 explains the meaning of most key terms used in the Model Law. The meaning of other terms is explained in various articles of the Model Law. For example: (a) the meaning of the term "registry" is explained in article 26; and (b) the meaning of the term "default" is explained in article 66, paragraph 1. Article 2 is based on the terminology and rules of interpretation of the Secured Transactions Guide (see Introduction, paras. 15-20). Rules of interpretation include the following: (a) the word "or" is not intended to be exclusive; (b) the singular includes the plural and vice versa; and (c) the words "include" or "including" are not intended to indicate an exhaustive list (see Introduction, para. 17).

Acquisition security right

61. An acquisition security right is a security right that secures the grantor's obligation with respect to credit provided to enable the grantor to acquire a tangible asset (other than reified intangible assets), intellectual property and the rights of a licensee in intellectual property. Where a security right secures obligations in addition to the credit extended and used for the purpose of acquiring the encumbered asset, it is an ordinary security right to the extent of those additional obligations.

Bank account

62. To underline the distinction between a "bank account" and a "securities account", the Model Law defines the latter term as "an account maintained by an intermediary to whom securities may be credited or debited" and the term "securities" in a manner that clearly excludes funds. The term "bank account" includes a checking or other current account, as well as a savings or deposit account. The enacting State may wish to consider including a definition of the term "bank" in its secured transactions law or rely for this purpose on other law.

Certificated non-intermediated securities

63. The term "represented" is broad enough to cover the approaches taken in different jurisdictions (e.g. "covered" or "embodied"). The term "certificate" means only a tangible document subject to physical possession. Thus, securities represented by an electronic certificate are uncertificated securities under the Model Law.

Control agreement

64. While the effect of a control agreement is to render a security right effective against third parties (see art. 16), its purpose is to ensure the cooperation of the depositary bank or the issuer in the enforcement of a security right. Unlike the definition of this term in the Secured Transactions Guide, on which this definition is based, this definition does not refer to a "signed writing". This difference does not reflect a policy change but rather a decision that this matter should be left to the authorization requirements of the enacting State. A control agreement does not need to be in a single writing. It should be noted that any reference to a "writing" in the Model Law is intended to cover electronic equivalents (see Secured Transactions Guide, recs. 11 and 12).

Money

65. The term "money", whose definition is based on a definition contained in the Secured Transactions Guide, is intended to include not only the national currency (i.e. banknotes and coins) of the enacting State but also foreign currency. No reference is made to currency "currently" authorized as a legal tender, because if currency is not "currently" authorized as a legal tender, it would not qualify as a legal tender. Rights to payment of funds credited to a bank account and negotiable instruments are recognized as distinct concepts in the Model Law and they are not included in the term "money".

Non-intermediated securities

66. The term "non-intermediated securities" includes shares and bonds that are not held in a securities account. The term does not include the rights of an intermediary or a competing claimant in securities held by the intermediary directly against the issuer because those securities are credited by the intermediary to a securities account in the name of the grantor and therefore qualify as intermediated securities for the purposes of that transaction.

Notification of a security right in a receivable

67. The requirement for the identification of the encumbered receivable and the secured creditor that was included in the definition of this term in the Secured Transactions Guide was moved to article 56, paragraph 1, as it states a substantive rule on the effectiveness of a notification of a security right, a matter that is already addressed in article 56, paragraph 1.

Proceeds

68. The term "proceeds" has the same meaning as in the Secured Transactions Guide. It is important to note that it covers both proceeds of the sale of an encumbered asset by the grantor or a person that acquired the asset from the grantor and natural or civil fruits. The terms revenues, dividends and distributions, which were included in the definition of this term in the Secured Transactions Guide, have been deleted on the understanding that they are covered by the term "civil fruits".

Receivable

69. Like the Secured Transactions Guide, the Model Law defines the term "receivable" in a broad way to cover even non-contractual receivables (e.g. tort receivables). To the contrary, in the Assignment Convention, the term "receivable" is limited to contractual rights to payment.

Secured obligation

70. The term "secured obligation" includes any obligation secured by a security right, including credit extended to cover the operational costs of a business or to pay the purchase price of goods. It includes not only obligations already incurred at the time of the extension of the credit but also obligations incurred thereafter, if the security agreement so provides. As in other UNCITRAL texts, in the Model Law the singular includes the plural and vice versa (see para. 60 above). So, for example, a reference to the secured obligation would be sufficient to cover all present and future secured obligations.

Securities

71. The definition of the term "securities" is narrower than the definition of that term in article 1, subparagraph (a), of the Unidroit Securities Convention. The reason is that, while a broad definition is appropriate for the purposes of that Convention, it is overly broad for the purposes of the Model Law and could result in subjecting security rights in receivables, negotiable instruments, money and other generic intangible obligations to the special rules applicable to security rights in non-intermediated securities (see A/CN.9/802, para. 74). In any case, each enacting State would need to coordinate the definition of the term "securities" in its secured transactions law with the definition of this term in its securities transfer law.

Securities account

72. The definition of this term is derived from article 1, subparagraph (c), of the Unidroit Securities Convention.

Tangible asset

73. The term "tangible asset" includes the terms consumer goods, equipment and inventory, terms that do not refer to subcategories of tangible assets but rather to the way in which particular tangible assets are used by the grantor. Thus, the same cars could qualify as "consumer goods", if it is used by the grantor for personal purposes, as "equipment", if it is used by the grantor in its business, or as "inventory", if the grantor happens to be a car dealer or manufacturer.

Article 3. International obligations of this State

74. Article 3 is based on article 3 of the UNCITRAL Model Law on Cross-Border Insolvency. It is intended to reflect the principle of the prevalence of international treaties (such as the Convention on International Interests in Mobile Equipment and its Protocols) over domestic law.

Article 4. Party autonomy

75. Article 4 is based on article 6 of the Assignment Convention (the first sentence of which is based on art. 6 of the United Nations Convention on Contracts for the International Sale of Goods ("CISG")) and recommendation 10 of the Secured Transactions Guide. It is intended to reflect the principle that, with certain exceptions stated in the Model Law, parties are free to vary its effect as between them.

76. An agreement referred to in paragraph 1 may be not only between the secured creditor and the grantor but also between the secured creditor or the grantor and other parties whose rights may be affected by the Model Law, such as the debtor of an encumbered receivable, or between the secured creditor and a competing claimant. [Paragraph 2 is intended to clarify that, while an agreement between two parties may benefit a third party, it cannot negatively affect its rights.]

[*Note to the Working Group: Depending on the decision of the Working Group with respect to the bracketed words in paragraph 2, the bracketed text in this paragraph my need to be revised.*]

Article 5. General standards of conduct

77. Article 5 is based on recommendation 132 of the Secured Transactions Guide (see chap. VII, para. 15). Under paragraph 1, any person must exercise all its rights and perform all its obligations under the Model Law (and not only the rights and obligations under the provisions of the enforcement chapter) in good faith and in a commercially reasonable manner. The violation of this obligation may result in liability to damages and other consequences that are left to the relevant law of the enacting State.

78. The concept of "commercial reasonableness" refers to the commercial transaction context and best practices. Meeting the specific standards referred to in other articles of the Model Law (e.g. art. 72, para. 4, according to which notice is to be given within a short period of time) should generally be construed as meeting the general standards of conduct referred to in this article.

79. To protect the legitimate interests of all parties and avoid abuses, subparagraph 2(a) provides that the duty to act in good faith and in a commercially reasonable manner cannot be waived or varied by agreement. Under subparagraph 2(b), this duty does not apply to an outright transfer without recourse. The reason is that the grantor (transferor) has no remaining vested interest in the receivable that could be protected by a limitation on the way in which the secured creditor (transferee) could collect the receivable.

Chapter II. Creation of a security right

A. General rules

Article 6. Security agreement

80. Article 6 is based on recommendations 13-15 of the Secured Transactions Guide (see chap. II, paras. 12-37). Its purpose is to deal with the creation of a security right, and the form and the minimum content of a security agreement so as to achieve one of the key objectives of an effective and efficient secured transactions law, that is, to enable parties to create a security right in a simple and efficient manner (see Secured Transactions, rec. 1, subpara. (c)).

81. Thus, under paragraph 1, an agreement that meets the requirements of paragraphs 2 to 5 is sufficient to create a security right even in future assets (produced or acquired by the grantor after the conclusion of the security agreement; see definition in art. 2, subpara. (m)). Paragraph 2 clarifies that, in the case of future assets, the security right is created when the grantor acquires rights in them or the power to encumber them.

82. Depending on what it considers as most efficient financing practices and on the assumptions of market participants, the enacting State may wish to consider whether to retain subparagraph 3(c). One approach is to retain subparagraph 3(c) to facilitate the grantor's access to secured financing from other creditors in situations where the value of the assets encumbered by the prior registered security right exceeds the maximum amount indicated in the notice. Another approach is to leave out subparagraph 3(c) to facilitate the grantor's access to credit by the first-registered secured creditor (for the comparative advantages and disadvantages of the two approaches, see Secured Transactions Guide, chap. IV, paras. 92-97).

83. The enacting State may wish to select in paragraph 4 one of the two alterative wordings that are set out within square brackets that is most fitting to its contract law. If the enacting State retains the words "concluded in", a security agreement that is not in written form is not effective. If the enacting State retains the words "evidenced in", a security agreement that is not in written form is in principle effective but its existence may only be evidenced by a writing.

Article 7. Obligations that may be secured

84. Article 7 is based on recommendation 16 of the Secured Transactions Guide (see chap. II, paras. 38-48). It is primarily intended to ensure that future, conditional and fluctuating obligations may be secured (see Secured Transactions Guide, chap. II, paras. 38-48). The main reason for this approach is to facilitate modern financing transactions, in the context of which disbursements are made at different times depending on the needs of the grantor (e.g. revolving credit facilities for the grantor to buy inventory). This approach does not preclude the introduction of special protections for grantors (e.g. setting a maximum amount for which the security right may be enforced; see art. 6, subpara. 3(c)).

Article 8. Assets that may be encumbered

85. Article 8 is based on recommendation 17 of the Secured Transactions Guide (see chap. II, paras. 49-57 and 61-71). It is primarily intended to ensure that future assets, parts of assets and undivided rights in assets, generic categories of assets, as well as all assets of a person, may become the subject of a security right.

86. It should be noted that the fact that future assets may be subject to a security right does not mean that statutory limitations to the creation or enforcement of a security right in specific types of asset (e.g. employment benefits in general or up to an amount) are overridden (see art. 1, para. 6).

87. It should also be noted that the fact that all assets of a grantor may be subject to a security right so as to maximize the credit that may be available and improve the terms of the credit agreement does not mean that other creditors of the grantor are necessarily

unprotected. The protection of other creditors (within and outside insolvency proceedings) is a matter of other law and is foreseen in article 32.

Article 9. Required description of assets

88. Article 9 is based on recommendation 14, subparagraph (d), of the Secured Transactions Guide (see chap. II, paras. 58-60). In view of their importance, the requirements for the description of encumbered assets in a security agreement are presented in a separate article. Article 9 is intended to ensure that a security right may be created in an asset or class of assets even if the description in the security agreement is generic, such as "all inventory" or "all receivables" (see Secured Transactions Guide, chap. II, paras. 58-60).

Article 10. Proceeds and proceeds in the form of funds commingled with other funds

89. Article 10 is based on recommendations 19 and 20 of the Secured Transactions Guide (see chap. II, paras. 72-89). Paragraph 1 is intended to ensure that, unless otherwise agreed by the parties, a security right in an asset automatically extends to its identifiable proceeds (see para. 1). The rationale for this rule is that it reflects the normal expectations of the parties and ensures that the secured creditor is sufficiently secured. This is important as other parties may have a security right in assets that are proceeds of other assets (e.g. in the receivables generated from the sale of encumbered inventory) and the rights of all competing creditors should be clearly defined and addressed in the same law.

90. Here is an example of a typical transaction that highlights the importance of proceeds: where the original encumbered asset is inventory, the receivables generated from the sale of the inventory are proceeds. If upon payment of the receivables the money is deposited in a bank account, the right to payment of the funds credited to the bank account are also proceeds of the inventory. If a check is issued out of the bank account for the purchase of new inventory, the check is also part of the proceeds of the inventory. So is new inventory purchased, as well as any warehouse receipt if the new inventory is placed in a warehouse.

91. Paragraph 2 introduces an exception to the rule in paragraph 1. Even though they are not identifiable, the security right in an asset extends to its proceeds in the form of funds that are commingled with other funds.

92. Paragraph 3 limits that security right to the value of the proceeds immediately before they were commingled. So, if a sum of €1,000.00 is deposited in a bank account and at the time of enforcement the bank account has a balance of €2,500.00, the security right extends to the sum of €1,000.00.

93. Paragraph 4 deals with the situation in which the balance in the bank account is less than the value of the proceeds deposited (e.g. less than €1,000.00). In such a case, under paragraph 4, the security right extends to the lowest value between the time when the proceeds were commingled and the time the security right in the proceeds is claimed. So, if in the example given, the balance in the account where the proceeds were deposited was €1,500.00, then it went down to €500.00 and at the time of enforcement was €750.00, the security right extends to €500.00 (i.e. the lowest intermediate balance).

Article 11. Tangible assets commingled in a mass or product

94. Article 11 is based on recommendations 22 and 91 of the Secured Transactions Guide (see chap. II, paras. 90-95 and 100-102, and chap. V, paras. 117-123). Paragraph 1 is intended to ensure that a security right in assets commingled in a mass or product, even though they are no longer identifiable, continues in the mass or product.

95. Under paragraph 2, the security right is limited to the value of the mass in the [same proportion as the encumbered assets and the assets not encumbered contributed to the mass] [quantity of the encumbered asset that became part of the mass]. So, [if a secured creditor has a security right in €100,000.00 worth of oil that is commingled with €50,000.00 worth of oil in the same tank and thus the mass has €150,000.00 worth of oil, the security right is deemed to encumber two thirds of whatever oil remains in the tank at the time it becomes necessary to enforce the security right (even if the price of the oil goes up or down)] [if: (a) a security right is created in 100,000 litres of oil to secure an obligation of €100,000.00

(€1 per litre) and the security agreement and the notice describe the encumbered assets accordingly; (b) the 100,000 litres of oil are commingled with another 50,000 litres of oil in a tank and become part of a mass; and (c) at the time of enforcement, the value of the mass (150,000 litres of oil) is only €75,000.00 because of a drop on oil prices (€0.5 per litre), the secured creditor should be able to enforce its security right against 100,000 litres of oil worth only €50,000.00)].

96. Paragraph 3 contains a different rule with respect to tangible assets commingled in a product (e.g. flour commingled in bread). Under paragraph 3, the security right in the product is limited to the value of the encumbered asset immediately before they became part of the product. So, if encumbered flour worth €100.00 is commingled and bread worth €500.00 is produced, the security right is limited to €100.00.

97. It should be noted that the word "limited" in paragraphs 2 and 3 means that, if the value of the encumbered asset commingled in the mass or product increases after commingling, the increased value is unencumbered. In other words, the secured creditor does not benefit from commodity price increases (see Secured Transactions Guide, chap. V, para. 118 ad finem). Similarly, the word "limited" does not address the question of what is the amount secured if the price of the encumbered asset decreases after commingling. The rule applicable to all types of encumbered asset applies to tangible assets commingled in a mass or product, namely that each party bears the risk of decreases of the price of the encumbered asset.

[*Note to the Working Group: Depending on the decisions of the Working Group, the commentary to paragraphs 2 and 3 may need to be revised. The commentary to 4, which appears within square brackets, will be prepared after the Working Group has decided whether it should be retained.*]

Article 11bis. Extinction of a security right

98. Article 11bis deals with the extinction of a security right by full payment or other satisfaction of all secured obligations, including future obligations based on an existing commitment of the secured creditor to extend credit. Reference to the extinction of a security right is made in articles 49 (obligation of a secured creditor to return an encumbered asset), and article 21, subparagraph 2(c) of the registry-related provisions (compulsory registration of an amendment or cancellation notice).

B. Asset-specific rules

Article 12. Contractual limitations on the creation of a security right

99. Article 12 is based on recommendation 24 of the Secured Transactions Guide (see chap. II, paras. 106-110 and 113), which in turn is based on article 9 of the Assignment Convention. It is intended to ensure that an agreement limiting the grantor's right to create a security right in the types of assets listed in this article does not invalidate a security right created in violation of such an agreement. The rationale underlying this approach is to facilitate the use of receivables as security for credit, which is in the interest of the economy as a whole, without unduly interfering with party autonomy.

100. Compared with recommendation 24 of the Secured Transactions Guide, article 12 has been revised to address contractual limitations on the creation of a security right in assets in addition to receivables, namely other intangible assets, negotiable instruments and rights to payment of funds credited to a bank account (see A/CN.9/830, paras. 59-63).

101. Paragraph 2 limits the impact of the rule in paragraph 1. Under paragraph 2, if the debtor of the receivable has sufficient negotiating power to force the grantor to accept the inclusion of a "no-assignment clause" in their agreement and a breach of that agreement by the grantor results in a loss to the debtor of the receivable, the grantor is liable to damages under contract law. However, the debtor of the receivable may not avoid the contract because of that breach or raise against the secured creditor (assignee) any claim it may have against the grantor for that breach. In addition, under paragraph 3, a secured creditor that accepts a receivable as security for credit is not liable for the grantor's breach just because it had knowledge of the "no-assignment clause".

102. As a result of the rules in paragraphs 1-3, a secured creditor does not have to check each contract from which a receivable might arise to determine whether it contains a no assignment clause. This facilitates secured transactions in which security is created in bulk receivables and transactions in which future receivables are involved.

103. Paragraph 4 limits the scope of the rule in paragraph 1 to broadly defined trade receivables. It does not apply to so-called "financial receivables", because, where the debtor of the receivable is a financial institution, even partial invalidation of an anti-assignment clause could affect obligations undertaken by the financial institution towards third parties (see Secured Transactions Guide, para. 108).

104. Read together with article 6, paragraph 1, article 24 does not override statutory limitations to the creation or enforcement of a security right in certain types of receivable (e.g. sovereign receivables).

Article 13. Personal or property rights securing or supporting payment or other performance of an encumbered receivable or other intangible asset, or negotiable instrument

105. Option A of paragraphs 1 and 2 reflects the thrust of recommendation 25 of the Secured Transactions Guide (see chap. II, paras. 111-122), while option B reflects the thrust of article 10 of the Assignment Convention.

106. Under option A, a security right in a receivable or another of the assets described in paragraph 1 automatically extends to any personal right that supports payment or other performance of the receivable (e.g. guarantee) and any property right that secures such payment or other performance (e.g. a security right in another asset). To avoid interfering with the rights of a guarantor, issuer, confirmer or nominated person of an independent undertaking, where the supporting right is an independent undertaking, the security right extends only to the right to receive the proceeds and not to the right to demand payment under the independent undertaking.

107. Under option B, the security right extends automatically to accessory security or supporting rights, while with respect to independent rights, the grantor is obliged to create a security right in them in favour of the secured creditor. Thus, there is no inconsistency with article 1, subparagraph 3(a), and there is no need to also include the full text of recommendation 127 of the Secured Transactions Guide to protect the rights of a guarantor/issuer, confirmer or nominated person of an independent undertaking.

[*Note to the Working Group: If the Working Group retains option A, to avoid any adverse impact on the rights of a guarantor/issuer, confirmer or nominated person of an independent undertaking, the thrust of recommendation 127 of the Secured Transactions Guide should also be included in the Model Law.*]

Article 14. Negotiable documents and tangible assets covered

108. Article 14 is based on recommendation 28 of the Secured Transactions Guide (see chap. II, para. 128). It is intended to ensure that a security right in a negotiable document extends to the tangible assets covered by the document, if the issuer is in possession of the assets when the document is issued (e.g. inventory or crops deposited in a warehouse for which the warehouse operator issued a negotiable warehouse receipt).

109. In view of the definition of the term "possession" in article 2, subparagraph (z), possession of the issuer of a negotiable document includes possession by its representative or a person acting on behalf of the issuer. A security right in a negotiable document extends to the tangible assets covered by the document and will continue to exist even after the document no longer covers the assets. However, effectiveness against third parties through possession of the document applies only as long as the document covers the assets and lapses once they are released by the issuer (see article 24, para. 2).

Article 15. Tangible assets with respect to which intellectual property is used

110. Article 15 is based on recommendation 243 of the Intellectual Property Supplement (see paras. 108-112). It is intended to ensure that, unless otherwise agreed, a security right

in a tangible asset does not automatically extend to the intellectual property right contained therein, and that a security right in an intellectual property right does not automatically extend to the tangible asset with respect to which the intellectual property right is used (e.g. the copyrighted software included in a personal computer or the trademark on an inventory of clothes).

Chapter III. Effectiveness of a security right against third parties

A. General rules

Article 16. General methods for achieving third-party effectiveness

111. Article 16 is based on recommendation 32 of the Secured Transactions Guide (see chap. III, paras. 19-86). It is intended to set out general methods for achieving third-party effectiveness (i.e. registration in the general security rights registry, a specialized registry or title certificate, and possession of the encumbered asset by the secured creditor). Other methods (e.g. control) are set out in the asset-specific provisions of this chapter.

Article 17. Proceeds

112. Article 17 is based on recommendations 39 and 40 of the Secured Transactions Guide (see chap. III, paras. 87-96). It is intended to determine the circumstances in which the security right in proceeds that is provided for in article 10 will be effective against third parties.

113. Under paragraph 1 a security right in cash proceeds (i.e. money, receivables, negotiable instruments or rights to payment of funds credited to a bank account) is automatically effective against third parties. For example, upon the sale of encumbered inventory, the receivable, cash, bank deposit, check and new inventory generated are proceeds of the originally encumbered inventory.

114. Unlike recommendation 39, on which this article is based, paragraph 1 does not refer to the description of the proceeds in the notice. This change is a drafting change and does not constitute a change of policy. The reason for this change is that, once the proceeds are described in the notice (in line with the security agreement), they constitute original encumbered assets, not proceeds, and article 16 is sufficient in dealing with the third-party effectiveness of a security right in those assets.

115. Under paragraph 2, if a security right in an asset is effective against third parties, the security right in their proceeds is effective against third parties for a short period of time and thereafter only, if before the expiry of that short period, the security right in the proceeds is made effective against third parties by one of the methods set out in article 16 or the asset-specific provisions of this chapter.

Article 18. Changes in the method for achieving third-party effectiveness

116. Article 18 is based on recommendation 46 of the Secured Transactions Guide (see chap. III, paras. 120 and 121). It is intended to ensure that a security right made effective by one method may later be made effective by another method, and that third-party effectiveness is continuous as long as there is no time gap between the two methods.

Article 19. Lapse in third-party effectiveness

117. Article 19 is based on recommendation 47 of the Secured Transactions Guide (see chap. III, paras. 122-127). It is intended to ensure that, if third-party effectiveness lapses, it may be re-established, but third-party effectiveness dates as of the time it is re-established.

Article 20. Impact of a transfer of an encumbered asset

118. Article 20 has a twofold purpose; first, to reflect the generally accepted rule that a security right follows an encumbered asset in the hands of a transferee (droit de suite); and second, to provide that, unless otherwise provided in article 27 [of the registry-related provisions], that security right is also automatically effective against third parties.

Article 21. Continuity in third-party effectiveness upon a change of the applicable law to this Law

119. Article 21 is based on recommendation 45 of the Secured Transactions Guide (see chap. III, paras. 117-119). Under paragraph 1, if the Model Law becomes applicable as a result, for example, of a change in the location of the encumbered asset or the grantor, a security right that was effective against third parties under the previously applicable law remains effective against third parties under the Model Law for a short period of time. Thereafter, the security right is effective only if, before the expiry of that period, it is made effective against third parties under the relevant provisions of the Model Law. Under paragraph 2, if the third-party effectiveness of a security right does not lapse, it dates back to the time it was first achieved under the previously applicable law.

Article 22. Acquisition security rights in consumer goods

120. Article 22 is based on recommendation 179 of the Secured Transactions Guide (see chap. IX, paras. 125-128). While an acquisition security right in consumer goods is automatically effective against third parties, it does not have the special priority of an acquisition security right over a security right registered in a specialized registry (see article 30).

B. Asset-specific rules

Article 23. Rights to payment of funds credited to a bank account

121. Article 23 is based on recommendation 49 of the Secured Transactions Guide (see chap. III, paras. 138-148). It adds three new methods of achieving third-party effectiveness of a security right in a right to payment of funds credited to a bank account (i.e. the creation of the security right in favour of the depositary bank, the conclusion of a control agreement and any action necessary for the secured creditor to become the account holder). The exact nature of the action to be taken for the secured creditor to become the account holder depends on the banking law and practice of the enacting State. For example, the name of the secured creditor may replace the name of the grantor as an account holder or the account of the grantor may be debited and the account of the secured creditor may be credited.

Article 24. Negotiable documents and tangible assets covered

122. Article 24 is based on recommendations 51-53 of the Secured Transactions Guide (see chap. III, paras. 154-158). It is intended to deal with the effect of the third-party effectiveness of a security right in a negotiable document on the third-party effectiveness of a security right in the tangible assets covered by the document.

123. Under paragraph 1, if a security right in a negotiable document (which extends to the assets covered by the document under article 14) is effective against third parties, the security right in the assets covered by the document is also effective against third parties. Under paragraph 2, possession of the document is sufficient to make effective against third parties also the security right in the assets covered by the document. Under paragraph 3, the security right referred to in paragraph 2 remains effective against third parties even after the secured creditor gives up possession of the document for a short period of time.

124. Enacting States that are parties to the Convention Providing a Uniform Law For Bills of Exchange and Promissory Notes (Geneva, 1930; the “Geneva Uniform Law”) may wish to consider including in the asset-specific section of the creation or third-party effectiveness chapter a provision that a security right in a negotiable instrument may be created and made effective against third parties by delivery and endorsement containing the statement “value in security” (“valeur en garantie”), “value in pledge” (“valeur en gage”), or any other statement implying a security right (see art. 19 and art. 22 of the United Nations Convention on International Bills of Exchange and International Promissory Notes (the “Bills and Notes Convention”), which contains a similar rule). An enacting State that decides to do so will have to adjust article 27 of the Model Law to deal with the comparative priority of such a security right.

Article 25. Uncertificated non-intermediated securities

125. Article 25 is a new provision that does not correspond to any of the recommendations of the Secured Transactions Guide, which did not apply to any type of securities (see rec. 4, subpara. (c)). It adds a new asset-specific method of third-party effectiveness, that is, notation of the security right or entry of the name of the secured creditor as the holder of the securities in the books maintained for recording the name of the holder of the securities by or on behalf of the issuer. It also reiterates the conclusion of a control agreement as a method of third-party effectiveness with respect to a security right in non-intermediated securities (not just rights to payment of funds credited to bank accounts; see art. 2, subpara. (g)).

126. Enacting States parties to the Geneva Uniform Law may wish to include in the asset-specific section of the creation or third-party effectiveness chapter a provision that a security right in non-intermediated securities may be created and made effective against third parties by delivery and endorsement containing the statement "value in security" ("valeur en garantie"), "value in pledge" ("valeur en gage"), or any other statement implying a security right (see art. 19 of the Geneva Uniform Law and art. 22 of the Bills and Notes Convention, which contains a similar rule). An enacting State that decides to do so will have to adjust article 46 of the Model Law to deal with the comparative priority of such a security right.

(A/CN.9/WG.VI/WP.66/Add.1) (Original: English)

Note by the Secretariat on a draft guide to enactment of the draft model law on secured transactions

ADDENDUM

Contents

Chapter IV. The registry system

Article 26. Establishment of a public registry

1. The promotion of certainty and transparency by providing for the registration of notices with respect to security rights in movable assets is a key objective of a modern secured transactions regime (see Secured Transactions Guide, rec. 1, subpara. (f)). Accordingly, the establishment of a general security rights registry (the "Registry") is an integral component of the third-party effectiveness and priority provisions of the draft Model Law (see Secured Transactions Guide, chap. IV, paras. 1-8, and Registry Guide, para. 73). Thus, article 26, which is based on recommendation 1 of the Secured Transactions Guide and the Registry Guide, provides for the establishment by the enacting State of a public registry for recording and searching information about the possible existence of security rights in movable assets within the scope of application of the draft Model Law.

2. The text in square brackets recognizes that an enacting State may decide to enact some or all of the provisions relating to the registry system in the secured transactions law, a separate law, subordinate regulations, or a combination thereof. For ease of reference, all the relevant provisions are collected below in a single separate instrument called "the registry-related provisions".[1]

3. The registry-related provisions have been drafted to accommodate flexibility in registry design. If possible, the registry record should be electronic in the sense that information in registered notices is stored in electronic form in a single computer database (see Secured Transactions Guide, rec. 54, subpara. (j)(i), and chap. IV, paras. 38-41 and 43). An electronic registry record is the most efficient and practical means of enabling enacting States to implement the recommendations of the Secured Transactions Guide that the registry record should be centralized and consolidated (see rec. 54, subpara. (e), and chap. IV, paras. 21-24).

4. In addition, the Secured Transactions Guide further recommends that, if possible, access to registry services 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 notices and search requests (see Secured Transactions Guide, rec. 54, subpara. (j)(ii), and chap. IV, paras. 23-26 and 43). This

[1] A reference to an article below is a reference to an article of the registry-related provisions, unless otherwise indicated.

approach eliminates the risk of human error in entering the information contained in a paper notice into the registry record, facilitates speedier and more efficient access to registry services by users, and greatly reduces the operational costs of the registry process (for a discussion of these advantages and guidance on implementation, see Registry Guide, paras. 82-89).

5. Some States provide for the registration in their general security rights registries of notices in addition to those contemplated by the draft Model Law, such as, for example, notices relating to judgments obtained by unsecured creditors against their debtors, claims of non-consensual preferential creditors or non-possessory ownership rights of long term lessors (see Registry Guide, paras. 40, 46, 50 and 51). If the enacting State follows this approach, it will need to specify whether registration is necessary for the creation or third-party effectiveness of these other rights and the priority effect of registration, including priority as against rights within the scope of the draft Model Law.

Registry-related provisions

Section A. General provisions

Article 1. Establishment of a public registry

6. Article 1 reiterates article 26 of chapter IV of the draft Model Law. It would be necessary only if the registry-related provisions are implemented in a law or other act other than the secured transactions law.

Article 2. Definitions

7. Article 2 contains definitions of key terms defined in the Registry Guide (see paras. 8 and 9). If the enacting State decides to implement the registry-related provisions in its enactment of the draft Model Law, these definitions should be included in the provision of the secured transactions law implementing article 2 of the draft Model Law.

Registry

8. If the Registry is operated by a governmental entity, it can exercise the supervisory functions foreseen in the registry-related provisions (e.g. art. 6, para. 2, art. 13, para. 2, art. 28, and art. 34, para. 2, below). Otherwise these functions should only be exercised by the governmental authority supervising the private entity operating the Registry.

Article 3. Grantor's authorization for registration

9. Article 3 is based on recommendations 71 of the Secured Transactions Guide (see chap. IV, para. 106) and recommendation 7, subpara. (b), of the Registry Guide (see para. 101). Paragraph 1 states the basic principle that the registration of an initial notice must be authorized by the grantor in writing. To ensure that this basic rule does not unnecessarily interfere with the efficiency of the registration process, paragraph 6 confirms that the authorization is to be given off-record. Thus, the Registry is not entitled to require evidence of the existence of the grantor's registration as part of the registration process. Paragraphs 4 and 5 further confirm that the grantor's authorization may be given before or after registration and that the conclusion of a written security agreement with the grantor automatically constitutes authorization.

10. Paragraphs 3 and 4, with which deal with amendment notices, are derived from the basic principle in paragraph 1. Paragraph 2 requires a new authorization from the grantor only for amendment notices that may affect the rights of the grantor. Thus, a new authorization is needed for the registration of an amendment notice that adds encumbered assets not included in a security agreement or any amendments to it. A new authorization from the grantor is not needed if the amendment notice merely seeks to add assets that were not described, inadvertently or otherwise, in the initial registered notice but were covered by the security agreement or any amendments to it. In addition, there is no need to register an amendment notice or obtain the authorization of the grantor with respect to "additional assets" that are proceeds of encumbered assets described in a prior registered notice if the

proceeds are: (a) of a type that fall within the existing description (for example, the description covers "all tangible assets" and the grantor exchanges one type of tangible asset for another (see Secured Transactions Guide, rec. 39); or (b) "cash proceeds" (money, receivables, negotiable instruments or funds credited to a bank account) (see art. 17, para. 1).

11. Under paragraph 2, the grantor's authorization must also be obtained for the registration of an amendment notice that seeks to increase the maximum amount for which the security right to which the registration relates may be enforced. This provision only applies in systems that require this information to be set out in the security agreement and in the registered notice. A new authorization from the grantor would not be needed for an amendment notice that merely seeks to correct an error in the maximum amount stated in the initial notice to bring it into line with the amount actually set out in the initial security agreement since the grantor's authorization would already have been given. It should be noted that the registration of an amendment notice takes effect only from the time when the registration of the amendment notice (not the initial notice) becomes effective (see article 14, para. 1).

12. Where an amendment notice seeks to add a new grantor, paragraph 3 requires the additional grantor's authorization to be obtained in line with the general principle in paragraph 1 and in the same manner. The bracketed wording in paragraph 3, which will be necessary only if the enacting State implements option A or option B of article 27 below, creates an exception to the requirement in paragraph 3. Where the new grantor is a transferee of an encumbered asset from the original grantor and the purpose of the amendment is to enable the secured creditor to protect its priority status as against claimants that acquire rights in the encumbered asset from that transferee the authorization of the grantor would not be necessary. Likewise, where the grantor's identifier changes after the registration, the grantor's authorization is not required for an amendment notice to disclose the new identifier of the grantor (see art. 26).

Article 4. One notice sufficient for security rights under multiple security agreements

13. Article 4 is based on recommendations 68 of the Secured Transactions Guide (see chap. IV, para. 101) and 14 of the Registry Guide (see paras. 125 and 126). It confirms that a single registered notice is sufficient to achieve the third-party effectiveness of security rights arising under multiple security agreements [between the parties identified in the notice] [with the same secured creditor]. This rule applies regardless of whether the agreements are related to one another or are separate and distinct, and regardless of whether the registration relates to security rights in the grantor's current assets or assets in which the grantor acquires rights only after the registration. This is the consistent with notice registration system contemplated by the draft Model Law, which requires a registrant to submit a standardized "notice" in the prescribed form rather than the underlying security agreements giving rise to the security rights to which their registrations relate or tender these for scrutiny.

14. A registration is effective only to the extent that the information in a registered notice accurately reflects the terms of any security agreement, as revised (see Registry Guide, para. 126). If, for example, the parties enter into a security agreement that covers assets not covered by the description in a previously registered notice, a new initial notice (or an amendment to an existing notice) will be needed for the security right in the additional assets to be effective against third parties, and it will take effect against third parties only from the time of its registration (see art. 14, para. 1).

Article 5. Advance registration

15. Article 5 is based on recommendations 67 of the Secured Transactions Guide (see chap. IV, paras. 98-100) and 13 of the Registry Guide (see paras. 122-124). It confirms that a registration may be made even before the conclusion of a security agreement [between the parties identified in the notice] [to which the notice relates], or the creation of any security rights contemplated by any such agreement. Article 5 is consistent with article 4, according to which the underlying security documentation is not required to be deposited with the

Registry or tendered for scrutiny in the type of notice registration system contemplated by the draft Model Law. It is also consistent with article 8, subparagraph (a), of the draft Model Law, which provides that a security agreement may cover future assets (see art. 2, subpara. (m)).

16. Registration does not create, and is not necessary for the creation of, a security right (see Registry Guide, paras. 20 and 123). Accordingly, advance registration does not protect a secured creditor against a competing claimant, other than a competing secured creditor that acquires rights in encumbered assets before the security agreement with the secured creditor that made an advance registration is actually entered into and the other requirements for creation are satisfied. However, where the competing claimant is another secured creditor, advance registration will ensure its priority regardless of the order of creation of the competing security rights, provided that priority among them is governed by the general first-to-register rule.

17. If a security agreement is never concluded between the parties, or covers different assets than those described in the registered notice, advance registration may have a negative impact on the ability of the person identified as the grantor to obtain financing against or dispose of its assets. Accordingly, article 21 below provides for a procedure to enable the grantor to obtain the compulsory amendment or cancellation of a registered notice that does not accurately reflect their relationship.

Section B. Access to registry services

Article 6. Public access

18. Article 6 is based on recommendations 54, subparagraph (c), (f) and (g), and 55, subparagraph (b), of the Secured Transactions Guide (see chap. IV, paras. 25-228) and 4, 6 and 9 of the Registry Guide (see paras. 95-97 and 103-105).

19. Paragraphs 1 and 3 confirm that the Registry is public in the sense that any person is entitled to register a notice of a security right or search the registry record subject only to meeting the conditions governing access. With one qualification, the conditions are the same for both types of service. The user must use the form of notice or search request prescribed by the registry (which includes both a paper and an electronic form or screen) and pay or make any arrangements to pay any fees prescribed by the Registry for the relevant service (if payment of a fee is required; see art. 34). The one qualification relates to the requirement in subparagraph 1(b) for a user to identify itself to the Registry in the prescribed manner. This requirement only applies to users that submit a notice for registration as opposed to a search request. This requirement is aimed at assisting the person identified in a registered notice as the grantor to determine the identity of the registrant in the event that the grantor did not authorize the registration (see Registry Guide, para. 96). This consideration must be balanced against the need to ensure efficiency and speed in the registration process. Accordingly, the evidence of identity required of a registrant should be that which is 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).

20. If access to registry services is refused, paragraph 4 requires the Registry to communicate the specific reason (for example, the user failed to use the prescribed form or to pay the prescribed fee). The reasons must be communicated without delay. What this means in practice depends on the mode by which the notice or search request is submitted to the Registry. If the system is designed to enable users to submit notices and search requests electronically and directly to the Registry, the system can and should be programmed to automatically communicate the reason during the registration process and display the reason on the registrant's screen. In the case of notices and search requests submitted in paper form, the registry staff will need a reasonable period of time to examine the notice or search request and then prepare and communicate a formal response.

21. In order to facilitate access to registry services, and avoid their unnecessary refusals, the Registry should be designed to accept all modes of payment in common commercial use in the enacting State. However, if cash payments are allowed, controls will need to be introduced for registry staff access to cash payments; and, in the case, of other modes of

payment, controls will be necessary with respect to the registry staff use of financial information submitted by clients (see Registry Guide, para. 138). In addition, users should be given the option of setting up a pre-payment account with the Registry that enables them to deposit funds on an ongoing basis to pay for their ongoing requests for services. This would facilitate more efficient access by frequent users (such as financial institutions, automobile dealers, lawyers and other intermediaries).

22. In order to protect secured creditors and third parties against the risk of the registration of amendments and cancellations not authorized by the secured creditor paragraph 2 provides for security requirements to be specified by the Registry (if it is a governmental authority and, otherwise, by the governmental authority supervising the Registry). For example, the system might require registrants to set up a password-protected account with the Registry when submitting an initial notice, and then require all amendments and cancellations to be submitted through that account. The registrant will thus not be able to amend or cancel registered notices that do not appear in its own account. Alternatively (or in addition), the system might be designed to provide a unique confidential user code to registrants upon registration of an initial notice and then require entry of that code on all amendment and cancellation notices submitted for registration (see art. 22).

Article 7. Rejection of the registration of a notice or a search request

23. Article 7 is based on recommendations 8 and 10 of the Registry Guide (see paras. 97-99 and 106). Paragraph 1 obligates the Registry to reject the registration of a notice if no information, or only illegible information, has been entered in one or more of the required designated fields in a notice submitted for registration. As all required fields must be completed legibly for a registered notice to be effective, this provision is designed to ensure that the information in submitted notices that clearly do not satisfy the minimum requirements for effectiveness are never entered into the registry record. On the other hand, even if all required fields in a submitted notice contain legible information and the notice is therefore accepted for registration, it does not follow that the registration is effective since the information that is entered, while being legible, may be erroneous or incomplete.

24. Paragraph 2 obligates the Registry to reject a search request if no information, or only illegible information, has been entered in one of the designated fields for entering a search criterion. Since searchers are entitled to search by either or both of the identifier of the grantor and the registration number assigned to the initial notice (see art. 23), it is sufficient if legible information is entered into at least one of the search criterion fields. That having been said, the fact that at least one of the search criteria fields contains legible information does not ensure that the search result will be accurate since the criterion entered by the searcher may be erroneous or incomplete. To avoid any arbitrary decisions on the part of the Registry, paragraph 3 clarifies that the Registry may not reject the registration of a notice or search request where registrant or searcher satisfies the access conditions set out in paragraphs 1 and 2.

25. Paragraph 4 obligates the Registry to provide the reason for rejecting the registration of a notice or a search request without delay. What this means in practice depends on the mode by which the notice or search request was submitted to the Registry. If the system is designed to enable users to electronically submit notices and search requests directly to the Registry, the system can and should be designed to automatically reject the submission of incomplete or illegible notices during the registration process and display the reasons on the registrant's screen. In the case of notices and search requests submitted in paper form, there will necessarily be some delay between the time of receipt by registry staff and the communication of the refusal and reason to the user. In the case of notices and search requests submitted in paper form, the registry staff will need a reasonable period of time to examine the notice or search request and then prepare and communicate a formal response.

Article 8. No verification by the Registry

26. Article 8 is based on recommendations 54, subparagraph (d), and 55, subparagraph (b), of the Secured Transactions Guide (see chap. IV, paras. 15-17 and 48) and 7 of the Registry Guide (see paras. 100 and 102). It obligates the Registry to maintain the identity information submitted by registrants in compliance with article 6, subparagraph 1(b). It

should be noted that, while this information does not form part of the public or archived registry record, it nonetheless must be preserved by the Registry in a manner that enables it to be retrieved in association with the registered notice to which it relates. In order to facilitate the time and cost efficiency of the registration process, article 8 goes on to provide that the Registry may not require verification of the identity information provided by a registrant under article 6, subparagraph 1(b).

Section C. Registration of a notice

Article 9. Information required in an initial notice

27. Article 9 is based on recommendations 57 of the Secured Transactions Guide (see chap. IV, para. 65) and 23 of the Registry Guide (see paras. 157-160). It sets out the items of information required to be entered in the appropriate designated fields in an initial notice submitted to the Registry for registration. As each of these required elements is the subject of separate specific articles below, the reader is generally referred to the commentary on the relevant articles. It should be noted, however, that a notice might relate to more than one grantor or secured creditor, and the required information should be entered separately for each grantor or secured creditor.

28. An enacting State may require "additional information" (such as the birth date of the grantor or an identification number issued by the enacting State) to be entered to assist in uniquely identifying a grantor where there is a risk that many persons may have the same name (see bracketed text in art. 9, subpara. (a)). However, this additional information does not constitute a separate and independent search criterion. Accordingly, if this approach is adopted, the form of notice prescribed by the enacting State should provide a separate designated field for entering this "additional information". The enacting State should also enact provisions specifying the type of additional information to be included. It should also specify that this additional information is required in the sense that it must be entered in the relevant field for a notice to be accepted by the Registry (on all these points, see Registry Guide, rec. 23, subpara. (a)(i), and paras. 167-169, 171, 181-183, 226, as well as examples of forms in Annex II).

29. It should also be noted that subparagraphs (d) and (e) appear within square brackets, as their inclusion depends on the decision of the enacting State with respect to the options in article 15 below and article 6, subparagraph 3(e), of the draft Model Law (see paras. 47-49 and commentary to art. 6, subpara. 3(e); see also Registry Guide, paras. 199-204).

Article 10. Grantor identifier

30. Article 10 is based on recommendations 59-60 of the Secured Transactions Guide (see chap. IV, paras. 68-74) and 24 and 25 of the Registry Guide (see paras. 161-180). It provides that the identifier of the grantor is its name. It then sets out separate rules for determining the name of the grantor depending on whether the grantor is a natural person or a legal person or other entity.

31. If the grantor is a natural person, paragraph 1 provides that the grantor's name is the name that appears in the official document specified by the enacting State as the authoritative source. Since not all grantors may possess a common official document, the enacting State will need to specify alternative official documents as authoritative sources and specify the hierarchy of authoritativeness among them (for examples of possible approaches, see Registry Guide, paras. 163-168).

32. In view of the conflict-of-laws provisions of the draft Model Law (see, for example, art. 79), the law of the enacting State could apply to a security right created by a foreign grantor. Thus, if 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 enacting State to address cases in which the grantor is not a citizen or resident of the enacting State, or for any other reason has not been issued an identification number. The enacting State might, for example, provide that the number of the grantor's foreign passport or the number in some other foreign official document is a sufficient substitute (see Registry Guide, para. 169).

33. Paragraph 2 requires the enacting State to indicate which components of a name of a grantor, who is a natural person, must be entered into the registered notice. Accordingly, the enacting State will need to specify, for example, whether only the given and family name of the grantor is required, or whether a middle name or initial must also be included. It will also need to specify, in the event the grantor's name consists of a single word, whether that name should be entered in the field designated for entering the grantor's family name (see Registry Guide, para. 165).

34. Paragraph 3 requires the enacting State to address how the grantor's name is to be determined where the grantor's name has legally changed under applicable law after the issuance of the official document that paragraph 1 designates as the authoritative source of the grantor's name (for example, by reason of marriage or as a result of a formal application for a name change under change of name legislation; see Registry Guide, para. 164(f)).

35. Paragraph 4 provides that, where the grantor is a legal person, the name of the grantor is the name that appears in the most recent document, law or decree to be specified by the enacting State constituting the legal person (see Registry Guide, paras. 170-173).

36. Paragraph 5, which is set out in square brackets, provides for the possibility that an enacting State may wish to require additional information to be entered in a registered notice in special cases, such as where the grantor subject to insolvency proceedings (see Registry Guide, paras. 174-179).

Article 11. Secured creditor identifier

37. Article 11 is based on recommendations 57, subparagraph (a), of the Secured Transactions Guide (see chap. IV, para. 81) and 27 of the Registry Guide (see paras. 184-189). It largely seeks to replicate the rules set out in article 10 concerning what constitutes the identifier of the grantor. Unlike article 10, however, article 11 provides that the registrant may also enter the name of a representative of the secured creditor (e.g. a service provider or an agent of a syndicate of lenders). This approach is intended to protect the privacy of the secured creditor. It is based on the assumption that it does not have an negative impact on the rights of the grantor, who would typically know the identity of the actual secured creditor from the security agreement and other dealings with the actual secured creditor) or third parties, as long as the representative is authorized to act on behalf of the actual secured creditor (see Registry Guide, paras. 186 and 187). It should also be noted that, as registration does not create the security right, the fact that the name of a representative is entered into a notice does not make the representative the actual secured creditor.

Article 12. Description of encumbered assets

38. Article 12 is based on recommendations 62 of the Secured Transactions Guide (see chap. IV, paras. 82-86) and 28 of the Registry Guide (see paras. 190-192). The test for the adequacy of a description contained in a registered notice in paragraph 1 consciously parallels the test for the adequacy of a description in a security agreement (see art. 9). In any case, a description in a registered notice need not be identical to the description in any related security agreement so long as it satisfies the requirement in paragraph 1 that it reasonably allows identification of the relevant encumbered assets. On the other hand, a description in a registered notice that satisfies this test will not make a security right effective against third parties, if the description exceeds the description in any related security agreement, since the requirements for the effective creation of a security right will not have been satisfied.

39. Paragraph 2 confirms that a description in a registered notice that refers to all of the grantor's movable assets or to all of the grantor's assets within a specified generic category (for example, all receivables owing to the grantor) satisfies the requirement in paragraph 1 that the description reasonably allow identification of the encumbered assets. It follows that a generic description will be sufficient even if any related security agreement only covers a specific asset within that broad generic category (for example, the description in the registered notice refers to all "tangible assets of the grantor", whereas the security agreement only covers a specific tangible asset). However, the grantor is entitled, pursuant to article 21, paragraph 1, to compel the secured creditor to register an amendment notice that narrows the description of the assets in the registered notice. Further, the efficacy of the registration

in this scenario is dependent on the authorization of the grantor pursuant to article 3; it follows that, if the grantor did not authorize a registration covering all assets within the specified category, but only a specific asset within that category, the registration will not be effective. It should be noted that reference to an asset in a registered notice does not imply or represent that the grantor presently or in the future will have rights in the asset.

40. The secured transactions laws of some States adopt specific alphanumerical description requirements ("serial number") for specified classes of high-value assets that have a significant resale market. In States that adopt this approach, entry of the serial number in its own designated field is required, in the sense of being necessary to achieve the third-party effectiveness and priority of the security right as against specified classes of third parties that acquire rights in the asset. States that are interested in adopting this approach are referred to the discussion in the Registry Guide (for the organization of the registry record to permit searches by serial number, see paras. 131-134; for the description of proceeds in a notice, see paras. 193-194; for the consequence of an error in a serial number, see para. 212; and for a search by serial number, see para. 266).

41. If proceeds of an encumbered asset are in the form of cash or equivalent types of asset and are not encompassed by the description of the encumbered assets in a registered notice, the secured creditor must amend its registered notice 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 as from the date of the initial registration (see art. 17, para. 2). An amendment is necessary because otherwise there would not be a registered notice that would provide a description of the assets constituting the proceeds (see Registry Guide, paras. 195-197).

Article 13. Language of information in a notice

42. Article 13 is based on recommendation 22 of the Registry Guide (see paras. 153-156; the Secured Transactions Guide includes a discussion of this matter in chapter IV, paras. 44-46, but does not include a recommendation). Paragraph 1 requires the enacting State to specify the language or languages in which the information contained in notices submitted for registration must be expressed. Typically, the enacting State would require registrants to use its officially recognized language or languages. Information that needs to be translated in the officially recognized language or languages does not include the name and addresses of the grantor and the secured creditor or its representative and is essentially limited to the description of the encumbered assets (as the other items of information required to be entered in a notice may be reflected by numbers). Where such information is not expressed in the required language or languages, the registration of the notice would be ineffective or ineffective if it would seriously mislead a reasonable searcher (see art. 25, para. 4).

43. Paragraph 2 requires all information in a notice to be in the character set to be prescribed and publicized by the Registry (where the Registry is a governmental authority and otherwise the government authority supervising the Registry). Where the names and addresses of the grantor and secured creditor or its representative are expressed in a character set different from the character set used in the language or languages recognized by the enacting State, guidance will need to be given on how the characters are to be adjusted or transliterated to conform to the language of the registry (see Registry Guide, para. 155). If the information is not in the character set prescribed and publicized by the Registry, the notice will be rejected as illegible under article 7, subparagraph 1(b) (for the same rule with respect to search requests, see art. 7, subpara. 2(b)).

Article 14. Time of effectiveness of the registration of a notice

44. Article 14 is based on recommendations 70 of the Secured Transactions Guide (see paras. 102-105) and 11 of the Registry Guide (see paras. 107-112). Paragraph 1 provides that the registration of an initial or amendment notice submitted to the Registry becomes effective only once the information in the notice is entered into the public registry record so as to be available to searchers. If the registry system is designed to enable users to electronically submit information in a notice to the Registry directly without the intervention of registry staff, there will be little or no delay between the time when the information in a

notice is submitted to the Registry and the time when it becomes available to searchers. But in systems that permit or require the use of paper notice forms, there will inevitably be some time lag since the registry staff must enter the information on the paper notice form into the registry record on behalf of registrants. In view of the importance of the timing and order of registration to the third-party effectiveness and priority of a security right, paragraph 2 obligates the Registry to enter the information into the registry record without delay after the notice is submitted and in the order in which it was submitted. For the same reason, paragraph 3 requires the date and time of effectiveness of the registration to be set out in the registry record and made available to searchers.

45. Paragraph 4 deals with the time of effectiveness of the registration of a cancellation notice. Option A reflects option A of article 31, which obligates the Registry to remove information in a registered notice from the public registry record, and archive it, upon registration of a cancellation notice. Accordingly, option A of paragraph 4 provides that the registration of a cancellation notice becomes effective once the information in the registered notices to which the cancellation notice relates is no longer publicly searchable. Option B of paragraph 4 reflects the "open-drawer approach" (in which all information in the registry record is available to searchers and the Registry has no authority to do anything but accept, retain and disclose all information submitted) enshrined in option B of article 31. Accordingly, it provides that the registration of a cancellation notice becomes effective once the information in the registered notices to which the cancellation notice is entered into the registry record so as to be accessible to searchers.

46. Option A and option B of paragraph 5 require the Registry to maintain a record in its archives of the date and time of effectiveness of the registration of the cancellation notice, reflecting the approaches taken in option A and option B of paragraph 4 respectively.

Article 15. Period of effectiveness of the registration of a notice

47. Article 15 is based on recommendations 69 of the Secured Transactions Guide (see chap. IV, paras. 87-91) and recommendation 12 of the Registry Guide (see paras. 113-121, 240 and 241). It offers enacting States a choice of three different approaches to the determination of the initial period of effectiveness (or duration) of the registration of a notice. If option A is enacted, an initial notice (and any associated amendment notices) would be effective for the period of years stipulated by the enacting State. If option B is enacted, registrants would be permitted to choose the desired period of effectiveness for themselves. If option C is enacted, registrants would likewise be permitted to choose the period of effectiveness not to exceed a maximum number of years stipulated by the enacting State.

48. All options permit registrants to extend the period of effectiveness of the notice before its expiry (more than once) by the registration of an amendment notice. Under option A, the duration of the registration would be extended by an equivalent number of years. Under option B or option C the registrant would again be permitted to select the further period of effectiveness up to the stipulated maximum in the case of option C.

49. If option B or option C is enacted, the period of effectiveness of a registered notice is a mandatory component of the information required to be included in a notice submitted to the registry (see art. 9, subpar. (d)). States that adopt either of these options would also need to indicate on the prescribed notice form how registrants must enter the desired period of effectiveness. The notice form might be designed to enable registrants to simply enter the desired number of whole years from the date of registration. Alternatively, the notice form might permit registrants to enter the specific day, month and year on which the registration is to expire unless renewed.

Article 16. Obligation to send a copy of a registered notice

50. Article 16 is based on recommendations 55 subparagraphs (c), (d) and (e) of the Secured Transactions Guide (see chap. IV, paras. 49-53) and 18 of the Registry Guide (see paras. 145-149).

51. Paragraph 1 obligates the Registry to send a copy of a registered (initial, amendment or cancellation) notice to the person identified in the notice as the secured creditor without

delay after the registration becomes effective (the Registry cannot know or have to determine the identity of the actual secured creditor). This is important for the grantor to be able to protect its rights where the registration was not authorized at all or only partially (see art. 21). It is also important for the person identified in a notice as the secured creditor to be able to protect its position where an amendment or cancellation notice was registered by error (see Registry Guide, paras. 245-248) or without the secured creditor's authorization (see art. 22; as to the liability of the Registry for failure to send a copy of a notice, see art. 33).

52. Paragraph 2 obligates the person identified as the secured creditor in a registered notice sent to it by the Registry pursuant to paragraph 1 to forward it to the person identified in the notice as the grantor. The secured creditor has to comply with this obligation within the period of time specified by the enacting State after it receives the notice.

53. [Paragraph 3 clarifies that compliance by the secured creditor with its obligation under paragraph 2 should not be a precondition to the effectiveness of the registration but rather should result in only a nominal penalty and liability to compensate the grantor for any actual damage caused by the non-compliance.]

Section D. Amendments and cancellations

Article 17. Right to register an amendment or cancellation notice

54. Article 17 is based on recommendations 73 of the Secured Transactions Guide (see chap. IV, paras. 110-116) and 19, subparagraph (a), of the Registry Guide (see paras. 150 and 225-244). Paragraph 1 gives the person identified in an initial notice as the secured creditor the right to register a related amendment or cancellation notice at any time (this right is given to the registrant as the Registry cannot know or have to determine the identity of the actual secured creditor). Paragraph 2 provides that after an amendment notice changing the secured creditor identifier has been registered, only the new secured creditor is entitled to register an amendment or cancellation notice. If more than one amendment has been registered, only the person identified in the latest registered notice has the right to register an amendment or cancellation notice. It should be noted that article 17 should be read in combination with the discussion of article 22 below on the effectiveness of a registered amendment or cancellation notice not authorized by the secured creditor.

Article 18. Information required in an amendment notice

55. Article 18 is based on recommendation 30 of the Registry Guide (see paras. 221-224; the Secured Transactions Guide does not contain an equivalent recommendation). Paragraph 1 provides that an amendment notice must contain in the designated field the registration number assigned by the Registry to the initial notice to which the amendment relates. This ensures that the amendment will be associated in the registry record with the initial notice so as to be retrieved and included in a search result (see arts. 23, subpara. (b), and 29, para. 1, below).

56. Paragraph 2 makes it clear that an amendment notice may relate to more than one item of information in a registered notice. That is to say, a registrant need register only one amendment notice even if it wishes, for example, to add both a description of new encumbered assets and a new grantor. It follows that the form of amendment notice prescribed by the Registry must be designed to enable a registrant to change any and all items of information in an initial notice using that form (see Registry Guide, Annex II, Examples of registry forms, amendment notice form).

Article 19. Global amendment of secured creditor information

57. Article 19 is based on recommendation 31 of the Registry Guide (see para. 242; the Secured Transactions Guide does not contain an equivalent recommendation). It addresses the scenario where there is a change in the identifier or address or both of the person identified in multiple registered notices as the secured creditor. Its purpose is to make it possible for the person identified in multiple registered notices as the secured creditor (option A) or for the Registry on the application of that person (option B) to register a single global amendment notice. The secured creditor's name and/or, address may change either as

a result of a name or address change (e.g. merger with another company), or as a result of an assignment of the secured obligation.

58. As provided in article 18, the amendment must contain in the relevant field the registration number and the new name, address or both. In addition, as provided in article 29, subparagraph 2(b), the Registry must organize the registry record in a manner that enables the retrieval of all registered notices according to secured creditor identifier. Moreover, as provided in article 6, paragraph 2, a person that submits a global amendment notice or requests the Registry to make such a global amendment must satisfy the secured access requirements to be specified by the enacting State. This should reduce the risk of the registration of unauthorized global amendments.

Article 20. Information required in a cancellation notice

59. Article 20 is based on recommendation 32 of the Registry Guide (see paras. 243 and 244; the Secured Transactions Guide does not contain an equivalent recommendation). It requires a cancellation notice to contain in the designated field the registration number assigned by the Registry under article 29, paragraph 1, to the initial notice to which the cancellation relates. The registration number is the only item of information required to be included in a cancellation notice form (see Registry Guide, Annex II, example of cancellation notice form).

60. As already noted (see paras. 55 above and 100 below), the purpose of assigning a registration number to an initial notice is to ensure that all related amendment and cancellation notices are associated in the registry record with the initial notice. This ensures that the effect of the registration of a cancellation notice extends to the information in all registered notices containing that number. To minimize the risk of inadvertent cancellations, the prescribed cancellation notice form should be designed to include a note alerting the secured creditor to the legal consequences of a cancellation (see Registry Guide, Annex II, example of cancellation notice form; for the effectiveness of a cancelation notice not authorized by the secured creditor, see paras. 66-72 below).

Article 21. Compulsory registration of an amendment or cancellation notice

61. Article 21 is based on recommendations 72 of the Secured Transactions Guide (see paras. 260-263) and 33 of the Registry Guide (see paras. 260-263). It should be read in conjunction with article 3, which requires the person identified as the grantor in a registered notice to authorize its registration.

62. Paragraph 1 obligates the secured creditor to register an amendment notice, if the information in a registered notice exceeds the scope of the grantor's authorization. This is the case, for example, where the description of the encumbered assets in the registered notice is broader than that included in the security agreement and the broader description is not otherwise authorized (see subpara. 1(a)). An amendment notice must also be registered if the security agreement to which a registered notice relates has been revised so as to make the information in the registered notice excessively broad and the grantor has not otherwise authorized the revised registered notice. For example, the parties have agreed to delete certain assets from the description of the encumbered assets in the original security agreement (see subpara. 1(b)). States that implement article 9, subparagraph (c), will also need to include in subparagraph 1(b) a requirement for the registration of an amendment notice in the case of a reduction of the maximum amount for which the security right may be enforced.

63. Paragraph 2 obligates the secured creditor to register a cancellation notice where the registration of an initial notice was not authorized by the grantor or the grantor has withdrawn its authorization and no security agreement has been entered into between the parties (see subparas. 2(a) and 2(b)). A cancellation notice must also be registered, if the obligation secured by the security right to which the registered notice relates has been extinguished. It should be noted that, under article 11bis, a security right is extinguished upon full payment or other satisfaction of the secured obligation[, provided that there is no further commitment by the secured creditor to extend any further secured credit (see subpara. 2(c)). Paragraph 3 provides that the secured creditor may not charge any fee for complying with its obligation[, except if …].

64. Normally a secured creditor will comply with its obligation under paragraphs 1 and 2 within a short period of time after it became aware that any of the relevant conditions were met. In the event it does not, any liability of the secured creditor is left to the law of the enacting State on liability for violations of statutory obligations. However, to protect the grantor, paragraph 4 gives the grantor the right to send at any time (i.e. without having to wait for the secured creditor to comply) a formal written request. If the secured creditor does not comply with the grantor's request within the time period specified by the enacting State, paragraph 5 contemplates that the enacting State will need to establish a summary judicial or administrative procedure and identify the relevant court or other authority to enable the grantor to seek an order compelling registration of the appropriate notice. Depending on local institutional considerations, the enacting State may decide to use an existing administrative or judicial summary procedure or it may decide to set up a special new procedure administered, for example, by the Registrar or registry staff. As noted in the Registry Guide (see para. 262), the process should be speedy and inexpensive while also incorporating appropriate safeguards to protect the secured creditor against an unwarranted demand by the grantor (for example, through a requirement to notify the secured creditor of a demand submitted to the relevant authority).

65. Once an order for registration has been issued pursuant to the procedure established by the enacting State under paragraph 5, paragraph 6 contemplates that the appropriate notice must be registered by the Registry upon receipt of a copy of the order (option A), or by the judicial or administrative officer who issued the order upon presenting a copy of the order to the Registry (option B). Where the officer charged by the enacting State with administering the process is the Registrar or a member of the Registry staff, it would be sufficient for the enacting State to simply provide that the Registry may make the relevant registration upon its issuance of the order.

Article 22. Amendment or cancellation notices not authorized by the secured creditor

66. Article 22 is a new provision and is not based on a recommendation of the Secured Transactions Guide or the Registry Guide. However, the options set out in article 22 are based on the discussion of the matter in the Registry Guide (see paras. 249-259). Article 22 addresses the effectiveness of a registered amendment or cancellation notice where the registration was not authorized by the secured creditor. An unauthorized registration may occur, for example, as a result of fraud or error by a third party, or even a member of the registry staff (for corrections of errors by the Registry, see art. 32). The issue is whether conclusive effect should be given to the registered notice in a priority competition with a competing claimant.

67. Under option A, the registration of an amendment or cancellation notice is effective regardless of whether or not it is authorized by the person identified as the secured creditor in the registered notice to which the amendment or cancellation relates. If a State adopts this approach, it would need to put in place security procedures in order to limit the risk of unauthorized registrations (see art. 6, para. 2).

68. Option B is a variation of option A in the sense that it places an important qualification on the extent of the effectiveness of an unauthorized amendment or cancellation. The priority of the security right to which the unauthorized registration relates is preserved as against the right of a competing claimant over whom it would have had priority but for the registration. This qualification is predicated on the theory that, to award priority to a competing claimant that would have been subordinated but for the unauthorized registration, would result in an unjustified windfall. The words in square brackets in option B are directed at the scenario where the competing claimant is a secured creditor that acquired its security right under a security agreement that was entered into before the unauthorized registration of the cancellation or amendment notice but that only made its security right effective against third parties after the unauthorized registration. The competing claimant in this scenario would have been subordinated at the time of the unauthorized registration, since it had not yet made its right effective against third parties.

69. If a State decides to adopt option A or option B, it would need to implement option B of article 31 below, which obligates the Registry to remove information in a registered notice

from the public registry record, and archive it, upon the expiry of its period of effectiveness or upon registration of a cancellation notice.

70. Option C is at the opposite end of the spectrum from option A. It provides that an unauthorized registration or cancellation is ineffective, unless authorized by the secured creditor. Under this approach, a third party would need to conduct off-record inquiries to verify whether the registration of a cancellation or amendment notice which purported to terminate a security right in an asset in which it wishes to acquire rights had in fact been authorized by the secured creditor.

71. Option D is a variation of option C in the sense that it places an important qualification on the general rule in option C. It provides that the unauthorized registration is nonetheless effective as against a competing claimant whose right was acquired in reliance on a search of the registry record made after the registration of the amendment or cancellation notice, and who did not have knowledge that the registration was unauthorized at the time it acquired its right. This qualification differs from the qualification in option B above insofar as it requires the competing claimant that would have priority if the registration were treated as effective to provide factual evidence that it actually searched and relied on the registry record prior to acquiring its right.

72. If a State decides to adopt option C or option D (that is, an "open drawer system), it would need to implement option B of article 31 below, which obligates the Registry to remove information in a registered notice from the public registry record, and archive it, only upon the expiry of its period of effectiveness. The cancellation notice and the registered notices to which it relates would need to remain in the public registry record in order for searchers to know whom they should contact to verify whether the cancellation was authorized.

[*Note to the Working Group: The Working Group may need to consider what constitutes an unauthorized registration (at least for States that adopt option A or B). In this regard, the Working Group may wish to note that it is not uncommon for secured creditors to delegate authority to register amendments or cancellations to third-party service providers. In this context the question arises whether, if the third party erroneously or inadvertently registers an amendment or cancellation notice, this would constitute an unauthorized registration. Similarly, the question arises whether, if the third party acts maliciously or fraudulently, this would be an unauthorized registration or the secured creditors should bear the risk of dishonesty by third parties they authorize to effect registrations on their behalf*.]

Section E. Searches

Article 23. Search criteria

73. Article 23 is based on recommendation 54, subparagraph (h), of the Secured Transactions Guide (see chap. IV, paras. 31-36) and 34 of the Registry Guide (see paras. 264-265). It sets out the two criteria according to which any person may conduct a search of the public registry record.

74. Under subparagraph (a), the first and principal search criterion is the identifier of the grantor. The identifier of the grantor is its name, determined according to the rules set out in article 10. If an enacting State decides to require "additional information" to be entered in a separate field to assist in uniquely identifying a grantor, this additional information does not constitute an alternative search criterion (see art. 9, subpara. (a)). Rather it will simply appear as additional information in a search result.

75. Under subparagraph (b), the registration number assigned to the initial notice under article 29, paragraph 1, constitutes an alternative search criterion. A search by registration number gives secured creditors an efficient means of identifying and retrieving a registered notice for the purposes of registering an amendment or cancellation notice. However, searches by registration number generally will not be conducted by third parties as they typically will not know the relevant registration number.

76. If the enacting State provides for the entry of the serial number of an asset in a separate designated field (see para. 40 above), entry of this serial number in its own designated field in the initial or amendment notice is required in the sense of being necessary to achieve the third-party effectiveness and priority of the security right as against specified classes of competing third-party claimants. If a State decides to adopt this approach, it would need to list the serial number of the asset as an additional search criterion in this article. It would also need to deal with a number of issues, including what constitutes the correct serial number, design the registry system so that registered notices can be searched and retrieved by serial number and third-party effectiveness and priority by serial number registration (see Registry Guide, para. 266).

77. To allow the registration of global amendment notices, as provided in article 17, the Registry must organize the registry record to permit registered notices to be identified and retrieved by reference to the relevant secured creditor. However, for public policy reasons relating to privacy and confidentiality, the name or other identifier of the secured creditor should not be an available criterion for general public searching (see Secured Transactions Guide, chap. IV, para. 81 and Registry Guide, para. 267).

Article 24. Search results

78. Article 24 is based on recommendation 35 of the Registry Guide (see paras. 268-273; the Secured Transactions Guide does not contain an equivalent recommendation). Paragraph 1 sets out the required content of search results provided by the Registry in response to a search request. The search result must first indicate the date and time when the search was performed.

79. No reference is made to a "currency date" indicating that the search result includes only information contained in notices that were registered as of that date (as opposed to the actual date of the search result). The reason is that registration becomes effective when the information in a notice submitted to the Registry has been entered into the registry record so as to be accessible to searchers (see art. 14, para. 1). Thus, the "currency date" is the actual date of the search (see Registry Guide, para. 273).

80. With respect to the substantive content of the search result, paragraph 1 contemplates that an enacting State may enact one of two options. The difference between the two options is whether the system should be designed to retrieve notices that match the search criterion (grantor name or registration number) exactly or the grantor name closely (close matches do not apply to registration numbers). What constitutes a "close match" under option B of paragraph 1 is not a free-floating concept but rather depends on the current close-match search programme or logic adopted by the enacting State.

81. Options A and B should be read in conjunction with article 25, paragraph 1, which provides that an error in the grantor identifier entered in a notice does not render the registration of the notice ineffective if the notice would be retrieved by a search of the registry record using the grantor's correct identifier as the search criterion. The result of applying this test differs depending on whether option A or B of article 24, paragraph 1, is adopted. If option A is adopted, a registration is ineffective if the registrant fails to enter the correct name of the grantor in the notice. But if option B is adopted, the registration of a notice that contains an error in the grantor's name would still be effective as long as the name that is entered is a sufficiently close match to result in the notice being retrieved on a search using the grantor's correct name.

82. Paragraph 2 obligates the Registry to issue an official search certificate setting out a search result on the request of a searcher. Paragraph 3 minimizes the administrative burden on the Registry in this respect by providing that a search certificate may take the form of a printed search result issued by the Registry. Paragraph 3 also facilitates the use of search results by providing that they are proof of their contents in the absence of evidence to the contrary.

Section F. Errors and post-registration changes

Article 25. Registrant errors in required information

83. Article 25 is based on recommendations 58 and 64-66 of the Secured Transactions Guide (see chap. IV, paras. 66-74, and 82-97) and 29 of the Registry Guide (see paras. 205-220). Its overall aim is to provide guidance on when the effectiveness of a registration may be challenged owing to errors or omissions in the information in registered notices.

84. Paragraph 1 addresses errors in the grantor identifier set out in a registered notice. It provides that: (a) if the registrant enters the name of the grantor in accordance with article 10 above, the effectiveness of the registration cannot be challenged on the ground of an error in the grantor name; and (b) if the registrant makes an error, the registration may still be effective if the notice would be retrieved by a search using the correct grantor identifier.

85. Paragraph 4 deals with errors or omissions in the other items of information required to be set out in registered notices under article 9, subparagraphs (a)-(c). It provides that an error does not make a registration ineffective unless it "would seriously mislead a reasonable searcher." This language implies an objective test in the sense that a person challenging the registration need not show that any person was actually misled by the error. It is sufficient to show that a reasonable person hypothetically would have been misled.

86. Paragraphs 3 and 5 incorporate the general legal concept of severability. A fatal error in entering the name of a particular grantor or the description of a particular encumbered asset does not make the registration of a notice ineffective with respect to other grantors correctly identified or other encumbered assets correctly described in a registered notice.

87. Paragraph 6 creates a special test for assessing the impact of errors made by a registrant in two instances. The first arises where an enacting State allows a registrant to self-select the period (duration) of effectiveness of the registration of a notice pursuant to options B or C of article 15 (and art. 9, subpara. (d)). The second arises where the enacting State requires a registrant to indicate the maximum sum for which a security right may be enforced pursuant to article 9, subparagraph (e). In these two cases, an error in the entry of the information does not render a registration ineffective even if the error would be seriously misleading from the perspective of an abstract reasonable searcher. Rather, the registration will be treated as ineffective only as against, and only to the extent that, the competing claimant that challenges the effectiveness of the registration shows that it was personally misled by the error (see Registry Guide, paras. 215 and 217-220). This approach may give rise to circular priority problems.

88. As observed in the commentaries on articles 12 and 23 above, some States provide for the entry of an alphanumerical asset identifier for specified classes of high-value assets that have a significant resale market. In States that adopt this approach, entry of this identifier in its own designated field in the initial notice is required in the sense of being necessary to achieve the third-party effectiveness and priority of the security right as against specified classes of competing third-party claimants. States that decide to adopt this approach would need to deal with the impact of errors in the serial number on the effectiveness of a registration. They may also wish to consider whether to provide for search results to disclose close matches.

[*Note to the Working Group, the Working Group may wish to consider the following text of paragraph 1 of article 25 for States that adopt option A of article 24, paragraph 1:*

> *"An error in a grantor identifier in a registered notice does not render the registration of the notice ineffective if the information in the notice would be retrieved as an exact match by a search of the registry record using the grantor's correct identifier as the search criterion."*

The Working Group may also wish to consider the following text of paragraphs 1 and 2 of article 25 for States that adopt option B of article 24, paragraph 1:

> *"1. An error in a grantor identifier in a registered notice does not render the registration of the notice ineffective if the information in the notice would be retrieved*

as an exact match by a search of the registry record using the grantor's correct identifier as the search criterion.

"2. An error in the grantor identifier in a registered notice does not render the registration of the notice ineffective if:

(a) The notice would be retrieved as a close match by a search of the registry record using the grantor's correct identifier as the search criterion, and

(b) The error would not seriously mislead a reasonable searcher."

The Working Group may also wish to consider the words "except to the extent in seriously misled third parties that relied on the information set out in the notice, as third parties may not be misled or prejudiced (see Registry Guide, paras. 215 and 217-220).]

Article 26. Post-registration change of the grantor's identifier

89. Article 26 is based on recommendation 61 of the Secured Transactions Guide (see chap. IV, paras. 75-77; see also Registry Guide, paras. 226-228). It addresses the impact of a post-registration change in the identifier of the grantor (i.e. its name under art. 10) on the effectiveness of the registration of a notice. It follows that, if the grantor's name changes after the registration of a notice, a search under the new name will not retrieve registered notices in which the grantor is identified by its old name. This poses a risk for third parties that acquire rights in the grantor's encumbered assets after the name change.

90. To address this risk, paragraph 1 gives the secured creditor a grace period (the duration of which is to be specified by the enacting State) to register an amendment notice adding the new name of the grantor. If the amendment notice is registered before the expiry of the grace period, the security right retains whatever priority it otherwise would have as against competing claimants, even if their rights arise after the change of name but before the registration of the amendment notice.

91. Under paragraph 2, the secured creditor may still register an amendment notice after the expiry of the grace period. However, its security right will be subordinated to an intervening security right that is made effective against third parties after the change of name but before the amendment notice is registered (see subpara. 2(a)). In addition, buyers, lessees or licensees who acquire rights in the encumbered assets after the change of name but before the registration of the amendment notice take free of the security right (see subpara. 2(b)).

92. As against competing claimants other than those specifically protected by subparagraph 2(b), the third-party effectiveness and priority of the security right is not prejudiced by the late registration of the amendment notice or the failure of the secured creditor to register an amendment notice altogether. Thus, the secured creditor will retain whatever priority it had against competing claimants whose rights arose before the change of name. Its rights are also preserved as against competing claimants whose rights arise after the change of name that are not specifically mentioned in paragraph 2 (for example, the grantor's insolvency representative).

Article 27. Post-registration transfer of an encumbered asset

93. Article 27 is based on recommendation 62 of the Secured Transactions Guide (see chap. IV, paras. 78-80; see also Registry Guide, paras. 229-232). It addresses the impact of a post-registration transfer of an encumbered asset on the effectiveness of the registration of a notice in relation to a security right in that asset. In principle, the transferee will acquire its right subject to the security right to which the registered notice relates (see art. 29, para. 1). This creates a risk for third parties that acquire rights in the encumbered asset from the transferee: a search of the registry record by the third party under the name of the transferee will not retrieve registered notices in which the grantor is identified as the transferor. This risk is analogous to that addressed in article 26 above in relation to post-registration changes in the grantor's identifier, but, unlike article 26, article 27 does not provide a uniform rule. Rather, it gives enacting States the option to enact any one of three approaches.

94. The approach in paragraphs 1 and 2 of option A is identical to that set out in article 26 for post-registration changes in the grantor's identifier. It gives the secured creditor a grace

period (the duration of which is to be specified by the enacting State) to register an amendment notice adding the transferee as a new grantor. As under article 26, the secured creditor's failure to register the amendment notice before the expiry of the grace period, or at all, does not generally prejudice the third-party effectiveness and priority status of its security right. However, its security right will be subordinated to competing security rights acquired and made effective against third parties after the encumbered asset was transferred, leased or licensed, and before the amendment notice was registered. Transferees that acquire rights during this same period also will take free of the security right.

95. Paragraph 1 of option B is similar to paragraph 1 of option A, with the important qualification that the grace period to register the amendment notice begins (not when the secured creditor acquires knowledge that the grantor has transferred the encumbered asset, as under paragraph 1, option A), but when the transfer takes place.

96. Paragraph 3 of options A and B implement recommendation 244 of the Intellectual Property Supplement. The reason for this different approach with respect to intellectual property is that, if the secured creditor would have to register an amendment notice each time intellectual property was transferred or licensed (to the extent that an exclusive licence is treated as a transfer under intellectual property law), intellectual property financing would be discouraged or become more expensive (see Intellectual Property Supplement, paras. 158-166).

97. Under paragraph 4 of options A and B (and paragraph 2 of option C), in the case of successive transfers of encumbered assets, article 27 applies to the last transfer. So, for example, where the encumbered assets are transferred from A to B, from B to C and from C to D, article 27 applies to the transfer from C to D and thus the secured creditor meant is the secured creditor of C.

98. Under paragraph 1 of option C, registration of the amendment notice is optional in the sense that the failure to register does not affect the third-party effectiveness or priority of the security right as against intervening competing claimants. This approach parallels the approach to post-registration transfers of encumbered intellectual property.

Section G. Organization of the Registry and the registry record

Article 28. Appointment of the registrar

99. Article 28 is based on recommendation 2 of the Registry Guide (see para. 74; the Secured Transactions Guide does not contain an equivalent recommendation). Recognizing that these matters may be dealt with differently in each State, article 28 leaves it to the enacting State to specify the authority responsible for the appointment, dismissal and supervision of the registrar. It also leaves it to the authority specified by each enacting State to determine the registrar's duties in the relevant law, decree, regulation or similar act.

Article 29. Organization of information in registered notices

100. Article 29 is based on recommendations 15 and 16 of the Registry Guide (see paras. 127-130; the Secured Transactions Guide did not include an equivalent recommendation). Paragraph 1 requires the Registry to assign a unique registration number to an initial notice and associate all registered amendment or cancellation notices that contain that number with the initial notice in the registry record. These requirements aim to ensure that amendment and cancellation notices are linked to an initial notice in the registry record so as to be retrievable on a search (see arts. 18, 20 and 23).

101. Option A of paragraph 2 is offered for States that implement option A of article 24, paragraph 1. Option B of paragraph 2 is offered for States that implement option B of article 24, paragraph 1. Option A of paragraph 3 is offered for States that implement option A of article 19, above. Option B of paragraph 3 is offered for States that implement option B of article 19 above.

102. Paragraph 3 is intended to ensure that the entire registration record relating to an initial notice remains intact. It provides that the registry record must be organized in a manner that preserves the information in all registered notices, notwithstanding the registration of

amendment or cancellation notices that purport to change the information contained in the initial notice.

103. The enacting State will need to revise article 27 to impose additional organizational obligations on the Registry should it decide to provide for: (a) registration and searching according to serial number (see the commentary on arts. 12 and 23); (b) registration and searching according to a grantor identifier other than the name of the grantor (see paras. 40 and 76); and (c) the assignment of unique confidential numbers to secured creditors on the registration of an initial notice, and to require registrants to enter this number as a precondition to the registration of related amendment or cancellation notices (see paras. 22, 58 and 67 above).

Article 30. Integrity of information in the registry record

104. Article 30, paragraph 1, is based on recommendation 17, subparagraph (a), of the Registry Guide (see para. 136; the Secured Transactions Guide does not contain an equivalent recommendation). It prohibits the Registry from unilaterally amending or removing information in the registry record except as authorized in articles 31 and 32 below.

105. Article 30, paragraph 2, is based on recommendations 55, subparagraph (f), of the Secured Transactions Guide (see chap. IV, para. 54), and 17, subparagraph (b), of the Registry Guide (see para. 137). It obligates the Registry to ensure that the information in the registry record is preserved and may be reconstructed in the event of loss or damage. In practice, this obligation requires the registry to create and maintain a backup copy of the registry record.

Article 31. Removal of information from the public registry record and archival

106. Option A of article 31 is based on recommendations 74 of the Secured Transactions Guide (see chap. IV, para. 109), and 20-21 of the Registry Guide (see paras. 151-152). It requires the Registry to remove information in registered notices from the public registry record once the period of effectiveness of the notice expires or a cancellation notice is registered. If the information in "cancelled or expired notices remained publicly searchable, this might create legal uncertainty for third-party searchers, potentially impeding the ability of the grantor to grant a new security right in or deal with the assets described in the notice" (see Registry Guide, para. 151).

107. Option B of article 31 is a new provision that has been inserted to implement the "open drawer approach", in the context of which all information in the registry record is available to searchers and the Registry is given no authority to do anything but accept, retain and disclose all information (see art. 22, options C and D).

108. Paragraph 2 requires the Registry to archive the information in registered notices removed from the pubic registry record under paragraph 1 in a manner that enables the information to be retrieved by the Registry in accordance with article 29. This is necessary since the information in "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 described in the notice for the purposes of a subsequent priority dispute between the secured creditor and a competing claimant" (see Registry Guide, para. 151).

109. As to the duration of the registry's archival obligation, paragraph 2 leaves this decision to the enacting State (while cautioning that it should minimally be coextensive with the prescription period under local law for disputes arising from a security agreement).

[Article 32. Correction of errors by the Registry]

[*Note to the Working Group: The Working Group may wish to note that the commentary on article 32 will be prepared once article 32 has been considered by the Working Group*.]

Article 33. Limitation of liability of the Registry

110. Article 33 is based on recommendation 56 of the Secured Transactions Guide (see chap. IV, paras. 55-64; see also Registry Guide, paras. 141-144).

111. Subparagraph (a) of option A is intended to leave the issue of the liability of the Registry (or the enacting State) for loss or damage to other law of the enacting State and, if liability is foreseen by that other law, to limit that liability to the types of errors or omissions listed in option A (which may be covered by a compensation fund that the Registry (or the enacting State) may wish to establish and pay from the registry fees). Subparagraph (b) is intended to cover the liability of the Registry in entering or failing to enter in the registry record information submitted by a registrant in a paper notice form. It is not intended to address any liability of the Registry for entering or failing to properly or completely enter information in the registry record directly submitted by a registrant electronically, since it may be impossible or very difficult for the registrant to prove that this was due to the fault of the Registry as opposed to the registrant's own error or omission. Subparagraph (c) is intended to address and limit any liability that the Registry may have under other law for loss or damage caused by a failure of the Registry to send a copy of the registered notice to the secured creditor that can then verify the accuracy and completeness of the information. Subparagraph (d) is intended to limit any liability that the Registry may have under other law for loss or damage caused by false or misleading information provided by the Registry to registrants or searchers.

112. Option B of article 33 is intended to leave any liability that the Registry (or the enacting State) may have for loss or damage caused by an error or omission in the administration or operation of the Registry to other law, and to limit it to an amount to be specified by the enacting State. Option C of article 33 is intended to exclude any liability of the Registry (or the enacting State) for an error or omission in the administration or operation of the Registry.

Article 34. Registry fees

113. Article 34 is based on recommendations 54, subparagraph (i), of the Secured Transactions Guide (see chap. IV, para. 37) and 36 of the Registry Guide (see paras. 274-280).

114. One of the key objectives of an effective and efficient secured transactions law is to enhance certainty and transparency by providing for registration of a notice in a general security rights registry (see Secured Transactions Guide, rec. 1, subpara. (f)). This objective cannot be achieved if the Registry is used as an opportunity to generate revenue, as borrowers in low-value transactions will not be able to bear the cost of registration, and borrowers in high-value transactions will be discouraged to use the Registry. Accordingly, the Secured Transactions Guide, recommends that registry fees, if any, should be set a cost-recovery level to encourage registrants and searchers to use the registry services. Following the same policy, the Registry Guide, sets forth in an indicative way three options, namely a cost-recovery option, a no-fee or fee-below cost-recovery option and an option leaving fees to be determined, in one of the two other options, not in the regulation, but in a decree to be enacted later (see Registry Guide, paras. 274-280, and rec. 36).

115. In line with the above-mentioned considerations, two options are presented in article 34. There may be other options and, in particular, a fee structure might distinguish between electronic and paper use of the registry, where the fee differential might be designed to stimulate electronic use rather than paper use in an enacting State that offers both. Irrespective of the option a State chooses to implement, it may wish to provide that the Registry may enter into an agreement with a person to establish a Registry user account to facilitate the payment of fees and the identification of the registrant. Similarly, irrespective of the option it decides to adopt, the enacting State may wish to specify the Registry fees in its registry related act and allow the administrative authority supervising the Registry (e.g. a ministry or the central bank) to modify the fees and methods of payment by decree. This may be necessary, for example, if experience shows that one or the other fee is too low or too high, or that the method payment initially chosen is not sufficiently time- or cost-efficient. Another variant of this approach is to leave the determination or modification of Registry fees to the administrative authority supervising the Registry.

116. Option A provides for fees for all Registry services but only at a cost-recovery level or lower. This cost-recovery option has several variants, including the following. One variant is to limit fees to registration services and to provide that all searching services are free of

charge. The advantage of this variant is that it will encourage and facilitate the due diligence that potential financiers have to do and reduce risks and disputes. Another variant is to limit fees to the registration of an initial notice and to provide that the registration of any subsequent notice and searching services are free of charge. This variant has the benefit of ensuring that the enacting State will receive the revenue that it desires to derive at the earliest time. In addition, this variant will remove fee issues from, and thus simplify, all subsequent transactions and searches. Moreover, this variant will encourage registrants to register cancellation notices and relieve grantors from incurring time and expense to initiative proceedings to force cancellations or amendments. Another variant for States that enact option B or C of article 15 (allowing a registrant to select the period of effectiveness) is to charge fees on a sliding scale, depending on the period selected by the registrant in an initial notice and any amendment notice that extends the period of effectiveness of a notice. This approach has the advantage of discouraging registrants from entering an inflated period in a notice out of an excess of caution (see Registry Guide, para. 277).

117. Option B is based on the assumptions that: (a) according to best practices, registries in the future will most likely be all electronic, and thus the cost of their establishment and operation should be minimal; and (b) that cost should be borne by the State, as the Registry is a key component of the public purpose of a modern secured transactions law to enhance the availability of more credit at lower cost and with greater speed and efficiency, and not simply a private benefit for grantors and secured creditors. Like option A, option B also has several variants. One variant is to offer free registration services for a limited start-up period in order to encourage acclimatization to and use of the registry system. Another variant is to charge no fee only for certain types of services (e.g., the registration of an amendment and cancellation notice, or for searching services, the registration of a notice aimed at restoring an erroneously cancelled notice or for registration of a notice aimed at preserving third-party effectiveness achieved by registration in a registry operating under prior law).

(A/CN.9/WG.VI/WP.66/Add.2) (Original: English)

Note by the Secretariat on a draft guide to enactment of the draft model law on secured transactions

ADDENDUM

Contents

Chapter V. Priority of a security right

A. General rules

Article 27. Competing security rights

1. Article 41 is based on recommendation 76 of the Secured Transactions Guide (see chap. V, paras. 45-54). It refers to third-party effectiveness (which requires creation and a third-party effectiveness act), while advance registration (i.e. registration before the creation of the security right or conclusion of the security agreement and thus before third-party effectiveness is achieved) is addressed in article 28.

2. As a general matter, priority between competing security rights is determined by the order in which the security rights became effective against third parties. Most often, third-party effectiveness of a security right created in accordance with the provisions of chapter II will be achieved by registration of a notice in the security rights registry (see art. 16). However, as detailed in chapter III, there are several other methods of achieving third-party effectiveness, the applicability of which depends on the nature of the encumbered asset and the secured transaction.

3. Notwithstanding the variety of acts that may achieve third-party effectiveness, however, the general rule in paragraph 1 determines priority unless one of the special rules in articles 28-37 is applicable. Thus, subject to those articles, paragraph 1 determines priority between competing security rights that were created by the same grantor and made effective against third parties by registration of a notice (i.e. where, for example, Grantor A creates a security right in its equipment favour of secured creditor ("SC") 1 and then another security right in favour of SC 2). It also determines priority when one or both of the competing security rights were made effective against third-parties by another means.

4. Paragraph 2 is a new provision dealing with competing security rights created by different grantors (i.e. where, for example, Grantor A creates a security right in its equipment in favour of SC 1 and then transfers it to Transferee B who creates a security right in favour of SC 2). Under paragraph 2, priority is determined on the basis of the order of third-party effectiveness, provided that the secured creditor (SC 1) registers an amendment notice indicating the identifier of the transferee within a short period of time after the secured creditor becomes aware of the transfer or after the transfer (see art. 27, options A and B, of [the registry-related provisions]).

5. Paragraph 3 addresses situations in which there has been a change in the method of third-party effectiveness. This may happen, for example where a secured creditor in possession of the encumbered asset returns possession of it to the grantor after registering a notice with respect to it in the security rights registry. In such a case, the priority of the security right is determined by the time at which the security right was first effective against third parties so long as there was no time thereafter during which the security right was not effective against third parties.

6. Paragraph 4, which is based on recommendation 100 of the Secured Transactions Guide (see chap. V, paras. 144-150), is of particular economic importance because the security right whose priority is being determined will often be a security right in proceeds of the original encumbered asset. This is quite common when the original encumbered asset is inventory or a receivable inasmuch as the grantor frequently sells the inventory or collects the receivable before satisfaction of the obligation secured by the encumbered asset. In such a case, the security right continues in the proceeds as provided in article 10 and the security right in the proceeds is effective against third parties if the conditions in article 17 are satisfied. If those conditions are satisfied, under paragraph 4 the security right in the proceeds has the same priority as the security right in the original collateral. The rule in paragraph 4 is, however, limited by the special rule on the priority of security rights in proceeds of acquisition security rights in article 37.

7. Paragraphs 5-8 address priority issues resulting from situations in which one or both of the competing security rights is a security right that continued to a mass or product because the original encumbered asset was commingled in that mass or product (see Secured Transactions Guide, paras. 117-124).

[*Note to the Working Group: The Working Group may wish to consider whether illustrations of the operation of paragraphs 5-8 would be helpful*.]

Article 28. Competing security rights in the case of advance registration

8. Article 28 qualifies article 27, paragraph 1. While a security right cannot be effective against third parties unless it has been created in accordance with the provisions of chapter II, it is possible to register a notice in the Registry before the security right has been created. In such a case, article 28 provides that the priority of that security right as against other security rights is determined by the time of registration rather than the time of third-party effectiveness.

9. When combined with article 27, paragraph 1, article 28 creates a rule that brings about the following results: (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; and (b) 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 by the order of registration or third-party effectiveness, whichever occurs first. In both cases, when a security right has been the subject of a notice that was registered before the security right was created, it is the time of registration rather than the later time of third-party effectiveness that is used to determine priority.

10. To illustrate this rule, assume that: (a) on Day 1, Grantor authorizes SC 1 to register a notice listing Grantor as the grantor and describing the encumbered assets as all present and future equipment of Grantor and SC 1 registers the notice; (b) on Day 2, Grantor borrows money from SC 2 and grants SC 2 a security right in all of Grantor's present and future equipment, and SC 2 registers a notice with respect to this security right; and (c) on Day 3, Grantor borrows money from SC 1 and grants SC 1 a security right in all of Grantor's present and future equipment. In this case, the security right of SC 2 became effective against third parties before the security right of SC 1 (because a security right cannot be effective against third parties until it is created). Yet, as a result of article 28, the priority of SC 1's security right is determined by the time of registration of its notice. Thus, SC 1 will have priority over SC 2 because SC 1's registration of the notice (on Day 1) occurred before the security right of SC 2 became effective against third parties.

11. This rule is beneficial for two reasons. First, as a result of this rule, the priority date for security rights that are made effective against third parties by the registration of a notice will always be determined by the time of registration. The time of registration is maintained by the Registry and is, therefore, easy to demonstrate and easy to search. By way of contrast, the creation of a security right is a private event between the grantor and the secured creditor; the time of creation is not maintained by the Registry and is not publicly available and may be difficult to establish.

12. Second, the results that follow from the application of the rule in this article are consistent with the behaviour of prudent secured creditors. For example, assume that SC 2 is considering extending credit to Grantor, secured by a security right in an item of Grantor's equipment. If SC 2 searches the records of the Registry and discovers that a notice has been registered listing Grantor as the grantor and SC 1 as the secured creditor and indicating that the encumbered asset is the same item of equipment, SC 2 will not know whether SC 1 has a security right or, rather, has registered a notice before creation of the security right. In such a situation, SC 2 would likely make the conservative assumption that the registered notice reflects an existing security right and, accordingly, if SC 2 decides to go forward with the transaction, it will be with the understanding that its rights are subordinate to that of SC 1. The rule in this article is consistent with the behaviour of SC 2.

[*Note to the Working Group: The Working Group may wish to note that, depending on the decision of the Working Group with respect to the contents of this article, the commentary may need to be revised*.]

Article 29. Rights of buyers or other transferees, lessees or licensees of an encumbered asset

13. Article 29 is based on recommendations 79-82 of the Secured Transactions Guide (see chap. V, paras. 60-89). It addresses situations in which the encumbered asset is sold or otherwise transferred, leased or licensed, and determines the rights of the buyer or other transferee, lessee or licensee vis-à-vis the security right.

14. The general rule, which is stated in paragraph 1 and is subject to important exceptions stated in paragraphs 2-6, is that a security right in an encumbered asset that is effective against third parties continues to encumber the asset notwithstanding the sale or other transfer, lease or license of the encumbered asset.

15. The article provides two types of exceptions to the general principle stated in paragraph 1. Paragraphs 2 and 3 provide exceptions based on the actions of the secured creditor, while paragraphs 4-6 provide exceptions based on the nature of the sale or other transfer, lease or licence and the knowledge of the buyer or other transferee, lessee or licensee.

16. Paragraphs 2 and 3 both give effect to authorizations of the secured creditor that protect the buyer or other transferee, lessee or licensee. The most common circumstances in which a secured creditor authorizes such a result are those in which the transaction will generate payment to the grantor that can be used to satisfy the secured obligation, although the rule is not limited to those circumstances.

17. Paragraphs 4-6 protect a buyer, lessee, or licensee in ordinary course of business transactions from being subject to a security right that was effective against the third parties, provided that they acquired their rights without knowledge that the transaction violated the rights of the secured creditor under the security agreement. “Knowledge”, as the term is used in paragraphs 4-6, is defined in article 2, paragraph (s), as actual knowledge. It is important to note that knowledge of the existence of the security right is insufficient to disqualify the buyer, lessee, or licensee from the benefits of paragraphs 4-6 (see art. 40 below).

18. Paragraphs 7 and 8 state what is often referred to as a “shelter principle” — once a buyer, lessee, or licensee obtains rights in the encumbered asset free of (or unaffected by) a security right, those that acquire their rights in the encumbered assets from or through the buyer, lessee, or licensee are similarly free of (or unaffected by) the security right.

Article 30. Rights of buyers or other transferees, lessees or licensees of an encumbered asset in the case of specialized registration

19. Article 30 is based on recommendations 77, subparagraph (a), and 78 of the Secured Transactions Guide (see chap. V, paras. 56 and 57). It is relevant only in States that provide a specialized registry or title certificate system for achieving third-party effectiveness of a security right in particular types of asset. Recommendation 77, subparagraph (b) of the Secured Transactions Guide is not reflected in this article on the understanding that the priority of rights registered in a specialized registry is a matter for the relevant specialized registration law.

20. In order to enable competing claimants that utilize the specialized registry or title certificate system to determine their rights solely by a search of the specialized registry system or examination of the title certificate, article 30 provides rights to such parties that are superior to the rights of a secured creditor that achieved third-party effectiveness by other means.

21. In particular, a security right made effective against third parties through the specialized registry or title certificate system is superior to a security right made effective against third parties by any other means. Similarly, even if a security right in an encumbered asset is effective against third parties by a means other than registration in a specialized registry or notation on a title certificate, if the security right could have been made effective against third parties by such registration or notation a buyer or other transferee, lessee, or licensee will acquire its rights free of, or unaffected by, the security right (for the coordination with specialized movable property registries, see Registry Guide, para. 64-70).

Article 31. Rights of the insolvency representative

[*Note to the Working Group: The Working Group may wish to note that the commentary to this article will be prepared if the Working Group decides to retain it*.]

Article 32. Preferential claims

22. Article 32 is based on recommendations 83, 85 and 86 of the Secured Transactions Guide (see chap. V, paras. 90-93 and 103-109). Its purpose is to implement the policy of these recommendations and give an enacting State an opportunity to: (a) list in a clear and specific way any statutory claims that may have priority over security rights; and (b) indicate a limitation on their amount. Examples of claims that may be listed in this article include claims of service providers and unpaid sellers or suppliers of goods but only to the extent that they have retained possession of the goods (see A/CN.9/830, para. 89). It should be noted that secured creditors typically obtain representations from grantors about preferential claims and otherwise address the possible existence of such claims.

23. This article applies outside insolvency. As the Model Law does not deal with insolvency matters, it does not include a similar rule for preferential claims in the case of the grantor's insolvency along the lines of recommendation 239 of the Secured Transactions Guide. In most States that require registration of a notice with respect to preferential claims, the priority of preferential claims is determined in the same way as the priority of security rights, that is, in other words, the general first-to-register priority rule applies. It should also be noted that, in the case of enforcement, if a preferential creditor does not take over the enforcement process (see art. 70), its claim will have to be paid ahead of the claims of secured creditors.

Article 33. Rights of judgement creditors

24. Article 33 is based on recommendation 84 of the Secured Transactions Guide (see chap. V, paras. 94-102). It determines the priority as between a security right in an encumbered asset and the rights of a judgement creditor that has acquired rights in the encumbered asset by taking certain steps. The enacting State will have to complete paragraph 1 by inserting the relevant step or steps necessary for a judgement creditor to acquire rights in the encumbered asset. These steps typically involve actions such as registration of a notice in the security rights registry, seizure of assets or service of a garnishment order.

25. Paragraph 1 gives priority to the judgement creditor if the steps necessary for it to acquire rights in the encumbered asset occur before the security right is made effective against third parties. In States that require registration of a notice with respect to these enforcement steps, the priority of the rights of judgement creditors is determined in the same way as the priority of security rights, that is, in other words, the general first-to-register priority rule applies.

26. Paragraph 2, however, provides that the priority of the rights of the judgement creditor does not extend to credit extended by the secured creditor within a short time after the judgement creditor notifies the secured creditor that it has taken the steps necessary to acquire its right, or to credit extended thereafter pursuant to an irrevocable commitment made before that notification. Paragraph 2 protects secured creditors against the possibility of inadvertently extending credit without realizing that their security rights are subordinate to the rights of a judgement creditor.

Article 34. Non-acquisition security rights competing with acquisition security rights

27. Article 34 is based on recommendations 180 of the Secured Transactions Guide (see chap. IX, paras. 131, 136, 137, 143 and 146) and recommendation 247 of the Intellectual Property Supplement (see paras. 259-263). Both option A and option B provide that, under certain circumstances, an acquisition security right has priority over a competing non-acquisition security right in the same encumbered asset even if, under the general priority rule in article 27, paragraph 1, the non-acquisition security right would have priority.

When those circumstances are present, it is often said colloquially that the acquisition security right has "super-priority" over the competing non-acquisition security right.

28. "Super-priority" for acquisition security rights is a feature of the law of most States, whether phrased in terms of a higher priority for security rights securing obligations incurred in acquiring the encumbered asset or, more traditionally, as a result of title to the encumbered asset being retained by the seller or other acquisition financier. Article 34 continues this practice, providing a variety of "super-priority" rules depending on the nature of the asset that is subject to the acquisition security right.

29. Option A contains three "super-priority" rules. Which of the three rules is applicable in a particular case depends on the nature of the encumbered assets. If the encumbered assets are inventory, or intellectual property or rights of a licensee under a licence of intellectual property held by the grantor [primarily] for sale or licence in the ordinary course of the grantor's business, the rule in subparagraph (1)(b) applies. If the encumbered assets are consumer goods, intellectual property or rights of a licensee under a licence of intellectual property used or intended to be used by the grantor [primarily] for personal, family or household purposes, the rule in subparagraph (1)(c) applies. In all other cases, the rule in subparagraph (1)(a) applies.

30. Under the general "super-priority" rule in subparagraph (1)(a), an acquisition security right has priority over a competing non-acquisition security right created by the grantor, if either the acquisition secured creditor is in possession of the asset (unlikely inasmuch as most acquisition security rights are non-possessory) or a notice with respect to the acquisition security right is registered in the Registry within a short period of time to be specified by the enacting State after the grantor obtains possession of the asset. Thus, so long as the acquisition secured creditor registers a notice with respect to the acquisition security right within the specified period, that security right will have priority over a competing non-acquisition security right that was made effective against third parties before the acquisition security right was made effective against third parties.

31. Under the super-priority rule in subparagraph (1)(b), additional requirements must be satisfied for an acquisition secured creditor that does not have possession of the encumbered assets to have "super-priority" over a competing non-acquisition security right. In particular, before the grantor obtains possession of the encumbered asset, a notice with respect to the acquisition security right must be registered and, in addition, a notice must be received by the non-acquisition secured creditor (if the non-acquisition secured creditor has registered a notice in the Registry with respect to a security right created by the grantor in an asset of the same kind), stating that the acquisition secured creditor has or intends to acquire an acquisition security right and describing the asset sufficiently to enable the non-acquisition secured creditor to identify the asset that is the object of the acquisition security right. Under the super-priority rule in subparagraph (1)(c), an acquisition security right automatically has priority over a non-acquisition security right in the same encumbered asset.

32. Option B contains only two "super-priority" rules. One of the rules (subparagraph (b)) applies when the encumbered assets are consumer goods, or intellectual property or rights of a licensee under a licence of intellectual property used or intended to be used by the grantor [primarily] for personal, family or household purposes. That "super-priority" rule is identical to the rule in option A, subparagraph (1)(c). For those types of encumbered asset, an acquisition security right automatically has priority over a non-acquisition security right in the same encumbered asset. The other "super-priority" rule in option B (subparagraph (a)) is identical to the rule in option A, subparagraph (1)(a). Thus, the only difference between option A and option B is that, in the former, extra steps must be taken in order for an acquisition security right in inventory, or in intellectual property or rights of a licensee under a licence of intellectual property held by the grantor [primarily] for sale or licence in the ordinary course of the grantor's business, to have priority over a competing non-acquisition security right.

33. The prerequisites to "super-priority" in option A, subparagraphs (1)(a) and (1)(b), and option B, subparagraph (a), are present to provide some protection to competing secured creditors whose security rights are effective against third parties before the third-party effectiveness of the acquisition security right. By providing a means by which the non-acquisition secured creditor can determine that newly-acquired assets are subject to an

acquisition security right (either by registration of a notice shortly after the grantor's acquisition of the asset (see option A, subparagraph (1)(a), and option B, subparagraph (a)) or by a notice to the acquisition secured creditor (see option A, subparagraph (1)(b)), the non-acquisition secured creditor can assess its economic position more accurately and make informed decisions as to whether to extend additional credit. The main difference in this regard is that under option A the non-acquisition secured creditor will receive a notice only for some types of encumbered asset (primarily inventory, see 34(1)(b)) and thus may have to conduct a search before every advance secured by another type of asset, while under option B the non-acquisition secured creditor will receive notice from the acquisition creditor for most types of encumbered asset (all but consumer goods).

Article 35. Competing acquisition security rights

34. Article 35 is based on recommendation 182 of the Secured Transactions Guide (see chap. IX, paras. 173-178). It addresses the priority of competing security rights when both are acquisition security rights. Unlike article 34 (which gives priority to acquisition security rights that satisfy certain criteria as against non-acquisition security rights), this article addresses priority as between security rights both of which would otherwise be entitled to "super-priority". The article reflects two policy decisions. First, an acquisition security right of a seller or lessor, or a licensor of intellectual property, has priority over an acquisition security right of another person such as a lender. Second, in all other cases, priority between acquisition security rights should be determined on the basis of rules applicable when neither are acquisition security rights.

Article 36. Acquisition security rights competing with the rights of judgement creditors

35. Article 36 is based on recommendation 183 of the Secured Transactions Guide (see chap. IX, paras. 145-148). Without the rule in this article, the period provided in article 34 would not be useful. The reason for this is that a secured creditor taking an acquisition security right typically would not want to have a period in which it would be vulnerable to the rights of a judgement creditor. In such a case, a secured creditor would likely register a notice before, or as soon as possible after, the security right was created. Accordingly, a secured creditor would not benefit from the longer period to register and achieve "super-priority" under article 34.

36. By way of illustration, assume that Grantor acquires an item of equipment from Seller on credit on Day 1 and grants Seller an acquisition security right in the item of equipment to secure its obligation to pay the remainder of the purchase price; on Day 5 Seller registers a notice that has the effect of making its acquisition security right effective against third parties. Between those two dates, on Day 3, Judgement Creditor obtains a judgement against Grantor and takes the steps specified in article 33, paragraph 1, to acquire rights in the item of equipment. Under the rule in article 33, paragraph 1, Judgement Creditor's rights would have priority over Seller's security right because Judgement Creditor obtained its rights before Seller's security right was effective against third parties. As a result of the operation of article 36, however, Seller's security right has priority over the rights of Judgement Creditor.

Article 37. Acquisition security rights in proceeds

37. Article 37 is based on recommendation 185 of the Secured Transactions Guide (see chap. IX, paras. 158-172). Both option A and option B of article 34 provide that, under certain circumstances, an acquisition security right has priority over a competing non-acquisition security right in the same encumbered asset even if, under the general priority rule in article 27, paragraph 1, the non-acquisition security right would have priority. This article determines whether that "super-priority" over non-acquisition security rights carries over to proceeds of the encumbered assets that are subject to the acquisition security right.

38. Under the general principles of article 10, a secured creditor with a security right in an asset obtains a security right in the identifiable proceeds of that asset and, under the circumstances described in article 17, that security right is effective against third parties.

This is equally true of assets subject to non-acquisition security rights and those subject to acquisition security rights. Under the general priority rule in article 27, paragraph 4, the priority of the security right in the proceeds is the same as the priority of the security right in that asset. Under that rule, the security right in proceeds of assets subject to an acquisition security right would have the same "super-priority" as the security right in the original asset. Article 37, however, limits the reach of article 27, paragraph 4, by extending "super-priority" to proceeds only of certain types of assets subject to an acquisition security right (option A) or by not extending the "super-priority" to proceeds at all (option B).

39. Under option A, the "super-priority" with respect to assets subject to an acquisition security right carries over to proceeds of those assets in certain circumstances and does not carry over in other circumstances. More particularly, option A provides that the "super-priority" with respect to the assets subject to the acquisition security right always carries over to the proceeds of those assets, except when the assets subject to the acquisition security right consist of: (a) inventory; (b) consumer goods; or (c) intellectual property or rights of a licensee under a licence of intellectual property held by the grantor [primarily] for sale or licence in the ordinary course of the grantor's business or used or intended to be used by the grantor [primarily] for personal, family or household purposes. When the asset subject to the acquisition security right is inventory, or intellectual property or rights of a licensee under a licence of intellectual property held by the grantor [primarily] for sale or licence in the ordinary course of the grantor's business, whether the "super-priority" carries over to proceeds depends on the nature of the proceeds. If the proceeds are receivables, negotiable instruments, or rights to payment of funds credited to a bank account, the "super-priority" does not carry over to those proceeds. If, on the other hand, the proceeds take another form, the "super-priority" does carry over to the proceeds. When the assets subject to the acquisition security right are consumer goods or intellectual property or rights of a licensee under a licence of intellectual property used or intended to be used by the grantor [primarily] for personal, family or household purposes, however, the "super-priority" does not carry over to the proceeds.

40. The primary reason for the decision not to provide "super-priority" for certain types of proceeds in option A relates to the difficulty that would be faced by competing secured creditors with security rights in payment rights in determining which of those payment rights are proceeds of assets subject to acquisition security rights and which are not. As a result, if there were "super-priority" treatment for those types of proceeds, competing secured creditors with security rights in payment rights might simply assume that all of those payment rights are proceeds and, as a result, extend less credit on the basis of them.

41. Option B provides that the "super-priority" with respect to assets subject to an acquisition security right does not carry over to proceeds of those assets under any circumstances, with the result that the priority of the security right in the proceeds will be determined under the general principle in article 27. This option is provided as an option for States that do not wish to make the sort of distinctions between types of proceeds made in option A.

42. As the Model Law does not deal with insolvency-related matters, with the exception of article 31, no article has been included in the Model Law along the lines of recommendation 186 of the Secured Transactions Guide to deal with the application of the special priority rules for acquisition security rights. However, there is nothing in these articles to imply that insolvency law will not operate against the background of secured transactions law and thus that these provisions will not apply to acquisition security rights in the case of insolvency.

Article 38. Subordination

43. Article 38 is based on recommendation 94 of the Secured Transactions Guide (see chap. V, paras. 128-131). Paragraph 1 allows a person to agree to lower priority of its security right as against a competing claimant than would otherwise result from application of the priority rules in this Chapter.

44. Such an agreement, usually referred to as a subordination agreement, may be in the form of a bilateral agreement between the party agreeing to lower priority and the competing claimant that will benefit from that agreement; it may also be a unilateral commitment

(usually made to the grantor) by the party agreeing to lower priority that its priority will be lower than that of the beneficiaries described in the commitment. Such an agreement is governed by this article so long as it is between a secured creditor and a grantor, between two or more secured creditors or between a secured creditor and another competing claimant (e.g. a judgement creditor or an insolvency representative).

45. Paragraph 2 makes it clear that a subordination agreement affects only the parties to it and any other beneficiaries of the subordination. For example, if SC 1, that has a claim for 50, subordinates its claim to SC 3, who has a claim for 70, SC 3 has priority over SC 2 only for 50.

46. In unusual circumstances, subordination can create circular priority issues. For example, assume that SC 1, 2, and 3 each have a security right in the same encumbered asset and their priority, determined under the rules of this chapter, is in that order, so that SC 1's security right is superior to that of SC 2 and SC 2's security right is, in turn, superior to that of SC 3. Then assume that SC 1 enters into a subordination agreement with SC 3, pursuant to which SC 1 agrees to subordinate its priority in favour of SC 3. As a result, SC 3 has priority over SC 1. However, SC 1 (who did not subordinate its priority in favour of SC 2) has priority over SC 2, and SC 2 has priority over SC 3, completing the circle.

Article 39. Future advances, future encumbered assets and maximum amount

47. Article 39 is based on recommendations 97-99 of the Secured Transactions Guide (see chap. V, paras. 135-143). Not all secured transactions involve a single extension of credit that is secured by encumbered assets in which the grantor has rights at the outset of the transaction. Rather, article 7 provides that the parties may agree that the encumbered assets will secure not only the obligation created contemporaneously with the security agreement but also any subsequent obligation of the grantor to the secured creditor; and article 8 provides that the parties may agree that assets created or acquired by the grantor after the security agreement is entered into will also secure the indebtedness.

48. Paragraphs 1 and 2 of this article provide that the priority of security rights so created extends to those subsequent obligations and after-acquired assets. Paragraph 3, which will be necessary only if the enacting State enacts provisions based on article 6, subparagraph 3(e), and article 9, subparagraph (e) [of the registry-related provisions], gives effect to any cap on the secured obligation stated in the notice by providing that the secured creditor's priority is limited by that cap.

Article 40. Irrelevance of knowledge of the existence of a security right

49. Article 40 is based on recommendation 93 of the Secured Transactions Guide (see chap. V, paras. 125-127). Knowledge or lack of knowledge of a security right by a competing secured creditor is not relevant to a determination of priority under either the general priority rule in article 27 or any of the special priority rules. The point is made explicit here to emphasize that priority is determined only on the basis of the objective facts referred to in those articles and not on the basis of difficult to prove subjective states of knowledge. However, article 40 does not go as far as to treat as irrelevant the knowledge on the part of, for example a buyer of an encumbered asset, that the sales agreement violates the rights of the secured creditor under the security agreement (see art. 29, paras. 4-6, art. 41, para. 2(c), art. 42, para. 6, and art. 43, para. 1).

B. Asset-specific rules

Article 41. Negotiable instruments

50. Article 41 is based on recommendations 101 and 102 of the Secured Transactions Guide (see chap. V, paras. 154-156). Any drafting changes are intended to ensure that paragraph 1 deals only with the relative priority of conflicting security rights in the same negotiable instrument, while paragraph 2 addresses the rights of a secured creditor with a security right in a negotiable instrument as against a buyer or other consensual transferee of the negotiable instrument (see A/CN.9/830, para. 49).

51. Under paragraph 1, a security right in a negotiable instrument that is made effective against third parties by the secured creditor's possession of the negotiable instrument has priority over a security right in the same negotiable instrument that is made effective against third parties by registration of a notice, without regard to the order in which the security rights became effective against third parties. This is consistent with the important role that possession plays in the law of negotiable instruments.

52. Under paragraph 2, certain buyers or other transferees that take possession of a negotiable instrument take their rights in the instrument free of a security right that is effective against third parties by registration of a notice (if the security right were effective against third parties because of the secured creditor's possession of the negotiable instrument, the buyer or other transferee could not also have possession of it, unless the same agent possesses the negotiable instrument both on behalf of the secured creditor and the buyer or other transferee).

53. The parties that take free under this rule are a protected holder of the negotiable instrument (see subpara. 2(a), which refers the exact formulation of this concept to the enacting State) or a transferee that takes possession of the instrument and gives value for it without knowledge that the sale or other transfer is in violation of the rights of the secured creditor (see subpara. 2(b)). As with the rule in paragraph 1, this rule preserves the important role of possession in the law of negotiable instruments.

54. Knowledge of the existence of a security right does not prevent a buyer or other transferee of a negotiable instrument from acquiring its rights in the instrument free of the security right. Rather, it is only knowledge that the transfer violates the rights of the secured creditor under the security agreement that prevents the transferee from taking free. "Knowledge", as defined in article 2, paragraph (s), means "actual knowledge". The reference to "good faith" that was included in recommendation 102, subparagraph (b) has been deleted on the understanding that the absence of knowledge amounts essentially to good faith and the concept of good faith is used in the draft Model Law only to reflect an objective standard of conduct (see A/CN.9/830, para. 50).

Article 42. Rights to payment of funds credited to a bank account

55. Article 42 is based on recommendations 103-105 of the Secured Transactions Guide (see chap. V, paras. 157-163). It determines the priority between competing security rights in a right to payment of funds credited to a bank account whether those rights to payment are original encumbered assets or proceeds of a security right in other property (which, according to art. 17, para. 1, is automatically effective against third parties, if the security right in the original encumbered asset is effective against third parties).

56. Paragraph 1 provides that a security right in a right to payment of funds credited to a bank account made effective against third parties by any of the methods foreseen in article 23 has priority over a security right made effective against third parties by registration of a notice. Under paragraphs 2 and 3, as among security rights in a right to payment of funds credited to a bank account that have been made effective against third parties by one of those alternative methods, a security right made effective against third parties by the secured creditor becoming the account holder has the highest priority, followed by a security right made effective against third parties as a result of the secured creditor being the depositary bank. Under paragraph 4, if there are more than one control agreements, priority is determined on the basis of the order of conclusion of the control agreements.

57. Under paragraph 5, except when the secured creditor has become the account holder, a security right in a right to payment of funds credited to a bank account will be subordinate to the depositary bank's rights of set-off (that are subject to other law) for debts owed to the depositary bank by the grantor. This protects depositary banks against losing their rights of set-off without their knowledge or consent.

58. Under paragraph 6, a transferee of funds from a bank account pursuant to a transfer initiated or authorized by the grantor acquires its rights free of a security right in the right to payment of funds credited to the bank account so long as the transferee does not have knowledge that the transfer violates the rights of the secured creditor under the security agreement. A "transfer of funds" includes transfers by a variety of mechanisms, including

by cheque and electronic means. The purpose of paragraph 7 is to preserve the free negotiability of funds.

59. Knowledge of the existence of a security right does not prevent a transferee of funds from the bank account from taking free of the security right. Rather, it is only knowledge that the transfer violates the rights of the secured creditor under the security agreement that prevents the transferee from taking free. "Knowledge", as defined in article 2, paragraph (s), means "actual knowledge".

Article 43. Money

60. Article 43 is based on recommendation 106 of the Secured Transactions Guide (see chap. V, para. 164). Its purpose is to preserve negotiability of money. Thus, under paragraph 1, a transferee of encumbered money acquires its rights in it free of the security right, unless it has knowledge that the transfer violates the rights of the secured creditor under the security agreement. "Knowledge", as defined in article 2, paragraph (s), means "actual knowledge". Paragraph 2 is intended to preserve the free negotiability of money.

Article 44. Negotiable documents and tangible assets covered

61. Article 44 is based on recommendations 108 and 109 of the Secured Transactions Guide (see chap. V, paras. 167-169). It is designed to preserve current practices under which rights to the tangible assets covered (or represented) by a negotiable document are subsumed in the negotiable document with the result that parties that deal with the document generally need not concern themselves separately with claims to the assets not reflected in the document. Accordingly, under paragraph 1, a security right in a tangible asset made effective against third parties by possession of the negotiable document covering that asset is given priority over a competing security right made effective against third parties by any other means.

62. Paragraph 2 states an exception to that general rule. Except when the encumbered asset is inventory, it provides that the rule in paragraph 1 does not apply against a secured creditor that had a security right in an encumbered asset before the earlier of the time that either the asset became covered by the negotiable document or the time that an agreement was concluded between the grantor and the secured creditor in possession of the negotiable document providing that the asset was to be covered by a negotiable document so long as the asset actually became covered by such a negotiable document within the time to be specified by the enacting State.

Article 45. Certain licensees of intellectual property

63. Article 45 is based on recommendation 245 of the Intellectual Property Supplement (see paras. 193-212). The purpose of this article is to clarify that the rule in article 29, paragraph 6, does not obviate other rights of the secured creditor as an owner or licensor of the intellectual property that is the subject of the license. This clarification is of particular importance because the concept of "ordinary course of business", used in article 29, paragraph 6, is a concept of commercial law and is not drawn from law relating to intellectual property law and thus may create confusion in an intellectual property financing context. Typically, law relating to intellectual property does not distinguish in this respect between exclusive and non-exclusive licences and focuses rather on the issue whether a licence has been authorized or not.

64. As a result, unless the secured creditor authorized the grantor to grant licences unaffected by the security right (which will typically be the case as the grantor will rely on its royalty income to pay the secured obligation), the licensee would take the licence subject to the security right. Thus, if the grantor defaults, the secured creditor would be able to enforce its security right in the licensed intellectual property and sell or license it free of the licence. In addition, a person obtaining a security right from the licensee will not obtain an effective security right as the licensee would not have received an authorized licence and would have no right in which to create a security right.

Article 46. Non-intermediated securities

65. Article 46 covers a topic not addressed in the Secured Transactions Guide, which excluded all types of securities (see rec. 4, subpara. (c)). So as not to interfere with existing customs and practices with respect to non-intermediated securities, this article adapts the general priority rule of article 27 in a manner similar to the special priority rules for security rights in negotiable instruments and rights to payment of funds credited to a bank account.

66. For certificated non-intermediated securities, paragraph 1 provides that a security right made effective against third parties by the secured creditor's possession of the certificate has priority over a competing security right by the same grantor that is made effective against third parties by registration of a notice in the Registry (this is parallel to the rule for negotiable instruments in art. 41, para. 1).

67. For uncertificated non-intermediated securities, paragraph 2 provides that notation of a security right or registration of the name of the secured creditor as the holder of the securities in the books maintained for that purpose (by the issuer or someone else on behalf of the issuer) fulfils a similar function to the secured creditor becoming the account holder of a bank account (this rule is similar to the rule for rights to payment of funds credited to a bank account in art. 42, para. 1).

68. Paragraphs 3 and 4 are also applicable only to uncertificated non-intermediated securities (they parallel the similar rules for rights to payment of funds credited to a bank account in art. 42, paras. 3 and 4). Paragraph 3 gives priority to a security right made effective against third parties by conclusion of a control agreement over other security rights in the same securities. As between security rights made effective against third parties by conclusion of a control agreement, paragraph 4 awards priority in the order in which those control agreements were concluded.

[*Note to the Working Group: The Working Group may wish to note that discussion of paragraph 5 will be inserted once the Working Group has had the opportunity to consider it and reach an agreement as to its contents*.]

(A/CN.9/WG.VI/WP.66/Add.3) (Original: English)

Note by the Secretariat on a draft guide to enactment of the draft model law on secured transactions

ADDENDUM

Contents

Chapter VI. Rights and obligations of the parties and third-party obligors

Section I. Mutual rights and obligations of the parties to a security agreement

A. General rules

Article 47. Source of mutual rights and obligations of the parties

1. Article 47 is based on recommendation 110 of the Secured Transactions Guide (see chap. VI, paras. 14 and 15). It is intended to describe the universe of sources affecting the mutual rights and obligations of the parties to a security agreement: (a) the other articles of chapter VI of the draft Model Law; (b) other applicable law; (c) the terms of the security agreement (reiterating the principle of party autonomy enshrined in art. 4); and (d) any usage the parties have agreed upon and any practices the parties have established (thereby giving legislative strength to these usages and practices, which might not be generally recognized in all jurisdictions but which may nevertheless have important meaning to the parties).

2. With the exception of certain mandatory rules included in the chapter (see art. 4, para. 1), the parties are given wide latitude to tailor their security agreement and their usage and practices to the transaction at hand in order to most effectively and efficiently facilitate their respective commercial goals (as reflected in articles 6 and 11 of the Assignment Convention, as well as articles 6 and 9 of the CISG).

3. It is important to note that the person challenging the effectiveness of the agreement on the ground that it is inconsistent with this article bears the burden of proof.

Article 48. Obligation of a person in possession to exercise reasonable care

4. Article 48 is based on recommendation 111 of the Secured Transactions Guide (see chap. VI, paras. 24-31). It sets forth the rule that a grantor or secured creditor in possession of a tangible asset (which under the definition in art. 2, subpara. (kk), includes money, negotiable instruments, negotiable documents and certificated non-intermediated securities) must exercise reasonable care in physically preserving both the asset and its value. It does not apply to any party in possession of an encumbered asset, but only to the grantor or secured creditor in possession of the asset. A third party in possession of an encumbered asset would also be obliged to take reasonable care to preserve the encumbered assets, but only if that third party agreed to do so, and such an agreement should be enforceable under contract law.

5. What constitutes “reasonable care” in a given case depends upon the nature of the encumbered asset. Thus, reasonable care may mean something very different with respect to equipment, inventory, crops or live animals.

6. Although physical preservation of a tangible asset would, in most cases, have the effect of preserving the asset's value, this rule also recognizes preservation of the asset's value as an end in itself that may go beyond the physical preservation of the asset, and in some cases may go beyond the control of the grantor or secured party in possession. For example, if a lender has possession of certificated non-intermediated shares of a borrower's wholly-owned subsidiary and actually takes over direct operation of the business of the subsidiary (a situation that would rarely happen in practice), article 48 could, depending on the particular circumstances, require the party in possession to exercise reasonable care in doing so.

7. Article 48 and a rule of securities law along the lines of article 5(1) of the Financial Collateral Directive ("FCD"), which gives a secured creditor the right to use securities in its possession, should be read together and their relationship would be a matter of domestic rules of interpretation. It should be noted that, according to article 1(4) of the FCD, financial collateral (a term that is, strictly speaking, not defined in the FCD) may consist of "cash" (see art. 2(1)(d) FCD), "credit claims" (see art. 2(1)(o) FCD), and/or "financial instruments" (see art. 2(1)(e) FCD). Under the FCD, "financial instruments" may be either intermediated ("book entry securities collateral"; see art. 2(1)(g) FCD) or non-intermediated securities, as long as they are tradable ("negotiable on the capital market" or "normally dealt in"; see art. 2(1)(e) FCD).

Article 49. Obligation of a secured creditor to return an encumbered asset [or to register an amendment or cancellation notice]

8. Article 49 is based on recommendations 112 and 72 of the Secured Transactions Guide (see chap. VI, paras. 35-39). It provides that, once a security right in an encumbered asset is extinguished, a secured creditor in possession of the asset must return it to the grantor and register an amendment or cancellation notice as provided in article 21, subparagraph 1 (b) or 2 (c) [of the registry-related provisions]. A security right generally will be deemed extinguished once the secured obligation is paid in full or otherwise satisfied in full, and all further commitments to extend credit to the debtor have terminated.

9. Article 49 does not expressly address the obligation of a secured creditor to withdraw any notifications that it has given to the debtor of the receivable. Rather, the grantor is protected in this regard by article 53, paragraph 2, and article 73, subparagraph 2 (b), which require the secured creditor to return to the grantor any surplus proceeds it receives.

10. This article does not apply to outright transfers of receivables, because the term "secured obligation" does not apply to outright transfers of receivables (see art. 2, subpara. (ff)), and receivables could not be the subject of physical possession (see art. 2, subpara. (z)).

11. The question of whether a secured creditor could return equivalent non-intermediated securities to replace the originally encumbered non-intermediated securities is a matter of securities law (see art. 5(2) FCD and A/CN.9/836, para. 24).

Article 50. Right of a secured creditor to use, be reimbursed for expenses and inspect an encumbered asset

12. Article 50 is based on recommendation 113 of the Secured Transactions Guide (see chap. VI, paras. 50-65). It provides that a secured creditor not only has certain obligations (described in articles 48 and 49), but also certain rights.

13. Under subparagraph 1 (a), a secured creditor in possession has the right to be reimbursed for the reasonable expenses incurred to preserve an encumbered asset in accordance with article 48.

14. Under subparagraph 1 (b), a secured creditor in possession may make reasonable use of an encumbered asset, so long as it applies any revenues generated from the use to the payment of the obligation secured by the asset.

15. Finally, under paragraph 2, where an encumbered asset is in the possession of the grantor, the secured creditor has the right to inspect the asset. As this article is subject to the general standard of commercial reasonableness and good faith set forth in article 5, the right

to inspect may only be exercised at commercially reasonable times and in a commercially reasonable manner. The application of this standard depends upon the circumstances. For example, in extreme cases, such as where the debtor is in default or the secured creditor has reason to believe that the physical condition of the collateral is in jeopardy or has been, or is about to be, removed from the jurisdiction, the secured creditor may be justified in demanding an immediate inspection.

16. As article 50 is not one of the mandatory rules listed in article 4, paragraph 1, article 50 may be waived or modified by the parties to the security agreement. An agreement between the secured creditor and the grantor may affect the rights of a third party in possession of the encumbered asset only in the case where the third party is acting as the agent of the secured creditor.

B. Asset-specific rules

Article 51. Representations of the grantor of a security right in a receivable

17. Article 51 is based on recommendation 114 of the Secured Transactions Guide (see chap. VI, para. 73), which in turn is based on article 12 of the Assignment Convention. It provides that, when a grantor grants a security right in a receivable, the grantor is deemed to make various representations to the secured creditor at the time the security agreement is concluded.

18. In particular, under paragraph 1, the grantor represents that it has not previously created a security right in the receivable in favour of another secured creditor, and that the debtor of the receivable will not have any defences or rights of set-off with respect to the receivable. Under paragraph 2, the grantor does not represent that it has, or will have, the ability to pay the receivable.

19. As article 51 is not one of the mandatory rules listed in article 4, paragraph 1, any or all of the provisions of article 51 may be waived or modified by the parties to the security agreement. For this reason, a reference to contrary agreement of the parties, which was included in recommendation 114 of the Secured Transactions Guide, has been deleted.

20. Article 51 presents another difference with recommendation 114 of the Secured Transactions Guide. The representation that the grantor has the right to create a security right was not carried over into article 51, to avoid giving the impression that it applies to security rights created only in receivables. As a result, the matter is left to general contract law.

Article 52. Right of the grantor or the secured creditor to notify the debtor of the receivable

21. Article 52 is based on recommendation 115 of the Secured Transactions Guide (see chap. VI, paras. 74 and 75), which is based on article 13 of the Assignment Convention. Subparagraph 1 provides that, when a security right has been created in a receivable, either the grantor or the secured creditor has the right to notify the debtor of the receivable of the existence of the security right and give a payment instruction, but that once notification of the security right has been received by the debtor of the receivable, only the secured creditor may give a payment instruction.

22. Subparagraph 2 provides that a notification sent in breach of an agreement between the grantor of the security right and the secured creditor is nevertheless effective for the purposes of article 58, which precludes the grantor from raising, after receiving notice of the security right, certain rights of set-off with respect to the receivable that became available to the grantor after it received notice of the security right.

23. Although the express language of article 52, paragraph 1, refers to the right of the parties to "give" a notification of the security right and a payment instruction, it is clear from the draft Model Law that the notification is effective only when received by the debtor of the receivable, provided that the notification also meets the other requirements of article 56.

24. As article 52 is not one of the mandatory rules listed in article 4, paragraph 1, it may be waived or modified by the parties to the security agreement. For this reason, a reference

to contrary agreement of the parties, which was included in recommendation 115 of the Secured Transactions Guide, has been deleted.

Article 53. Right of the secured creditor to payment of a receivable

25. Article 53 is based upon recommendation 116 of the Secured Transactions Guide (see chap. VI, paras. 76-80), which is based on article 14 of the Assignment Convention. Any changes made are intended to clarify the text, but not change its policy.

26. The article establishes the right of the secured creditor to receive the proceeds of a receivable in which it holds a security right as against the grantor of the security right. Paragraph 1 provides that, regardless of whether notification of the security right has been sent to the debtor of the receivable, the secured creditor is entitled to retain: (a) the proceeds of any full or partial payment of the receivable made to the secured creditor, as well as any tangible assets (such as inventory) returned to the secured creditor in respect of the receivable; (b) the proceeds of any full or partial payment of any receivable made to the grantor (as well as any tangible assets returned to the grantor); and (c) the proceeds of any full or partial payment of any receivable made to a third party (as well as any tangible assets returned to the grantor) if the right of the secured creditor has priority over the right of the third person.

27. As article 53 is not one of the mandatory rules listed in article 4, paragraph 1, it may be waived or modified by the parties to the security agreement. For this reason, a reference to contrary agreement of the parties, which was included in recommendation 116 of the Secured Transactions Guide, has been deleted.

Article 54. Right of the secured creditor to preserve encumbered intellectual property

28. Article 54 is based on recommendation 246 of the Intellectual Property Supplement (paras. 223-226). It recognizes the effectiveness of an agreement between the grantor of a security right in intellectual property and the secured creditor that the secured creditor may take the necessary steps to preserve the value of the intellectual property, such as making any necessary registration (such as a patent registration) and initiating actions to prevent infringement by third parties.

29. Although articles 4 (party autonomy) and 48 (obligation to preserve an encumbered asset) may be generally sufficient to ensure that the secured creditor may take these steps, article 54 has been inserted in to the draft Model Law, because, in an intellectual property right context, these rights are normally rights of the intellectual property owner.

Section II. Rights and obligations of third-party obligors

A. Receivables

Article 55. Protection of the debtor of the receivable

30. Article 55 is derived from recommendation 117 of the Secured Transactions Guide (see chap. VII, para. 12), which is based on article 15 of the Assignment Convention. Paragraph 1 sets forth the general principle that the creation of a security right in a receivable does not affect the rights or obligations of the debtor of the receivable, unless the debtor of the receivable consents.

31. To implement the general principle of paragraph 1, paragraph 2 provides that a payment instruction may change the person, address or account to which the debtor of the receivable is required to make payment, but it may not change: (a) the currency in which the receivable is to be paid, as specified in the original contract giving rise to the receivable; or (b) the State in which the payment is to be made, as specified in the original contract giving rise to the receivable, to a State other than that in which the debtor of the receivable is located.

Article 56. Notification of a security right in a receivable

32. Article 56 is based on recommendation 118 of the Secured Transactions Guide (see chap. VII, paras. 13-16), which is based on article 16 of the Assignment Convention. It describes the requirements for an effective: (a) notification to a debtor of a receivable of the existence of a security right in the receivable; or (b) payment instruction with respect to the receivable.

33. Under paragraph 1, for the effectiveness of both a notification and a payment instruction, they must be "received" by the debtor of the receivable. In addition, both must reasonably identify the receivable and the secured creditor, and be in a language reasonably expected to inform the debtor of its contents. On this latter point, paragraph 2 makes it clear that the language of the original contract evidencing the receivable is always sufficient.

34. Under paragraph 3, both a notification and payment instruction may relate not only to receivables in existence at the time the notification or payment instruction is given, but also may relate to receivables arising thereafter.

35. Under paragraph 4, where A creates a security right in its receivables and then transfers them to B, who also creates a security right in the receivables and then transfers them to C, who also creates a security right in the receivables, notification of the debtor of the receivable relating to the security right created by C constitutes notification of all prior security rights created by A and B.

Article 57. Discharge of the debtor of the receivable by payment

36. Article 57 is based on recommendation 119 of the Secured Transactions Guide (see chap. VII, paras. 17-20), which is based on article 17 of the Assignment Convention. It sets forth the rules affecting when and how a receivable is discharged by payment.

37. Paragraph 1 embodies the basic principle that, until the debtor of the receivable is notified of the existence of a security right in the receivable, it may be discharged by payment in accordance with the contract giving rise to the receivable ("original contract"). Where the original contract is a sales contract, this means payment to the seller. However, under paragraph 2, once the debtor receives notices of the existence of the security right, it can only be discharged by paying either the secured creditor or another party, as instructed by the secured creditor in the notification or as subsequently instructed by the secured creditor in a written payment instruction received by the debtor. However, the rule in paragraph 2 is subject to a number of qualifications that are set forth in paragraphs 3-8.

38. First, under paragraph 3, if the debtor of the receivable receives more than one payment instruction relating to a single security right in a receivable created by the same grantor, it is discharged by paying in accordance with the last payment instruction received from the secured creditor before payment, as the last payment instruction will be the most up-to-date. Second, under paragraph 4, if the debtor is notified of the existence of more than one security right in the same receivable created by the same grantor, it is discharged by paying in accordance with the first notification received, on the theory that the security right covered by the first notification will probably have priority over the subsequent security right under the draft Model Law's priority rules.

39. Third, under paragraph 5, if the debtor receives notification of one or more subsequent security rights in the same receivable, it is discharged by paying in accordance with the notification of the last of such subsequent security rights. The reason is that the last in a series of transferees/secured creditors will be the actual holder of the security right.

40. Fourth, under paragraph 6, where the debtor receives notification of a security right in a part of, or an undivided interest in, one or more receivables, the debtor has a choice. It may be discharged by paying either in accordance with the notification or in accordance with paragraph 1 as if the debtor has not received the notification. However, if the debtor chooses the first of these alternatives, under paragraph 7, it is discharged only to the extent of the part or undivided interest paid.

41. Finally, under paragraph 8, if the debtor receives notification from a [subsequent secured creditor][a secured creditor that acquires its right from the initial or any other secured creditor], to be protected, it may request from the secured creditor to provide, within

a reasonable time, proof of the creation of the security right by the initial grantor to the initial secured creditor and any intermediate security right. If the secured creditor fails to provide such proof, the debtor may pay as if it had not received such notification. For this purpose, under paragraph 9, adequate proof includes any writing from the grantor that indicates a security right has been created (e.g. a security agreement).

42. Paragraph 10 is intended to preserve any other grounds for discharge based on payment to the person entitled to payment under other law (e.g. payment to a competent judicial or other authority, or to a public fund).

Article 58. Defences and rights of set-off of the debtor of the receivable

43. This article is based on recommendation 120 of the Secured Transactions Guide (see chap. VII, para. 21), which is based on article 18 of the Assignment Convention. It must be read in conjunction with article 59. Subparagraph 1 preserves for the debtor all defences and rights of set-off arising from the contract giving rise to the receivable, including any other contract that was part of the same transaction, as if the security right had never been created and the claim were made by the grantor. Subparagraph 1 is subject to a contrary agreement of the parties as provided in article 59. Subparagraph 1 (b) ensures that the debtor of the receivable can assert against the secured creditor any other right of set-off that was available to the debtor at the time it received notification of the security right. This means, however, that the debtor may not assert a right of set-off that arises subsequent to such notification.

44. Under paragraph 2, paragraph 1 does not give the right to the debtor of the receivable to raise against the secured creditor as a defence or right of set-off the breach of an agreement by the grantor limiting the grantor's right to create a security right. Otherwise, the validation of a security right under article 12 notwithstanding such an agreement would be meaningless.

Article 59. Agreement not to raise defences or rights of set-off

45. Article 59 is based on recommendation 121 of the Secured Transactions Guide (see chap. VII, para. 22), which is based on article 19 of the Assignment Convention. Paragraph 1 provides that the debtor of the receivable may agree, in a writing signed by it, not to raise the defences and rights of set-off permitted by article 58. Under paragraph 2, any modification to such an agreement must also be in a writing signed by the debtor of the receivable and is effective as against the secured creditor only if the secured creditor consents or, in the case of a receivable that has not been earned yet by performance, a reasonable secured creditor would consent. To avoid abuses, paragraph 3 provides that the debtor may not waive defences based on fraud committed by the secured creditor or the debtor's incapacity.

Article 60. Modification of the original contract

46. This article is based on recommendation 122 of the Secured Transactions Guide (see chap. VII, paras. 23 and 24), which is based on article 20 of the Assignment Convention. It addresses the impact of an agreement between the grantor of a security right in a receivable and the debtor of the receivable that modifies the terms of the receivable. The result depends on when the agreement is made.

47. Under paragraph 1, if the agreement is concluded before the debtor receives notification of a security right in the receivable, it is effective against the secured creditor, although the secured creditor also [enjoys any benefits derived from the agreement].

48. Under paragraph 2, even if the agreement is concluded after notification, it is also effective, even if it affects the secured creditor's rights if either: (a) the secured creditor consents to it; or (b) the receivable has not been fully earned by performance and the modification was provided for in the original contract giving rise to the receivable or a reasonable secured creditor would consent to the modification.

49. Paragraph 3 provides that article 60 does not affect any right of the grantor or secured creditor arising under other law for breach of an agreement between them (such as an agreement that the grantor would not agree to any modifications of the terms of the receivable).

Article 61. Recovery of payments made by the debtor of the receivable

50. Article 61 is based on recommendation 123 of the Secured Transactions Guide (see chap. VII, paras. 25 and 26), which is based on article 21 of the Assignment Convention. It addresses the situation in which the grantor of a security right in a receivable (or the transferor in an outright transfer of the receivable) fails to perform its obligations under the contract giving rise to the receivable. The article insulates the secured creditor from liability in this circumstance, by providing that the debtor of the receivable may not look to the secured creditor to recover any amount that it has paid to either the grantor or the secured creditor. As a result, the debtor of the receivable bears the risk of the insolvency of its contractual partner (i.e. the grantor).

B. Negotiable instruments

Article 62. Rights as against the obligor under a negotiable instrument

51. Article 62 is based on recommendation 124 of the Secured Transactions Guide (see chap. VII, paras. 27-31). It is intended to preserve the rights of parties under the applicable law relating to negotiable instruments. For example, a secured creditor with a security right in a negotiable instrument may collect from the obligor under the instrument only in accordance with its terms; also, even if the grantor defaults, the secured creditor cannot collect from the obligor before payment becomes due under the instrument and the law relating to such instruments.

C. Rights to payment of funds credited to a bank account

Article 63. Rights as against the depositary bank

52. Article 63 is based on recommendations 125 and 126 of the Secured Transactions Guide (see chap. VII, paras. 32-37). It addresses the situation in which a security right is granted in a right to payment of funds credited to a bank account.

53. Paragraph 1 provides that the rights and obligations of the depositary bank are unaffected by the security right, unless the bank consents. The rationale for protecting banks in this manner is that imposing duties on a depositary bank or changing the rights and duties of a depositary bank without its consent may subject the bank to risks that it is not in a position to manage appropriately unless it knows in advance what those risks might be (see chap. VII, para. 33).

54. To safeguard the confidentiality of the relationship of a bank and its client, paragraph 1 also provides that the depositary bank has no obligation to respond to requests for information (e.g. about the balance in the account, whether a control agreement exists or whether the account holder retains the right to dispose of funds credited to its bank account).

55. Finally, paragraph 2 provides that, even where the depositary bank consents to the creation of a security right in the right to payment of funds credited in a bank account held by the grantor with the bank, any right of set-off that the bank may have under other law also remains unaffected. The rationale for this rule is the need to avoid any interference with the way banks manage risks, given the nature of the transaction and the business of their customer.

D. Negotiable documents and tangible assets covered

Article 64. Rights as against the issuer of a negotiable document

56. Article 64 is based on recommendation 130 of the Secured Transactions Guide (see chap. VII, paras. 43-45). It provides that, when a secured creditor has a security right in a negotiable document, the rights of the secured creditor as against the issuer of the document or any person obligated on the document are determined by the law relating to negotiable documents. This means that, for a secured creditor with a security right in the document to enforce it against the assets covered by the document: (a) at the time of enforcement, the

assets covered by the document must still be in the possession of the issuer or other obligor under the document; and (b) the issuer or other obligor will have no obligation to deliver the assets to the secured creditor, unless the negotiable document was transferred to the secured creditor in accordance with the law governing negotiable documents (e.g. with a necessary endorsement).

E. Non-intermediated securities

Article 65. Rights as against the issuer of a non-intermediated security

57. As already mentioned, the Secured Transactions Guide did not address security rights in any types of securities (see rec. 4, subpara. (c)). Thus, article 65 is a new rule. In line with articles 62-64, it provides that the rights of a secured creditor holding a security right in non-intermediated securities as against the issuer of the securities are determined by other law of the enacting State. For example, under that law, governmental approval, specific formalities, payment of a special tax, registration on the books of a corporation, or special enforcement procedures may be required with respect to a security right in the shares of a domestic corporation.

Chapter VII. Enforcement of a security right

A. General rules

Article 66. Post-default rights

58. Article 66 is based on recommendations 133, 139, 141, 143, and 144 of the Secured Transactions Guide (see chap. VIII, paras. 10-12, 15-17, 33-35). Paragraph 1 clarifies that, following the debtor's default, the grantor and the secured creditor may exercise any right they may have under the provisions of chapter VII, as well as under the security agreement and the law governing the security agreement, provided that it is not inconsistent with the provisions of the draft Model Law.

59. The meaning of the term "default" is generally defined in paragraph 1. Its exact meaning, however, is subject to the agreement of the parties and the law governing the agreement. It should also be noted that some of the grantor's rights under this article would be available to the grantor even before default under contract law (e.g., the right of redemption and the right to apply to a court or other authority for relief).

60. Paragraphs 2 and 3 indicate that the exercise of one right generally does not prevent the exercise of another right, except if the exercise of one right makes impossible the exercise of another right (e.g. if the secured creditor decides to obtain possession and sell the encumbered asset, it cannot propose to acquire it in satisfaction of the secured obligation).

61. Paragraph 4 provides that the grantor and others who may owe payment of the secured obligation may not waive or vary their rights under this chapter before default. Otherwise, the secured creditor could put pressure on any debtor of the secured obligation to waive or vary their rights in return for concession in the security agreement (see Secured Transactions Guide, chap. VIII, paras. 16 and 17).

Article 67. Methods of exercising post-default rights

62. Article 67 is based on recommendation 142 of the Secured Transactions Guide (see chap. VIII, paras. 18-20 and 29-33). Paragraph 1 clarifies that the secured creditor may exercise its post-default rights by applying or without applying to a court or other authority to be specified by the enacting State (e.g. a chamber of commerce, arbitration tribunal or notary public). The enacting State may wish to indicate whether any rights specified in this chapter must be exercised by application to a court or other authority (e.g. the right to obtain possession and the right to dispose of an asset). In any case, in view of the fact that legal systems differ as to which post-default rights may be exercised only by an application to a court or other authority (e.g. the right to obtain possession and the right to dispose of an asset), the draft Model Law does not introduce any limitation to the ability of the parties to

avail themselves of the assistance of a court or other authority at any time to exercise a post-default right or resolve a dispute arising in that respect (A/CN.9/836, para. 52).

63. Under paragraph 2, the exercise of post-default rights by application to a court or other authority is subject to the relevant rules to be specified by the enacting State, while, under paragraph 3, the exercise of those rights without application to a court or other authority is subject to the provisions of this chapter.

Article 68. Relief for non-compliance

64. Article 68 is based on recommendation 137 of the Secured Transactions Guide (see chap. VII, para. 31). It is intended to indicate that, if a person's rights are affected by another person's non-compliance with its obligations under the provisions of this chapter, the first person is entitled to relief by a court or other authority. A violation of the secured creditor's obligations includes violations by the secured creditor's agents, employees or service providers. Persons that may be affected include: 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.

65. The enacting State may wish to specify the court or other authority to which the party seeking relief should apply and the type of expeditious proceeding that would be available. That authority may include an arbitral tribunal, chamber of commerce or notary public (provided that there is an arbitration agreement between the grantor and the secured creditor that is enforceable under the law of the enacting State). In such a case: (a) the arbitral agreement (and award) would bind only the parties thereto; and (b) if the winning party attempts to seize an asset, the law of the enacting State must provide protection for the rights of persons, who are not party to the arbitration agreement, in the encumbered assets. In this case, third-party creditors should be notified (e.g. before an extrajudicial sale takes place, as provided in article 72) and given an opportunity to assert their rights (e.g. their right to take over enforcement, as provided in article 70, or be paid from the proceeds of a sale according to their priority rank, as provided in article 73).

66. As protracted and expensive enforcement proceedings are likely to have a negative impact on the availability and the cost of credit, enacting States are encouraged to provide for expedited court proceedings (including proceedings for interim measures of protection and preliminary orders).

Article 69. Right of affected persons to terminate the enforcement process

67. Article 69 is based on recommendation 140 of the Secured Transactions Guide (see chap. VIII, paras. 22-24). Under paragraph 1, any person whose rights are affected by the enforcement process is entitled to terminate the enforcement process by paying or otherwise performing the secured obligation in full. This provision is based on the assumption that the residual value of the asset is higher than the outstanding part of the secured obligation. It should be noted that the extinction of a security right, which was also addressed in recommendation 140 of the Secured Transactions Guide, is addressed in article 11bis.

68. Full payment includes the reasonable cost of enforcement. This means that: (a) in the case of enforcement before a court or other authority, the court or other authority would set the cost of enforcement based on evidence; and (b) in the case of enforcement without an application to a court or other authority, the grantor could seek the assistance of a court or other authority if it were to dispute the reasonableness of the cost of enforcement.

69. Under paragraph 2, this right may be exercised until the secured creditor has disposed of, acquired or collected the encumbered asset, or entered into an agreement for that purpose. Otherwise, the finality of acquired rights would be undermined. [Paragraph 3 provides that the rule in paragraph 2 does not apply in the case of a lease or licence of an encumbered asset. This means that a person affected by the enforcement may still terminate the enforcement process, if there is sufficient residual value left in the encumbered asset. However, there is one limitation, the rights of a lessee or licensee must be respected.]

[*Note to the Working Group: The Working Group may wish to note that the reference to article 69, paragraph 3, in paragraph 69 above appears within square brackets, because article 69, paragraph 3, is also within square brackets*.]

Article 70. Right of the higher-ranking secured creditor to take over enforcement

70. Article 70 is based on recommendation 145 of the Secured Transactions Guide (see chap VIII, para. 36). Paragraph 1 clarifies that a secured creditor, whose security right has priority over that of the enforcing secured creditor or judgement creditor ("higher-ranking secured creditor"), has the right to take over the enforcement process. The higher-ranking secured creditor may take over the enforcement process at any time before the asset is sold or otherwise disposed of, or acquired by the secured creditor or until the conclusion of an agreement by the secured creditor for that purpose. [Like article 69, paragraph 3, paragraph 3 of this article, allows the exercise of this right even after the encumbered asset has been leased or licensed, without, however, affecting the rights of lessees or licensees.]

71. Under paragraph 3, the right of the higher-ranking secured creditor to take over the enforcement process includes the right to enforce by any of the methods foreseen in this chapter. This means that the higher-ranking secured creditor may change the method of enforcement, for example to correct mistakes made by the enforcing creditor. It should be noted, however, that the exercise of this right is subject to the standard of article 5, paragraph 1, that is, the secured creditor would be obliged to act in good faith and in a commercially reasonable manner, for example, to avoid unnecessary enforcement costs.

Article 71. Right of the secured creditor to possession of an encumbered asset

72. Article 71 is based on recommendations 146 and 147 of the Secured Transactions Guide (see chap. VIII, paras. 38-48 and 51-56). Paragraph 1 clarifies that, after default, the secured creditor is entitled to obtain possession of an encumbered asset by applying to a court or other authority. The opening words of paragraph 1 are intended to clarify that the mere fact that the grantor defaulted does not automatically give the secured creditor the right to obtain possession of the encumbered asset from a person that obtained its rights free of the security right (e.g. buyer or other transferee, a lessee or licensee; see art. 29).

73. Under paragraph 2, the secured creditor is also entitled to obtain possession of an encumbered asset without applying to a court or other authority if all the conditions set out therein are met. The enacting State may wish to specify how long before seeking possession the secured creditor must give notice.

74. [Under paragraph 3, the secured creditor may take possession only after the short period of time (to be specified by the enacting State), and not upon receipt of the notice by its addressees.]

75. Under paragraph 4, to avoid damage to perishable assets or speedy loss of value of an encumbered asset [such as an intermediated security], the notice referred to in subparagraph 2 (b) need not be given.

[*Note to the Working Group: The Working Group may wish to note that the commentary to paragraphs 3 and 4 will be prepared after their finalization*.]

Article 72. Right of the secured creditor to dispose of an encumbered asset

76. Article 72 is based on recommendations 148-151 of the Secured Transactions Guide (see chap. VIII, paras. 48 and 57-60). Paragraph 1 deals with the secured creditor's right to sell or otherwise dispose of, lease, or license an encumbered asset by applying or without applying to a court or other authority (to be specified by the enacting State); and paragraph 2 provides that the enacting State is also to specify the rules that will determine the method, manner, time, place and other aspects of the sale or other disposition, lease or licence.

77. Paragraphs 3-8 deal with dispositions by the secured creditor without an application to a court or other authority. Under paragraph 3, the secured creditor may determine the aspects of the sale or other disposition, lease or licence. Under paragraph 4, the secured creditor must give to the grantor, any debtor and any person with rights in the encumbered asset that notifies in writing the secured creditor of those rights a notice that contains all the elements set out in paragraphs 5-7. Under paragraph 8, 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.

78. Subject to its obligation to act in good faith and in a commercially reasonable manner (see art. 5, para. 1), the secured creditor may: (a) dispose of the encumbered assets by public or private sale, and if by public sale, through auction or tender (see A/CN.9/836, para. 68); and (b) decide whether to dispose of the encumbered assets individually, in groups or as a whole (see Secured Transactions Guide, chap. VIII, paras. 71-73).

Article 73. Right of the secured creditor to distribute the proceeds of disposition of an encumbered asset

79. Article 73 is based on recommendations 152-155 of the Secured Transactions Guide (see chap. VIII, paras. 60-64). Paragraph 1 clarifies that, in the case of a sale or other disposition, lease or licence supervised by a court or other authority, the distribution of the proceeds is subject to the rules to be specified by the enacting State. However, such distribution should follow the order of priority according to the priority rule of the draft Model Law.

80. Under paragraph 2, the distribution of the proceeds of a sale or other disposition, lease or licence without an application to a court or other authority is subject to the rules set forth in paragraph 2. Subparagraph 2 (b) refers only to payment to a subordinate secured creditor, because, under article 75, paragraphs 3 and 4, the security right of a higher-ranking secured creditor is preserved even after enforcement by a lower-ranking secured creditor.

81. Under paragraph 3, if after distribution of the proceeds there is a shortfall, the debtor has a personal (unsecured) obligation to pay.

82. It should be noted that: (a) this article does not apply to outright transfers of receivables; and (b) damages for non-compliance with enforcement obligations under the provisions of this chapter are a matter for other law, in particular in relation to consumer transactions (see A/CN.9/836, para. 73).

Article 74. Right of the secured creditor and the grantor to propose the acquisition of an encumbered asset by the secured creditor

83. Article 74 is based on recommendations 156-159 of the Secured Transactions Guide (see chap. VIII, paras. 65-70). Paragraph 1 states the right of the secured creditor to propose in writing to acquire one or more of the encumbered assets in total or partial satisfaction of the secured obligation. Paragraphs 2 and 3 deal with the addressees and the contents of the proposal. The proposal must be sent to: (a) the grantor and any debtor; and (b) certain other persons.

84. Paragraph 4 provides that: (a) in the case of a proposal for the acquisition of the encumbered asset in full satisfaction of the secured obligation, the secured creditor acquires the encumbered asset, if none of the addressees objects; (b) in the case of a proposal for the acquisition of the encumbered asset in partial satisfaction of the secured obligation, the secured creditor acquires the encumbered asset if all of the addressees consent. The latter approach is intended to safeguard the rights of all addressees of the notice, since they will remain liable for part of the secured obligation.

85. Under paragraph 5, if the grantor makes such a proposal and the secured creditor accepts it, the secured creditor must proceed as provided in paragraphs 2-4.

Article 75. Rights acquired in an encumbered asset

86. Article 75 is based on recommendations 160-163 of the Secured Transactions Guide (see chap. VIII, paras. 74-81). It is intended to deal with the finality of rights acquired in an encumbered asset pursuant to the enforcement of a security right (e.g. whether a transferee acquires its rights free or subject to the security right). Paragraph 1 deals with sales or other dispositions under the supervision of a court or other authority and refers finality of rights to the law to be specified by the enacting State. Paragraph 2 deals with leases and licences of encumbered assets under the supervision of a court or other authority and provides that the lessee or licensee acquires its rights to use the leased or licensed asset except as against creditors with rights that have priority over the right of the enforcing secured creditor.

87. Under paragraphs 3 and 4, in the case of a sale or other disposition, lease or licence of an encumbered asset, the buyer or other transferee acquires its rights subject only to rights that have priority over the security right of the secured creditor, and the lessee or licensee is entitled to the benefit of the lease or licence except as against creditors with rights that have priority over the rights of the secured creditor.

88. Under paragraph 5, if the sale or other disposition, lease or licence of an encumbered asset takes place in violation of the provisions of chapter VII, the buyer or other transferee, lessee or licensee does not acquire any rights or benefits[, if it had knowledge of the violation and that the violation materially prejudiced the rights of the grantor or another person].

[*Note to the Working Group: The Working Group may wish to note that part of paragraph 88 above appears within square brackets as the relevant text in article 75, paragraph 5, also appears within square brackets*.]

B. Asset-specific rules

Article 76. Collection of payment under a receivable, negotiable instrument, right to payment of funds credited to a bank account or non-intermediated security

89. Article 76 is based on recommendations 169-171, 173 and 175 of the Secured Transactions Guide (see chap. VIII, paras. 93-98, 102-108, 111 and 112). It is intended to indicate that where the encumbered asset is an obligation to pay money, after default, the secured creditor is entitled to collect payment from the obligor.

90. Under paragraph 2, the secured creditor may exercise the right to collect even before default but with the agreement of the grantor; and, under paragraph 3, the secured creditor may also enforce any personal or property right that secures or supports payment of the encumbered asset.

91. Paragraph 4 is intended to protect a depositary bank from the obligation of having to pay against its consent without a decision by a court or other authority. As a result of paragraph 4, the secured creditor may collect the balance credited in a bank account without applying to a court or other authority only if the security right in the right to payment of the funds has been made effective against third parties by the security right being created in favour of the depositary bank, the conclusion of a control agreement or the secured creditor becoming the account holder (see art. 23).

Article 77. Collection of payment under a receivable by an outright transferee

92. Article 77 is based on recommendations 167-168 of the Secured Transactions Guide (see chap. VIII, paras. 99-101). It clarifies that, in the case of an outright transfer of a receivable, the transferee is entitled to collect the receivable before or after default. It should be noted that, under article 5, paragraph 2(b), the standards of good faith and commercial reasonableness do not apply to an outright transfer of a receivable without recourse to the transferor, as the grantor (transferor) had no remaining vested interest in the receivable that could be protected by a limitation on the way in which the secured creditor (transferee) could collect the receivable.

(A/CN.9/WG.VI/WP.66/Add.4) (Original: English)

Note by the Secretariat on a draft guide to enactment of the draft model law on secured transactions

ADDENDUM

Contents

Chapter VIII. Conflict of laws

Introduction

1. Chapter VIII of the draft Model Law states the rules for determining the substantive law applicable to most of the issues dealt with in the other chapters. These rules are generally referred to as the conflict-of-laws rules. In a State that has enacted the draft Model Law, a court or other authority will use the conflict-of-laws rules of chapter VIII to determine the substantive law governing issues such as the creation, effectiveness against third party, priority and enforcement of a security right, as well as the mutual rights and obligations of the grantor and the secured creditor and the relationship between third-party obligors and secured creditors. The substantive law indicated by conflict-of-laws rules may be that of the enacting State or the law of another State. It must be stressed that in the event of litigation in a State, the court or other authority will apply the conflict-of-laws rules of its own legal system to resolve the dispute (for a more elaborate discussion of the role of conflict-of-laws rules, see Secured Transactions Guide, chap. X, paras. 1-13).

2. The application of the conflict-of-laws rules relating to security rights should not be conditional on a prior determination that the case presents an international element. Whenever a conflict-of-laws rule refers to the law of a State, that reference should not be refused on the ground of the absence of true "internationality" in the situation. Otherwise, courts might disregard a conflict-of-laws rule enacted by a State by deciding that the case is not sufficiently international on the basis of discretionary criteria that are not part of the conflict-of-laws rules of that State. In other words, if in a given situation the rule of State A points to the law of State B, it must be presumed that the legislator of State A has considered that the situation of itself is presenting an international element. In the particular circumstances where additional criteria would be a prerequisite for the application of a conflict-of-laws rule of a State, these criteria should be spelled out in the conflict-of-laws rules of that State.

3. With the exception of article 78, the conflict-of-laws rules on security rights are mandatory (see art. 4, para. 1). This means that the parties cannot be permitted by a choice-of-law clause to avoid the substantive provisions of the legal system to which a conflict-of-laws rule refers. This must be so because security rights are property (*in rem*) rights and thus affect third parties. Allowing the parties to select the applicable conflict-of-laws rule would also defeat one of the main purposes of the conflict-of-laws rules, which is to identify the State whose substantive law will apply in the event of a priority dispute among competing claimants. In a priority dispute between secured creditor X and secured creditor Y, it would be impossible to ascertain the law applicable to the resolution of the dispute if each of X and Y had been permitted to choose in their security agreement with the grantor a different governing law for the ranking of their respective security right.

[*Note to the Working Group: The Working Group may wish to note that, depending on its decision with respect to the scope of application of the conflict-of-laws rules, the introduction may need to be revised (see note at the beginning of chapter VIII of the draft Model Law).*]

A. General rules

Article 78. Law applicable to the mutual rights and obligations of the grantor and the secured creditor

4. Article 78 is based on recommendation 216 of the Secured Transactions Guide (see chap. X, para. 61). It states that the parties to a security agreement are free to choose the law applicable to their contractual relationship. Article 78 follows the approach recommended by international texts on this matter, including the Hague Principles on Choice of Law in International Contracts. The question of whether there should be constraints to party autonomy with respect to the law applicable is not addressed by the draft Model Law and is left to the other conflict-of-laws rules of the enacting State. These other rules will also determine the law governing the contractual relationship of the parties in the absence of a choice of law in the security agreement; these rules will often point to the law of the State

most closely connected to the security agreement. It should be noted that the rule of article 78 is confined to the contractual aspects of the security agreement. As already mentioned, matters relating to the property aspects of secured transactions (e.g. the priority of a security right) are outside the scope of freedom of contract; the parties cannot select a law other than that indicated by the conflict-of-laws rules on such matters.

Article 79. Law applicable to a security right in a tangible asset

5. Article 79 is based on recommendations 203-207 of the Secured Transactions Guide (see chap. X, paras. 28-38). It deals with the law applicable to the creation, effectiveness against third parties and priority of a security right in a tangible asset. The term "tangible asset" is defined to refer to all types of tangible movable asset, including money, negotiable instruments, negotiable documents and certificated non-intermediated securities (see art. 2, subpara. (kk); see also Secured Transactions Guide, chap. X, para. 26).

6. Paragraph 1 states the general rule that the law applicable to these issues is the law of the location of the encumbered asset (the "*lex situs*" or the "*lex rei sitae*"). Article 85 deals with the scenario where the location of the asset changes to another State after the security right has been created. The *lex situs* rule for tangible assets is subject to five exceptions that are set out in paragraphs 2 to 5 and in options B and C of article 93.

7. The first exception provides that, if a tangible asset located in a State is covered by a negotiable document in the possession of a secured creditor in another State, the priority of the security right over the asset will be determined by the law of the location of the document, and not by the location of the asset covered by that document (see para. 2). The second exception points to the law of the grantor's location for an asset of a type which may be ordinarily used in more than one State, that is, a "mobile asset" (see para. 3; for the meaning of "location", see art. 84; for the relevant time for determining location, see art. 85). The test is an objective one and does not refer to actual use. The most obvious example is an aircraft, which may fly from a State to many other States. The rule will apply even if a particular aircraft is actually operated only in one single State. [The rule in paragraph 3 is subject to the rule in paragraph 4, which deals with mobile assets, rights in which may be registered in a specialized registry or noted on a title certificate.]

8. The third exception relates to an asset the ownership of which may be registered in a registry maintained for such purpose in a State (see para. 4).

[*Note to the Working Group: The Working Group may wish to note that the last sentence of paragraph 7 above appears within square brackets, because the words in article 79, paragraph 3, to which that sentence refers, appear within square brackets. The Working Group may also wish to note that the commentary to article 79, paragraph 4, will be prepared if the Working Group decides to retain and, if so, finalizes formulation of the specialized-registry rule.*]

9. The fourth exception deals with a tangible asset in transit or to be exported (see para. 5). A security right in a tangible asset located in a State but which is in transit or destined to be moved to another State may be created and made effective against third parties under the law of its ultimate destination, if the asset reaches that destination within the period of time to be specified by the enacting State. It should be noted that: (a) if the assets are mobile goods to which the rule in paragraph 3 applies or do not reach the intended destination in a timely fashion, the rule in paragraph 5 will not apply; and (b) the rule in paragraph 5 does not prevent taking the necessary steps to create and make the security right effective against third parties under the law of the actual location of the asset at the time such steps are taken. It should also be noted that paragraph 5 is a conflict-of-laws rule of the enacting State only and whether the security right will be treated as validly created and made effective against third parties in the State of the ultimate destination of the asset is a matter for the conflict-of-laws rules of that State.

10. The fifth exception is contained in options B and C in article 93, which refer to laws other than the location of the certificate for a security right in certificated securities.

[*Note to the Working Group: The Working Group may wish to note that the commentary to the exception in article 93 will have to be refined depending on the outcome of the discussions on article 93*.]

Article 80. Law applicable to a security right in an intangible asset

11. Article 80 is based on recommendations 208 and 209 of the Secured Transactions Guide (see chap. X, paras. 39-47). It states the general conflict-of-laws rule for the creation, effectiveness against third parties and priority of a security right in an intangible asset. The applicable law is that of the location of the grantor (for the meaning of "location", see art. 84; for the relevant time for determining location, see art. 85). It must be noted that receivables are covered by this rule, which is subject to several exceptions that are set out in articles 81 and 90-93.

12. The first exception relates to the priority of a security right in a receivable arising from a sale or lease of or a transaction secured by immovable property (see art. 81 below). The other exceptions relate to a security right in rights to payment of funds credited in a bank account (see art. 90), intellectual property (see art. 92) and non-intermediated securities (see art. 93).

Article 81. Law applicable to a security right in a receivable arising from a sale or lease of or a transaction secured by immovable property

13. Article 81 is based on recommendation 209 of the Secured Transactions Guide (see chap. X, para. 54). It deals with the priority of a security right in a receivable arising from a sale or lease of or a transaction secured by immovable property as against the rights of competing claimants. Paragraph 1 restates the general rule of article 80. Paragraph 2 states an exception to the general rule of paragraph 1 and refers that matter to the law of the State under whose authority the immovable property registry is organized. For article 81 to apply, two conditions must be satisfied. First, the law of the State of the immovable property registry must have priority rules and registration must be relevant to the priority of a security right in such receivables; and second, the right of a competing claimant must be registered in that registry.

Article 82. Law applicable to the enforcement of a security right

14. Article 82 is based on recommendation 218 of the Secured Transactions Guide (see chap. X, paras. 64-72). Subparagraph (a) deals with the law applicable to the enforcement of a security right in a tangible asset, as defined in article 2, subparagraph (kk) (with the exception of certificated non-intermediated securities, with respect to which all matters are addressed in art. 93). [It also clarifies that enforcement may involve several distinct acts (e.g. notice of default, notice of the secured creditor's intent to obtain possession of an encumbered asset without applying to a court or other authority, disposition of an encumbered asset, and distribution of the proceeds of disposition) that may take place in different States (see A/CN.9/802, para. 105). For example, a secured creditor may take possession of the encumbered assets in one State, dispose of them in a second State, and distribute the proceeds of disposition in a third State.]

15. Under, subparagraph (b), the law applicable to the enforcement of a security right in an intangible asset (with the exception of a right to payment of funds credited in a bank account, intellectual property and non-intermediated securities) is the law governing priority. As a result, the creation, third-party effectiveness, priority and enforcement of a security right in a receivable (but not the relationship between the debtor of the receivable and the secured creditor; see art. 89) is referred to one and the same law, that is, the law of the location of the grantor.

[*Note to the Working Group: The Working Group may wish to note that part the text in paragraph 14 appears within square brackets, because the wording in article 82, subparagraph (a), to which that sentence refers, appears within square brackets*.]

Article 83. Law applicable to a security right in proceeds of an encumbered asset

16. Article 83 is based on recommendation 215 of the Secured Transactions Guide (see chap. X, paras. 55-60). The following example illustrates how the rule on the law applicable to proceeds operates. Assume that the original encumbered asset is inventory, which is subsequently sold, and the purchase price is paid into a bank account. Under paragraph 1,

the law applicable to the question of whether the secured creditor automatically acquires a security right in the right to payment of the funds credited to the bank account as proceeds of the original encumbered inventory will be the law of the location of the inventory. Under paragraph 2, the law applicable to the third-party effectiveness and priority of the security right in the proceeds will be the law applicable to the right to payment of funds credited to the bank account.

17. It should be noted that this type of bifurcated rule may lead to difficulties in cases where the law governing creation recognizes a broad-based automatic proceeds rule whereas the law governing third-party effectiveness and priority recognizes no or only a very limited automatic proceeds right. It should also be noted that this article is dealing only with the law applicable to proceeds derived from the original encumbered assets as a result of a disposition by the grantor or other event prior to enforcement, whereas article 85 deals with the law applicable to the distribution of proceeds derived from a disposition of the encumbered assets pursuant to post-default enforcement proceedings.

Article 84. Meaning of "location" of the grantor

18. This article is based on recommendation 219 of the Secured Transactions Guide (see chap. X, paras. 73 and 74). It should be noted that the place of the central administration of a legal person is not necessarily the place of its statutory seat (or registered office). If the grantor is a legal person formed under the law of State A with its statutory seat in that State but has in State B a place of business where its senior management is based, then the grantor is located in State B.

Article 85. Relevant time for determining location

19. Article 85 is based on recommendation 220 of the Secured Transactions Guide (see chap. X, paras. 75-78). It deals with the situation where the location of the asset or the location of the grantor changes from one State (State A) to another (State B) in circumstances where the applicable law is determined by reference to that location. Paragraph 1 establishes that State B will recognize the existence of the security right if the latter was validly created under the law of State A at the time the asset or the grantor was located in State A. However, if a priority dispute occurs either in State A or in State B, the substantive law of State B will be applied to determine whether the security right is effective against third parties and has priority over the rights of competing claimants. As a result, the third-party effectiveness requirements of the law of State B must have been fulfilled in order for the security right to be treated as being effective against third parties either in State A or in State B. This is so even if the security right had been made effective against third parties under the law of State A at the time the asset or the grantor was located in State A. Indeed, this analysis assumes that both States are enacting States.

20. Paragraph 2 constitutes an exception to the general rules of paragraph 1. In the event of a priority dispute between two security rights that have been made effective against third parties in the State of the initial location (State A, in the example), the priority dispute will be resolved under the law of the initial location.

[*Note to the Working Group: The Working Group may wish to note that the commentary to article 85, paragraph 2, may need to be further elaborated once the rule contained therein has been finalized*.]

Article 86. Exclusion of *renvoi*

21. Article 86 is based on recommendation 221 of the Secured Transactions Guide (see chap. X, para. 14). Its purpose is to provide greater certainty with respect to the law applicable by avoiding the complications arising from the doctrine of *renvoi*. Under this doctrine, the applicable law as indicated by the conflict-of-laws rules of a State (State A) includes the private international law (this term is used in the same sense as the term "conflict of laws") of the State whose law is the applicable law. Thus, under this doctrine, if the conflict-of-laws rules of State A refer the priority of a security right in a receivable to the law of the location of the grantor (the law of State B) and the conflict-of-laws rules of State B refer that issue to the law governing the receivable (which is the law of State C), then a court in State A will resolve the priority dispute using the law of State C (and not the

law of State B). This result, however, would create uncertainty as to the law applicable and also run contrary to the expectations of the parties. For those reasons, article 86 prohibits *renvoi* (for an exception, see art. 94, para. 3).

Article 87. Overriding mandatory rules and public policy (*ordre public*)

22. This article, which is based on recommendation 222 of the Secured Transactions Guide (see chap. X, para. 79), states generally recognized principles of private international law.

23. To illustrate how the rules in paragraphs 1 and 3 will operate, assume that the law of the forum prohibits dealings in certain types of asset (such as an asset which is the proceeds of criminal activities or is the subject of international sanctions) and that the law of the State whose law is applicable does not foresee such a prohibition. In such a case, the forum court may refuse to recognize as validly created a security right created in the asset under the foreign law that is applicable under the provisions of this chapter even though that law does not foresee the same prohibition. However, to do so, the forum court must conclude that the application of the foreign law would be manifestly contrary to the public policy of the forum State (see para. 3).

24. Under paragraphs 2 and 4, the forum court (if it is allowed to do so under its law) may refuse to recognize as validly created a security right permitted to be created under the applicable law (even if the law applicable is the law of the forum), if the creation of such security right would be manifestly contrary to public policy in a State which has a close connection with the situation. For example, if a law firm is located in the forum State and under the applicable law of the forum State a security right may be created in receivables arising from legal services, but the location of the client is in a foreign State, which has strict confidentiality rules prohibiting a security right in a law firm's receivables arising from legal services, the forum court may refuse the application of the applicable law of the forum State, if it finds that its application would be manifestly contrary to the public policy of the State of the location of the client.

25. Under paragraph 5, the forum State may not displace the provisions of the law applicable to third-party effectiveness and priority of a security right on the ground that this would offend its public policy, and apply its own provisions or the provisions of another State (unless the forum law or the law of another State is the law applicable under the provisions of this chapter). This approach is justified by the need to achieve certainty with respect to the law applicable to third-party effectiveness and priority. The same approach is followed in article 23, paragraph 2, article 30, paragraph 2, and article 31 of the Assignment Convention, as well as in article 11, paragraph 3, of The Hague Securities Convention.

Article 88. Impact of commencement of insolvency proceedings on the law applicable to a security right

26. Article 88 is based on recommendation 223 of the Secured Transactions Guide (see chap. X, paras. 80-82). Its purpose is to establish that an insolvency court in the enacting State must in principle respect the conflict-of-laws rules of the draft Model Law. However, paragraph 2 preserves the application of the law of the State in which insolvency proceedings are commenced (*lex fori concursus*) to certain such matters as the avoidance of fraudulent or preferential transactions, the treatment of secured creditors, the ranking of claims and the distribution of proceeds in the grantor's insolvency.

B. Asset-specific rules

Article 89. Law applicable to the relationship of third-party obligors and secured creditors

27. Article 89 is based on recommendation 217 of the Secured Transactions Guide (see chap. X, paras. 62 and 63), Its purpose is twofold. First, the conflict-of-laws rules on the third party effectiveness of a security right do not apply to the effectiveness or enforceability of a security right against the debtor of a receivable, the obligor under a negotiable instrument or the issuer of a negotiable document; they are not considered "third parties".

Second, the law applicable to these issues is the law governing the legal relationship between the grantor and the debtor of the receivable, the obligor under the instrument or the issuer of the document; the same law also applies to the question of whether any of the latter may invoke that their agreement with the grantor prohibits or limits the grantor's right to create a security right in the relevant receivable, instrument or document.

Article 90. Law applicable to a security right in a right to payment of funds credited to a bank account

28. Article 90 is based on recommendation 210 of the Secured Transactions Guide (see chap. X, paras. 49-51). It departs from the general conflict-of-laws rule on the law applicable to intangible assets (see art. 80). A right to payment of funds credited to a bank account is in the generic sense a receivable of the bank's customer against the depositary bank but a different rule applies in this case for the determination of the applicable law. Two options are offered to the enacting State for the law applicable to the creation, third-party effectiveness, priority and enforcement of a security right in a right to payment of funds credited to a bank account, as well as to the rights and obligations between the depositary bank and the secured creditor.

29. Under option A, the applicable law is that of the State of the location of the branch or office of the bank where the account is located. It should be noted that a branch (or office) of a bank should be considered as being located in a particular jurisdiction irrespective of whether the bank offers its branch (or office) services through physical offices or only through an online connection accessible electronically by customers located in that jurisdiction. In this connection, it should be noted that a bank must have a physical presence or legal address in a jurisdiction for regulatory and other purposes (e.g. accounting, taxation and anti-money-laundering laws).

30. Under option B, the applicable law is the law designated in the account agreement as governing the issues that are the subject of article 90 or, in the absence of a designation of a law for these issues, the law designated by the parties to the account agreement as the law governing that agreement. To be effective for conflict-of-laws purposes, a designation must refer to the law of a State in which the bank is engaged in the business of maintaining bank accounts. It must be noted, however, that the State whose law is so designated may be different than the State in which the grantor's bank account is maintained.

31. If the applicable law cannot be determined as described in the preceding paragraph, option B provides for a series of sub-rules along the lines of the default rules contained in article 5 of the Hague Securities Convention, which the enacting State may wish to insert in this article, if it decides to adopt option B of article 90.

Article 91. Law applicable to the third-party effectiveness of a security right in certain types of asset by registration

32. Article 91 is based on recommendation 211 of the Secured Transactions Guide (see chap. X, para. 34). Under article 91, if the enacting State recognizes registration of a notice as a method of third-party effectiveness for a security right in a negotiable instrument or right to payment of funds credited to a bank account, the law applicable to third-party effectiveness by registration is the law of the State in which the grantor is located.

[*Note to the Working Group: The Working Group may wish to note that, depending on its decision with respect to article 91, this commentary may have to be deleted or elaborated after the Commission has revisited article 91*.]

Article 92. Law applicable to a security right in intellectual property

33. Article 92 is based on recommendation 248 of the Intellectual Property Supplement (see paras. 284-337). The effect of paragraph 1 is the following. If intellectual property is protected in a particular State, the law of that State will apply to the requirements to be met for the security right in that intellectual property to be considered as having been created, made effective against third parties and enjoying priority. It should be noted that a security right in intellectual property may be granted by any person that is entitled to use the related intellectual property under the relevant intellectual property law. Therefore, the grantor may

be the owner or a transferee, or a licensor or licensee of the intellectual property to be encumbered.

34. Paragraph 2 provides for an alternative way to create and make effective against certain third parties a security right in intellectual property. Under paragraph 2, the secured creditor may also use for these purposes the law of the State in which the grantor is located. The principal benefit of paragraph 2 is that if the security right has been made effective against an insolvency administrator of the grantor under the law of the grantor's location, an insolvency court in the enacting State will recognize the security right even if the third-party effectiveness requirements of all States in which the intellectual property is protected have not been fulfilled.

35. Paragraph 3 refers to the law of the grantor's location for enforcement issues relating to intellectual property. As enforcement may relate to several acts that may take place in several States (e.g. notice of enforcement, re-possession and sale of the encumbered assets by the secured creditor, as well as disposition of the sale proceeds), this rule leads to the application of one and the same law to all enforcement acts. It should be noted that the effectiveness of the security right against persons other than the grantor (e.g. the owner of the intellectual property, if the grantor is a licensee) is outside the scope of this article.

Article 93. Law applicable to a security right in non-intermediated securities

36. […].

[*Note to the Working Group: The Working Group may wish to note that the commentary to article 93 will be prepared after the Working Group has made a decision as to which of the options is to be retained or, alternatively, whether the article should include several options, and reached an agreement as to the contents of the article*.]

Article 94. Law applicable in the case of a multi-unit State

37. Article 94 is based on recommendations 224-227 of the Secured Transactions Guide (see chap. X, paras. 83-87). Its purpose is to deal with the law applicable where: (a) the forum State is an enacting State (so that the forum's courts are bound by this rule); (b) the State whose law is applicable under the rules in this chapter is a State other than the enacting/forum State (since the law of the enacting/forum State would directly lead the courts of that State to the right territorial unit); and (c) the State whose law is applicable has two or more territorial units.

38. In such a case, paragraph 1 is intended to preserve the application of the law of the relevant unit and, if the multi-unit State and its territorial units have different substantive laws that will be applicable to an issue, the law of the multi-unit State. For instance, in a federal State, secured transactions laws may fall under the legislative authority of one of its territorial units. In such case, each unit will have its own substantive law and conflict-of-laws rules. Under paragraph 2, the relevant unit is to be determined on the basis of the location of the grantor or of the encumbered asset, or otherwise under the provisions of this chapter.

39. To preserve the consistency of the internal conflict-of-laws rules of a multi-unit State, paragraph 3 introduces internal *renvoi*, as it provides that the conflict-of-laws rules in the relevant State or territorial unit will determine whether to apply the law of a different territorial unit in the State (see Secured Transactions Guide, chap. X, para. 85). This means that the forum court is required to master the internal conflict-of-laws rules of the State of the location of the grantor or the encumbered asset. In this regard, the Assignment Convention allows a declaration by States as to the determination of the applicable priority rule as between various territorial units (on article 37 of the Assignment Convention), but in this article there would be no declaration and the forum court would be on its own to determine the applicable under the conflict-of-laws rules of another State.

40. To illustrate how the rule in paragraph 3 will operate, assume that the conflict-of-laws rules of this chapter refer to the law of the location of the grantor and that the location of the grantor under this chapter is in a territorial unit of a multi-unit State whose laws (including its conflict-of-laws rules) govern secured transactions. Also assume that the location of the grantor under this chapter is in unit A of that multi-unit State (unit A being the place of

central administration of the grantor). If, however, the conflict-of-laws rules of unit A refer to the law of unit B as being the applicable law (e.g. because unit B also refers to the location of the grantor but defines the location of the grantor as its statutory seat instead of its place of central administration), then the forum court would have to apply the law of unit B if the statutory seat of the grantor is in unit B.

[*Note to the Working Group: The Working Group may wish to consider in particular whether subparagraph (b) should be retained in paragraph 37 above, that is, whether the rule in paragraph 1 may apply also where the applicable law is the law of the enacting/forum State*.]

Chapter IX. Transition

Article 95. Amendment and repeal of other laws

41. Security agreements that are entered into while the prior law is in effect may continue for extensive periods of time after the new secured transactions law enters into force. Thus, this chapter provides rules by which the law governing such transactions moves in a fair and efficient manner from the prior law to the new one (see Secured Transactions Guide, chap. XI, paras. 1-3).

42. The draft Model Law is intended as a complete system of secured transactions law, replacing in its entirety the prior regime, rather than a supplement to existing law. Accordingly, the enacting State should list in paragraph 1 and thus repeal the body of laws that comprise its secured transactions regime.

43. Many other bodies of law interact with secured transactions law. In some cases, provisions of those other bodies of law may be written on the assumption that prior secured transactions law is in effect. Paragraph 2 provides the enacting State an opportunity to amend those provisions so as to mesh with the new secured transactions regime.

Article 96. Transitional application of this Law

44. Paragraph 1 of this article defines two terms used in this chapter. Paragraph 2 is based on recommendation 228 (second sentence) of the Secured Transactions Guide (see chap. XI, paras. 7-12). It provides that, by the end of the transitional period specified in article 101, the draft Model Law applies to all security rights within its scope, including prior security rights, except as provided in article 97.

45. As a result of paragraph 2, even secured transactions entered into before the new law enters into force will be governed, at least in part, by the new law. Inasmuch as many secured transactions endure for several years, if the new law applied only to transactions entered into after the effective date of the new law, the prior law would persist for a lengthy period during which lenders, borrowers, attorneys, and judges would need to apply both systems and search for competing claimants under the rules of both. This would entail additional cost as well as delaying the economic benefits of the new system.

Article 97. Inapplicability of this Law to actions commenced before its entry into force

46. Article 97 is based on recommendation 229 of the Secured Transactions Guide (see chap. XI, paras. 13-16). It introduces an exception to the rule in article 96 that by the end of the transitional period the draft Model Law applies to all security rights within its scope, including prior security rights. In certain situations, only prior law will govern an aspect of a security agreement entered into under that regime.

47. In particular, paragraph 1 provides that, if a matter with respect to a security agreement entered into under prior law is the subject of litigation or arbitration proceedings commenced before the new secured transactions law enters into force, the law governing the matter under dispute will remain the prior law. This paragraph applies to all disputes arising under the prior law, whether between the secured creditor and the grantor, the secured creditor and a competing claimant, or the secured creditor and a person liable, for example, on a receivable or negotiable instrument. It should be noted that the commencement of litigation before the

new secured transactions law enters into force with respect to one dispute does not preclude application of the rules of the new law to a separate dispute arising under the same security agreement.

48. Paragraph 2, on the other hand, provides a substantive rule about enforcement of security rights. Under the rule in this paragraph, if enforcement is commenced under prior law, the secured creditor may continue enforcement under the rules of the prior law even after the new secured transactions law enters into force.

Article 98. Creation of a prior security right

49. Article 98 is based on recommendation 230 of the Secured Transactions Guide (see chap. XI, paras. 17-19). Under this article, if a security right was effectively created under prior law, this is sufficient for its continued effectiveness between the parties under the new secured transactions law even if the manner of creation would not suffice under the new law. This rule avoids creating a situation in which it might be difficult for the secured creditor to obtain the cooperation necessary from the grantor to take the additional steps necessary to create the security right under the new law. After all, a grantor that has already received an extension of credit secured by the security right in the encumbered asset might not have an incentive to cooperate in taking additional steps necessary for the continued effectiveness of the security right under the new law.

Article 99. Third-party effectiveness of a prior security right

50. Article 99 is based on recommendation 231 of the Secured Transactions Guide (see chap. XI, paras. 20-22). Under this article, security rights created and made effective against third parties under prior law before the effective date of the new secured transactions law remain effective against third parties for some time under the new law, even if the conditions for third-party effectiveness under the new law have not been satisfied.

51. Illustration 1: Under the former secured transactions law of State X, a security right effectively created in a receivable is automatically effective against third parties without any additional action required. Prior to the effective date of the new secured transactions law, Grantor created in favour of Creditor a security right in Grantor's receivables. All steps necessary for creation of a security right under prior law were properly taken; therefore, under the prior law, Creditor had a security right in the receivables that was effective against third parties. Under paragraph 1, once the new secured transactions law goes into effect, Creditor's security right will remain effective against third parties until the expiration of the period of time specified in subparagraph 1(a).

52. Illustration 2: Under the former secured transactions law of State Y, a security right effectively created in receivables by a grantor that is a corporation was made effective against third parties by submitting a notice to the registrar of corporations. Such a notice expired after four years. One year prior to the effective date of the new secured transactions law, Grantor created in favour of Creditor a security right in Grantor's receivables. All steps necessary for creation of a security right were properly taken, and Creditor submitted the requisite notice to the registrar of corporations the same day; as a result, under the former legal regime Creditor's security right was effective against third parties. Under paragraph 1, once the new secured transactions law goes into effect, Creditor's security right will remain effective against third parties until the earlier of: (a) the expiration of the four-year period of effectiveness under the prior law of the notice submitted to the registrar of corporations: and (b) the expiration of the period of time specified in subparagraph 1(b).

53. A secured creditor whose security right that is effective against third-parties based on compliance with prior law will cease to be effective against third parties under the rule in paragraph 1 may take the appropriate steps under the new secured transactions law to achieve third-party effectiveness. Most often, this will be accomplished by registering a notice with the Registry. The ability to do so is aided by paragraph 2, which provides that the prior written agreement creating the security right constitutes sufficient authorization for registration of the notice.

54. For some purposes, the secured creditor's concern may be only whether the prior security right is effective against third parties under the new secured transactions law. For

other purposes, however, such as priority, the date in which the security right became against third parties (for purposes of the priority rules) is critically important. Paragraph 3 provides that, so long as the requirements for third-party effectiveness under the new secured transactions law are satisfied before the expiration of the period specified in paragraph 1, the prior security right continues to be effective against third parties from the time when it was made effective against third parties under prior law and, thus, priority will date from that time.

55. If, however, there is a gap between the period in which third-party effectiveness under the prior regime constituted third-party effectiveness under the new secured transactions law and the satisfaction of the requirements for third-party effectiveness under the new law, paragraph 4 provides that the security right is effective against third parties only from the time it is made effective against third parties under the new law and, thus, its priority dates only from that time.

Article 100. Priority of a prior security right

56. […].

[*Note to the Working Group: The Working Group may wish to note that the commentary to this article will be prepared after the Working Group has had the opportunity to consider its content*.]

Article 101. Entry into force of this Law

57. Article 101 is based on recommendation 228 of the Secured Transactions Guide (see chap. XI, paras. 4-6). In determining when the new secured transactions law will enter into force, careful consideration should be given both to obtaining the economic benefits of the new law as soon as possible and to minimizing dislocations that may be caused by significant changes in secured transactions practice resulting from the new law. Inasmuch as the new legal regime will have been chosen because it is an improvement over the prior regime, the new law should come into force as soon as is practical. However, some lead time is necessary in order to, inter alia: (a) publicize the existence of the new law; (b) enable establishment of the Registry (or adaptation of an existing registry to the system required by the new law); and (c) enable participants in the secured transactions system, particularly present and future secured creditors, to prepare, for example, for compliance with new rules and develop new forms.

D. Report of the Working Group on Security Interests on the work of its twenty-ninth session (New York, 8-12 February 2016)

(A/CN.9/871)

[Original: English]

Contents

I. Introduction

1. At its present session, Working Group VI (Security Interests) continued its work on the preparation of a model law on secured transactions (the "draft Model Law"), pursuant to a decision taken by the Commission at its forty-fifth session (New York, 25 June-6 July 2012).[1] At that session, 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 UNCITRAL Legislative Guide on Secured Transactions (the "Secured Transactions Guide") and consistent with all texts prepared by UNCITRAL on secured transactions, including the United Nations Convention on the Assignment of Receivables in International Trade (the "Assignment Convention"), the Supplement on Security Rights in Intellectual Property (the "Intellectual Property Supplement") and the UNCITRAL Guide on the Implementation of a Security Rights Registry (the "Registry Guide").[2]

2. At its twenty-third session (New York, 8-12 April 2013), the Working Group 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).

3. At its forty-sixth session (Vienna, 8-26 July 2013), the Commission 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.[3] After discussion, the Commission confirmed the mandate it had given to Working Group VI in 2012 (see para. 1 above).[4] The Commission also agreed

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[1] *Official Records of the General Assembly, Sixty-seventh Session, Supplement No. 17* (A/67/17), para. 105.

[2] Ibid.

[3] Ibid., *Sixty-eighth Session, Supplement No. 17* (A/68/17), para. 193.

[4] Ibid., para. 194.

that whether that work would include security interests in non-intermediated securities would be assessed at a future time.[5]

4. At its twenty-fourth session (Vienna, 2-6 December 2013), the Working Group considered a note by the Secretariat entitled "Draft Model Law on Secured Transactions" (A/CN.9/WG.VI/WP.57 and Add.1 and 2) and requested the Secretariat to revise the draft Model Law to reflect the deliberations and decisions of the Working Group (A/CN.9/796, para. 11). At its twenty-fifth session (New York, 31 March-4 April 2014), the Working Group continued its work based on a note by the Secretariat entitled "Draft Model Law on Secured Transactions" (A/CN.9/WG.VI/WP.57/Add.2-4 and A/CN.9/WG.VI/WP.59 and Add.1) and requested the Secretariat to revise the draft Model Law to reflect the deliberations and decisions of the Working Group (see A/CN.9/802, para. 11). The Working Group also decided to recommend to the Commission that the draft Model Law address security rights in non-intermediated securities along the lines agreed upon by the Working Group at that session (see A/CN.9/802, para. 93).

5. At its forty-seventh session (New York, 7-18 July 2014), the Commission expressed its satisfaction for the considerable progress achieved by the Working Group in its work and requested the Working Group to expedite its work so as to complete the draft Model Law, including certain definitions and provisions on non-intermediated securities, and to submit it to the Commission for adoption together with a guide to enactment as soon as possible.[6]

6. At its twenty-sixth session (Vienna, 8-12 December 2014), the Working Group considered a note by the Secretariat entitled "Draft Model Law on Secured Transactions" (A/CN.9/WG.VI/WP.61 and Add.1-4) and requested the Secretariat to revise the draft Model Law to reflect the deliberations and decisions of the Working Group (see A/CN.9/830, para. 12). At its twenty-seventh session (New York, 20-24 April 2015), the Working Group considered a note by the Secretariat entitled "Draft Model Law on Secured Transactions" (A/CN.9/WG.VI/WP.63 and Add.1-4) and requested the Secretariat to revise the draft Model Law to reflect the deliberations and decisions of the Working Group (see A/CN.9/836, para. 13).

7. At its forty-eighth session (New York, 29 June-16 July 2015), the Commission considered and approved in principle article 26 of chapter IV (on the registry system) of the draft Model Law and articles 1 to 29 of the draft Registry Act (see A/CN.9/852). At that session, the Commission also agreed that a draft guide to enactment (the "draft Guide to Enactment") should be prepared and referred that task to the Working Group.[7]

8. At its twenty-eighth session (Vienna, 12-16 October 2015), the Working Group considered a note by the Secretariat entitled "Draft Model Law on Secured Transactions" (A/CN.9/WG.VI/WP.65 and Add.2 and 4) and requested the Secretariat to revise the draft Model Law to reflect the deliberations and decisions of the Working Group (see A/CN.9/865, para. 14).

II. Organization of the session

9. The Working Group, which was composed of all States members of the Commission, held its twenty-ninth session in New York from 8 to 12 February 2016. The session was attended by representatives of the following States members of the Working Group: Armenia, Australia, Belarus, Brazil, Canada, China, Colombia, Czech Republic, Ecuador, El Salvador, France, Germany, Hungary, India, Indonesia, Israel, Italy, Japan, Liberia, Malaysia, Mexico, Namibia, Pakistan, Panama, Republic of Korea, Russian Federation, Sierra Leone, Singapore, Spain, Switzerland, Thailand, Turkey, Uganda, United Kingdom of Great Britain and Northern Ireland and United States of America.

10. The session was attended by observers from the following States: Iraq, Libya, Malta, Qatar, Syria and Ukraine. The session was also attended by observers from the Holy See and the European Union.

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[5] Ibid., para. 332.

[6] Ibid., *Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 163.

[7] Ibid., para. 216.

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

(a) *United Nations system*: World Bank and World Intellectual Property Organization (WIPO);

(b) *International non-governmental organizations invited by the Commission*: American Bar Association (ABA), Asociación Americana de Derecho International Privado (ASADIP), Commercial Finance Association (CFA), Factors Chain International and International Factors Group (FCI+IFG), Forum for International Conciliation and Arbitration (FICACIC), International Bar Association (IBA), International Insolvency Institute (III), Moot Alumni Association (MAA), National Law Centre for Inter-American Free Trade (NLCIFT) and The European Law Students' Association (ELSA).

12. The Working Group elected the following officers:

Chairperson: Sr. Rodrigo LABARDINI (Mexico)

Rapporteur: Ms. Pavlína RUCKI (Czech Republic)

13. The Working Group had before it the following documents: A/CN.9/WG.VI/WP.67 (Annotated Provisional Agenda) and A/CN.9/WG.VI/WP.65/Add.1 and 3, A/CN.9/WG.VI/WP.68 and Add. 1 and 2 (Draft Model Law on Secured Transactions), as well as A/CN.9/WG.VI/WP.66/Add.1 and 3 and A/CN.9/WG.VI/WP.69 and Add. 1 and 2 (Draft Guide to Enactment).

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. Draft Model Law on Secured Transactions.
5. Draft Guide to Enactment of the draft Model Law on Secured Transactions.
6. Other business.
7. Adoption of the report.

III. Deliberations and decisions

15. The Working Group considered notes by the Secretariat entitled "Draft Model Law on Secured Transactions" (A/CN.9/WG.VI/WP.65/Add.1 and 3). The deliberations and decisions of the Working Group are set forth below in chapter IV. The Secretariat was requested to revise the draft Model Law and the draft Guide to Enactment to reflect the deliberations and decisions of the Working Group.

IV. Draft Model Law on Secured Transactions

A. Chapter IV. The registry system (A/CN.9/WG.VI/WP.65/Add.1)

Article 26. Establishment of a public registry

16. In order to deal with the legal purpose of the Registry and its relationship to the draft Model Law, rather than with the operational characteristics of the Registry, it was agreed that article 26 of the draft Model Law should be revised to read along the following lines: "The Registry is established for the purpose of giving effect to the provisions of the Law relating to the registration of notices of security rights". Subject to that change, the Working Group adopted article 26 of the draft Model Law.

B. Registry-related provisions (A/CN.9/WG.VI/WP.65/Add.1)

17. Differing views were expressed with respect to the placement of the registry-related provisions. One view was that those provisions were an integral part of, and should thus be included in, the draft Model Law. Another view was that those provisions dealt with both substantive and technical matters that could be addressed in primary or secondary legislation and should thus be included in an annex to the draft Model Law. It was stated that, if the registry-related provisions were included in an annex to the draft Model Law, to highlight their importance and their nature as legal rules, their title should be "model registry act" or "model registry law". The prevailing view, however, was that, as a compromise between the above-mentioned views, those provisions should be presented right after article 26 of the draft Model Law with a separate numbering. It was widely felt that, while the registry-related provisions were of equal importance to the provisions of the draft Model Law, their enactment in primary or secondary legislation, or a combination of both, should be left to each enacting State. In addition, it was widely felt that, to avoid inadvertently creating the impression that those provisions should in all cases be enacted in a law other than the secured transactions law, they should be called "model registry-related provisions", rather than "model registry act" or "model registry law". After discussion, it was agreed that the registry-related provisions should be presented right after article 26 of the draft Model Law with a separate numbering under the heading "model registry-related provisions".

Article 1. Establishment of a public registry

18. In view of its decision as to the placement of the registry-related provisions (see para. 17 above) and the fact that article 1 of the registry-related provisions merely restated the essence of article 26 of the draft Model Law, the Working Group agreed that article 1 of the registry-related provisions should be deleted.

Article 2. Definitions

19. It was agreed that, like article 2 of the draft Model Law, article 2 of the registry-related provisions should include a chapeau along the following lines: "For the purposes of these registry-related provisions".

"Amendment"

20. It was agreed that the definition of the term "amendment" should be revised to read along the following lines: "'Amendment notice' means a notice submitted to the Registry in the prescribed registry notice form to modify information contained in a related registered notice".

"Cancellation"

21. It was agreed that the definition of the term "cancellation" should be revised to read along the following lines: "'Cancellation notice' means a notice submitted to the Registry in the prescribed registry notice form to cancel the effectiveness of the registration of all related registered notices". In that context, it was noted that a partial cancellation amounted to an amendment.

22. It was also agreed that, to have a complete set of definitions of all kinds of notices referred to in the registry-related provisions, the term "initial notice" should also be defined along the following lines: "'Initial notice' means a notice submitted to the Registry in the prescribed registry notice form to make the security right, to which the notice relates, effective against third parties".

"Law"

23. It was agreed that, in view of the decision of the Working Group with respect to the placement of the registry-related provisions (see para. 17 above), the definition of the term "law" was no longer necessary and should thus be deleted.

"Notice"

24. It was agreed that, as all kinds of notices were already defined, the definition of the term "notice" should be made into a rule of interpretation that should read along the following lines: "'Notice' includes an initial notice, an amendment notice and a cancellation notice".

"Registrant"

25. It was agreed that the definition of the term "registrant" should be revised to read along the following lines: "'Registrant' means a person who submits a notice to the Registry".

"Registrar"

26. As the term "registrar" was only used in article 28 of the registry-related provisions, it was agreed that its substance should be included in that article and the definition should be deleted. In that connection, it was also agreed that article 28 should track the language of recommendation 2 of the Registry Guide and also include a reference to the monitoring of the performance of the registrar's duties by the authority to be specified by the enacting State. It was further agreed that the draft Guide to Enactment should clarify that, while the Registry could be operated by a private or public entity, it should always be supervised by the public authority specified by the enacting State (e.g. ministry or central bank).

"Registration"

27. It was agreed that the definition of the term "registration" might be reviewed for consistency with the registry-related provisions and in particular with article 14, pursuant to which the registration of a notice was effective when the information in a notice was entered into the registry record so as to be accessible to searchers of the public registry record.

"Registry"

28. It was agreed that the definition of the term "Registry" should be revised to read along the following lines: "'Registry' means the registry established pursuant to article 26 of this Law".

"Regulation"

29. It was agreed that, in view of the decision of the Working Group with respect to the placement of the registry-related provisions (see para. 17 above) and the fact that the term "regulation" was not universally understood in the same way, its definition was no longer necessary and should thus be deleted.

30. At the close of its consideration of article 2 of the registry-related provisions, the Working Group considered whether the term "registered notice" should be defined along the following lines: "'Registered notice' means a notice after the information in the notice has been entered into the public registry record". One view was that that term did not need to be defined. It was stated that the definitions of the term "notice", the various types of notice and the term "registration", as well as article 14 of the registry-related provisions, were sufficient. It was also stated that the proposed wording was inconsistent with article 14 of the registry-related provisions that required information to be made accessible to searchers of the public registry record for a registered notice to be effective. Another view was that the term "registered notice" should be defined as it was used in several articles of the registry-related provisions. It was stated that the proposed wording could form a starting point for a definition that would be consistent with article 14 of the registry-related provisions. After discussion, the Working Group agreed that the matter could be reviewed at a later stage on the basis of an appropriately revised definition.

31. Subject to the above-mentioned changes, the Working Group adopted article 2 of the registry-related provisions.

Article 3. Grantor's authorization for registration

32. With respect to paragraph 1, it was widely felt that, in the case of multiple grantors, lack of authorization by one grantor should not result in the registration of an initial notice being generally ineffective. In order to address that point, it was agreed that paragraph 1 should be revised to read along the following lines: "Registration of an initial notice with respect to a security right in an asset of a grantor is ineffective unless authorized by that grantor in writing".

33. With respect to paragraph 2, it was agreed that: (a) it should be revised to also refer to an amendment notice that extended the period of effectiveness of the registration of a notice within square brackets to reflect option B or C of article 15 of the registry-related provisions; and (b) the words "not included in the security agreement" should be deleted in view of the change to paragraph 5 (see para. 35 below).

34. With respect to paragraph 4, it was agreed that it should refer to an initial or amendment notice. It was also agreed that the draft Guide to Enactment should explain that, like paragraphs 1-3, paragraph 4 also required that the grantor's authorization be in writing.

35. With respect to paragraph 5, it was agreed that it should be revised to read along the following lines: "A written security agreement is sufficient to constitute authorization by the grantor for the registration of an initial or amendment notice covering the encumbered assets described in the security agreement".

36. With respect to paragraph 6, it was agreed that, while paragraph 4 might be sufficient to reflect the fact that the Registry did not have the right to require evidence of the grantor's authorization, paragraph 6 had educational value and should thus be retained. As to the placement of paragraph 6 in the text, while it was stated that it would also fit in article 8, it was agreed that, for the sake of having a complete set of rules dealing with the grantor's authorization for registration in one and the same article, it should be retained in article 3.

37. In the discussion, the question was raised whether, in the case of a security right created by transfer of possession to the secured creditor and conclusion of an oral agreement, possession should be sufficient to reflect the grantor's authorization for registration. After discussion, it was agreed that, in such a case, possession would not be sufficient, as: (a) the creation of a security right was a different issue from the issue of the grantor's authorization for registration; (b) the relinquishment of possession could result in the extinction of the security right; and (c) the possession of an asset might be transferred to the secured creditor for reasons of confidentiality that would preclude the registration of a notice with respect to the security right.

38. Subject to the above-mentioned changes, the Working Group adopted article 3 of the registry-related provisions.

Article 4. One notice sufficient for security rights under multiple security agreements

39. The Working Group agreed that article 4 of the registry-related provisions should be revised to read along the following lines: "The registration of a single notice may relate to security rights granted by the grantor to the secured creditor under one or more than one security agreement". Subject to that change, the Working Group adopted article 4 of the registry-related provisions.

Article 5. Advance registration

40. The Working Group agreed that article 5 of the registry-related provisions should be revised to read along the following lines: "A notice may be registered before the creation of a security right or the conclusion of a security agreement to which the notice relates". Subject to that change, the Working Group adopted article 5 of the registry-related provisions.

Article 6. Public access

41. With respect to article 6 of the registry-related provisions, it was agreed that: (a) to better reflect its contents, its title should be revised to read along the following lines "conditions for access to registry services"; (b) for reasons of consistency in the terminology

used, subparagraph 1(a) should be revised to refer to the "prescribed registry notice form"; and (c) paragraph 2 should be revised to follow the formulation of paragraph 1. It was also agreed that the draft Guide to Enactment should explain the words "secure access requirements" and their relationship to the need to protect secured creditors against the risk of registration of unauthorized amendment and cancellation notices that was addressed in article 22 of the registry-related provisions. Subject to those changes, the Working Group adopted article 6 of the registry-related provisions.

Article 7. Rejection of the registration of a notice or a search request

42. With respect to subparagraphs 1(a), 1(b), and 2(b), it was agreed that reference should be made to "mandatory", rather than "required", designated fields. It was also agreed that the draft Guide to Enactment should explain that: (a) the registration of a notice could also be rejected, if no information was entered in one of the mandatory designated fields, even if the information entered in the other fields was legible; and (b) a search request could also be rejected if the registration number given by a searcher had expired or was non-existent. Subject to those changes, the Working Group adopted article 7 of the registry-related provisions.

Article 8. No verification by the Registry

43. It was agreed that article 8 of the registry-related provisions should be revised to more clearly address, in line with recommendation 7 of the Registry Guide: (a) the obligation of the Registry to maintain information about the registrant's identity submitted in accordance with article 6, subparagraph 1(b); (b) the prohibition of the Registry requiring verification of that information; and (c) the prohibition of the Registry conducting any scrutiny of the content of a notice or search request other than that permitted under articles 6 and 7. It was also agreed that the title of the article should be revised to better reflect its content. Subject to those changes, the Working Group adopted article 8 of the registry-related provisions.

Article 9. Information required in an initial notice

44. The Working Group adopted article 9 of the registry-related provisions unchanged.

Article 10. Grantor identifier

45. It was agreed that paragraph 4 should be revised to avoid creating the impression that it referred to a law or decree that was no longer in force. It was also agreed that the draft Guide to Enactment should make reference to a number as a grantor identifier. Subject to those changes, the Working Group adopted article 10 of the registry-related provisions.

Article 11. Secured creditor identifier

46. It was agreed that paragraph 2 should be revised to avoid giving the impression that the identifier of the representative of a secured creditor that was a legal person had to appear on the document, law, or decree constituting the legal person. Subject to that change, the Working Group adopted article 11 of the registry-related provisions.

Articles 12-15

47. After discussion, the Working Group adopted articles 12-15 of the registry-related provisions unchanged.

Article 16. Obligation to send a copy of a registered notice

48. With respect to article 16 of the registry-related provisions, it was agreed that: (a) subparagraph 1(a) should refer to the date and time recorded by the Registry under article 14, paragraph 3; (b) subparagraph 1(b) should refer to the registration number without repeating concepts that were already included in the definition of the term "registration number" in article 2, subparagraph (j) of the registry-related provisions; (c) a new paragraph should be added to clarify that the failure of the secured creditor to comply with its obligation pursuant to paragraph 2 would not affect the effectiveness of the registration of the notice; (d) paragraph 3 should be retained to limit the secured creditor's liability to nominal

penalties to be specified by the enacting State and actual damages proven to have been caused by the secured creditor's failure, while the standard of liability and other related matters could be left to the relevant law of the enacting State; and (e) paragraph 4 should be placed in article 6 or 8, which addressed issues related to the registrant's identity. It was also agreed that the draft Guide to Enactment should explain that, under paragraph 2, the secured creditor was obliged to send a copy to the grantor at the address set forth in the notice or, if the secured creditor was aware of the fact that the grantor had changed address and knew that new address or could reasonably discover it, at the grantor's new address. Subject to those changes, the Working Group adopted article 16 of the registry-related provisions.

Article 17. Right to register an amendment or cancellation notice

49. It was agreed that paragraph 2 of article 17 of the registry-related provisions should be revised to clarify that, after (rather than "upon") the registration of an amendment notice changing the person identified in a registered initial notice as the secured creditor, only the person identified in the amendment notice as the secured creditor was entitled to register an amendment or cancellation notice. It was also agreed that the draft Guide to Enactment should explain that the secured access data of the secured creditor would need to be modified to minimize the risk of the registration of unauthorized amendment or cancellation notices. Subject to those changes, the Working Group adopted article 17 of the registry-related provisions.

Article 18. Information required in an amendment notice

50. It was agreed that paragraph 1 of article 18 of the registry-related provisions should be revised to clarify that: (a) subparagraph 1(a) referred to the registration number of the initial notice to which the amendment notice related; and (b) subparagraph 1(b) referred to the information to be added or changed on the understanding that, while no information should be deleted from the registry record, a release of an encumbered asset or grantor amounted to a "partial deletion", a matter that should be clarified in the draft Guide to Enactment. It was also agreed that paragraph 2 should be modified to read along the following lines: "An amendment notice may modify one or more than one item of information in the notice to which it relates". Subject to those changes, the Working Group adopted article 18 of the registry-related provisions.

Article 19. Global amendment of secured creditor information

51. It was agreed that article 19 of the registry-related provisions should be revised so that: (a) option A would permit a person to register a single amendment notice to amend its identifier, address or both, in all registered notices in which that person was identified as the secured creditor; and (b) option B would provide that the Registry could make such a global amendment upon the request of that person. It was also agreed that the reasons for such a global amendment (i.e. a change of the secured creditor's identifier, address, or both, or an assignment of the secured obligation) should be discussed in the draft Guide to Enactment. Subject to those changes, the Working Group adopted article 19 of the registry-related provisions.

Article 20. Information required in a cancellation notice

52. It was agreed that article 20 of the registry-related provisions should be revised to refer to the registration number of the initial notice to which the cancellation notice related, without repeating elements contained in the definition of the term "registration number". Subject to that change, the Working Group adopted article 20 of the registry-related provisions.

Article 21. Compulsory registration of an amendment or cancellation notice

53. It was agreed that article 21 of the registry-related provisions should be revised so that: (a) for reasons of clarity in the text, paragraph 1 would be separated in two paragraphs (one that would deal with an amendment notice deleting encumbered assets described in a registered notice and another that would deal, within square brackets as it stated an optional rule, with an amendment notice reducing the maximum amount specified in a registered

notice); (b) for reasons of consistency with article 3, paragraph 4, that permitted the secured creditor to register a notice even before the grantor had authorized the registration, subparagraph 2(a) would apply only where the secured creditor knew that the grantor's authorization was not forthcoming or where the grantor requested the registration of a cancellation notice; (c) subparagraphs 2(b) and (c) would be set out in a separate paragraph; (d) paragraph 3 would apply where the registration was not authorized at all (subpara. 2(a)) or was authorized but not to the extent addressed in the registered notice (subpara. 1(a)); (e) paragraph 4 would require that, in its request to the secured creditor, the grantor state its identifier and the registration number of the initial notice to which the requested amendment or cancellation notice related; and (f) paragraph 6 would require the registration of an amendment or cancellation notice where a judicial or administrative order had been issued, leaving to each enacting State to determine who should register that notice (e.g. the Registry or an officer of the authority that issued the order). Subject to those changes, the Working Group adopted article 21 of the registry-related provisions.

Article 22. Amendment or cancellation notices not authorized by the secured creditor

54. With respect to article 22 of the registry-related provisions, it was agreed that: (a) in options A and C, and in paragraph 1 of option B and D, the word "amendment" should be retained outside square brackets (or the matter could be addressed with new wording to be prepared by the Secretariat); (b) in paragraph 2 of option B, the bracketed text should be retained outside square brackets to avoid that the exception in paragraph 2 would render meaningless the rule in paragraph 1, and the text would be clarified to refer to the registration of an unauthorized amendment or cancellation notice; and (c) in paragraph 2 of option D, for reasons of clarity, the word "nonetheless" should be deleted. Subject to those changes, the Working Group adopted article 22 of the registry-related provisions.

Article 23. Search criteria

55. It was agreed that, in subparagraph (b), the words "assigned to the initial notice" should be deleted, as they were part of the definition of the term "registration number". Subject to that change, the Working Group adopted article 23 of the registry-related provisions.

Article 24. Search results

56. It was agreed that paragraph 2 should be revised to read along the following lines: "Upon request by a searcher, the Registry must issue an official search certificate setting out the search result and certifying that the search result was issued by the Registry". Subject to that change, the Working Group adopted article 24 of the registry-related provisions.

Article 25. Registrant errors in required information

57. With respect to article 25, it was agreed that: (a) paragraphs 1 and 2 should refer to "information in" a notice being retrieved by a search of the "public" registry record; (b) a footnote should be added to paragraph 2 stating that it would be necessary only if the enacting State implemented option B of article 24. Subject to those changes, the Working Group adopted article 25 of the registry-related provisions.

Articles 26 and 27

58. The Working Group considered a proposal for revisions to articles 26 and 27 of the registry-related provisions. While there was broad agreement in the Working Group that the proposed revised text constituted a substantial improvement of the text of those articles, it was widely felt that it could be further refined. Subject to those changes, the Working Group adopted articles 26 and 27 as revised.

Article 28. Appointment of the registrar

59. Recalling its decision with respect to the definition of the term "registrar" (see, para. 26), the Working Group agreed that article 28 should be revised to also make reference to the monitoring of the performance of the registrar's duties by the authority to be specified

by the enacting State. Subject to that change, the Working Group adopted article 28 of the registry-related provisions.

Article 29. Organization of information in registered notices

60. With respect to article 29 of the registry-related provisions, it was agreed that: (a) to better reflect its contents, the title should be revised to refer to information in "the registry record" (rather than to information "in registered notices"); (b) in both options of subparagraph 2(b), the words "or the registration number assigned to the initial notice" should be deleted, as a search against that criterion would retrieve only a single registered notice and thus fail to achieve the purpose of a global amendment; and (c) in paragraph 3, the words "and the registration of an amendment or cancellation notice does not result in the amendment or deletion of information in any associated notice" should be deleted as redundant. Subject to those changes, the Working Group adopted article 29 of the registry-related provisions.

Article 30. Integrity of information in the registry record

61. It was agreed that paragraph 2 needed to be revised to clarify the object of reconstruction. Subject to that change, the Working Group adopted article 30 of the registry-related provisions.

Article 31. Removal of information from the public registry record and archival

62. With respect to article 31 of the registry-related provisions, it was agreed that: (a) option A should be revised to clarify that, upon the expiry of the notice or registration of a cancellation notice, the Registry was not only obliged to remove information in a registered notice from the public registry record, but also prohibited from doing so before the expiry of the notice or the registration of a cancellation notice; (b) a footnote should be added to option A stating that option A would be necessary only if the enacting State implemented option A or B of article 22; and (c) a footnote should be added to option B stating that option B would be necessary only if the enacting State implemented option C or D of article 22. Subject to those changes, the Working Group adopted article 31 of the registry-related provisions.

Article 32. Correction of errors by the Registry

63. With respect to article 32 of the registry-related provisions, it was agreed that: (a) to better reflect its contents, the title should be revised to refer to errors "made" by the Registry; (b) in options A and B of paragraph 2 (and where appropriate throughout the registry-related provisions), reference should be made to the "public" registry record; (c) for reasons of clarity, in options B and D of paragraph 2, the exception should be set forth in a separate sentence; (d) the draft Guide to Enactment should explain that, to reduce the risk of error or ensure timely correction, the secured creditor should monitor the information entered into the public registry record, which, in the case of a fully electronic registry, should be easy for the secured creditor to do; and (e) the entire article should be placed within square brackets with a footnote indicating that it would be appropriate for States that had registry systems that were not fully electronic. Subject to those changes, the Working Group adopted article 32 of the registry-related provisions.

Article 33. Limitation of liability of the Registry

64. With respect to article 33 of the registry-related provisions, it was agreed that: (a) in the chapeau of option A, to better reflect the limitation of liability, the words "limited for" should be replaced with the words "limited to"; and (b) the draft Guide to Enactment should give examples of approaches to the limitation of the liability of the Registry (such as a fixed monetary amount, an amount up to the value of the encumbered asset and a maximum annual monetary amount). Subject to those changes, the Working Group adopted article 33 of the registry-related provisions.

Article 34. Registry fees

65. With respect to article 34 of the registry-related provisions, it was agreed that: (a) in line with the approach followed in recommendations 54, subparagraph (i), of the Secured Transactions Guide and 36 of the Registry Guide, both options (fees at cost-recovery level and no fees at all) should be preserved to ensure that the Registry would not be used as a source of revenue; (b) paragraph 1 of option A should be revised to provide that fees to be specified by the enacting State could be charged or collected for the registry services, leaving all other details to the enacting State; (c) a new paragraph could be inserted to provide that the authority to be specified by the enacting State might modify the fee schedule from time to time; (d) paragraph 2 of option A should be revised to provide that the Registry should be able to publicize the fee schedule (but not modify it); and (e) the draft Guide to Enactment should explain both options in a balanced and neutral way with cross references to the Secured Transactions Guide and the Registry Guide. Subject to those changes, the Working Group adopted article 34 of the registry-related provisions.

C. Chapter VI. Rights and obligations of the parties to a security agreement and third-party obligors (A/CN.9/WG.VI/WP.65/Add.3)

Section I. Mutual rights and obligations of the parties to a security agreement

Article 47. Source of mutual rights and obligations of the parties

66. Differing views were expressed as to whether article 47 should be retained. After discussion, the Working Group agreed that: (a) subparagraphs (a) (application of the provisions of chapter VI of the draft Model Law) and (b) (application of contract law) were self-evident and should be deleted; and (b) subparagraphs (c) (security agreement) and (d) (trade usages and practices) should be retained, the latter with any necessary modification to be aligned more closely with article 11, paragraph 2, of the Assignment Convention. Subject to those changes, the Working Group adopted article 47.

67. In the discussion, differing views were expressed as to whether a new provision along the lines of article 11, paragraph 3, of the Assignment Convention (which was based on article 9, paragraph 2, of the United Nations Convention on Contracts for the International Sale of Goods), dealing with the application of practice-specific international trade usages, should be added in article 47. After discussion, the Working Group agreed that that matter should be left to the contract law of the enacting State.

Article 48. Obligation of a person in possession to exercise reasonable care

68. Differing views were expressed as to whether article 48 should be listed in article 3 as a mandatory law provision. It was ultimately agreed that article 48 could be retained as a mandatory law provision on the understanding that the reference to reasonable care and the standards of conduct contained in article 4 (good faith and commercial reasonable manner) provided sufficient flexibility. After discussion, the Working Group adopted article 48 unchanged.

Article 49. Obligation of a secured creditor to return an encumbered asset [or to register an amendment or cancellation notice]

69. It was agreed that the obligation of a secured creditor to register an amendment or cancellation notice was sufficiently addressed in article 21 of the registry-related provisions and thus the reference to that obligation within square brackets in the title and the text of article 49 should be deleted. It was also agreed that release of control of an encumbered asset by a secured creditor was a different issue and should not be addressed in article 49. Subject to those changes, the Working Group adopted article 49.

Article 50. Right of a secured creditor to use, be reimbursed for expenses and inspect an encumbered asset

70. It was agreed that, in paragraph 2, the reference to inspection by the secured creditor, where the encumbered asset was in the possession of a person other than the grantor, should be deleted. It was widely felt, in view of the definition of the term “possession” in article 2,

subparagraph (y), possession by the grantor would include possession by the grantor's representative or an independent person acting on behalf of the grantor. It was also agreed that the draft Guide to Enactment should explain: (a) the inter-relationship of article 50, subparagraph 1(b) (use of encumbered assets) and article 48 (reasonable care for encumbered assets) and that the two provisions should be read together; and (b) as a result of the standards of conduct contained in article 4 (good faith and reasonable commercial manner), the secured creditor should be able to inspect the encumbered assets in the grantor's possession only at reasonable times and pursuant to a prior notice. Subject to those changes, the Working Group adopted article 50.

Article X. Grantor's right to obtain information

71. With respect to article X (see note after art. 50), it was agreed that: (a) it was useful, as the notice registration system foreseen in the draft Model Law did not disclose sufficient information about a security right, and should thus be retained; (b) the right to obtain information from the secured creditor should be given to the grantor (other than an outright transferor of a receivable), but not to the grantor's third-party creditors (information to whom could be given at the request of the grantor); (c) the grantor's right to obtain information should be limited to information about the grantor's current indebtedness and the encumbered assets currently encumbered; and (d) the draft Guide to Enactment should discuss the possibility of extending the right to obtain information to the grantor's third-party creditors (in particular judgement creditors), and explain that other matters (such as the legal consequences of the secured creditor's failure to comply or to give accurate information) would be left to other law. Subject to those changes, the Working Group adopted article X.

Articles 51, 52, 54, 56, 62, 64 and 65

72. The Working Group adopted articles 51, 52, 54, 56, 62, 64 and 65 unchanged.

Article 53. Right of the secured creditor to payment of a receivable

73. With respect to article 53, it was agreed that: (a) the chapeau of paragraph 1 would be revised to refer to a grantor of a security right in a receivable; (b) subparagraph 1(c) should be aligned more closely with article 14, subparagraph 1(c) of the Assignment Convention; and (c) paragraph 2 should be aligned more closely with article 14, paragraph 2, of the Assignment Convention. Subject to those changes, the Working Group adopted article 53.

Section II. Rights and obligations of third party-obligors

74. It was agreed that, to more closely reflect its contents and the overall structure of the provisions of the draft Model Law, the title of section II of chapter VI on the rights and obligations of third-party obligors should clarify that the section contained asset-specific rules.

Article 55. Protection of the debtor of the receivable

75. It was agreed that the draft Guide to Enactment should explain that paragraph 1 was sufficiently broad to cover all payment terms, including those relating to the currency and the time of payment. After discussion, the Working Group adopted article 55 unchanged.

Article 57. Discharge of the debtor of the receivable by payment

76. With respect to article 57, it was agreed that: (a) in paragraph 5, the term "subsequent security rights" should be clarified to reflect the meaning of the term "subsequent assignments"; and (b) in paragraph 8, the second set of bracketed words should be retained outside square brackets, while the first set of bracketed words should be deleted. Subject to those changes, the Working Group adopted article 57.

Article 58. Defences and rights of set-off of the debtor of the receivable

77. With respect to article 58, it was agreed that: (a) in subparagraph 1(a), reference should be made to a "receivable arising from a contract" rather than to a "contractual receivable",

while the words "giving rise to the receivable" should be deleted; and (b) in paragraph 2, the words "limiting in any way the initial or subsequent grantor's right to create the security right" should be deleted as redundant. Subject to those changes, the Working Group adopted article 58.

Article 59. Agreement not to raise defences or rights of set-off

78. While some doubt was expressed as to whether the reference in paragraph 2 to the effectiveness of a waiver of the debtor's defences was necessary, it was ultimately agreed that it could be retained for reasons of consistency with article 19, paragraph 2, of the Assignment Convention, on which article 59, paragraph 2, was based. After discussion, the Working Group adopted article 59 unchanged.

Article 60. Modification of the original contract

79. It was agreed that the words "created by a security agreement" in paragraphs 1 and 2 were redundant and should be deleted. Subject to that change, the Working Group adopted article 60.

Article 61. Recovery of payments made by the debtor of the receivable

80. It was agreed that the reference to a transferor in an outright transfer of receivables in the definition of the term "grantor" contained in article 2, subparagraph (n), should be retained outside square brackets, so that the term "grantor" would include a transferor in an outright transfer of a receivable. As a result, it was agreed that the term "grantor" in article 61 was sufficient and the reference to a transferor in an outright transfer of receivables was redundant and should be deleted. Subject to that change, the Working Group adopted article 61.

Article 63. Rights as against the depositary bank

81. Subject to the substitution of the term "depositary institution" for the term "depositary bank" (see definition of the term "bank account" in art. 2, subpara. (c)), the Working Group adopted article 63.

D. Chapter VII. Enforcement of a security right (A/CN.9/WG.VI/WP.65/Add.3)

Article 66. Post-default rights

82. With respect to article 66, it was agreed that: (a) the definition of the term "default" contained in paragraph 1 should be moved to article 2 with the clarification that it would be subject to party autonomy and the explanation in the draft Guide to Enactment that it did not infringe on other laws; and (b) paragraph 3 should be deleted as its essence was covered in paragraph 2. It was also agreed that the draft Guide to Enactment should discuss the matter addressed in paragraph 3 as an example of the application of the rule in paragraph 2. Subject to those changes, the Working Group adopted article 66.

Article 67. Methods of exercising post-default rights

83. Recalling its earlier discussion (see A/CN.9/836, paras. 48-50), the Working Group considered the question whether article 67 should refer to the possibility of the parties exercising their post-default rights through alternative dispute resolution (ADR), including online dispute resolution (ODR), mechanisms (conciliation and arbitration).

84. With respect to ODR, the Working Group noted the restrictive mandate given by the Commission to Working Group III (Online Dispute Resolution) "to continue its work towards elaborating a non-binding descriptive document reflecting elements of an ODR process, on which elements the Working Group had previously reached consensus, excluding the question of the nature of the final stage of the ODR process (arbitration/non-

arbitration)",[8] and the one year given by the Commission to Working Group III to bring its work "to an end, whether or not a result had been achieved".[9]

85. There was general agreement in the Working Group as to the value of ADR. However, differing views were expressed as to whether a short reference to ADR in article 67 would be useful. After discussion, it was agreed that, in view of the complexity of the matter and the need to coordinate with Working Group II (Arbitration and Conciliation) and to discuss the matter on the basis of a detailed proposal, no such reference should be made in article 67 or other part of the draft Model Law (such as chapter VI on the mutual rights and obligations of the parties, as, in view of the consensual nature of ADR, it was said that a reference to it would fit better in chapter VI). It was also agreed that the draft Guide to Enactment should explain that there was nothing in the draft Model Law that would preclude the grantor and the secured creditor from agreeing to resolve any dispute that may arise between them by ADR, and explain the advantages of ADR, but also the difficulties associated with the use of ADR in the context of secured transactions (e.g. arbitrability, third-party rights and confidentiality of arbitral proceedings).

86. After discussion, the Working Group adopted article 67 unchanged.

Article 68. Relief for non-compliance

87. After discussion, the Working Group was not able to reach agreement on article 68 and referred it to the Commission for further consideration on the basis of a revised version to be prepared by the Secretariat.

Article 69. Right of affected persons to terminate enforcement

88. With respect to article 69. it was agreed that: (a) paragraph 1 would refer to the grantor, the debtor and any other person with a right in the encumbered asset; (b) paragraph 2 would clarify that the words "the conclusion of an agreement by the secured creditor for that purpose" referred to an agreement "for the purpose of a sale or other disposition"; and (c) paragraph 3 should be retained outside square brackets with a clarification that it did not provide the lessee or licensee with more rights than it had under the other provisions of the draft Model Law. Subject to those changes, the Working Group adopted article 69.

Article 70. Right of the higher-ranking secured creditor to take over enforcement

89. With respect to article 70, it was agreed that: (a) paragraphs 1 and 3 should be aligned more closely with recommendation 145 of the Secured Transactions Guide; (b) paragraph 1 should be revised to clarify that, where the secured creditor was a transferee of a receivable in an outright transfer, it did not need to continue enforcement; and (c) paragraph 2 should include similar clarifications as article 69, paragraph 2 (see para. 88 above). Subject to those changes, the Working Group adopted article 70.

Article 71. Right of the secured creditor to possession of an encumbered asset

90. With respect to article 71, it was agreed that: (a) its title should be revised to better reflect its content; (b) in paragraph 1, reference should be made to those parties in connection to any person with a superior right, including lessees and licensees; (c) in subparagraph 2(a), reference should be made to the grantor's consent, which could be given before or after default; (d) in subparagraph 2(c), it should be clarified that it referred to the person in possession of an encumbered asset; (e) paragraph 3 would be deleted on the understanding that the notice referred to in subparagraph 2(b) would be subject to the general standards of conduct contained in article 4 (good faith and commercially reasonable manner); (f) paragraph 4 would be retained outside square brackets and also include a reference to assets of a kind sold on a recognized market along the lines of recommendation 149 of the Secured Transactions Guide; and (g) in paragraph 5, option B would be retained on the understanding that the junior secured creditor could enforce its security right without obtaining possession and the buyer of the encumbered asset would acquire the asset subject

[8] *Official Records of the General Assembly, Seventieth Session, Supplement No. 17* (A/70/17), para. 352.
[9] Ibid.

to the right of the senior secured creditor. It was also agreed that, to ensure consistency with paragraph 1 of article 71 and other articles that dealt with enforcement by application to a court or other authority, article 67, paragraph 2, should also refer to the provisions of the enforcement chapter of the draft Model Law. It was further agreed that the draft Guide to Enactment would explain that: (a) the notice referred to in subparagraph 2(b) was subject to the general standards of conduct contained in article 4; and (b) the term "recognized market" referred to in paragraph 4 meant a market in which prices were set by the market and not by individual sellers. Subject to those changes, the Working Group adopted article 71.

E. Future work

91. At the close of its session, the Working Group decided to submit the draft Model Law to the Commission for consideration and adoption at its forty-ninth session, which was scheduled to take place in New York from 27 June to 15 July 2016. The Working Group also decided to request the Commission for an additional 1 or 2 sessions in order to complete the draft Guide to Enactment.

92. The Working Group noted that the thirtieth and thirty-first sessions of the Working Group were scheduled to take place in Vienna from 5 to 9 December 2016 and in New York from 13 to 17 February 2017, those dates being subject to approval by the Commission at its forty-ninth session.

E. Note by the Secretariat on a draft model law on secured transactions

(A/CN.9/WG.VI/WP.68 and Add.1-2)

[Original: English]

Contents

Chapter I. Scope of application and general provisions

Article 1. Scope of application

1. This Law applies to security rights in movable assets.

2. With the exception of articles 66, paragraphs 1-3, to 75,[*] this Law applies to outright transfers of receivables [and, in such a case, references in this Law to a grantor apply to the transferor, references to a secured creditor apply to the transferee, references to a security agreement apply to the agreement for the outright of a receivable, references to a security right apply to the right of the transferee and references to an encumbered asset apply to the receivable, but references to a secured obligation do not apply to the right to payment of the price of the receivable].

3. Notwithstanding paragraph 1, this Law does not apply to security rights in:

(a) The right to request payment under or to receive the proceeds of an independent guarantee or letter of credit;

(b) Intellectual property in so far as this Law is inconsistent with [the law relating to intellectual property to be specified by the enacting State];[1]

(c) Intermediated securities;

(d) Payment rights arising under or from financial contracts governed by netting agreements, except a payment right arising upon the termination of all outstanding transactions; and

(e) [Other types of asset that the enacting State wishes to exclude, such as those that are subject to specialized secured transactions and asset-based registration regimes under other law to the extent that that other law governs matters addressed in this Law].[2]

[4. This Law does not apply to security rights in proceeds of encumbered assets if the proceeds are a type of asset, to which this Law does not apply, to the extent that [any other law to be specified by the enacting State] applies to security rights in those types of asset and governs the matters addressed in this Law.]

5. Nothing in this Law affects the rights and obligations of the grantor and the secured creditor under laws governing the protection of parties to transactions made for personal, family or household purposes.

6. Nothing in this Law overrides a provision of any other law that limits the creation or enforcement of a security right in, or the transferability of, specific types of asset, with the exception of a provision that limits the creation or enforcement of a security right in or the transferability of an asset on the sole ground that it is a future asset, or a part or undivided interest in an asset.

[*Note to the Working Group: The Working Group may wish to consider which of the alternative bracketed texts should be retained, the text in article 1(2) or the texts in article 2 (j), (n), (cc), (dd), (gg) and (hh), prepared pursuant to its decision (A/CN.9/865, para. 40. The Working Group may also wish to consider whether, unlike recommendation 4(d) of the* UNCITRAL Legislative Guide on Secured Transactions *(the "*Secured Transactions Guide*") and article 4(2) of the United Nations Convention on the*

[*] The reference is to these articles as they appear in document A/CN.9/WG.VI/WP.65/Add.3.

[1] This provision may not be necessary if the enacting State has coordinated, or has otherwise addressed the relationship between this Law and any secured transactions provisions of its law relating to intellectual property.

[2] If the enacting State decides to introduce any other exception(s), they should be limited and set out in the Law in a clear and specific way.

Assignment of Receivables in International Trade (the "Assignment Convention") on which it is based, article 1(3)(d) should exclude not only "payment rights" but "rights" in general arising from or under such financial contracts before close-out. Alternatively, the draft Guide to Enactment could explain that: (a) security rights in any rights arising before close-out would interrupt the mutuality of obligation that is necessary to ensure that close-out netting is fully enforceable even in the event of the grantor's insolvency; (b) if a security right in rights arising before close-out were to be created (e.g. in the case of a security right in all the assets of a grantor), the relevant financial contract should include a broad prohibition to the creation of a security right in such rights by one party without the prior written consent of the other party; and (c) the draft Model Law does not affect such a prohibition, as article 13 applies only to trade receivables and payment rights arising after close-out, and article 15 applies only to rights to payment of funds credited to a bank account (while under article 63(1), the creation of a security right does not affect the rights and obligations of the depositary institution without its consent).]

Article 2. Definitions and rules of interpretation

For the purposes of this Law:

(a) "Acquisition secured creditor" means a secured creditor that has an acquisition security right;

(b) "Acquisition security right" means a security right in a tangible asset, intellectual property or the rights of a licensee under a licence of intellectual property, which secures the obligation to pay any unpaid portion of the purchase price of the asset or other credit extended to enable the grantor to acquire it to the extent the credit is used for that purpose;

(c) "Bank account" means an account maintained by a [a financial institution authorized to receive deposits from the public] [an authorized deposit-taking institution] [any institution to be specified by the enacting State] to which funds may be credited or debited;

(d) "Certificated non-intermediated securities" means non-intermediated securities represented by a certificate that:

(i) Provides that the person entitled to the securities is the person in possession of the certificate; or

(ii) Identifies the person entitled to the securities;

(e) "Competing claimant" means a creditor of a grantor or other person with rights in an encumbered asset that may be in competition with the rights of a secured creditor in the same encumbered asset. The term includes:

(i) Another secured creditor of the grantor that has a security right in the same encumbered asset;

(ii) Another creditor of the grantor that has a right in the same encumbered asset [the enacting State to specify creditors that have a right in the encumbered asset under other law];

(iii) The insolvency representative in insolvency proceedings in respect of the grantor; or

(iv) A buyer or other transferee, lessee or licensee of the encumbered asset;

(f) "Consumer goods" means goods primarily used or intended to be used by the grantor for personal, family or household purposes;

(g) "Control agreement":

(i) With respect to uncertificated non-intermediated securities means an agreement in writing among the issuer, the grantor and the secured creditor, according to which the issuer agrees to follow instructions from the secured creditor with respect to the securities without further consent from the grantor; and

(ii) With respect to rights to payment of funds credited to a bank account means an agreement in writing among the depositary institution, the grantor and the secured

creditor, according to which the depositary institution agrees to follow instructions from the secured creditor with respect to the payment of funds credited to the bank account without further consent from the grantor;

(h) "Debtor" means a person that owes payment or other performance of a secured obligation, whether or not that person is the grantor of the security right securing payment or other performance of that obligation, including a secondary obligor such as a guarantor of a secured obligation;

(i) "Debtor of the receivable" means[: (i) a person that owes payment of a receivable that is subject to a security right, including a guarantor or other person secondarily liable for payment of the receivable; and (ii) a transferor of a receivable];

(j) "Encumbered asset" means[: (i)] a movable asset that is subject to a security right; [and (ii) a receivable that is the subject of an outright transfer;]

(k) "Equipment" means a tangible asset other than inventory or consumer goods that is primarily used or intended to be used by the grantor in the operation of its business;

(l) "Financial contract" means any spot, forward, future, option or swap transaction involving interest rates, commodities, currencies, equities, bonds, indices or any other financial instrument, any securities repurchase or lending transaction, and any other transaction similar to those transactions entered into in financial markets and any combination of those transactions;

(m) "Future asset" means a movable asset, which does not exist or which the grantor does not have rights in or the power to encumber at the time the security agreement is concluded;

(n) "Grantor" means: (i) a person that creates a security right to secure either its own obligation or that of another person; [and] (ii) a buyer or other transferee, lessee, or licensee of an encumbered asset that acquires its rights subject to a security right; [and (iii) a transferor in an outright transfer of a receivable;]

(o) "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;

[*Note to the Working Group: The Working Group may wish to note that this term is only referred to in the definition of "competing claimant" and thus consider whether it should be retained in article 2 or rather explained in the draft Guide to Enactment. In any case, the Guide to Enactment may clarify that the term includes an insolvency representative that may be appointed to supervise, rather than only administer, the reorganization of the insolvency estate, for example, in the context of debtor-in-possession insolvency proceedings, and/or simply refer to the discussion in* UNCITRAL Legislative Guide on Insolvency Law *(the "*Insolvency Guide*") on the supervision of the debtor by the insolvency representative and the various functions performed by the insolvency representative (see part two, chap. III, paras. 11-18 and 35). The Working Group may also wish to consider whether the term "insolvency proceedings", which is referred to in this definition and in articles 33 (priority chapter) and 91 (conflict-of-laws chapter), and the term "insolvency estate", which is referred in the definition of this term and the definition of the term "competing claimant", should also be defined in article 2 or explained in the draft Guide to Enactment by reference to the definitions of those terms contained in the* Secured Transactions Guide, *which are based on the relevant definitions of the Insolvency Guide.*]

(p) "Intangible asset" means all types of movable asset other than tangible assets;

(q) "Inventory" means tangible assets held by the grantor for sale or lease in the ordinary course of the grantor's business, including raw and semi-processed materials (work-in-process);

(r) "Knowledge" means actual knowledge;

(s) "Mass or product" means tangible assets that are so physically associated or united with other tangible assets that they have lost their separate identity;

(t) "Money" means currency authorized as legal tender by any State;

(u) "Non-intermediated securities" means securities other than securities credited to a securities account and rights in securities resulting from the credit of securities to a securities account;

(v) "Netting agreement" means an agreement between two or more parties that provides for one or more of the following:

(i) The net settlement of payments due in the same currency on the same date whether by novation or otherwise;

(ii) Upon the insolvency or other default by a party, the termination of all outstanding transactions at their replacement or fair market values, conversion of such sums into a single currency and netting into a single payment by one party to the other; or

(iii) The set-off of amounts calculated as set forth in subparagraph (ii) under two or more netting agreements;

(w) "Notice" means a communication in writing;

(x) "Notification of a security right in a receivable" means a notice by the grantor or the secured creditor informing the debtor of the receivable that a security right has been created in the receivable;

(y) "Possession" means the actual possession of a tangible asset by a person [directly or indirectly] or its representative, or by an independent person that acknowledges holding it for that person;

[*Note to the Working Group: The Working Group may wish to note that the bracketed words have been added pursuant to its decision to address situations in which the issuer of a negotiable document held it through various persons responsible to perform parts of a multimodal transport contract (A/CN.9/865, para. 62), and consider whether they should be retained.*]

(z) "Priority" means the right of a person in an encumbered asset in preference to the right of another person;

(aa) "Proceeds" means whatever is received in respect of an encumbered asset, including what is received as a result of sale or other transfer, lease, licence or collection of an encumbered asset, civil and natural fruits, insurance proceeds, claims arising from defects in, damage to or loss of an encumbered asset, and proceeds of proceeds;

(bb) "Receivable" means a right to payment of a monetary obligation, excluding a right to payment evidenced by a negotiable instrument, a right to payment of funds credited to a bank account and a right to payment under a non-intermediated security;

(cc) "Secured creditor" means[: (i)] a person that has a security right; [and (ii) a transferee in an outright transfer of a receivable;]

(dd) "Secured obligation" means an obligation secured by a security right[. The term does not include the obligation of the transferee to pay the price in an outright transfer of a receivable];

(ee) "Securities" means:

[(i)] An obligation of an issuer or any share or similar right of participation in an issuer or in the enterprise of an issuer that:

a. Is one of a class or series, or by its terms is divisible into a class or series; [and]

b. Is of a type dealt in or traded on a recognized market, or is issued as a medium for investment [and

(ii) The enacting State to specify any additional rights that should qualify as securities even if they do not satisfy the requirements expressed in subparagraphs (i) a. and (i) b.;]

(ff) "Securities account" means an account maintained by an intermediary to which securities may be credited or debited;

(gg) "Security agreement" means[: (i)] an agreement, regardless of whether the parties have denominated it as a security agreement, between a grantor and a secured creditor that provides for the creation of a security right; [and (ii) an agreement that provides for the outright transfer of a receivable;]

(hh) "Security right" means[: (i)] a property right in a movable asset that is created by an agreement to secure payment or other performance of an obligation, regardless of whether the parties have denominated it as a security right, and regardless of the type of asset, the status of the grantor or secured creditor, or the nature of the secured obligation; [and (ii) the right of the transferee in an outright transfer of a receivable;]

(ii) "Tangible asset" means all types of tangible movable asset. Except in articles [2, subparagraphs (b), (j), (q) and (s), 11, 32, 36-40, and …], the term includes money, negotiable instruments, negotiable documents and certificated non-intermediated securities; and

(jj) "Uncertificated non-intermediated securities" means non-intermediated securities not represented by a certificate.

Article 3. Party autonomy

1. Except for articles [4, 6, 9, 48, 49, 66, paragraph 4,* and 82-97], the provisions of this Law may be derogated from or varied by agreement.

2. An agreement referred to in paragraph 1 does not affect the rights or obligations of any person that is not a party to the agreement.

Article 4. General standards of conduct

A person must exercise its rights and perform its obligations under this Law in good faith and in a commercially reasonable manner.

Article 5. International origin and general principles

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

2. Questions concerning matter 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.

[*Note to the Working Group: The Working Group may wish to note that article 5, which has been added pursuant to its decision (A/CN.9/865, para. 47), is based on article 3 of the* UNCITRAL Model Law on Electronic Commerce, *article 4 of the* UNCITRAL Model Law on Electronic Signatures, *and art. 2A of the* UNCITRAL Model Law on International Commercial Arbitration.]

Chapter II. Creation of a security right

A. General rules

Article 6. Creation of a security right

1. A security right is created by a security agreement, provided that the grantor has rights in the asset to be encumbered or the power to encumber it.

2. A security agreement may provide for the creation of a security right in a future asset, but the security right in that asset is created only at the time when the grantor acquires rights in it or the power to encumber it.

* The reference to articles 48, 49 and 66, paragraph 4, is a reference to those articles as they appear in document A/CN.9/WG.VI/WP.65/Add.3.

3. Except as provided in paragraph 4, a security agreement must be [concluded in] [evidenced by][3] a writing that is signed by the grantor and:

(a) Identifies the secured creditor and the grantor;

(b) Except in the case of an agreement that provides for the outright transfer of a receivable, describes the secured obligation;

(c) Describes the encumbered assets as provided in article 9[; and

(d) Indicates the maximum monetary amount for which the security right may be enforced].[4]

4. A security agreement may be oral if the secured creditor has possession of the encumbered asset.

Article 7. Obligations that may be secured

A security right may secure any type of obligation, present or future, determined or determinable, conditional or unconditional, fixed or fluctuating.

Article 8. Assets that may be encumbered

A security right may encumber:

(a) Any type of movable asset, including future assets;

(b) Parts of assets and undivided rights in movable assets;

(c) Generic categories of movable assets; and

(d) All of a grantor's movable assets.

Article 9. Description of encumbered assets

1. The assets encumbered or to be encumbered must be described in the security agreement in a manner that reasonably allows their identification.

2. A description that indicates that the encumbered assets consist of all the grantor's movable assets, or of all the grantor's movable assets within a generic category satisfies the standard in paragraph 1.

Article 10. Right to proceeds and commingled funds

1. A security right in an encumbered asset extends to its identifiable proceeds.

2. Where proceeds in the form of funds credited to a bank account or money are commingled with other assets of the same kind:

(a) The security right extends to the commingled assets, notwithstanding that the proceeds have ceased to be identifiable;

(b) The security right in the commingled assets is limited to the value of the proceeds immediately before they were commingled; and

(c) If at any time after the commingling, the value of the balance credited to the bank account or of the commingled money is less than the value of the proceeds immediately before they were commingled, the obligation secured by the security right that is enforceable against the commingled assets is limited to the lowest value between the time when the proceeds were commingled and the time the security right in the proceeds is claimed.

Article 11. Tangible assets commingled in a mass or product

1. A security right in a tangible asset that is commingled in a mass of assets of the same kind or product extends to the mass or product.

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[3] The enacting State may wish to choose the option that best fits its legal system.

[4] The enacting State may wish to include this subparagraph in the draft Model Law if it determines that an indication of the maximum monetary amount for which the security right may be enforced would be helpful to facilitate lending from another creditor.

Option A

2. A security right that continues in a mass or product is limited to the value of the encumbered assets immediately before they became part of the mass or product.

Option B

2. A security right that continues in a mass is limited to the same proportion of the value of the mass as the value of the encumbered assets bore to the value of the mass at the time of commingling.

3. A security right that continues in a product is limited to the value of the encumbered assets immediately before they became part of the product.

[3][4.] Where more than one security right continues in the same mass or product and each was a security right in a separate tangible asset at the time of commingling, the secured creditors are entitled to share in the mass or product according to the ratio that the obligation secured by each security right bears to the sum of the obligations secured by all security rights.

Article 12. Extinguishment of a security right

A security right is extinguished upon the extinguishment of all present and future secured obligations, including conditional obligations, by payment or otherwise.

B. Asset-specific rules

Article 13. Contractual limitations on the creation of a security right

1. A security right in a receivable is effective as between the grantor and the secured creditor and as against the debtor of the receivable notwithstanding any agreement between the initial or any subsequent grantor and the debtor of the receivable or any subsequent secured creditor limiting in any way the grantor's right to create a security right.

2. Nothing in this article affects any obligation or liability of the grantor for breach of the agreement referred to in paragraph 1, but the other party to the agreement may not avoid the contract giving rise to the receivable or the security agreement on the sole ground of the breach of that agreement, or raise against the secured creditor any claim it may have as a result of such a breach against the grantor, as provided in article 58, paragraph 2.[*]

3. A person that is not a party to the agreement referred to in paragraph 1 is not liable for the grantor's breach of the agreement on the sole ground that it had knowledge of the agreement.

4. This article applies only to receivables:

(a) Arising from a 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 a 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) Arising upon net settlement of payments due pursuant to a netting agreement involving more than two parties.

[*Note to the Working Group: The Working Group may wish to consider whether the words "initial or any subsequent" in paragraph 1 should be deleted as the definition of the term "grantor" covers both an initial and a subsequent grantor-transferee. The Working Group may also wish to consider whether the word "avoid" in paragraph 2 should be replaced by the word "terminate".*]

[*] The reference to article 58, paragraph 2, is a reference to that article as it appears in document A/CN.9/WG.VI/WP.65/Add.3.

Article 14. Personal or property rights securing or supporting payment or other performance of an encumbered receivable or other intangible asset, or negotiable instrument

1. A secured creditor with a security right in a receivable or other intangible asset, or a negotiable instrument has the benefit of any personal or property right that secures or supports payment or other performance of the encumbered asset without a new act of transfer.

2. If the right referred to in paragraph 1 is transferable only with a new act of transfer, the grantor is obliged to create a security right in it in favour of the secured creditor.

Article 15. Right to payment of funds credited to a bank account

A security right in a right to payment of funds credited to a bank account is effective notwithstanding an agreement between the grantor and the depositary institution limiting in any way the grantor's right to create a security right.

[*Note to the Working Group: The Working Group may wish to note that the draft Guide to Enactment will explain that, under article 63(1) (in document A/CN.9/WG.VI/WP.65/Add.3), the depositary institution is not obliged to pay the secured creditor or provide any information about the bank account to any third party.*]

Article 16. Tangible assets covered by negotiable documents

A security right in a negotiable document extends to the tangible asset covered by the document, provided that the issuer of the document is in possession of the asset at the time the security right in the document is created.

Article 17. Tangible assets with respect to which intellectual property is used

A security right in a tangible asset with respect to which intellectual property is used does not extend to the intellectual property and a security right in the intellectual property does not extend to the tangible asset.

Chapter III. Effectiveness of a security right against third parties

A. General rules

Article 18. Primary methods for achieving third-party effectiveness

1. A security right in an encumbered asset is effective against third parties if a notice with respect to the security right is registered in the general security rights registry (the "Registry").

2. A security right in a tangible asset is also effective against third parties if the secured creditor has possession of the asset.

Article 19. Proceeds

1. If a security right in an asset is effective against third parties, a security right in any proceeds of that asset remains effective against third parties without any further act if the proceeds are in the form of money, receivables, negotiable instruments or rights to payment of funds credited to a bank account.

2. If a security right in an asset is effective against third parties, a security right in any type of proceeds of that asset other than the types of proceeds referred to in paragraph 1 is effective against third parties:

(a) For [a short period of time to be specified by the enacting State] days after the proceeds arise; and

(b) Thereafter, if the security right in the proceeds is made effective against third parties by one of the methods applicable to the relevant type of encumbered asset referred to in this chapter before the expiry of the time period provided in subparagraph (a).

[*Note to the Working Group: The Working Group may wish to consider whether an article should be inserted in this place of the draft Model Law to implement recommendation 44 of the* Secured Transactions Guide *providing for the automatic third-party effectiveness of a security right in tangible assets commingled in a mass or product (for creation issues, see art. 11, and for priority issues, see art. 40).*]

Article 20. Changes in the method for achieving third-party effectiveness

A security right that is effective against third parties remains effective against third parties despite a change in the method for achieving third-party effectiveness, provided that there is no time when the security right is not effective against third parties.

Article 21. Lapse in third-party effectiveness

If the third-party effectiveness of a security right lapses, it may be re-established, but the security right is effective against third parties only as of that time.

Article 22. Continuity in third-party effectiveness upon a change of the applicable law to this Law

1. If a security right is effective against third parties under the law of another State and this Law becomes applicable as a result of a change in the location of the encumbered asset or the grantor, whichever determines the applicable law under the provisions of chapter VIII, the security right remains effective against third parties under this Law until the earlier of:

(a) The time when third-party effectiveness would have lapsed under the law of the other State; and

(b) [A short period of time to be specified by the enacting State] days after the change and, thereafter, only if the third-party effectiveness requirements of this Law are satisfied before the expiry of that time period.

2. If the security right remains effective against third parties under paragraph 1, the time of third-party effectiveness is the time when it was achieved under the law of the other State.

[*Note to the Working Group: The Working Group may wish to consider whether a buyer or judgment creditor, who acquired a right in an encumbered asset when the security right was effective against third parties and thus acquired its right subject to the security right, would remain subordinated even after the security right ceased to be effective against third parties under subparagraph (a) or (b) of this article.*]

Article 23. Acquisition security rights in consumer goods

Option A

An acquisition security right in consumer goods is effective against third parties, other than a buyer or other transferee, upon its creation without any further step.

Option B

An acquisition security right in consumer goods [below a value to be specified by the enacting State] is effective against third parties upon its creation without any further act.

[*Note to the Working Group: The Working Group may wish to consider whether the exception to the rule in option A is too broad and should thus be limited to consensual transferees and/or transferees for value.*]

B. Asset-specific rules

Article 24. Rights to payment of funds credited to a bank account

A security right in a right to payment of funds credited to a bank account may also be made effective against third parties by:

(a) The creation of the security right in favour of the depositary institution;

(b) The conclusion of a control agreement; or

(c) The secured creditor becoming the account holder.

Article 25. Negotiable documents and tangible assets covered by negotiable documents

1. If a security right in a negotiable document is effective against third parties, the security right that extends to the asset covered by the document in accordance with article 16 is also effective against third parties.

2. During the period when a negotiable document covers an asset, a security right in the asset may also be made effective against third parties by possession of the document.

3. A security right in a negotiable document that was effective against third parties by possession of the document remains effective against third parties for [a short period of time to be specified by the enacting State] after the document has been returned to the grantor or other person for the purpose of ultimate sale or exchange, loading or unloading, or otherwise dealing with the assets covered by the document.

Article 26. Uncertificated non-intermediated securities

A security right in uncertificated non-intermediated securities may also be made effective against third parties by:

(a) The [notation of the security right] [entry of the name of the secured creditor as the holder of the securities] in the books maintained by or on behalf of the issuer for the purpose of recording the name of the holder of the securities;[5] or

(b) The conclusion of a control agreement.

[5] The enacting State may wish to choose the method that best suits its legal system.

(A/CN.9/WG.VI/WP.68/Add.1) (Original: English)

Note by the Secretariat on a draft model law on secured transactions

ADDENDUM

Contents

Chapter V. Priority of a security right

A. General rules

Article 28. Competing security rights

1. Subject to articles 29-40, priority among competing security rights created by the same grantor in the same encumbered asset is determined according to the order of third-party effectiveness.

2. Subject to [article 27 of the registry-related provisions] and articles 29-40, priority among competing security rights created by different grantors in the same encumbered asset is determined according to the order of third-party effectiveness.

3. The priority of a security right with respect to which a notice has been registered in the Registry before the conclusion of a security agreement or, in the case of a security right in a future asset, before the grantor acquires rights in the asset or the power to encumber it, is determined according to the time of registration.

Article 29. Competing security rights in the case of a change in the method of third-party effectiveness

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 period during which the security right is not effective against third parties.

Article 30. Competing security rights in proceeds

If a security right in proceeds of an encumbered asset is effective against third parties as provided in article 19, the priority of the security right in the proceeds is the same as the priority of the security right in that asset.

Article 31. Competing security rights in tangible assets commingled 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 11 and each security right is effective against third parties, the priority of each security right in the mass or product is the same as its priority in that asset 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 those security rights.

3. For the purposes of paragraph 2, the maximum value of a security right is the lesser of the value determined in accordance with article 11 and the amount of the secured obligation.

Article 32. Security rights competing with rights of buyers or other transferees, lessees or licensees of an encumbered asset

1. If an encumbered asset is sold or otherwise transferred, leased or licensed while the security right in that asset is effective against third parties, the buyer or other transferee, lessee or licensee acquires its rights subject to the security right except as provided in this article.

2. A buyer or other transferee of an encumbered asset acquires its rights free of the security right, if the secured creditor authorizes the sale or other transfer of the asset free of the security right.

3. The rights of a lessee or licensee 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 encumbered asset sold in the ordinary course of the seller's business acquires its rights free of the security right, provided that, at the time of the

conclusion of the sale agreement, 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 encumbered asset leased in the ordinary course of the lessor's business are not affected by the security right, provided that, at the time of the conclusion of the lease agreement, the lessee does not have knowledge that the lease violates the rights of the secured creditor under the security agreement.

6. Subject to the rights of a secured creditor with a security right in intellectual property in accordance with article 48, the rights of a non-exclusive licensee of an intangible encumbered asset licensed in the ordinary course of the licensor's business are not affected by the security right, provided that, at the time of the conclusion of the licence agreement, the licensee does not have knowledge that the licence violates the rights of the secured creditor under the security agreement.

7. If a buyer or other transferee of a tangible encumbered asset acquires its rights free of a security right, any subsequent buyer or other transferee also acquires its rights free of that security right.

8. If the rights of a lessee of a tangible encumbered asset or licensee of an intangible encumbered asset are not affected by the security right, the rights of any sub-lessee or sub-licensee are also unaffected by that security right.

Article 33. Impact of the grantor's insolvency on the priority of a security right

A security right that is effective against third parties under this Law at the time of the commencement of insolvency proceedings in respect of the grantor remains effective against third parties and retains the priority it had before the commencement of the insolvency proceedings, unless another claim has priority pursuant to [the insolvency law to be specified by the enacting State].

Article 34. Security rights competing with preferential claims

The following claims arising by operation of other law have priority over a security right that is effective against third parties but only up to [the enacting State to specify the amount for each category of claim]:

(a) […];

(b) […].[1]

Article 35. Security rights competing with rights of judgement creditors

1. Subject to the rights of acquisition secured creditors in accordance with article 38, the right of a creditor that has obtained a judgement or provisional order ("judgement creditor") has priority over a security right if, before the security right is made effective against third parties, the judgement creditor [has taken the steps to be specified by the enacting State for a judgement creditor to acquire rights in the encumbered asset or the steps referred to in the relevant provisions of other law to be specified by the enacting State].

2. If a security right is made effective against third parties before [or at the same time] the judgement creditor acquires its right in an encumbered asset by taking the steps referred to in paragraph 1, the security right has priority but that priority is limited to credit extended by the secured creditor:

(a) Within [a period of time to be specified by the enacting State] days from or before the time when the secured creditor received a notice from the judgement creditor that the judgement creditor has taken the steps referred to in paragraph 1; 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 secured creditor received a notice from the judgement creditor that the judgement creditor had taken the steps referred to in paragraph 1.

[1] The enacting State will not need this article if it does not have any preferential claims.

[*Note to the Working Group: The Working Group may wish to note that, in the case of future assets, a security right is created and thus made effective against third parties at the time when the grantor acquires rights in the assets or the power to encumber them (see art. 6, para. 2). Thus, the time when a security right becomes effective in future assets may coincide with the time when a judgment creditor takes the steps referred to in paragraph 1. The Working Group may wish to consider whether this issue should be addressed and, if so, how and where, in the draft Model Law or in the Guide to Enactment (see bracketed text in para. 2 above).*]

Article 36. Non-acquisition security rights competing with acquisition security rights[2]

Option A[3]

1. An acquisition security right in equipment has priority over a competing non-acquisition security right created by the grantor, provided that:

(a) The acquisition secured creditor has possession of the asset; or

(b) A notice with respect to the acquisition security right is registered in the Registry not later than the expiry of [a period of time to be specified by the enacting State] days after the grantor obtains possession of the asset.

2. An acquisition security right in inventory, intellectual property or rights of a licensee under a licence of intellectual property that is held by the grantor for sale or licence in the ordinary course of the grantor's business has priority over a competing non-acquisition security right created by the grantor, provided that:

(a) The acquisition secured creditor is in possession of the asset; or

(b) Before the grantor obtains possession of the asset:

(i) A notice with respect to the acquisition security right is registered in the Registry; and

(ii) A notice that is sent by the acquisition secured creditor is received by the non-acquisition secured creditor that has registered a notice in the Registry with respect to a security right created by the grantor in an asset of the same kind, stating that the acquisition secured creditor has or intends to acquire an acquisition security right and describing the asset sufficiently to enable the non-acquisition secured creditor to identify the asset that is the object of the acquisition security right.

3. An acquisition security right in consumer goods, intellectual property or rights of a licensee under a licence of intellectual property that is used or intended to be used by the grantor primarily for personal, family or household purposes has priority over a competing non-acquisition security right created by the grantor in the same asset [provided that the goods are below [a value to be specified by the enacting State]].

4. A notice that is sent in accordance with subparagraph 2(b)(ii) 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 assets of which the grantor obtains possession or which the grantor acquires not later than the expiry of [a period of time to be specified by the enacting State] days after the notice is received.

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[2] This section includes the unitary-approach recommendations of the *Secured Transactions Guide*. If a State prefers to adopt the non-unitary approach recommendations, it may wish to consider implementing instead recommendations 187-202 of the *Secured Transactions Guide*.
[In particular, States may wish to consider doing so if they have implemented regional legislation along the Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions (the "Late Payment Directive"), article 9 of which, provides that "Member States shall provide in conformity with the applicable national provisions designated by private international law that the seller retains title to goods until they are fully paid for if a retention of title clause has been expressly agreed between the buyer and the seller before the delivery of the goods".]

[3] A State may adopt option A or option B of this article.

Option B

1. An acquisition security right in equipment, inventory, or intellectual property or rights of a licensee under a licence of intellectual property that is held by the grantor for sale or licence in the ordinary course of the grantor's business has priority as against a competing non-acquisition security right created by the grantor, provided that:

(a) The acquisition secured creditor is in possession of the asset; or

(b) A notice with respect to the acquisition security right is registered in the Registry not later than the expiry of [a period of time to be specified by the enacting State] days after the grantor obtains possession of the asset.

2. An acquisition security right in consumer goods, intellectual property or rights of a licensee under a licence of intellectual property that is used or intended to be used by the grantor primarily for personal, family or household purposes has priority over a competing non-acquisition security right created by the grantor in the same asset.

[*Note to the Working Group: The Working Group may wish to note that the wording within square brackets in paragraph 3 of option A is intended to reflect the options of article 23.*]

Article 37. Competing acquisition security rights

1. Subject to paragraph 2, the priority between competing acquisition security rights is determined according to article 28.

2. An acquisition security right of a seller or lessor, or a licensor of intellectual property that was made effective against third parties not later than the expiry of the period specified in article 36, subparagraph 1(b) has priority over a competing acquisition security right of a secured creditor other than a seller or lessor, or a licensor of intellectual property.

Article 38. Acquisition security rights competing with the rights of judgement creditors

An acquisition security right that is made effective against third parties not later than the expiry of the period specified in article 36, subparagraph 1(b) has priority over the rights of a judgement creditor that would otherwise have priority under article 35.

Article 39. Acquisition security rights in proceeds[4]

Option A

1. In the case of an acquisition security right in equipment, a security right in proceeds has the same priority as the acquisition security right.

2. In the case of an acquisition security right in inventory, intellectual property or rights of a licensee under a licence of intellectual property that is held by the grantor for sale or licence in the ordinary course of the grantor's business, a security right in proceeds has the same priority as the acquisition security right, except where the proceeds take the form of receivables, negotiable instruments, or rights to payment of funds credited to a bank account.

3. The priority of a security right in proceeds referred to in paragraph 2 is conditional on the acquisition secured creditor notifying non-acquisition secured creditors [with a security right in the same kind of asset as the proceeds] that, before the proceeds arose, the acquisition secured creditor registered a notice with respect to assets of the same kind as the proceeds in the Registry.

Option B

Notwithstanding article 36, the priority of an acquisition security right in a tangible asset that is effective against third parties does not extend to its proceeds.

[4] A State may adopt option A of this article, if it adopts option A of article 36, or option B of this article, if it adopts option B of article 36.

Article 40. Acquisition security rights in tangible assets commingled in a mass or product competing with non-acquisition security rights in the mass or product

An acquisition security right in a tangible asset that continues in a mass or product and is effective against third parties has priority over a non-acquisition security right granted by the same grantor in the mass or product.

Article 41. Subordination

1. A person may at any time subordinate the priority of its rights under this Law in favour of any existing or future competing claimant without the need for the beneficiary to be a party to the subordination.

2. Subordination does not affect the rights of competing claimants other than the person subordinating its priority and the beneficiary of the subordination.

Article 42. Future advances, future encumbered assets and maximum amount

1. Subject to the rights of judgement creditors under article 35, the priority of a security right extends to all secured obligations, including obligations incurred after the security right became effective against third parties.

2. The priority of a security right covers all encumbered assets described in a notice registered in the Registry, irrespective of whether they are acquired by the grantor or come into existence before or after the time of registration.

[3. The priority of the security right is limited to the maximum amount set out in the notice registered in the Registry.][5]

Article 43. Irrelevance of knowledge of the existence of a security right

Knowledge of the existence of a security right on the part of a secured creditor does not affect its priority under this Law.

B. Asset-specific rules

Article 44. Negotiable instruments

1. A security right in a negotiable instrument that is made effective against third parties by possession of the instrument has priority over a security right in the instrument that is made effective against third parties by registration of a notice in the Registry.

2. A buyer or other consensual transferee of an encumbered negotiable instrument acquires its rights free of the security right that is made effective against third parties by registration of a notice in the Registry if the buyer or other consensual transferee:

(a) Qualifies as a [protected holder or other type of holder to be specified by the enacting State]; or

(b) [Takes possession of the negotiable instrument and gives value or takes any other act to be specified by the enacting State] without knowledge that the sale or other transfer is in violation of the rights of the secured creditor under the security agreement.

Article 45. Rights to payment of funds credited to a bank account

1. A security right in a right to payment of funds credited to a bank account that is made effective against third parties by the secured creditor becoming the account holder has priority over a competing security right that is made effective against third parties by any other method.

2. A security right in a right to payment of funds credited to a bank account with respect to which the secured creditor is the depositary institution has priority over a competing

[5] This provision will be necessary if the enacting State implements article 6, subparagraph 3(e) of the draft Model Law, and article 9, subparagraph (e) of the registry-related provisions.

security right made effective against third parties by any method other than by the secured creditor becoming the account holder.

3. A security right in a right to payment of funds credited to a bank account that is made effective against third parties by a control agreement has priority over a competing security right other than a security right of the depositary institution or a security right that is made effective against third parties by any method other than by the secured creditor becoming the account holder.

4. The order of priority among competing security rights in a right to payment of funds credited to a bank account that are made effective against third parties by the conclusion of control agreements is determined on the basis of the time of conclusion of the control agreements.

5. A depositary institution's right under other law to set off obligations owed to it by the grantor against the grantor's right to payment of funds credited to a bank account maintained with the depositary institution has priority as against a security right in the right to payment of funds credited to the bank account, except a security right that is made effective against third parties by the secured creditor becoming the account holder.

6. A transferee of funds from a bank account pursuant to a transfer initiated or authorized by the grantor acquires its rights free of a security right in the right to payment of funds credited to the bank account, unless the transferee has knowledge that the transfer violates the rights of the secured creditor under the security agreement.

7. Paragraph 6 does not adversely affect the rights of transferees of funds from bank accounts under [the relevant law to be specified by the enacting State].

Article 46. Money

1. A transferee that obtains possession of money that is subject to a security right acquires its rights free of the security right, unless that person has knowledge that the transfer violates the rights of the secured creditor under the security agreement.

2. This article does not adversely affect the rights of persons in possession of money under [the relevant law to be specified by the enacting State].

Article 47. Negotiable documents and tangible assets covered

1. Subject to paragraph 2, a security right in a tangible asset made effective against third parties by possession of the negotiable document covering that asset has priority over a competing security right made effective against third parties by any other method.

2. Paragraph 1 does not apply to a security right in a tangible asset other than inventory if the security right of the secured creditor not in possession of the negotiable document was made effective against third parties before the earlier of:

(a) The time that the asset became covered by the negotiable document; and

(b) The time of conclusion of an agreement between the grantor and the secured creditor in possession of the negotiable document providing for the asset to be covered by a negotiable document so long as the asset became so covered within [a short period of time to be specified by the enacting State] from the date of the agreement.

3. A transferee of an encumbered negotiable document under [the relevant law to be specified by the enacting State under which certain transferees of negotiable documents acquire their rights free of competing claims] acquires its rights free of a security right in the negotiable document and the tangible assets covered thereby that is made effective against third parties by registration of a notice in the Registry or by possession of the document or the assets covered thereby.

Article 48. Intellectual property

Article 32, paragraph 6, does not affect any rights that a secured creditor may have as an owner or licensor of intellectual property under [the relevant law relating to intellectual property to be specified by the enacting State].

Article 49. Non-intermediated securities

1. A security right in certificated non-intermediated securities made effective against third parties by the secured creditor's possession of the certificate has priority over a competing security right created by the same grantor in the same securities made effective against third parties by registration of a notice in the Registry.

2. A security right in uncertificated non-intermediated securities made effective against third parties by [[a notation of the security right] [entry of the name of the secured creditor as the holder of the securities] in the books maintained for that purpose by or on behalf of the issuer][6] has priority over a security right in the same securities made effective against third parties by any other method.

3. A security right in uncertificated non-intermediated securities made effective against third parties by the conclusion of a control agreement has priority over a security right in the same securities made effective against third parties by registration of a notice in the Registry.

4. The order of priority among competing security rights in uncertificated non-intermediated securities that are made effective against third parties by the conclusion of control agreements is determined on the basis of the time of conclusion of the control agreements.

5. This article does not adversely affect the rights of holders of non-intermediated securities under [the relevant law relating to the transfer of securities to be specified by the enacting State].

[*Note to the Working Group: The Working Group may wish to note that articles 44(2) and 47(3), while referring to other law for the terminology to be used, provide a substantive rule for transferees of encumbered negotiable instruments and negotiable documents to acquire their rights free of the security right, while article 49(5) essentially refers the matter to other law. The Working Group may thus wish to either consider following the same approach with respect to all three types of paper or, at least, reach an understanding as to how the draft Guide to Enactment should explain the different approaches followed.*]

[6] The enacting State may wish to insert here the method it chose in article 26.

(A/CN.9/WG.VI/WP.68/Add.2) (Original: English)

Note by the Secretariat on a draft model law on secured transactions

ADDENDUM

Contents

Chapter VIII. Conflict of laws[1]

A. General rules

Article 81. Law applicable to the mutual 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, the law governing the security agreement.

Article 82. Law applicable to a security right in a tangible asset

1. Except as provided in paragraphs 2 to 5 and article 96, the law applicable to the creation, effectiveness against third parties 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 priority of a security right in a tangible asset covered by a negotiable document made effective against third parties by possession of the 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.

3. The law applicable to the creation, third-party effectiveness and priority of 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.

4. Subject to paragraph 3, a security right in a tangible asset that is in transit at the time of its putative creation or intended to be relocated to a different State than the State in which it is located at the time of the putative 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 the putative creation of the security right or under the law of the State of the asset's ultimate destination, provided that the asset reaches that State within [a period of time to be specified by the enacting State] after the time of the putative creation of the security right.

Article 83. Law applicable to a security right in an intangible asset

Except as provided in articles 84 and 93-96, 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 84. Law applicable to a security right in receivables relating to immovable property

Notwithstanding article 83, in the case of a security right in a receivable arising from a sale or lease of, or secured by, immovable property, the law applicable to the priority of the security right in the receivable as against the right of a competing claimant that is registrable in the immovable property registry in which rights in the relevant immovable may be registered is the law of the State under whose authority the immovable property registry is maintained.

[*Note to the Working Group: The Working Group may wish to note that it may not be easy for a secured creditor with a security right in receivables to find out that they are secured by a mortgage and thus that a law other than the law of the grantor's location will apply to the priority competition with a mortgagee. The Working Group may, therefore, wish to consider whether the rule in article 84 should be limited to receivables arising from the sale or lease of immovable property or whether article 84 should be deleted altogether.*]

Article 85. Law applicable to the enforcement of a security right

The law applicable to issues relating to the enforcement of a security right:

[1] Depending on its legal tradition and drafting conventions, the enacting State may incorporate the conflict-of-laws provisions in its secured transactions law (at the beginning or at the end of it) or in a separate law (civil code or other law).

(a) In a tangible asset is the law of the State where [enforcement takes place] [the encumbered asset is located], except as provided in article 96; and

(b) In an intangible asset is the law applicable to the priority of the security right, except as provided in articles 93, 95 and 96.

[*Note to the Working Group: The Working Group may wish to consider the options within square brackets in subparagraph (a) (see A/CN.9/865, para. 90), noting that recommendation 218(a), on which article 85(a) is based, refers to the place of enforcement on the assumption that, in most cases, this place will be the place in which the encumbered asset is located (see* Secured Transactions Guide, *chap. X, paras. 66-71).*]

Article 86. Law applicable to a security right in proceeds of an encumbered asset

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 original encumbered asset of the same kind as the proceeds.

Article 87. Meaning of "location" of the grantor

For the purposes of the provisions of this chapter, the grantor is located:

(a) In the State in which it has its place of business;

(b) If the grantor has a place of business in more than one State, in the State in which the central administration of the grantor is exercised; and

(c) If the grantor does not have a place of business, in the State in which the grantor has his or her habitual residence.

Article 88. Relevant time for determining location

1. Except as provided in paragraph 2, references to the location of the encumbered asset or of the grantor in the provisions of this chapter refer:

(a) For creation issues, to the location at the time of the putative creation of the security right; and

(b) For third-party effectiveness and priority issues, to the location at the time the issue arises.

2. If the right of the secured creditor in an encumbered asset is created and made effective against third parties and the rights of all competing claimants are established before a change in the location of the asset or the grantor, references in the provisions of this chapter 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 89. Exclusion of *renvoi*

A reference in the provisions of this chapter to "the law" of a State as the law applicable to an issue refers to the law in force in that State other than its rules of private international law.

Article 90. Overriding mandatory rules and public policy (*ordre public*)

1. The provisions of this chapter do not prevent a court from applying overriding mandatory provisions of the law of the forum that apply irrespective of the law applicable under the provisions of this chapter.

2. The law of the forum determines when a court may or must apply or take into account overriding mandatory provisions of another law.

3. A court may only exclude the application of a provision of the law applicable under the provisions of this chapter if and to the extent that the result of such application would be manifestly incompatible with fundamental notions of public policy (*ordre public*) of the forum.

4. The law of the forum determines when a court may or must apply or take into account the public policy (*ordre public*) of a State other than the State the law of which would be applicable under the provisions of this chapter.

5. This article does not prevent an arbitral tribunal from applying or taking into account public policy (*ordre public*), or from applying or taking into account overriding mandatory provisions of a law other than the law applicable under the provisions of this chapter, if the arbitral tribunal is required or entitled to do so.

6. This article does not permit a court to displace the provisions of this chapter dealing with the law applicable to the third-party effectiveness and priority of a security right.

Article 91. Impact of commencement of insolvency proceedings on the law applicable to a security right

The commencement of insolvency proceedings in respect of the grantor does not displace the law applicable to a security right under the provisions of this chapter.

B. Asset-specific rules

Article 92. Law applicable to the relationship of third-party obligors and secured creditors

The law applicable to the relationship between the grantor of a security right in a receivable, negotiable instrument or negotiable document and the debtor of the receivable, the obligor under the negotiable instrument or the issuer of the negotiable document is the law applicable to:

(a) The relationship between the debtor of the receivable, the obligor under the instrument or the issuer of the document and the holder of a security right in the receivable, instrument or document;

(b) The conditions under which a security right in the receivable, instrument or document may be invoked against the debtor of the receivable, the obligor under the instrument or the issuer of the document, including whether an agreement limiting the grantor's right to create a security right may be asserted by the debtor of the receivable, the obligor under the instrument or the issuer of the document; and

(c) Whether the obligations of the debtor of the receivable, the obligor under the instrument or the issuer of the document have been discharged.

Article 93. Law applicable to a security right in a right to payment of funds credited to a bank account

1. Subject to article 94, the law applicable to the creation, effectiveness against third parties, priority and enforcement of a security right in a right to payment of funds credited to a bank account, as well as to the rights and obligations between the depositary institution and the secured creditor, is

Option A[2]

the law of the State in which the depositary institution with which the account is maintained has its place of business.

2. If the depositary institution has places of business in more than one State, the law applicable is the law of the State in which the branch maintaining the account is located.

[2] A State may adopt option A or B of this article.

Option B

the law of the State expressly stated in the account agreement as the State whose law governs the account agreement or, if the account agreement expressly provides that another law is applicable to all such issues, that other law.

2. The law of the State determined pursuant to paragraph 1 applies only if the depositary institution has, at the time of the conclusion of the account agreement, an office in that State that is engaged in the regular activity of maintaining bank accounts.

3. If the applicable law is not determined pursuant to paragraph 1 or 2, the applicable law is to be determined pursuant to [the default rules based on article 5 of the Hague Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary to be inserted here by the enacting State].

Article 94. Law applicable to the third-party effectiveness of a security right in certain types of asset by registration

If the law of the State in which the grantor is located recognizes registration of a notice as a method for achieving effectiveness against third parties of a security right in a negotiable instrument, negotiable document, right to payment of funds credited to a bank account or certificated non-intermediated security, the law of that State also is the law applicable to the third-party effectiveness of the security right by registration.

Article 95. Law applicable to a security right in intellectual property

1. The law applicable to the creation, effectiveness against third parties and priority of a security right in intellectual property is the law of the State in which the intellectual property is protected.

2. A security right in intellectual property may also be created under the law of the State in which the grantor is located and may also be made effective under that law against third parties other than another secured creditor, a transferee or a licensee.

3. The law applicable to the enforcement of a security right in intellectual property is the law of the State in which the grantor is located.

Article 96. Law applicable to a security right in non-intermediated securities

Option A

1. Subject to paragraph 2:

(a) The law applicable to the creation, effectiveness against third parties and priority of a security right in certificated non-intermediated securities is the law of the State in which the certificate is located; and

(b) The law applicable to the enforcement of a security right in certificated non-intermediated securities is the law of the State in which [the relevant act of] enforcement takes place.

[2. The law applicable to the effectiveness of a security right in certificated non-intermediated securities against the issuer is the law of the State under which the issuer is constituted.]

[2. The law applicable to the effectiveness of a security right in non-intermediated debt securities against the issuer is the law governing the securities.]

3. The law applicable to the creation, effectiveness against third parties, priority and enforcement of a security right in uncertificated non-intermediated securities, as well as to its effectiveness against the issuer, is the law of the State under which the issuer is constituted.

Option B

The law applicable to the creation, effectiveness against third parties, priority and enforcement of a security right in non-intermediated securities, as well as to its effectiveness against the issuer, is the law of the State under which the issuer is constituted.

Option C

1. The law applicable to the creation, effectiveness against third parties, priority and enforcement of a security right in non-intermediated equity securities, as well as to its effectiveness against the issuer, is the law under which the issuer is constituted.

2. The law applicable to the creation, the effectiveness against third parties, the priority and the enforcement of a security right in non-intermediated debt securities, as well as to its effectiveness against the issuer, is the law governing the securities.

[*Note to the Working Group: The Working Group may wish to note that articles 92, 93 and 96 use a different wording to describe the relationship between a third-party obligor and the secured creditor, and consider whether these articles should be revised to use the same wording, or the matter should be addressed in a comprehensive way in article 92.*]

Article 97. Law applicable in the case of a multi-unit State

1. If the law applicable to an issue is the law of a multi-unit State, subject to paragraph 3, references to the law of a multi-unit State are to the law of the relevant territorial unit and, to the extent applicable in that unit, to the law of the multi-unit State itself.

2. The relevant territorial unit referred to in paragraph 1 is to be determined on the basis of the location of the grantor or of the encumbered asset, or otherwise under the provisions of this chapter.

3. If 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.

Chapter IX. Transition

Article 98. Amendment and repeal of other laws

1. [The laws to be specified by the enacting State] are repealed.

2. [The laws to be specified by the enacting State] are amended as follows [the text of amendments to be specified by the enacting State].

Article 99. Transitional application of this Law

1. For the purposes of this chapter:

(a) "Prior law" means [the law applicable under the conflict-of-laws rules of the enacting State] that was in force immediately before the entry into force of this Law; and

(b) "Prior security right" means a right covered by a security agreement entered into before the entry into force of this Law that is a security right within the meaning of this Law and to which this Law would have applied if it had been in force at the time when the security right was created.

2. Except as otherwise provided in this chapter, this Law applies to all security rights within its scope, including prior security rights.

Article 100. Inapplicability of this Law to actions commenced before the entry into force of this Law

1. Prior law applies to a matter that is the subject of proceedings before a court or arbitral tribunal commenced before the entry into force of this Law.

2. If enforcement of a prior security right commenced before the entry into force of this Law, the enforcement may continue under the prior law.

Article 101. Creation of a prior security right

1. Prior law determines whether a prior security right was created before the entry into force of this Law.

2. A prior security right remains effective between the parties notwithstanding that its creation did not comply with the creation requirements of this Law.

Article 102. Third-party effectiveness of a prior security right

1. A prior security right that was effective against third parties under prior law continues to be effective against third parties under this Law until the earlier of:

(a) The time it would have ceased to be effective against third parties under prior law; and

(b) The expiration of [a period of time to be specified by the enacting State] after the entry into force of this Law.

2. A written agreement between the grantor and the secured creditor creating or providing for a prior security right is sufficient to constitute authorization by the grantor for the registration of a notice after the entry into force of this Law.

3. If the third-party effectiveness requirements of this Law are satisfied before the third-party effectiveness of a prior security right ceases in accordance with paragraph 1, the security right continues to be effective against third parties under this Law from the time when it was made effective against third parties under prior law.

4. If the third-party effectiveness requirements of this Law are not satisfied before the third-party effectiveness of a prior security right ceases in accordance with paragraph 1, the prior security right is effective against third parties only from the time it is made effective against third parties under this Law.

Article 103. Priority of a prior security right

1. The time to be used for determining priority of a prior security right is the time it became effective against third parties under prior law or, in the case of advance registration, became the subject of a registered notice under prior law.

2. The priority of a prior security right is determined by prior law if:

(a) The security right and the rights of all competing claimants arose before the entry into force of this Law; and

(b) The priority status of none of these rights has changed since the entry into force of this Law.

3. The priority status of a security right has changed only if:

(a) It was effective against third parties at the time when this Law entered into force, in accordance with article 102, paragraph 1, and ceased to be effective against third parties as provided in article 102, paragraph 4; or

(b) It was not effective against third parties under prior law at the time when this Law entered into force, and became effective against third parties under this Law.

Article 104. Entry into force of this Law

This Law enters into force [on the date or according to mechanism to be specified by the enacting State].

F. Note by the Secretariat on a draft guide to enactment of the draft model law on secured transactions

(A/CN.9/WG.VI/WP.69 and Add.1-2)

[Original: English]

Contents

I. Purpose of the Guide to Enactment

1. In preparing and adopting the [draft] UNCITRAL draft Model Law on Secured Transactions (the "Model Law"), the United Nations Commission on International Trade Law ("UNCITRAL" or the "Commission") was mindful of the fact that the Model Law would be a more effective tool for States modernizing their legislation and organizations assisting States, if background and explanatory information were provided to executive and legislative branches of Government to assist in their consideration of the Model Law for enactment ("Guide to Enactment").[1]

2. In addition, the Commission was aware that in the preparation of the Model Law it was assumed that the Model Law would be accompanied by such a guide. For example, it was decided in respect of a number of issues not to settle them in the Model Law but to address them in the Guide so as to provide guidance to States enacting the Model Law. So, the Guide also addresses or clarifies matters that were not settled in the Model Law but were referred to the Guide.[2]

3. The Commission agreed that the Guide to Enactment should be prepared and referred that task to the Working Group. In addition, the Commission agreed that the Guide to Enactment: (a) should be as short as possible; (b) include cross references to the UNCITRAL Legislative Guide on Secured Transactions (the "Secured Transactions Guide") and the other texts of the Commission on secured transactions; (c) focus on giving guidance to legislators rather than users of the text; (d) explain the thrust of each provision or section of the Model Law and any difference with the corresponding recommendations of the Secured Transactions Guide or the provisions of another UNCITRAL text on secured transactions; (e) give guidance to States with respect to matters referred to them and in particular explain

[1] *Official Records of the General Assembly, Seventieth Session, Supplement No. 17* (A/70/17) para. 215.
[2] Ibid.

each option offered in various articles of the Model Law to assist enacting States in choosing one of the options offered.[3]

4. The Commission was also aware of the likelihood that the Model Law would be used in a number of States with limited familiarity with the type of secured transaction covered by in the Model Law. So, the Guide, much of which is drawn from the *travaux préparatoires* of the Model Law, is also intended to be helpful to other users of the text, such as judges, arbitrators, practitioners and academics.

5. The information presented in this Guide is intended to briefly explain the thrust of each provision or section of the Model Law and its relationship with the corresponding recommendation(s) of the Secured Transactions Guide or other UNCITRAL texts on secured transactions, including the Supplement on Security Rights in Intellectual Property (the "Intellectual Property Supplement"). With respect to security rights in receivables, the recommendations of the Secured Transactions Guide and thus the provisions of the Model Law are based on the United Nations Convention on the Assignment of Receivables in International Trade (the "Assignment Convention"). The provisions of the Model Law dealing with the security rights registry (the "Registry") are also based on the UNCITRAL Guide on the Implementation of a Security Rights Registry (the "Registry Guide").

6. Mindful of the fact that the Secured Transactions Guide contains extensive commentary, the Commission decided that the Guide to Enactment should nevertheless be prepared. The reason was that the commentary of the Secured Transactions Guide had a different structure and did not contain a straightforward discussion of each recommendation but rather a discussion of the comparative advantages and disadvantages of various workable approaches with the recommendation being set out as a conclusion of that discussion. At the same time, as mentioned above, to avoid repetition, the Commission agreed that the Guide to Enactment should not repeat, but rather incorporate by reference, those comments contained in the Secured Transactions Guide that could assist in explaining a provision of the Model Law.

7. The Guide to Enactment was prepared by the Secretariat pursuant to the request of the Commission and is based on the considerations of the Working Group and the Commission. [It was considered and approved in principle by the Working Group at its twenty-eighth and twenty-ninth sessions (see […] respectively) and by the Commission at its forty-ninth session (see […]).]

II. Purpose and origin of the Model Law

A. Purpose of the Model Law

8. The Model Law is designed to assist States in implementing the recommendations of the Secured Transactions Guide, the Intellectual Property Supplement and the Registry Guide with respect to security rights in movable assets. The overall objective of those texts and the Model Law is to promote low-cost credit by enhancing the availability of secured credit (see Secured Transactions Guide, rec. 1, subpara. (a)). Like all those texts, the Model Law is intended to be useful to States that do not currently have efficient and effective secured transactions laws, as well as to States that already have workable laws but wish to modernize their laws and harmonize them with the laws of other States whose secured transactions laws are generally consistent with the recommendations of those texts (see Secured Transactions Guide, Introduction, para. 1).

9. The provisions of the Model Law are based on the recommendations of the Secured Transactions Guide, including the Intellectual Property Supplement. The provisions of the Model Law dealing with the security rights registry (the "Registry") are also based on the Registry Guide. The provisions of the Model Law on security rights in receivables are based on the recommendations of the Secured Transactions Guide, which in turn are based on the Assignment Convention.

[3] Ibid., para. 216.

B. Background

10. At its first session, in 1968, the Commission included the topic of security interests in goods in its future work programme.[4] From its third session in, 1970, to its thirteenth session, in 1980, the Commission discussed the topic[5] and, at its thirteenth session, in 1980, decided that no further work should be carried out and the subject should no longer be accorded priority as "the world-wide unification of the law of security interests in goods, for the reasons brought out in the discussions, was in all likelihood unattainable".[6] The main reason mentioned for this decision was that "the subject was too complex for there to be reasonable expectations that uniform rules might be developed" because: (a) the concepts of security interests and title retention were understood differently in various legal systems and it would be difficult for many legal systems to make the adjustments necessary to accommodate the different concepts; and (b) the topic of security interests was closely connected with other areas of law, such as bankruptcy law, which would have to be unified or harmonized for the proposed model law to be effective.[7]

C. Preparatory work and adoption

11. At its forty-third session, in 2010, the Commission had before it a note by the Secretariat on possible future work in the area of security interests (A/CN.9/702 and Add.1). The Commission agreed that four issues related to secured transactions law listed in document A/CN.9/702, paragraph 2(a)-(d), were interesting (non-intermediated securities, registration of security rights, a model law and a contractual guide on secured transactions) and should be retained on its future work agenda.[8] At the same time, in view of the limited resources available to it, the Commission agreed that it could not undertake work on all four issues at the same time and that, as a result, it should set priorities. In that regard, there was general agreement that priority should be given to work on registration of security rights in movable assets.

12. At that session, the Commission decided that Working Group VI should be entrusted with the preparation of a text on registration of security rights in movable assets as a matter of priority. It was also agreed that other topics, such as security rights in non-intermediated securities, a model law based on the recommendations of the Guide and a text dealing with the rights and obligations of the parties should be retained in the future programme of Working Group VI for further consideration by the Commission at a future session on the basis of notes to be prepared by the Secretariat within the limits of existing resources.[9] With respect to intellectual property licensing, the Commission requested the Secretariat to prepare a study, within existing resources, that would identify specific topics and discuss the desirability and feasibility of the Commission preparing a legal text with a view to removing specific obstacles to international trade in the context of intellectual property licensing practices.[10]

13. At its forty-fifth session, in 2012, the Commission decided that, upon its completion of the Registry Guide, Working Group VI should undertake work to prepare a simple, short and concise model law on secured transactions based on the Secured Transactions Guide and consistent with all texts prepared by UNCITRAL on secured transactions.[11] At that session, the Commission noted that the Working Group, at its twenty-first session, had agreed to propose to the Commission that the Working Group should develop a model law on secured transactions based on the general recommendations of the Secured Transactions Guide and consistent with all the texts prepared by UNCITRAL on secured transactions. It

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[4] Ibid., *Twenty-third Session, Supplement No. 16* (A/7216), paras. 40-48.
[5] For this project, see http://www.uncitral.org/uncitral/uncitral_texts/security_past.html.
[6] *Official Records of the General Assembly, Thirty-fifth Session, Supplement No. 17* (A/35/17), para. 28.
[7] Ibid., para. 26.
[8] *Official Records of the General Assembly, Sixty-fifth session, Supplement No. 17* (A/65/17), para. 264.
[9] Ibid., para. 268.
[10] Ibid., para. 273.
[11] Ibid., *Sixty-seventh Session, Supplement No. 17* (A/67/17), para. 105.

was also noted that the Working Group had agreed to propose to the Commission that the topic of security rights in non-intermediated securities should be retained on its work agenda and be considered at a future session (A/CN.9/743, para. 76).[12]

14. Recalling that, at its forty-third session, in 2010, the Commission had agreed that the topics mentioned above should be retained on the programme of the Working Group for further consideration, the Commission considered the proposals of the Working Group. It was widely felt that a simple, short and concise model law on secured transactions could usefully complement the Secured Transactions Guide and would be extremely useful in addressing the needs of States and in promoting implementation of the Secured Transactions Guide. While a concern was expressed that a model law might limit the flexibility of States to address the local needs of their legal traditions, it was generally viewed that a model law could be drafted in a sufficiently flexible manner to adapt to various legal traditions. Moreover, there was support for the idea that a model law could greatly assist States in addressing urgent issues relating to access to credit and financial inclusion, in particular for small and medium-sized enterprises.[13]

15. As to the topic of security rights in non-intermediated securities, it was widely felt that the topic merited further consideration. The Commission noted that non-intermediated securities, in the sense of securities other than those credited to a securities account, that were used as security for credit in commercial finance transactions were excluded from the scope of the Secured Transactions Guide (see recommendation 4, subparas. (c)-(e) of the Guide), the Unidroit Convention on Substantive Rules for Intermediated Securities (Geneva, 2009; the "Unidroit Securities Convention") and the Convention on the Law Applicable to Certain Rights in respect of Securities held with an Intermediary (The Hague, 2006; the "Hague Securities Convention").[14]

16. At its twenty-third session, in 2013, Working Group VI 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).[15] The Working Group developed the Model Law in 6 one-week sessions,[16] the final taking place in February 2016.

17. At its forty-seventh session, in 2014, the Commission expressed its satisfaction for the considerable progress achieved by the Working Group in its work and requested the Working Group to expedite its work so as to complete the draft Model Law, including certain definitions and provisions on non-intermediated securities (see A/CN.9/811), and to submit it to the Commission for adoption together with a guide to enactment as soon as possible.

18. At its forty-eighth session, in 2015, the Commission considered and approved the substance of article 26 of chapter IV of the Model Law and articles 1-29 of the draft Registry Act.[17] At that session, the Commission also agreed that a guide to enactment of the Model Law should be prepared and referred that task to the Working Group.[18]

19. In preparation for the forty-ninth session of the Commission, the text of the draft Model Law as approved by Working Group VI was circulated to all Governments and to interested international organizations for comment. At that session, the Commission had before it the reports of the Working Group on its twenty-eighth and twenty-ninth sessions, the comments received from Governments (A/CN.9/[…]), as well as the Model Law and the draft Guide to Enactment prepared by the Secretariat (A/CN.9/[…]). At that session, the Commission […].

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[12] Ibid., para. 101.

[13] Ibid., paras. 102 and 103.

[14] Ibid., para. 104.

[15] See A/CN.9/767, paras. 63 and 64.

[16] The reports of the Working Group on its work during these 6 sessions are contained in documents A/CN.9/796, A/CN.9/802, A/CN.9/830, A/CN.9/836, A/CN.9/865 and A/CN.9/871. During these sessions, the Working Group considered documents A/CN.9/WG.VI/WP.57 and Add.1 to 4, A/CN.9/WG.VI/WP.59 and Add.1, A/CN.9/WG.VI/WP.61 and Add.1 to 3, A/CN.9/WG.VI/WP.63 and Add.1 to 4, A/CN.9/WG.VI/WP.65 and Add.1 to 4, and A/CN.9/WG.VI/WP.68 and Add.1 and 2.

[17] *Official Records of the General Assembly, Seventieth Session, Supplement No. 17* (A/70/17), para. 214.

[18] Ibid., para. 216.

20. After consideration of the Model Law and the draft Guide to Enactment, the Commission adopted the following decision:

[…].

III. The Model Law as a tool for harmonizing laws

21. The Model Law is in the form of a legislative text that is recommended to States for incorporation into their national law. Unlike an international convention, model legislation does not require the State enacting it to notify the United Nations or other States that may have also enacted it. However, States are strongly encouraged to inform the UNCITRAL secretariat of any enactment of the new Model Law (or any other model law resulting from the work of UNCITRAL).

22. In incorporating the text of model legislation into its legal system, a State may wish to consider modifying or leaving out some of its non-fundamental provisions. In the case of a convention, the possibility of changes being made to the uniform text by the States parties (normally referred to as "declarations") is much more restricted; trade law conventions in particular usually either totally prohibit declarations or allow only very few, specified ones. The flexibility inherent in model legislation is particularly desirable in those cases where it is likely that the State would wish to make various modifications to the uniform text before it would be ready to enact it as national law. Some modifications may be expected, in particular when the uniform text is closely related to the national court and procedural system. This, however, also means that the degree of, and certainty about, harmonization achieved through model legislation is likely to be lower than in the case of a convention.

23. However, this relative disadvantage of model legislation may be balanced by the fact that the number of States enacting model legislation is likely to be higher than the number of States adhering to a convention. In order to achieve a satisfactory degree of harmonization and certainty, it is recommended that States make as few changes as possible in incorporating the new Model Law into their legal systems and that they take due regard of its basic principles, including the unitary and functional approach to secured transactions, party autonomy and the international origin of the Model Law. In general, in enacting the Model Law, it is advisable to adhere as much as possible to the uniform text in order to make the national law as transparent and familiar as possible for foreign users of the national law. The Model Law is sufficiently flexible in providing options and leaving a number of matters to States.

24. While it is recommended that the Model Law should be implemented in one law, depending on its legal tradition and drafting conventions, the enacting State may implement the registry-related provisions in its secured transactions law, or in another law, decree, regulation or another act adopted by a legislative or executive body, or in a combination thereof. Similarly, the conflict-of-laws provisions may be incorporated in the secured transactions law (at the beginning or at the end of it) or in a separate law (civil code or other law).

IV. Main features of the Model Law

A. Relationship of the Model Law with the secured transactions texts of UNCITRAL

25. The Secured Transactions Guide, including the Intellectual Property Supplement, and the Registry Guide contain detailed commentary and recommendations on all issues to be addressed in a modern law on secured transactions. However, they are long texts and States will need assistance in implementing their recommendations. Thus, the Model Law was prepared to complement those texts and to assist States in implementing their recommendations.

26. The Model Law reflects the policies embodied in the recommendations of those texts. The difference in the formulation between a provision of the Model Law and the relevant

recommendation is due to the legislative nature of the Model Law. Where there is a difference, it is explained in the remarks to the relevant provision of the Model Law below.

27. For reasons explained below, the Model Law also addresses matters that were not addressed in the Secured Transactions Guide (e.g. security rights in non-intermediated securities) or were not addressed in a recommendation of the Registry Guide (e.g. the effectiveness of amendment or cancellation notices that have not been authorized by the secured creditor). At the same time, the Model Law does not address certain matters that were addressed in the Secured Transactions Guide (e.g. security rights in the right to receive the proceeds under an independent undertaking).

B. Key objectives and fundamental policies of the Model Law

28. The overall objective of the Model Law is the same as that of the Secured Transactions Guide, that is, to promote low-cost credit by enhancing the availability of secured credit (see Secured Transactions Guide rec. 1 and Introduction, paras. 43-59). The fundamental policies of the Model Law are the same as those of the Secured Transactions Guide (see Secured Transactions Guide, Introduction, paras. 60-72). In enacting the Model Law, States may wish to consider issues of harmonization with existing law, legislative method, drafting technique and post-enactment acculturation (see Secured Transactions Guide, Introduction, paras. 73-89).

29. Depending on its drafting method and technique, the enacting State may wish to consider including the key objectives of the Model Law in a preamble or other statement of objectives of the law. That statement could be used for the purpose of the interpretation of, and the filling of gaps in, the Model Law (see paras. 74 and 75 below).

V. Assistance from the UNCITRAL secretariat

A. Assistance in drafting legislation

30. In the context of its training and assistance activities, the UNCITRAL secretariat assists States with technical consultations for the preparation of legislation based on the Model Law. The same assistance is brought to Governments considering legislation based on other UNCITRAL model laws (i.e. the UNCITRAL Model Law on Cross-Border Insolvency, the UNCITRAL Model Law on International Commercial Arbitration, the UNCITRAL Model Law on International Commercial Conciliation, the UNCITRAL Model Law on Electronic Commerce, the UNCITRAL Model Law on Electronic Signatures, the UNCITRAL Model Law on International Credit Transfers and the UNCITRAL Model Law on Public Procurement) or considering adhesion to one of the international trade law conventions prepared by UNCITRAL (e.g. the Assignment Convention).

31. Further information concerning the Model Law and other model laws and conventions developed by UNCITRAL, may be obtained from the UNCITRAL secretariat at the address below:

International Trade Law Division, Office of Legal Affairs
United Nations
Vienna International Centre
P.O. Box 500
A-1400 Vienna, Austria
Telephone: (+43-1) 26060-4060 or 4061
Telecopy: (+43-1) 26060-5813
Electronic mail: uncitral@uncitral.org
Internet home page: www.uncitral.org

B. Information on the interpretation of legislation based on the Model Law

32. The UNCITRAL secretariat welcomes comments concerning the Model Law and the Guide, as well as information concerning enactment of legislation based on the Model Law. Once enacted, the Model Law will be included in the CLOUT information system, which is used for collecting and disseminating information on case law relating to the conventions and model laws that have emanated from the work of UNCITRAL. The purpose of the system is to promote international awareness of the legislative texts formulated by UNCITRAL and to facilitate their uniform interpretation and application. The UNCITRAL secretariat publishes, in the six official languages of the United Nations, abstracts of decisions and arbitral awards. In addition, upon individual request and subject to any copyright and confidentiality restrictions, the UNCITRAL secretariat makes available to the public all decisions and arbitral awards on the basis of which the abstracts were prepared. The system is explained in a user's guide that is available from the UNCITRAL secretariat in hard copy (A/CN.9/SER.C/GUIDE/1/Rev.2) and on the above-mentioned Internet home page of UNCITRAL.

VI. Article-by-article remarks

Chapter I. Scope of application and general provisions

Article 1. Scope of application

33. Article 1 is based on recommendations 1-7 of the Secured Transactions Guide (see chap. I, paras. 1-4). It is intended to set out the various types of transaction and asset covered by the Model Law (see art. 1, paras. 1-4), as well as to clarify the relationship between the Model Law and other law (see art. 1, paras. 5 and 6). Generally, the Model Law has the same comprehensive scope of application as the Secured Transactions Guide and applies to any property right in any type of movable asset, such as equipment, inventory and receivables, which is created by an agreement and which secures payment or other performance of an obligation (see art. 1, para. 1, and definition of the term "security right" in art. 2, subpara. (hh)). However, there are a few differences between the scope of the Model Law and the scope of the Secured Transactions Guide.

34. Like the Secured Transactions Guide (see rec. 3) and the Assignment Convention (see art. 1, para. 1 and art. 2, subpara. (a)), the Model Law applies to outright transfers of receivables (see art. 1, para. 2). The main reasons for this approach are that outright transfers of receivables take place in the context of financing transactions and it is sometimes difficult to determine at the outset of a transaction whether an assignment will be held to be an outright or a security assignment (see Secured Transactions Guide, chap. I, paras. 25-31). The enacting State may wish to consider excluding from the scope of the Model Law certain types of outright transfers of receivables that are not financing transactions (e.g. outright transfers of receivables for collection purposes only or as part of a sale of the business out of which they arose; see para. 39 below.

35. In addition, unlike the Secured Transactions Guide which covered security rights in the right to receive payment under an independent undertaking (see rec. 2, subpara. (a)), the Model Law excludes from its scope security rights in both the right to receive and the right to request payment under an independent guarantee or letter of credit, whether commercial or standby (see art. 1, subpara. 3(a)). The reason is that financing practices relating to independent guarantees or letters of credit might be subject to special rules. In any case, States interested in addressing those practices in their general secured transactions law can always implement the relevant recommendations of the Secured Transactions Guide (recs. 27, 50, 107, 127, 176 and 212).

36. Moreover, like the Secured Transactions Guide (see rec. 4, subpara. (b)), the Model Law defers to law relating to intellectual property (see art. 1, subpara. 3(b)). This limitation may not be necessary if the enacting State has already coordinated or otherwise addressed the relationship between the Model Law and its law relating to intellectual property.

37. Also, unlike the Secured Transactions Guide (see rec. 4, subpara. (c)), the Model Law does not exclude from its scope security rights in non-intermediated securities (see art. 1, subpara. 3(c)). The reason is that such securities are part of commercial finance transactions and are not addressed in any other international trade law text (see Secured Transactions Guide, chap. 1, paras. 37 and 38).

38. Finally, the Model Law excludes payment rights under or from financial contracts governed by netting agreements (see art. 1, subpara. 3(d)), including foreign exchange transactions, because they raise complex issues that require special rules (see Secured Transactions Guide, chap. I, para. 39).

39. Combining the policy of recommendations 4, subparagraph (a), and 7 of the Secured Transactions Guide, subparagraph 3(e) permits the enacting State to exclude further types of asset (or transaction), provided, that other law governs matters addressed in the Model Law. The reason for this approach is to avoid inadvertently creating gaps in the law. In addition, subparagraph 3(e), provides guidance to States as to possible exclusions, referring to types of asset, such as ships and aircraft, that are subject to specialized secured transactions and asset-based registration regimes.

40. Similarly, while paragraph 4, is formulated somehow differently from recommendation 6 of the Secured Transactions Guide, there is no policy difference between the two rules. The policy may be explained as follows. In the case of a security right in an asset covered by the Model Law, the security right extends to its identifiable proceeds (see art. 10, para. 1). This rule applies even if the proceeds are of a type that is outside the scope of the Model Law (such as intermediated securities) except if a security right in those securities is subject to other law.

41. Paragraph 5, which is a reformulation of the rule in recommendation 2, subparagraph (b), of the Secured Transactions Guide along the lines of article 4, paragraph 4 of the Assignment Convention, is intended to preserve the application of consumer protection law. For example, under consumer-protection law, it may not be possible to create a security right in all present and future assets, employment benefits, at least up to a certain amount, or necessary household items of a consumer. Enacting States that do not have a developed consumer-protection law may need to consider whether enactment of the Model Law should be accompanied by the enactment of such special protections for consumers. It should also be noted that the Model Law already includes certain consumer-specific rules. For example, under article 23, an acquisition security right in consumer goods is effective against third parties upon its creation (see also para. 118 below).

42. In line with recommendation 18 of the Secured Transactions Guide, paragraph 6 is intended to preserve limitations to the creation or the enforceability of a security right in certain types of asset (such as employment benefits) that are based on other law (statutory or case law), if any. At the same time, it is intended to ensure that such limitations based on the sole ground that an asset is a future asset or a part or undivided interest in an asset are overridden (see art. 8, paras. (a) and (b)). However, paragraph 6 does not apply to contractual limitations (negative pledge agreements). The Model Law overrides explicitly contractual limitations with respect to receivables (see art. 13) or rights to payment of funds credited to a bank account (see art. 15). With respect to other types of asset, contractual limitations are overridden implicitly to the extent that the Model Law allows the owner of an asset to create a security right in that asset, even if the security or other agreement expressly restricts that right. The Model Law does not condition the creation, third-party effectiveness or priority of a security right in an asset on the grantor having the right to encumber it (art. 6, para. 1, refers only to the “power to encumber”).

43. Finally, unlike the Secured Transactions Guide, the Model Law does not apply to attachments to movable assets or immovable property. Thus, the Model Law does not include a provision along the lines of recommendation 5, which provides that, while the law recommended in the Secured Transactions Guide does not apply to immovable property, it does apply to attachments to immovable property. Enacting States are encouraged to include in their enactments of the Model Law provisions based on the relevant recommendations of the Secured Transactions Guide (see recs. 21, 25, 43, 48, 87, 88, 164, 165, 184, 195 and 196).

Article 2. Definitions and rules of interpretation

44. Article 2 contains definitions and rules of interpretation with respect to most key terms used in the Model Law. Other terms are defined explained in various articles of the Model Law. For example: (a) the term "registry" is defined in article [26];* and (b) the term "default" is defined in article [66, paragraph 1]. Article 2 is based on the terminology and rules of interpretation of the Secured Transactions Guide (see Secured Transactions Guide, Introduction, paras. 15-20). Rules of interpretation include the following: (a) the word "or" is not intended to be exclusive; (b) the singular includes the plural and vice versa; and (c) the words "include" or "including" are not intended to indicate an exhaustive list (see Secured Transactions Guide, Introduction, para. 17).

Acquisition security right

45. An acquisition security right is a security right that secures the grantor's obligation with respect to credit provided to enable the grantor to acquire a tangible asset (other than reified intangible assets), intellectual property and the rights of a licensee in intellectual property. This definition, in conjunction with the definition of "security right," results in retention-of-title transactions, conditional sales and financial leases being "acquisition security rights." For a security right to be an acquisition security right, the credit it secures has to be used for that purpose. Where a security right secures obligations in addition to the credit extended and used for the purpose of acquiring the encumbered asset, it is an ordinary security right to the extent of those additional obligations.

Bank account

46. To underline the distinction between a "bank account" and a "securities account", the Model Law defines the former term as "an account maintained by a [essentially, deposit taking institution] to which funds may be credited or debited" and the latter term as "an account maintained by an intermediary to which securities may be credited or debited" and the term "securities" in a manner that clearly excludes funds. The term "bank account", therefore, includes any checking or savings account. The term does not include a right against the bank to payment evidenced by a negotiable instrument. The enacting State may wish to consider including a definition of the term "bank" in its secured transactions law or rely for this purpose on other law.

Certificated non-intermediated securities

47. The term "represented" is broad enough to cover the approaches taken in different jurisdictions (e.g. "covered" or "embodied"). The term "certificate" means only a tangible document subject to physical possession. Thus, securities represented by an electronic certificate are uncertificated securities under the Model Law.

Competing claimant

48. A competing claimant may have a right in the same encumbered asset as original encumbered asset or as proceeds. Other creditors of the grantor with a right in the same encumbered asset include judgement creditors.

Consumer goods

49. Unlike the definition of the term "consumer goods" in the Secured Transactions Guide on which it is based, this definition includes the word "primarily" to ensure that goods used incidentally for personal, family or household purposes would not be treated as consumer goods.

Control agreement

50. While the effect of a control agreement is to render a security right effective against third parties (see art. 18), its purpose is to ensure the cooperation of the depositary institution or the issuer of securities in the enforcement of a security right. Unlike the definition of this term in the Secured Transactions Guide, on which it is based, this definition does not refer

* The reference is to this article as it appears in document A/CN.9/WG.VI/WP.65/Add.1.

to a "signed writing". This difference does not reflect a policy change but rather a decision that this matter should be left to the authorization requirements of the enacting State. A control agreement does not need to be in a single writing. It should be noted that any reference to a "writing" in the Model Law is intended to cover electronic equivalents (see Secured Transactions Guide, recs. 11 and 12).

Equipment

51. Unlike the definition of the term "equipment" in the Secured Transactions Guide on which it is based, this definition includes the word "primarily" to ensure that goods used incidentally by a person in the operation of its business would not be treated as equipment. This definition also includes the words "or intended to be used" to ensure that goods are treated as equipment as long as their intended use is in the operation of a person's business. This definition also includes the words "other than inventory" to draw a distinction between "equipment" and "inventory".

Insolvency representative

52. The term is sufficiently broad to include the person responsible for administering or supervising insolvency proceedings (see UNCITRAL Legislative Guide on Insolvency Law (the "Insolvency Guide"), part two, chap. III, paras. 11-18 and 35).

Intangible asset

53. The term includes receivables, rights to the performance of obligations other than receivables, rights to payment of funds credited to a bank account, and uncertificated non-intermediated securities.

Inventory

54. In States in which a licence of tangible assets is possible, the term "lease of tangible assets" in this definition includes the licence of tangible assets.

Money

55. The term "money", whose definition is based on a definition contained in the Secured Transactions Guide, is intended to include not only the national currency (i.e. banknotes and coins) of the enacting State but also foreign currency. No reference is made to currency "currently" authorized as a legal tender, because if currency is not "currently" authorized as a legal tender, it would not qualify as a legal tender. Rights to payment of funds credited to a bank account and negotiable instruments are recognized as distinct concepts in the Model Law and they are not included in the term "money".

Non-intermediated securities

56. The term "non-intermediated securities" refers to securities (i.e. shares and bonds) that are not held in a securities account. The term does not include the rights of an intermediary or a competing claimant in securities held by the intermediary directly against the issuer where equivalent securities are credited by the intermediary to a securities account in the name of the grantor.

Notification of a security right in a receivable

57. This definition is based on the definition of the term "notification of the assignment" and recommendation 118 of the Secured Transactions Guide. The requirement for the identification of the encumbered receivable and the secured creditor was moved to article [56, paragraph 1],* as it states a substantive rule on the effectiveness of a notification of a security right, a matter that is already addressed in that article.

Possession

58. […]

* The reference is to this article as it appears in document A/CN.9/WG.VI/WP.65/Add.3.

Priority

59. The definition of this term is based on the definition in article 5, subparagraph (g), of the Assignment Convention. Its difference with the definition of the term in the Secured Transactions Guide is due to the need to clarify that the person with priority may be a secured creditor or a competing claimant (and not just a person with a security right) and that priority provides a preference to the person with priority (and not just a competing claimant).

Proceeds

60. The term "proceeds" has the same meaning as in the Secured Transactions Guide. It is important to note that it covers both proceeds of the sale or other disposition of an encumbered asset by the grantor or a person that acquired the asset from the grantor and natural or civil fruits. The terms revenues, dividends and distributions, which were included in the definition of this term in the Secured Transactions Guide, have been deleted on the understanding that they are covered by the term "civil fruits".

61. The term is not limited to proceeds received by the grantor but includes proceeds received by a transferee of an encumbered asset. The reason for this approach is that, with such a limitation, even where a transferee acquired the asset subject to the security right, it could sell the asset further and keep the proceeds. In addition, transferees are anyway protected by other provisions of the Model Law (e.g. arts. 19, para. 2, and 32, para. 2). However, as a result of this approach, third-party transferees would have no way of finding out that the assets were proceeds of another asset in which somebody else had a security right. This would be the case at least where the proceeds are cash proceeds and thus a security right in such proceeds would be effective against third parties without the registration of an amendment notice (see art. 19, para. 1, and 27, option C, of the registry-related provisions in document A/CN.9/WG.VI/WP.65/Add.1). Thus, the enacting State may wish to consider limiting the term "proceeds" to proceeds received by the grantor or consider other ways to avoid a prejudice to third-party financiers (e.g. requiring the registration of an amendment notice in the case of a transfer of an encumbered asset; see art. 27, option A or B, of the registry-related provisions in document A/CN.9/WG.VI/WP.65/Add.1).

Receivable

62. Like the Secured Transactions Guide, the Model Law defines the term "receivable" in a broad way to cover even non-contractual receivables (e.g. tort receivables). To the contrary, in the Assignment Convention, the term "receivable" is limited to contractual rights to payment. Rights to payment evidenced by a negotiable instrument, rights to payment of funds credited to a bank account and rights to payment under a non-intermediated security are excluded as they are subject to special rules.

Secured obligation

63. The term "secured obligation" includes any obligation secured by a security right, including credit extended to cover the operational costs of a business or to pay the purchase price of goods. It includes not only obligations already incurred at the time of the extension of the credit but also obligations incurred thereafter, if the security agreement so provides. As in other UNCITRAL texts, in the Model Law the singular includes the plural and vice versa (see para. 44 above). So, for example, a reference to the secured obligation would be sufficient to cover all present and future secured obligations.

Securities

64. The definition of the term "securities" is narrower than the definition of that term in article 1, subparagraph (a), of the Unidroit Securities Convention. The reason is that, while a broad definition is appropriate for the purposes of that Convention, it is overly broad for the purposes of the Model Law and could result in subjecting security rights in receivables, negotiable instruments, money and other generic intangible obligations to the special rules applicable to security rights in non-intermediated securities (see A/CN.9/802, para. 74). In any case, each enacting State would need to coordinate the definition of the term "securities" in its secured transactions law with the definition of this term in its securities transfer law.

Securities account

65. The definition of this term is derived from article 1, subparagraph (c), of the Unidroit Securities Convention.

Tangible asset

66. The term "tangible asset" includes the terms consumer goods, equipment and inventory, terms that do not refer to subcategories of tangible assets but rather to the way in which particular tangible assets are used by the grantor. Thus, the same cars could qualify as "consumer goods", if they are used by the grantor for personal purposes, as "equipment", if they are used by the grantor in its business, or as "inventory", if the grantor happens to be a car dealer or manufacturer. The term also includes the reified intangible assets listed in the definition except for the purposes of certain articles that contain rules that are non-applicable to reified intangible assets.

International obligations of this State

67. The Model Law leaves to the enacting State the issue whether international treaties (such as the Convention on International Interests in Mobile Equipment and its Protocols) prevail over domestic law. For example, in the case of a conflict with an obligation of the enacting State arising out of any treaty or other form of agreement to which it is a party with one or more other States, the requirements of the treaty or agreement may prevail (see art. 3 of the UNCITRAL Model Law on Cross-Border Insolvency). Such an approach may need to be limited to international treaties that directly address matters governed by the Model Law. In other States, in which international treaties are not self-executing but require internal legislation in order to become enforceable law, such an approach might be inappropriate or unnecessary (see Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency, paras. 91-93).

Article 3. Party autonomy

68. Article 3 is based on article 6 of the Assignment Convention (the first sentence of which is based on art. 6 of the United Nations Convention on Contracts for the International Sale of Goods ("CISG")) and recommendation 10 of the Secured Transactions Guide. It is intended to reflect the principle that, with certain exceptions stated in the Model Law, parties are free to vary its effect as between them.

69. An agreement referred to in paragraph 1 may be not only between the secured creditor and the grantor but also between the secured creditor or the grantor and other parties whose rights may be affected by the Model Law, such as the debtor of an encumbered receivable, or between the secured creditor and a competing claimant.

70. The Model Law deals with relationships in which an agreement between two parties (e.g. the grantor and the secured creditor) might have or appear to have an impact on the rights of third parties (e.g. the debtor of a receivable). Thus, paragraph 2 reiterates the general principle that an agreement between two parties cannot affect the rights of a third party.

Article 4. General standards of conduct

71. Article 4 is based on recommendation 132 of the Secured Transactions Guide (see chap. VII, para. 15). Under article 4, any person must exercise all its rights and perform all its obligations under the Model Law (and not only the rights and obligations under the provisions of the enforcement chapter) in good faith and in a commercially reasonable manner. The violation of this obligation may result in liability in damages and other consequences that are left to the relevant law of the enacting State.

72. The concept of "commercial reasonableness" refers to the commercial transaction context and best practices. Meeting the specific standards referred to in other articles of the Model Law (e.g. art. [72, para. 4],[*] according to which notice is to be given within a short

[*] Reference is to this article as it appears in document A/CN.9/WG.VI/WP.65/Add.3.

period of time) should generally be construed as meeting the general standards of conduct referred to in this article.

73. Article 4 is listed in article 3 as a mandatory law rule. As a result, the duty to act in good faith and in a commercially reasonable manner cannot be waived or varied by agreement.

Article 5. International origin and general principles

74. Article 5 is inspired by article 7 of the United Nations Convention on Contracts for the International Sale of Goods (the "CISG") and based on article 3 of the UNCITRAL Model Law on Electronic Commerce, article 4 of the UNCITRAL Model Law on Electronic Signatures and article 2A of the UNCITRAL Model Law on International Commercial Arbitration. It is intended to limit the extent to which a national law implementing the Model Law would be interpreted only by reference to concepts of national law.

75. The Model Law is a tool for harmonizing secured transactions laws (see paras. 21-24 above). To promote harmonization, paragraph 1 provides that the provisions of a national law implementing the Model Law should be interpreted with reference to its international origin and the observance of good faith. Paragraph 2 is intended to provide guidance with respect to the filling of gaps in a law implementing the Model Law by reference to the general principles on which the Model Law is based (see paras. 28 and 29 above).

Chapter II. Creation of a security right

A. General rules

Article 6. Creation of a security right

76. Article 6 is based on recommendations 13-15 of the Secured Transactions Guide (see chap. II, paras. 12-37). Its purpose is to deal with the creation of a security right, and the form and the minimum content of a security agreement so as to achieve one of the key objectives of an effective and efficient secured transactions law, that is, to enable parties to obtain a security right in a simple and efficient manner (see Secured Transactions Guide, rec. 1, subpara. (c)). A security right is created by agreement, for the content of which there are no requirements other than those listed in paragraphs 3 and 4, and for the conclusion of which no terms of art need be used.

77. Under paragraph 1, an agreement is sufficient to create a security right, provided that at the time of the conclusion of the security agreement the grantor has either a right in the asset to be encumbered (e.g. in the case of assets existing at that time) or the power to encumber it (e.g. where there is an anti-assignment agreement, the creditor does not have the right to encumber a receivable, but it does have the power to do so). Paragraph 2 clarifies that, in the case of future assets (i.e. assets produced or acquired by the grantor after the conclusion of the security agreement; see definition in art. 2, subpara. (m)), the security right is created when the grantor acquires rights in them or the power to encumber them.

78. Paragraph 3 sets out the requirements that a written security agreement has to meet. Whether written or oral, a security agreement creates a security right but need not any special words to achieve that result (see art. 2, subpara. (gg)). From the two alternative wordings set out in paragraph 3 within square brackets, the enacting State may wish to select the one that is most fitting to its contract law. If the enacting State retains the words "concluded in", a security agreement that is not in written form is not effective. If the enacting State retains the words "evidenced in", a security agreement that is not in written form is in principle effective but its existence may only be evidenced by a writing.

79. Depending on what it considers as most efficient financing practices and on the assumptions of market participants, the enacting State may wish to consider whether to retain subparagraph 3(d). One approach is to retain subparagraph 3(c) to facilitate the grantor's access to secured financing from other creditors in situations where the value of the assets encumbered by the prior registered security right exceeds the maximum amount indicated in the notice. Another approach is to leave out subparagraph 3(d) to facilitate the grantor's access to credit by the first-registered secured creditor (for the comparative

advantages and disadvantages of the two approaches, see Secured Transactions Guide, chap. IV, paras. 92-97).

80. Under paragraph 4, where the secured creditor is in possession of the encumbered asset, there is no need for a written security agreement and thus the existence of a security agreement may be evidenced by any other means.

Article 7. Obligations that may be secured

81. Article 7 is based on recommendation 16 of the Secured Transactions Guide (see chap. II, paras. 38-48). It is primarily intended to ensure that future, conditional and fluctuating obligations may be secured. The main reason for this approach is to facilitate modern financing transactions, in the context of which disbursements are made at different times depending on the needs of the grantor (e.g. revolving credit facilities for the grantor to buy inventory). This approach does not preclude the introduction of special protections for grantors (e.g. setting a maximum amount for which the security right may be enforced; see art. 6, subpara. 3(d)).

Article 8. Assets that may be encumbered

82. Article 8 is based on recommendation 17 of the Secured Transactions Guide (see chap. II, paras. 49-57 and 61-70). It is primarily intended to ensure that future assets, parts of assets and undivided rights in assets, generic categories of assets, as well as all assets of a person, may become the subject of a security right.

83. It should be noted that the fact that future assets may be subject to a security right does not mean that statutory limitations to the creation or enforcement of a security right in specific types of asset (e.g. employment benefits in general or up to an amount) are overridden (see art. 1, para. 6).

84. It should also be noted that the fact that all assets of a grantor may be subject to a security right so as to maximize the credit that may be available and improve the terms of the credit agreement does not mean that other creditors of the grantor are necessarily unprotected. The protection of other creditors (within and outside insolvency proceedings) is a matter of other law and is foreseen in article 32.

Article 9. Description of encumbered assets

85. Article 9 is based on recommendation 14, subparagraph (d), of the Secured Transactions Guide (see chap. II, paras. 58-60). In view of their importance, the requirements for the description of encumbered assets in a security agreement are presented in a separate article. Article 9 is intended to ensure that a security right may be created in an asset or class of assets even if the description in the security agreement is generic, such as “all inventory” or “all receivables” (see Secured Transactions Guide, chap. II, paras. 58-60).

Article 10. Right to proceeds and commingled funds

86. Article 10 is based on recommendations 19 and 20 of the Secured Transactions Guide (see chap. II, paras. 72-89). Paragraph 1 is intended to ensure that, unless otherwise agreed by the parties (as this article is not listed in article 4 as a mandatory law rule), a security right in an asset automatically extends to its identifiable proceeds. The rationale for this rule is that it reflects the normal expectations of the parties and ensures that the secured creditor is sufficiently secured. Otherwise, a grantor could effectively deprive a secured creditor of its security either by disposing of those assets to a person who would take free of the security right or to a person from whom those assets could not easily be recovered.

87. By way of example, where the original encumbered asset is inventory, cash or receivables generated from the sale of the inventory are proceeds. If upon payment of the receivables the funds received are deposited in a bank account, the right to payment of the funds credited to the bank account are also proceeds of the inventory.

88. Paragraph 2 introduces an exception to the identifiability requirement in paragraph 1. A security right in an asset extends to its proceeds in the form of funds that are commingled

with other funds even though the funds that are proceeds cannot be identified separately from the funds that are not proceeds (see subparagraph 2(a)).

89. Subparagraph 2(b) limits that security right to the value of the proceeds immediately before they were commingled. So, if a sum of €1,000.00 is deposited in a bank account and at the time of enforcement the bank account has a balance of €2,500.00, the security right extends to the sum of €1,000.00.

90. Subparagraph 2(c) deals with situations in which the balance in the bank account fluctuates and, at some point of time, is less than the value of the proceeds deposited (e.g. less than €1,000.00). In such a case, the security right extends to the lowest value between the time when the proceeds were commingled and the time the security right in the proceeds is claimed. So, if in the example given, the balance in the account where the proceeds were deposited was €1,500.00, then it went down to €500.00 and at the time of enforcement was €750.00, the security right extends to €500.00 (i.e. the lowest intermediate balance).

Article 11. Tangible assets commingled in a mass or product

91. Article 11 is based on recommendations 22 and 91 of the Secured Transactions Guide (see chap. II, paras. 90-95 and 100-102, and chap. V, paras. 117-123). It accomplishes three related objectives. First, it transforms the security right in the original asset into a security right in the mass or product. Second, it limits the value of that security right by tying its value to the value of the original collateral in the mass or product. Third, it addresses situations in which more than one secured creditor has a claim to a mass or product as a result of a security right in its components.

92. Paragraph 1 is intended to ensure that a security right in assets commingled in a mass or product, even though they are no longer identifiable, continues in the mass or product.

93. Under option A, the security right is limited to the value of the encumbered assets immediately before they were commingled and became part of the mass. So, if a secured creditor has a security right in €100,000.00 worth of oil (100,000 litres at €1 per litre) that is commingled with €50,000.00 worth of oil in the same tank and thus the mass has €150,000.00 worth of oil, the security right encumbers €100,000.00 worth of oil.

94. Under option B, this rule applies to products (see paragraph 3). So, if encumbered flour worth €100.00 is commingled and bread worth €500.00 is produced, the security right is limited to €100.00. But option B (see paragraph 2) contains a different rule with respect to tangible assets commingled in a mass. In the example just given, the security right is limited to two thirds of the value of the oil (i.e. €100,000.00 worth of oil).

95. It should be noted that the word “limited” in paragraph 2 of option A and paragraphs 2 and 3 of option B means that, if the value of the encumbered asset commingled in the mass or product increases after commingling, the increased value is unencumbered. In other words, the secured creditor does not benefit from commodity price increases (see Secured Transactions Guide, chap. V, para. 118 ad finem). Similarly, the word “limited” does not address the question of what is the amount secured if the price of the encumbered asset decreases after commingling. The rule applicable to all types of encumbered asset applies to tangible assets commingled in a mass or product, namely that each party bears the risk of decreases of the price of the encumbered asset. Thus, in the example given above, if, at the time of enforcement, the value of the mass is only €75,000.00 because of a drop on oil prices (€0.5 per litre), the secured creditor should be able to enforce its security right against only €50,000.00 worth of oil. If the value of the oil goes up (€1.5 per litre), the secured creditor should not benefit from it as its claim is sufficiently secured and thus should be able to enforce its security right against €100,000.00 worth of oil (not €150,000.00).

Article 12. Extinguishment of a security right

96. Article 12 deals with the extinguishment of a security right, which triggers the obligation of a secured creditor to return an encumbered asset or register an amendment or

cancellation notice (see arts. 49* and 21, subpara. 2(c), of the registry-related provisions**). Article 12 refers to full payment or other satisfaction of all present and future secured obligations, including conditional obligations. This means that a security right is extinguished only where there is full payment or other satisfaction of the secured obligation and there is no commitment of the secured creditor to extend further credit. As a result, the security right is not extinguished where temporarily there is a zero balance but there is an existing commitment of the secured creditor to extend further credit (e.g. on the basis of revolving credit arrangement).

B. Asset-specific rules

Article 13. Contractual limitations on the creation of a security right

97. Article 12 is based on recommendation 24 of the Secured Transactions Guide (see chap. II, paras. 106-110 and 113), which in turn is based on article 9 of the Assignment Convention. Paragraph 1 provides that an agreement limiting the grantor's right to create a security right in the receivables listed in paragraph 4 (often referred to as "trade receivables") does not invalidate a security right created in violation of such an agreement. The rationale underlying this approach is to facilitate the use of receivables as security for credit, which is in the interest of the economy as a whole, without unduly interfering with party autonomy. This rule does not affect statutory limitations to the creation or enforcement of a security right in certain types of receivable (e.g. consumer or sovereign receivables; see art. 1, paras. 5 and 6).

98. Paragraph 2 makes it clear that paragraph 1 goes no further than what it says (the assignment is effective notwithstanding the contractual provision to the contrary), but paragraph 1 does not excuse the assignor from liability for damages caused by breach of that contractual provision. Thus, under paragraph 2, if the debtor of the receivable has sufficient negotiating power to force the grantor to accept the inclusion of a "no-assignment clause" in their agreement and a breach of that agreement by the grantor results in a loss to the debtor of the receivable, the grantor is liable to damages under contract law. However, the debtor of the receivable may not avoid the contract because of that breach or raise against the secured creditor (assignee) any claim it may have against the grantor for that breach. In addition, under paragraph 3, a secured creditor that accepts a receivable as security for credit is not liable for the grantor's breach just because it had knowledge of the "no-assignment clause".

99. As a result of the rules in paragraphs 1-3, a secured creditor does not have to examine each contract from which a receivable might arise to determine whether it contains an anti-assignment clause. This facilitates secured transactions in which security is created in bulk receivables and transactions in which future receivables are involved.

100. Paragraph 4 limits the scope of the rule in paragraph 1 to broadly defined trade receivables. It does not apply to so-called "financial receivables", because, where the debtor of the receivable is a financial institution, even partial invalidation of an anti-assignment clause could affect obligations undertaken by the financial institution towards third parties (see Secured Transactions Guide, para. 108).

101. Article 13 applies also to anti-assignment agreements limiting the creation of a security right in any personal or property rights securing or supporting payment or other performance of an encumbered receivable or other intangible asset, or negotiable instrument (see art. 14).

Article 14. Personal or property rights securing or supporting payment or other performance of an encumbered receivable or other intangible asset, or negotiable instrument

102. Paragraph 1 reflects the thrust of recommendation 25 of the Secured Transactions Guide (see chap. II, paras. 111-122). It is intended to ensure that a security right in a

* Reference is made to article 49 as it appears in document A/CN.9/WG.VI/WP.65/Add.3.

** Reference is made to article 21 of the registry-related provisions as it appears in document A/CN.9/WG.VI/WP.65/Add.1.

receivable or another of the assets described in paragraph 1 automatically extends to any personal right that supports payment or other performance of the receivable (e.g. guarantee) and any property right that secures such payment or other performance (e.g. a security right in another asset).

103. Under paragraph 2, which reflects the thrust of article 10 of the Assignment Convention, where the rights securing or supporting payment of a receivable are independent rights (i.e. they are transferable only with a new act of transfer), the grantor is obliged to create a security right in them in favour of the secured creditor.

104. This article does not affect a right in immovable property that under other law is transferable separately from the obligation that the right in the immovable property secures. In addition, this article does not affect any duties of the grantor to the debtor of the receivable or other intangible asset, or the obligor of the negotiable instrument. Moreover, to the extent that the automatic effects of paragraph 1 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 that is not covered in this Law (e.g. registration of a mortgage in the relevant immovable property registry).

Article 15. Right to payment of funds credited to a bank account

105. Article 15 is based on recommendation 26 of the Secured Transactions Guide (see chap. II, paras. 123-125). It is intended to implement article 13 with respect to rights to payment of funds credited to a bank account. As a result of article 63,[*] a security right may be created in a right to payment of funds credited to a bank account without the consent of the depositary institution but the depositary institution is not obliged to pay the secured creditor or respond to requests of information by the secured creditor.

Article 16. Tangible assets covered by negotiable documents

106. Article 14 is based on recommendation 28 of the Secured Transactions Guide (see chap. II, para. 128). The purpose is to follow existing law in which a negotiable document is treated as a reified right to the tangible assets it covers, so there is no need separately to create a security right in those tangible assets if there is a security right in the document (e.g. inventory or crops deposited in a warehouse for which the warehouse operator issued a negotiable warehouse receipt).

107. In view of the definition of the term “possession” in article 2, subparagraph (y), possession of the issuer of a negotiable document includes possession by its representative or a person acting on behalf of the issuer (including in the context of multi-modal transport contracts). A security right in a negotiable document extends to the tangible assets covered by the document and will continue to exist even after the document no longer covers the assets. However, effectiveness against third parties through possession of the document applies only as long as the document covers the assets and lapses once they are released by the issuer (see article 25, para. 2).

Article 17. Tangible assets with respect to which intellectual property is used

108. Article 17 is based on recommendation 243 of the Intellectual Property Supplement (see paras. 108-112). It is intended to ensure that, unless otherwise agreed, a security right in a tangible asset does not automatically extend to the intellectual property right contained therein, and that a security right in an intellectual property right does not automatically extend to the tangible asset with respect to which the intellectual property right is used (e.g. the copyrighted software included in a personal computer or the trademark on an inventory of clothes).

[*] Reference is made to this article as it appears in document A/CN.9/WG.VI/WP.65/Add.3.

Chapter III. Effectiveness of a security right against third parties

A. General rules

Article 18. Primary methods for achieving third-party effectiveness

109. Article 18 is based on recommendation 32 of the Secured Transactions Guide (see chap. III, paras. 19-86). It is intended to set out the primary methods for achieving third-party effectiveness (i.e. registration in the general security rights registry and possession of a tangible asset by the secured creditor). Other methods (e.g. control and notation in the books of an issuer) are set out in the asset-specific provisions of this chapter.

110. States that have specialized registries with respect to assets covered by the Model Law (e.g. patent or trademark registries) or title notation systems (e.g. with respect to motor vehicles) may wish to consider whether registration with respect to security rights in those types of asset should take place in the security rights registry, in a specialized registry or both. If registration may take place in both (or, if a security right may also be noted on a title certificate), the enacting State may wish to ensure coordination (with national or international specialized registries), including by way of linking the relevant registries so that information entered in one will also become available in the other and by way of appropriate priority rules (see Secured Transactions Guide, chap. IV, para. 117, and Registry Guide, paras. 64-66). With respect to security interests in attachments to immovable property and receivables arising from sale or lease of, or secured by, immovable property, the enacting State may wish to consider issues of coordination with immovable property registries (see Registry Guide, paras. 67-69). Finally, the enacting State may wish to consider issues of coordination among national security rights registries (Registry Guide, para. 70).

Article 19. Proceeds

111. Article 19 is based on recommendations 39 and 40 of the Secured Transactions Guide (see chap. III, paras. 87-96). It is intended to determine the circumstances in which the security right in proceeds that is provided for in article 10 is effective against third parties.

112. Under paragraph 1 a security right in proceeds in the form of money, receivables, negotiable instruments or rights to payment of funds credited to a bank account is automatically effective against third parties without the need for any further action by the secured creditor. For example, upon the sale of encumbered inventory, any receivable, cash, bank deposit, or check generated by the sale are proceeds of the originally encumbered inventory.

113. Unlike recommendation 39, on which this article is based, paragraph 1 does not refer to the description of the proceeds in the notice. This change is a drafting change and does not constitute a change of policy. The reason for this change is that, once the proceeds are described in the notice (in line with the security agreement), they constitute original encumbered assets, not proceeds, and article 16 is sufficient in dealing with the third-party effectiveness of a security right in those assets.

114. For proceeds other than those covered in paragraph 1, paragraph 2 provides that, if a security right in an asset was effective against third parties, the security right in its proceeds is effective against third parties for a short period of time and thereafter only, if before the expiry of that short period, the security right in the proceeds is made effective against third parties by one of the methods set out in article 18 or the asset-specific provisions of this chapter.

Article 20. Changes in the method for achieving third-party effectiveness

115. Article 20 is based on recommendation 46 of the Secured Transactions Guide (see chap. III, paras. 120 and 121). It is intended to ensure that a security right made effective by one method may later be made effective by another method, and that third-party effectiveness is continuous as long as there is no time gap between the two methods.

Article 21. Lapse in third-party effectiveness

116. Article 21 is based on recommendation 47 of the Secured Transactions Guide (see chap. III, paras. 122-127). It is intended to ensure that, if third-party effectiveness lapses, it may be re-established. In such a case, third-party effectiveness dates only form the time it is re-established.

Article 22. Continuity in third-party effectiveness upon a change of the applicable law to this Law

117. Article 22 is based on recommendation 45 of the Secured Transactions Guide (see chap. III, paras. 117-119). Under paragraph 1, if the law enacting the Model Law becomes applicable as a result, for example, of a change in the location of the encumbered asset or the grantor, a security right that was effective against third parties under the previously applicable law remains effective against third parties under the law enacting the Model Law for a short period of time, unless its third-party effectiveness under the initially applicable law has already lapsed. Thereafter, the security right is effective against third parties only if, before the expiry of that period, it is made effective against third parties under the relevant provisions of the law enacting the Model Law. Under paragraph 2, if the third-party effectiveness of a security right does not lapse, it dates back to the time it was first achieved under the previously applicable law.

Article 23. Acquisition security rights in consumer goods

118. Article 23 is based on recommendation 179 of the Secured Transactions Guide (see chap. IX, paras. 125-128). An acquisition security right in consumer goods is automatically effective against third parties [except as against buyers or other transferees of the consumer goods] [if the consumer goods are below a value to be specified by the enacting State]. This limitation is intended to [require registration for a security right in consumer goods to be effective against buyers or other transferees of consumer goods] [to exempt from registration only low-value consumer transactions]. If registration in a specialized registry or notation in a title certificate is also possible, such an acquisition security right in consumer goods should not have the special priority of an acquisition security right over a security right registered in a specialized registry. This approach would be necessary to avoid any interference with any specialized registration system.

B. Asset-specific rules

Article 24. Rights to payment of funds credited to a bank account

119. Article 24 is based on recommendation 49 of the Secured Transactions Guide (see chap. III, paras. 138-148). It adds to the primary methods of article 16 three asset-specific methods of achieving third-party effectiveness of a security right in a right to payment of funds credited to a bank account. First, if the secured creditor is the depositary institution, no additional action is required for a security right to become effective against third parties. Second, the security right is effective against third parties upon conclusion of a control agreement (see art. 2, subpara. (g)(ii)) among the grantor, the secured creditor and the depositary institution. Third, the security right is effective against third parties if the secured creditor becomes the account holder). The exact action required for the secured creditor to become the account holder depends on the banking law and practice of the enacting State.

Article 25. Negotiable documents and tangible assets covered by negotiable documents

120. Article 25 is based on recommendations 51-53 of the Secured Transactions Guide (see chap. III, paras. 154-158). It addresses the relationship between the third-party effectiveness of a security right in a negotiable document and the third-party effectiveness of a security right in the tangible assets covered by the document.

121. Under paragraph 1, if a security right in a negotiable document (which extends to the assets covered by the document under article 16) is effective against third parties, the security right in the assets covered by the document is also effective against third parties.

Under paragraph 2, possession of the document is sufficient to make the security right in the assets covered by the document effective against third parties. Under paragraph 3, the security right referred to in paragraph 2 remains effective against third parties for a short period of time after the secured creditor gives up possession of the document for the purpose of enabling the grantor to dealing with the assets covered by it.

122. Enacting States that are parties to the Convention Providing a Uniform Law For Bills of Exchange and Promissory Notes (Geneva, 1930; the "Geneva Uniform Law") may wish to consider including in the asset-specific section of the creation or third-party effectiveness chapter a provision that a security right in a negotiable instrument may be created and made effective against third parties by delivery and endorsement containing the statement "value in security" ("valeur en garantie"), "value in pledge" ("valeur en gage"), or any other statement implying a security right (see art. 19 and art. 22 of the United Nations Convention on International Bills of Exchange and International Promissory Notes (the "Bills and Notes Convention"), which contains a similar rule). An enacting State that decides to do so will have to adjust article 28 of the Model Law to deal with the comparative priority of such a security right.

Article 26. Uncertificated non-intermediated securities

123. Article 26 is a new provision that does not correspond to any of the recommendations of the Secured Transactions Guide, which did not apply to any type of securities (see rec. 4, subpara. (c)). It addresses the methods, other than registration of a notice, by which a security right in uncertificated non-intermediated securities may be made effective against third parties. First, the security right may be made effective against third parties by notation or entry of the name of the secured creditor as the holder of the securities in those books. Second, as in the case of a security right in a right to payment of funds credited to a bank account, the conclusion of a control agreement with respect to the encumbered securities will result in the security right in those securities being effective against third parties.

124. Enacting States parties to the Geneva Uniform Law may wish to include in the asset-specific section of the creation or third-party effectiveness chapter a provision that a security right in non-intermediated securities may be created and made effective against third parties by delivery and endorsement containing the statement "value in security" ("valeur en garantie"), "value in pledge" ("valeur en gage"), or any other statement implying a security right (see art. 19 of the Geneva Uniform Law and art. 22 of the Bills and Notes Convention, which contains a similar rule). An enacting State that decides to do so will have to adjust article 49 of the Model Law to deal with the comparative priority of such a security right.

(A/CN.9/WG.VI/WP.69/Add.1) (Original: English)

Note by the Secretariat on a draft guide to enactment of the draft model law on secured transactions

ADDENDUM

Contents

Chapter V. Priority of a security right

A. General rules

Article 28. Competing security rights

1. Article 28 is based on recommendation 76 of the Secured Transactions Guide (see chap. V, paras. 45-54). It addresses two related topics. First, it addresses priority between competing security rights in the same encumbered asset in cases in which the security rights were granted by the same grantor. Second, it addresses priority between competing security rights in the same encumbered asset in cases in which the security rights were granted by different grantors. The first situation is more common. The second situation can occur, for example, if Grantor A creates a security right in its equipment in favour of Secured Creditor ("SC") 1 and then transfers the equipment to Transferee B who creates a security right in it in favour of SC 2.

2. As a general matter, priority between competing security rights is determined by the order in which the security rights became effective against third parties. This rule is reflected in paragraphs 1 and 2. Most often, third-party effectiveness of a security right is achieved by registration of a notice in the security rights registry (see art. 18). Because registration of a notice may precede creation of the security right (see art. 5 of the registry-related provisions[*]), a special rule for that circumstance is provided in paragraph 3. Paragraphs 1 and 2 also apply, however, in the wide variety of situations in which a method of third-party effectiveness other than registration of a notice is utilized, subject to certain exceptions (see paras. 29-40 below).

3. Under paragraph 3, a special rule is provided for cases in which one or both of the competing security rights was made effective against third parties by registration of a notice that preceded creation of the security right. Under the provisions of chapter II, such a security right is not effective against third parties until it has been created, but under paragraph 3 the time of the pre-registration is relevant for determining priority. In particular, paragraph 3 provides that the priority of that security right as against other security rights is determined by the time of registration rather than the time of third-party effectiveness. This means that in applying the rule in paragraph 1 or paragraph 2 to a priority determination between security rights one or both of which was the subject of a pre-registered notice, the time of such pre-registration, rather than the later date of third-party effectiveness (i.e., the time at which the security right was created), should be used.

4. To illustrate this rule, assume that: (a) on Day 1, Grantor authorized SC 1 to register a notice listing Grantor as the grantor and describing the encumbered assets as all present and future equipment of Grantor and SC 1 registered the notice; (b) on Day 2, Grantor borrowed money from SC 2 and granted SC 2 a security right in all of Grantor's present and future equipment and SC 2 registered a notice with respect to this security right; and (c) on Day 3, Grantor borrowed money from SC 1 and granted SC 1 a security right in all of Grantor's present and future equipment. In this case, the security right of SC 2 became effective against third parties before the security right of SC 1 (because SC 1's security right did not become effective against third parties until it was created). Yet, as a result of the rule in paragraph 3, in determining the priority between the security rights of SC 1 and SC 2 under paragraph 1, the time of registration of SC 1's notice, rather than the later date on which SC 1's security right became effective against third parties, is used. Thus, SC 1 has priority over SC 2 because SC 1's registration of the notice (on Day 1) occurred before the security right of SC 2 became effective against third parties.

5. When combined with the rules in paragraphs 1 and 2, paragraph 3 results in the following priorities: (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; and (b) 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 by

[*] Reference is to this article as it is contained in document A/CN.9/WG.VI/WP.65/Add.1.

the order of registration or third-party effectiveness, whichever occurs first for each of the parties.

6. This rule is beneficial for two reasons. First, as a result of this rule, the priority date for security rights that are made effective against third parties by the registration of a notice will always be determined by the time of registration. The time of registration is maintained by the Registry and is, therefore, easy to demonstrate and easy to search. By way of contrast, the creation of a security right is a private event between the grantor and the secured creditor; the time of creation is not maintained by the Registry and is not publicly available and may be difficult to establish.

7. Second, the results that follow from the application of the rule in this article are consistent with the behaviour of prudent secured creditors. For example, assume that SC 2 is considering extending credit to Grantor, secured by a security right in an item of Grantor's equipment. If SC 2 searches the records of the Registry and discovers that a notice has been registered listing Grantor as the grantor and SC 1 as the secured creditor and indicating that the encumbered asset is the same item of equipment, SC 2 will not know whether SC 1 has a security right or, rather, has registered a notice before creation of the security right. In such a situation, SC 2 would likely make the conservative assumption that the registered notice reflects an existing security right and, accordingly, if SC 2 decides to go forward with the transaction, it will be with the understanding that its rights are subordinate to that of SC 1. The rule in this article is consistent with the behaviour of SC 2.

Article 29. Competing security rights in the case of a change in the method of third-party effectiveness

8. Article 29 addresses situations in which there has been a change in the method of third-party effectiveness. This may happen, for example where a secured creditor in possession of the encumbered asset returns possession of it to the grantor after registering a notice with respect to it in the security rights registry. In such a case, the priority of the security right is determined by the time at which the security right was first effective against third parties so long as there was no time thereafter during which the security right was not effective against third parties.

Article 30. Competing security rights in proceeds

9. Article 30, which is based on recommendation 100 of the Secured Transactions Guide (see chap. V, paras. 144-150), is important because in many cases one or both of the competing security rights in the encumbered asset will be a security right that the secured creditor has in that asset because that asset is proceeds of a different encumbered asset that, for example, the grantor has sold. This is quite common when the original encumbered asset is inventory or a receivable inasmuch as the grantor frequently sells the inventory or collects the receivable before satisfaction of the obligation secured by the encumbered asset. In such a case, the security right continues in the proceeds as provided in article 10 and the security right in the proceeds is effective against third parties if the conditions in article 19 are satisfied. This article determines the priority of that security right in proceeds as against another secured creditor with a security right in the same encumbered asset, whether as original encumbered asset or as proceeds. Under this article, the priority of the security right in the proceeds is the same as the priority of the security right in the original encumbered asset.

10. Thus, for example, assume that: (a) on Day 1, Grantor grants SC 1 a security right in all of Grantor's present and future inventory and SC 1 registers a notice with respect to that security right; (b) on Day 2, Grantor grants SC 2 a security right in all of Grantor's present and future receivables and SC 2 registers a notice with respect to that security right; and (c) on Day 3, Grantor sells the inventory on credit, generating a receivable. SC 2 has a security right in that receivable because of its security right in present and future receivables, and SC 1 has a security right in that receivable because it is proceeds of the inventory in which SC 1 had a security right. SC 1's security right in the receivable has priority over SC 2's security right because SC 1's priority in the receivable as proceeds is determined utilizing the date of third-party effectiveness or registration of notice with respect to the security right in the inventory, whichever came first (see art. 28). Thus SC 1's priority in the

receivable dates from Day 1, while SC 2's priority in the receivable dates from Day 2 (for security rights in proceeds of acquisition security rights, however, see art. 39).

Article 31. Competing security rights in tangible assets commingled in a mass or product

11. Article 31 addresses two priority issues resulting from situations in which one or both of the competing security rights is a security right that continued to a mass or product because the original encumbered asset was commingled in that mass or product (see Secured Transactions Guide, chap. V, paras. 117-124 and recs. 90 and 91). First, in paragraph 1, it addresses situations in which the competing security rights were in the same encumbered asset and that asset became part of a mass or product. In that case, the order of priority of the two security rights in the mass or product is the same as the order of priority of the security rights in the original encumbered asset.

12. Second, in paragraphs 2 and 3, it addresses situations in which the competing security rights were originally in different encumbered assets and both of those encumbered assets became part of the same mass or product. In such as case, if the value of the two security rights in the mass or product, as determined in article 11, is insufficient to satisfy the two secured obligations, the secured parties share the aggregate maximum value of their security rights in same proportion as the ratio of the value of the two security rights in the mass or product.

13. [Illustrations will be added after a determination is made whether to retain only one of options A and B in article 11 or both options.]

Article 32. Security rights competing with rights of buyers or other transferees, lessees or licensees of an encumbered asset

14. Article 32 is based on recommendations 79-82 of the Secured Transactions Guide (see chap. V, paras. 60-89). It addresses situations in which the encumbered asset is sold or otherwise transferred, leased or licensed, and determines the rights of the buyer or other transferee, lessee or licensee vis-à-vis the security right.

15. The general rule, which is stated in paragraph 1 and is subject to important exceptions stated in paragraphs 2-6, is that a security right in an encumbered asset that is effective against third parties continues to encumber the asset notwithstanding the sale or other transfer, lease or licence of the encumbered asset.

16. The article provides two types of exceptions to the general principle stated in paragraph 1. Paragraphs 2 and 3 provide exceptions based on the actions of the secured creditor, while paragraphs 4-6 provide exceptions based on the nature of the sale or other transfer, lease or licence and the knowledge of the buyer or other transferee, lessee or licensee.

17. Paragraph 2 provides that, if the secured creditor authorizes the sale or other transfer of the asset free of the security right, the buyer or other transferee takes free of that security right. The rule in this paragraph fulfils the intention of the parties inasmuch as the secured creditor has, by its authorization, evidenced intent for the general rule in paragraph 1 not to apply. Such an authorization may occur, for example, when a sale transfer of the encumbered asset free of the security right will generate sufficient proceeds that the grantor can use to satisfy the secured obligation, but a sale subject to the security right would not do so. Paragraph 3 brings about the same result in the case of a lease or licence of the encumbered asset. It is stated differently than the rule in paragraph 2 because some, but not all, States do not characterize the rights of a lessee or licensee as property rights.

18. Paragraphs 4-6 protect a buyer, lessee, or licensee of an encumbered asset in an ordinary course of business transaction from being subject to a security right in that asset that encumbered it while in the hands of the seller, lessor, or licensor. Under paragraph 4, a buyer of a tangible encumbered asset acquires its rights free of the security right if two conditions are satisfied. First, the sale must have been in the ordinary course of the seller's business. Thus, for example, the sale of some of a seller's inventory in accordance with the typical business practices of the seller would satisfy this condition, but an atypical sale by that seller of a used item of the seller's equipment would not satisfy this condition. The

second condition is that buyer must have acquired the encumbered asset without knowledge (as of the time of the conclusion of the agreement with the seller pursuant to which buyer acquired the asset) that the sale violated the rights of the secured creditor under the security agreement. "Knowledge" is defined in article 2, subparagraph (r), as actual knowledge. It is important to note that knowledge of the existence of the security right, as opposed to knowledge that the sale violated the secured creditor's rights, is insufficient to disqualify the buyer from the benefits of paragraph 4. If, for example, a buyer knows that the seller has encumbered its inventory, but does not know whether the secured creditor has authorized sales of that inventory free of the security right, the buyer has knowledge of the security right but does not have knowledge of whether the sale violated the rights of the secured creditor.

19. Paragraphs 5 and 6 bring about similar results to those in paragraph 4 in the case of leases of tangible encumbered assets and non-exclusive licences of intellectual property. As with paragraph 3, the formulation of paragraphs 5 and 6 differs from the formulation of paragraph 4, because some, but not all, States do not characterize the rights of a lessee or licensee as property rights.

20. Paragraphs 7 and 8 state what is often referred to as a "shelter principle" — once a buyer, lessee, or licensee obtains rights in the encumbered asset free of (or unaffected by) a security right, those that acquire their rights in the encumbered assets from or through the buyer, lessee, or licensee are similarly free of (or unaffected by) the security right.

Rights of buyers or other transferees, lessees or licensees of an encumbered asset in the case of specialized registration

21. States that provide a specialized registry or title certificate system for achieving third-party effectiveness of a security right in particular types of asset may wish to consider whether, in order to enable competing claimants that utilize the specialized registry or title certificate system to determine their rights solely by a search of the specialized registry system or examination of the title certificate, rights of such parties should be superior to the rights of a secured creditor that achieved third-party effectiveness by other means (see Secured Transactions Guide, chap. V, paras. 56 and 57, and rec. 77; for the coordination with specialized movable property registries, see Registry Guide, para. 64-70).

Article 33. Impact of the grantor's insolvency on the priority of a security right

22. Under article 33, nothing in the secured transactions law changes determinations of third-party effectiveness or priority merely because insolvency proceedings have been commenced. Thus, unless the applicable insolvency law provides to the contrary, a security right that is effective against third parties under the Model Law at the time of the commencement of insolvency proceedings remains effective against third parties and retains the priority it had before the commencement of the insolvency proceedings.

Article 34. Security rights competing with preferential claims

23. Article 34 is based on recommendations 83, 85 and 86 of the Secured Transactions Guide (see chap. V, paras. 90-93 and 103-109). Its purpose is to implement the policy of these recommendations and give an enacting State an opportunity to: (a) list in a clear and specific way any statutory claims that may have priority over security rights; and (b) indicate a limitation on their amount. Examples of claims that may be listed in this article include claims of service providers and unpaid sellers or suppliers of goods but only to the extent that they have retained possession of the goods (see A/CN.9/830, para. 89). It should be noted that secured creditors typically obtain representations from grantors about preferential claims and otherwise address the possible existence of such claims.

24. This article applies outside insolvency. As the Model Law does not deal with insolvency matters, it does not include a similar rule for preferential claims in the case of the grantor's insolvency along the lines of recommendation 239 of the Secured Transactions Guide. In most States that require registration of a notice with respect to preferential claims, the priority of preferential claims is determined in the same way as the priority of security rights, that is, in other words, the general first-to-register priority rule applies. It should also be noted that, in the case of enforcement, if a preferential creditor does not take over the

enforcement process (see art. 70), its claim will have to be paid ahead of the claims of secured creditors.

Article 35. Security rights competing with rights of judgement creditors

25. Article 35 is based on recommendation 84 of the Secured Transactions Guide (see chap. V, paras. 94-102). It determines the priority as between a security right in an encumbered asset and the rights of a judgement creditor that has acquired rights in the encumbered asset by taking whatever steps are necessary under applicable law. The enacting State should complete paragraph 1 by inserting the relevant step or steps necessary for a judgement creditor to acquire rights in the encumbered asset. These steps may include actions such as registration of a notice in the security rights registry, seizure of assets or service of a garnishment order.

26. Paragraph 1 gives priority to the judgement creditor if the steps necessary for it to acquire rights in the encumbered asset occur before the security right becomes effective against third parties.

27. Paragraph 2 provides that, in cases in which the judgement creditor does not acquire its rights in the encumbered asset before the security right becomes effective against third parties, the security right has priority. However, paragraph 2 limits the extent of that priority by providing that the priority of the security right does not extend to credit extended by the secured creditor more than a short period of time after the judgement creditor notifies the secured creditor that it has taken the steps necessary to acquire its right, or to credit extended thereafter pursuant to an irrevocable commitment made before that notification. Paragraph 2 protects secured creditors against the possibility of inadvertently extending credit without realizing that their security rights are subordinate to the rights of a judgement creditor.

Article 36. Non-acquisition security rights competing with acquisition security rights

28. Article 36 is based on recommendations 180 of the Secured Transactions Guide (see chap. IX, paras. 131, 136, 137, 143 and 146) and recommendation 247 of the Intellectual Property Supplement (see paras. 259-263). Two alternative options are provided for the enacting State. Both options provide that, under certain circumstances, an acquisition security right has priority over a competing non-acquisition security right in the same encumbered asset even if, under the general priority rule in article 28, paragraph 1, the non-acquisition security right would have priority. When those circumstances are present, it is often said that the acquisition security right has "super-priority" over the competing non-acquisition security right.

29. "Super-priority" for acquisition security rights is a feature of the law of most States, whether phrased in terms of a higher priority for security rights securing obligations incurred in acquiring the encumbered asset or, in many legal systems, as a necessary implication of title to the encumbered asset being retained by the seller. Article 36 continues this advantageous treatment of acquisition finance, providing a variety of "super-priority" rules depending on the nature of the asset that is subject to the acquisition security right.

30. Option A contains three "super-priority" rules. Which of the three rules is applicable in a particular case depends on the nature of the encumbered assets. If the encumbered assets are equipment, the rule in paragraph 1 applies. If the encumbered assets are either inventory or the intellectual property equivalent of inventory (that is, intellectual property or rights of a licensee under a licence of intellectual property held by the grantor for sale or licence in the ordinary course of the grantor's business, the rule in paragraph 2 applies. If the encumbered assets are consumer goods or the intellectual property equivalent of consumer goods (that is, intellectual property or rights of a licensee under a licence of intellectual property used or intended to be used by the grantor primarily for personal, family or household purposes), the rule in paragraph 3 applies.

31. Under the "super-priority" rule in paragraph 1 of option A, an acquisition security right in equipment has priority over a competing non-acquisition security right created by

the grantor, if either the acquisition secured creditor is in possession of the asset (unlikely inasmuch as most acquisition security rights are non-possessory) or a notice with respect to the acquisition security right is registered in the Registry within a short period of time to be specified by the enacting State after the grantor obtains possession of the asset. Thus, so long as the acquisition secured creditor registers a notice with respect to the acquisition security right within the specified period, that security right will have priority over a competing non-acquisition security right that was made effective against third parties before the acquisition security right was made effective against third parties.

32. Under the super-priority rule in paragraph 2 of option A, additional requirements must be satisfied for an acquisition secured creditor with a security right in inventory or its intellectual property equivalent to have "super-priority" over a competing non-acquisition security right. In particular, two actions must occur before the grantor obtains possession of the encumbered asset in order for the acquisition security right to have "super-priority". First, a notice with respect to the acquisition security right must be registered. Second, a notice stating that the acquisition secured creditor has or intends to acquire an acquisition security right and describing the asset sufficiently to enable the non-acquisition secured creditor to identify the asset that is the object of the acquisition security right must be received by the non-acquisition secured creditor (if the non-acquisition secured creditor has registered a notice in the Registry with respect to a security right created by the grantor in an asset of the same kind).

33. There are two reasons for this more stringent treatment. First, because inventory may "turn over" quickly and depreciate quickly, it would be economically inefficient for a secured creditor with a non-acquisition security right in present and future inventory to need to wait for the passage of the period of time stated in paragraph 1 before being certain that future inventory is not subject to an acquisition security right that will have super-priority of the rights. The requirement that the actions required for super-priority in paragraph 2 take place before the grantor obtains possession of the encumbered asset addresses this concern. Second, inasmuch as new inventory can often be difficult to distinguish from old inventory, even a secured creditor with a security right in future inventory that monitors the assets of the grantor will not always be able to easily detect the presence of new inventory that has replaced similar older inventor. Thus, such a secured creditor may not be able to determine that some items of inventory are recently acquired and thus potentially subject to an acquisition security right. The notice requirement addresses this concern.

34. Paragraph 4 of option A contains two important rules about the notice required in subparagraph 2(b)(ii). First, such a notice may cover acquisition security rights under multiple transactions between the same parties without the need to identify each transaction. Thus, for example, a seller that is planning to engage in a series of transactions with the same grantor, under which the seller will sell inventory to the grantor subject to an acquisition security right, may send a single notice to the competing non-acquisition secured creditor generally describing the set of transactions. Second, a notice suffices to bring about super-priority if the grantor acquires the assets subject to the acquisition security right it is received not later than a time period to be specified by the enacting State (such as five years) after the grantor acquires the assets subject to the acquisition security right. As a result, a seller that provides a notice for a series of transactions in which acquisition security rights are created will not need to send another notice with respect to assets acquired not later than five years after the first notice is received.

35. Under the super-priority rule in subparagraph 3, an acquisition security right in consumer goods or their intellectual property equivalent automatically has priority over a non-acquisition security right in the same encumbered asset. No additional actions are required. [This paragraph to be adjusted when the Working Group reaches a decision about the bracketed language in paragraph 3.]

36. Option B contains only two "super-priority" rules. The first rule, found in paragraph 1, is identical to paragraph 1 of option A (which applies only to equipment) except that it also applies to inventory and the intellectual property equivalent of inventory. The second rule, found in paragraph 2, is identical to paragraph 3 of option A. Thus, the only difference between option A and option B is that, in the former, additional steps must be

taken in order for an acquisition security right in inventory or in the intellectual property equivalent of inventory to have priority over a competing non-acquisition security right.

Article 37. Competing acquisition security rights

37. Article 37 is based on recommendation 182 of the Secured Transactions Guide (see chap. IX, paras. 173-178). It addresses the priority of competing security rights when both are acquisition security rights. Unlike article 36 (which gives priority to acquisition security rights that satisfy certain criteria as against non-acquisition security rights), this article addresses priority as between security rights both of which would otherwise be entitled to "super-priority". The rule in article 37 reflects two policy decisions. First, an acquisition security right of a seller or lessor, or a licensor of intellectual property, should have priority over an acquisition security right of another person such as a lender. Second, in all other cases, priority between acquisition security rights should be determined on the basis of rules applicable when neither are acquisition security rights.

Article 38. Acquisition security rights competing with the rights of judgement creditors

38. Article 38 is based on recommendation 183 of the Secured Transactions Guide (see chap. IX, paras. 145-148). Without the rule in this article, the period provided in article 36 would not be useful. The reason for this is that a secured creditor taking an acquisition security right typically would not want to have a period in which it would be vulnerable to the rights of a judgement creditor. In such a case, a secured creditor would likely register a notice before, or as soon as possible after, the security right was created. Accordingly, a secured creditor would not benefit from the longer period to register and achieve "super-priority" under article 34.

39. By way of illustration, assume that Grantor acquires an item of equipment from Seller on credit on Day 1 and grants Seller an acquisition security right in the item of equipment to secure its obligation to pay the remainder of the purchase price; on Day 5 Seller registers a notice that has the effect of making its acquisition security right effective against third parties. Between those two dates, on Day 3, Judgement Creditor obtains a judgement against Grantor and takes the steps specified in article 35, paragraph 1, to acquire rights in the item of equipment. Under the rule in article 35, paragraph 1, Judgement Creditor's rights would have priority over Seller's security right because Judgement Creditor obtained its rights before Seller's security right was effective against third parties. As a result of the operation of article 38, however, Seller's security right has priority over the rights of Judgement Creditor.

Article 39. Acquisition security rights in proceeds

40. Article 39 is based on recommendation 185 of the Secured Transactions Guide (see chap. IX, paras. 158-172). Both option A and option B of article 36 provide that, under certain circumstances, an acquisition security right has priority over a competing non-acquisition security right in the same encumbered asset even if, under the general priority rule in article 28, the non-acquisition security right would have priority. This article determines whether that "super-priority" over non-acquisition security rights carries over to proceeds of the encumbered assets that are subject to the acquisition security right.

41. Under the general principles of article 10, a secured creditor with a security right in an asset obtains a security right in the identifiable proceeds of that asset and, under the circumstances described in article 19, that security right is effective against third parties. This is equally true of assets subject to non-acquisition security rights and those subject to acquisition security rights. Under the rule in article 30, the priority of the security right in the proceeds is the same as the priority of the security right in the original encumbered asset. Under that rule, the security right in proceeds of assets subject to an acquisition security right would have the same "super-priority" as the security right in the original encumbered asset. Article 39, however, limits the reach of article 30 by extending "super-priority" to proceeds only of certain types of assets subject to an acquisition security right (option A) or by not extending the "super-priority" to proceeds at all (option B).

42. Under option A, the "super-priority" with respect to the assets subject to the acquisition security right always carries over to the proceeds of those assets, except when the assets subject to the acquisition security right consist of inventory, consumer goods or their intellectual property equivalent. When the asset subject to the acquisition security right is inventory or its intellectual property equivalent, whether the "super-priority" carries over to proceeds depends on the nature of the proceeds. If the proceeds are receivables, negotiable instruments, or rights to payment of funds credited to a bank account, the "super-priority" does not carry over to those proceeds. If, on the other hand, the proceeds take another form, the "super-priority" does carry over to the proceeds. When the assets subject to the acquisition security right are consumer goods or intellectual property or rights of a licensee under a licence of intellectual property used or intended to be used by the grantor [primarily] for personal, family or household purposes, however, the "super-priority" does not carry over to the proceeds.

43. The primary reason for the decision not to provide "super-priority" for certain types of proceeds in option A relates to the difficulty that would be faced by competing secured creditors with security rights in payment rights in determining which of those payment rights are proceeds of assets subject to acquisition security rights and which are not. As a result, if there were "super-priority" treatment for those types of proceeds, competing secured creditors with security rights in payment rights might simply assume that all of those payment rights are proceeds and, as a result, extend less credit on the basis of them.

44. Option B provides that the "super-priority" with respect to assets subject to an acquisition security right does not carry over to proceeds of those assets under any circumstances, with the result that the priority of the security right in the proceeds will be determined under the general principle in article 28. This option is provided as an option for States that do not wish to make the sort of distinctions between types of proceeds made in option A.

45. As the Model Law does not deal with insolvency-related matters, with the exception of article 33, no article has been included in the Model Law along the lines of recommendation 186 of the Secured Transactions Guide to deal with the application of the special priority rules for acquisition security rights. However, there is nothing in these articles to imply that insolvency law will not operate against the background of secured transactions law and thus that these provisions will not apply to acquisition security rights in the case of insolvency.

Article 40. Acquisition security rights in tangible assets commingled in a mass or product competing with non-acquisition security rights in the mass or product

46. Article 40 deals with situations in which a grantor has granted an acquisition security right in an asset that later becomes part of a mass or product and has also granted a security right in the mass or product. Under article 11, when the original asset becomes part of the mass or product, the secured creditor has a security right in that mass or product. This article provides that the acquisition security right in the mass or product that results from the security right in the separate asset has priority over the security right in the mass or product as original encumbered asset, even if that security right was previously made effective against third parties or was the subject of a pre-registered notice.

Article 41. Subordination

47. Article 41 is based on recommendation 94 of the Secured Transactions Guide (see chap. V, paras. 128-131). Paragraph 1 allows a person to agree to lower priority of its security right as against a competing claimant than would otherwise result from application of the priority rules in this chapter.

48. Such an agreement, usually referred to as a subordination agreement, may be in the form of a bilateral agreement between the party agreeing to lower priority and the competing claimant that will benefit from that agreement; it may also be a unilateral commitment (usually made to the grantor) by the party agreeing to lower priority that its priority will be lower than that of the beneficiaries described in the commitment. Such an agreement is governed by this article so long as it is between a secured creditor and a grantor, between

two or more secured creditors or between a secured creditor and another competing claimant (e.g. a judgement creditor or an insolvency representative).

49. Paragraph 2 makes it clear that, as an agreement, a subordination agreement binds only the parties to it and does not subordinate the claims of any other parties. For example, if SC 1, that has a claim for 50, subordinates its claim to SC 3, who has a claim for 70, SC 3 has priority over SC 2 only for 50.

50. In unusual circumstances, subordination can create circular priority issues. For example, assume that SC 1, 2, and 3 each have a security right in the same encumbered asset and their priority, determined under the rules of this chapter, is in that order, so that SC 1's security right is superior to that of SC 2 and SC 2's security right is, in turn, superior to that of SC 3. Then assume that SC 1 enters into a subordination agreement with SC 3, pursuant to which SC 1 agrees to subordinate its priority in favour of SC 3. As a result, SC 3 has priority over SC 1. However, SC 1 (who did not subordinate its priority in favour of SC 2) has priority over SC 2, and SC 2 has priority over SC 3, completing the circle.

Article 42. Future advances, future encumbered assets and maximum amount

51. Article 42 is based on recommendations 97-99 of the Secured Transactions Guide (see chap. V, paras. 135-143). Inasmuch as a security right can secure obligations arising after the conclusion of the security agreement (see art. 7) and a secured obligation can be secured by assets created or acquired after the conclusion of the security agreement (see art. 8), this article clarifies the priority of a security right in such circumstances.

52. Paragraph 1 provides that the priority of a security right is not affected by the time when the obligation it secures was incurred. Thus, a security right has the same priority whether the entire secured obligation was incurred at or before the creation of the security right or whether the security right secures obligations incurred thereafter. Paragraph 2 similarly provides that when a security right has been made effective against third parties by the registration of a notice, the priority resulting from the time of that notice under article 28 is the same whether the encumbered assets were owned by the grantor at the time of registration or acquired thereafter.

53. Paragraph 3, which will be necessary only if the enacting State enacts provisions based on article 6, subparagraph 3(e), and article 9, subparagraph (e) [of the registry-related provisions[*]], gives effect to any cap on the secured obligation stated in the notice by providing that the secured creditor's priority is limited by that cap.

Article 43. Irrelevance of knowledge of the existence of a security right

54. Article 43 is based on recommendation 93 of the Secured Transactions Guide (see chap. V, paras. 125-127). A secured creditor's knowledge or lack of knowledge of a competing security right is not relevant to a determination of priority under either the general priority rule in article 28 or any of the special priority rules. The point is made explicit here to emphasize that priority is determined only on the basis of the facts referred to in those articles and not on the basis of difficult to prove subjective states of knowledge. Article 43 applies only to the knowledge of a secured creditor. Under the Model Law, knowledge of other facts is relevant to priority. For example, a buyer of a tangible encumbered asset that has knowledge that the sale violates the rights of a secured creditor with a security right in that asset under the security agreement does not take free of the security right (see art. 32).

B. Asset-specific rules

Article 44. Negotiable instruments

55. Article 44 is based on recommendations 101 and 102 of the Secured Transactions Guide (see chap. V, paras. 154-156). Any drafting changes are intended to ensure that paragraph 1 deals only with the relative priority of conflicting security rights in the same

[*] Reference is to this article as it is contained in document A/CN.9/WG.VI/WP.65/Add.1.

negotiable instrument, while paragraph 2 addresses the rights of a secured creditor with a security right in a negotiable instrument as against a buyer or other consensual transferee of the negotiable instrument.

56. Under paragraph 1, a security right in a negotiable instrument that is made effective against third parties by the secured creditor's possession of the negotiable instrument has priority over a security right in the same negotiable instrument that is made effective against third parties by registration of a notice, without regard to the order in which the security rights became effective against third parties. This is consistent with the important role that possession plays in the law of negotiable instruments.

57. Under paragraph 2, certain buyers or other transferees that take possession of a negotiable instrument take their rights in the instrument free of a security right that is effective against third parties by registration of a notice. If the security right were effective against third parties because of the secured creditor's possession of the negotiable instrument, the buyer or other transferee could not also have possession of it, unless the same agent possesses the negotiable instrument both on behalf of the secured creditor and the buyer or other transferee.

58. More specifically, under paragraph 2, a buyer or other transferee of a negotiable instrument can take free of a security right in that instrument in either of two ways. First, under subparagraph 2(a), a person who becomes a protected holder or the like (the enacting State should insert the appropriate term here) of the negotiable instrument under the law of the enacting State acquires its right in the instrument free of an existing security right in it. Second, under subparagraph 2(b), a transferee that takes possession of the instrument and gives value for it without knowledge that the sale or other transfer is in violation of the rights of the secured creditor also acquires its right in the instrument free of that security right. As with the rule in paragraph 1, this rule preserves the important role of possession in the law of negotiable instruments.

59. Knowledge of the existence of a security right does not prevent a buyer or other transferee of a negotiable instrument from acquiring its rights in the instrument free of the security right under subparagraph 2(b) (although such knowledge may prevent the buyer from qualifying as a protected purchaser or the like and, thus, may prevent the buyer from taking free of the security right under subparagraph 2(a)). Rather, only knowledge that the transfer violates the rights of the secured creditor under the security agreement prevents the transferee from acquiring its rights in the instrument free of the security right under subparagraph 2(b). "Knowledge", as defined in article 2, paragraph (r), means "actual knowledge". The reference to "good faith" that was included in recommendation 102, subparagraph (b) has been deleted on the understanding that the absence of knowledge amounts essentially to good faith and the concept of good faith is used in the Model Law only to reflect an objective standard of conduct (see A/CN.9/830, para. 50).

Article 45. Rights to payment of funds credited to a bank account

60. Article 45 is based on recommendations 103-105 of the Secured Transactions Guide (see chap. V, paras. 157-163). It determines the priority between competing security rights in a right to payment of funds credited to a bank account whether those rights to payment are original encumbered assets or proceeds of a security right in other property (which, according to art. 17, para. 1, is automatically effective against third parties, if the security right in the original encumbered asset is effective against third parties).

61. Paragraphs 1-3, taken together, result in the conclusion that a security right in a right to payment of funds credited to a bank account made effective against third parties by any of the methods provided for in article 24 has priority over a security right made effective against third parties by registration of a notice. Under paragraph 1, a security right in a right to payment of funds credited to a bank account that is made effective against third parties by the secured creditor becoming the account holder has priority over all competing security rights in the same asset. Next in priority order, paragraphs 2 and 3 give priority to: (a) a security right in a right to payment of funds credited to a bank account with respect to which the secured creditor is the depositary institution; and (b) a security right made effective against third parties by a control agreement. Under paragraph 4, if there are more than one

control agreements, priority is determined on the basis of the order of conclusion of the control agreements.

62. Under paragraph 5, except when the secured creditor has become the account holder, a security right in a right to payment of funds credited to a bank account is subordinate to the depositary institution's rights under other law to set off claims against the grantor against its obligations to the grantor with respect to the grantor's right to payment of funds from the bank account. This rule protects depositary institutions from losing their rights of set-off without their knowledge or consent.

63. Under paragraph 6, a transferee of funds from a bank account pursuant to a transfer initiated or authorized by the grantor acquires its rights free of a security right in the right to payment of funds credited to the bank account so long as the transferee does not have knowledge that the transfer violates the rights of the secured creditor under the security agreement. A "transfer of funds" includes transfers by a variety of mechanisms, including by cheque and electronic means. The purpose of paragraph 6 is to preserve the free negotiability of funds.

64. Knowledge of the existence of a security right does not prevent a transferee of funds from the bank account from taking free of the security right. Rather, it is only knowledge that the transfer violates the rights of the secured creditor under the security agreement that prevents the transferee from taking free. "Knowledge", as defined in article 2, paragraph (r), means "actual knowledge". Paragraph 7 is intended to preserve the rights of transferees of funds credited to a bank account under other law to be specified by the enacting State.

Article 46. Money

65. Article 46 is based on recommendation 106 of the Secured Transactions Guide (see chap. V, para. 164). Its purpose is to preserve negotiability of money. Thus, under paragraph 1, a transferee of encumbered money acquires its rights in it free of the security right, unless it has knowledge that the transfer violates the rights of the secured creditor under the security agreement. "Knowledge", as defined in article 2, paragraph (r), means "actual knowledge". Paragraph 2 is intended to preserve the free negotiability of money.

Article 47. Negotiable documents and tangible assets covered

66. Article 47 is based on recommendations 108 and 109 of the Secured Transactions Guide (see chap. V, paras. 167-169). It is designed to preserve current practices under which rights to the tangible assets covered (or represented) by a negotiable document are subsumed in the negotiable document with the result that parties that deal with the document generally need not concern themselves separately with claims to the assets not reflected in the document. Accordingly, under paragraph 1, a security right in a tangible asset made effective against third parties by possession of the negotiable document covering that asset is given priority over a competing security right made effective against third parties by any other means.

67. Paragraph 2 states an exception to that general rule. Except when the encumbered asset is inventory, it provides that the rule in paragraph 1 does not apply against a secured creditor that had a security right in an encumbered asset before the earlier of the time that either the asset became covered by the negotiable document or the time that an agreement was concluded between the grantor and the secured creditor in possession of the negotiable document providing that the asset was to be covered by a negotiable document so long as the asset actually became covered by such a negotiable document within the time to be specified by the enacting State.

Article 48. Intellectual property

68. Article 48 is based on recommendation 245 of the Intellectual Property Supplement (see paras. 193-212). The purpose of this article is to clarify that the rule in article 32, paragraph 6, does not obviate other rights of the secured creditor as an owner or licensor of the intellectual property that is the subject of the licence. This clarification is of particular importance because the concept of "ordinary course of business", used in article 32, paragraph 6, is a concept of commercial law and is not drawn from law relating to intellectual

property law and thus may create confusion in an intellectual property financing context. Typically, law relating to intellectual property does not distinguish in this respect between exclusive and non-exclusive licences and focuses rather on the issue whether a licence has been authorized or not.

69. As a result, unless the secured creditor authorized the grantor to grant licences unaffected by the security right (which will typically be the case as the grantor will rely on its royalty income to pay the secured obligation), the licensee would take the licence subject to the security right. Thus, if the grantor defaults, the secured creditor would be able to enforce its security right in the licensed intellectual property and sell or license it free of the licence. In addition, a person obtaining a security right from the licensee will not obtain an effective security right as the licensee would not have received an authorized licence and would have no right in which to create a security right.

Article 49. Non-intermediated securities

70. Article 49 covers a topic not addressed in the Secured Transactions Guide, which excluded from its scope all types of securities (see rec. 4, subpara. (c)). So as not to interfere with existing customs and practices with respect to non-intermediated securities, this article adjusts the general priority rule of article 27 in a manner similar to the special priority rules for security rights in negotiable instruments and rights to payment of funds credited to a bank account.

71. For certificated non-intermediated securities, paragraph 1 provides that a security right made effective against third parties by the secured creditor's possession of the certificate has priority over a competing security right by the same grantor that is made effective against third parties by registration of a notice in the Registry. This is parallel to the rule for negotiable instruments in article 44, paragraph 1.

72. For uncertificated non-intermediated securities, paragraph 2 provides that either the notation of the security right or the registration of the name of the secured creditor as the holder of the securities in the books maintained for that purpose by or on behalf of the issuer has priority over a security right in the same securities made effective against third parties by any other method. This rule is similar to the rule for rights to payment of funds credited to a bank account in article 45, paragraph 1. The rationale for this rule is that such notation or registration in the books of the issuer fulfils a similar function to the secured creditor becoming the account holder of a bank account.

73. Paragraphs 3 and 4 are also applicable only to uncertificated non-intermediated securities. They parallel the similar rules for rights to payment of funds credited to a bank account in article 45, paragraphs 3 and 4. Paragraph 3 gives priority to a security right made effective against third parties by conclusion of a control agreement over other security rights in the same securities. As between security rights made effective against third parties by conclusion of a control agreement, paragraph 4 awards priority in the order in which those control agreements were concluded.

74. Paragraph 5 is intended to preserve the rights of transferees of non-intermediated securities under other law to be specified by the enacting State. It parallels article 45, paragraph 7.

(A/CN.9/WG.VI/WP.69/Add.2) (Original: English)

Note by the Secretariat on a draft guide to enactment of the draft model law on secured transactions

ADDENDUM

Contents

Chapter VIII. Conflict of laws

Introduction

58. Chapter VIII of the Model Law states the rules for determining the substantive law applicable to most of the issues dealt with in the other chapters. These rules are generally referred to as the conflict-of-laws rules. In a State that has enacted the Model Law, a court or other authority will use the conflict-of-laws rules of chapter VIII to determine the substantive law governing issues such as the creation, effectiveness against third parties, priority and enforcement of a security right, as well as the mutual rights and obligations of the grantor and the secured creditor and the relationship between third-party obligors and secured creditors. The substantive law indicated by conflict-of-laws rules may be that of the enacting State or the law of another State. It must be stressed that in the event of litigation in a State, the court or other authority will apply the conflict-of-laws rules of its own legal system to resolve the dispute (for a more elaborate discussion of the role of conflict-of-laws rules, see Secured Transactions Guide, chap. X, paras. 1-13).

59. The application of the conflict-of-laws rules relating to security rights should not be conditional on a prior determination that the case presents an international element. Whenever a conflict-of-laws rule refers to the law of a State, that reference should not be refused on the ground of the absence of true "internationality" in the situation. Otherwise, courts might disregard a conflict-of-laws rule enacted by a State by deciding that the case is not sufficiently international on the basis of discretionary criteria that are not part of the conflict-of-laws rules of that State. In other words, if in a given situation the rule of State A points to the law of State B, it must be presumed that the legislator of State A has considered that the situation of itself is presenting an international element. In the particular circumstances where additional criteria would be a prerequisite for the application of a conflict-of-laws rule of a State, these criteria should be spelled out in the conflict-of-laws rules of that State.

60. The conflict-of-laws rule dealing with the law applicable to the mutual rights and obligations of the parties is a non-mandatory law rule (it is not listed in art. 3, para. 1). This means that the parties may choose the law applicable to their contractual rights and obligations. However, the conflict-of-laws rules dealing with the law applicable to the creation, third-party effectiveness, priority and enforcement of a security right, as well as with the relationship between third-party obligors and secured creditors (or the effect of a security right on a third-party obligor), are mandatory (see art. 3, para. 1). This means that the parties cannot be permitted by a choice-of-law clause to avoid the substantive law provisions of the legal system to which a conflict-of-laws rule refers. This must be so because security rights are property (*in rem*) rights and thus affect third parties. Allowing the parties to select the applicable conflict-of-laws rule would also defeat one of the main purposes of the conflict-of-laws rules, which is to identify the State whose substantive law will apply in the event of a priority dispute among competing claimants. For example, if there is a priority dispute between secured creditor X and secured creditor Y, it would be impossible to ascertain the law applicable to the resolution of the dispute if each of X and Y had been permitted to choose in their security agreement with the grantor a different governing law for the ranking of their respective security right.

A. General rules

Article 81. Law applicable to the mutual rights and obligations of the grantor and the secured creditor

61. Article 81 is based on recommendation 216 of the Secured Transactions Guide (see chap. X, para. 61). It states that the parties to a security agreement are free to choose the law applicable to their contractual relationship. Article 81 follows the approach recommended by international texts on this matter, including the Hague Principles on Choice of Law in International Contracts. The question of whether there should be constraints to party autonomy with respect to the law applicable to contractual relationships is not addressed in the Model Law and is left to other conflict-of-laws rules of the enacting State. These other rules will also determine the law governing the contractual relationship of the parties in the

absence of a choice of law in the security agreement; these rules will often point to the law of the State most closely connected to the security agreement. It should be noted that the rule of article 81 is confined to the contractual aspects of the security agreement. As already mentioned, matters relating to the property aspects of secured transactions (e.g. the priority of a security right) are outside the scope of freedom of contract; the parties cannot select a law other than that indicated by the conflict-of-laws rules on such matters.

Article 82. Law applicable to a security right in a tangible asset

62. Article 82 is based on recommendations 203-207 of the Secured Transactions Guide (see chap. X, paras. 28-38). It deals with the law applicable to the creation, effectiveness against third parties and priority of a security right in a tangible asset. The term "tangible asset" is defined to refer generally to all types of tangible movable asset, including money, negotiable instruments, negotiable documents and certificated non-intermediated securities (see art. 2, subpara. (ii); see also Secured Transactions Guide, chap. X, para. 26; although with regard to certificated non-intermediated securities, art. 96 prevails as an asset-specific rule).

63. Paragraph 1 states the general rule that the law applicable to these issues is the law of the location of the encumbered asset (the "*lex situs*" or the "*lex rei sitae*"). Article 88 deals with the scenario where the location of the asset changes to another State after the security right has been created. The *lex situs* rule for tangible assets is subject to five exceptions that are set out in paragraphs 2 to 4 and in options B and C of article 96.

64. The first exception provides that, if a tangible asset located in a State is covered by a negotiable document in the possession of a secured creditor in another State, the priority of the security right over the asset will be determined by the law of the location of the document, and not by the location of the asset covered by that document (see para. 2). The second exception points to the law of the grantor's location for an asset of a type which may be ordinarily used in more than one State in the course of its normal use, that is, a "mobile asset" (see para. 3; for the meaning of "location", see art. 87; for the relevant time for determining location, see art. 88). The test is an objective one and does not refer to actual use. The most obvious example is an aircraft, which may fly from a State to many other States. The rule will apply even if a particular aircraft is actually operated only in one single State.

65. The third exception deals with a tangible asset (other than a mobile asset) in transit or to be exported (see para. 4). A security right in a tangible asset located in a State but which is in transit or destined to be moved to another State may be created and made effective against third parties under the law of its ultimate destination, if the asset reaches that destination within the period of time to be specified by the enacting State. It should be noted that: (a) if the assets do not reach the intended destination in a timely fashion, the rule in paragraph 4 will not apply; and (b) the rule in paragraph 4 does not prevent a secured creditor form taking the necessary steps to create and make the security right effective against third parties under the law of the actual location of the asset at the time such steps are taken. It should also be noted that paragraph 4 is a conflict-of-laws rule of the enacting State only and whether the security right will be treated as validly created and made effective against third parties in the State of the ultimate destination of the asset is a matter for the conflict-of-laws rules of that State.

66. The fourth exception is contained in options B and C in article 96, which refer to laws other than the location of the certificate for a security right in certificated securities.

67. Another possible exception relates to assets, with respect to which a notice of a security right may be registered in a specialized title registry or noted on a title certificate. In the case of a security right in such an asset, the law applicable to the security right is the law of the State under whose authority the registry is maintained or the certificate is located (see Secured Transactions Guide, chap. X, paras. 37 and 38, as well as rec. 205).

Article 83. Law applicable to a security right in an intangible asset

68. Article 83 is based on recommendation 208 of the Secured Transactions Guide (see chap. X, paras. 39-47). It states the general conflict-of-laws rule for the creation,

effectiveness against third parties and priority of a security right in an intangible asset. The applicable law is that of the location of the grantor (for the meaning of "location", see art. 87; for the relevant time for determining location, see art. 88). It must be noted that receivables are covered by this rule, which is subject to several exceptions that are set out in articles 84 and 93-96.

69. The first exception relates to the priority of a security right in a receivable arising from a sale or lease of [or secured by] immovable property (see art. 84 below). The other exceptions relate to a security right in rights to payment of funds credited in a bank account (see art. 93), intellectual property (see art. 95, which refers both to the *lex protectionis* and to the law of the State of the grantor's location) and non-intermediated securities (see art. 96).

Article 84. Law applicable to a security right in receivables relating to immovable property

70. Article 84 is based on recommendation 209 of the Secured Transactions Guide (see chap. X, para. 54). It deals with the priority of a security right in a receivable arising from a sale or lease of [or secured by] immovable property as against the rights of competing claimants. Introducing an exception to the general rule of article 83, article 84 refers that matter to the law of the State under whose authority the immovable property registry is organized. For article 84 to apply, the right of a competing claimant must be registrable in the relevant immovable property registry.

Article 85. Law applicable to the enforcement of a security right

71. Article 85 is based on recommendation 218 of the Secured Transactions Guide (see chap. X, paras. 64-72). Subparagraph (a) deals with the law applicable to the enforcement of a security right in a tangible asset, as defined in article 2, subparagraph (ii). It refers to the law of the State [in which enforcement takes place (*lex fori*), which in most instances would be the law of the State in which the encumbered asset would be located (for the policy reasons for this approach, see Secured Transactions Guide, chap. X, para. 66)] [in which the encumbered asset is located].

72. It should be noted that enforcement may involve several distinct acts (e.g. notice of the secured creditor's intent to obtain possession of an encumbered asset without applying to a court or other authority, disposition of an encumbered asset, and distribution of the proceeds of disposition) that may take place in different States. For example, a secured creditor may take possession of the encumbered assets in one State, dispose of them in a second State, and distribute the proceeds of disposition in a third State. As a result, the law applicable to enforcement may be the law of several States. The result would be the same if a security right is created in several tangible assets that are located in different States It should also be note that subparagraph (a) does not deal with the less frequent case where enforcement takes place in different States because the asset has been moved to another State after commencement of enforcement. In such case, it is, however, assumed that the relevant place is the place where enforcement commences.

73. Under, subparagraph (b), the law applicable to the enforcement of a security right in an intangible asset (with the exception of a right to payment of funds credited in a bank account, intellectual property and non-intermediated securities) is the law governing priority. The main advantage of this approach is that the creation, third-party effectiveness, priority and enforcement of a security right in a receivable (but not the relationship between the debtor of the receivable and the secured creditor; see art. 92) is referred to one and the same law, that is, the law of the location of the grantor (see Secured Transactions Guide, chap. X, para. 69).

Article 86. Law applicable to a security right in proceeds of an encumbered asset

74. Article 86 is based on recommendation 215 of the Secured Transactions Guide (see chap. X, paras. 55-60). The following example illustrates how the rule on the law applicable to proceeds operates. Assume that the original encumbered asset is inventory, which is subsequently sold, and the purchase price is paid into a bank account. Under paragraph 1,

the law applicable to the question of whether the secured creditor automatically acquires a security right in the right to payment of the funds credited to the bank account as proceeds of the original encumbered inventory will be the law of the location of the inventory. Under paragraph 2, the law applicable to the third-party effectiveness and priority of the security right in the proceeds will be the law applicable to the right to payment of funds credited to the bank account (see art. 93).

75. It should be noted that this type of bifurcated rule may lead to difficulties in cases where the law governing creation recognizes a broad-based automatic proceeds rule whereas the law governing third-party effectiveness and priority recognizes no or only a very limited automatic proceeds right. It should also be noted that this article is dealing only with the law applicable to proceeds derived from the original encumbered assets as a result of a disposition by the grantor or other event prior to enforcement, whereas article 88 deals with the law applicable to the distribution of proceeds derived from a disposition of the encumbered assets pursuant to post-default enforcement proceedings.

Article 87. Meaning of "location" of the grantor

76. Article 87 is based on recommendation 219 of the Secured Transactions Guide (see chap. X, paras. 73 and 74). It should be noted that the place of the central administration of a legal person is not necessarily the place of its statutory seat (or registered office). If the grantor is a legal person formed under the law of State A with its statutory seat in that State but has in State B a place of business where its senior management is based, then the grantor is located in State B. As a result of this approach, the creation, third-party effectiveness, priority and enforcement of a security right in a receivable is referred to a single law that is easy to determine and is most likely to be the law of the State in which the main insolvency proceeding with respect to the grantor will take place.

Article 88. Relevant time for determining location

77. Article 88 is based on recommendation 220 of the Secured Transactions Guide (see chap. X, paras. 75-78). It deals with the situation where the location of the asset or the location of the grantor changes from one State (State A) to another (State B) in circumstances where the applicable law is determined by reference to that location.

78. Paragraph 1 establishes that State B will recognize the existence of the security right if the latter was validly created under the law of State A at the time the asset or the grantor was located in State A. However, if a priority dispute is raised either in State A or in State B, the substantive law of State B will be applied to determine whether the security right is effective against third parties and has priority over the rights of competing claimants. As a result, for the security right to be treated as being effective against third parties either in State A or in State B, the third-party effectiveness requirements of the law of State B must have been fulfilled. This is so even if the security right had been made effective against third parties under the law of State A at the time the asset or the grantor was located in State A. Indeed, this analysis assumes that both States are enacting States.

79. Paragraph 2 constitutes an exception to the general rules of paragraph 1. In the event of a priority dispute between two security rights that have been made effective against third parties in the State of the initial location (State A, in the example), the priority dispute will be resolved under the law of the initial location.

Article 89. Exclusion of *renvoi*

80. Article 89 is based on recommendation 221 of the Secured Transactions Guide (see chap. X, para. 14). Its purpose is to reject the doctrine of *renvoi* and provide greater certainty with respect to the law applicable by avoiding the complications arising from this doctrine. Under this doctrine, the applicable law as indicated by the conflict-of-laws rules of a State (State A) includes the private international law (this term is used in the same sense as the term "conflict of laws") of the State whose law is the applicable law. As a result of this doctrine, if the conflict-of-laws rules of State A refer the priority of a security right in a receivable to the law of the location of the grantor (the law of State B) and the conflict-of-laws rules of State B refer that issue to the law governing the receivable (which is the law of State C), then a court in State A will resolve the priority dispute using the law of State C

(and not the law of State B). This result, however, would create uncertainty as to the law applicable and also run contrary to the expectations of the parties. For those reasons, article 89 prohibits *renvoi* (for an exception, see art. 97, para. 3).

Article 90. Overriding mandatory rules and public policy (*ordre public*)

81. Article 90, which is based on recommendation 222 of the Secured Transactions Guide (see chap. X, para. 79) and article 11 of the Hague Principles on Choice of Law in International Commercial Contracts (the "Hague Principles"), states generally recognized principles of private international law.

82. To illustrate how the rules in paragraphs 1 and 3 will operate, assume that the law of the forum prohibits dealings in certain types of asset (such as an asset which is the proceeds of criminal activities or is the subject of international sanctions) and that the law of the State whose law is applicable does not contain such a prohibition. In such a case, the forum court may refuse to recognize as validly created a security right created in the asset under the foreign law that is applicable under the provisions of this chapter even though that law does not contain the same prohibition. However, to do so, the forum court must conclude that the application of the foreign law would be manifestly contrary to the public policy of the forum State (see para. 3).

83. Under paragraphs 2 and 4, the forum court (if it is allowed to do so under its law) may refuse to recognize as validly created a security right permitted to be created under the applicable law (even if the law applicable is the law of the forum), if the creation of such security right would be manifestly contrary to public policy in a State which has a close connection with the situation. For example, if a law firm is located in the forum State and under the applicable law of the forum State a security right may be created in receivables arising from legal services, but the location of the client is in a foreign State, which has strict confidentiality rules prohibiting a security right in a law firm's receivables arising from legal services, the forum court may refuse the application of the applicable law of the forum State, if it finds that its application would be manifestly contrary to the public policy of the State of the location of the client.

84. Paragraph 5 is intended to make clear that the rules in paragraph 1-4 may also be relied upon by an arbitral tribunal, although, unlike a court, it does not operate as part of the judicial infrastructure of a single legal system. Under paragraph 5, an arbitral tribunal may take into account the overriding mandatory provisions and policies, for example, of the seat, however identified, or of the place where enforcement of any award would be likely to take place. Paragraph 5 requires an arbitral tribunal to determine whether it is required or entitled to take into account public policy or overriding mandatory provisions of another law, having regard (in particular) to the agreement of the parties, the designated or deemed seat of the arbitration, any institutional rules applicable to the arbitration, and the potentially controlling influence of State courts applying local arbitration legislation (see commentary to article 11(5) of the Hague Principles).

85. Under paragraph 6, the forum State may not displace the provisions of the law applicable to third-party effectiveness and priority of a security right on the ground that this would offend its public policy, and apply its own provisions or the provisions of another State. This approach is justified by the need to achieve certainty with respect to the law applicable to third-party effectiveness and priority. The same approach is followed in article 23, paragraph 2, article 30, paragraph 2, and article 31 of the Assignment Convention, as well as in article 11, paragraph 3, of the Hague Securities Convention.

Article 91. Impact of commencement of insolvency proceedings on the law applicable to a security right

86. Article 91 is based on recommendation 223 of the Secured Transactions Guide (see chap. X, paras. 80-82). Its purpose is to establish that an insolvency court in the enacting State must in principle respect the law applicable to security rights under its conflict-of-laws rules. However, nothing in article 91 restricts the application of the law of the State in which insolvency proceedings are commenced (*lex fori concursus*) to matters such as the avoidance of fraudulent or preferential transactions, the treatment of secured creditors, the ranking of claims and the distribution of proceeds in the grantor's insolvency.

B. Asset-specific rules

Article 92. Law applicable to the relationship of third-party obligors and secured creditors

87. Article 92 is based on recommendation 217 of the Secured Transactions Guide (see chap. X, paras. 62 and 63) and article 29 of the Assignment Convention. Its purpose is twofold. First, the conflict-of-laws rules on the third-party effectiveness or enforcement of a security right do not apply to the effectiveness or enforcement of a security right against the debtor of a receivable, the obligor under a negotiable instrument or the issuer of a negotiable document; they are not considered "third parties". Second, the law applicable to these issues is the law governing the legal relationship between the grantor and the debtor of the receivable, the obligor under the instrument or the issuer of the document; the same law also applies to the question of whether any of the latter may invoke that their agreement with the grantor prohibits or limits the grantor's right to create a security right in the relevant receivable, instrument or document.

Article 93. Law applicable to a security right in a right to payment of funds credited to a bank account

88. Article 93 is based on recommendation 210 of the Secured Transactions Guide (see chap. X, paras. 49-51). It departs from the general conflict-of-laws rule on the law applicable to intangible assets (see art. 83). A right to payment of funds credited to a bank account is in the generic sense a receivable of the customer against the depositary institution but a different rule applies in this case for the determination of the applicable law. Two options are offered to the enacting State for the law applicable to the creation, third-party effectiveness, priority and enforcement of a security right in a right to payment of funds credited to a bank account, as well as to the rights and obligations between the depositary institution and the secured creditor.

89. Under option A, the applicable law is that of the State of the location of the branch or office of the depositary institution with which the account is maintained. It should be noted that a branch (or office) of a depositary institution may be considered as being located in a particular jurisdiction irrespective of whether the institution offers its services through physical offices or only through an online connection accessible electronically by customers. In this connection, it should be noted that a depositary institution must generally have a physical presence or legal address in a jurisdiction in order to be allowed by the relevant regulatory authorities to carry on business in that jurisdiction.

90. Under option B, the applicable law is the law designated in the account agreement as governing the issues that are the subject of article 93 or, in the absence of a designation of a law for these issues, the law designated by the parties to the account agreement as the law governing that agreement. To be effective for conflict-of-laws purposes, a designation must refer to the law of a State in which the depositary institution is engaged in the business of maintaining bank accounts. It must be noted, however, that the State whose law is so designated may be different than the State in which the grantor's bank account is maintained.

91. If the applicable law cannot be determined as described in the preceding paragraph, option B provides for a series of subrules along the lines of the default rules contained in article 5 of the Hague Securities Convention, which the enacting State may wish to insert in this article, if it decides to adopt option B of article 93.

Article 94. Law applicable to the third-party effectiveness of a security right in certain types of asset by registration

92. Article 94 is based on recommendation 211 of the Secured Transactions Guide (see chap. X, para. 34). This article is an exception to the conflict-of-laws rules on the third-party effectiveness of a security right in a negotiable instrument, negotiable document, right to payment of funds credited to a bank account or certificated non-intermediated security. Under articles 82, 93 and 96, the effectiveness against third parties of a security right in any of these assets is governed by the laws of a State which may be different from the State of the location of the grantor. However, under article 94, if the State of the location of the grantor recognizes registration of a notice as a method of third-party effectiveness for a

security right in a negotiable instrument, right to payment of funds credited to a bank account or certificated non-intermediated security, then the law applicable to third-party effectiveness by registration is the law of the State in which the grantor is located.

Article 95. Law applicable to a security right in intellectual property

93. Article 95 is based on recommendation 248 of the Intellectual Property Supplement (see paras. 284-337). The effect of paragraph 1 is the following. If intellectual property is protected in a particular State, the law of that State will apply to the requirements to be met for the security right in that intellectual property to be considered as having been created, made effective against third parties and enjoying priority. It should be noted that a security right in intellectual property may be granted by any person that is entitled to use the related intellectual property under the relevant intellectual property law. Therefore, the grantor may be the owner or a transferee, or a licensor or licensee of the intellectual property to be encumbered.

94. Paragraph 2 provides for an alternative way to create and make effective against certain third parties a security right in intellectual property. Under paragraph 2, the secured creditor may also use for these purposes the law of the State in which the grantor is located. The principal benefit of paragraph 2 is that if the security right has been made effective against an insolvency administrator of the grantor under the law of the grantor's location, an insolvency court in the enacting State will recognize the security right even if the third-party effectiveness requirements of all States in which the intellectual property is protected have not been fulfilled.

95. Paragraph 3 refers to the law of the grantor's location for enforcement issues relating to intellectual property. If enforcement involves several acts that take place in several States, this rule would still lead to the application of one and the same law because it is unlikely that the grantor's location would change between any of those several acts. Moreover, in the rare case where there would be such a change, it is assumed that a court would refer to the laws of the grantor's location at the time of commencement of the enforcement. It should be noted that the effectiveness of the security right against persons other than the grantor (e.g. the owner of the intellectual property, if the grantor is a licensee) is outside the scope of this article.

Article 96. Law applicable to a security right in non-intermediated securities

96. […].

[*Note to the Working Group: The Working Group may wish to note that the commentary to article 96 will be prepared after the Working Group has made a decision as to which of the options is to be retained or, alternatively, whether the article should include several options, and reached an agreement as to the contents of the article.*]

Article 97. Law applicable in the case of a multi-unit State

97. Article 97 is based on recommendations 224-227 of the Secured Transactions Guide (see chap. X, paras. 83-87). Its purpose is to deal with the law applicable where the State whose law is applicable has two or more territorial units. In such a case, paragraph 1 provides that a reference to the law of a multi-unit State is a reference to the law applicable in the relevant unit. For example, in a federal State, secured transactions laws may fall under the legislative authority of one of its territorial units. In such case, each unit will have its own substantive law and conflict-of-laws rules. Under paragraph 2, the relevant unit is to be determined on the basis of the location of the grantor or of the encumbered asset, or otherwise under the provisions of this chapter. It should be noted that paragraphs 1 and 2 are interpretative provisions and also apply where the forum State is the State whose law is applicable under the provisions of this chapter.

98. Where the applicable law is that of a multi-unit State that is not an enacting State, paragraph 3 provides that the conflict-of-laws rules in the relevant State or territorial unit will determine whether to apply the law of a different territorial unit in the State (see Secured Transactions Guide, chap. X, para. 85). This means that the forum court is required to examine the internal conflict-of-laws rules of the State of the location of the grantor or the

encumbered asset. In this regard, the Assignment Convention allows a declaration by States as to the determination of the applicable priority rule as between various territorial units (on article 37 of the Assignment Convention), but in this article there would be no declaration and the forum court would have to determine the applicable law under the conflict-of-laws rules of the multi-unit State.

99. To illustrate how the rule in paragraph 3 will operate, assume that the conflict-of-laws rules of this chapter refer to the law of the location of the grantor and that the location of the grantor under this chapter is in a territorial unit of a multi-unit State whose laws (including its conflict-of-laws rules) govern secured transactions. Also assume that the location of the grantor under this chapter is in unit A of that multi-unit State (unit A being the place of central administration of the grantor). If, however, the conflict-of-laws rules of unit A refer to the law of unit B as being the applicable law (e.g. because unit B also refers to the location of the grantor but defines the location of the grantor as its statutory seat instead of its place of central administration), then the forum court would have to apply the law of unit B if the statutory seat of the grantor is in unit B.

100. Paragraph 3 is indirectly an exception to the exclusion of the doctrine of *renvoi* (see art. 89) as it introduces "internal *renvoi*". The purpose of the exception is to ensure that where the applicable law is that of a unit of a multi-unit State which is not an enacting State, a forum court outside that multi-unit State will apply the substantive law of the same unit as a forum court in that multi-unit State.

Chapter IX. Transition

Introduction

101. This chapter has three functions. First, it provides that prior law governing security rights (the "prior law") is to be repealed (see art. 98). Second, it establishes the law applicable to security rights that are created while the prior law is in force but continue to be effective, perhaps for extensive periods of time, after the new secured transactions law (the "new law") enters into force (see arts. 99-103). Third, it provides for the setting of a date on which the new law goes into effect (see art. 104). Thus, this chapter provides rules by which the law governing such security rights moves in a fair and efficient manner from the prior law to the new one (see Secured Transactions Guide, chap. XI, paras. 1-3).

Article 98. Amendment and repeal of other laws

102. The Model Law is intended as a complete system of secured transactions law, replacing in its entirety the prior law, rather than a supplement to existing law. Accordingly, the enacting State should list in paragraph 1 and thus repeal the body of laws that comprise its secured transactions law. The way in which the repeal is effectuated will depend on the form of the prior law. Where the prior law is a free-standing code or the like, that code can be repealed in its entirety. Where the prior law is derived from statutes that also address other topics, though, the enacting State must determine how to excise the rules formerly governing security rights from the rules that apply to other topics. Where part of the prior law is based on judicial opinions (as may be the case, for example, in some common law systems), the method of repeal of the prior law must be determined by the enacting State.

103. Many other bodies of law interact with secured transactions law. In some cases, provisions of those other bodies of law may be written on the assumption that prior secured transactions law is in effect. Paragraph 2 provides the enacting State an opportunity to amend those provisions so as to mesh with the new law.

Article 99. Transitional application of this Law

104. Paragraph 1 of this article defines two terms used in this chapter. According to subparagraph 1(a), "prior law" may be the law of the enacting State or the law of another State, whose law is applicable under the conflict-of-laws rules of the enacting State. According to subparagraph 1(b), "prior security right" is a security right as long as the relevant security agreement is entered into before the entry into force of the new law, even

if the security right is in future assets (see art. 2, subpara. (m)). As a result, such a security right will benefit from the transition provisions of the Model Law.

105. Paragraph 2 is based on recommendation 228 (second sentence) of the Secured Transactions Guide (see chap. XI, paras. 7-12). It provides that, by the end of the transitional period specified in article 104, the Model Law applies to all security rights within its scope, including prior security rights, except as otherwise provided in this chapter (e.g. art. 100).

106. As a result of paragraph 2, even prior security rights will be governed, at least in part, by the new law. Inasmuch as many secured transactions endure for several years, if the new law applied only to security rights from agreements entered into after the effective date of the new law, the prior law would persist for a lengthy period during which lenders, borrowers, attorneys, and judges would need to apply both laws and search for competing claimants under the rules of both. This result would entail additional cost as well as delaying the economic benefits of the new law.

Article 100. Inapplicability of this Law to actions commenced before its entry into force

107. Article 100 is based on recommendation 229 of the Secured Transactions Guide (see chap. XI, paras. 13-16). It introduces an exception to the rule in article 99 that by the end of the transitional period the Model Law applies to all security rights within its scope, including prior security rights. In certain situations, only prior law will govern an aspect of a security agreement entered into under that regime.

108. In particular, paragraph 1 provides that, if a matter with respect to a security right is the subject of litigation or arbitration proceedings commenced before the new law enters into force, the law governing the matter under dispute will remain the prior law. This paragraph applies to all disputes arising under the prior law, whether between the secured creditor and the grantor, the secured creditor and a competing claimant, or the secured creditor and a person liable, for example, on a receivable or negotiable instrument. It should be noted that the commencement of litigation before the new secured transactions law enters into force with respect to one dispute does not preclude application of the rules of the new law to a separate dispute arising under the same security agreement.

109. Paragraph 2 provides a substantive rule about enforcement of security rights created under prior law. Under the rule in this paragraph, if enforcement is commenced under prior law, the secured creditor may continue enforcement under the rules of the prior law even after the new law enters into force.

Article 101. Creation of a prior security right

110. Article 101 is based on recommendation 230 of the Secured Transactions Guide (see chap. XI, paras. 17-19). Under this article, if a security right was effectively created under prior law, this is sufficient for its continued effectiveness between the parties under the new law even if the manner of creation would not suffice under the new law. This rule avoids the invalidation of prior security rights and the creation of a situation in which the secured creditor would need to obtain cooperation from the grantor to take the additional steps necessary to continue the existence of the security right under the new law. Such cooperation may not be forthcoming from a grantor that has already received an extension of credit secured by the security right in the encumbered asset.

Article 102. Third-party effectiveness of a prior security right

111. Article 102 is based on recommendation 231 of the Secured Transactions Guide (see chap. XI, paras. 20-22). Under this article, security rights created and made effective against third parties under prior law before the effective date of the new law remain effective against third parties for a period of time under the new law, even if the conditions for third-party effectiveness under the new law have not been satisfied. The period expires at the earlier of the date specified in the Model Law or the date on which third-party effectiveness would have ceased under prior law.

112. Illustration 1: Under the former secured transactions law of State X, a security right effectively created in a receivable is automatically effective against third parties without any

additional action required. Prior to the effective date of the new secured transactions law, Grantor created in favour of Creditor a security right in Grantor's receivables. All steps necessary for creation of a security right under prior law were properly taken; therefore, under the prior law, Creditor had a security right in the receivables that was effective against third parties. Under paragraph 1, once the new secured transactions law goes into effect, Creditor's security right will remain effective against third parties until the expiration of the period of time specified in subparagraph 1(a).

113. Illustration 2: Under the former secured transactions law of State Y, a security right effectively created in receivables by a grantor that is a corporation was made effective against third parties by submitting a notice to the registrar of corporations. Under prior law, such a notice expired after four years. One year prior to the effective date of the new secured transactions law, Grantor created in favour of Creditor a security right in Grantor's receivables. All steps necessary for creation of a security right were properly taken, and Creditor submitted the requisite notice to the registrar of corporations the same day; as a result, under the former legal regime Creditor's security right was effective against third parties. Under paragraph 1, once the new secured transactions law goes into effect, Creditor's security right will remain effective against third parties until the earlier of: (a) the expiration of the four-year period of effectiveness under the prior law of the notice submitted to the registrar of corporations; and (b) the expiration of the period of time specified in subparagraph 1(b).

114. A secured creditor, whose security right that is effective against third-parties based on compliance with prior law will cease to be effective against third parties under the rule in paragraph 1, may take the appropriate steps under the new law to achieve third-party effectiveness. Most often, this result will be accomplished by registering a notice with the Registry. The ability to do so is aided by paragraph 2, which provides that the prior written agreement creating the security right constitutes sufficient authorization for registration of the notice.

115. Paragraph 3 provides that, so long as a security right is effective against third parties under prior law and the requirements for third-party effectiveness under the new law are satisfied before the expiration of the period specified in paragraph 1, the prior security right continues to be effective against third parties from the time when it was made effective against third parties under prior law and, thus, priority will date from that time.

116. If, however, a security right was effective against third parties under prior law but there is a gap before third-party effectiveness was achieved under the new law, paragraph 4 provides that the security right is effective against third parties only from the time it is made effective against third parties under the new law and, thus, its priority dates only from that time.

Article 103. Priority of a prior security right

117. Article 103 contains two rules relevant to determining the priority of a security right that was created under prior law. Paragraph 1 indicates how to apply the priority rule of article 28 to such a security right. Under that paragraph, the date of third-party effectiveness or registration of a notice, as applicable, under prior law is used for priority purposes if the security right was effective against third parties under prior law and remained effective against third parties under the new law under article 102, paragraph 3.

118. Under paragraph 2, however, prior law, rather than the new law, determines priority if the "priority status" of competing claimants has not changed. The purpose of this rule is to preserve priority among completing claimants that was established under prior law when no change has occurred other than the new law becoming effective.

Article 104. Entry into force of this Law

119. Article 104 is based on recommendation 228 of the Secured Transactions Guide (see chap. XI, paras. 4-6). It leaves to the enacting State to determine the date when or the mechanism according to which the new law will enter into force. The enacting State may also wish to determine whether this article should be placed at the beginning or at the end of the new law.

120. In determining when the new law will enter into force, careful consideration should be given both to obtaining the economic benefits of the new law as soon as possible and to minimizing dislocations that may be caused by significant changes in secured transactions practice resulting from the new law. Inasmuch as the new law will have been chosen because it is an improvement over the prior law, the new law should come into force as soon as is practical. However, some lead time is necessary in order to, inter alia: (a) publicize the existence of the new law; (b) enable establishment of the Registry (or adaptation of an existing registry to the system required by the new law); and (c) enable participants in the secured transactions system, particularly present and future secured creditors, to prepare, for example, for compliance with new rules and develop new forms. For example, the new law may enter into force on a specific date or a few months after a specific date, or on the date to be specified by a decree once the Registry becomes operational.

G. Note by the Secretariat on a draft model law on secured transactions

(A/CN.9/884 and Add.1-4)

[Original: English]

Contents

Chapter I. Scope of application and general provisions

Article 1. Scope of application

1. This Law applies to security rights in movable assets.

2. With the exception of articles 70, paragraphs 1-3, to 79, this Law applies to outright transfers of receivables [and, in such a case, references in this Law to a grantor apply to the transferor, references to a secured creditor apply to the transferee, references to a security agreement apply to the agreement for the outright transfer of a receivable, references to a security right apply to the right of the transferee and references to an encumbered asset apply to the receivable, but references to a secured obligation do not apply to the right to payment of the price of the receivable].

3. Notwithstanding paragraph 1, this Law does not apply to security rights in:

(a) The right to request payment under, or to receive the proceeds of, an independent guarantee or letter of credit;

(b) Intellectual property in so far as this Law is inconsistent with [the law relating to intellectual property to be specified by the enacting State];[1]

(c) Intermediated securities;

(d) Payment rights arising under or from financial contracts governed by netting agreements, except a payment right arising upon the termination of all outstanding transactions; and

(e) [Any other types of asset to be specified by the enacting State, such as those that are subject to specialized secured transactions and asset-based registration regimes under other law to the extent that that other law governs matters addressed in this Law].[2]

[4. This Law does not apply to security rights in proceeds of encumbered assets if the proceeds are a type of asset, to which this Law does not apply, to the extent that [any other law to be specified by the enacting State] applies to security rights in those types of asset and governs the matters addressed in this Law.]

5. Nothing in this Law affects the rights and obligations of the grantor and the debtor of the receivable under other laws governing the protection of parties to transactions made for personal, family or household purposes.

6. Nothing in this Law overrides a provision of any other law that limits the creation or enforcement of a security right in, or the transferability of, specific types of asset, with the exception of a provision that limits the creation or enforcement of a security right in, or the transferability of, an asset on the sole ground that it is a future asset, or a part or undivided interest in an asset.

[*Note to the Commission: The Commission may wish to consider which of the alternative bracketed texts should be retained, the text in article 1, paragraph 2 or the texts in article 2 subparagraph (k), (o), (dd), (ee), (hh) and (ii), prepared pursuant to a decision by the Working Group (A/CN.9/865, para. 40).*]

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[1] This provision may not be necessary if the enacting State has coordinated, or has otherwise addressed the relationship between this Law and any secured transactions provisions of its law relating to intellectual property.

[2] If the enacting State decides to introduce any other exception(s), they should be limited and set out in the Law in a clear and specific way.

Article 2. Definitions and rules of interpretation

For the purposes of this Law:

(a) "Acquisition secured creditor" means a secured creditor that has an acquisition security right;

(b) "Acquisition security right" means a security right in a tangible asset, intellectual property or the rights of a licensee under a licence of intellectual property, which secures the obligation to pay any unpaid portion of the purchase price of the asset or other credit extended to enable the grantor to acquire rights in the asset to the extent that the credit is used for that purpose;

(c) "Bank account" means an account maintained by a [a financial institution authorized to receive deposits from the public] [an authorized deposit-taking institution] [any institution to be specified by the enacting State] to which funds may be credited or debited;

(d) "Certificated non-intermediated securities" means non-intermediated securities represented by a certificate that:

(i) Provides that the person entitled to the securities is the person in possession of the certificate; or

(ii) Identifies the person entitled to the securities;

(e) "Competing claimant" means a creditor of a grantor or other person with rights in an encumbered asset that may be in competition with the rights of a secured creditor in the same encumbered asset. The term includes:

(i) Another secured creditor of the grantor that has a security right in the same encumbered asset;

(ii) Another creditor of the grantor that has a right in the same encumbered asset [to be specified by the enacting State];

(iii) The insolvency representative in insolvency proceedings in respect of the grantor; or

(iv) A buyer or other transferee, lessee or licensee of the encumbered asset;

(f) "Consumer goods" means goods primarily used or intended to be used by the grantor for personal, family or household purposes;

(g) "Control agreement":

(i) With respect to uncertificated non-intermediated securities means an agreement in writing among the issuer, the grantor and the secured creditor, according to which the issuer agrees to follow instructions from the secured creditor with respect to the securities without further consent from the grantor; and

(ii) With respect to rights to payment of funds credited to a bank account means an agreement in writing among the depositary institution, the grantor and the secured creditor, according to which the depositary institution agrees to follow instructions from the secured creditor with respect to the payment of funds credited to the bank account without further consent from the grantor;

(h) "Debtor" means a person that owes payment or other performance of a secured obligation, whether or not that person is the grantor of the security right securing payment or other performance of that obligation, including a secondary obligor such as a guarantor of a secured obligation;

(i) "Debtor of the receivable" means:

(i) A person that owes payment of a receivable that is subject to a security right, including a guarantor or other person secondarily liable for payment of the receivable; and

(ii) A transferor in an outright transfer of a receivable;

(j) "Default" means the failure of the debtor to pay or otherwise perform the secured obligation [and any other event that the grantor and the secured creditor define in their agreement as constituting default];

[*Note to the Commission: The Commission may wish to note that this definition was added pursuant to the decision of the Working Group (see A/CN.9/871, para. 82) and consider whether the bracketed words are necessary. In this connection, the Commission may wish to note that all provisions of the draft Model Law are subject to contrary agreement of the parties, unless they are set out in article 3 as mandatory law rules.*]

(k) "Encumbered asset" means[:

(i)] A movable asset that is subject to a security right; [and

(ii) A receivable that is the subject of an outright transfer;]

(l) "Equipment" means a tangible asset other than inventory or consumer goods that is primarily used or intended to be used by the grantor in the operation of its business;

(m) "Financial contract" means any spot, forward, future, option or swap transaction involving interest rates, commodities, currencies, equities, bonds, indices or any other financial instrument, any securities repurchase or lending transaction, and any other transaction similar to those transactions entered into in financial markets and any combination of those transactions;

(n) "Future asset" means a movable asset, which does not exist or which the grantor does not have rights in or the power to encumber at the time the security agreement is concluded;

(o) "Grantor" means:

(i) A person that creates a security right to secure either its own obligation or that of another person; [and]

(ii) A buyer or other transferee, lessee, or licensee of an encumbered asset that acquires its rights subject to a security right; [and

(iii) A transferor 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;

[*Note to the Commission: The Commission may wish to note that this term is only referred to in the definition of "competing claimant" and thus consider whether it should be retained in article 2 or rather explained in the draft Guide to Enactment. In any case, the draft Guide to Enactment may clarify that the term includes an insolvency representative that may be appointed to supervise, rather than only administer, the reorganization of the insolvency estate, for example, in the context of debtor-in-possession insolvency proceedings, and/or simply refer to the discussion in the* UNCITRAL Legislative Guide on Insolvency Law *(the "*Insolvency Guide*") on the supervision of the debtor by the insolvency representative and the various functions performed by the insolvency representative (see part two, chap. III, paras. 11-18 and 35). The Commission may also wish to consider whether the term "insolvency proceedings", which is referred to in this definition and in articles 33 (priority chapter) and 92 (conflict-of-laws chapter), and the term "insolvency estate", which is referred to in the definition of this term and the definition of the term "competing claimant", should also be defined in article 2 or explained in the draft Guide to Enactment by reference to the definitions of those terms contained in the* UNCITRAL Legislative Guide on Secured Transactions (the "Secured Transactions Guide"), *which are based on the relevant definitions of the* Insolvency Guide.]

(q) "Intangible asset" means all types of movable asset other than tangible assets;

(r) "Inventory" means tangible assets held by the grantor for sale or lease in the ordinary course of the grantor's business, including raw and semi-processed materials (work-in-process);

(s) "Knowledge" means actual knowledge;

(t) "Mass or product" means tangible assets that are so physically associated or united with other tangible assets that they have lost their separate identity;

(u) "Money" means currency authorized as legal tender by any State;

[*Note to the Commission: Noting that the term is used throughout the draft Model Law (see, for example, art 2, subpara. (jj), art. 10, para. 2 and art. 19, para. 1), the Commission may wish to consider whether the term "movable asset" should be defined along the following lines "'Movable asset' means a tangible or intangible asset other than [immovable property as defined in the law of the enacting State*.]

(v) "Non-intermediated securities" means securities other than securities credited to a securities account and rights in securities resulting from the credit of securities to a securities account;

(w) "Netting agreement" means an agreement between two or more parties that provides for one or more of the following:

(i) The net settlement of payments due in the same currency on the same date whether by novation or otherwise;

(ii) Upon the insolvency or other default by a party, the termination of all outstanding transactions at their replacement or fair market values, conversion of such sums into a single currency and netting into a single payment by one party to the other; or

(iii) The set-off of amounts calculated as set forth in subparagraph (ii) under two or more netting agreements;

(x) "Notice" means a communication in writing;

(y) "Notification of a security right in a receivable" means a notice by the grantor or the secured creditor informing the debtor of the receivable that a security right has been created in the receivable;

(z) "Possession" means the actual possession of a tangible asset by a person [directly or indirectly] or its representative, or by an independent person that acknowledges holding it for that person;

[*Note to the Commission: The Commission may wish to note that the bracketed words have been added pursuant to a decision by the Working Group to address situations in which the issuer of a negotiable document holds it through various persons responsible to perform parts of a multimodal transport contract (A/CN.9/865, para. 62), and consider whether they should be retained.*]

(aa) "Priority" means the right of a person in an encumbered asset in preference to the right of a competing claimant;

(bb) "Proceeds" means whatever is received in respect of an encumbered asset, including what is received as a result of sale or other transfer, lease, licence or collection of an encumbered asset, civil and natural fruits, insurance proceeds, claims arising from defects in, damage to or loss of an encumbered asset, and proceeds of proceeds;

(cc) "Receivable" means a right to payment of a monetary obligation, excluding a right to payment evidenced by a negotiable instrument, a right to payment of funds credited to a bank account and a right to payment under a non-intermediated security;

(dd) "Secured creditor" means:

[(i)] A person that has a security right;[and

(ii) A transferee in an outright transfer of a receivable;]

(ee) "Secured obligation" means an obligation secured by a security right[. The term does not include the obligation of the transferee to pay the price in an outright transfer of a receivable];

(ff) "Securities" means:

[(i)] An obligation of an issuer or any share or similar right of participation in an issuer or in the enterprise of an issuer that:

a. Is one of a class or series, or by its terms is divisible into a class or series; [and]

b. Is of a type dealt in or traded on a recognized market, or is issued as a medium for investment [and

(ii) The enacting State to specify any additional rights that should qualify as securities even if they do not satisfy the requirements expressed in subparagraphs (i) a. and (i) b.;]

(gg) "Securities account" means an account maintained by an intermediary to which securities may be credited or debited;

(hh) "Security agreement" means:

[(i)] An agreement, regardless of whether the parties have denominated it as a security agreement, between a grantor and a secured creditor that provides for the creation of a security right; [and

(ii) An agreement that provides for the outright transfer of a receivable;]

(ii) "Security right" means:

[(i)] A property right in a movable asset that is created by an agreement to secure payment or other performance of an obligation, regardless of whether the parties have denominated it as a security right, and regardless of the type of asset, the status of the grantor or secured creditor, or the nature of the secured obligation; [and

(ii) The right of the transferee in an outright transfer of a receivable;]

(jj) "Tangible asset" means all types of tangible movable asset. Except in articles 2, subparagraphs (b), (k), (r) and (t), 11, 32 and 36-40, the term includes money, negotiable instruments, negotiable documents and certificated non-intermediated securities; and

(kk) "Uncertificated non-intermediated securities" means non-intermediated securities not represented by a certificate.

Article 3. Party autonomy

1. Except for articles 4, 6, 9, 51, 52, 70, paragraph 3, and 83-105, the provisions of this Law may be derogated from or varied by agreement.

2. An agreement referred to in paragraph 1 does not affect the rights or obligations of any person that is not a party to the agreement.

Article 4. General standards of conduct

A person must exercise its rights and perform its obligations under this Law in good faith and in a commercially reasonable manner.

Article 5. International origin and general principles

1. In the interpretation of this Law, regard is to be had to its international origin and 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.

[*Note to the Commission: The Commission may wish to note that article 5, which has been added pursuant to a decision by the Working Group (A/CN.9/865, para. 47), is based on article 3 of the UNCITRAL Model Law on Electronic Commerce, article 4 of the* UNCITRAL Model Law on Electronic Signatures, *and art. 2A of the UNCITRAL* Model Law on International Commercial Arbitration.]

Chapter II. Creation of a security right

A. General rules

Article 6. Creation of a security right

1. A security right is created by a security agreement, provided that the grantor has rights in the asset to be encumbered or the power to encumber it.

2. A security agreement may provide for the creation of a security right in a future asset, but the security right in that asset is created only when the grantor acquires rights in it or the power to encumber it.

3. Except as provided in paragraph 4, a security agreement must be [concluded in] [evidenced by][3] a writing that is signed by the grantor and:

(a) Identifies the secured creditor and the grantor;

(b) Describes the secured obligation;

(c) Describes the encumbered assets as provided in article 9[; and

(d) Indicates the maximum monetary amount for which the security right may be enforced].[4]

4. A security agreement may be oral if the secured creditor is in possession of the encumbered asset.

Article 7. Obligations that may be secured

A security right may secure any type of obligation, present or future, determined or determinable, conditional or unconditional, fixed or fluctuating.

Article 8. Assets that may be encumbered

A security right may encumber:

(a) Any type of movable asset, including future assets;

(b) Parts of and undivided rights in movable assets;

(c) Generic categories of movable assets; and

(d) All of a grantor's movable assets.

Article 9. Description of encumbered assets

1. The assets encumbered or to be encumbered must be described in the security agreement in a manner that reasonably allows their identification.

2. A description that indicates that the encumbered assets consist of all the grantor's movable assets, or of all the grantor's movable assets within a generic category, satisfies the standard in paragraph 1.

Article 10. Right to proceeds and commingled funds

1. A security right in an encumbered asset extends to its identifiable proceeds.

2. Where proceeds in the form of money or funds credited to a bank account are commingled with other assets of the same kind:

(a) The security right extends to the commingled assets, notwithstanding that the proceeds have ceased to be identifiable;

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[3] The enacting State may wish to choose the option that best fits its legal system.

[4] The enacting State may wish to include this subparagraph if it determines that an indication of the maximum monetary amount for which the security right may be enforced would be helpful to facilitate lending from another creditor.

(b) The security right in the commingled assets is limited to the value of the proceeds immediately before they were commingled; and

(c) If at any time after the commingling, the value of the commingled money or of the balance credited to the bank account is less than the value of the proceeds immediately before they were commingled, the security right in the commingled assets is limited to the lowest value between the time when the proceeds were commingled and the time when the security right is claimed.

Article 11. Tangible assets commingled in a mass or product

1. A security right in a tangible asset that is commingled in a mass of assets of the same kind or product extends to the mass or product.

Option A

2. A security right that extends to a mass or product is limited to the value of the encumbered assets immediately before they became part of the mass or product.

Option B

2. A security right that extends to a mass is limited to the same proportion of the value of the mass as the value that the encumbered assets bore to the value of the mass at the time of commingling.

3. A security right that extends to a product is limited to the value of the encumbered assets immediately before they became part of the product.

[3][4.] Where more than one security right extends to the same mass or product and each was a security right in a separate tangible asset at the time of commingling, the secured creditors are entitled to share in the mass or product according to the ratio that the obligation secured by each security right bears to the sum of the obligations secured by all the security rights.

Article 12. Extinguishment of a security right

A security right is extinguished upon the extinguishment of all present and future secured obligations, including conditional obligations, by payment or otherwise.

B. Asset-specific rules

Article 13. Contractual limitations on the creation of a security right

1. A security right in a receivable is effective as between the grantor and the secured creditor and as against the debtor of the receivable notwithstanding any agreement between the initial or any subsequent grantor and the debtor of the receivable or any subsequent secured creditor limiting in any way the grantor's right to create a security right.

2. Nothing in this article affects any obligation or liability of the grantor for breach of the agreement referred to in paragraph 1, but the other party to the agreement may not avoid the contract giving rise to the receivable or the security agreement on the sole ground of the breach of that agreement, or raise against the secured creditor any claim it may have as a result of such a breach against the grantor, as provided in article 62, paragraph 2.

3. A person that is not a party to the agreement referred to in paragraph 1 is not liable for the grantor's breach of the agreement on the sole ground that it had knowledge of the agreement.

4. This article applies only to receivables:

(a) Arising from a 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 a 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) Arising upon net settlement of payments due pursuant to a netting agreement involving more than two parties.

Article 14. Personal or property rights securing or supporting payment or other performance of an encumbered receivable or other intangible asset, or negotiable instrument

1. A secured creditor with a security right in a receivable or other intangible asset, or a negotiable instrument has the benefit of any personal or property right that secures or supports payment or other performance of the encumbered asset without a new act of transfer.

2. If the right referred to in paragraph 1 is transferable only with a new act of transfer, the grantor is obliged to transfer the benefit of that right to the secured creditor.

Article 15. Right to payment of funds credited to a bank account

A security right in a right to payment of funds credited to a bank account is effective notwithstanding an agreement between the grantor and the depositary institution limiting in any way the grantor's right to create a security right.

Article 16. Tangible assets covered by negotiable documents

A security right in a negotiable document extends to the tangible asset covered by the document, provided that the issuer of the document is in possession of the asset at the time the security right in the document is created.

Article 17. Tangible assets with respect to which intellectual property is used

A security right in a tangible asset with respect to which intellectual property is used does not extend to the intellectual property and a security right in the intellectual property does not extend to the tangible asset.

Chapter III. Effectiveness of a security right against third parties

A. General rules

Article 18. Primary methods for achieving third-party effectiveness

1. A security right in an encumbered asset is effective against third parties if a notice with respect to the security right is registered in the general security rights registry (the "Registry").[5]

2. A security right in a tangible asset is also effective against third parties if the secured creditor has possession of the asset.

Article 19. Proceeds

1. If a security right in an asset is effective against third parties, a security right in any proceeds of that asset is effective against third parties without any further act if the proceeds are in the form of money, receivables, negotiable instruments or rights to payment of funds credited to a bank account.

[5] If a State implements the Model Registry-related Provisions in its secured transactions law, it will not need to define the term "Registry" in this article. If a State implements these Provisions in another statute or other type of legal instrument, it will need to refer to that other law or instrument in this article. If a State incorporate some of these Provisions in its secured transactions law and the balance of the Provisions in a separate statute or other type of legal instrument, it will need to coordinate its secured transactions law with that statute or other legal instrument.

2. If a security right in an asset is effective against third parties, a security right in any identifiable proceeds of that asset other than the types of proceeds referred to in paragraph 1 is effective against third parties:

(a) For [a short period of time to be specified by the enacting State] after the proceeds arise; and

(b) Thereafter, only if the security right in the proceeds is made effective against third parties by one of the methods applicable to the relevant type of encumbered asset referred to in the provisions of this chapter before the expiry of the time period specified in subparagraph (a).

[*Note to the Commission: The Commission may wish to consider whether an article should be inserted in this part of the draft Model Law to implement recommendation 44 of the* Secured Transactions Guide *providing for the automatic third-party effectiveness of a security right in tangible assets commingled in a mass or product (for creation issues, see art. 11, and for priority issues, see art. 40)*.]

Article 20. Changes in the method for achieving third-party effectiveness

A security right that is effective against third parties remains effective against third parties despite a change in the method for achieving third-party effectiveness, provided that there is no time when the security right is not effective against third parties.

Article 21. Lapse in third-party effectiveness

If the third-party effectiveness of a security right lapses, third-party effectiveness may be re-established, but the security right is effective against third parties only as of that time.

Article 22. Continuity in third-party effectiveness upon a change of the applicable law to this Law

1. If a security right is effective against third parties under the law of another State and this Law becomes applicable as a result of a change in the location of the encumbered asset or the grantor, whichever determines the applicable law under the provisions of chapter VIII, the security right remains effective against third parties under this Law until the earlier of:

(a) The time when third-party effectiveness would have lapsed under the law of the other State; and

(b) [A short period of time to be specified by the enacting State] after the change and, thereafter only if the third-party effectiveness requirements of this Law are satisfied before the expiry of that time period.

2. If a security right continues to be effective against third parties under paragraph 1, the time of third-party effectiveness is the time when it was achieved under the law of the other State.

[*Note to the Commission: The Commission may wish to consider whether a third party, who acquired a right in an encumbered asset when the security right was effective against third parties and thus acquired its right subject to the security right, would remain subordinated even after the security right ceased to be effective against third parties under subparagraph (a) or (b) of this article.*]

Article 23. Acquisition security rights in consumer goods

Option A

An acquisition security right in consumer goods is effective against third parties, other than a buyer or other transferee, lessee or licensee upon its creation without any further act.

Option B

An acquisition security right in consumer goods [below a value to be specified by the enacting State] is effective against third parties upon its creation without any further act.

[*Note to the Commission: The Commission may wish to consider whether the exception to the rule in option A is too broad and should thus be limited to transferees for value*.]

B. Asset-specific rules

Article 24. Rights to payment of funds credited to a bank account

A security right in a right to payment of funds credited to a bank account may also be made effective against third parties by:

(a) The creation of the security right in favour of the depositary institution;

(b) The conclusion of a control agreement; or

(c) The secured creditor becoming the account holder.

Article 25. Negotiable documents and tangible assets covered by negotiable documents

1. If a security right in a negotiable document is effective against third parties, the security right that extends to the asset covered by the document in accordance with article 16 is also effective against third parties.

2. During the period when a negotiable document covers an asset, a security right in the asset may also be made effective against third parties by the secured creditor's possession of the document.

3. A security right in a negotiable document that was effective against third parties by the secured creditor's possession of the document remains effective against third parties for [a short period of time to be specified by the enacting State] after the document has been returned to the grantor or other person for the purpose of ultimate sale or exchange, loading or unloading, or otherwise dealing with the assets covered by the document.

Article 26. Uncertificated non-intermediated securities

A security right in uncertificated non-intermediated securities may also be made effective against third parties by:

(a) The [notation of the security right] [entry of the name of the secured creditor as the holder of the securities][6] in the books maintained by or on behalf of the issuer for the purpose of recording the name of the holder of the securities; or

(b) The conclusion of a control agreement.

[6] The enacting State may wish to choose the method that best suits its legal system.

(A/CN.9/884/Add.1) (Original: English)

Note by the Secretariat on a draft model law on secured transactions

ADDENDUM

Contents

Chapter IV. The registry system

Article 27. Establishment of a registry

A registry is established to give effect to the provisions of this Law relating to the registration of notices with respect to security rights.

Draft Model Registry-related Provisions[1]

Section A. General rules

Article 1. Definitions and rules of interpretation

For the purposes of these Provisions:

(a) "Address" means: (i) a physical address or a post office box number, city, postal code and State; or (ii) an electronic address;

(b) "Amendment notice" means a notice submitted to the Registry in the prescribed registry notice form to modify information contained in a related registered notice;

(c) "Cancellation notice" means a notice submitted to the Registry in the prescribed registry notice form to cancel the effectiveness of the registration of all related registered notices;

(d) "Designated field" means the space on the prescribed registry notice form designated for entering a specified type of information;

[1] The draft Model Registry-related Provisions are intended to take effect simultaneously with the enactment of the other provisions of the draft Model Law. They are presented as a separate component with their own internal numbering in order to give enacting States flexibility in their implementation. Depending on its drafting conventions, an enacting State may choose to: (a) incorporate all of the Provisions in its secured transactions law as a separate chapter (e.g., as chapter IV); (b) incorporate all of the Provisions in a separate statute or other type of legal instrument such as rules, regulations, orders, by-laws, proclamations, or the like by the authority designated under article 27 of these Provisions; or (c) incorporate some of the Provisions in its secured transactions law and the balance in a separate statute or other type of legal instrument.

(e) "Initial notice" means a notice submitted to the Registry in the prescribed registry notice form to achieve the third-party effectiveness of the security right to which the notice relates;

(f) "Notice" means an initial notice, an amendment notice and a cancellation notice;

[(g) "Registered notice" means a notice the information in which has been entered into the registry record;]

[(h)] "Registrant" means a person who submits a notice to the Registry;

[(i)] "Registration" means the entry of information contained in a notice into the registry record;

[(j)] "Registration number" means the unique number assigned to an initial notice by the Registry and permanently associated with that notice and any related notice;

[(k)] "Registry" means the Registry established pursuant to article 27 of this Law; and

[(l)] "Registry record" means the information in all registered notices stored by the Registry. The registry record consists of the record that is publicly accessible (the public registry record) and the record that has been removed from the public registry record and archived (the registry archives).

Article 2. Grantor's authorization for registration

1. Registration of an initial notice with respect to a security right in an asset of a grantor is ineffective unless authorized by that grantor in writing.

2. Registration of an amendment notice that adds encumbered assets [or increases the maximum amount for which the security right may be enforced][2] or extends the period of effectiveness of the registration of a notice is ineffective unless authorized by the grantor in writing.

3. [With the exception of an amendment notice to add a transferee of an encumbered asset as a grantor in accordance with article 26 of these Provisions, registration] [3] [Registration] of an amendment notice that adds a grantor is ineffective unless authorized by the additional grantor in writing.

4. Authorization may be given before or after the registration of an initial or amendment notice.

5. A written security agreement is sufficient to constitute authorization by the grantor for the registration of an initial or amendment notice covering the encumbered asset described in that security agreement.

6. The Registry may not require evidence of the existence of the grantor's authorization.

Article 3. One notice sufficient for multiple security rights

The registration of a single notice may relate to security rights created by the grantor in favour of the secured creditor under one or more than one security agreement.

Article 4. Advance registration

A notice may be registered before the creation of a security right or the conclusion of a security agreement to which the notice relates.

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[2] This provision will be necessary if the enacting State implements article 6, subparagraph 3 (d), of the draft Model Law.

[3] This wording will be necessary if the enacting State implements option A or option B of article 26 of the draft Model Registry-related Provisions.

Section B. Access to registry services

Article 5. Conditions for access to registry services

1. Any person may submit a notice to the Registry, if that person:

(a) Uses the prescribed registry notice form; [and]

(b) Identifies itself in the prescribed manner[; and

(c) Has paid or arranged to pay the prescribed fee].[4]

2. A person may submit an amendment or cancellation notice if that person also [satisfies the secure access requirements to be specified by the Registry].

3. Any person may submit a search request to the Registry, if that person:

(a) Uses the prescribed registry search request form[; and

(b) Has paid or arranged to pay the prescribed fee].

4. If access is refused, the Registry must communicate the reason to the registrant or searcher without delay.

[*Note to the Commission: The Commission may wish to consider whether article 5 should include a paragraph along the lines of article 6, paragraph 3, which could read along the following lines: "Except if a person does not comply with the requirements of paragraph 1 or 2, the Registry may not refuse access."*]

Article 6. Rejection of the registration of a notice or a search request

1. The Registry must reject the registration of:

(a) A notice if no information or no legible information is entered in one or more of the mandatory designated fields; or

(b) An amendment notice to extend the period of effectiveness of the registration of a notice if it is not submitted within the period referred to in article 14, paragraph 2, of these Provisions.

2. The Registry must reject a search request if no information or no legible information is entered in at least one of the mandatory fields designated for entering a search criterion.

3. Except as provided in paragraph 1 or 2, the Registry may not reject the registration of a notice or a search request.

4. If the registration of a notice or a search request is rejected, the Registry must communicate the reason to the registrant or searcher without delay.

Article 7. Information about the registrant's identity and scrutiny of the form or contents of the notice by the Registry

1. The Registry must maintain information about the registrant's identity submitted in accordance with article 5, subparagraph 1(b), of these Provisions, and must, upon request, provide that information to the person identified in a registered notice as the grantor.

2. The Registry may not require verification of the information about the registrant's identity submitted in accordance with article 5, subparagraph 1(b), of these Provisions.

3. The Registry may not scrutinize the form or content of a notice or a search request other than to the extent authorized in articles 5 and 6 of these Provisions.

[4] The bracketed wording in this provision will be necessary if the enacting State implements option A of article 33 of the draft Model Registry-related Provisions.

Section C. Registration of a notice

Article 8. Information required in an initial notice

An initial notice must contain the following information in the relevant designated field:

(a) The identifier and address of the grantor [and any additional information that the enacting State may decide to require to be entered to assist in uniquely identifying the grantor] in accordance with article 9 of these Provisions;

(b) The identifier and address of the secured creditor or its representative in accordance with article 10 of these Provisions; [and]

(c) A description of the encumbered assets in accordance with article 11 of these Provisions;

[(d) The period of effectiveness of the registration in accordance with article 14 of these Provisions];[5] [and]

[(e) A statement of the maximum amount for which the security right may be enforced.][6]

Article 9. Grantor identifier

1. Where the person to be identified in an initial or amendment notice as the grantor is a natural person, the grantor identifier is the name of that person as it appears in [the relevant official document to be specified by the enacting State; if the enacting State specifies more than one document, it must designate the order in which each document should be used to determine that person's name].

2. [The enacting State should specify which components of the grantor's name determined in accordance with paragraph 1 must be entered in an initial or amendment notice].

3. [The enacting State should specify the manner in which the grantor's name is determined if the name is legally changed after the issuance of the relevant document referred to in paragraph 1.]

4. Where the person to be identified in an initial or amendment notice as the grantor is a legal person, the grantor identifier is the name of that person as it appears in [the relevant document, law or decree to be specified by the enacting State] constituting that person.

5. [The enacting State should specify whether additional information must be entered in an initial or amendment notice in special cases, such as where the grantor is subject to insolvency proceedings, a trustee, or a representative of the estate of a deceased person.]

Article 10. Secured creditor identifier

1. Where the person to be identified in an initial or amendment notice as the secured creditor is a natural person, the secured creditor identifier is the name of that person as it appears in [the relevant official document to be specified by the enacting State; if the enacting State specifies more than one document, it must designate the order in which each document should be used to determine that person's name].

2. Where the person to be identified in an initial or amendment notice as the secured creditor is a legal person, the secured creditor identifier is the name of that person as it appears in [the relevant document, law or decree to be specified by the enacting State] constituting that person.

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[5] This provision will be necessary, if the enacting State implements option B or option C of article 14 of the draft Model Registry-related Provisions.

[6] This provision will be necessary if the enacting State includes in its law article 6, subparagraph 3 (d), of the draft Model Law.

3. [The enacting State should specify whether additional information must be entered in an initial or amendment notice in special cases, such as where the secured creditor is subject to insolvency proceedings, a trustee, or a representative of the estate of a deceased person.]

Article 11. Description of encumbered assets

1. The assets encumbered or to be encumbered must be described in an initial or amendment notice in a manner that reasonably allows their identification.

2. A description that indicates that the encumbered assets consist of all of the grantor's movable assets, or of all of the grantor's movable assets within a particular category, satisfies the standard in paragraph 1.

Article 12. Language of information in a notice

1. With the exception of the names and addresses of the grantor and the secured creditor or its representative, the information contained in an initial or amendment notice must be expressed in [the language or languages to be specified by the enacting State].

2. The information contained in an initial or amendment notice must be expressed in the character set prescribed and publicized by the Registry.

Article 13. Time of effectiveness of the registration of a notice

1. The registration of an initial or amendment notice is effective from the date and time when the information in the notice is entered into the registry record so as to be accessible to searchers of the public registry record.

2. The Registry must enter information in an initial or amendment notice into the public registry record without delay after the notice is submitted and in the order in which each notice is submitted.

3. The Registry must record the date and time when the information in an initial or amendment notice is entered into the registry record so as to be accessible to searchers of the public registry record.

Option A[7]

4. The registration of a cancellation notice is effective from the date and time when the information in the notice to which it relates is no longer accessible to searchers of the public registry record.

Option B[8]

4. The registration of a cancellation notice is effective from the date and time when the information in the notice is entered into the registry record so as to be accessible to searchers of the public registry record.

Option A[9]

5. The Registry must record the date and time when the information in the initial or amendment notice to which a cancellation notice relates is no longer accessible to searchers of the public registry record.

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[7] This provision will be necessary, if the enacting State implements option A or option B of article 21 of the draft Registry-related Provisions.

[8] This provision will be necessary, if the enacting State implements option C or option D of article 21 of the draft Registry-related Provisions.

[9] This provision will be necessary, if the enacting State implements option A of paragraph 4 of this article.

Option B[10]

5. The Registry must record the date and time when the information in a cancellation notice is entered into the registry record so as to be accessible to searchers of the public registry record.

Article 14. Period of effectiveness of the registration of a notice

Option A

1. The registration of an initial notice is effective for [a period of time to be specified by the enacting State].

2. The period of effectiveness of the registration of an initial notice may be extended within [a period of time to be specified by the enacting State] before its expiry by the registration of an amendment notice providing for an extension.

3. The period of effectiveness of the registration of an initial notice may be extended more than once.

4. The registration of an amendment notice in accordance with paragraph 2 extends the period of effectiveness for the period referred to in paragraph 1 beginning from the time the current period would have expired if the amendment notice had not been registered.

Option B

1. The registration of an initial notice is effective for the period of time indicated by the registrant in the designated field of the notice.

2. The period of effectiveness of the registration of an initial notice 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.

3. The period of effectiveness of the registration of an initial notice may be extended more than once.

4. The registration of an amendment notice in accordance with paragraph 2 extends the period of effectiveness for the period indicated in the amendment notice beginning from the time the current period would have expired if the amendment notice had not been registered.

Option C

1. The registration of an initial notice is effective for the period of time indicated by the registrant in the designated field of the notice, not exceeding [a maximum period of time to be specified by the enacting State].

2. The period of effectiveness of the registration of an initial notice may be extended within [a period of time to be specified by the enacting State] before its expiry by the registration of an amendment notice that indicates in the designated field a new period not exceeding the maximum period of time referred to in paragraph 1.

3. The period of effectiveness of the registration of an initial notice may be extended more than once.

4. The registration of an amendment notice in accordance with paragraph 2 extends the period of effectiveness for the period specified in the amendment notice beginning from the time the current period would have expired if the amendment notice had not been registered.

[10] This provision will be necessary, if the enacting State implements option B of paragraph 4 of this article.

Article 15. Obligation to send a copy of a registered notice

1. Without delay after the registration of a notice, the Registry must send to the person identified in the notice as the secured creditor at its address set forth in the notice a copy of the information in the registered notice, indicating:

(a) The date and time recorded by the Registry in accordance with article 13, paragraph 3, of these Provisions; and

(b) The registration number assigned to the initial notice by the Registry in accordance with article 28, paragraph 1, of these Provisions.

2. Within [a period to be specified by the enacting State] after the person identified in a registered notice as the secured creditor receives a copy of the information in the notice in accordance with paragraph 1, that person must send it to the person identified in the notice as the grantor:

(a) At the address set forth in the notice; or

(b) If that person knows that the address has changed, at the most recent address known to that person or an address reasonably available to that person.

3. The failure of a person to comply with its obligation in accordance with paragraph 2 does not affect the effectiveness of the registration of the related notice.

4. A person that fails to comply with its obligation in accordance with paragraph 2 is liable to the person identified in the notice as the grantor only for [a nominal amount to be specified by the enacting State] and any actual loss or damage proven to have resulted from that failure.

Section D. Registration of an amendment or cancellation notice

Article 16. Right to register an amendment or cancellation notice

1. Subject to paragraph 2, only the person identified in a registered initial notice as the secured creditor may register an amendment or cancellation notice relating to that notice.

2. After registration of an amendment notice changing the person identified in an initial or amendment notice as the secured creditor, only the person identified in the amendment notice as the new secured creditor may register an amendment or cancellation notice.

Article 17. Information required in an amendment notice

1. An amendment notice must contain in the relevant designated field:

(a) The registration number of the initial notice to which it relates; and

(b) The information to be added or changed.

2. An amendment notice may modify one or more than one item of information in the notice to which it relates.

Article 18. Global amendment of secured creditor information

Option A

A person may register a single amendment notice to amend its identifier, its address or both, in multiple registered notices in which that person is identified as the secured creditor.

Option B

The Registry must amend the identifier, address or both of a person identified as the secured creditor in multiple registered notices upon the request of that person.

Article 19. Information required in a cancellation notice

A cancellation notice must contain in the relevant designated field the registration number of the initial notice to which it relates.

Article 20. Compulsory registration of an amendment or cancellation notice

1. The secured creditor must register an amendment notice deleting encumbered assets described in a registered notice if:

(a) The grantor has not authorized the registration of a notice in relation to those assets and the secured creditor knows that the grantor will not authorize that registration; or

(b) The security agreement to which the registered notice relates has been revised to release those assets from the security right and the grantor has not otherwise authorized the registration of a notice covering those assets.

[2. The secured creditor must register an amendment notice reducing the maximum amount specified in a registered notice if:

(a) The grantor has authorized the registration of a notice only in the reduced amount and the secured creditor knows that the grantor will not authorize the registration the registration of a notice in the higher amount; or

(b) The security agreement to which the registered notice relates has been revised to reduce the maximum amount specified in that agreement and the grantor has not otherwise authorized the registration of a notice in that amount.][11]

[3]. The secured creditor must register a cancellation notice if:

(a) The registration of the initial notice was not authorized by the grantor: and

(i) The secured creditor knows that the grantor will not authorize the registration of the initial notice; or

(ii) The grantor requests the registration of the cancellation notice in accordance with paragraph 5;

(b) The registration of the initial notice was authorized by the grantor but the authorization has been withdrawn and no security agreement has been concluded; or

(c) The security right to which the initial notice relates has been extinguished.

[4.] The secured creditor may not charge or accept a fee or expense for complying with its obligation in accordance with subparagraph 1(a), [2(a)] or 3(a) and (b).

[5.] If the conditions set out in paragraph 1, 2 or 3 have been met, the grantor may request the secured creditor in writing, reasonably identifying itself and the related initial or amendment notice to register the appropriate amendment or cancellation notice and the secured creditor may not charge or accept any fee or expense for complying with the grantor's request.

[6.] If the secured creditor does not comply with the grantor's request made in accordance with paragraph 5 within [a short period of time to be specified by the enacting State] after its receipt, the grantor may seek an order for the registration of an amendment or cancellation notice through [a summary judicial or administrative procedure to be specified by the enacting State].

[7.] Where an order for the registration of an amendment or cancellation notice is issued in accordance with paragraph 6 the Registry must register the notice without delay [upon receipt of a request] with a copy of the relevant order] [upon the issuance of the relevant order].

[11] This provision will be necessary if the enacting State includes in its law article 6, subparagraph 3 (d), of the draft Model Law.

Article 21. Effectiveness of the registration of an amendment or cancellation notice not authorized by the secured creditor

Option A

The registration of an amendment or cancellation notice is effective regardless of whether it is authorized by the person entitled to register an amendment or cancellation notice in accordance with article 16 of these Provisions.

Option B

1. Subject to paragraph 2, the registration of an amendment or cancellation notice is effective regardless of whether it is authorized by the person entitled to register an amendment or cancellation notice in accordance with article 16 of these Provisions.

2. The unauthorized registration of an amendment or cancellation notice does not affect the priority of the security right to which the notice relates as against the right of a competing claimant which arose before the registration and over which the security right had priority before the registration.

Option C

The registration of an amendment or cancellation notice is ineffective unless authorized by the person entitled to register an amendment or cancellation notice in accordance with article 16 of these Provisions.

Option D

1. Subject to paragraph 2, the registration of an amendment or cancellation notice is ineffective unless authorized by the person entitled to register an amendment or cancellation notice in accordance with article 16 of these Provisions.

2. The unauthorized registration of an amendment or cancellation notice is effective against a competing claimant whose right was acquired in reliance on a search of the registry record made after the registration of the amendment or cancellation notice, provided that the competing claimant did not have knowledge that the registration was unauthorized at the time it acquired its right.

Section E. Searches

Article 22. Search criteria

A search of the public registry record may be conducted according to:

(a) The identifier of the grantor; or

(b) The registration number of the initial notice.

Article 23. Search results

1. Upon submission of a search request, the Registry must provide a search result that indicates the date and time when the search was performed and:

Option A

(a) Sets forth all information in each registered notice that contains information matching the search criterion exactly; or

(b) Indicates that no registered notice contains information matching the search criterion exactly.

Option B

(a) Sets forth all information in each registered notice that contains information matching the search criterion:

(i) Exactly; or

(ii) Where the search criterion is the grantor identifier, closely [under criteria to be specified by the enacting State];

(b) Indicates that no registered notice contains information matching the search criterion:

(i) Exactly; or

(ii) Where the search criterion is the grantor identifier, closely [under criteria to be specified by the enacting State].

2. Upon request by a searcher, the Registry must issue an official search certificate setting out the search result and certifying that it was issued by the Registry.

3. A written search result that purports to have been issued by the Registry is proof of its contents in the absence of evidence to the contrary.

Section F. Errors and post-registration changes

Article 24. Registrant errors in required information

1. An error in the grantor identifier entered in an initial or amendment notice does not render the registration of the notice ineffective if the information in the notice would be retrieved by a search of the public registry record using the grantor's correct identifier as the search criterion.

[2. An error in the grantor identifier entered in an initial or amendment notice does not render the registration of the notice ineffective if the information in the notice would be retrieved as a close match [under criteria to be specified by the enacting State] by a search of the public registry record using the grantor's correct identifier as the search criterion, unless the error would seriously mislead a reasonable searcher.][12]

[3.] An error in the grantor identifier that renders the registration of notice ineffective with respect to that grantor in accordance with paragraph 1 or 2 does not render the registration of the notice ineffective with respect to other grantors correctly identified in the notice.

[4.] An error in information required to be entered in an initial or amendment notice other than the grantor's identifier does not render the registration ineffective unless the error would seriously mislead a reasonable searcher.

[5.] An error in the description of an encumbered asset that renders the registration of a notice ineffective with respect to that asset in accordance with paragraph 4 does not render the registration of the notice ineffective with respect to other encumbered assets sufficiently described in the notice.

[6.] Notwithstanding paragraph 4, an error in the period of effectiveness of registration[13] [or the maximum amount for which the security right may be enforced][14] entered in an initial or amendment notice, does not render the registration of the notice ineffective, except to the extent it seriously misled third parties that relied on the erroneous information in the registered notice.

[*Note to the Commission: The Commission may wish to consider the words "except to the extent it seriously misled third parties that relied on the information set out in the notice" in paragraph 6. As explained in the Registry Guide (see paras. 215 and 217-220), as a practical matter, third-party searchers may not be misled or prejudiced by reliance on an erroneous indication of the duration of registration or an erroneous indication of the maximum amount in a registered notice (see Registry Guide, paras. 215 and 217-220). For example, if the period of effectiveness stated in the notice was too long, third-party searchers would not be prejudiced, as they would still have been alerted to the fact that a security right*

[12] This provision will be necessary if the enacting State implements option B of article 23 of the draft Model Registry-related Provisions.

[13] This provision will be necessary, if the enacting State implements option B or option C of article 14 of the draft Model Registry-related Provisions.

[14] This provision will be necessary, if the enacting State implements article 8, subparagraph (e), of the draft Model Registry-related Provisions.

might exist (although the grantor would have the right to have the record corrected). If the period of effectiveness was too short, again third-party searchers would not be prejudiced, as the registration would lapse at the end of the specified period and the security right would no longer be effective against third parties, unless the registration was renewed before the lapse.]

Article 25. Post-registration change of grantor identifier

1. Subject to paragraph 2, if the grantor's identifier changes after a notice is registered, the security right to which the notice relates remains effective against third parties and retains the priority it had over the rights of competing claimants before the change.

2. If the grantor's identifier changes after a notice is registered, and the secured creditor does not register an amendment notice adding the new identifier of the grantor before the expiry of [a short period of time to be specified by the enacting State] after the change, the security right to which the notice relates is:

(a) Ineffective against a person to whom the grantor sells or otherwise transfers, leases or licenses the encumbered asset after the change in the grantor's identifier and before the registration of the amendment notice; and

(b) Subordinate to a security right created by the grantor that is made effective against third parties during the period referred to in subparagraph (a).

Article 26. Post-registration transfer of an encumbered asset

Option A

1. Subject to paragraph 2, if a security right in an encumbered asset has been made effective against third parties by registration of a notice and the encumbered asset is sold or otherwise transferred to a transferee that acquires its rights subject to the security right in accordance with article 32 of this Law, the security right remains effective against third parties and retains the priority it had over the rights of competing claimants before the transfer.

2. If an encumbered asset is sold or otherwise transferred in the circumstances referred to in paragraph 1, and the secured creditor does not register an amendment notice adding the transferee, or, in the case of successive transfers, the most recent transferee, as a new grantor before the expiry of [a period of time to be specified by the enacting State] after the transfer, the security right is:

(a) Ineffective against the right of a person to whom the transferee sells or otherwise transfers, leases or licenses the encumbered asset after the transfer and before the registration of the amendment notice; and

(b) Subordinate to a security right created by the transferee that is made effective against third parties during the period referred to in subparagraph (a).

3. A security right in intellectual property that has been made effective against third parties by registration of a notice remains effective against third parties and retains its priority notwithstanding a transfer of the encumbered asset covered by the notice.

Option B

1. Subject to paragraph 2, if a security right in an encumbered asset has been made effective against third parties by registration of a notice and the encumbered asset is sold or otherwise transferred to a transferee that acquires its rights subject to the security right in accordance with article 32 of this Law, the security right remains effective against third parties and retains the priority it otherwise has over the rights of competing claimants before the transfer.

2. If an encumbered asset is sold or otherwise transferred in the circumstances referred to in paragraph 1, and the secured creditor does not register an amendment notice adding the transferee or, in the case of successive transfers, the most recent transferee, as a new grantor before the expiry of [enacting State to specify a period of time] after the secured creditor acquires knowledge of the transfer, the security right is:

(a) Ineffective against the right of a person to whom the transferee sells or otherwise transfers, leases or licenses the encumbered asset after the secured creditor acquires knowledge of the transfer and before it registers the amendment notice; and

(b) Subordinate to a security right granted by the transferee that is made effective against third parties in the period referred to in subparagraph (a).

3. A security right in intellectual property that has been made effective against third parties by registration of a notice remains effective against third parties and retains its priority notwithstanding a transfer of the encumbered asset covered by the notice.

Option C

A security right in an encumbered asset that was made effective against third parties by registration of a notice remains effective against third parties and retains whatever priority it otherwise has over the rights of competing claimants notwithstanding that the encumbered asset is sold or otherwise transferred by the grantor to a transferee that acquires its right subject to the security right in accordance with article 32 of this Law.

Section G. Organization of the Registry and the registry record

Article 27. Appointment of the registrar

The [the appropriate authority to be specified by the enacting State] is authorized to appoint and dismiss the registrar, and determine the registrar's duties and monitor their performance.

Article 28. Organization of information in the registry record

1. The Registry must assign a registration number to an initial notice and organize the registry record so that all registered amendment and cancellation notices that contain that number are associated with the initial notice in the registry record.

2. The Registry must organize the registry record so that the information in a registered initial notice and in any associated registered notice can be retrieved:

Option A[15]

As an exact match by a searcher of the registry record that uses the correct identifier of the grantor as the search criterion.

Option B[16]

As an exact match or as a close match by a searcher of the registry record that uses the correct identifier of the grantor as the search criterion.

Option A[17]

3. The Registry must organize the registry record so that a person may register a single amendment notice to amend its identifier, address or both in multiple registered notices in which that person is identified as the secured creditor.

[15] This provision will be necessary, if the enacting State implements option A of article 23, paragraph 1, of the draft Model Registry-related Provisions.

[16] This provision will be necessary, if the enacting State implements option B of article 23, paragraph 1, of the draft Model Registry-related Provisions.

[17] This provision will be necessary, if the enacting State implements option A of article 18 of the draft Model Registry-related Provisions.

Option B[18]

3. The Registry must organize the registry record so that it may amend the identifier, address or both of a person identified as the secured creditor in multiple registered notices upon the request of that person.

4. Upon registration of an amendment or cancellation notice, the Registry may not amend or remove information contained in any associated registered notice from the registry record.

Article 29. Integrity of information in the registry record

1. Except as provided in articles 30 and 31 of these Provisions, the Registry may not amend or remove information contained in a registered notice from the registry record.

2. The Registry must preserve all information contained in the registry record and reconstruct the registry record in the event of loss or damage.

Article 30. Removal of information from the public registry record and archival

Option A

1. The Registry must remove information in a registered notice from the public registry record upon the expiry of the period of effectiveness of the registration of a notice in accordance with article 14 or upon the registration of a cancellation notice in accordance with article 19 or 20 of these Provisions.[19]

Option B

1. The Registry must remove information in a registered notice from the public registry record upon the expiry of the period of effectiveness of the registration of a notice in accordance with article 14 of these Provisions.[20]

2. Except as provided in paragraph 1, the Registry may not remove information contained in a registered notice from the public registry record.

3. The Registry must archive information removed from the public registry record in accordance with paragraph 1 for [a period of time to be specified by the enacting State that is at least co-extensive with its prescription period for rights arising from a security agreement under contract or property law] in a manner that enables the information to be retrieved by the Registry in accordance with article 28 of these Provisions.

Article 31. Correction of errors made by the Registry

1. Without delay after discovering that [it made an error or omission in entering into the public registry record the information contained in a notice submitted for registration or][21] erroneously removed from the public registry record information contained in a registered notice, the Registry must

Option A

[register a notice to correct the error or omission, or] restore the erroneously removed information, and send a copy of the information in the registered notice to the person identified in the notice as the secured creditor.

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[18] This provision will be necessary, if the enacting State implements option B of article 18 of the draft Model Registry-related Provisions.

[19] This provision will be necessary if a State implements option A or B of article 21 of the draft Model Registry-related Provisions.

[20] This provision will be necessary if a State implements option C or D of article 21 of the draft Model Registry-related Provisions.

[21] The bracketed wording in this provision will be necessary if a State has a Registry that is not fully electronic.

Option B

inform the person identified in the registered notice as the secured creditor so as to enable that person to [register a notice to correct the error or omission or] restore the erroneously removed information.

Option A

2. The registration of a notice referred to in paragraph 1 is effective as of the time the information in the notice becomes accessible to searchers of the public registry record.

Option B

2. The registration of a notice referred to in paragraph 1 is effective as of the time the information in the notice becomes accessible to searchers of the public registry record.

3. Notwithstanding paragraph 1, the security right to which the notice relates has the priority it would otherwise have had over the right of a competing claimant but for [the Registry's error or omission or] the Registry's erroneous removal of the information.

Option C

The registration of a notice referred to in paragraph 1 is effective as of the time it would have been effective if [the error or omission had never been made or] the information had never been erroneously removed.

Option D

1. The registration of a notice referred to in paragraph 1 is effective as of the time it would have been effective if [the error or omission had never been made or] the information had never been erroneously removed.

2. Notwithstanding paragraph 1, the security right to which the notice relates is subordinate to the right of a competing claimant that acquired a right in the encumbered asset in reliance on a search of the public registry record made before the notice was registered, provided the competing claimant did not have knowledge of [the error or omission or] the erroneous removal of the information at the time it acquired its right.

Article 32. Limitation of liability of the Registry

Option A

1. Any liability that the Registry may have in accordance with other law is limited to loss or damage caused by:

(a) An error or omission in a search result issued to a searcher or in a copy of information in a registered notice sent to a secured creditor in accordance with article 15, paragraph 1; [and]

(b) [An error or omission in entering or failing to enter information in a notice submitted to the Registry into the public registry record or] the erroneous removal of information in the registered notice from the public registry record;

(c) The failure of the Registry to send a copy of the registered notice to the person identified in the notice as the secured creditor in accordance with article 15, paragraph 1, and article 31, paragraph 1, of these Provisions; and

(d) The provision of false or misleading information to a registrant or searcher.

2. Any liability that a State may have in accordance with paragraph 1 is limited to [a maximum amount to be specified by the enacting State].

Option B

Any liability that the Registry may have in accordance with other law for loss or damage caused by an error or omission in the administration or operation of the Registry is limited to [a maximum amount to be specified by the enacting State].

Option C

The Registry is not liable for loss or damage caused to a person by an error or omission in the administration or operation of the Registry.

Article 33. Registry fees

Option A

1. Fees may be charged for [the Registry services and in the amounts to be specified by the enacting State].

2. The [authority to be specified by the enacting State pursuant to article 27 of these Provisions] may modify the fee schedule from time to time.

3. The Registry must publicize the fee schedule.

4. The Registry may enter into an account agreement with any person to facilitate the registration process, including the payment of registry fees.

Option B

The Registry may not charge any fee for its services.

(A/CN.9/884/Add.2) (Original: English)

Note by the Secretariat on a draft model law on secured transactions

ADDENDUM

Contents

Chapter V. Priority of a security right

A. General rules

Article 28. Competing security rights

1. Subject to articles 29-40, priority among competing security rights created by the same grantor in the same encumbered asset is determined according to the order of third-party effectiveness.

2. Subject to [article 26 of the Model Registry-related Provisions] and articles 29-40, priority among competing security rights created by different grantors in the same encumbered asset is determined according to the order of third-party effectiveness.

3. The priority of a security right with respect to which a notice has been registered in the Registry before the conclusion of a security agreement or, in the case of a security right in a future asset, before the grantor acquires rights in the asset or the power to encumber it, is determined according to the time of registration.

Article 29. Competing security rights in the case of a change in the method of third-party effectiveness

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 period during which the security right is not effective against third parties.

Article 30. Competing security rights in proceeds

If a security right in proceeds of an encumbered asset is effective against third parties as provided in article 19, the priority of the security right in the proceeds is the same as the priority of the security right in that asset.

Article 31. Competing security rights in tangible assets commingled 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 11 and each security right is effective against third parties, the priority of each security right in the mass or product is the same as its priority in that asset 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 those security rights.

3. For the purposes of paragraph 2, the maximum value of a security right is the lesser of the value determined in accordance with article 11 and the amount of the secured obligation.

Article 32. Security rights competing with rights of buyers or other transferees, lessees or licensees of an encumbered asset

1. If an encumbered asset is sold or otherwise transferred, leased or licensed while the security right in that asset is effective against third parties, the buyer or other transferee, lessee or licensee acquires its rights subject to the security right except as provided in this article.

2. A buyer or other transferee of an encumbered asset acquires its rights free of the security right, if the secured creditor authorizes the sale or other transfer of the asset free of the security right.

3. The rights of a lessee or licensee 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 encumbered asset sold in the ordinary course of the seller's business acquires its rights free of the security right, provided that, at the time of the

conclusion of the sale agreement, 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 encumbered asset leased in the ordinary course of the lessor's business are not affected by the security right, provided that, at the time of the conclusion of the lease agreement, the lessee does not have knowledge that the lease violates the rights of the secured creditor under the security agreement.

6. Subject to the rights of a secured creditor with a security right in intellectual property in accordance with article 48, the rights of a non-exclusive licensee of an intangible encumbered asset licensed in the ordinary course of the licensor's business are not affected by the security right, provided that, at the time of the conclusion of the licence agreement, the licensee does not have knowledge that the licence violates the rights of the secured creditor under the security agreement.

7. If a buyer or other transferee of a tangible encumbered asset acquires its rights free of a security right, any subsequent buyer or other transferee also acquires its rights free of that security right.

8. If the rights of a lessee of a tangible encumbered asset or licensee of an intangible encumbered asset are not affected by the security right, the rights of any sub-lessee or sub-licensee are also unaffected by that security right.

Article 33. Impact of the grantor's insolvency on the priority of a security right

A security right that is effective against third parties under this Law at the time of the commencement of insolvency proceedings in respect of the grantor remains effective against third parties and retains the priority it had before the commencement of the insolvency proceedings, unless another claim has priority pursuant to [the insolvency law to be specified by the enacting State].

Article 34. Security rights competing with preferential claims

The following claims arising by operation of other law have priority over a security right that is effective against third parties but only up to [the enacting State to specify the amount for each category of claim]:

(a) […];

(b) […].[1]

Article 35. Security rights competing with rights of judgement creditors

1. Subject to the rights of acquisition secured creditors in accordance with article 38, the right of a creditor that has obtained a judgement or provisional order ("judgement creditor") has priority over a security right if, before the security right is made effective against third parties, the judgement creditor [has taken the steps to be specified by the enacting State for a judgement creditor to acquire rights in the encumbered asset or the steps referred to in the relevant provisions of other law to be specified by the enacting State].

2. If a security right is made effective against third parties before [or at the same time] the judgement creditor acquires its right in an encumbered asset by taking the steps referred to in paragraph 1, the security right has priority but that priority is limited to the greater of the credit extended by the secured creditor:

(a) Within [a short period of time to be specified by the enacting State] from or before the time when the secured creditor received a notice from the judgement creditor that the judgement creditor has taken the steps referred to in paragraph 1; or

(b) Pursuant to an irrevocable commitment of the secured creditor to extend credit in a fixed amount or an amount to be fixed pursuant to a specified formula, if the

[1] This provision will not need to be implemented if the enacting State does not have any preferential claims.

commitment was made before the secured creditor received a notice from the judgement creditor that the judgement creditor had taken the steps referred to in paragraph 1.

[*Note to the Commission: The Commission may wish to note that, in the case of future assets, a security right is created and thus made effective against third parties when the grantor acquires rights in the assets or the power to encumber them (see art. 6, para. 2). Thus, the time when a security right becomes effective in future assets may coincide with the time when a judgement creditor takes the steps referred to in paragraph 1. The Commission may wish to consider whether this issue should be addressed and, if so, how and where, in the draft Model Law or in the draft Guide to Enactment (see bracketed text in art. 35, para. 2).*]

Article 36. Non-acquisition security rights competing with acquisition security rights[2]

Option A[3]

1. An acquisition security right in assets other than inventory, consumer goods, and intellectual property or rights of a licensee under a licence of intellectual property that are held by the grantor for sale or licence in the ordinary course of the grantor's business or that are used or intended to be used by the grantor primarily for personal, family or household purposes has priority over a competing non-acquisition security right created by the grantor, provided that:

(a) The acquisition secured creditor is in possession of the assets other than inventory or consumer goods, or the agreement for the sale or licence of intellectual property has been concluded; or

(b) A notice with respect to the acquisition security right is registered in the Registry not later than the expiry of [a short period of time to be specified by the enacting State] after the grantor obtains possession of the assets other than inventory or consumer goods, or the agreement for the sale or licence of intellectual property has been concluded.

2. An acquisition security right in inventory and intellectual property or rights of a licensee under a licence of intellectual property that are held by the grantor for sale or licence in the ordinary course of the grantor's business has priority over a competing non-acquisition security right created by the grantor, provided that:

(a) The acquisition secured creditor is in possession of the inventory, or the agreement for the sale or licence of intellectual property has been concluded; or

(b) Before the grantor obtains possession of the inventory, or the agreement for the sale or licence of intellectual property has been concluded:

(i) A notice with respect to the acquisition security right is registered in the Registry; and

(ii) A notice that is sent by the acquisition secured creditor is received by the non-acquisition secured creditor that has registered a notice in the Registry with respect to a security right created by the grantor in an asset of the same kind, stating that the acquisition secured creditor has or intends to acquire an acquisition security right and describing the asset sufficiently to enable the non-acquisition secured creditor to identify the asset that is the object of the acquisition security right.

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[2] This section includes the unitary-approach recommendations of the *Secured Transactions Guide*. If a State prefers to adopt the non-unitary approach recommendations, it may wish to consider implementing instead recommendations 187-202 of the *Secured Transactions Guide*. [In particular, States may wish to consider doing so if they have implemented regional legislation along the lines of Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions (the "Late Payment Directive"), article 9 of which, provides that "Member States shall provide in conformity with the applicable national provisions designated by private international law that the seller retains title to goods until they are fully paid for if a retention of title clause has been expressly agreed between the buyer and the seller before the delivery of the goods".]

[3] A State may adopt option A or option B of this article.

3. An acquisition security right in consumer goods and intellectual property or rights of a licensee under a licence of intellectual property that are used or intended to be used by the grantor primarily for personal, family or household purposes has priority over a competing non-acquisition security right created by the grantor in the same asset [provided that the goods are below [a value to be specified by the enacting State]].

4. A notice that is sent in accordance with subparagraph 2(b)(ii) 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 assets of which the grantor obtains possession or which the grantor acquires not later than the expiry of [a period of time to be specified by the enacting State] after the notice is received.

Option B

1. An acquisition security right in assets other than consumer goods and intellectual property or rights of a licensee under a licence of intellectual property that are used or intended to be used by the grantor primarily for personal, family or household purposes has priority as against a competing non-acquisition security right created by the grantor, provided that:

(a) The acquisition secured creditor is in possession of the assets other than consumer goods, or the agreement for the sale or licence of intellectual property has been concluded; or

(b) A notice with respect to the acquisition security right is registered in the Registry not later than the expiry of [a short period of time to be specified by the enacting State] after the grantor obtains possession of the assets other than consumer goods, or the agreement for the sale or licence of intellectual property has been concluded.

2. An acquisition security right in consumer goods and intellectual property or rights of a licensee under a licence of intellectual property that are used or intended to be used by the grantor primarily for personal, family or household purposes has priority over a competing non-acquisition security right created by the grantor in the same asset.

[*Note to the Commission: The Commission may wish to note that the wording within square brackets in paragraph 3 of option A is intended to reflect the options of article 23*.]

Article 37. Competing acquisition security rights

1. Subject to paragraph 2, the priority between competing acquisition security rights is determined according to article 28.

2. An acquisition security right of a seller or lessor, or a licensor of intellectual property that was made effective against third parties not later than the expiry of the period specified in article 36, subparagraph 1(b) has priority over a competing acquisition security right of a secured creditor other than a seller or lessor, or a licensor of intellectual property.

Article 38. Acquisition security rights competing with the rights of judgement creditors

An acquisition security right that is made effective against third parties not later than the expiry of the period specified in article 36, subparagraph 1(b) has priority over the rights of a judgement creditor that would otherwise have priority under article 35.

Article 39. Acquisition security rights in proceeds[4]

Option A

1. In the case of an acquisition security right in assets other than inventory, consumer goods and intellectual property or rights of a licensee under a licence of intellectual property that is held by the grantor for sale or licence in the ordinary course of the grantor's business or that that is used or intended to be used by the grantor primarily for personal, family or

[4] A State may adopt option A of this article, if it adopts option A of article 36, or option B of this article, if it adopts option B of article 36.

household purposes, a security right in proceeds has the same priority as the acquisition security right.

2. In the case of an acquisition security right in inventory and intellectual property or rights of a licensee under a licence of intellectual property that is held by the grantor for sale or licence in the ordinary course of the grantor's business, a security right in proceeds has the same priority as the acquisition security right, except where the proceeds take the form of receivables, negotiable instruments, or rights to payment of funds credited to a bank account.

3. The priority of a security right in proceeds referred to in paragraph 2 is conditional on the acquisition secured creditor notifying non-acquisition secured creditors that have registered a notice in the Registry with respect to a security right created by the grantor in an asset of the same kind as the proceeds that, before the proceeds arose, the acquisition secured creditor registered a notice with respect to assets of the same kind as the proceeds in the Registry.

Option B

The priority of an acquisition security right in an asset in accordance with article 36 does not extend to its proceeds.

Article 40. Acquisition security rights in tangible assets commingled in a mass or product competing with non-acquisition security rights in the mass or product

An acquisition security right in a tangible asset that continues in a mass or product and is effective against third parties has priority over a non-acquisition security right granted by the same grantor in the mass or product.

Article 41. Subordination

1. A person may at any time subordinate the priority of its rights under this Law in favour of any existing or future competing claimant without the need for the beneficiary to be a party to the subordination.

2. Subordination does not affect the rights of competing claimants other than the person subordinating its priority and the beneficiary of the subordination.

Article 42. Future advances, future encumbered assets and maximum amount

1. Subject to the rights of judgement creditors under article 35, the priority of a security right extends to all secured obligations, including obligations incurred after the security right became effective against third parties.

2. The priority of a security right covers all encumbered assets described in a notice registered in the Registry, irrespective of whether they are acquired by the grantor or come into existence before or after the time of registration.

[3. The priority of the security right is limited to the maximum amount set out in the notice registered in the Registry.][5]

Article 43. Irrelevance of knowledge of the existence of a security right

Knowledge of the existence of a security right on the part of a secured creditor does not affect the priority of the security right under this Law.

[5] This provision will be necessary if the enacting State implements article 6, subparagraph 3(d), of the draft Model Law, and article 8, subparagraph (e), of the draft Model Registry-related Provisions.

B. Asset-specific rules

Article 44. Negotiable instruments

1. A security right in a negotiable instrument that is made effective against third parties by possession of the instrument has priority over a security right in the instrument that is made effective against third parties by registration of a notice in the Registry.

2. A buyer or other consensual transferee of an encumbered negotiable instrument acquires its rights free of the security right that is made effective against third parties by registration of a notice in the Registry if the buyer or other transferee:

(a) Qualifies as a [protected holder or other type of holder to be specified by the enacting State]; or

(b) [Takes possession of the negotiable instrument and gives value or takes any other act to be specified by the enacting State] without knowledge that the sale or other transfer is in violation of the rights of the secured creditor under the security agreement.

Article 45. Rights to payment of funds credited to a bank account

1. A security right in a right to payment of funds credited to a bank account that is made effective against third parties by the secured creditor becoming the account holder has priority over a competing security right that is made effective against third parties by any other method.

2. A security right in a right to payment of funds credited to a bank account with respect to which the secured creditor is the depositary institution has priority over a competing security right made effective against third parties by any method, except a security right that is made effective against third parties by the secured creditor becoming the account holder.

3. A security right in a right to payment of funds credited to a bank account that is made effective against third parties by a control agreement has priority over a competing security right except:

(a) A security right of the depositary institution; or

(b) A security right that is made effective against third parties by the secured creditor becoming the account holder.

4. The order of priority among competing security rights in a right to payment of funds credited to a bank account that are made effective against third parties by the conclusion of control agreements is determined on the basis of the time of conclusion of the control agreements.

5. A depositary institution's right under other law to set off obligations owed to it by the grantor against the grantor's right to payment of funds credited to a bank account maintained with the depositary institution has priority as against a security right in the right to payment of funds credited to the bank account, except a security right that is made effective against third parties by the secured creditor becoming the account holder.

6. A transferee of funds from a bank account pursuant to a transfer initiated or authorized by the grantor acquires its rights free of a security right in the right to payment of funds credited to the bank account, unless the transferee has knowledge that the transfer violates the rights of the secured creditor under the security agreement.

7. Paragraph 6 does not adversely affect the rights of transferees of funds from bank accounts under [the relevant law to be specified by the enacting State].

Article 46. Money

1. A transferee that obtains possession of money that is subject to a security right acquires its rights free of the security right, unless that person has knowledge that the transfer violates the rights of the secured creditor under the security agreement.

2. This article does not adversely affect the rights of persons in possession of money under [the relevant law to be specified by the enacting State].

Article 47. Negotiable documents and tangible assets covered by negotiable documents

1. Subject to paragraph 2, a security right in a tangible asset made effective against third parties by possession of the negotiable document covering that asset has priority over a competing security right made effective against third parties by any other method.

2. Paragraph 1 does not apply to a security right in a tangible asset other than inventory if the security right of the secured creditor not in possession of the negotiable document was made effective against third parties before the earlier of:

(a) The time that the asset became covered by the negotiable document; and

(b) The time of conclusion of an agreement between the grantor and the secured creditor in possession of the negotiable document providing for the asset to be covered by a negotiable document so long as the asset became so covered within [a short period of time to be specified by the enacting State] from the date of the agreement.

3. A transferee of an encumbered negotiable document that obtains possession of the document under [the relevant law to be specified by the enacting State under which certain transferees of negotiable documents acquire their rights free of competing claims] acquires its rights free of a security right in the negotiable document and the tangible assets covered thereby that is made effective against third parties by any other method.

Article 48. Intellectual property

Article 32, paragraph 6, does not affect any rights that a secured creditor may have as an owner or licensor of intellectual property under [the relevant law relating to intellectual property to be specified by the enacting State].

Article 49. Non-intermediated securities

1. A security right in certificated non-intermediated securities made effective against third parties by the secured creditor's possession of the certificate has priority over a competing security right created by the same grantor in the same securities made effective against third parties by registration of a notice in the Registry.

2. A security right in uncertificated non-intermediated securities made effective against third parties by [[a notation of the security right] [entry of the name of the secured creditor as the holder of the securities][6] in the books maintained for that purpose by or on behalf of the issuer] has priority over a security right in the same securities made effective against third parties by any other method.

3. A security right in uncertificated non-intermediated securities made effective against third parties by the conclusion of a control agreement has priority over a security right in the same securities made effective against third parties by registration of a notice in the Registry.

4. The order of priority among competing security rights in uncertificated non-intermediated securities that are made effective against third parties by the conclusion of control agreements is determined on the basis of the time of conclusion of the control agreements.

5. This article does not adversely affect the rights of holders of non-intermediated securities under [the relevant law relating to the transfer of securities to be specified by the enacting State].

[*Note to the Commission: The Commission may wish to note that articles 44, paragraph 2, and 47, paragraph 3, while referring to other law for the terminology to be used, provide a substantive rule for transferees of encumbered negotiable instruments and negotiable documents to acquire their rights free of the security right, while article 49, paragraph 5, essentially refers the matter to other law. The Commission may thus wish to either consider following the same approach with respect to all three types of paper or, at*

[6] The enacting State may wish to insert here the method it chose in article 26.

least, reach an understanding as to how the draft Guide to Enactment should explain the different approaches followed.]

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Note by the Secretariat on a draft model law on secured transactions

ADDENDUM

Contents

Chapter VI. Rights and obligations of the parties and third-party obligors

Section I. Mutual rights and obligations of the parties to a security agreement

A. General rules

Article 50. Sources of mutual rights and obligations of the parties

1. The mutual rights and obligations of the grantor and the secured creditor arising from their agreement are determined by the terms and conditions set forth in that agreement, including any rules or general conditions referred to therein.

2. The grantor and the secured creditor are bound by any usage to which they have agreed and, unless otherwise agreed, by any practices they have established between themselves.

Article 51. Obligation of the party in possession to exercise reasonable care

A grantor or secured creditor in possession of an encumbered asset must exercise reasonable care to preserve the asset and its value.

Article 52. Obligation of a secured creditor to return an encumbered asset

Upon extinction of a security right in an encumbered asset, a secured creditor in possession must return the asset to the grantor.

Article 53. Right of a secured creditor to use and inspect an encumbered asset, and to be reimbursed for expenses

1. A secured creditor in possession of an encumbered asset has the right:

(a) To be reimbursed for reasonable expenses it incurs for the preservation of the asset and its value in accordance with article 51;

(b) To make reasonable use of the asset and apply the revenues it generates to the payment of the secured obligation.

2. A secured creditor not in possession has the right to inspect an encumbered asset in the possession of the grantor.

Article 54. Right of the grantor to obtain information

1. Within [a short period of time to be specified by the enacting State] after receipt of a request by a grantor, a secured creditor other than a transferee in an outright transfer of a receivable must send to the grantor at the address specified in the request:

(a) A statement of the obligation currently secured; and

(b) A description of the assets currently encumbered.

2. A grantor is entitled without charge to one response to a request during [a period of time to be specified by the enacting State].

3. The secured creditor may require payment of a charge not exceeding [a nominal amount to be specified by the enacting State] for each additional response.

B. Asset-specific rules

Article 55. Representations of the grantor of a security right in a receivable

1. At the time of conclusion of a security agreement that creates a security right in a receivable, the grantor represents that:

(a) The grantor has not previously created a security right in the receivable in favour of another secured creditor; and

(b) The debtor of the receivable does not and will not have any defences or rights of set-off.

2. The grantor does not represent that the debtor of the receivable has, or will have, the ability to pay.

Article 56. Right of the grantor or the secured creditor to notify the debtor of the receivable

1. The grantor or the secured creditor or both may give the debtor of the receivable notification of the security right and a payment instruction, but after notification of the security right has been received by the debtor of the receivable only the secured creditor may send a payment instruction.

2. Notification of a security right or of a payment instruction sent in breach of an agreement between the grantor and the secured creditor is not ineffective for the purposes of article 61, but nothing in this article affects any obligation or liability of the party in breach for any damages arising as a result of the breach.

Article 57. Right of the secured creditor to payment of a receivable

1. As between the grantor of a security right in a receivable and the secured creditor, whether or not notification of the security right has been sent:

(a) If payment is made to the secured creditor or a tangible asset is returned to the grantor with respect to the receivable, the secured creditor is entitled to retain the proceeds of the payment and to delivery of the asset;

(b) If payment is made or a tangible asset is returned to the grantor with respect to the receivable, the secured creditor is entitled to payment of the proceeds of the payment and to delivery of the asset; and

(c) If payment is made to another person over whom the secured creditor has priority or a tangible asset is returned to the grantor with respect to the receivable, the secured creditor is entitled to payment of the proceeds of the payment and to delivery of the asset.

2. The secured creditor may not retain more than the value of its right in the receivable.

Article 58. Right of the secured creditor to preserve encumbered intellectual property

If so agreed between the grantor and the secured creditor, the secured creditor is entitled to [the enacting State to specify the steps necessary to preserve encumbered intellectual property].

Section II. Asset-specific rules: Rights and obligations of third-party obligors

A. Receivables

Article 59. Protection of the debtor of the receivable

1. Except as otherwise provided in this Law, the creation of a security right in a receivable does not, without the consent of the debtor of the receivable, affect its rights and obligations, including the payment terms contained in the contract giving rise to the receivable.

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.

Article 60. Notification of a security right in a receivable

1. Notification of a security right in a receivable or a payment instruction is effective when received by the debtor of the receivable if it reasonably identifies the encumbered receivable and the secured creditor, and is in a language that is reasonably expected to inform the debtor of the receivable about its contents.

2. It is sufficient if a notification of the security right or a payment instruction is in the language of the contract giving rise to the receivable.

3. Notification of a security right in a receivable or a payment instruction may relate to receivables arising after notification.

4. Notification of a subsequent security right in a receivable constitutes notification of all prior security rights.

Article 61. Discharge of the debtor of the receivable by payment

1. Until the debtor of the receivable receives notification of a security right in a receivable, it is discharged by paying in accordance with the original contract.

2. After the debtor of the receivable receives notification of a security right in a receivable, subject to paragraphs 3-8, it is discharged only by paying the secured creditor or, if otherwise instructed in the notification or subsequently by the secured creditor in a writing received by the debtor of the receivable, in accordance with the payment instruction.

3. If the debtor of the receivable receives more than one payment instruction relating to a single security right in the same receivable created by the same grantor, it is discharged by

paying in accordance with the last payment instruction received from the secured creditor before payment.

4. If the debtor of the receivable receives notification of more than one security right in the same receivable created by the same grantor, 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 security rights in the same receivable created by a secured creditor that acquired its right from the initial or any other secured creditor, it is discharged by paying in accordance with the notification of the last of such subsequent security rights.

6. If the debtor of the receivable receives notification of the security right in 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 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 a security right in the receivable from the secured creditor, the debtor is entitled to request the secured creditor to provide within a reasonable period of time adequate proof of its security right and, if the secured creditor acquired its right from the initial or any other secured creditor, adequate proof of the security right created by the initial grantor in favour of the initial secured creditor, and of any intermediate security right. Unless the secured creditor does so, the debtor of the receivable is discharged by paying in accordance with this article as if it had not received notification of the security right.

9. Adequate proof of a security right referred to in paragraph 8 includes but is not limited to any writing emanating from the grantor and indicating that a security right has been created.

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.

[*Note to the Commission: The Commission may wish to note that the draft Guide to Enactment will explain that: (a) reflecting normal practices (e.g. undisclosed invoice discounting or securitization), paragraph 2 recognizes payment instruction as a notion distinct from notification and clarifies that a payment instruction should be in writing; and (b) paragraph 3 is intended to ensure that the assignee may change or correct its payment instructions and to protect the debtor against the risk of having to pay twice by allowing the debtor to disregard a payment instruction received by the debtor after payment*.]

Article 62. Defences and rights of set-off of the debtor of the receivable

1. Unless otherwise agreed in accordance with article 63, in a claim by the secured creditor against the debtor of the receivable for payment of the encumbered receivable, the debtor of the receivable may raise against the secured creditor:

(a) In the case of a receivable arising from a contract, all defences and rights of set-off arising from that 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 security right had not been created and the claim were made by the grantor; and

(b) Any other right of set-off that was available to the debtor of the receivable at the time it received notification of the security right.

2. Notwithstanding paragraph 1, the debtor of the receivable may not raise a breach of an agreement referred to in article 13, paragraph 2, as a defence or right of set-off against the grantor.

Article 63. Agreement not to raise defences or rights of set-off

1. Subject to paragraph 3, the debtor of the receivable may agree with the grantor in a writing signed by the debtor of the receivable not to raise against the secured creditor the defences and rights of set-off that it could raise in accordance with article 62.

2. The agreement referred to in paragraph 1 may be modified only by an agreement in a writing signed by the debtor of the receivable and its effectiveness against the secured creditor is determined by article 64, paragraph 2.

3. The debtor of the receivable may not waive defences arising from fraudulent acts on the part of the secured creditor or based on the incapacity of the debtor of the receivable.

Article 64. Modification of the original contract

1. In the case of a receivable arising from a contract, an agreement concluded before notification of a security right in a receivable between the grantor and the debtor of the receivable that affects the secured creditor's rights is effective as against the secured creditor, and the secured creditor acquires corresponding rights.

2. An agreement concluded after notification of a security right in a receivable between the grantor and the debtor of the receivable that affects the secured creditor's rights is ineffective against the secured creditor unless:

(a) The secured creditor consents to it; or

(b) The receivable is not fully earned by performance and either the modification is provided for in the contract giving rise to the receivable or, in the context of that contract, a reasonable secured creditor would consent to the modification.

3. Paragraphs 1 and 2 do not affect any right of the grantor or the secured creditor arising from breach of an agreement between them.

Article 65. Recovery of payments made by the debtor of the receivable

The failure of the grantor of a security right in a receivable arising from a contract to perform that contract does not entitle the debtor of the receivable to recover from the secured creditor a sum paid by the debtor of the receivable to the grantor or the secured creditor.

B. Negotiable instruments

Article 66. Rights as against the obligor under a negotiable instrument

The rights of a secured creditor that has a security right in a negotiable instrument as against any person obligated on the negotiable instrument are determined by [the relevant law relating to negotiable instruments to be specified by the enacting State].

C. Rights to payment of funds credited to a bank account

Article 67. Rights as against the depositary institution

1. The creation of a security right in a right to payment of funds credited to a bank account maintained with a depositary institution does not:

(a) Affect the rights and obligations of the depositary institution without its consent; or

(b) Obligate the depositary institution to provide any information about the bank account to third parties.

2. Any rights of set-off that a depositary institution, with which a bank account is maintained, may have are not affected by any security right that the depositary institution may have in a right to payment of funds credited to that bank account.

D. Negotiable documents and tangible assets covered by negotiable documents

Article 68. Rights as against the issuer of a negotiable document

The rights of a secured creditor that has a security right in a negotiable document as against the issuer of the document or any other person obligated on the document are determined by [the relevant law relating to negotiable documents to be specified by the enacting State].

E. Non-intermediated securities

Article 69. Rights as against the issuer of a non-intermediated security

The rights of a secured creditor that has a security right in non-intermediated securities as against the issuer of the securities are determined by [the relevant law relating to the obligations of the issuer of non-intermediated securities to be specified by the enacting State].

Chapter VII. Enforcement of a security right

A. General rules

Article 70. Post-default rights

1. After default, the grantor and the secured creditor are entitled to exercise:

(a) Any right under the provisions of this chapter; and

(b) Any other right provided in the security agreement or any other law, except to the extent it is inconsistent with the provisions of this Law.

2. The exercise of one post-default right does not prevent the exercise of another post-default right, except to the extent that the exercise of one right makes the exercise of another right impossible.

3. Before default, the grantor and the debtor may not waive unilaterally or vary by agreement any of its rights under the provisions of this chapter.

Article 71. Methods of exercising post-default rights

1. The secured creditor may exercise its post-default rights by application to [a court or other authority to be specified by the enacting State] or without such an application.

2. The exercise of the secured creditor's post-default rights by application to [a court or other authority to be specified by the enacting State] is determined by the provisions of this chapter and [the provisions to be specified by the enacting State], including the provisions on proceedings in the form of [the expeditious proceedings to be specified by the enacting State].

3. The exercise of the secured creditor's post-default rights without application to [a court or other authority to be specified by the enacting State] is determined by the provisions of this chapter.

Article 72. Relief for non-compliance

Option A

If a secured creditor does not comply with its obligations under the provisions of this chapter, the debtor, the grantor or a competing claimant.

Option B

Any person whose rights are affected by the non-compliance of another person with the provisions of this chapter is entitled to apply for relief to [a court or other authority to be

specified by the enacting State], including expeditious relief in the form of [expeditious proceedings to be specified by the enacting State].

Article 73. Right of affected persons to terminate enforcement

1. The grantor, the debtor and any other person with a right in the encumbered asset is entitled to terminate the enforcement process by paying or otherwise performing the secured obligation in full, including the reasonable cost of enforcement.

2. The right of termination may be exercised until the earlier of the sale or other disposition, acquisition or collection of an encumbered asset by the secured creditor or until the conclusion of an agreement by the secured creditor for the sale or other disposition of an encumbered asset.

3. Where the secured creditor has leased or licensed the encumbered asset to a third party, the right of termination may still be exercised subject to the rights of the lessee or licensee.

Article 74. Right of a higher-ranking secured creditor to take over enforcement

1. Notwithstanding commencement of enforcement by another creditor, a secured creditor whose security right has priority over that of the enforcing creditor is entitled to take over enforcement at any time before the earlier of the sale or other disposition, acquisition or collection of an encumbered asset by the enforcing creditor or until the conclusion of an agreement by that creditor for the sale or other disposition of an encumbered asset.

2. Where the enforcing creditor has leased or licensed the encumbered asset to a third party, the higher-ranking secured creditor may take over enforcement subject to the right of the lessee or licensee.

3. The right of the higher-ranking secured creditor to take over enforcement includes the right to enforce by any method available to a secured creditor under this Law.

Article 75. Right of the secured creditor to obtain possession of an encumbered asset

1. Subject to the rights of a person with a superior right to possession, including a lessee or licensee with such a right, after default, the secured creditor is entitled to obtain possession of an encumbered asset by applying to a [court or other authority to be specified by the enacting State].

[2. If a secured creditor decides to exercise the right provided in paragraph 1 by applying to a court or other authority, all of the following conditions must be satisfied: [to be specified by the enacting State].]

[3]. If a secured creditor decides to exercise the right provided in paragraph 1 without applying to [a court or other authority to be specified by the enacting State], all of the following conditions must be satisfied:

(a) The grantor has consented in writing to the secured creditor obtaining possession without applying to a [court or other authority to be specified by the enacting State];

(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; and

(c) At the time the secured creditor attempts to obtain possession of the encumbered asset, the person in possession of the encumbered asset does not object.

[4.] The notice referred to in subparagraph 3(b) 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.

[5.] If a higher-ranking secured creditor is in possession of the encumbered asset, a lower-ranking secured creditor is not entitled to obtain possession of the asset.

[*Note to the Commission: The Commission may wish to note that paragraph 2 has been added by the Secretariat to align the structure of this article with the structure of article 76. In line with the recommendations of the Secured Transactions Guide, this article and the*

following article leave the details of judicial enforcement to the law to be specified by the enacting State but repeat this statement in each relevant article.]

Article 76. Right of the secured creditor to dispose of an encumbered asset

1. After default, a secured creditor is entitled to sell or otherwise dispose of, lease or license an encumbered asset by applying or without applying to a [court or other authority to be specified by the enacting State].

2. If a secured creditor decides to exercise the right provided in paragraph 1 by applying to a [court or other authority to be specified by the enacting State], the method, manner, time, place and other aspects of the sale or other disposition, lease or licence are determined by [the rules to be specified by the enacting State].

3. If a secured creditor decides to exercise the right provided in paragraph 1 without applying to a [court or other authority to be specified by the enacting State], the secured creditor may select the method, manner, time, place and other aspects of the sale or other disposition, lease or licence, including whether to sell or otherwise dispose of, lease or license encumbered assets individually, in groups or altogether.

4. If a secured creditor decides to sell or otherwise dispose of, lease or license an encumbered asset without applying to a [court or other authority to be specified by the enacting State], the secured creditor must give notice of its intention to:

(a) The grantor and the debtor;

(b) Any person with a right in the encumbered asset that notifies in writing the secured creditor of that right at least [a short period of time to be specified by the enacting State] before the notice is sent;

(c) Any other secured creditor that registered a notice with respect to a security right in the encumbered asset at least [a short period of time to be specified by the enacting State] before the notice is sent; and

(d) Any other secured creditor that was in possession of the encumbered asset when the enforcing secured creditor took possession of the asset.

5. The notice must be given at least [a short period of time to be specified by the enacting State] before the sale or other disposition, lease or licence takes place and must contain:

(a) A description of the encumbered assets;

(b) A statement of the amount required at the time notice is given to satisfy the secured obligation, including interest and the reasonable cost of enforcement;

(c) A statement that the grantor, the debtor and any other person with a right in the encumbered asset are entitled to terminate the enforcement process as provided in article 73; and

(d) A statement of the date after which the encumbered asset will be sold or otherwise disposed of, leased or licensed, or, in the case of a public disposition, the time, place and manner of the intended disposition.

6. The notice must be in a language that is reasonably expected to inform the recipient about its content.

7. It is sufficient if the notice to the grantor is in the language of the security agreement.

8. 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.

Article 77. Right of the secured creditor to distribute the proceeds of a disposition of an encumbered asset

1. If a secured creditor decides to exercise the right provided in article 76 by applying to a [court or other authority to be specified by the enacting State], the distribution of the proceeds of sale or other disposition of, lease or licence of an encumbered asset is determined by [the rules to be specified by the enacting State], but in accordance with the provisions of this Law on priority.

2. If a secured creditor decides to exercise the right provided in article 76 without applying to a [court or other authority to be specified by the enacting State]:

(a) [Subject to the rights of holders of preferential claims in accordance with article 34,] the enforcing secured creditor must apply the net proceeds of its enforcement to the secured obligation after deducting the reasonable cost of enforcement;

(b) Except as provided in subparagraph 2(c), 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 its claim, to the extent of the amount of that claim, and remit any balance remaining 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 pay the surplus to [a competent judicial or other authority or to a public deposit fund to be specified by the enacting State] for distribution in accordance with the provisions of this Law on priority.

3. A debtor remains liable for any shortfall owing after application of the net proceeds of enforcement to the secured obligation.

Article 78. Right of the secured creditor and the grantor to propose the acquisition of an encumbered asset by the secured creditor

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 secured creditor must send the proposal to:

(a) The grantor and the debtor;

(b) Any person with a right in the encumbered asset that notified in writing the secured creditor of that right, at least [a short period of time to be specified by the enacting State] before the proposal is sent;

(c) Any other secured creditor that registered a notice with respect to a security right in the encumbered asset at least [a short period of time to be specified by the enacting State] before the proposal is sent; and

(d) Any other secured creditor that was in possession of the encumbered asset when the secured creditor took possession.

3. The proposal must include:

(a) A statement of the amount of the secured obligation owed at the time the proposal is sent, including interest and the reasonable cost of enforcement, and the amount of the secured obligation that is proposed to be satisfied;

(b) A statement that the secured creditor proposes to acquire the encumbered asset described in the proposal in total or partial satisfaction of the secured obligation;

(c) A statement that the debtor, the grantor and any other person with a right in the encumbered asset are entitled to terminate the enforcement as provided in article 73;

(d) A statement of the date after which the encumbered asset will be acquired by the secured creditor.

4. The secured creditor acquires the encumbered asset:

(a) In the case of a proposal for the acquisition of the encumbered asset in full satisfaction of the secured obligation, unless the secured creditor receives an objection in writing from any person entitled to receive a proposal under paragraph 2 within [a short period of time to be specified by the enacting State] after the proposal is received by that person; and

(b) In the case of a proposal for the acquisition of the encumbered asset in partial satisfaction of the secured obligation, only if the secured creditor receives the affirmative consent of each person entitled to receive a proposal under paragraph 2 in writing within [a short period of time to be specified by the enacting State] after the proposal is received by that person.

5. The grantor may request the secured creditor to make a proposal under paragraph 1 and, if the secured creditor accepts the grantor's request, it must proceed as provided in paragraphs 1-4.

[*Note to the Commission: The Commission may wish to consider whether the deadline included in subparagraph 4(b), which was not included in recommendation 158 of the Secured Transactions Guide, on which this article is based, should be retained*.]

Article 79. Rights acquired in an encumbered asset

1. If a secured creditor sells or otherwise disposes of an encumbered asset by applying to a [court or other authority to be specified by the enacting State], the buyer or other transferee acquires the asset [the enacting State to specify whether the buyer or other transferee acquires its rights free of any rights, except rights that have priority over the right of the enforcing secured creditor].

2. If a secured creditor leases or licenses an encumbered asset by applying to a [court or other authority to be specified by the enacting State], [the enacting State to specify whether a lessee or licensee is entitled to the benefit of the lease or licence during its term, except as against creditors with rights that have priority over the right of the enforcing secured creditor].

3. If a secured creditor sells or otherwise disposes of an encumbered asset without applying to a [court or other authority to be specified by the enacting State], the buyer or other transferee acquires the grantor's right in the asset free of the rights of the enforcing secured creditor and any competing claimant, except rights that have priority over the right of the enforcing secured creditor.

4. If a secured creditor leases or licenses an encumbered asset without applying to a [court or other authority to be specified by the enacting State], the lessee or licensee is entitled to the benefit of the lease or licence during its term, except as against creditors with rights that have priority over the right of the enforcing secured creditor.

5. If a secured creditor sells or otherwise disposes of, leases or licenses the encumbered asset not in compliance with the provisions of this chapter, the buyer or other transferee, lessee or licensee of the encumbered asset acquires the rights or benefits described in paragraphs 1 and 2[, provided that it had no knowledge of a violation of the provisions of this chapter that materially prejudiced the rights of the grantor or another person].

[*Note to the Commission: The Commission may wish to consider whether the bracketed text in paragraph 5 should be retained outside square brackets*.]

B. Asset-specific rules

Article 80. Collection of payment under a receivable, negotiable instrument, right to payment of funds credited to a bank account or non-intermediated security

1. After default, a secured creditor with a security right in a receivable, negotiable instrument, right to payment of funds credited to a bank account or non-intermediated security is entitled to collect payment from the debtor of the receivable, obligor under the negotiable instrument, depositary institution or issuer of the non-intermediated security.

2. The secured creditor may exercise the right to collect under paragraph 1 before default provided that the grantor consents.

3. A secured creditor exercising the right to collect under paragraph 1 or 2 is also entitled to enforce any personal or property right that secures or supports payment of the encumbered asset.

4. If a security right in a right to payment of funds credited to a bank account has been made effective against third parties by registration of a notice, the secured creditor is entitled to collect or otherwise enforce its security right only pursuant to an order of a court, unless the depositary institution agrees otherwise.

5. The right of the secured creditor to collect under paragraphs 1 to 4 is subject to articles 59-69.

Article 81. Collection of payment under a receivable by an outright transferee

In the case of an outright transfer of a receivable, the transferee is entitled to collect the receivable before or after default of the transferor.

(A/CN.9/884/Add.4) (Original: English)

Note by the Secretariat on a draft model law on secured transactions

ADDENDUM

Contents

Chapter VIII. Conflict of laws[1]

A. General rules

Article 82. Law applicable to the mutual 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, the law governing the security agreement.

Article 83. Law applicable to a security right in a tangible asset

1. Except as provided in paragraphs 2 to 4 and article 97, the law applicable to the creation, effectiveness against third parties 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 priority of a security right in a tangible asset covered by a negotiable document made effective against third parties by possession of the 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.

3. The law applicable to the creation, third-party effectiveness and priority of 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.

4. A security right in a tangible asset that is in transit at the time of its putative creation or intended to be relocated to a State other than the State in which it is located at that time may be created and made effective against third parties under:

(a) The law of the State of the location of the asset at the time of the putative creation of the security right; or

(b) The law of the State of the asset's ultimate destination, provided that the asset reaches that State within [a short period of time to be specified by the enacting State] after the time of the putative creation of the security right.

Article 84. Law applicable to a security right in an intangible asset

Except as provided in articles 85 and 94-97, 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 85. Law applicable to a security right in a receivable relating to immovable property

Notwithstanding article 84, in the case of a security right in a receivable that arises from the sale or lease of, or is secured by, immovable property, the law applicable to the priority of the security right in the receivable as against the right of a competing claimant that is registrable in the immovable property registry in which rights in the relevant immovable may be registered is the law of the State under whose authority the immovable property registry is maintained.

[*Note to the Commission: The Commission may wish to note that it may not be easy for a secured creditor with a security right in receivables to find out that they are secured*

[1] Depending on its legal tradition and drafting conventions, the enacting State may incorporate the provisions of this chapter in its secured transactions law (at the beginning or at the end of it) or in a separate law (civil code or other law).

by a mortgage and thus that a law other than the law of the grantor's location will apply to the priority competition with a mortgagee. The Commission may, therefore, wish to consider whether the rule in article 85 should be limited to receivables arising from the sale or lease of immovable property.]

Article 86. Law applicable to the enforcement of a security right

The law applicable to issues relating to the enforcement of a security right in:

(a) A tangible asset is the law of the State in which [enforcement takes place] [the encumbered asset is located at the time of commencement of enforcement], except as provided in article 97; and

(b) An intangible asset is the law applicable to the priority of the security right, except as provided in articles 94, 96 and 97.

[*Note to the Commission: The Commission may wish to consider the options within square brackets in subparagraph (a) added pursuant to a decision of the Working Group (see A/CN.9/865, para. 90). In this connection, the Commission may wish to note that recommendation 218, subparagraph a, on which subparagraph (a) is based, refers to the place of enforcement (lex fori), as it would result to: (a) the law governing enforcement remedies coinciding with the law generally applicable to procedural issues; (b) the law governing remedies coinciding in many instances with the place in which the encumbered asset is located; and (c) the enforcement requirements being the same for enforcement by both domestic and foreign creditors (see* Secured Transactions Guide, *chap. X, para. 66)*.]

Article 87. Law applicable to a security right in proceeds of an encumbered asset

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 original encumbered asset of the same kind as the proceeds.

Article 88. Meaning of "location" of the grantor

For the purposes of the provisions of this chapter, the grantor is located:

(a) In the State in which it has its place of business;

(b) If the grantor has a place of business in more than one State, in the State in which the central administration of the grantor is exercised; and

(c) If the grantor does not have a place of business, in the State in which the grantor has his or her habitual residence.

Article 89. Relevant time for determining location

1. Except as provided in paragraph 2, references to the location of the encumbered asset or of the grantor in the provisions of this chapter refer:

(a) For creation issues, to the location at the time of the putative creation of the security right; and

(b) For third-party effectiveness and priority issues, to the location at the time the issue arises.

2. If the right of a secured creditor in an encumbered asset is created and made effective against third parties and the rights of all competing claimants are established before a change in the location of the asset or the grantor, references in the provisions of this chapter 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.

Article 90. Exclusion of *renvoi*

A reference in the provisions of this chapter to "the law" of a State as the law applicable to an issue refers to the law in force in that State other than its rules of private international law.

Article 91. Overriding mandatory rules and public policy (*ordre public*)

1. The provisions of this chapter do not prevent a court from applying overriding mandatory provisions of the law of the forum that apply irrespective of the law applicable under the provisions of this chapter.

2. The law of the forum determines when a court may or must apply or take into account overriding mandatory provisions of another law.

3. A court may only exclude the application of a provision of the law applicable under the provisions of this chapter if and to the extent that the result of such application would be manifestly incompatible with fundamental notions of public policy (*ordre public*) of the forum.

4. The law of the forum determines when a court may or must apply or take into account the public policy (*ordre public*) of a State other than the State the law of which would be applicable under the provisions of this chapter.

5. This article does not prevent an arbitral tribunal from applying or taking into account public policy (*ordre public*), or from applying or taking into account overriding mandatory provisions of a law other than the law applicable under the provisions of this chapter, if the arbitral tribunal is required or entitled to do so.

6. This article does not permit a court to displace the provisions of this chapter dealing with the law applicable to the third-party effectiveness and priority of a security right.

Article 92. Impact of commencement of insolvency proceedings on the law applicable to a security right

The commencement of insolvency proceedings in respect of the grantor does not displace the law applicable to a security right under the provisions of this chapter.

B. Asset-specific rules

Article 93. Law applicable to the rights and obligations between third-party obligors and secured creditors

The law governing the rights and obligations between a debtor of a receivable, an obligor under a negotiable instrument or an issuer of a negotiable document and the grantor of a security right in these types of asset is the law applicable to:

(a) The rights and obligations between the secured creditor and the debtor, obligor or issuer;

(b) The conditions under which the security right may be invoked against the debtor, obligor or issuer, including whether an agreement limiting the grantor's right to create a security right may be asserted by the debtor, obligor or issuer; and

(c) Whether the obligations of the debtor, obligor or issuer have been discharged.

Article 94. Law applicable to a security right in a right to payment of funds credited to a bank account

1. Subject to article 95, the law applicable to the creation, effectiveness against third parties, priority and enforcement of a security right in a right to payment of funds credited to a bank account, as well as to the rights and obligations between the depositary institution and the secured creditor, is

Option A[2]

The law of the State in which the depositary institution maintaining the account has its place of business.

2. If the depositary institution has places of business in more than one State, the law applicable is the law of the State in which the office maintaining the account is located.

Option B

The law of the State expressly stated in the account agreement as the State whose law governs the account agreement or, if the account agreement expressly provides that the law of another State is applicable to all such issues, the law of that other State.

2. The law of the State determined pursuant to paragraph 1 applies only if the depositary institution has, at the time of the conclusion of the account agreement, an office in that State that is engaged in the regular activity of maintaining bank accounts.

3. If the applicable law is not determined pursuant to paragraph 1 or 2, the applicable law is to be determined pursuant to [the default rules based on article 5 of the Hague Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary to be inserted here by the enacting State].

Article 95. Law applicable to the third-party effectiveness of a security right in certain types of asset by registration

If the law of the State in which the grantor is located recognizes registration of a notice as a method for achieving effectiveness against third parties of a security right in a negotiable instrument, negotiable document, right to payment of funds credited to a bank account or certificated non-intermediated security, the law of that State also is the law applicable to the third-party effectiveness of the security right in that asset by registration.

Article 96. Law applicable to a security right in intellectual property

1. The law applicable to the creation, effectiveness against third parties and priority of a security right in intellectual property is the law of the State in which the intellectual property is protected.

2. A security right in intellectual property may also be created under the law of the State in which the grantor is located and may also be made effective under that law against third parties other than another secured creditor, a transferee or a licensee.

3. The law applicable to the enforcement of a security right in intellectual property is the law of the State in which the grantor is located.

Article 97. Law applicable to a security right in non-intermediated securities

Option A

1. Subject to paragraph 2:

(a) The law applicable to the creation, effectiveness against third parties and priority of a security right in certificated non-intermediated securities is the law of the State in which the certificate is located; and

(b) The law applicable to the enforcement of a security right in certificated non-intermediated securities is the law of the State in which [enforcement takes place] [the securities are located at the time of commencement of enforcement].

[2. The law applicable to the effectiveness of a security right in certificated non-intermediated securities against the issuer is the law of the State under which the issuer is constituted.]

[2. The law applicable to the effectiveness of a security right in non-intermediated debt securities against the issuer is the law governing the securities.]

[2] A State may adopt option A or B of this article.

3. The law applicable to the creation, effectiveness against third parties, priority and enforcement of a security right in uncertificated non-intermediated securities, as well as to its effectiveness against the issuer, is the law of the State under which the issuer is constituted.

Option B

The law applicable to the creation, effectiveness against third parties, priority and enforcement of a security right in non-intermediated securities, as well as to its effectiveness against the issuer, is the law of the State under which the issuer is constituted.

Option C

1. The law applicable to the creation, effectiveness against third parties, priority and enforcement of a security right in non-intermediated equity securities, as well as to its effectiveness against the issuer, is the law under which the issuer is constituted.

2. The law applicable to the creation, the effectiveness against third parties, the priority and the enforcement of a security right in non-intermediated debt securities, as well as to its effectiveness against the issuer, is the law governing the securities.

[*Note to the Commission: The Commission may wish to note that articles 93 and 94 refer to the rights and obligations between a third-party obligor and a secured creditor, while article 97 refers to the effectiveness of a security right in non-intermediated securities against the issuer. In this connection, the Commission may wish to consider whether these articles should be revised to use the same wording, and, if so, which wording should be used. In addition, the Commission may wish to consider whether the rights and obligations of a depositary bank and the effectiveness of a security right in non-intermediated securities against the issuer should be addressed in article 93 (to have the rights and obligations of all third-party obligors addressed in one and the same article) or in articles 94 and 97 (to have all bank account- and securities-related issues addressed in one article)*.]

Article 98. Law applicable in the case of a multi-unit State

1. Any reference in the provisions of this chapter to the law of a State that has two or more territorial units refers to the law in force in the relevant territorial unit.

2. The relevant territorial unit referred to in paragraph 1 is to be determined on the basis of the location of the grantor or of the encumbered asset, or otherwise under the provisions of this chapter.

3. If the applicable law is the law in force in a territorial unit, the internal conflict-of-laws provisions in force in the territorial unit determine whether the substantive law provisions of the State or of a particular territorial unit of the State apply.

[*Note to the Commission: The Commission may wish to consider a simplified version of this article that could read along the following lines: "If the law applicable to an issue is the law of a State that comprises one or more territorial units each of which has its own rules of law in respect of that issue: (a) any reference in the provisions of this chapter to the law of a State means the law in force in the relevant territorial unit; and (b) the internal conflict-of-laws rules of the State, or in the absence of such rules, the law in force in that territorial unit determine the relevant territorial unit whose substantive law is to apply*."]

Chapter IX. Transition

Article 99. Amendment and repeal of other laws

1. [The laws to be specified by the enacting State] are repealed.

2. [The laws to be specified by the enacting State] are amended as follows [the text of the relevant amendments to be specified by the enacting State].

Article 100. General applicability of this Law

1. For the purposes of the provisions of this chapter:

(a) "Prior law" means [the law applicable under the conflict-of-laws rules of the enacting State] that applied to prior security rights immediately before the entry into force of this Law; and

(b) "Prior security right" means a right created by an agreement entered into before the entry into force of this Law that is a security right within the meaning of this Law and to which this Law would have applied if it had been in force when the right was created.

2. Except as otherwise provided in this chapter, this Law applies to all security rights, including prior security rights within its scope.

Article 101. Applicability of prior law to matters that are the subject of proceedings commenced before the entry into force of this Law

1. Subject to paragraph 2, prior law applies to a matter that is the subject of proceedings before a court or arbitral tribunal commenced before the entry into force of this Law.

2. If any step has been taken to enforce a prior security right before the entry into force of this Law, enforcement may continue under prior law or may proceed under this Law.

Article 102. Applicability of prior law to the creation of a prior security right

1. Prior law determines whether a prior security right was created.

2. A prior security right remains effective between the parties notwithstanding that its creation did not comply with the creation requirements of this Law.

Article 103. Transitional rules for determining the third-party effectiveness of a prior security right

1. A prior security right that was effective against third parties under prior law at the time this Law entered into force continues to be effective against third parties under this Law until the earlier of:

(a) The time it would have ceased to be effective against third parties under prior law; and

(b) The expiration of [a period of time to be specified by the enacting State] after the entry into force of this Law.

2. If the third-party effectiveness requirements of this Law are satisfied before the third-party effectiveness of a prior security right ceases in accordance with paragraph 1, the prior security right continues to be effective against third parties under this Law from the time when it was made effective against third parties under prior law.

3. If the third-party effectiveness requirements of this Law are not satisfied before the third-party effectiveness of a prior security right ceases in accordance with paragraph 1, the prior security right is effective against third parties only from the time it is made effective against third parties under this Law.

4. A written agreement between a grantor and a secured creditor creating a prior security right is sufficient to constitute authorization by the grantor for the registration of a notice covering the assets described in that agreement under this Law.

Article 104. Application of prior law to the priority of a prior security right as against the rights of competing claimants arising under prior law

1. The time to be used for determining the priority of a prior security right is the time it became effective against third parties under prior law or, in the case of advance registration, became the subject of a registered notice under prior law.

2. The priority of a prior security right as against the rights of a competing claimant is determined by prior law if:

(a) The security right and the rights of all competing claimants arose before the entry into force of this Law; and

(b) The priority status of none of these rights has changed since the entry into force of this Law.

3. For the purposes of subparagraph 2(b), the priority status of a prior security right has changed only if:

(a) It was effective against third parties when this Law entered into force but ceased to be effective against third parties as provided in article 103, paragraph 3; or

(b) It was not effective against third parties under prior law when this Law entered into force, and only became effective against third parties under this Law.

[*Note to the Commission: The Commission may wish to consider the content, the placement and the necessity of retaining paragraph 1, as (a) it may be inconsistent with article 103, paragraph 2; (b) its wording may be unclear; and (c) article 103 already addresses comprehensively the transitional rules for determining the time of third-party effectiveness of prior security rights for the purposes of applying the priority provisions of this Law. To address these concerns and as its content relates to article 103, paragraph 2, paragraph 1 could be placed at the end of article 103 and be revised to read along the following lines: "If a prior security right referred to in paragraph 2 was made effective against third parties by registration under prior law, the time of registration under prior law is the time to be used for the purposes of applying the priority rules of this Law that refer to the time of registration of a security right*."]

Article 105. Entry into force of this Law

This Law enters into force [on the date or according to mechanism to be specified by the enacting State].

H. Note by the Secretariat on a draft guide to enactment of the draft model law on secured transactions

(A/CN.9/885 and Add.1-4)

[Original: English]

Contents

I. Purpose of the Guide to Enactment

1. In preparing and adopting the [draft] UNCITRAL Model Law on Secured Transactions (the "Model Law"), the United Nations Commission on International Trade Law ("UNCITRAL" or the "Commission") was mindful of the fact that the Model Law would be a more effective tool for States modernizing and harmonizing their legislation, as well as organizations assisting States, if background and explanatory information were provided to executive and legislative branches of Government to assist in their consideration of the Model Law for enactment (the "Guide to Enactment").[1]

2. In addition, the Commission was aware that in the preparation of the Model Law it was assumed that the Model Law would be accompanied by such a Guide to Enactment. For example, it was decided in respect of a number of issues not to settle them in the Model Law but to address them in the Guide so as to provide guidance to States enacting the Model Law (see, for example, paras. 68 and 124 below). Thus, the Guide to Enactment also addresses or clarifies matters that were not settled in the Model Law but were referred to in the Guide to Enactment.[2]

3. Moreover, when it referred the task of the preparation of the Guide to Enactment to the Working Group, the Commission agreed that the Guide to Enactment should: (a) be as short as possible; (b) include cross references to the UNCITRAL Legislative Guide on Secured Transactions (the "Secured Transactions Guide") and the other texts of the Commission on secured transactions; (c) focus on giving guidance to legislators rather than users of the text; (d) explain the thrust of each provision of the Model Law and any difference with the corresponding recommendations of the Secured Transactions Guide or the provisions of another UNCITRAL text on secured transactions; and (e) give guidance to States with respect to matters referred to them and in particular explain each option offered

[1] *Official Records of the General Assembly, Seventieth Session, Supplement No. 17* (A/70/17) para. 215.

[2] Ibid.

in various articles of the Model Law to assist enacting States in choosing one of the options offered.[3]

4. Mindful of the fact that the Secured Transactions Guide contains extensive commentary, the Commission decided that the Guide to Enactment should nevertheless be prepared. The reason was that the commentary of the Secured Transactions Guide had a different structure and did not contain a straightforward discussion of each recommendation but rather a discussion of the comparative advantages and disadvantages of various workable approaches with the recommendation being set out as a conclusion of that discussion. At the same time, to avoid repetition, the Commission agreed that the Guide to Enactment should not repeat, but should rather incorporate by reference, those comments contained in the Secured Transactions Guide that could assist in explaining a provision of the Model Law.

5. The Commission was also aware of the likelihood that the Model Law would be used in a number of States with limited familiarity with the type of secured transaction covered by in the Model Law. So, the Guide to Enactment, much of which is drawn from the travaux préparatoires of the Model Law, is also intended to be helpful to other users of the text, such as judges, arbitrators, practitioners and academics.

6. In view of the above, the information presented in the Guide to Enactment is intended to briefly explain the thrust of each provision of the Model Law and its relationship with the corresponding recommendation(s) of the Secured Transactions Guide or other UNCITRAL texts on secured transactions, including the Supplement on Security Rights in Intellectual Property (the "Intellectual Property Supplement"), the United Nations Convention on the Assignment of Receivables in International Trade (the "Assignment Convention") and the UNCITRAL Guide on the Implementation of a Security Rights Registry (the "Registry Guide").

7. The Guide to Enactment was prepared by the Secretariat and is based on the considerations of the Working Group and the Commission. [It was considered and approved in principle by the Working Group at its [thirtieth] and [thirty-first] sessions (see […] respectively) and by the Commission at its [fiftieth] session (see […]).[4]]

II. Purpose and origin of the Model Law

A. Purpose of the Model Law

8. The Model Law is designed to assist States in implementing the recommendations of the Secured Transactions Guide, the Intellectual Property Supplement and the Registry Guide with respect to security rights in movable assets. The overall objective of those texts and the Model Law is to promote low-cost credit by enhancing the availability of secured credit (see Secured Transactions Guide, rec. 1, subpara. (a)). Like all those texts, the Model Law is intended to be useful to States that do not currently have efficient and effective secured transactions laws, as well as to States that already have workable laws but wish to modernize their laws and harmonize them with the laws of other States whose secured transactions laws are generally consistent with the recommendations of those texts (see Secured Transactions Guide, Introduction, para. 1).

9. Thus, the provisions of the Model Law are based on the recommendations of the Secured Transactions Guide, including the Intellectual Property Supplement. The Model Registry-related Provisions are also based on the Registry Guide. The provisions of the Model Law on security rights in receivables are substantially based on the recommendations of the Secured Transactions Guide, which in turn are based on the Assignment Convention.

[3] Ibid., para. 216.

[4] Ibid., [*Seventy-second Session, Supplement No. 17* (A/72/17), para. […].]

B. Background

10. At its first session, in 1968, the Commission included the topic of security interests in goods in its future work programme.[5] From its third session in, 1970, to its thirteenth session, in 1980, the Commission discussed the topic[6] and, at its thirteenth session, in 1980, decided that no further work should be carried out and the subject should no longer be accorded priority as "the world-wide unification of the law of security interests in goods, for the reasons brought out in the discussions, was in all likelihood unattainable".[7]

C. Preparatory work and adoption

11. At its forty-third session, in 2010, the Commission had before it a note by the Secretariat on possible future work in the area of security interests (A/CN.9/702 and Add.1). The Commission agreed that four issues related to secured transactions law listed in document A/CN.9/702, paragraph 2(a)-(d), were interesting (non-intermediated securities, registration of security rights, a model law and a contractual guide on secured transactions) and should be retained on its future work agenda.[8] At the same time, in view of the limited resources available to it, the Commission agreed that it could not undertake work on all four issues at the same time and that, as a result, it should set priorities. In that regard, there was general agreement that priority should be given to work on registration of security rights in movable assets.

12. At that session, the Commission decided that Working Group VI should be entrusted with the preparation of a text on registration of security rights in movable assets as a matter of priority. It was also agreed that other topics, such as security rights in non-intermediated securities, a model law based on the recommendations of the Guide and a text dealing with the rights and obligations of the parties should be retained in the future programme of Working Group VI for further consideration by the Commission at a future session on the basis of notes to be prepared by the Secretariat within the limits of existing resources.[9]

13. At its forty-fifth session, in 2012, the Commission decided that, upon its completion of the Registry Guide, Working Group VI should undertake work to prepare a simple, short and concise model law on secured transactions based on the Secured Transactions Guide and consistent with all texts prepared by UNCITRAL on secured transactions.[10] At that session, the Commission noted that the Working Group, at its twenty-first session, had agreed to propose to the Commission that the Working Group should develop a model law on secured transactions based on the general recommendations of the Secured Transactions Guide and consistent with all the texts prepared by UNCITRAL on secured transactions. It was also noted that the Working Group had agreed to propose to the Commission that the topic of security rights in non-intermediated securities should be retained on its work agenda and be considered at a future session (A/CN.9/743, para. 76).[11]

14. Recalling that, at its forty-third session, in 2010, the Commission had agreed that the topics mentioned above should be retained on the programme of the Working Group for further consideration, the Commission considered the proposals of the Working Group. It was widely felt that a simple, short and concise model law on secured transactions could usefully complement the Secured Transactions Guide and would be extremely useful in addressing the needs of States and in promoting implementation of the Secured Transactions Guide. While a concern was expressed that a model law might limit the flexibility of States to address the local needs of their legal traditions, it was generally viewed that a model law could be drafted in a sufficiently flexible manner to adapt to various legal traditions. Moreover, there was support for the idea that a model law could greatly assist States in

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[5] Ibid., *Twenty-third Session, Supplement No. 16* (A/7216), paras. 40-48.
[6] For this project, see www.uncitral.org/uncitral/uncitral_texts/security_past.html.
[7] *Official Records of the General Assembly, Thirty-fifth Session, Supplement No. 17* (A/35/17), para. 28.
[8] Ibid., *Sixty-fifth session, Supplement No. 17* (A/65/17), para. 264.
[9] Ibid., para. 268.
[10] Ibid., *Sixty-seventh Session, Supplement No. 17* (A/67/17), para. 105.
[11] Ibid., para. 101.

addressing urgent issues relating to access to credit and financial inclusion, in particular for small and medium-sized enterprises.[12]

15. As to the topic of security rights in non-intermediated securities, it was widely felt that the topic merited further consideration. The Commission noted that non-intermediated securities, in the sense of securities other than those credited to a securities account, that were used as security for credit in commercial finance transactions were excluded from the scope of the Secured Transactions Guide (see rec. 4, subparas. (c)-(e) of the Guide), the Unidroit Convention on Substantive Rules for Intermediated Securities (Geneva, 2009; the "Unidroit Securities Convention") and the Convention on the Law Applicable to Certain Rights in respect of Securities held with an Intermediary (The Hague, 2006; the "Hague Securities Convention").[13]

16. At its twenty-third session, in 2013, Working Group VI 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).[14] The Working Group developed the Model Law in six one-week sessions,[15] the final taking place in February 2016.

17. At its forty-seventh session, in 2014, the Commission expressed its satisfaction for the considerable progress achieved by the Working Group in its work and requested the Working Group to expedite its work so as to complete the draft Model Law, including certain definitions and provisions on non-intermediated securities (see A/CN.9/811), and to submit it to the Commission for adoption together with a guide to enactment as soon as possible.

18. At its forty-eighth session, in 2015, the Commission considered and approved the substance of article 26 of chapter IV of the Model Law and articles 1-29 of the draft Registry Act.[16] At that session, the Commission also agreed that a guide to enactment of the Model Law should be prepared and referred that task to the Working Group.[17]

19. In preparation for the forty-ninth session of the Commission, the text of the Model Law as approved by Working Group VI was circulated to all Governments and to interested international organizations for comment. At that session, the Commission had before it the reports of the Working Group on its twenty-eighth and twenty-ninth sessions (A/CN.9/865 and A/CN.9/871), the Model Law (A/CN.9/884 and Add.1-4), the Guide to Enactment prepared by the Secretariat (A/CN.9/885 and Add.1-4) and the comments received from Governments (A/CN.9/886 and A/CN.9/887). At that session, the Commission […].

20. After consideration of the Model Law, the Commission adopted the following decision:

[…].[18]

III. The Model Law as a tool for modernizing and harmonizing laws

21. The Model Law is in the form of a legislative text that is recommended to States for incorporation into their national law. Unlike an international convention, model legislation does not require the State enacting it to notify the United Nations or other States that may

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[12] Ibid., paras. 102 and 103.

[13] Ibid., para. 104.

[14] See A/CN.9/767, paras. 63 and 64.

[15] The reports of the Working Group on its work during these 6 sessions are contained in documents A/CN.9/796, A/CN.9/802, A/CN.9/830, A/CN.9/836, A/CN.9/865 and A/CN.9/871. During these sessions, the Working Group considered documents A/CN.9/WG.VI/WP.57 and Add.1 to 4, A/CN.9/WG.VI/WP.59 and Add.1, A/CN.9/WG.VI/WP.61 and Add.1 to 3, A/CN.9/WG.VI/WP.63 and Add.1 to 4, A/CN.9/WG.VI/WP.65 and Add.1 to 4, and A/CN.9/WG.VI/WP.68 and Add.1 and 2.

[16] *Official Records of the General Assembly, Seventieth Session, Supplement No. 17* (A/70/17), para. 214.

[17] Ibid., para. 216.

[18] Ibid., [*Official Records of the General Assembly, Seventy-first Session, Supplement No. 17* (A/71/17), para. […].]

have also enacted it. However, States are strongly encouraged to inform the UNCITRAL secretariat of any enactment of the new Model Law (or any other model law resulting from the work of UNCITRAL). This information may be made available on the UNCITRAL website to send the message that the enacting State has adopted an international standard and, in any case, assist other States in their consideration of the Model Law.

22. In incorporating the text of model legislation into its legal system, a State may wish to consider modifying or leaving out some of its non-fundamental provisions. In the case of a convention, the possibility of changes being made to the uniform text by the States parties (normally referred to as "declarations") is much more restricted; trade law conventions in particular usually either totally prohibit declarations or allow only very few, specific ones. The flexibility inherent in model legislation is particularly desirable in those cases where it is likely that the State would wish to make various modifications to the uniform text before it would be ready to enact it as national law. Some modifications may be expected, in particular when the uniform text is closely related to the national court and procedural system. This, however, also means that the degree of harmonization achieved through model legislation is likely to be lower than that achieved by a convention.

23. However, this relative disadvantage of model legislation may be balanced by the fact that the number of States enacting model legislation is likely to be higher than the number of States adhering to a convention. In order to achieve a satisfactory degree of modernization, harmonization and certainty, it is recommended that States make as few changes as possible in incorporating the new Model Law into their legal systems and that they take due regard of its basic principles, including the unitary, functional and comprehensive approach to secured transactions, notice registration, party autonomy and the international origin of the Model Law. In general, in enacting the Model Law, it is advisable to adhere as much as possible to the uniform text in order to make the national law as efficient as possible for all users and as transparent and familiar as possible for foreign users. This does not deprive enacting States of the necessary flexibility as the Model Law provides options and leaves a number of matters to enacting States.

24. While it is recommended that the Model Law should be implemented in one law, depending on its legal tradition and drafting conventions, the enacting State may implement the Model Registry-related Provisions in its secured transactions law, in a separate statute or other type of legal instrument, such as rules, regulations, orders, by-laws, proclamations or the like adopted by a legislative or executive body, or some of these Provisions in its secured transactions law and the rest in a separate statute or other type of legal instrument. Similarly, the conflict-of-laws provisions may be incorporated in the secured transactions law (at the beginning or at the end of it) or in a separate law (civil code or other law).

IV. Main features of the Model Law

A. Relationship of the Model Law with the secured transactions texts of UNCITRAL

25. The Secured Transactions Guide, including the Intellectual Property Supplement, and the Registry Guide contain detailed commentary and recommendations on all issues to be addressed in a modern law on secured transactions. However, they are long texts and States will need assistance in implementing their recommendations. Thus, the Model Law was prepared to complement those texts and to assist States in implementing their recommendations.

26. The Model Law reflects the policies embodied in the recommendations of those texts. The difference in the formulation between a provision of the Model Law and the relevant recommendation is generally due to the legislative nature of the Model Law and is briefly explained in the remarks to the relevant provision of the Model Law below.

27. For reasons explained below, the Model Law also addresses matters that were not addressed in a recommendation or even discussed in the Secured Transactions Guide, including the Intellectual Property Supplement, or in the Registry Guide (e.g. security rights in non-intermediated securities and the effectiveness of the registration of an amendment or

cancellation notice that has not been authorized by the secured creditor). At the same time, the Model Law does not address certain matters that were addressed in the Secured Transactions Guide (e.g. security rights in the right to receive the proceeds under an independent undertaking and security rights in attachments).

B. Key objectives and fundamental policies of the Model Law

28. The overall objective of the Model Law is the same as that of the Secured Transactions Guide, that is, to promote low-cost credit by enhancing the availability of secured credit (see Secured Transactions Guide rec. 1 and Introduction, paras. 43-59). The fundamental policies of the Model Law are the same as those of the Secured Transactions Guide (see Secured Transactions Guide, Introduction, paras. 60-72). In enacting the Model Law, States may wish to consider issues of harmonization with existing law, legislative method, drafting technique and post-enactment acculturation (see Secured Transactions Guide, Introduction, paras. 73-89).

29. Depending on its drafting method and technique, the enacting State may wish to consider including the key objectives of the Model Law in a preamble or other statement of objectives of the law. That statement could be used for the purpose of the interpretation of, and the filling of gaps in, the Model Law (see paras. 75 and 76 below).

V. Assistance from the UNCITRAL secretariat

A. Assistance in drafting legislation

30. In the context of its training and assistance activities, the UNCITRAL secretariat assists States with technical consultations for the preparation of legislation based on the Model Law. The same assistance is brought to Governments considering legislation based on other UNCITRAL model laws (e.g. the UNCITRAL Model Law on Cross-Border Insolvency, the UNCITRAL Model Law on International Commercial Arbitration and the UNCITRAL Model Law on International Commercial Conciliation) or considering adhesion to one of the international trade law conventions prepared by UNCITRAL (e.g. the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (New York, 1995) and the Assignment Convention).

31. Further information concerning the Model Law and other model laws and conventions developed by UNCITRAL, may be obtained from the UNCITRAL secretariat at the address below:

International Trade Law Division, Office of Legal Affairs
United Nations
Vienna International Centre
P.O. Box 500
A-1400 Vienna, Austria
Telephone: (+43-1) 26060-4060 or 4061
Telecopy: (+43-1) 26060-5813
Electronic mail: uncitral@uncitral.org
Internet home page: www.uncitral.org

B. Information on the interpretation of legislation based on the Model Law

32. The UNCITRAL secretariat welcomes comments concerning the Model Law and the Guide to Enactment, as well as information concerning enactment of legislation based on the Model Law. Once enacted, the Model Law will be included in the CLOUT information system, which is used for collecting and disseminating information on case law relating to the conventions and model laws that have emanated from the work of UNCITRAL. The purpose of the system is to promote international awareness of the legislative texts formulated by UNCITRAL and to facilitate their uniform interpretation and application. The

UNCITRAL secretariat publishes, in the six official languages of the United Nations, abstracts of decisions and arbitral awards. In addition, upon individual request and subject to any copyright and confidentiality restrictions, the UNCITRAL secretariat makes available to the public all decisions and arbitral awards on the basis of which the abstracts were prepared. The system is explained in a user's guide that is available from the UNCITRAL secretariat in hard copy (A/CN.9/SER.C/GUIDE/1/Rev.2) and on the above-mentioned Internet home page of UNCITRAL.

VI. Article-by-article remarks

Chapter I. Scope of application and general provisions

Article 1. Scope of application

33. Article 1 is based on recommendations 1-7 of the Secured Transactions Guide (see chap. I, paras. 1-4). It is intended to set out the various types of transaction and asset covered by the Model Law (see art. 1, paras. 1-4), as well as to clarify the relationship between the Model Law and other law (see art. 1, paras. 5 and 6). Generally, the Model Law has the same comprehensive scope of application as the Secured Transactions Guide and applies to any property right in any type of movable asset, such as equipment, inventory and receivables, provided that the property right is created by an agreement and secures payment or other performance of an obligation (see art. 1, para. 1, and the definition of the term "security right" in art. 2, subpara. (ii)). However, there are a few differences between the scope of the Model Law and the scope of the Secured Transactions Guide.

34. Like the Secured Transactions Guide (see rec. 3) and the Assignment Convention (see art. 1, para. 1, and art. 2, subpara. (a)), the Model Law also applies to outright transfers of receivables (see art. 1, para. 2). The main reasons for this approach are that: (a) outright transfers of receivables take place in the context of financing transactions; and (b) it is sometimes difficult to determine at the outset of a transaction whether an assignment will be held to be an outright or a security assignment (see Secured Transactions Guide, chap. I, paras. 25-31). The enacting State may wish to consider excluding from the scope of the Model Law certain types of outright transfers of receivables that are not financing transactions (e.g. outright transfers of receivables for collection purposes only or as part of a sale of the business out of which they arose; see para. 39 below).

35. In addition, unlike the Secured Transactions Guide which covered security rights in the right to receive payment under an independent undertaking (see rec. 2, subpara. (a)), the Model Law excludes from its scope security rights in both the right to receive and the right to request payment under an independent guarantee or letter of credit, whether commercial or standby (see art. 1, subpara. 3(a)). The reason is that there are various specialized financing practices in those areas and dealing with them in the Model Law would be unduly complex. States interested in addressing those practices in their general secured transactions law can always implement the relevant recommendations of the Secured Transactions Guide (recs. 27, 50, 107, 127, 176 and 212).

36. Moreover, like the Secured Transactions Guide (see rec. 4, subpara. (b)), to the extent that its provisions are inconsistent with law relating to intellectual property, the Model Law defers to law relating to intellectual property (see art. 1, subpara. 3(b)). This limitation may not be necessary if the enacting State has already coordinated or otherwise addressed the relationship between the Model Law and its law relating to intellectual property.

37. Also, unlike the Secured Transactions Guide (see rec. 4, subpara. (c)), the Model Law does not exclude from its scope security rights in non-intermediated securities (see art. 1, subpara. 3(c)). The reasons for this approach are that: (a) such securities often are part of commercial finance transactions (in which, for example, it is common for the lender's security to include in the assets to be encumbered shares of the borrower's wholly-owned subsidiaries or the shares of the borrower itself); (b) there are wide divergences among national regimes in this regard; and (c) such securities are not addressed in any other uniform law text. To the contrary, security rights in intermediated securities are excluded as such securities are typically part of financial market transactions and are addressed in other uniform law texts; see Secured Transactions Guide, chap. 1, paras. 37 and 38).

38. Finally, the Model Law excludes payment rights under or from financial contracts governed by netting agreements (see art. 1, subpara. 3(d)), including foreign exchange transactions, because they raise complex issues that require special rules (see Secured Transactions Guide, chap. I, para. 39).

39. Combining the policy of recommendations 4, subparagraph (a), and 7 of the Secured Transactions Guide, the Model Law permits the enacting State to exclude further types of asset (or transaction), provided that other law governs the matters that are addressed in the Model Law (see art. 1, subpara. 3(e)). The reason for this approach is to avoid inadvertently creating gaps (where other law does not govern an issue addressed in the Model Law) or overlaps (where other law governs an issue addressed in the Model Law). In addition, the Model Law provides guidance to States as to possible exclusions, referring to types of asset, such as ships and aircraft, that are subject to specialized secured transactions and asset-based registration regimes.

40. Similarly, with respect to the application of the Model Law to proceeds, while the relevant provision of the Model Law (see art. 1, para. 4), is formulated somehow differently from recommendation 6 of the Secured Transactions Guide, there is no policy difference between the two rules. The policy may be explained as follows. In the case of a security right in an asset covered by the Model Law (e.g. receivables), the security right extends to its identifiable proceeds (see art. 10, para. 1); this rule applies even if the proceeds are of a type of asset that is outside the scope of the Model Law (e.g. as intermediated securities), except other law applies and governs the matters addressed in the Model Law.

41. With respect to the relationship with consumer protection law, the Model Law is intended to preserve the application of consumer protection law that protects a grantor or a debtor of an encumbered receivable (see art. 1, para. 5, of the Model Law rec. 2, subpara. (b), of the Secured Transactions Guide and art. 4, para. 4, of the Assignment Convention). For example, under consumer-protection law, it may not be possible to create a security right in all present and future assets, employment benefits, at least up to a certain amount, or necessary household items of a consumer. Enacting States that do not have a developed consumer-protection law may need to consider whether enactment of the Model Law should be accompanied by the enactment of such special protections for consumers. It should also be noted that the Model Law already includes certain consumer-specific rules. For example, under article 23, an acquisition security right in consumer goods is effective against third parties upon its creation (see also para. 119 below).

42. Following the approach of the Secured Transactions Guide (see rec. 18), the Model Law (see art. 1, para. 6), is intended to preserve limitations to the creation or the enforceability of a security right in certain types of asset (e.g. employment benefits) that are based on any other statutory or case law. At the same time, it is intended to ensure that such limitations based on the sole ground that an asset is a future asset or a part or undivided interest in an asset are overridden (see art. 8, paras. (a) and (b)). However, paragraph 6 does not apply to contractual limitations (also known as negative pledge agreements). The Model Law overrides explicitly contractual limitations on the creation of a security right in receivables (see art. 13) or rights to payment of funds credited to a bank account (see art. 15). [With respect to other types of asset, contractual limitations on the creation of a security right are overridden implicitly to the extent that the Model Law allows the owner of an asset to create a security right in that asset, even if the security or other agreement expressly restricts that right. The Model Law does not condition the creation, third-party effectiveness or priority of a security right in an asset on the grantor having the right to encumber it (art. 6, para. 1, refers also to the “power to encumber”; see para. 78 below). However, the rights and obligations of third-party obligors are determined by the other law (see arts. 59-69).]

43. Finally, unlike the Secured Transactions Guide, the Model Law does not apply to attachments to movable or immovable property. Thus, the Model Law does not include a provision along the lines of recommendation 5, which provides that, while the law recommended in the Secured Transactions Guide does not apply to immovable property, it does apply to attachments to immovable property. Enacting States are encouraged to include in their enactments of the Model Law provisions based on the relevant recommendations

of the Secured Transactions Guide (see recs. 21, 25, 43, 48, 87, 88, 164, 165, 184, 195 and 196).

Article 2. Definitions and rules of interpretation

44. Article 2 contains definitions and rules of interpretation with respect to most key terms used in the Model Law. Other terms are defined or explained in various articles of the Model Law. For example, the term "registry" is defined in article 1, subparagraph (k), of the Model Registry-related Provisions. Article 2 is based on the terminology and rules of interpretation of the Secured Transactions Guide (see Secured Transactions Guide, Introduction, paras. 15-20). Rules of interpretation include the following: (a) the word "or" is not intended to be exclusive; (b) the singular includes the plural and vice versa; and (c) the words "include" or "including" are not intended to indicate an exhaustive list (see Secured Transactions Guide, Introduction, para. 17).

Acquisition security right

45. An acquisition security right is a security right that secures the grantor's obligation with respect to credit provided to enable the grantor to acquire a tangible asset (other than reified intangible assets; see art. 2, subparas. (b) and (jj)), intellectual property and the rights of a licensee in intellectual property. This definition, in conjunction with the definition of "security right," results in retention-of-title transactions, conditional sales and financial leases being treated in the Model Law as "acquisition security rights." For a security right to be an acquisition security right, the credit it secures has to be used for that purpose. Where a security right secures obligations in addition to the credit extended and used for the purpose of acquiring the encumbered asset, it is an ordinary security right to the extent of those additional obligations.

Bank account

46. To underline the distinction between a "bank account" and a "securities account", the Model Law defines: (a) the former term as "an account maintained by [essentially, a deposit taking institution] to which funds may be credited or debited"; (b) the latter term as "an account maintained by an intermediary to which securities may be credited or debited"; and (c) the term "securities" in a manner that clearly excludes funds (see art. 2, subparas. (c), (gg) and (ff) respectively). The term "bank account", therefore, includes any current or checking and savings account. The term does not include a right against the bank to payment evidenced by a negotiable instrument. The enacting State may wish to consider including a definition of the term "bank" in its secured transactions law or rely for this purpose on other law.

Certificated non-intermediated securities

47. The term "represented" used in the definition of the term "certificated non-intermediated securities" (see art. 2, subpara. (d)) is broad enough to cover the approaches taken in different jurisdictions (e.g. "covered" or "embodied"). The term "certificate" means only a tangible document subject to physical possession. Thus, securities represented by an electronic certificate are considered to be uncertificated securities under the Model Law.

Competing claimant

48. A competing claimant may have a right in the same encumbered asset as original encumbered asset or as proceeds (see art. 2, subpara. (e)). Other creditors of the grantor with a right in the same encumbered asset include judgement creditors.

Consumer goods

49. Unlike the definition of the term "consumer goods" in the Secured Transactions Guide on which it is based, the definition of the term in the Model Law (see art. 2, subpara. (f)) includes the word "primarily" to ensure that: (a) goods used primarily for personal family or household purposes and only incidentally for business purposes would be treated as

consumer goods; and (b) goods used primarily for business purposes and only incidentally for personal, family or household purposes would not be treated as consumer goods.

Control agreement

50. While the effect of a control agreement is to render a security right effective against third parties (see art. 18), its purpose is to ensure: (a) the cooperation of the depositary institution or the issuer of securities in the enforcement of a security right; and (b) the priority of the secured creditor that has control. Unlike the definition of this term in the Secured Transactions Guide, on which it is based, the definition of the term in the Model Law does not refer to a "signed writing" (see art. 2, subpara. (g)). This difference does not reflect a policy change but rather a decision that this matter should be left to the authorization requirements of the enacting State. In any case, a control agreement does not need to be in a single writing. It should also be noted that, on the assumption that other law would address this matter, the Model Law does not include a provision implementing the recommendations of the Secured Transactions Guide with respect to electronic communications (see Secured Transactions Guide, recs. 11 and 12).

Equipment

51. Unlike the definition of the term "equipment" in the Secured Transactions Guide on which it is based, the definition of the term in the Model Law includes the word "primarily" to ensure that: (a) goods used by a person primarily in the operation of its business and only incidentally for other purposes would be treated as equipment; and (b) goods used by a person primarily for other purposes and only incidentally in the operation of its business would not be treated as equipment (see art. 2, subpara. (l)). This definition also includes the words "or intended to be used" to ensure that goods are treated as equipment as long as their intended use is in the operation of a person's business. This definition also includes the words "other than inventory" to draw a distinction between "equipment" and "inventory".

Insolvency representative

52. As defined in the Model Law (see art. 2, subpara. (p)), the term "insolvency representative" is sufficiently broad to include the person responsible for administering or supervising insolvency proceedings (see UNCITRAL Legislative Guide on Insolvency Law (the "Insolvency Guide"), part two, chap. III, paras. 11-18 and 35).

Intangible asset

53. The term "intangible asset" includes receivables, rights to the performance of obligations other than receivables, rights to payment of funds credited to a bank account and uncertificated non-intermediated securities, as well as any asset other than a tangible asset (see art. 2, subpara. (q)).

Inventory

54. In States in which a licence of tangible assets is possible, the term "lease of tangible assets" in this definition includes the licence of tangible assets (see art. 2, subpara. (r)).

Money

55. The term "money", whose definition is based on a definition contained in the Secured Transactions Guide, is intended to include not only the national currency (i.e. banknotes and coins, as well as virtual currency, such as bitcoin) of the enacting State but also the currency of another State (see art. 2, subpara. (u)) No reference is made to currency "currently" authorized as a legal tender, because if currency is not "currently" authorized as a legal tender, it would not qualify as a legal tender. Rights to payment of funds credited to a bank account and negotiable instruments are recognized as distinct concepts in the Model Law and they are not included in the term "money".

Non-intermediated securities

56. The term "non-intermediated securities" refers to securities (i.e. shares and bonds) that are not held in a securities account (see art. 2, subpara. (v)). The term does not include the

rights of an intermediary or a competing claimant in securities held by the intermediary directly against the issuer where equivalent securities are credited by the intermediary to a securities account in the name of the grantor.

Notification of a security right in a receivable

57. The definition of the term "notification of a security right in a receivable" is based on the definition of the term "notification of the assignment" and recommendation 118 of the Secured Transactions Guide (see art. 2, subpara. (y)). The requirement for the identification of the encumbered receivable and the secured creditor was moved to article 60, paragraph 1, as it states a substantive rule on the effectiveness of a notification of a security right, a matter that is already addressed in that article.

Possession

58. […]

Priority

59. The definition of the term "priority" is based on the definition in article 5, subparagraph (g), of the Assignment Convention (see art. 2, subpara. (aa)). The difference in its formulation from the formulation of the definition of the term in the Secured Transactions Guide is due to the need to clarify that the person with priority may be a person with a security right or another competing claimant.

Proceeds

60. The term "proceeds" in the Model Law has the same meaning as in the Secured Transactions Guide (see art. 2, subpara. (bb)). It is important to note that it covers: (a) proceeds of the sale or other disposition, lease or licence of an encumbered asset (broadly understood); (b) proceeds of proceeds; and (c) natural or civil fruits. The terms revenues, dividends and distributions, which were included in the definition of this term in the Secured Transactions Guide, have been deleted on the understanding that they are covered by the term "civil fruits".

61. The term is not limited to proceeds received by the grantor but includes proceeds received by a transferee of an encumbered asset. The reason for this approach is that, if such a limitation were imposed, a transferee of an encumbered asset that acquired the asset subject to the security right could sell the asset further and keep the proceeds free of the security right. This result would limit the extent to which the secured creditor would be actually secured, in particular if the value of the encumbered asset diminished or the proceeds disappeared or were difficult to trace. In addition, transferees are anyway protected by other provisions of the Model Law. For example, a security right in certain types of identifiable proceeds is effective against third parties only for a short period of time and, thereafter, only if it is made effective against third parties by one of the relevant methods of third-party effectiveness (see. art. 19, para. 2); and a buyer or other transferee of an encumbered asset acquires its rights free of the security right, if the secured creditor authorized the sale or other transfer free of the security right, or if the sale or other transfer was in the ordinary course of business of the seller or other transferor (see art. 32, para. 2).

62. However, it should be noted that, as a result of the approach of the Model Law, in certain circumstances, third-party transferees would have no way of finding out that the assets were proceeds of another asset in which somebody else had a security right. This would apply be the case at least where the proceeds would be cash proceeds and a security right in such proceeds would be effective against third parties without the registration of an amendment notice (see art. 19, para. 1, of the Model Law and art. 26, option C, of the Model Registry-related Provisions). Thus, the enacting State may wish to consider limiting the term "proceeds" to proceeds received by the grantor or consider other ways to avoid a prejudice to third-party financiers (e.g. requiring the registration of an amendment notice in the case of a transfer of an encumbered asset; see art. 26, option A or B, of the Model Registry-related Provisions or protecting good faith transferees).

Receivable

63. Like the Secured Transactions Guide, the Model Law defines the term "receivable" in a broad way to cover even non-contractual receivables, such as tort receivables (see art. 2, subpara. (cc)). However, the term "receivable" does not include rights to payment evidenced by a negotiable instrument, rights to payment of funds credited to a bank account and rights to payment under a non-intermediated security, as they are treated as distinct types of asset that are subject to different asset-specific rules.

Secured obligation

64. The term "secured obligation" includes any obligation secured by a security right, including obligations arising from credit extended to finance the operation of a business or the purchase of goods (see art. 2, subpara. (ee)). It includes: (a) monetary and non-monetary obligations (see art. 2, subpara. (ii)); and (b) obligations already incurred at the time of the extension of the credit, as well as obligations incurred thereafter, if the security agreement so provides. As in other UNCITRAL texts, in the Model Law also the singular includes the plural and vice versa (see para. 44 above). So, for example, a reference to the secured obligation would be sufficient to cover all present and future secured obligations.

Securities

65. The definition of the term "securities" in the Model Law is narrower than the definition of the term in article 1, subparagraph (a), of the Unidroit Securities Convention (see art. 2, subpara. (ff)). The reason is that, while a broad definition is appropriate for the purposes of that Convention, it is overly broad for the purposes of the Model Law and could result in subjecting security rights in receivables, negotiable instruments, money and other generic intangible assets to the special rules applicable to security rights in non-intermediated securities. In any case, each enacting State would need to coordinate the definition of the term "securities" in its secured transactions law with the definition of the term in its securities transfer law.

Securities account

66. The definition of the term "securities account" in the Model Law is derived from article 1, subparagraph (c), of the Unidroit Securities Convention (see art. 2, subpara. (gg)).

Tangible asset

67. The term "tangible asset" in the Model Law includes consumer goods, equipment and inventory. These terms do not refer to subcategories of tangible assets but rather to the way in which particular tangible assets are used by the grantor (see art. 2, subpara. (jj)). Thus, the same cars could qualify as "consumer goods", if they are used by the grantor for personal, family or household purposes, as "equipment", if they are used by the grantor in the operation of its business, or as "inventory", if the grantor is a car dealer or manufacturer. The term also includes the reified intangible assets listed in the definition except for the purposes of certain articles that contain rules that are non-applicable to reified intangible assets.

International obligations of this State

68. The Model Law leaves to the enacting State the issue whether international treaties (such as the Assignment Convention) prevail over domestic law. For example, in the case of a conflict between a provision of the Model Law and a provision of any treaty or other form of agreement to which an enacting State is a party with one or more other States, the requirements of the treaty or agreement may prevail (see art. 3 of the UNCITRAL Model Law on Cross-Border Insolvency). Such an approach may need to be limited to international treaties that directly address matters governed by the Model Law. In other States, in which international treaties are not self-executing but require internal legislation in order to become enforceable law, such an approach might be inappropriate or unnecessary (see Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency, paras. 91-93).

Article 3. Party autonomy

69. Article 3 is based on article 6 of the Assignment Convention (the first sentence of which is based on art. 6 of the United Nations Convention on Contracts for the International Sale of Goods ("CISG")) and recommendation 10 of the Secured Transactions Guide. It is intended to reflect the principle that, with the exception of the provisions listed in article 3, parties are free to vary by agreement the effect of the provisions of the Model Law as between them.

70. An agreement referred to in paragraph 1 may be not only between the secured creditor and the grantor but also between the secured creditor or the grantor and other parties whose rights may be affected by the Model Law, such as the debtor of an encumbered receivable, or between the secured creditor and a competing claimant.

71. Paragraph 2 reiterates the general principle that an agreement between two parties cannot affect the rights of a third party. The reason for stating a general principle of contract law is that the Model Law deals with relationships in which an agreement between two parties (e.g. the grantor and the secured creditor) might have or inadvertently appear to have an impact on the rights of third parties (e.g. the debtor of a receivable).

Article 4. General standards of conduct

72. Article 4 is based on recommendation 131 of the Secured Transactions Guide (see chap. VII, para. 15). It is included in chapter I on the scope of application and general provisions, rather than in chapter VII on enforcement, as it states a standard of conduct with which parties should comply when they exercise their rights and perform their obligations under the Model Law, even outside the context of enforcement. Under article 4, any person must exercise all its rights and perform all its obligations under the Model Law in good faith and in a commercially reasonable manner. The violation of this obligation may result in liability in damages and other consequences that are left to the relevant law of the enacting State.

73. The concept of "commercial reasonableness" refers to the commercial transaction context and best practices. Meeting the specific standards referred to in other provisions of the Model Law (e.g. art. 76, para. 4, according to which notice is to be given within a short period of time) should generally be construed as meeting the general standards of conduct referred to in this article.

74. Article 4 is listed in article 3 as a mandatory law rule. As a result, the duty to act in good faith and in a commercially reasonable manner cannot be waived or varied by agreement.

Article 5. International origin and general principles

75. Article 5 is inspired by article 7 of the CISG and based on article 3 of the UNCITRAL Model Law on Electronic Commerce, article 4 of the UNCITRAL Model Law on Electronic Signatures and article 2A of the UNCITRAL Model Law on International Commercial Arbitration. It is intended to limit the extent to which a national law implementing the Model Law would be interpreted only by reference to concepts of national law.

76. The Model Law is a tool not only for modernizing but also for harmonizing secured transactions laws (see paras. 21-24 above). To promote harmonization, paragraph 1 provides that the provisions of a national law implementing the Model Law should be interpreted with reference to its international origin and the observance of good faith. Paragraph 2 is intended to provide guidance with respect to the filling of gaps in a law implementing the Model Law by reference to the general principles on which the Model Law is based (see paras. 28 and 29 above).

Chapter II. Creation of a security right

A. General rules

Article 6. Creation of a security right

77. Article 6 is based on recommendations 13-15 of the Secured Transactions Guide (see chap. II, paras. 12-37). Its purpose is to deal with the creation of a security right, as well as the form and the minimum content of a security agreement, so as to enable parties to obtain a security right in a simple and efficient manner (see Secured Transactions Guide, rec. 1, subpara. (c)). A security right is created by agreement, for the content of which there are no requirements other than those listed in paragraphs 3 and 4, and for the conclusion of which no terms of art need be used.

78. Under paragraph 1, an agreement is sufficient to create a security right, provided that at the time of the conclusion of the security agreement the grantor has either a right in the asset to be encumbered or the power to encumber it. This is the case, for example, where: (a) the grantor is the owner of the asset; and (b) the grantor is in possession of the asset on the basis of a security agreement (including a retention-of title sale or conditional lease) with the owner ("possession" is defined as actual possession; see art. 2, subpara. (z)). In addition, it should be noted that a transferor of a receivable can continue to have a right in or the power to encumber the receivable, even if it has already transferred the receivable. Moreover, it should be noted that, in the case of an anti-assignment agreement between the owner/grantor and the debtor of a receivable, the owner/grantor may not have the right as against the debtor of the receivable to transfer or encumber the receivable, but does have a right in the receivable, and also the power to encumber it. Paragraph 2 clarifies that, in the case of future assets (i.e. assets produced or acquired by the grantor after the conclusion of the security agreement; see definition in art. 2, subpara. (n)), the security right is created when the grantor acquires rights in them or the power to encumber them.

79. Paragraph 3 sets out the requirements that a written security agreement has to meet. Whether written or oral, a security agreement creates a security right but need not use any special words to achieve that result (see art. 2, subpara. (hh)). From the two alternative wordings set out in paragraph 3 within square brackets, the enacting State may wish to select the one that is most fitting to its contract law. If the enacting State retains the words "concluded in", a security agreement that is not in written form is not effective. If the enacting State retains the words "evidenced by", a security agreement that is not in written form is in principle effective but its existence may only be evidenced by a writing.

80. Depending on what it considers as most efficient financing practices and reasonable assumptions of market participants, the enacting State may wish to consider whether to retain subparagraph 3(d). One approach is to retain subparagraph 3(d) to facilitate the grantor's access to secured financing from other creditors in situations where the value of the assets encumbered by the prior security right exceeds the maximum amount indicated in the notice registered with respect to that right. Another approach is to leave out subparagraph 3(d) to facilitate the grantor's access to credit by the first secured creditor (for the comparative advantages and disadvantages of the two approaches, see Secured Transactions Guide, chap. IV, paras. 92-97).

81. Under paragraph 4, where the secured creditor is in possession of the encumbered asset, there is no need for a written security agreement and thus the existence of a security agreement may be concluded in or evidenced by any other means.

Article 7. Obligations that may be secured

82. Article 7 is based on recommendation 16 of the Secured Transactions Guide (see chap. II, paras. 38-48). It is primarily intended to ensure that future, conditional and fluctuating obligations may be secured. The main reason for this approach is to facilitate modern financing transactions, in the context of which disbursements are made at different times depending on the needs of the grantor (e.g. revolving credit facilities for the grantor to buy inventory). This approach does not preclude the introduction of special protections for grantors (e.g. setting a maximum amount for which the security right may be enforced; see art. 6, subpara. 3(d); or limiting the creation of a security right in or the transferability of

specific types of movable asset, such as employment benefits in general or up to a specific amount; see art. 1, para. 6).

Article 8. Assets that may be encumbered

83. Article 8 is based on recommendation 17 of the Secured Transactions Guide (see chap. II, paras. 49-57 and 61-70). It is primarily intended to ensure that future movable assets, parts of movable assets and undivided rights in movable assets, generic categories of movable assets, as well as all movable assets of a person, may become the subject of a security right.

84. It should be noted that the fact that future movable assets may be subject to a security right does not mean that statutory limitations to the creation or enforcement of a security right in specific types of movable asset (e.g. employment benefits in general or up to a specific amount) are overridden (see art. 1, para. 6).

85. It should also be noted that the fact that all movable assets of a grantor may be subject to a security right so as to maximize the credit that may be available and improve the terms of the credit agreement does not mean that other creditors of the grantor are necessarily unprotected. The protection of other creditors (within and outside insolvency proceedings) is a matter of other law and is foreseen in articles 33 and 34 of the Model Law.

Article 9. Description of encumbered assets

86. Article 9 is based on recommendation 14, subparagraph (d), of the Secured Transactions Guide (see chap. II, paras. 58-60). In view of their importance, the requirements for the description of encumbered assets in a security agreement are presented in a separate article. Article 9 is intended to ensure that a security right may be created in an asset or class of assets even if the description in the security agreement is generic, such as "all inventory" or "all receivables" (see Secured Transactions Guide, chap. II, paras. 58-60).

Article 10. Right to proceeds and commingled funds

87. Article 10 is based on recommendations 19 and 20 of the Secured Transactions Guide (see chap. II, paras. 72-89). Paragraph 1 is intended to ensure that, unless otherwise agreed by the parties (as this article is not listed in article 4 as a mandatory law rule), a security right in an asset automatically extends to its identifiable proceeds. The rationale for this rule is that it reflects the normal expectations of the parties and ensures that the secured creditor is sufficiently secured. Otherwise, a grantor could effectively deprive a secured creditor of its security either by disposing of those assets to a person who would take free of the security right or to a person from whom those assets could not easily be recovered.

88. By way of example, where the original encumbered asset is inventory, the cash or receivables generated from the sale of the inventory are proceeds. If upon payment of the receivables the funds received are deposited in a bank account, the right to payment of the funds credited to the bank account are also proceeds of the inventory. So, is a check issued by the holder of that bank account to buy new inventory and a warehouse receipt issued by the warehouse in which new inventory may be stored.

89. Paragraph 2 introduces an exception to the identifiability requirement in paragraph 1. A security right in an asset extends to its proceeds in the form of funds that are commingled with other funds even though the funds that are proceeds cannot be identified separately from the funds that are not proceeds (see subpara. 2(a)).

90. Subparagraph 2(b) limits that security right to the value of the proceeds immediately before they were commingled. So, if a sum of €1,000 is deposited in a bank account and at the time of enforcement the bank account has a balance of €2,500, the security right extends to the sum of €1,000.

91. Subparagraph 2(c) deals with situations in which the balance in the bank account fluctuates and, at some point of time, is less than the value of the proceeds deposited (e.g. less than €1,000). In such a case, the security right extends to the lowest value between the time when the proceeds were commingled and the time the security right in the proceeds is claimed. So, if in the example given, the balance in the account when the proceeds were

deposited was €1,500, then it went down to €500 and at the time of enforcement was €750, the security right extends to €500 (i.e. the lowest intermediate balance).

Article 11. Tangible assets commingled in a mass or product

92. Article 11 is based on recommendations 22 and 91 of the Secured Transactions Guide (see chap. II, paras. 90-95 and 100-102, and chap. V, paras. 117-123). It accomplishes three related objectives. First, it transforms the security right in the original asset into a security right in the mass or product. Second, it limits the value of that security right by tying its value to the value of the original asset in the mass or product. Third, it addresses situations in which more than one secured creditor has a claim to a mass or product as a result of a security right in its components.

93. Paragraph 1 is intended to ensure that a security right in assets commingled in a mass or product, even though they are no longer identifiable, continues in the mass or product.

94. Under option A, the security right that extends to a mass or product is limited to the value of the encumbered assets immediately before they were commingled and became part of the mass or product. So, if a secured creditor has a security right in €100,000 worth of oil (100,000 litres at €1 per litre) that is commingled with €50,000 worth of oil in the same tank and thus the mass has €150,000 worth of oil, the security right encumbers €100,000 worth of oil.

95. Under option B, the same rule applies only to products (see para. 3). So, if encumbered flour worth €100 is commingled and bread worth €500 is produced, the security right is limited to €100. But option B (see para. 2) contains a different rule with respect to tangible assets commingled in a mass. In the example just given, the security right is limited to two thirds of the value of the oil (i.e. €100,000 worth of oil).

96. It should be noted that the word “limited” in paragraph 2 of option A and paragraphs 2 and 3 of option B means that, if the value of the encumbered asset commingled in the mass or product increases after commingling, the increased value is unencumbered. In other words, the secured creditor does not benefit from commodity price increases (see Secured Transactions Guide, chap. V, para. 118 ad finem). Similarly, the word “limited” does not address the question of what is the amount secured if the price of the encumbered asset decreases after commingling. The rule applicable to all types of encumbered asset applies to tangible assets commingled in a mass or product, namely that each party bears the risk of decreases of the price of the encumbered asset. Thus, in the example given above, if, at the time of enforcement, the value of the mass is only €75,000 because of a drop on oil prices (€0.5 per litre), the secured creditor should be able to enforce its security right against only €50,000 worth of oil. If the value of the oil goes up (€1.5 per litre), the secured creditor should not benefit from it as its claim is sufficiently secured and thus should be able to enforce its security right against €100,000 worth of oil (not €150,000).

Article 12. Extinguishment of a security right

97. Article 12 deals with the extinguishment of a security right, which triggers the obligation of a secured creditor to return an encumbered asset or register an amendment or cancellation notice (see art. 52 of the Model Law and art. 20, subpara. 3(c), of the Model Registry-related Provisions). Article 12 refers to full payment or other satisfaction of all present and future secured obligations, including conditional obligations. This means that a security right is extinguished only where there is full payment or other satisfaction of the secured obligation and there is no longer any commitment of the secured creditor to extend further credit. As a result, the security right is not extinguished where temporarily there is a zero balance but there is an existing commitment of the secured creditor to extend further credit (e.g. on the basis of revolving credit arrangement).

B. Asset-specific rules

Article 13. Contractual limitations on the creation of a security right

98. Article 13 is based on recommendation 24 of the Secured Transactions Guide (see chap. II, paras. 106-110 and 113), which in turn is based on article 9 of the Assignment

Convention. Paragraph 1 provides that an agreement limiting the grantor's right to create a security right in the receivables listed in paragraph 4 (often referred to as "trade receivables") does not prevent the creation of a security right where such an agreement exists. The rationale underlying this approach is to facilitate the use of receivables as security for credit, which is in the interest of the economy as a whole, without unduly interfering with party autonomy. This rule does not affect statutory limitations to the creation or enforcement of a security right in certain types of receivable (e.g. consumer or sovereign receivables; see art. 1, paras. 5 and 6).

99. Paragraph 2 makes it clear that, while under paragraph 1 a security right is effective notwithstanding an agreement to the contrary, the grantor is not excused from any liability to its counter-party for damages caused by breach of that contractual provision, if such liability exists under other law. Thus, under paragraph 2, if the debtor of the receivable has sufficient negotiating power to force the creditor/grantor to accept the inclusion of an "anti-assignment clause" in their agreement and a breach of that agreement by the grantor results in a loss to the debtor of the receivable, the grantor is liable to the debtor of the receivable for damages under contract law. However, the debtor of the receivable may not avoid the contract because of that breach or raise against the secured creditor (assignee) any claim it may have against the grantor for that breach; in addition, under paragraph 3, a secured creditor that accepts a receivable as security for credit is not liable to the debtor of the receivable for the grantor's breach just because it had knowledge of the "anti-assignment clause". Otherwise, the anti-assignment agreement would in effect prevent a secured creditor from obtaining a security right in a receivable covered by the anti-assignment agreement.

100. As a result of the rules in paragraphs 1-3, a secured creditor does not have to examine each contract from which a receivable might arise to determine whether it contains an anti-assignment clause. This facilitates transactions relating to pools of receivables that are not specifically identified (with respect to which a search of the underlying transactions is possible but not necessarily time- or cost-efficient), as well as transactions relating to future receivables (with respect to which such a search would not be possible at the time of the conclusion of the security agreement).

101. Paragraph 4 limits the scope of the rule in paragraph 1 to broadly defined trade receivables. It does not apply to so-called "financial receivables", because, where the debtor of the receivable is a financial institution, even partial invalidation of an anti-assignment clause could affect obligations undertaken by the financial institution towards third parties (see Secured Transactions Guide, para. 108).

102. Article 13 applies also to anti-assignment agreements limiting the creation of a security right in any personal or property rights securing or supporting payment or other performance of an encumbered receivable or other intangible asset, or negotiable instrument (see art. 14).

Article 14. Personal or property rights securing or supporting payment or other performance of an encumbered receivable or other intangible asset, or negotiable instrument

103. Paragraph 1 reflects the thrust of recommendation 25 of the Secured Transactions Guide (see chap. II, paras. 111-122). It is intended to ensure that a secured creditor with a security right in a receivable or another of the assets described in paragraph 1 automatically has the benefit of any personal right that supports payment or other performance of the receivable (e.g. a guarantee) and any property right that secures such payment or other performance (e.g. a security right in another asset). For example, if a receivable is secured by a guarantee or mortgage, the secured creditor with a security right in that receivable obtains the benefit of that guarantee or mortgage. This means that, if the receivable is not paid, the secured creditor may seek payment from the guarantor or enforce the mortgage (which may require that the secured creditor is registered as a mortgagee; see para. 105 below).

104. Under paragraph 2, which reflects the thrust of article 10 of the Assignment Convention, where the rights securing or supporting payment of a receivable are independent rights (i.e. they are transferable only with a new act of transfer), the grantor is obliged to

transfer the benefit of that right to the secured creditor (e.g. an independent guarantee or stand-by letter of credit).

105. This article does not affect a right in immovable property that under other law is transferable separately from the obligation that the right in the immovable property secures. In addition, this article does not affect any duties of the grantor to the debtor of the receivable or other intangible asset, or the obligor of the negotiable instrument. Moreover, to the extent that the automatic effects of paragraph 1 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 that is not covered in the Model Law (e.g. registration of a mortgage in the relevant immovable property registry).

Article 15. Right to payment of funds credited to a bank account

106. Article 15 is based on recommendation 26 of the Secured Transactions Guide (see chap. II, paras. 123-125). It is intended to implement article 13 with respect to rights to payment of funds credited to a bank account. As a result of article 15, a security right may be created in a right to payment of funds credited to a bank account without the consent of the depositary institution. However, as a result of article 67, the creation of such a security right does not affect the rights and obligations of the depositary institution or obligate the depositary institution to provide any information about the bank account to third parties.

Article 16. Tangible assets covered by negotiable documents

107. Article 16 is based on recommendation 28 of the Secured Transactions Guide (see chap. II, para. 128). Its purpose is to follow existing law in which a negotiable document is treated as a reified right in the tangible assets it covers. As a result, there is no need separately to create a security right in those tangible assets if there is a security right in the document (e.g. inventory or crops deposited in a warehouse for which the warehouse operator issued a negotiable warehouse receipt).

108. In view of the definition of the term "possession" in article 2, subparagraph (z), possession of the issuer of a negotiable document includes possession by its representative or a person acting on behalf of the issuer (including in the context of multi-modal transport contracts). A security right in a negotiable document extends to the tangible assets covered by the document and will continue to exist even after the document no longer covers the assets. However, effectiveness against third parties through possession of the document applies only as long as the document covers the assets and lapses once they are released by the issuer (see art. 25, para. 2, and para. 122 below).

Article 17. Tangible assets with respect to which intellectual property is used

109. Article 17 is based on recommendation 243 of the Intellectual Property Supplement (see paras. 108-112). It is intended to ensure that: (a) unless otherwise agreed (as art. 17 is not listed in art. 3 among the mandatory law provisions of the Model Law), a security right in a tangible asset does not automatically extend to the intellectual property right contained therein; and (b) that a security right in an intellectual property right does not automatically extend to the tangible asset with respect to which the intellectual property right is used (e.g. the copyrighted software included in a personal computer or the trademark on an inventory of clothes).

Chapter III. Effectiveness of a security right against third parties

A. General rules

Article 18. Primary methods for achieving third-party effectiveness

110. Article 18 is based on recommendation 32 of the Secured Transactions Guide (see chap. III, paras. 19-86). It is intended to set out the primary methods for achieving third-party effectiveness (i.e. registration in the general security rights registry and possession of a tangible asset by the secured creditor). Other methods (e.g. control and

registration in the books of an issuer of securities) are set out in the asset-specific provisions of this chapter (see paras. 120-124 below).

111. States that have specialized registries with respect to assets covered by the Model Law (e.g. patent or trademark registries) or title notation systems (e.g. with respect to motor vehicles) may wish to consider whether registration with respect to security rights in those types of asset should take place in the security rights registry, in a specialized registry or both. If registration may take place in both (or, if a security right may also be noted on a title certificate), the enacting State may wish to ensure coordination (with national or international specialized registries), including by way of linking the relevant registries so that information entered in one will also become available in the other and by way of appropriate priority rules (see Secured Transactions Guide, chap. IV, para. 117, and Registry Guide, paras. 64-66). With respect to security rights in attachments to immovable property and receivables arising from sale or lease of, or secured by, immovable property, the enacting State may wish to consider issues of coordination with immovable property registries (see Registry Guide, paras. 67-69). Finally, the enacting State may wish to consider issues of international coordination among national security rights registries (Registry Guide, para. 70).

Article 19. Proceeds

112. Article 19 is based on recommendations 39 and 40 of the Secured Transactions Guide (see chap. III, paras. 87-96). It is intended to determine the circumstances in which the security right in proceeds that is provided for in article 10 is effective against third parties.

113. Under paragraph 1, a security right in proceeds in the form of money, receivables, negotiable instruments or rights to payment of funds credited to a bank account is automatically effective against third parties, that is, without the need for any further act. For example, upon the sale of inventory that is subject to a security right that is effective against third parties, the security right in any receivable, cash, bank deposit, or check generated by the sale that are proceeds of the originally encumbered inventory is effective against third parties without any further act.

114. Unlike recommendation 39, on which this article is based, paragraph 1 does not refer to the description of the proceeds in the notice. This change is a drafting change and does not constitute a change of policy. The reason for this change is that, once the proceeds are described in the notice (in line with the security agreement), they constitute original encumbered assets, and article 18 is sufficient in dealing with the third-party effectiveness of a security right in those assets.

115. For proceeds other than those covered in paragraph 1, paragraph 2 provides that, if a security right in an asset was effective against third parties, the security right in its proceeds is effective against third parties for a short period of time; thereafter, the security right in the proceeds continues to be effective against third parties only, if before the expiry of that short period, it is made effective against third parties by one of the methods set out in article 18 or the asset-specific provisions of this chapter.

Article 20. Changes in the method for achieving third-party effectiveness

116. Article 20 is based on recommendation 46 of the Secured Transactions Guide (see chap. III, paras. 120 and 121). It is intended to ensure that a security right made effective by one method may later be made effective by another method, and that third-party effectiveness is continuous as long as there is no time gap between the two methods.

Article 21. Lapse in third-party effectiveness

117. Article 21 is based on recommendation 47 of the Secured Transactions Guide (see chap. III, paras. 122-127). It is intended to ensure that, if third-party effectiveness lapses, it may be re-established. In such a case, third-party effectiveness dates only from the time it is re-established.

Article 22. Continuity in third-party effectiveness upon a change of the applicable law to this Law

118. Article 22 is based on recommendation 45 of the Secured Transactions Guide (see chap. III, paras. 117-119). Under paragraph 1, if the law enacting the Model Law becomes applicable as a result, for example, of a change in the location of the encumbered asset or the grantor, a security right that was effective against third parties under the previously applicable law continues to be effective against third parties under the law enacting the Model Law for a short period of time, unless its third-party effectiveness under the initially applicable law has already lapsed. Thereafter, the security right is effective against third parties only if, before the expiry of that period, it is made effective against third parties under the relevant provisions of the law enacting the Model Law. Under paragraph 2, if the third-party effectiveness of a security right does not lapse, it dates back to the time it was first achieved under the previously applicable law.

Article 23. Acquisition security rights in consumer goods

119. Article 23 is based on recommendation 179 of the Secured Transactions Guide (see chap. IX, paras. 125-128). An acquisition security right in consumer goods is automatically effective against third parties [except as against buyers or other transferees, lessees or licensees of the consumer goods] [if the consumer goods are below a value to be specified by the enacting State]. This limitation is intended to [require registration for a security right in consumer goods to be effective against buyers or other transferees, lessees or licensees of consumer goods] [to exempt from registration only low-value consumer transactions]. If registration in a specialized registry or notation in a title certificate is also possible, such an acquisition security right in consumer goods should not have the special priority of an acquisition security right over a security right registered in a specialized registry. This approach would be necessary to avoid any interference with any specialized registration system (see Secured Transactions Guide, recs. 179 and 181).

B. Asset-specific rules

Article 24. Rights to payment of funds credited to a bank account

120. Article 24 is based on recommendation 49 of the Secured Transactions Guide (see chap. III, paras. 138-148). It adds to the primary methods of article 18 three asset-specific methods of achieving third-party effectiveness of a security right in a right to payment of funds credited to a bank account. First, if the secured creditor is the depositary institution, no additional action is required for a security right to become effective against third parties. Second, the security right is effective against third parties upon conclusion of a control agreement (see art. 2, subpara. (g)(ii)) among the grantor, the secured creditor and the depositary institution. Third, the security right is effective against third parties if the secured creditor becomes the account holder. The exact action required for the secured creditor to become the account holder depends on the relevant law and practice of the enacting State.

Article 25. Negotiable documents and tangible assets covered by negotiable documents

121. Article 25 is based on recommendations 51-53 of the Secured Transactions Guide (see chap. III, paras. 154-158). It addresses the relationship between the third-party effectiveness of a security right in a negotiable document and the third-party effectiveness of a security right in the tangible assets covered by the document.

122. Under paragraph 1, if a security right in a negotiable document (which extends to the assets covered by the document under article 16) is effective against third parties, the security right in the assets covered by the document is also effective against third parties for as long as the assets are covered by the document. Under paragraph 2, possession of the document is sufficient to make the security right in the assets covered by the document effective against third parties. Under paragraph 3, the security right referred to in paragraph 2 remains effective against third parties for a short period of time after the secured creditor relinquishes the possession of the document for the purpose of enabling the grantor to deal with the assets covered by it.

Article 26. Uncertificated non-intermediated securities

123. Article 26 is a new provision that does not correspond to any of the recommendations of the Secured Transactions Guide, which did not apply to any type of securities (see rec. 4, subpara. (c)). It addresses the methods, other than registration of a notice, by which a security right in uncertificated non-intermediated securities may be made effective against third parties. First, the security right may be made effective against third parties by notation of the security right or entry of the name of the secured creditor as the holder of the securities in the books maintained by the issuer or another person on behalf of the issuer for that purpose (the enacting State should choose the method that best suits its legal system). Second, as in the case of a security right in a right to payment of funds credited to a bank account, the conclusion of a control agreement with respect to the encumbered securities will result in the security right in those securities being effective against third parties.

124. Under article 19 of the Convention Providing a Uniform Law For Bills of Exchange and Promissory Notes (Geneva, 1930; the "Geneva Uniform Law"), "when an endorsement contains the statements 'value in security' ('valeur en garantie'), 'value in pledge' ('valeur en gage'), or any other statement implying a pledge, the holder may exercise all the rights arising out of the bill of exchange, but an endorsement by him has the effects only of an endorsement by an agent" (art. 22 of the United Nations Convention on International Bills of Exchange and International Promissory Notes (the "Bills and Notes Convention") contains a similar rule, according to which such a holder "may endorse the instrument only for purposes of collection"). An enacting State that has enacted the Geneva Uniform Law (or the Bills and Notes Convention) may wish to include: (a) this rule in its enactment of the Model Law (as a rule of creation and/or third-party effectiveness of a security right in negotiable instruments, negotiable documents and non-intermediated securities); and (b) a rule dealing with the comparative priority of such a security right. Another option would be to leave the matter to articles 44, paragraph 2, 47, paragraph 3, and 49, paragraph 3, under which such a holder of a negotiable instrument, negotiable document or non-intermediated security would take its rights free of, or unaffected by, any security right. A further option would be to leave the matter to the relevant domestic law rule dealing with the hierarchy between domestic law and an international convention (see para. 68 above).

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Note by the Secretariat on a draft guide to enactment of the draft model law on secured transactions

ADDENDUM

Contents

Chapter IV. The registry system

Article 27. Establishment of a registry

1. Article 27, which is based on recommendation 1, subparagraph (f), of the Secured Transactions Guide and recommendation 1 of the Registry Guide, provides for the establishment by the enacting State of a public registry to give effect to the provisions of the Model Law relating to the registration of notices with respect to security rights. In particular, under article 18 of the Model Law, a non-possessory security right in an encumbered asset is effective against third parties, as a general rule, only if a notice with respect to the security right is registered in the registry (see Secured Transactions Guide, chap. III, paras. 29-46 and the Registry Guide, paras. 20-35). Under article 28 of the Model Law, the time of registration is also relevant, again as a general rule, to the ordering of priorities among competing claimants (see Secured Transactions Guide, chap. V, paras. 42-50, and the Registry Guide, paras. 36-46).

2. Depending on its drafting conventions, an enacting State may decide to incorporate the provisions relating to the registry system in its secured transactions law enacting the Model Law, in a separate law, or in another legal instrument, such as rules, regulations, orders, by-laws or the like issued by a governmental authority, or in a combination thereof. To preserve flexibility for enacting States, all the relevant provisions are collected below in a set of rules presented after article 27 of the Model Law and called the "Model Registry-related Provisions".[1]

3. These Provisions have been drafted to accommodate flexibility in registry design. The Secured Transactions Guide recommends that, if possible, the Registry should be electronic (see Secured Transactions Guide, rec. 54, subpara. (j)). The registry record should be electronic in the sense of permitting information in registered notices to be stored in electronic form in a single computer database (see Secured Transactions Guide, rec. 54, subpara. (j)(i), and chap. IV, paras. 38-41 and 43). An electronic registry record is the most efficient and practical means of enabling enacting States to implement the recommendations of the Secured Transactions Guide that the registry record should be centralized and consolidated (see rec. 54, subpara. (e), and chap. IV, paras. 21-24).

4. The access to registry services 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

[1] A reference to an article in this chapter is a reference to an article of the Model Registry-related Provisions, unless otherwise indicated.

networking systems as an alternative to the submission of paper notices and search requests (see Secured Transactions Guide, rec. 54, subpara. (j)(ii), and chap. IV, paras. 23-26 and 43). This approach eliminates the risk of human error in entering the information contained in a paper notice into the registry record, facilitates speedier and more efficient access to registry services by users, and greatly reduces the operational costs of the registry process (for a discussion of these advantages and guidance on implementation, see Registry Guide, paras. 82-89).

5. Some States provide for the registration in their general security rights registries of notices in addition to those contemplated by the Model Law, such as, for example, notices relating to judgements obtained by unsecured creditors against their debtors, non-consensual non-possessory security rights, non-consensual preferential claims or non-possessory ownership rights of commercial consignors or long-term lessors (see Registry Guide, paras. 40, 46, 50 and 51). If the enacting State follows this approach, it will need to specify whether registration is necessary for the creation or third-party effectiveness of these other rights and the priority effect of registration, including priority as against rights within the scope of the Model Law.

Model Registry-related Provisions

Section A. General rules

Article 1. Definitions and rules of interpretation

6. Article 1 contains definitions of key terms used in the Model Registry-related Provisions. These terms are derived in part from the Registry Guide (see Registry Guide, paras. 8 and 9). If the enacting State decides to incorporate the Model Registry-related Provisions in its enactment of the Model Law, these definitions should be included in the provision of the secured transactions law implementing article 1 of the Model Law. In general, the definitions are self-explanatory. Where elaboration is needed, it is provided in the commentary on the relevant articles below.

Article 2. Grantor's authorization for registration

7. Article 2 is based on recommendations 71 of the Secured Transactions Guide (see chap. IV, para. 106) and 7, subpara. (b), of the Registry Guide (see para. 101). Paragraph 1 states the basic principle that the registration of an initial notice is ineffective unless authorized by the grantor in writing (the rule is formulated in the negative, as effectiveness of a registration is also subject to other requirements). To ensure that this basic rule does not interfere with the efficiency of the registration process, paragraph 6 confirms that the authorization is to be given off-record. Thus, the Registry is not entitled to require evidence of the existence of the grantor's registration as part of the registration process.

8. Paragraphs 4 and 5 confirm that: (a) the grantor's authorization need not be obtained before registration; and (b) the conclusion of a written security agreement with the grantor automatically constitutes authorization without the need to include an express authorization clause. Thus, the post-registration conclusion of a security agreement will constitute "ratification" of an initially unauthorized registration to the extent of the assets described in the security agreement. If the security agreement covers a narrower range of encumbered assets than that described in the registered notice, the registration would still be unauthorized to the extent of those additional assets. However, if the parties were to later conclude a new security agreement covering the additional assets, this would constitute retroactive authorization.

9. Paragraph 2 requires the grantor's authorization for the registration of an amendment notice that adds encumbered assets to those described in the initial registered notice or any amendment notice. The grantor's authorization is not needed if the amendment notice adds assets that are covered by a security agreement between the parties, since under paragraph 6 the conclusion of a security agreement automatically constitutes authorization. Moreover, as explained above, authorization may be given under paragraph 4 before the registration of a notice. Consequently, the subsequent conclusion of a security agreement covering the

additional assets would constitute retroactive authorization for the registration of the amendment notice.

10. It should be noted that there is no need to register an amendment notice (and thus no need to obtain the authorization of the grantor) with respect to "additional assets" that are proceeds of encumbered assets described in a prior registered notice if the proceeds are: (a) of a type that fall within the existing description (for example, the description covers "all tangible assets" and the grantor exchanges one type of tangible asset for another (see Secured Transactions Guide, rec. 39); or (b) "cash proceeds", that is, money, receivables, negotiable instruments or funds credited to a bank account (see art. 16, para. 1, of the Model Law).

11. Under the bracketed language in paragraph 2, the grantor's written authorization must also be obtained for the registration of an amendment notice to increase the maximum amount set out in a registered notice for which the security right to which the registration relates may be enforced. This provision is only needed in systems that require this information to be set out in the security agreement and in the registered notice (see art. 8, subpara. (e)). A separate authorization from the grantor is not needed if the grantor has agreed to a new amount in a security agreement since the conclusion of a security agreement automatically constitutes authorization under paragraph 6 (even if the agreement is concluded after the registration of the amendment notice).

12. Where an amendment notice seeks to add a new grantor, paragraph 3 requires the additional grantor's written authorization to be obtained in line with the general principle in paragraph 1 and in the same manner. The bracketed wording in paragraph 3 is necessary only if the enacting State implements option A or option B of article 26. It creates an exception to the requirement to obtain the grantor's written authorization where the new grantor is a transferee of an encumbered asset from the original grantor and the purpose of the amendment is to enable the secured creditor to protect its priority status as against claimants that acquire rights in the encumbered asset from that transferee in accordance with these options. Likewise, where the grantor identifier changes after the registration, the grantor's authorization is not required for the registration of an amendment notice to disclose the new identifier of the grantor for the purposes of protecting the priority of the security right against subsequent claimants dealing with the grantor after the change of name pursuant to article 25.

13. The registration of a notice, whether or not authorized by the grantor, is effective against third parties only to the extent that the assets described in the registered notice are actually covered by a security agreement between the parties. However, third parties have no means of obtaining this information with a search of the public registry record. Consequently, the grantor's ability to sell, or create a security right in, the assets described in a registered notice will be impaired, even if those assets are not subject to a security right, because of the priority risk for subsequent secured creditors and buyers posed by the potential existence of a security right. If the grantor did not authorize the registration of the notice, or only authorized the registration of a notice covering a narrower range of encumbered assets, article 20 provides a procedure by which the grantor can compel the secured creditor to register a cancellation or amendment notice as the case may be. This procedure is not available, however, if the grantor separately authorized the registration of a notice covering the assets described in the notice even if any actual or contemplated security agreement between the parties only covers a narrower range of assets.

14. While this point is not directly relevant to the issue of the grantor's authorization in article 2, it should be noted that registration of an amendment notice may affect intervening competing claimants, if it: (a) adds encumbered assets; (b) increases the maximum amount; or (c) adds a new grantor. Thus, it takes effect only from the time when the registration of the amendment notice (not the initial notice) becomes effective (see art. 13, para. 1).

Article 3. One notice sufficient for multiple security rights

15. Article 3 is based on recommendations 68 of the Secured Transactions Guide (see chap. IV, para. 101) and 14 of the Registry Guide (see paras. 125 and 126). It confirms that a single registered notice is sufficient to achieve the third-party effectiveness of security rights arising under one or more security agreements between the parties identified in the notice. This rule applies regardless of whether the agreements are related to one another or

are separate and distinct, and regardless of whether the notice relates to security rights in the grantor's current assets or assets in which the grantor acquires rights only after the registration. This is consistent with the notice registration system contemplated by the Model Law, under which a registrant need only submit a standardized "notice" containing basic information about the parties and the encumbered assets rather than having to register the underlying security agreements giving rise to the security rights to which the registration relates (see arts. 8 and 17-19).

16. A single registration is effective for security rights arising under one or more security agreements between the parties identified in the notice only to the extent that the information in the registered notice corresponds to the content of off-record agreements between those parties (see Registry Guide, para. 126). If, for example, the parties enter into a security agreement that extends to assets not covered by the description of the encumbered assets in the registered notice, a new initial notice (or an amendment to the existing notice) will have to be registered for the security right in the additional assets to be effective against third parties, and that notice will take effect against third parties only from the time of its registration (see art. 13, para. 1).

Article 4. Advance registration

17. Article 4 is based on recommendations 67 of the Secured Transactions Guide (see chap. IV, paras. 98-100) and 13 of the Registry Guide (see paras. 122-124). It confirms that a registration may be made before the conclusion of a security agreement to which the notice relates, or the creation of any security rights contemplated by any such agreement. Thus, article 4 is consistent with article 8, subparagraph (a), of the Model Law, which provides that a security agreement may cover the grantor's future assets (see art. 2, subpara. (n), of the Model Law).

18. Registration in advance of the conclusion of any security agreement between the parties is practically possible under the notice registration system contemplated by the Model Law because, as noted in relation to article 3 (see para. 15 above), the underlying security agreement does not have to be deposited with the Registry or tendered for scrutiny. Where priority among competing secured creditors is determined by the general order of registration or third-party effectiveness rule in article 28 of the Model Law, advance registration is useful because it enables a secured creditor to be sure of its priority ranking even before the security agreement with the grantor is formally concluded. However, for a security right to be effective against other classes of competing claimants, the security right must also have been created (see Registry Guide, paras. 20 and 123). Accordingly, advance registration does not protect a secured creditor against a competing claimant, other than a competing secured creditor that acquires rights in the encumbered assets before the security agreement is actually entered into and the other requirements for creation are satisfied.

19. If a security agreement is never concluded between the parties, or only covers a narrower range of assets than those described in the registered notice, advance registration may have a negative impact on the ability of the person identified in the notice as the grantor to sell or create a security in the assets described in the notice. As noted in relation to article 2 (see para. 13 above), article 20 provides for a procedure to enable the grantor to obtain the compulsory amendment or cancellation of a registered notice in this scenario, unless the grantor expressly authorized the registration of the notice.

Section B. Access to registry services

Article 5. Conditions for access to registry services

20. Article 5 is based on recommendations 54, subparagraph (c), (f) and (g), and 55, subparagraph (b), of the Secured Transactions Guide (see chap. IV, paras. 25-228) and 4, 6 and 9 of the Registry Guide (see paras. 95-97 and 103-105).

21. Paragraphs 1 and 3 confirm that the Registry is public in the sense that any person is entitled to register a notice of a security right or search the registry record subject only to meeting the conditions governing access. With one qualification, the conditions are the same for both types of service. For both types of service, the user must submit the (paper or

electronic) form of notice or search request prescribed by the registry and pay or make any arrangements to pay the prescribed fees, if any (see art. 33). The one qualification relates to the requirement in subparagraph 1(b) for a user to identify itself to the Registry in the prescribed manner. This requirement only applies to users that submit a notice for registration as opposed to a search request. This requirement is aimed at assisting the person identified in a registered notice as the grantor to determine the identity of the registrant in the event that the grantor did not authorize the registration (see Registry Guide, para. 96). This consideration must be balanced against the need to ensure efficiency and speed in the registration process. Accordingly, the evidence of identity required of a registrant should be that which is generally accepted as sufficient in day-to-day commercial transactions in the enacting State (for example, an identity card, driver's licence or other state-issued official document).

22. If access to registry services is refused, paragraph 4 requires the Registry to communicate the specific reason (for example, the user failed to use the prescribed form or to pay the prescribed fee). The reasons must be communicated without delay. What this means in practice depends on the mode by which the notice or search request is submitted to the Registry. If the system is designed to enable users to submit notices and search requests through electronic means of communication directly to the Registry, the system can and should be programmed to automatically communicate the reason during the registration process and display the reason on the registrant's screen. In the case of notices and search requests submitted in paper form, the registry staff will need a reasonable period of time to examine the notice or search request and prepare and communicate a formal response.

23. In order to facilitate access to registry services and avoid unnecessary refusals, the Registry should be organized to accept all modes of payment in common commercial use in the enacting State. However, controls will need to be introduced to avoid the risk of staff embezzlement of cash payments and to ensure the confidentiality of financial information submitted by users (see Registry Guide, para. 138). To facilitate efficient access by frequent users (such as financial institutions, automobile dealers or other suppliers of goods on credit, lawyers and other intermediaries), users should be given the option of setting up a pre-payment account that enables them to deposit funds on an ongoing basis to pay for their ongoing requests for services.

24. To limit the risk of the registration of amendment and cancellation notices not authorized by the secured creditor, paragraph 2 requires persons who submit an amendment or cancellation notice to specify the secure access details required by the Registry. For example, the Registry might require registrants to set up a password-protected account when submitting an initial notice, and then require all amendment and cancellation notices to be submitted through that account. This would prevent the grantor or third parties from amending or cancelling a registered initial notice without being given access to the account by the registrant. Alternatively, the system might be designed to assign a unique user code to registrants upon registration of an initial notice and then require entry of that code on all amendment and cancellation notices submitted for registration. This would ensure that only the registrant and those to whom the registrant chooses to disclose the code are able to register an amendment or cancellation notice (with respect to the effectiveness of the registration of unauthorized amendment or cancellation notices, see art. 21).

Article 6. Rejection of the registration of a notice or a search request

25. Article 6 is based on recommendations 8 and 10 of the Registry Guide (see paras. 97-99 and 106). Paragraph 1 obligates the Registry to reject the registration of a notice submitted for registration if no information, or only illegible information, has been entered in one or more of the mandatory designated fields in the notice. As all mandatory fields must be completed for a registered notice to be effective, this provision ensures that the information in submitted notices that clearly do not satisfy the minimum requirements for effectiveness are never entered into the registry record. On the other hand, even if all the mandatory fields in a submitted notice contain legible information and the notice is therefore accepted for registration, it does not follow that the registration is effective if the information that is entered, while being legible, is erroneous or incomplete (with respect to whether and to what extent an error or omission in the information contained in a registered notice renders the registration ineffective, see art. 24; with respect to whether and to what extent a secured

creditor is obligated to update the record where the information in a registered notice becomes inaccurate as a result of post-registration events, see arts. 25 and 26).

26. Paragraph 2 obligates the Registry to reject a search request if no information, or only illegible information, has been entered in either one of the designated fields for entering a search criterion. Since searchers are entitled to search by either or both the identifier of the grantor and the registration number assigned to the initial notice (see art. 22), it is sufficient if legible information is entered into at least one of the search criterion fields. The fact that at least one of the search criteria fields contains legible information does not necessarily mean that a search result will be accurate since the criterion entered by the searcher may be erroneous or incomplete. To avoid any arbitrary decisions on the part of the Registry, paragraph 3 confirms that the Registry may not reject the registration of a notice or search request where the registrant or searcher satisfies the access conditions set out in paragraphs 1 and 2.

27. Paragraph 4 obligates the Registry to provide the reason for rejecting the registration of a notice or a search request without delay. What this means in practice depends on the mode by which the notice or search request was submitted to the Registry. If the system is designed to enable users to submit notices and search requests through electronic means of communication directly to the Registry, the system can and should be designed to automatically reject the submission of incomplete or illegible notices during the registration process and display the reasons on the registrant's screen. In the case of notices and search requests submitted in paper form, there will necessarily be some delay between the time of receipt by registry staff and the communication of the refusal and reason to the user. In the case of notices and search requests submitted in paper form, the registry staff will need a reasonable period of time to examine the notice or search request and then prepare and communicate a formal response.

Article 7. Information about the registrant's identity and scrutiny of the form or contents of the notice by the Registry

28. Article 7 is based on recommendations 54, subparagraph (d), and 55, subparagraph (b), of the Secured Transactions Guide (see chap. IV, paras. 15-17 and 48) and 7 of the Registry Guide (see paras. 100 and 102). Paragraph 1 obligates the Registry to maintain the identity information submitted by registrants in compliance with article 5, subparagraph 1(b), and to provide information upon request to the person identified in the registered notice as the grantor. While this information does not form part of the public or archived registry record, it nonetheless must be preserved by the Registry in a manner that enables it to be retrieved in association with the registered notice to which it relates. This is consistent with the rationale for obtaining and preserving this information which is to assist the grantor in identifying the registrant in cases where the registration of the notice was not authorized by the grantor (see para. 21 above). In order to ensure that this objective is balanced against the need to facilitate efficiency of the registration process, paragraph 2 provides that the Registry may not require further verification of the identity information provided by a registrant under article 5, subparagraph 1(b). With the same objective in mind, paragraph 3 generally prohibits the Registry from scrutinizing the form or content of notices and search requests submitted to it except to the extent needed to give effect to articles 5 and 6.

Section C. Registration of a notice

Article 8. Information required in an initial notice

29. Article 8 is based on recommendations 57 of the Secured Transactions Guide (see chap. IV, para. 65) and 23 of the Registry Guide (see paras. 157-160). It sets out the items of information required to be entered in the appropriate designated fields in an initial notice submitted to the Registry for registration. The items of information specified in subparagraphs (a), (b) and (c) are the subject of articles 9, 10 and 11, and the reader is generally referred to the commentary on those articles. It should be noted, however, that where a notice relates to more than one grantor or secured creditor, the required information should be entered separately for each grantor or secured creditor.

30. An enacting State may decide to require "additional information" (such as the birth date of the grantor or an identification number issued by the enacting State) to be entered to assist in uniquely identifying a grantor where there is a risk that many persons may have the same name (see bracketed text in art. 8, subpara. (a)). If this approach is adopted, the form of notice prescribed by the enacting State should provide a separate designated field for entering the "additional information". The enacting State should also specify the type of additional information to be included and make its inclusion mandatory in the sense that it must be entered in the relevant field for a notice to be accepted by the Registry (on all these points, see Registry Guide, rec. 23, subpara. (a)(i), and paras. 167-169, 171, 181-183, 226, as well as examples of forms in Annex II).

31. Subparagraph (d) appears within square brackets, as an indication of the duration of registration on an initial notice is required only if the enacting State adopts options B or C of article 14 (see paras. 50-52 below; see also Registry Guide, paras. 199-204). Subparagraph (e) also appears within square brackets, as an indication of the maximum amount for which the security right may be enforced is required only if the enacting State implements the approach set out article 6, subparagraph 3(d), of the Model Law, which also appears within square brackets (see para. A/CN.9/885, para. 79).

Article 9. Grantor identifier

32. Article 9 is based on recommendations 59 and 60 of the Secured Transactions Guide (see chap. IV, paras. 68-74), as well as recommendations 24 and 25 of the Registry Guide (see paras. 161-180). It provides that the identifier of the grantor is its name. It then sets out separate rules for determining the name of the grantor depending on whether the grantor is a natural person or a legal person or other entity.

33. If the grantor is a natural person, paragraph 1 provides that the grantor's name is the name that appears in the official document specified by the enacting State as the authoritative source. Since not all grantors may possess a common official document (e.g., an identity card or driver's licence), the enacting State will need to specify alternative official documents as authoritative sources and specify the hierarchy of authoritativeness among them (for examples of possible approaches, see Registry Guide, paras. 163-168).

34. The enacting State may require the entry of a State-issued identity or other official number to uniquely identify a grantor either as additional information (see para. 30 above) or as alternative grantor identifier. If this approach is adopted, it will be necessary for the enacting State to address cases in which the grantor is not a citizen or resident of the enacting State, or for any other reason has not been issued an identification number. The enacting State might, for example, provide that the number of the grantor's foreign passport or the number in some other foreign official document is a sufficient substitute (see Registry Guide, para. 169).

35. Paragraph 2 requires the enacting State to indicate which components of a name of a grantor, who is a natural person, must be entered into the registered notice. Accordingly, the enacting State will need to specify, for example, whether only the given and family name of the grantor is required or whether a middle name or initial must also be included. It will also need to specify, in the event the grantor's name consists of a single word, whether that name should be entered in the field designated for entering the grantor's family name (see Registry Guide, para. 165).

36. Paragraph 3 requires the enacting State to address how the grantor's name is to be determined where the grantor's name has legally changed under applicable law after the issuance of the official document designated in paragraph 1 as the authoritative source of the grantor's name (for example, by reason of marriage or as a result of a formal application for a name change under change of name legislation; see Registry Guide, para. 164(f)).

37. Paragraph 4 provides that where the grantor is a legal person the name of the grantor is the name that appears in the relevant document, law or decree to be specified by the enacting State constituting the legal person (see Registry Guide, paras. 170-173).

38. Paragraph 5, which appears in square brackets, provides for the possibility that an enacting State may wish to require additional information pertaining to the grantor's status

to be entered in a registered notice in special cases, such as where the grantor subject to insolvency proceedings (see Registry Guide, paras. 174-179).

Article 10. Secured creditor identifier

39. Article 10 is based on recommendations 57, subparagraph (a), of the Secured Transactions Guide (see chap. IV, para. 81) and 27 of the Registry Guide (see paras. 184-189). It largely replicates the rules in article 9 for determining the identifier of the grantor. Unlike article 9, however, article 10 provides that the registrant may enter the name of a representative of the secured creditor (e.g. a service provider or an agent of a syndicate of lenders). This approach is intended to protect the privacy of the actual secured creditor and facilitate the efficiency of arrangements such as syndicated loans where there are multiple secured lenders whose identity may change over time. This approach does not have a negative impact on the grantor, who would typically know the identity of the actual secured creditor from their dealings, or third parties, as long as the representative is authorized to act on behalf of the actual secured creditor (see Registry Guide, paras. 186 and 187). It should also be noted that, as the security right is created by an off-record security agreement, the entry of the name of a representative as the secured creditor on a registered notice does not make the representative the actual secured creditor.

Article 11. Description of encumbered assets

40. Article 11 is based on recommendations 62 of the Secured Transactions Guide (see chap. IV, paras. 82-86) and 28 of the Registry Guide (see paras. 190-192). The test for the adequacy of a description of the encumbered assets in a registered notice in paragraph 1 parallels the test for the adequacy of a description of the encumbered assets in a security agreement (see art. 9 of the Model Law). The description in a registered notice need not be identical to the description in any related security agreement so long as it reasonably allows identification of the relevant encumbered assets in accordance with the test in paragraph 1. On the other hand, a description in a registered notice that satisfies this test will not make a security right effective against third parties to the extent that the description includes assets that are not covered by any related security agreement, since the requirements for the effective creation of a security right will not have been satisfied.

41. Paragraph 2 confirms that a description in a registered notice that refers to all of the grantor's movable assets or to all of the grantor's assets within a specified generic category (for example, all receivables owing to the grantor) satisfies the test in paragraph 1 that the description reasonably allow identification of the encumbered assets. It follows that a generic description will be sufficient even if any related security agreement only covers a specific asset within that broad generic category (for example, the description in the registered notice refers to all "tangible assets of the grantor", whereas the security agreement only covers a specific tangible asset). However, the effectiveness of the registration in this scenario is dependent on the authorization of the grantor pursuant to article 2; if the grantor only authorized a registration covering a specific asset, the registration will only be effective with respect to that asset. Moreover, the grantor is entitled, pursuant to article 20, paragraph 1, to compel the secured creditor to register an amendment notice that narrows the description of the assets in the registered notice to correspond to the encumbered assets covered by any security agreement between them unless the grantor separately authorized the secured creditor to register a broader description (see para. 8 above).

42. The secured transactions laws of some States adopt specific alphanumerical ("serial number") rules for describing specified classes of high-value assets that have a significant resale market. In States that adopt this approach, entry of the serial number in its own designated field is required in the sense of being necessary to preserve the priority of the security right as against specified classes of third parties that acquire rights in the asset. States that are interested in adopting this approach are referred to the discussion in the Registry Guide (for the organization of the registry record to permit searches by serial number, see paras. 131-134; for the consequences of an error in a serial number, see para. 212; and for a search by serial number, see para. 266).

43. If proceeds of an encumbered asset are not in the form of money, receivables, negotiable instruments or rights to payment of funds credited to a bank account and are

already covered by the description of the encumbered assets in a registered notice, the secured creditor must register an amendment notice 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 as from the date of the initial registration (see art. 19, para. 2, of the Model Law). An amendment is necessary because otherwise a search result would not disclose the potential existence of a security right in the assets constituting the proceeds (see Registry Guide, paras. 193-197).

44. It should be noted that the inclusion of a description of an encumbered asset in a registered notice does not imply or represent that the grantor has or will have rights in that asset (see art. 6, para. 1, of the Model Law). That is to say, the Registry only provides for the disclosure of potential security rights in assets, not ownership or other rights. Whether the grantor owns or has rights in the relevant asset is determined by other law.

Article 12. Language of information in a notice

45. Article 12 is based on recommendation 22 of the Registry Guide (see paras. 153-156; the Secured Transactions Guide includes a discussion of this matter in chapter IV, paras. 44-46, but does not include a recommendation). Paragraph 1 requires the information contained in a notice to be expressed in the language or languages to be specified by the enacting State with the exception of the names and addresses of the grantor and the secured creditor or its representative. Typically, the enacting State would require registrants to use its officially recognized language or languages. As the names and addresses of the grantor and the secured creditor or its representative need not be translated, registrants will only need to translate the description of the encumbered assets (as the other items of information required to be entered in a notice may be expressed by numbers). Where the description of the encumbered assets is not expressed in the required language or languages, the registration of the notice would likely seriously mislead a reasonable searcher and thus would be ineffective (see art. 24, para. 4).

46. Paragraph 2 requires all information in a notice to be in the character set prescribed and publicized by the Registry. Where the names and addresses of the grantor and secured creditor or its representative are expressed in a character set different from the character set used in the language or languages recognized by the enacting State, guidance will need to be given on how the characters are to be adjusted or transliterated to conform to the language of the Registry (see Registry Guide, para. 155). If the information in a notice submitted to the Registry is not in the character set prescribed and publicized by the Registry, the notice will be rejected as illegible under article 6, subparagraph 1(a) (for the same rule with respect to search requests, see art. 6, para. 2).

Article 13. Time of effectiveness of the registration of a notice

47. Article 13 is based on recommendations 70 of the Secured Transactions Guide (see paras. 102-105) and 11 of the Registry Guide (see paras. 107-112). Paragraph 1 provides that the registration of an initial or amendment notice submitted to the Registry becomes effective only once the information in the notice is entered into the public registry record so as to be available to searchers (see the definition of the term “registry record” in art. 1, subpara. (l)). If the registry system is designed to enable users to submit information in a notice to the Registry through electronic means of communication directly without the intervention of registry staff, there will be little or no delay between the time when the information in a notice is submitted to the Registry and the time when it becomes available to searchers. But in systems that permit or require the use of paper notice forms, there will inevitably be some time lag since the registry staff must enter the information on the paper notice form into the registry record on behalf of registrants. In view of the importance of the timing and order of registration to the third-party effectiveness and priority of a security right, paragraph 2 obligates the Registry to enter the information into the registry record without delay after the notice is submitted and in the order in which it was submitted. For the same reason, paragraph 3 requires the date and time of effectiveness of the registration to be set out in the registry record and made available to searchers.

48. Paragraph 4 deals with the time of effectiveness of the registration of a cancellation notice. Option A provides that the registration of a cancellation notice becomes effective

once the information in the registered notices to which the cancellation notice relates is no longer publicly searchable. Accordingly, option A should be adopted by enacting States that adopt option A or B of article 21, since in States that adopt that approach the Registry is obligated to remove information in a registered notice from the public registry record and archive it upon registration of a cancellation notice pursuant to option A of article 30. Option B provides that the registration of a cancellation notice becomes effective once the information in the registered notices to which the cancellation notice is entered into the registry record so as to be accessible to searchers. Accordingly, option B should be adopted by enacting States that adopt option C or D of article 21, since in States that adopt that approach the Registry is obligated to retain the information in all registered notices, including cancellation notices, on the public registry record until the registration lapses pursuant to option B of article 30.

49. Option A and option B of paragraph 5 require the Registry to record the date and time of effectiveness of the registration of the cancellation notice as determined by option A and option B of paragraph 4 respectively. Accordingly, enacting States that adopt option A of paragraph 4 should adopt option A of paragraph 5, while enacting States that adopt option B of paragraph 4 should adopt option B of paragraph 5.

Article 14. Period of effectiveness of the registration of a notice

50. Article 14 is based on recommendations 69 of the Secured Transactions Guide (see chap. IV, paras. 87-91) and recommendation 12 of the Registry Guide (see paras. 113-121, 240 and 241). It offers enacting States a choice of three different approaches to the determination of the initial period of effectiveness (or duration) of the registration of a notice. If option A is enacted, an initial notice (and any associated amendment notices) would be effective for the period of time stipulated by the enacting State. If option B is enacted, registrants would be permitted to choose the desired period of effectiveness for themselves. If option C is enacted, registrants would likewise be permitted to choose the period of effectiveness but without exceeding a maximum number of years stipulated by the enacting State.

51. All options permit registrants to extend (more than once) the period of effectiveness of a notice before its expiry by the registration of an amendment notice. Under option A, the duration of the registration would be extended by an equivalent period of time. Under option B or option C the registrant would be permitted to select the further period of effectiveness, but up to the stipulated maximum number of years in the case of option C.

52. If option B or option C is enacted, the period of effectiveness of a registered notice is a mandatory component of the information required to be included in a notice submitted to the registry (see art. 8, subpara. (d)). States that adopt either of these options would also need to indicate on the prescribed notice form how registrants must enter the desired period of effectiveness. The notice form might be designed to enable registrants to simply enter the desired number of whole years from the date of registration. Alternatively, the notice form might permit registrants to enter the specific day, month and year on which the registration is to expire unless renewed.

Article 15. Obligation to send a copy of a registered notice

53. Article 15 is based on recommendations 55 subparagraphs (c), (d) and (e) of the Secured Transactions Guide (see chap. IV, paras. 49-53) and 18 of the Registry Guide (see paras. 145-149). Paragraph 1 obligates the Registry to send a copy of the information in a registered notice to the person identified in the notice as the secured creditor without delay after the registration becomes effective. This enables the person identified in a notice as the secured creditor to find out about erroneous or unauthorized amendment or cancellation notices (see art. 21; see also Registry Guide, paras. 245-248; with respect to the liability of the Registry for failure to send a copy of a notice, see art. 32).

54. In order to enable the grantor to take the steps necessary to protect its position if the registration of a notice is wholly or partially unauthorized (see art. 20), paragraph 2 obligates the person identified as the secured creditor in the copy of the registered notice sent to it by the Registry pursuant to paragraph 1 to forward it to the person identified in the notice as the grantor. The secured creditor has to comply with this obligation within the period of time

specified by the enacting State after it receives the notice. The copy must be sent to the grantor at its address set forth in the registered notice or, if the secured creditor knows that the grantor changed its address and the secured creditor knows or could reasonably discover that address, at the grantor's new address.

55. Paragraphs 3 and 4 confirm that non-compliance by the secured creditor with its obligation under paragraph 2 does not affect the effectiveness of its registration but only exposes the secured creditor to a nominal penalty and liability to compensate the grantor for any actual loss or damage caused by the non-compliance.

Section D. Registration of an amendment and cancellation notice

Article 16. Right to register an amendment or cancellation notice

56. Article 16 is based on recommendations 73 of the Secured Transactions Guide (see chap. IV, paras. 110-116) and 19, subparagraph (a), of the Registry Guide (see paras. 150 and 225-244). Paragraph 1 gives the person identified in an initial notice as the secured creditor the right to register a related amendment or cancellation notice at any time (this right is given to the registrant as the Registry cannot know or have to determine the identity of the actual secured creditor).

57. Paragraph 2 provides that, after an amendment notice changing the secured creditor identifier has been registered, only the new secured creditor is entitled to register an amendment or cancellation notice. If more than one amendment has been registered, only the person identified in the latest registered notice has the right to register an amendment or cancellation notice.

58. Where an amendment notice changes the secured creditor of record, the registry system should be designed to assign a new unique secure access code to the new secured creditors so as to prevent the previous secured creditor from registering an amendment or cancellation notice (see para. 24 above).

Article 17. Information required in an amendment notice

59. Article 17 is based on recommendation 30 of the Registry Guide (see paras. 221-224; the Secured Transactions Guide does not contain an equivalent recommendation). Paragraph 1 provides that an amendment notice must contain in the designated field the registration number assigned by the Registry to the initial notice to which the amendment relates (see art. 28, para. 1, and para. 111 below). This ensures that the amendment will be associated in the registry record with the initial notice so as to be retrieved and included in a search result (see the definition of the term "registration number" in art. 1(j) , as well as arts. 22, subpara. (b)).

60. Subparagraph 1(b) requires the amendment notice to set out the information to be "added or changed". The term change should be understood to include an amendment notice that releases an item or kind of asset or one of several grantors. Although this type of change amounts in effect to a cancellation of the registration as it relates to the relevant asset or grantor, it should be effected by registering an amendment notice and not a cancellation notice. A cancellation notice is to be used only when the purpose is to cancel the effectiveness of the registration of an initial notice and all related notices in their entirety (see the definitions of "amendment notice" and "cancellation notice" in art. 1, subparas. (b) and (c)).

61. Paragraph 2 makes it clear that an amendment notice may relate to more than one item of information in a registered notice. That is to say, a registrant need register only one amendment notice even if it wishes, for example, to add both a description of new encumbered assets and a new grantor. It follows that the form of amendment notice prescribed by the Registry must be designed to enable a registrant to change any and all items of information in an initial notice using a single form (see Registry Guide, Annex II, Examples of registry forms, amendment notice form).

Article 18. Global amendment of secured creditor information

62. Article 18 is based on recommendation 31 of the Registry Guide (see para. 242; the Secured Transactions Guide does not contain an equivalent recommendation). It addresses the scenario where there is a change in the identifier or address, or both, of the person identified in multiple registered notices as the secured creditor. Its purpose is to make it possible for the person identified in multiple registered notices as the secured creditor (option A) or for the Registry on the application of that person (option B) to amend the relevant information in all the notices in which it is contained with the registration of a single global amendment notice. For example, a secured creditor's name or address, or both, may change as a result of: (a) a merger with another company; (b) a relocation; or (c) an assignment of the secured obligations owing to a secured creditor under multiple security agreements with different grantors to an assignee who would then usually become the secured creditor of record.

63. In order to effectuate the global amendment of secured creditor information in multiple notices through a single registration, the registry record must be organized in a manner that enables the retrieval of all registered notices in which a particular person is identified as the secured creditor. To avoid the risk of unauthorized global amendments, the Registry should institute secure access requirements to ensure that the person requesting or effecting a global amendment is in fact the secured creditor of record (see para. 24 above).

Article 19. Information required in a cancellation notice

64. Article 19 is based on recommendation 32 of the Registry Guide (see paras. 243 and 244; the Secured Transactions Guide does not contain an equivalent recommendation). It requires a cancellation notice to contain in the designated field the registration number assigned by the Registry under article 28, paragraph 1, to the initial notice to which the cancellation relates. The registration number is the only item of information required to be included in a cancellation notice form (see Registry Guide, Annex II, example of cancellation notice form).

65. The purpose of assigning a registration number to an initial notice is to ensure that all related amendment and cancellation notices are associated in the registry record with the initial notice (see the definition of the term "registration number" in art. 1(j)). The inclusion of the registration number in a cancellation notice ensures that the cancellation notice extends to the information in all registered notices containing that number. To minimize the risk of inadvertent cancellations, the prescribed cancellation notice form should include a note alerting the secured creditor to the effect of a cancellation (see Registry Guide, Annex II, example of cancellation notice form; with respect to the effectiveness of a cancelation notice not authorized by the secured creditor, see paras. 74-82 below).

Article 20. Compulsory registration of an amendment or cancellation notice

66. Article 20 is based on recommendations 72 of the Secured Transactions Guide (see paras. 260-263) and 33 of the Registry Guide (see paras. 260-263). It should be read in conjunction with article 2 which requires the person identified as the grantor in a registered notice to authorize its registration.

67. Subparagraph 1(a) obligates the secured creditor to register an amendment notice deleting encumbered assets from the description in a registered notice if the grantor has not authorized (and the secured creditor knows that the grantor will not authorize) the registration of a notice in relation to those assets. For example, the secured creditor may have registered an initial notice covering "all assets" of the grantor but the security agreement between the parties ultimately covers only a specific tangible asset and the grantor does not contemplate entering into any further security agreements with the secured creditor. Provided that the grantor did not otherwise authorize the registration of the "all assets" notice, subparagraph 1(a) obligates the secured creditor to amend the description in its registered notice to limit it to the specific encumbered asset.

68. Subparagraph 1(b) addresses the scenario where the security agreement to which a registered notice relates is revised to release some of the initially encumbered assets from the security right. In this scenario, the secured creditor is obligated to register an amendment

notice to delete the released assets from the description in the registered notice provided that the grantor did not authorize the registration of a notice covering the released assets otherwise than by entering into the initial security agreement.

69. States that implement article 8, subparagraph (d), will need to adopt paragraph 2 which requires a secured creditor to register an amendment notice reducing the maximum amount specified in a registered notice if: (a) the grantor only authorized the registration of a notice in the reduced amount; or (b) the security agreement to which the notice relates has been revised to reduce the maximum amount.

70. Paragraph 3 obligates a secured creditor to register a cancellation notice where the registration of an initial notice was not authorized by the grantor or the grantor has withdrawn its authorization and no security agreement has been entered into between the parties (see subparas. 3(a) and 3(b)). A cancellation notice must also be registered if the obligation secured by the security right to which the registered notice relates has been extinguished (see subpara. 3(c)). It should be noted that, under article 12 of the Model Law, a security right is extinguished upon full payment or other satisfaction of the secured obligation[, provided that there is no further commitment by the secured creditor to extend any further secured credit.

71. Paragraph 4 prohibits the secured creditor from charging any fee for complying with its obligations under subparagraphs 1(a), 2(a) or 3(a) and (b). These provisions require a secured creditor to amend or cancel a registration because it was either never authorized by the grantor or because the grantor's initial authorization was withdrawn owing to the failure of the parties to ultimately conclude a security agreement. In these circumstances, it is appropriate to impose the cost on the secured creditor.

72. It is assumed that a secured creditor will comply with its obligation under paragraphs 1, 2 and 3 within a short period of time after it became aware that any of the relevant conditions are met. In the event it does not, any obligation of the secured creditor to compensate the grantor for loss or damage caused by non-compliance is left to the general law of the enacting State on liability for violations of statutory obligations. However, paragraph 5 gives the grantor the right to send at any time (i.e. without having to wait for the secured creditor to comply) a formal written request. If the secured creditor does not comply with the grantor's request within the time period specified by the enacting State, under paragraph 6, the grantor is entitled to apply for an order compelling registration of the appropriate notice. The enacting State needs to establish a summary judicial or administrative procedure and identify the relevant court or other authority to enable the grantor to exercise this right. Depending on local institutional considerations, the enacting State may decide to use an existing administrative or judicial summary procedure or it may decide to set up a new procedure administered, for example, by the Registrar or registry staff. As noted in the Registry Guide (see para. 262), the process should be speedy and inexpensive while also incorporating appropriate safeguards to protect the secured creditor against an unwarranted demand by the grantor (for example, by requiring the relevant authority to notify the secured creditor of a demand submitted to it and give the secured creditor an opportunity to challenge the demand within a short period of time).

73. Once an order for registration has been issued pursuant to the procedure established by the enacting State under paragraph 6, paragraph 7 requires the appropriate notice to be registered by the Registry upon receipt of a copy of the order (option A), or by the judicial or administrative officer who issued the order upon presenting a copy of the order to the Registry (option B). Where the officer charged by the enacting State with administering the process is the Registrar or a member of the Registry staff, the enacting State should simply provide that the Registry may itself make the relevant registration upon its issuance of the order.

Article 21. Effectiveness of the registration of an amendment or cancellation notice not authorized by the secured creditor

74. While not based on a recommendation of the Secured Transactions Guide or the Registry Guide, the options set out in article 21 are based on the discussion of the matter in the Registry Guide (see paras. 249-259). Its purpose is to address the effectiveness of a

registered amendment or cancellation notice where the registration was not authorized by the secured creditor.

75. An unauthorized registration may occur as a result of fraud or error made by the grantor or a third party, or even a member of the registry staff (for corrections of errors by the Registry, see art. 31). The issue is whether and to what extent conclusive effect should be given to a registered amendment or cancellation notice for the purposes of determining the third-party effectiveness and priority of the related security right as against a competing claimant.

76. Under option A, the registration of an amendment or cancellation notice is effective regardless of whether or not it was authorized by the person identified as the secured creditor in the registered notice to which the amendment or cancellation notice relates. If a State adopts this approach, it will need to put in place secure access procedures for registering amendment or cancellation notices in order to limit the risk of unauthorized registrations (see para. 24 above).

77. Option B is a variation of option A in the sense that it places an important qualification on the effectiveness of an unauthorized amendment or cancellation notice. The priority of the security right to which the unauthorized registration relates is preserved as against the right of a competing claimant over whom it had priority prior to the unauthorized registration. This qualification is predicated on the theory that to award priority to a competing claimant that would have been subordinated but for the unauthorized registration would result in an unjustified windfall, since that claimant by definition could not have suffered any loss of priority by relying on the unauthorized registration.

78. If an enacting State decides to adopt option A or option B, it will need to also implement option B of article 30 which obligates the Registry to remove information in a registered notice from the public registry record and archive it upon the expiry of its period of effectiveness or upon registration of a cancellation notice. It will also need to implement option A of article 13, paragraphs 4 and 5, dealing with the time of effectiveness of the registration of a cancellation notice.

79. Option C is at the opposite end of the spectrum from option A. It provides that the registration of an amendment or cancellation notice is ineffective, unless authorized by the secured creditor. Under this approach, a searcher will need to conduct off-record inquiries to verify whether the registration of a cancellation or amendment notice which purports to terminate a security right in an asset in which it wishes to acquire rights was in fact authorized by the secured creditor.

80. Option D is a variation of option C in the sense that it places an important qualification on the general rule in option C. It provides that the unauthorized registration of an amendment or cancellation notice is effective as against a competing claimant whose right was acquired in reliance on a search of the registry record made after the registration of the amendment or cancellation notice, and who did not have knowledge that the registration was unauthorized at the time it acquired its right. This qualification differs from the qualification in option B above insofar as it requires the competing claimant to provide factual evidence that it actually searched and relied on the registry record prior to acquiring its right in order to prevail over the secured creditor whose registration was amended or cancelled without authority.

81. If an enacting State decides to adopt option C or option D, it will need to implement option B of article 30, which obligates the Registry to remove information in registered notices from the public registry record and archive it only upon the expiry of the period of effectiveness of the initial notice. Under option C or D, all amendment or cancellation notices need to remain in the public registry record in order for searchers to discover the security right and know whom to contact to verify whether the amendment or cancellation was authorized. If all the relevant notices were instead removed from the public record upon registration of a cancellation notice, searchers would be bound by a security right of whose existence they would be entirely ignorant.

82. Searchers may not necessarily appreciate that registered amendment and cancellation notices may not be legally effective. Accordingly, enacting States that implement options C or D may wish to include a note on search results advising searchers of the need to conduct

off-record inquiries to verify whether the registration of an amendment or cancellation notice was authorized by the secured creditor.

Section E. Searches

Article 22. Search criteria

83. Article 22 is based on recommendation 54, subparagraph (h), of the Secured Transactions Guide (see chap. IV, paras. 31-36) and 34 of the Registry Guide (see paras. 264-265). It sets out the two criteria according to which any person may conduct a search of the public registry record.

84. Under subparagraph (a), the first and principal search criterion is the identifier of the grantor. The identifier of the grantor is its name, determined according to the rules set out in article 9. If an enacting State decides to require "additional information" to be entered in a separate field to assist in uniquely identifying a grantor, this additional information does not constitute an alternative search criterion (see art. 8, subpara. (a)). Rather it will simply appear as additional information in a search result.

85. Under subparagraph (b), the registration number assigned to an initial notice under article 28, paragraph 1, constitutes an alternative search criterion. A search by registration number gives secured creditors an efficient means of identifying and retrieving a registered notice for the purposes of registering an amendment or cancellation notice. Searches by registration number generally will not be conducted by third parties as they typically will not know the relevant registration number.

86. If the enacting State provides for the entry of the serial number of an asset in a separate designated field (see para. 42 above), entry of this serial number in its own designated field in the initial or amendment notice is required in the sense of being necessary to achieve the third-party effectiveness and priority of the security right as against specified classes of competing third-party claimants. If an enacting State decides to adopt this approach, it will need to list the serial number of the asset as an additional search criterion in this article. It will also need to provide rules for determining what constitutes the correct serial number, design the registry system so that registered notices can be searched and retrieved by serial number, and what categories of subsequent claimants are entitled to priority if the secured creditor omits to include the serial number in its registered notice (see Registry Guide, para. 266).

87. To allow the registration of global amendment notices, as provided in article 18, the registry record must be organized to permit registered notices to be identified and retrieved by reference to the relevant secured creditor. For public policy reasons relating to privacy and confidentiality, the name or other identifier of the secured creditor should not be an available criterion for general public searching (see Secured Transactions Guide, chap. IV, para. 81 and Registry Guide, para. 267).

Article 23. Search results

88. Article 23 is based on recommendation 35 of the Registry Guide (see paras. 268-273; the Secured Transactions Guide does not contain an equivalent recommendation). Paragraph 1 sets out the required content of search results provided by the Registry in response to a search request. The search result must first indicate the date and time when the search was performed.

89. Article 23 does not require search results to include a "currency date" indicating that the search result includes only information contained in notices that were registered as of that date (as opposed to the actual date on which the search result was issued). The reason is that registration becomes effective when the information in a notice submitted to the Registry has been entered into the registry record so as to be accessible to searchers (see art. 14, para. 1). Thus, the "currency date" is the actual date of the search (see Registry Guide, para. 273).

90. With respect to the substantive content of the search result, paragraph 1 contemplates that an enacting State may adopt one of two options. Option A contemplates that the registry

system will be designed to only retrieve notices that match the grantor's name exactly. Option B contemplates that the registry system will be designed to also retrieve notices that contain the grantor's name that closely matches the grantor's name entered by the searcher. What constitutes a "close match" under option B is not a free-floating concept but rather depends on the particular close-match search programme or logic used by the Registry.

91. Options A and B should be read in conjunction with article 24, paragraph 1, which provides that an error in the grantor identifier entered in a notice does not render the registration of the notice ineffective if the notice would be retrieved by a search of the registry record using the grantor's correct identifier as the search criterion. The result of applying this test differs depending on whether option A or B is adopted. If option A is adopted, a registration will be ineffective if the registrant fails to enter the correct name of the grantor in the notice. If option B is adopted, the registration of a notice that contains an error in the grantor's name might still be effective if the name that is entered is a sufficiently close match to result in the notice being retrieved on a search using the grantor's correct name. Whether this is the case depends on whether the information in the search result is sufficient to enable the searcher to reasonably identify the relevant grantor from the list of close matches so as to make the error not seriously misleading.

92. Paragraph 2 obligates the Registry to issue an official search certificate setting out a search result upon the request of a searcher. Paragraph 3 minimizes the administrative burden on the Registry in this respect by providing that a printed search result that purports to have been issued by the Registry is proof of its contents in the absence of evidence to the contrary.

Section F. Errors and post-registration changes

Article 24. Registrant errors in required information

93. Article 24 is based on recommendations 58 and 64-66 of the Secured Transactions Guide (see chap. IV, paras. 66-74, and 82-97) and 29 of the Registry Guide (see paras. 205-220). Its overall aim is to provide guidance on when the effectiveness of a registration may be challenged owing to errors or omissions in the information in registered notices.

94. Paragraph 1 addresses errors in the grantor identifier set out in a registered notice. It provides that: (a) if the registrant enters the name of the grantor in accordance with article 9, the effectiveness of the registration cannot be challenged on the ground of an error in the grantor's name; and (b) if the registrant makes an error, the registration may still be effective if the notice would be retrieved by a search using the correct grantor identifier.

95. Paragraph 4 deals with errors or omissions in the other items of information required to be set out in registered notices under article 8. It provides that an error does not make a registration ineffective unless it "would seriously mislead a reasonable searcher." This language implies an objective test in the sense that a person challenging the effectiveness of the registration need not show that any person was actually misled by the error. It is sufficient to show that a reasonable searcher hypothetically would have been misled.

96. Paragraphs 3 and 5 incorporate the general legal concept of severability. A fatal error in entering the name of a particular grantor or the description of a particular encumbered asset does not make the registration of a notice ineffective with respect to other grantors correctly identified or other encumbered assets correctly described in a registered notice.

97. Paragraph 6 creates a special test for assessing the impact of errors made by a registrant on the effectiveness of a registration in two scenarios. The first arises where an enacting State allows a registrant to self-select the period (duration) of effectiveness of the registration of a notice pursuant to options B or C of article 14 (and art. 8, subpara. (d)). The second arises where the enacting State requires a registrant to indicate the maximum sum for which a security right may be enforced pursuant to article 8, subparagraph (e). In these two cases, an error in the entry of the information does not render a registration ineffective even if the error would be seriously misleading from the perspective of a hypothetical reasonable searcher. Rather, the registration will be treated as ineffective only as against, and only to the extent that, the competing claimant that challenges the effectiveness of the registration

shows that it was actually misled by the error (see Registry Guide, paras. 215 and 217-220). This approach may give rise to circular priority problems.

98. As observed in the commentaries on articles 11 and 22 (see paras. 42 and 85 above), some States provide for the entry of an alphanumerical asset identifier for specified classes of high-value assets that have a significant resale market. In States that adopt this approach, entry of this identifier in its own designated field in the initial notice is required in the sense of being necessary to achieve the third-party effectiveness and priority of the security right as against specified classes of competing third-party claimants. Enacting States that decide to adopt this approach will need to deal with the impact of errors in the serial number on the effectiveness of a registration. They may also wish to consider whether to provide for search results to disclose close matches.

Article 25. Post-registration change of grantor identifier

99. Article 25 is based on recommendation 61 of the Secured Transactions Guide (see chap. IV, paras. 75-77; see also Registry Guide, paras. 226-228). It addresses the impact of a post-registration change in the identifier of the grantor (i.e. its name under art. 9) on the effectiveness of the registration of a notice. If the grantor's name changes after the registration of a notice, a search under the new name will not retrieve registered notices in which the grantor is identified by its old name. This poses a risk for third-party searchers that acquire rights in the grantor's encumbered assets after the name change.

100. To address this risk, paragraph 1 gives the secured creditor a grace period (the duration of which is to be specified by the enacting State) to register an amendment notice adding the new name of the grantor. If the amendment notice is registered before the expiry of the grace period, the security right retains whatever priority it otherwise would have as against competing claimants, even if their rights arise after the change of name but before the registration of the amendment notice.

101. Under paragraph 2, the secured creditor may still register an amendment notice after the expiry of the grace period. However, its security right will be subordinated to an intervening security right that is made effective against third parties after the change of name but before the amendment notice is registered (see subpara. 2(b)). In addition, buyers, lessees or licensees, who acquire rights in the encumbered assets after the change of name but before the registration of the amendment notice, acquire their rights in the assets free of the security right (see subpara. 2(a)).

102. As against competing claimants other than those specifically protected by subparagraphs 2(a) and (b), the third-party effectiveness and priority of the security right is not prejudiced by the late registration of the amendment notice or the failure of the secured creditor to register an amendment notice altogether. Thus, the secured creditor will retain whatever priority it had against competing claimants whose rights arose before the change of name. Its rights are also preserved as against competing claimants whose rights arise after the change of name that are not specifically mentioned in subparagraphs 2(a) and (b) (for example, the grantor's judgement creditors and insolvency representative).

Article 26. Post-registration transfer of an encumbered asset

103. Article 26 is based on recommendation 62 of the Secured Transactions Guide (see chap. IV, paras. 78-80; see also Registry Guide, paras. 229-232). It addresses the impact of a post-registration transfer of an encumbered asset on the effectiveness of the registration of a notice in relation to a security right in that asset where the transferee acquires the asset subject to the security right under article 32, paragraph 1, of the Model Law. This creates a risk for third parties that acquire rights in the encumbered asset from the transferee: a search of the registry record by the third party under the name of the transferee will not retrieve registered notices in which the grantor is identified as the transferor. This risk is analogous to that addressed in article 25 in relation to post-registration changes in the grantor identifier. Unlike article 25, article 26 does not provide a uniform rule. Rather, it gives enacting States the option to enact any one of three approaches.

104. The approach in paragraphs 1 and 2 of option A is identical to that set out in article 25 for post-registration changes in the grantor identifier. It gives the secured creditor a grace

period (the duration of which is to be specified by the enacting State) to register an amendment notice adding the transferee as a new grantor. As under article 25, the secured creditor's failure to register the amendment notice before the expiry of the grace period, or at all, does not generally prejudice the third-party effectiveness and priority status of its security right. However, its security right will be subordinated to competing security rights created by transferees and made effective against third parties after the transfer, and before the amendment notice was registered. Transferees that acquire rights during this same period from another transferee also acquire their rights free of the security right.

105. Paragraph 1 of option B is similar to paragraph 1 of option A, with the important qualification that the grace period to register the amendment notice begins only when the secured creditor acquires knowledge that the grantor has transferred the encumbered asset and not when the transfer takes place, as under paragraph 1 of option A.

106. In the case of successive transfers of encumbered assets, paragraph 2 of options A and B applies to the last transfer. So, for example, where the encumbered assets are transferred from the grantor to A, and thereafter from A to B, from B to C and from C to D before the amendment notice is registered, the secured creditor need only enter D's name as an additional grantor in its registered amendment notice.

107. Paragraph 3 of options A and B implement recommendation 244 of the Intellectual Property Supplement. It provides that a security right in intellectual property retains its third-party effectiveness and priority status notwithstanding a post-registration transfer by the grantor even as against subsequent parties. The reason for this different approach with respect to intellectual property is that, if the secured creditor were required to register an amendment notice each time intellectual property was transferred or licensed (to the extent that an exclusive licence is treated as a transfer under intellectual property law), intellectual property financing would be discouraged or become more expensive (see Intellectual Property Supplement, paras. 158-166).

108. Under option C, registration of an amendment notice following a transfer of an encumbered asset is optional in the sense that the failure to register does not affect the third-party effectiveness or priority of the security right as against intervening competing claimants. This approach parallels the approach to post-registration transfers of encumbered intellectual property.

Section G. Organization of the Registry and the registry record

Article 27. Appointment of the registrar

109. Article 27 is based on recommendation 2 of the Registry Guide (see para. 74; the Secured Transactions Guide does not contain an equivalent recommendation). Recognizing that these matters may be dealt with differently in each State, article 27 leaves it to the enacting State to specify the authority responsible for the appointment, dismissal and supervision of the registrar. It also leaves it to the authority specified by each enacting State to determine the registrar's duties and monitor their performance.

110. While an enacting State can always provide for the day-to-day operations of the Registry to be carried out by either a private or public entity, the Registry and the registrar should always be subject to the ultimate direction of and accountable to the enacting State. Accordingly, the authority specified by the enacting State under this article should be a governmental ministry or other public agency, such as a central bank (see Registry Guide, para. 77).

Article 28. Organization of information in the registry records

111. Article 28 is based on recommendations 15 and 16 of the Registry Guide (see paras. 127-130; the Secured Transactions Guide does not contain an equivalent recommendation). Paragraph 1 requires the Registry to assign a unique registration number to an initial notice and associate all registered amendment or cancellation notices that contain that number with the initial notice in the registry record. These requirements aim to ensure that amendment and cancellation notices are linked to an initial notice in the registry record

so as to be retrievable on a search (see the definition of the term "registration" in art. 1(i), as well as arts. 17, 19 and 22).

112. Option A of paragraph 2 is offered for States that implement option A of article 23, paragraph 1. Option B of paragraph 2 is offered for States that implement option B of article 23, paragraph 1. Option A of paragraph 3 is offered for States that implement option A of article 18. Option B of paragraph 3 is offered for States that implement option B of article 18.

113. Paragraph 3 is intended to ensure that the entire registration record relating to an initial notice remains intact. It provides that the registry record must be organized in a manner that preserves the information in all registered notices, notwithstanding the registration of amendment or cancellation notices that purport to change the information contained in the initial notice.

114. The enacting State will need to revise article 28 to impose additional organizational obligations on the Registry should it decide to provide for: (a) registration and searching according to serial number (see paras. 42 and 86 above); (b) registration and searching according to a grantor identifier other than the name of the grantor (see paras. 30 and 85); and (c) the assignment of unique confidential numbers to secured creditors on the registration of an initial notice, and to require registrants to enter this number as a precondition to the registration of related amendment or cancellation notices (see paras. 24 above).

Article 29. Integrity of information in the registry record

115. Article 29, paragraph 1, is based on recommendation 17, subparagraph (a), of the Registry Guide (see para. 136; the Secured Transactions Guide does not contain an equivalent recommendation). It prohibits the Registry from unilaterally amending or removing information in the registry record except as authorized in articles 30 and 31.

116. Article 29, paragraph 2, is based on recommendations 55, subparagraph (f), of the Secured Transactions Guide (see chap. IV, para. 54), and 17, subparagraph (b), of the Registry Guide (see para. 137). It obligates the Registry to ensure that the information in the registry record is preserved and may be reconstructed in the event of loss or damage. In practice, this obligation requires the Registry to create and maintain a backup copy of the registry record.

Article 30. Removal of information from the public registry record and archival

117. Option A of article 30 is based on recommendations 74 of the Secured Transactions Guide (see chap. IV, para. 109), as well as recommendations 20 and 21 of the Registry Guide (see paras. 151-152). It requires the Registry to remove information in registered notices from the public registry record once the period of effectiveness of the notice expires or a cancellation notice is registered. If the information in cancelled or expired notices remained publicly searchable, this might create legal uncertainty for third-party searchers, potentially impeding the ability of the grantor to grant a new security right in or deal with the assets described in the notice (see Registry Guide, para. 151). It should be enacted by States that adopt option A or B of article 21.

118. Option B of article 30 is a new provision that should be enacted by States that adopt options C or D of article 21. It requires the Registry to preserve all information in registered notices, including cancellation notices, on the public registry record until the registration expires. This is necessary since registered amendment and cancellation notices under these options are not legally effective unless authorized by the secured creditor, a matter that can only be determined by conducting off-record inquiries.

119. Paragraph 2 requires the Registry to archive the information in registered notices removed from the public registry record under paragraph 1 in a manner that enables the information to be retrieved in accordance with the search criteria set out in article 22. This is necessary since the information in "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 described in the notice for the purposes of a subsequent priority dispute between the secured creditor and a competing claimant" (see Registry Guide, para. 151).

120. As to the duration of the registry's archival obligation, paragraph 2 leaves this decision to the enacting State (while cautioning that it should minimally be coextensive with the prescription period under local law for disputes arising in relation to a security agreement).

Article 31. Correction of errors made by the Registry

121. Article 31 addresses the effect of errors made by the Registry in two scenarios. The first is where the Registry makes an error or omission in entering into the public registry record information contained in a notice submitted for registration. The need to address this scenario arises only if the registry system implemented by a State allows the submission of notices in paper form as opposed to requiring all registrants to transmit the information in notices directly to the Registry via electronic means of communication. The second scenario is where the Registry erroneously removes from the registry record information contained in a registered notice. The need to address this scenario arises even where notices may only be submitted directly to the Registry via electronic means of communication.

122. Paragraph 1 of article 31 requires the Registry to takes steps to correct the error or restore the erroneously removed information without delay after discovering the error. Under option A, the Registry is itself entitled to take the necessary corrective action and must then send to the secured creditor of record a copy of the notice it registered to correct the record. Under option B, the Registry is instead required to inform the secured creditor of record of the error so as to enable it to directly register the notice needed to correct the record.

123. Paragraph 2 addresses the impact of the Registry's error on the third-party effectiveness and priority status of the security right in the event of a competition with the right of a competing claimant which arose prior to the registration of the notice correcting the record referred to in paragraph 1. It offers four options which parallel the four options in article 21 with respect to the effectiveness of the unauthorized registration of an amendment or cancellation notice. The enacting State should adopt the option in article 31 that corresponds to the option it selects in article 21. Accordingly, a State that adopts option A, B, C or D of article 21 should adopt the corresponding option of article 31 (i.e. A, B, C or D respectively).

Article 32. Limitation of liability of the Registry

124. Article 32 is based on recommendation 56 of the Secured Transactions Guide (see chap. IV, paras. 55-64; see also Registry Guide, paras. 141-144). It offers three options to an enacting State in dealing with the potential liability of the Registry or the enacting State for errors or omissions allegedly committed by the Registry.

125. Option A leaves the issue of the liability of the Registry or the enacting State for loss or damage to other law of the enacting State. However, if liability is foreseen by that other law, option A restricts any right of recovery to the types of errors or omissions listed in subparagraphs (a) through (d). Thus, any potential liability is limited to: (a) errors or omissions in a search result issued to a searcher (subpara. (a)); (b) errors or omissions in a copy of information in a registered notice sent to a secured creditor under article 15 or the failure of the Registry to send a copy of a registered notice as required by that article or article 31 (subparas. (a) and (c)); and (c) the provision of false or misleading information to a registrant or searcher (subpara. (d)).

126. Subparagraph (b) appears within square brackets as it limits any liability that the Registry may have under other law for errors or omissions in registered notices to the scenario where the Registry is responsible for entering into the registry record information submitted by a registrant in a paper notice. It does not permit recovery for errors or omissions in registered notices where the information was directly transmitted to the registry record by a registrant electronically since these errors or omissions would by definition be the responsibility of the registrant as opposed to the Registry. Accordingly, subparagraph (b) should only be adopted by an enacting State if its registry system permits the submission of notices to the Registry using paper forms.

127. Like option A, option B of article 32 leaves to other law any liability that the Registry or the enacting State may have for loss or damage caused by an error or omission in the

administration or operation of the Registry. Unlike option A, option B does not restrict any right of recovery that a person may have under other law to particular types of errors or omissions. But like option A, it limits the Registry's liability to the maximum amount specified by the enacting State. As with option A, the enacting State should make it clear whether the maximum monetary limit is based on the maximum value of the relevant encumbered asset or is an absolute limit.

128. Option C of article 32 simply excludes any liability of the Registry or the enacting State for an error or omission in the administration or operation of the Registry.

Article 33. Registry fees

129. Article 33 is based on recommendations 54, subparagraph (i), of the Secured Transactions Guide (see chap. IV, para. 37) and 36 of the Registry Guide (see paras. 274-280). The Secured Transactions Guide recommends that registry fees, if any, should be set a cost-recovery level. If the Registry were instead used as an opportunity for the enacting State to generate profit, registrants and searchers may be discouraged from using the registry services. In line with this policy, the Registry Guide, sets forth three fee options, namely a cost-recovery option, a no-fee or fee-below cost-recovery option and an option leaving fees to be determined in a subsequent instrument (see Registry Guide, paras. 274-280, and rec. 36).

130. In conformity with these policy considerations, two options are presented in article 33. Under paragraphs 1 and 3 of option A, fees may be charged for the registry services and in the amounts to be specified by the enacting State; the fee schedule must be publicized. To ensure that these fees are based on cost recovery, paragraph 2 entitles the authority responsibility for the appointment of the registrar under article 27 to modify the fee schedule on an ongoing basis.

131. In setting the fee schedule, an enacting State might decide to charge a lower fee for the registration of notices and the execution of search requests transmitted directly to the registry via electronic means of communication given that electronic registration or searching does not require the intercession of registry staff and therefore is less costly.

132. To enhance the efficiency of the payment process for frequent users of registry services, paragraph 4 of option A provides that the Registry may enter into an agreement with a person to establish a Registry user account for the payment of fees. This approach has the additional advantage of facilitating the identification of the registrant for the purposes of article 5 (see para. 21 above).

133. Enacting States that adopt option A may decide to limit the charging of fees to registration services and allow searches to be made free of charge. This variant would encourage and facilitate due diligence by potential secured creditors and buyers and thereby reduce risk and future disputes. Enacting States that adopt option A may decide to limit the fees to registration services and allow searches to be made free of charge.

134. Another variant would be for the Registry to not charge any fee for the registration of amendments and cancellation notices. This variant would encourage registrants to voluntarily register amendment and cancellation notices in the circumstances contemplated by article 20 and relieve grantors from the time and expense of having to initiate proceedings to force cancellations or amendments under that article. This variant would encourage registrants to voluntarily register amendment and cancellation notices in the circumstances contemplated by article 20 and relieve grantors from time and expense of having to initiate proceedings to force cancellations or amendments under that article.

135. For enacting States that enact option B or C of article 14 (allowing a registrant to select the duration of a notice), another variant would be to charge fees on a sliding scale depending on the period selected by the registrant in an initial notice and any amendment notice. This approach would have the advantage of discouraging registrants from selecting an inflated period out of an excess of caution (see Registry Guide, para. 277).

136. Option B provides that the Registry may not charge any fees for its services. This approach is based on the assumption that the cost of establishing and operating a Registry should be borne by the State. The rationale for this approach is that the Registry is a key

component of the public purpose of a modern secured transactions law to enhance the availability of credit at lower cost and with greater speed and efficiency, and not simply a private benefit for grantors and secured creditors. Like option A, option B might have several variants. For example, the enacting State may wish to offer free registration services for a limited start-up period in order to encourage acclimatization to and use of the registry system. Another variant of this policy approach would be for the enacting State to provide that no fee should be charged for certain types of services (e.g., for the registration of an amendment and cancellation notice, the registration of a notice aimed at restoring an erroneously cancelled notice or at preserving the third-party effectiveness of a security right under prior law during the transition period to the new registry system).

(A/CN.9/885/Add.2) (Original: English)

Note by the Secretariat on a draft guide to enactment of the draft model law on secured transactions

ADDENDUM

Contents

Chapter V. Priority of a security right

A. General rules

Article 28. Competing security rights

1. Article 28 is based on recommendation 76 of the Secured Transactions Guide (see chap. V, paras. 45-54). It addresses two related topics with respect to competing security rights in the same encumbered asset: (a) the priority as between security rights granted by the same grantor; and (b) priority as between competing security rights granted by different grantors. The first situation is more common. The second situation can occur, for example, if Grantor A creates a security right in its equipment in favour of Secured Creditor ("SC") 1 and then transfers the equipment to Transferee B who creates a security right in it in favour of SC 2. While the two related topics are distinct, this article applies the same basic principle to both of them.

2. As a general matter, but subject to the important rule set out in paragraph 3, priority between competing security rights is determined by the order in which the security rights became effective against third parties. This rule is reflected in paragraphs 1 and 2. Most often, third-party effectiveness of a security right is achieved by registration of a notice in the security rights registry (see art. 18). Because registration of a notice may precede creation of the security right (see art. 4 of the Model Registry-related Provisions), a rule that addresses the effect on priority of such an advance registration is provided in paragraph 3. Paragraphs 1 and 2 also apply, however, in the wide variety of situations in which a method of third-party effectiveness other than registration of a notice is utilized, subject to certain exceptions (see paras. 29-40 below).

3. Under paragraph 3, when a security right was made effective against third parties by registration of a notice that preceded creation of the security right, the time of that registration is used in applying the priority rules in paragraphs 1 and 2, rather than the later time of third-party effectiveness. This is the case even though, under the provisions of chapter II, such a security right is not effective against third parties until it has been created.

4. To illustrate the rule in paragraph 3, assume that: (a) on Day 1, Grantor authorized SC 1 to register a notice listing Grantor as the grantor and describing the encumbered assets as all present and future equipment of Grantor, and SC 1 registered the notice; (b) on Day 2, Grantor borrowed money from SC 2 and granted SC 2 a security right in all of Grantor's present and future equipment and SC 2 registered a notice with respect to this security right; and (c) on Day 3, Grantor borrowed money from SC 1 and granted SC 1 a security right in all of Grantor's present and future equipment. In this case, the security right of SC 2 became effective against third parties before the security right of SC 1 (because SC 1's security right did not become effective against third parties until it was created). Yet, as a result of the rule in paragraph 3, in determining the priority between the security rights of SC 1 and SC 2 under paragraph 1, the time of registration of SC 1's notice, rather than the later time on which SC 1's security right became effective against third parties, is used. Thus, the security right of SC 1 has priority over the security right of SC 2 because the notice with respect to the security right of SC1 was registered on Day 1 before the security right of SC 2 became effective against third parties on Day 2.

5. When combined with the rules in paragraphs 1 and 2, paragraph 3 results in the following priorities: (a) as between security rights that were made effective against third parties by registration of a notice, priority is determined according to the order of registration, regardless of the order of creation of the security rights; and (b) 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 according to the order of registration or third-party effectiveness, whichever occurs first for each of the parties.

6. This rule is beneficial for two reasons. First, as a result of this rule, the priority of security rights that are made effective against third parties by the registration of a notice will always be determined according to the time of registration. The time of registration is maintained by the Registry and is, therefore, easy to demonstrate and easy to search. By way of contrast, the creation of a security right is a private event between the grantor and the

secured creditor; the time of creation is not maintained by the Registry and is not publicly available and may be difficult to establish.

7. Second, the results that follow from the application of the rule in this article are consistent with the behaviour of prudent secured creditors. For example, assume that SC 2 is considering extending credit to Grantor, secured by a security right in an item of Grantor's equipment. If SC 2 searches the records of the Registry and discovers that a notice has been registered listing Grantor as the grantor and SC 1 as the secured creditor and indicating that the encumbered asset is the same item of equipment, SC 2 will not know whether SC 1 has a security right or, rather, has registered a notice before creation of the security right. In such a situation, SC 2 would likely make the conservative assumption that the registered notice reflects an existing security right and, accordingly, if SC 2 decides to go forward with the transaction, it will be with the understanding that its rights are subordinate to that of SC 1. The rule in this article is consistent with the behaviour of SC 2.

Article 29. Competing security rights in the case of a change in the method of third-party effectiveness

8. Article 29 addresses situations in which there has been a change in the method of third-party effectiveness. This may happen, for example where a secured creditor in possession of the encumbered asset returns possession of it to the grantor after registering a notice with respect to it in the security rights registry. In such a case, the priority of the security right is determined by the time at which the security right initially became effective against third parties so long as there was no time thereafter during which the security right was not effective against third parties.

Article 30. Competing security rights in proceeds

9. Article 30, which is based on recommendation 100 of the Secured Transactions Guide (see chap. V, paras. 144-150), is important because, in many cases in which two secured creditors have a security right in the same asset, one or both of those security rights exist because the asset is proceeds of a different encumbered asset that, for example, the grantor has sold. Situations in which a secured creditor has a security right in proceeds are quite common when the original encumbered asset is inventory or a receivable inasmuch as a grantor will frequently sell the inventory or collect a receivable before satisfaction of the obligation secured by that asset. In such a case, the security right continues in the proceeds as provided in article 10 and the security right in the proceeds is effective against third parties if the conditions in article 19 are satisfied. This article determines the priority of that security right in proceeds as against another secured creditor with a security right in the same encumbered asset, whether as original encumbered asset or as proceeds. Under this article, the priority of the security right in the proceeds is the same as the priority of the security right in the original encumbered asset.

10. Thus, for example, assume that: (a) on Day 1, Grantor grants SC 1 a security right in all of Grantor's present and future inventory and SC 1 registers a notice with respect to that security right; (b) on Day 2, Grantor grants SC 2 a security right in all of Grantor's present and future receivables and SC 2 registers a notice with respect to that security right; and (c) on Day 3, Grantor sells the inventory on credit, generating a receivable. SC 2 has a security right in that receivable because of its security right in present and future receivables, and SC 1 has a security right in that receivable because it is proceeds of the inventory in which SC 1 had a security right. SC 1's security right in the receivable has priority over SC 2's security right because SC 1's priority in the receivable as proceeds is determined utilizing the time of third-party effectiveness or registration of notice with respect to the security right in the inventory, whichever came first (see art. 28). Thus SC 1's priority in the receivable dates from Day 1, while SC 2's priority in the receivable dates from Day 2 (for security rights in proceeds of acquisition security rights, however, see art. 39).

Article 31. Competing security rights in tangible assets commingled in a mass or product

11. Article 31 addresses two priority issues resulting from situations in which one or both of the competing security rights is a security right that continued in (or extended to) a mass

or product because the original encumbered asset was commingled in that mass or product (see Secured Transactions Guide, chap. V, paras. 117-124 and recs. 90 and 91). First, paragraph 1 addresses situations in which the competing security rights were in the same encumbered asset and that asset became part of a mass or product. In that case, the order of priority of the two security rights in the mass or product is the same as the order of priority of the security rights in the original encumbered asset.

12. Second, paragraphs 2 and 3 address situations in which the competing security rights were originally in different encumbered assets and both of those encumbered assets became part of the same mass or product. In such a case, if the value of the two security rights in the mass or product, as determined in article 11, is insufficient to satisfy the two secured obligations, the secured parties share the aggregate maximum value of their security rights in same proportion as the ratio of the value of the two security rights in the mass or product.

13. [Illustrations will be added after a determination is made whether to retain only one of options A and B in article 11 or both options.]

Article 32. Security rights competing with rights of buyers or other transferees, lessees or licensees of an encumbered asset

14. Article 32 is based on recommendations 79-82 of the Secured Transactions Guide (see chap. V, paras. 60-89). It determines the rights of a buyer or other transferee, lessee or licensee of an encumbered asset vis-à-vis the security right.

15. The general rule, which is stated in paragraph 1 and is subject to important exceptions stated in paragraphs 2-6, is that a security right in an encumbered asset that is effective against third parties continues to encumber the asset notwithstanding the sale or other transfer, lease or licence of the encumbered asset.

16. The article provides two types of exceptions to the general principle stated in paragraph 1. Paragraphs 2 and 3 provide exceptions based on the actions of the secured creditor, while paragraphs 4-6 provide exceptions based on the nature of the sale or other transfer, lease or licence and the knowledge of the buyer or other transferee, lessee or licensee.

17. Paragraph 2 provides that, if the secured creditor authorizes the sale or other transfer of the asset free of the security right, the buyer or other transferee acquires its rights in the asset free of that security right. The rule in this paragraph fulfils the intention of the parties inasmuch as the secured creditor has, by its authorization, evidenced intent for the general rule in paragraph 1 not to apply. Such an authorization may be given in the security agreement or separately. It may be given when, for example, a sale or other transfer of an encumbered asset free of the security right would generate proceeds that the grantor can use to satisfy the secured obligation, but a sale or other transfer subject to the security right would generate a smaller amount of proceeds and thus result in the satisfaction of a smaller part of the secured obligation. Paragraph 3 brings about the same result in the case of a lease or licence of the encumbered asset. It is stated differently than the rule in paragraph 2 because some, but not all, States do not characterize the rights of a lessee or licensee as property rights.

18. Paragraphs 4-6 provide that a buyer, lessee, or licensee of a tangible encumbered asset (but not reified intangibles; see art. 2, subpara. (jj)) in an ordinary-course-of-business transaction acquires its rights in that asset free of the security right that encumbered it while in the hands of the seller, lessor, or licensor. Under paragraph 4, a buyer of a tangible encumbered asset acquires its rights free of the security right if two conditions are satisfied. First, the sale must have been in the ordinary course of the seller's business. Thus, for example, the sale of some of a seller's inventory in accordance with the typical business practices of the seller would satisfy this condition, but an atypical sale by that seller of a used item of the seller's equipment would not satisfy this condition. The second condition is that the buyer must have acquired the encumbered asset without knowledge (as of the time of the conclusion of the agreement with the seller pursuant to which the buyer acquired the asset) that the sale violated the rights of the secured creditor under the security agreement. "Knowledge" is defined in article 2, subparagraph (s), as actual knowledge. Therefore, "constructive knowledge" that the sale violated the rights of the secured creditor does not

disqualify the buyer from the protection of this provision. It is also important to note that knowledge of the existence of the security right, as opposed to knowledge that the sale violated the secured creditor's rights, is insufficient to disqualify the buyer from the benefits of paragraph 4. If, for example, a buyer knows that the seller has encumbered its inventory, but does not know whether the secured creditor has authorized sales of that inventory free of the security right, the buyer has knowledge of the security right but does not have knowledge of whether the sale violated the rights of the secured creditor.

19. Paragraphs 5 and 6 bring about similar results to those in paragraph 4 in the case of leases of tangible encumbered assets and non-exclusive licences of intellectual property. As with paragraph 3, the formulation of paragraphs 5 and 6 differs from the formulation of paragraph 4, because some, but not all, States do not characterize the rights of a lessee or licensee as property rights.

20. Paragraphs 7 and 8 state what is often referred to as a "shelter principle". Accordingly, once a buyer, lessee, or licensee obtains rights in the encumbered asset free of (or unaffected by) a security right, those that acquire their rights in the encumbered assets from or through the buyer, lessee, or licensee are similarly free of (or unaffected by) that security right.

Rights of buyers or other transferees, lessees or licensees of an encumbered asset in the case of specialized registration

21. States that provide a specialized registry or title certificate system for achieving third-party effectiveness of a security right in particular types of asset (see A/CN.9/885, para. 110) may wish to consider whether, in order to enable competing claimants that utilize the specialized registry or title certificate system to determine their rights solely by a search of the specialized registry system or examination of the title certificate, rights of such parties should be superior to the rights of a secured creditor that achieved third-party effectiveness by other means (see Secured Transactions Guide, chap. V, paras. 56 and 57, and rec. 77; for the coordination with specialized movable property registries, see Registry Guide, para. 64-70).

Article 33. Impact of the grantor's insolvency on the priority of a security right

22. Under article 33, a security right that is effective against all parties remains effective against all parties notwithstanding the commencement of insolvency proceedings against the grantor. Moreover, nothing in the secured transactions law changes the priority of that security right as against the rights of competing claimants merely because insolvency proceedings have been commenced. Thus, unless the applicable insolvency law provides to the contrary, a security right retains the priority it had as against the rights of competing claimants before the commencement of the insolvency proceedings.

Article 34. Security rights competing with preferential claims

23. Article 34 is based on recommendations 83, 85 and 86 of the Secured Transactions Guide (see chap. V, paras. 90-93 and 103-109). It provides a framework by which a State can implement the policy of these recommendations by: (a) listing in a clear and specific way any claims that will have priority over security rights; and (b) indicating a cap on the amount of the claim given priority. Examples of claims that a State may determine that should have priority over a competing security right and thus should be listed in this article include: (a) claims of service providers and unpaid sellers or suppliers of goods but only to the extent that they have retained possession of the goods; (b) claims of employees for employment benefits. It should be noted that, while secured creditors typically obtain representations from grantors about preferential claims and otherwise address the possible existence of such claims, a claim listed by the enacting State in this article has priority to the extent stated in this article whether or not the grantor discloses the existence of that claim.

24. The rule in this article applies whether or not insolvency proceedings have been commenced with respect to the grantor. It does not address though the issue of whether certain claims have preferential status triggered in the grantor's insolvency along the lines of recommendation 239 of the Secured Transactions Guide. In many States that require registration of a notice with respect to preferential claims, the priority of preferential claims

is determined in the same way as the priority of security rights, that is, in other words, the general first-to-register priority rule applies.

Article 35. Security rights competing with rights of judgement creditors

25. Article 35 is based on recommendation 84 of the Secured Transactions Guide (see chap. V, paras. 94-102). It determines the priority as between a security right in an encumbered asset and the right of a judgement creditor that has acquired a right in the encumbered asset by taking whatever steps are necessary in order to do so under applicable law. The enacting State should complete paragraph 1 by inserting the relevant steps, or a reference to those steps, necessary for a judgement creditor to acquire rights in the encumbered asset. These steps may include actions such as registration of a notice in the security rights registry, seizure of assets or service of a garnishment order.

26. Paragraph 1 gives priority to the right of the judgement creditor if the steps necessary for it to acquire rights in the encumbered asset occur before the security right becomes effective against third parties.

27. Paragraph 2 provides that, in cases in which the judgement creditor does not acquire its rights in the encumbered asset before the security right becomes effective against third parties, the security right has priority over the right of the judgement creditor. This rule protects a secured creditor against the possibility of having its security right be subordinate to the right of a judgement creditor that did not exist at the time the secured creditor took the steps necessary to make its security right effective against third parties. However, paragraph 2 limits the extent of that priority by providing that the priority of the security right does not extend to: (a) credit extended by the secured creditor more than a short period of time (to be specified by the enacting State) after the judgement creditor notifies the secured creditor that it has taken the steps necessary to acquire its right; or (b) credit extended thereafter pursuant to an irrevocable commitment made before that notification. This rule prevents the secured creditor from exploiting its priority status to increase the secured obligation even after the secured creditor acquires actual knowledge about the rights of the judgment creditor and has had a short period of time to adjust to the existence of those rights.

Article 36. Non-acquisition security rights competing with acquisition security rights

28. Article 36 is based on recommendation 180 of the Secured Transactions Guide (see chap. IX, paras. 131, 136, 137, 143 and 146) and recommendation 247 of the Intellectual Property Supplement (see paras. 259-263). Two alternative options are provided for the enacting State. Both options provide that, under certain circumstances, an acquisition security right has priority over a competing non-acquisition security right in the same encumbered asset even if, under the general priority rule in article 28 the non-acquisition security right would have priority over the acquisition security right. When those circumstances are present, it is often said that the acquisition security right has "super-priority" over the competing non-acquisition security right.

29. "Super-priority" for acquisition security rights is a feature of the law of most States, whether phrased in terms of a higher priority for security rights securing obligations incurred in order to acquire the encumbered asset or, in many legal systems, as a necessary implication of title to the encumbered asset being retained by the seller. Article 36 continues this advantageous treatment of acquisition finance, providing a variety of "super-priority" rules depending on the nature of the asset that is subject to the acquisition security right. [The reference to possession by the secured creditor in subparagraphs 1(a) and 2(a) of option A and subparagraph 1(a) of option B means possession as a method of third-party effectiveness, and not possession acquired in the context of enforcement. Thus, an acquisition secured creditor who forgot to register on time cannot obtain this super-priority by taking possession of the encumbered asset in the context of enforcement or otherwise if the security agreement allowed the acquisition secured creditor to do so. In other words, third-party effectiveness and priority cannot be changed upon commencement of enforcement. Otherwise, each secured creditor could change its priority by commencing enforcement, a result that would introduce great uncertainty.]

30. Option A contains three "super-priority" rules. Which of the three rules is applicable in a particular case depends on the nature of the encumbered assets. If the encumbered assets are equipment or its intellectual property equivalent (that is, intellectual property or rights of a licensee under a licence of intellectual property that is primarily used or intended to be used by the grantor in the operation of its business), the rule in paragraph 1 applies. If the encumbered assets are either inventory or its intellectual property equivalent (that is, intellectual property or rights of a licensee under a licence of intellectual property held by the grantor for sale or licence in the ordinary course of the grantor's business), the rule in paragraph 2 applies. If the encumbered assets are consumer goods or their intellectual property equivalent (that is, intellectual property or rights of a licensee under a licence of intellectual property used or intended to be used by the grantor primarily for personal, family or household purposes), the rule in paragraph 3 applies.

31. Under the "super-priority" rule in paragraph 1 of option A, an acquisition security right in equipment or its intellectual property equivalent has priority over a competing non-acquisition security right created by the grantor, if either the acquisition secured creditor is in possession of the asset (unlikely inasmuch as most acquisition security rights are non-possessory) or a notice with respect to the acquisition security right is registered in the Registry within a short period of time to be specified by the enacting State after the grantor obtains possession of the asset. Thus, so long as the acquisition secured creditor registers a notice with respect to the acquisition security right within the specified period, that security right will have priority over a competing non-acquisition security right that was made effective against third parties before the acquisition security right was made effective against third parties.

32. Under the super-priority rule in paragraph 2 of option A, additional requirements must be satisfied for an acquisition secured creditor with a security right in inventory or its intellectual property equivalent to have "super-priority" over a competing non-acquisition security right. In addition to the requirements set out in paragraph 1, the acquisition secured creditor must send a notice that must be received by the non-acquisition secured creditor that has registered a notice in the Registry with respect to a security right created by the grantor in an asset of the same kind. The notice must: (a) state that the acquisition secured creditor has or intends to acquire an acquisition security right; and (b) describe the asset sufficiently to enable the non-acquisition secured creditor to identify the asset that is the object of the acquisition security right.

33. There are two reasons for this more stringent treatment. First, because inventory may "turn over" quickly and depreciate quickly, it would be economically inefficient for a potential financier considering extending credit to be secured by a non-acquisition security right in present and future inventory to need to wait for the passage of the period of time stated in paragraph 1 before being certain that the grantor's inventory is not subject to an acquisition security right that will have super-priority. The requirement that the actions required for super-priority in paragraph 2 take place before the grantor obtains possession of the encumbered asset addresses this concern. Second, inasmuch as new inventory can often be difficult to distinguish from old inventory, even a secured creditor with a security right in future inventory that monitors the assets of the grantor will not always be able to easily detect the presence of new inventory that has replaced similar older inventory. Thus, such a secured creditor may not be able to determine that some items of inventory are recently acquired and thus potentially subject to an acquisition security right. The notice requirement addresses this concern.

34. Paragraph 4 of option A contains two important rules about the notice required in subparagraph 2(b)(ii). First, such a notice may cover acquisition security rights under multiple transactions between the same parties without the need to identify each transaction. Thus, for example, a seller that is planning to engage in a series of transactions with the same grantor, under which the seller will sell inventory to the grantor subject to an acquisition security right, may send a single notice to the competing non-acquisition secured creditor generally describing the set of transactions. Second, a notice suffices to bring about super-priority if the grantor acquires the assets subject to the acquisition security right if it is received not later than a time period to be specified by the enacting State, such as five years, after the grantor acquires the assets subject to the acquisition security right. As a result, a seller that provides a notice for a series of transactions in which acquisition security rights

are created will not need to send another notice with respect to assets acquired not later than five years after the first notice is received.

35. Under the super-priority rule in subparagraph 3, an acquisition security right in consumer goods or their intellectual property equivalent automatically has priority over a non-acquisition security right in the same encumbered asset. No additional actions are required. No reference to a requirement of third-party effectiveness is needed because, under either option in article 23, an acquisition security right in consumer goods [below the value specified by the enacting State] is automatically effective against third parties. [This paragraph to be adjusted when the Working Group reaches a decision about the bracketed language in paragraph 3.]

36. Option B contains only two "super-priority" rules. The first rule, found in paragraph 1, is identical to paragraph 1 of option A (which applies only to equipment) except that it also applies to inventory and the intellectual property equivalent of inventory. The second rule, found in paragraph 2, is identical to paragraph 3 of option A. Thus, the only difference between option A and option B is that, in the former, additional steps must be taken in order for an acquisition security right in inventory or in the intellectual property equivalent of inventory to have priority over a competing non-acquisition security right.

Article 37. Competing acquisition security rights

37. Article 37 is based on recommendation 182 of the Secured Transactions Guide (see chap. IX, paras. 173-178). It addresses the priority of competing security rights when both are acquisition security rights. Unlike article 36 (which gives priority to acquisition security rights that satisfy certain criteria as against non-acquisition security rights), this article addresses priority as between security rights both of which would otherwise be entitled to "super-priority". The rule in article 37 reflects two policy decisions. First, an acquisition security right of a seller or lessor, or a licensor of intellectual property, should have priority over an acquisition security right of another person such as a lender. Second, in all other cases, priority between acquisition security rights should be determined on the basis of rules applicable when neither are acquisition security rights.

Article 38. Acquisition security rights competing with the rights of judgement creditors

38. Article 38 is based on recommendation 183 of the Secured Transactions Guide (see chap. IX, paras. 145-148). Without the rule in this article, the period provided in article 36 would not be useful. The reason for this is that a secured creditor taking an acquisition security right typically would not want to have a period in which it would be vulnerable to the rights of a judgement creditor. In such a case, a secured creditor would likely register a notice before, or as soon as possible after, the security right was created. Accordingly, a secured creditor would not benefit from the longer period to register and achieve "super-priority" under article 36.

39. By way of illustration, assume that Grantor acquires an item of equipment from Seller on credit on Day 1 and grants Seller an acquisition security right in the item of equipment to secure its obligation to pay the remainder of the purchase price; on Day 5 Seller registers a notice that has the effect of making its acquisition security right effective against third parties. Between those two dates, on Day 3, Judgement Creditor obtains a judgement against Grantor and takes the steps specified in article 35, paragraph 1, to acquire rights in the item of equipment. Under the rule in article 35, paragraph 1, Judgement Creditor's rights would have priority over Seller's security right because Judgement Creditor obtained its rights before Seller's security right was effective against third parties. As a result of the operation of article 38, however, Seller's security right has priority over the rights of Judgement Creditor.

Article 39. Acquisition security rights in proceeds

40. Article 39 is based on recommendation 185 of the Secured Transactions Guide (see chap. IX, paras. 158-172). Both option A and option B of article 36 provide that, under certain circumstances, an acquisition security right has priority over a competing non-acquisition security right in the same encumbered asset even if, under the general

priority rule in article 28, the non-acquisition security right would have priority. This article determines whether that "super-priority" over non-acquisition security rights carries over to proceeds of the encumbered assets that are subject to the acquisition security right.

41. Under the general principles of article 10, a secured creditor with a security right in an asset obtains a security right in the identifiable proceeds of that asset and, under the circumstances described in article 19, that security right is effective against third parties. This is equally true of assets subject to non-acquisition security rights and those subject to acquisition security rights. Under the rule in article 30, the priority of the security right in the proceeds is the same as the priority of the security right in the original encumbered asset. Under that rule, the security right in proceeds of assets subject to an acquisition security right would have the same "super-priority" as the security right in the original encumbered asset. Article 39, however, limits the reach of article 30 by extending "super-priority" to proceeds only of certain types of assets subject to an acquisition security right (option A) or by not extending the "super-priority" to proceeds at all (option B).

42. Under option A, the "super-priority" with respect to the assets subject to the acquisition security right always carries over to the proceeds of those assets, except when the assets subject to the acquisition security right consist of inventory, consumer goods or their intellectual property equivalent. When the asset subject to the acquisition security right is inventory or its intellectual property equivalent, whether the "super-priority" carries over to proceeds depends on the nature of the proceeds. If the proceeds are receivables, negotiable instruments, or rights to payment of funds credited to a bank account, the "super-priority" does not carry over to those proceeds. If, on the other hand, the proceeds take another form, the "super-priority" does carry over to the proceeds. When the assets subject to the acquisition security right are consumer goods or intellectual property or rights of a licensee under a licence of intellectual property used or intended to be used by the grantor [primarily] for personal, family or household purposes, however, the "super-priority" does not carry over to the proceeds.

43. The primary reason for the decision not to provide "super-priority" for certain types of proceeds in option A relates to the difficulty that would be faced by competing secured creditors with security rights in payment rights in determining which of those payment rights are proceeds of assets subject to acquisition security rights and which are not. As a result, if there were "super-priority" treatment for those types of proceeds, competing secured creditors with security rights in payment rights might simply assume that all of those payment rights are proceeds and, as a result, extend less credit on the basis of them.

44. Option B provides that the "super-priority" with respect to assets subject to an acquisition security right does not carry over to proceeds of those assets under any circumstances, with the result that the priority of the security right in the proceeds will be determined under the general principle in article 28. This option is provided as an option for States that do not wish to make the sort of distinctions between types of proceeds made in option A.

45. As the Model Law does not deal with insolvency-related matters, with the exception of article 33, no article has been included in the Model Law along the lines of recommendation 186 of the Secured Transactions Guide to deal with the application of the special priority rules for acquisition security rights. However, there is nothing in these articles to imply that insolvency law will not operate against the background of secured transactions law and thus that these provisions will not apply to acquisition security rights in the case of insolvency.

Article 40. Acquisition security rights in tangible assets commingled in a mass or product competing with non-acquisition security rights in the mass or product

46. Article 40 deals with situations in which a grantor has granted an acquisition security right in an asset that later becomes part of a mass or product and has also granted a security right in the mass or product. Under article 11, when the original asset becomes part of the mass or product, the secured creditor has a security right in that mass or product, subject to the limits set forth in that article. This article provides that the acquisition security right in the mass or product that results from the security right in the separate asset has priority over the security right in the mass or product as original encumbered asset, even if that security

right was previously made effective against third parties or was the subject of a pre-registered notice.

Article 41. Subordination

47. Article 41 is based on recommendation 94 of the Secured Transactions Guide (see chap. V, paras. 128-131). Paragraph 1 allows a person to agree to lower priority of its security right as against a competing claimant than would otherwise result from application of the priority rules in this chapter.

48. Such an agreement, usually referred to as a subordination agreement, may be in the form of a bilateral agreement between the party agreeing to lower priority and the competing claimant that will benefit from that agreement; it may also be a unilateral commitment (usually made to the grantor) by the party agreeing to lower priority that its priority will be lower than that of the beneficiaries described in the commitment. Such an agreement is governed by this article so long as it is between a secured creditor and a grantor, between two or more secured creditors or between a secured creditor and another competing claimant (e.g. a judgement creditor or an insolvency representative).

49. Paragraph 2 makes it clear that, as an agreement, a subordination agreement binds only the parties to it and does not subordinate the claims of any other parties. For example, if SC 1, that has a claim for 50, subordinates its claim to SC 3, who has a claim for 70, SC 3 has priority over SC 2 only for 50.

50. In unusual circumstances, subordination can create circular priority issues. For example, assume that SC 1, 2, and 3 each have a security right in the same encumbered asset and their priority, determined under the rules of this chapter, is in that order, so that SC 1's security right is superior to that of SC 2 and SC 2's security right is, in turn, superior to that of SC 3. Then assume that SC 1 enters into a subordination agreement with SC 3, pursuant to which SC 1 agrees to subordinate its priority in favour of SC 3. As a result, SC 3 has priority over SC 1. However, SC 1 (who did not subordinate its priority in favour of SC 2) has priority over SC 2, and SC 2 has priority over SC 3, completing the circle.

Article 42. Future advances, future encumbered assets and maximum amount

51. Article 42 is based on recommendations 97-99 of the Secured Transactions Guide (see chap. V, paras. 135-143). Inasmuch as a security right can secure obligations arising after the conclusion of the security agreement (see art. 7) and a secured obligation can be secured by assets created or acquired after the conclusion of the security agreement (see art. 8), this article clarifies the priority of a security right in such circumstances.

52. Paragraph 1 provides that the priority of a security right is not affected by the time when the obligation it secures was incurred. Thus, a security right has the same priority whether the entire secured obligation was incurred at or before the creation of the security right or whether the security right secures obligations incurred thereafter. Paragraph 2 similarly provides that when a security right has been made effective against third parties by the registration of a notice, the priority resulting from the time of that notice under article 28 is the same whether the encumbered assets were owned by the grantor at the time of registration or acquired thereafter.

53. Paragraph 3, which will be necessary only if the enacting State enacts provisions based on article 6, subparagraph 3(d), of the Model Law and article 8, subparagraph (e), of the Model Registry-related Provisions, gives effect to any cap on the secured obligation stated in the notice by providing that the secured creditor's priority is limited by that cap.

Article 43. Irrelevance of knowledge of the existence of a security right

54. Article 43 is based on recommendation 93 of the Secured Transactions Guide (see chap. V, paras. 125-127). A secured creditor's knowledge or lack of knowledge of a competing security right is not relevant to a determination of priority under either the general priority rule in article 28 or any of the special priority rules. The point is made explicit here to emphasize that priority is determined only on the basis of the facts referred to in those articles and not on the basis of difficult to prove subjective states of knowledge. Article 43 applies only to the knowledge of a secured creditor. Under the Model Law, knowledge of

other facts is relevant to priority. For example, a buyer of a tangible encumbered asset that has knowledge that the sale violates the rights of a secured creditor with a security right in that asset under the security agreement does not take free of the security right (see art. 32).

B. Asset-specific rules

Article 44. Negotiable instruments

55. Article 44 is based on recommendations 101 and 102 of the Secured Transactions Guide (see chap. V, paras. 154-156). Any differences between article 44 and recommendations 101 and 102 are of a drafting nature and are intended to ensure that paragraph 1 deals only with the relative priority of competing security rights in the same negotiable instrument, while paragraph 2 addresses the rights of a secured creditor with a security right in a negotiable instrument as against a buyer or other consensual transferee of the negotiable instrument.

56. Under paragraph 1, a security right in a negotiable instrument that is made effective against third parties by the secured creditor's possession of the negotiable instrument has priority over a security right in the same negotiable instrument that is made effective against third parties by registration of a notice, without regard to the order in which the security rights became effective against third parties. This is consistent with the important role that possession plays in the law of negotiable instruments.

57. Under paragraph 2, certain buyers or other transferees that take possession of a negotiable instrument take their rights in the instrument free of a security right that is effective against third parties by registration of a notice. If the security right were effective against third parties because of the secured creditor's possession of the negotiable instrument, the buyer or other transferee could not also have possession of it, unless the same agent possesses the negotiable instrument both on behalf of the secured creditor and the buyer or other transferee.

58. More specifically, under paragraph 2, a buyer or other transferee of a negotiable instrument can acquire its rights free of a security right in that instrument in either of two ways. First, under subparagraph 2(a), a person who becomes a protected holder or the like (the enacting State should insert the appropriate term in subpara. 2(a)) of the negotiable instrument under the law of the enacting State acquires its right in the instrument free of an existing security right in it. Second, under subparagraph 2(b), a buyer or other transferee that takes possession of the instrument and gives value for it without knowledge that the sale or other transfer is in violation of the rights of the secured creditor also acquires its right in the instrument free of that security right. As with the rule in paragraph 1, this rule preserves the important role of possession in the law of negotiable instruments.

59. Knowledge of the existence of a security right does not prevent a buyer or other transferee of a negotiable instrument from acquiring its rights in the instrument free of the security right under subparagraph 2(b) (although such knowledge may prevent the buyer from qualifying as a protected purchaser or the like and, thus, may prevent the buyer from taking free of the security right under subparagraph 2(a)). Rather, only knowledge that the transfer violates the rights of the secured creditor under the security agreement prevents the transferee from acquiring its rights in the instrument free of the security right under subparagraph 2(b). "Knowledge", as defined in article 2, paragraph (s), means "actual knowledge". The reference to "good faith" that was included in recommendation 102, subparagraph (b) has been deleted on the understanding that the absence of knowledge amounts essentially to good faith and the concept of good faith is used in the Model Law only to reflect an objective standard of conduct.

Article 45. Rights to payment of funds credited to a bank account

60. Article 45 is based on recommendations 103-105 of the Secured Transactions Guide (see chap. V, paras. 157-163). It determines the priority between competing security rights in a right to payment of funds credited to a bank account whether those rights to payment are original encumbered assets or proceeds of a security right in other property (according

to art. 19, para. 1, a security right in proceeds in the form of a right to payment of funds credited in a bank account is automatically effective against third parties, if the security right in the original encumbered asset is effective against third parties).

61. Paragraphs 1-3, taken together, result in the conclusion that a security right in a right to payment of funds credited to a bank account made effective against third parties by any of the methods provided for in article 24 has priority over a security right made effective against third parties by registration of a notice. Under paragraph 1, a security right in a right to payment of funds credited to a bank account that is made effective against third parties by the secured creditor becoming the account holder has priority over all competing security rights in the same asset. Next in priority order, paragraphs 2 and 3 give priority to: (a) a security right in a right to payment of funds credited to a bank account with respect to which the secured creditor is the depositary institution; and (b) a security right made effective against third parties by a control agreement. Under paragraph 4, if there are multiple control agreements, priority is determined on the basis of the order of conclusion of the control agreements.

62. Under paragraph 5, except when the secured creditor has become the account holder, a security right in a right to payment of funds credited to a bank account is subordinate to the depositary institution's rights under other law to set off claims against the grantor against its obligations to the grantor with respect to the grantor's right to payment of funds from the bank account. This rule protects depositary institutions from losing their rights of set-off without their knowledge or consent.

63. Under paragraph 6, a transferee of funds from a bank account pursuant to a transfer initiated or authorized by the grantor acquires its rights free of a security right in the right to payment of funds credited to the bank account so long as the transferee does not have knowledge that the transfer violates the rights of the secured creditor under the security agreement. A "transfer of funds" includes transfers by a variety of mechanisms, including by cheque and electronic means. The purpose of paragraph 6 is to preserve the free negotiability of funds.

64. Knowledge of the existence of a security right does not prevent a transferee of funds from the bank account from taking free of the security right. Rather, it is only knowledge that the transfer violates the rights of the secured creditor under the security agreement that prevents the transferee from taking free. "Knowledge", as defined in article 2, paragraph (s), means "actual knowledge". Paragraph 7 is intended to preserve the rights of transferees of funds credited to a bank account under other law to be specified by the enacting State.

Article 46. Money

65. Article 46 is based on recommendation 106 of the Secured Transactions Guide (see chap. V, para. 164). Its purpose is to preserve negotiability of money. Thus, under paragraph 1, a transferee of encumbered money acquires its rights in it free of the security right, unless it has knowledge that the transfer violates the rights of the secured creditor under the security agreement. "Knowledge", as defined in article 2, paragraph (s), means "actual knowledge". Paragraph 2 is intended to preserve the free negotiability of money.

Article 47. Negotiable documents and tangible assets covered by negotiable documents

66. Article 47 is based on recommendations 108 and 109 of the Secured Transactions Guide (see chap. V, paras. 167-169). It is designed to preserve current practices under which rights to the tangible assets covered (or represented) by a negotiable document are subsumed in the negotiable document with the result that parties that deal with the document generally need not concern themselves separately with claims to the assets not reflected in the document. Accordingly, under paragraph 1, a security right in a tangible asset made effective against third parties by possession of the negotiable document covering that asset is given priority over a competing security right made effective against third parties by any other means.

67. Paragraph 2 states an exception to that general rule. Except when the encumbered asset is inventory, it provides that the rule in paragraph 1 does not apply against a secured creditor

that had a security right in an encumbered asset before the earlier of the time that either the asset became covered by the negotiable document or the time that an agreement was concluded between the grantor and the secured creditor in possession of the negotiable document providing that the asset was to be covered by a negotiable document so long as the asset actually became covered by such a negotiable document within the time to be specified by the enacting State.

Article 48. Intellectual property

68. Article 48 is based on recommendation 245 of the Intellectual Property Supplement (see paras. 193-212). Its purpose is to clarify that the rule in article 32, paragraph 6, does not obviate other rights of the secured creditor as an owner or licensor of the intellectual property that is the subject of the licence. This clarification is of particular importance because the concept of "ordinary course of business", used in article 32, paragraph 6, is a concept of commercial law and is not drawn from law relating to intellectual property and thus may create confusion in an intellectual property financing context. Typically, law relating to intellectual property does not distinguish in this respect between exclusive and non-exclusive licences and focuses rather on the issue whether a licence has been authorized or not.

69. As a result, unless the secured creditor authorized the grantor to grant licences unaffected by the security right (which will typically be the case as the grantor will rely on its royalty income to pay the secured obligation), the licensee would take the licence subject to the security right. Thus, if the grantor defaults, the secured creditor would be able to enforce its security right in the licensed intellectual property and sell or license it free of the licence. In addition, a person obtaining a security right from the licensee will not obtain an effective security right as the licensee would not have received an authorized licence and would have no right in which to create a security right.

Article 49. Non-intermediated securities

70. Article 49 covers a topic not addressed in the Secured Transactions Guide, which excluded from its scope all types of securities (see rec. 4, subpara. (c)). So as not to interfere with existing customs and practices with respect to non-intermediated securities, this article adjusts the general priority rule of article 28 in a manner similar to the special priority rules for security rights in negotiable instruments and rights to payment of funds credited to a bank account.

71. For certificated non-intermediated securities, paragraph 1 provides that a security right made effective against third parties by the secured creditor's possession of the certificate has priority over a competing security right by the same grantor that is made effective against third parties by registration of a notice in the Registry. This is parallel to the rule for negotiable instruments in article 44, paragraph 1.

72. For uncertificated non-intermediated securities, paragraph 2 provides that a security right made effective against third parties by registration in the books maintained for that purpose by or on behalf of the issuer has priority over a security right in the same securities made effective against third parties by any other method. Such registration may take the form of a notation of the security right or an entry of the name of the secured creditor as the holder of the securities in the issuer's books. The enacting State may choose the method that best suits its legal system. This rule is similar to the rule for rights to payment of funds credited to a bank account in article 45, paragraph 1. The rationale for this rule is that such notation or registration in the books of the issuer fulfils a similar function to the secured creditor becoming the account holder of a bank account.

73. Paragraphs 3 and 4 are also applicable only to uncertificated non-intermediated securities. They parallel the similar rules for rights to payment of funds credited to a bank account in article 45, paragraphs 3 and 4. Paragraph 3 gives priority to a security right made effective against third parties by conclusion of a control agreement over other security rights in the same securities. As between security rights made effective against third parties by conclusion of a control agreement, paragraph 4 awards priority in the order in which those control agreements were concluded.

74. Paragraph 5 is intended to preserve the rights of transferees of non-intermediated securities under other law to be specified by the enacting State. It parallels article 45, paragraph 7.

(A/CN.9/885/Add.3) (Original: English)

Note by the Secretariat on a draft guide to enactment of the draft model law on secured transactions

ADDENDUM

Contents

Chapter VI. Rights and obligations of the parties and third-party obligors

Section I. Mutual rights and obligations of the parties to a security agreement

A. General rules

Article 50. Sources of mutual rights and obligations of the parties

1. Article 50 is based on recommendation 110 of the Secured Transactions Guide (see chap. VI, paras. 14 and 15), which in turn is based on article 11 of the Assignment Convention. Paragraph 1 is intended to reiterate the principle of party autonomy enshrined in article 3. Paragraph 2 is intended to give legislative strength to trade usages and practices, which may not be generally recognized in all States.

2. With the exception of certain mandatory rules included in chapter VI (see arts. 3, para. 1, 51, 52 and 70, para. 3), the parties are given wide latitude to tailor their security agreement and their usage and practices to the transaction at hand in order to most effectively and efficiently facilitate their respective commercial goals. Thus, other articles of chapter VI are non-mandatory rules and apply where the parties have not provided otherwise in the security agreement. For this reason, a reference to contrary agreement of the parties, which was included in the recommendations of the Secured Transactions Guide and the provisions of the Assignment Convention on which the provisions of this chapter are based, has been deleted (see, for example, article 55, recommendation 114 of the Secured Transactions Guide and article 12 of the Assignment Convention).

Article 51. Obligation of the party in possession to exercise reasonable care

3. Article 51 is based on recommendation 111 of the Secured Transactions Guide (see chap. VI, paras. 24-31). It sets forth the rule that a grantor or secured creditor in possession of a tangible asset (which under the definition in art. 2, subpara. (jj), includes money, negotiable instruments, negotiable documents and certificated non-intermediated securities)

must exercise reasonable care to preserve both the asset and its value. Any other person in possession of an encumbered asset may also be obliged to take reasonable care to preserve the encumbered assets under other law.

4. What constitutes "reasonable care" in a given case depends upon the nature of the encumbered asset. Thus, reasonable care may mean something different with respect to equipment, inventory, crops or live animals. Although physical preservation of a tangible asset would, in most cases, have the effect of preserving the asset's value, this rule also recognizes preservation of the asset's value that may go beyond the physical preservation of the asset. For example, if a secured creditor has possession of certificated non-intermediated shares of a company, the secured creditor may be required in particular circumstances to exercise certain rights arising under the shares to preserve their rights. In any case, preservation of the value of the encumbered assets may only include measures that are within the control of the person in possession.

5. Article 51 and a rule of law relating to securities along the lines of article 5(1) of the Financial Collateral Directive ("FCD"), which gives a secured creditor the right to use securities in its possession, should be read together and their relationship would be a matter of interpretation under the rules of the applicable law (under the FCD, "financial collateral" may consist of "cash", "credit claims" and "financial instruments", and "financial instruments" may be either intermediated or non-intermediated securities, as long as they are "negotiable on the capital market" or "normally dealt in").

Article 52. Obligation of a secured creditor to return an encumbered asset

6. Article 52 is based on recommendations 112 and 72 of the Secured Transactions Guide (see chap. VI, paras. 35-39). It provides that, once a security right in an encumbered asset is extinguished, a secured creditor in possession of the asset must return it to the grantor (for the secured creditor's obligation to register an amendment or cancellation notice, see art. 20, subparas. 1(b) and 3(c) of the Model Registry-related Provisions). A security right generally will be deemed to have been extinguished once the secured obligation has been paid in full or otherwise satisfied in full, and all further commitments to extend credit to the debtor have terminated.

7. Article 52 does not expressly address the obligation of a secured creditor to withdraw any notification that it has given to the debtor of the receivable. Rather, the grantor is protected in this regard by article 57, paragraph 2, and article 77, subparagraph 2(b), which require the secured creditor to return to the grantor any surplus proceeds it receives. It should also be noted that: (a) article 52 does not apply to receivables or other intangible assets, because they cannot be the subject of physical possession (see art. 2, subpara. (z)); and (b) the question of whether a secured creditor should return equivalent non-intermediated securities replacing the originally encumbered non-intermediated securities received pursuant to the exercise of a right of use is a matter for the parties and other law (see, for example, art. 5(2) FCD).

Article 53. Right of a secured creditor to use and inspect an encumbered asset, and to be reimbursed for expenses

8. Article 53 is based on recommendation 113 of the Secured Transactions Guide (see chap. VI, paras. 50-65). It provides that a secured creditor not only has certain obligations (described in articles 51 and 52), but also certain rights. Under subparagraph 1(a), a secured creditor in possession has the right to be reimbursed for the reasonable expenses incurred to preserve an encumbered asset in accordance with article 51. Under subparagraph 1(b), a secured creditor in possession may make reasonable use of an encumbered asset, so long as it applies any revenues generated from the use to the payment of the obligation secured by the asset.

9. Finally, under paragraph 2, where an encumbered asset is in the possession of the grantor, the secured creditor has the right to inspect the asset. As this article is subject to the general standard of commercial reasonableness and good faith set forth in article 4, the right to inspect may only be exercised at commercially reasonable times and in a commercially reasonable manner. The application of this standard depends upon the circumstances. For example, in extreme cases, such as where the debtor is in default or the secured creditor has

reason to believe that the physical condition of the collateral is in jeopardy or has been, or is about to be, removed from the State of its location, the secured creditor may be justified to demand an immediate inspection.

Article 54. Right of the grantor to obtain information

10. Article 54 is a new provision intended to provide the grantor (other than the transferor in an outright transfer of a receivable) with the right to obtain information from a secured creditor (other than a transferee in an outright transfer of a receivable) as to the amount of the secured obligation or the assets encumbered at a certain point of time. This information may be necessary where the grantor is interested in obtaining credit against the security of assets that are already encumbered and the potential third-party creditor requests that information (this does not apply to a transferor of a receivable, as such a transferor retains no right in the receivable and thus may not create a security right in it under art. 6, para. 1). The enacting State may wish to extend that right to third-party creditors (e.g. judgement creditors). Other matters, such as the legal consequences of the secured creditor's failure to comply with a request for information or to give accurate information are left to other law.

B. Asset-specific rules

Article 55. Representations of the grantor of a security right in a receivable

11. Article 55 is based on recommendation 114 of the Secured Transactions Guide (see chap. VI, para. 73), which in turn is based on article 12 of the Assignment Convention. It provides that, when a grantor grants a security right in a receivable, the grantor is deemed to make various representations to the secured creditor at the time the security agreement is concluded. In particular, under paragraph 1, the grantor represents that it has not previously created a security right in the receivable in favour of another secured creditor, and that the debtor of the receivable will not have any defences or rights of set-off with respect to the receivable (e.g. that the grantor will fully perform the contract giving rise to the receivable and any other contract it has entered into with the debtor of the receivable). Under paragraph 2, the grantor does not represent that the debtor of the receivable has, or will have, the ability to pay the receivable (as this is beyond the grantor's control).

12. The representation that the grantor has the right to create a security right was not carried over from recommendation 114 of the Secured Transactions Guide into article 55, to avoid giving the impression that it applies to security rights created only in receivables. As a result, the matter is left to general contract law. It should be noted, however, that even in the case of an anti-assignment agreement between a grantor and a secured creditor, the grantor still has rights in the receivable and the power to encumber it, and thus may create a security right in the receivable (see art. 6, para. 1 and A/CN.9/885, para. 77).

Article 56. Right of the grantor or the secured creditor to notify the debtor of the receivable

13. Article 56 is based on recommendation 115 of the Secured Transactions Guide (see chap. VI, paras. 74 and 75), which is based on article 13 of the Assignment Convention. Paragraph 1 provides that, when a security right has been created in a receivable, either the grantor or the secured creditor has the right to notify the debtor of the receivable of the existence of the security right and send a payment instruction; but that, once notification of the security right has been received by the debtor of the receivable, only the secured creditor may send a payment instruction (under art. 60, a notification or a payment instruction is effective only when received by the debtor of the receivable).

14. It should be noted that a payment instruction is treated as a notion distinct from notification, because: (a) a notification may not contain a payment instruction (for example, because the secured creditor may have obtained control of the grantor's bank account to which debtors of receivables have been instructed by the grantor to pay); (b) no notification may be given (for example, because the transaction involved is a non-notification factoring or undisclosed invoice discounting transaction); and (c) the secured creditor may need to change its payment instructions and thus there may be more than one payment instruction.

15. Paragraph 2 provides that a notification sent in breach of an agreement between the grantor of the security right and the secured creditor is nevertheless effective for the purposes of article 62, which precludes the grantor from raising, after receiving notice of the security right, certain rights of set-off with respect to the receivable that became available to the grantor after it received notice of the security right (see para. 35 below).

Article 57. Right of the secured creditor to payment of a receivable

16. Article 57 is based upon recommendation 116 of the Secured Transactions Guide (see chap. VI, paras. 76-80), which in turn is based on article 14 of the Assignment Convention. Any changes made are intended to clarify the text, but not to change its policy. The article establishes the right of the secured creditor to receive the proceeds of a receivable in which it holds a security right as against the grantor of the security right.

17. Paragraph 1 provides that, regardless of whether notification of the security right has been sent to the debtor of the receivable, the secured creditor is entitled to retain: (a) the proceeds of any full or partial payment of the receivable made to the secured creditor, as well as any tangible assets (such as inventory) returned to the secured creditor in respect of the receivable; (b) the proceeds of any full or partial payment of any receivable made to the grantor (as well as any tangible assets returned to the grantor); and (c) the proceeds of any full or partial payment of any receivable made to a third party (as well as any tangible assets returned to the grantor) if the right of the secured creditor has priority over the right of the third person.

18. Paragraph 2 reflects normal practice in secured transactions relating to receivables in which the secured creditor may have the right to collect the full amount of the receivable owed, plus interest owed on the ground of contract or law, but has to account for and return to the grantor any balance remaining after payment of the secured obligation (see also art. 77, para. 2).

Article 58. Right of the secured creditor to preserve encumbered intellectual property

19. Article 58 is based on recommendation 246 of the Intellectual Property Supplement (paras. 223-226). It recognizes the effectiveness of an agreement between the grantor of a security right in intellectual property and the secured creditor that the secured creditor may take the necessary steps to preserve the value of the intellectual property, such as making any necessary registration (such as a patent registration) and initiating actions to prevent infringement by third parties.

20. Although articles 3 (party autonomy) and 51 (obligation to preserve an encumbered asset) may be generally sufficient to ensure that the secured creditor may take these steps, article 58 has been included in the Model Law, because, in an intellectual property right context, these rights are normally rights of the intellectual property owner.

Section II. Asset-specific rules: Rights and obligations of third-party obligors

A. Receivables

Article 59. Protection of the debtor of the receivable

21. Article 59 is derived from recommendation 117 of the Secured Transactions Guide (see chap. VII, para. 12), which in turn is based on article 15 of the Assignment Convention. Paragraph 1 sets forth the general principle that the creation of a security right in a receivable does not affect the rights or obligations of the debtor of the receivable, unless the debtor of the receivable consents. So, for example, the creation of a security right cannot change the payment terms of a contract giving rise to a receivable (e.g. the amount or the time of payment).

22. To implement the general principle of paragraph 1, paragraph 2 provides that, to enable the secured creditor to exercise its security right, a payment instruction (which is

treated as a notion distinct from notification; see para. 14 above) may change the person, address or account to which the debtor of the receivable is required to make payment, but it may not change: (a) the currency in which the receivable is to be paid, as specified in the original contract giving rise to the receivable; or (b) the State in which the payment is to be made, as specified in the original contract giving rise to the receivable, to a State other than that in which the debtor of the receivable is located.

Article 60. Notification of a security right in a receivable

23. Article 60 is based on recommendation 118 of the Secured Transactions Guide (see chap. VII, paras. 13-16), which in turn is based on article 16 of the Assignment Convention. It describes the requirements for an effective: (a) notification of a security right in a receivable; or (b) payment instruction (a payment instruction is treated as a notion distinct from notification, see para. 14 above).

24. Under paragraph 1, for the effectiveness of a notification or a payment instruction, it must be "received" by the debtor of the receivable. In addition, a notification or payment instruction must reasonably identify the receivable and the secured creditor, and be in a language reasonably expected to inform the debtor of its contents. On this latter point, paragraph 2 makes it clear that the language of the original contract giving rise to the receivable is always sufficient. Under paragraph 3, a notification or payment instruction may relate not only to receivables in existence at the time the notification or payment instruction is given, but also may relate to receivables arising thereafter.

25. Under paragraph 4, where A creates a security right in its receivables and then transfers the obligation secured by them to B, who also creates a security right in the receivables and then transfers the secured obligation to C, who also creates a security right in the receivables, notification of the debtor of the receivable relating to the security right created by C constitutes notification of all prior security rights created by A and B.

Article 61. Discharge of the debtor of the receivable by payment

26. Article 61 is based on recommendation 119 of the Secured Transactions Guide (see chap. VII, paras. 17-20), which in turn is based on article 17 of the Assignment Convention. It sets forth the rules affecting when and how a receivable is discharged by payment.

27. Paragraph 1 embodies the basic principle that, until the debtor of the receivable receives notification of a security right in a receivable, it may be discharged by payment in accordance with the contract giving rise to the receivable ("original contract"). Where the original contract is a sales contract, this means payment to the seller. However, under paragraph 2, once the debtor receives notification of a security right, it can only be discharged by paying either the secured creditor or another party, as instructed by the secured creditor in the notification or as subsequently instructed by the secured creditor in a written payment instruction received by the debtor. However, the rule in paragraph 2 is subject to a number of qualifications that are set forth in paragraphs 3-8.

28. First, under paragraph 3, if the debtor of the receivable receives more than one payment instruction relating to a single security right in a receivable created by the same grantor, it is discharged by paying in accordance with the last payment instruction received from the secured creditor before payment, as the last payment instruction will be the most up-to-date (a payment instruction is treated as a notion distinct from notification, see para. 14 above).

29. Second, under paragraph 4, if the debtor receives notification of more than one security right in the same receivable created by the same grantor, it is discharged by paying in accordance with the first notification received, on the theory that the security right covered by the first notification will probably have priority over the subsequent security right under the Model Law's priority rules. It should be noted that the debtor of the receivable is discharged even if the first notification does not relate to the security right with priority, since the debtor cannot be required to determine which security right has priority. In such a case, the secured creditor with a security right that has priority will have to claim the proceeds of payment from the creditor to whom the debtor paid.

30. Third, under paragraph 5, if the debtor receives notification of one or more subsequent security rights in the same receivable, it is discharged by paying in accordance with the notification of the last of such subsequent security rights (i.e. where A creates a security right in favour of B, B creates a security right in favour of C). The reason is that the last in such a series of successive secured creditors will be the actual holder of the security right.

31. Fourth, under paragraph 6, where the debtor receives notification of a security right in a part of, or an undivided interest in, one or more receivables, the debtor has a choice. It may be discharged by paying either in accordance with the notification or in accordance with paragraph 1 as if the debtor has not received the notification. However, if the debtor chooses the first of these alternatives, under paragraph 7, it is discharged only to the extent of the part or undivided interest paid.

32. Finally, under paragraph 8, if the debtor receives notification from a person other than the initial creditor of the receivable and wants to make sure that that person is a secured creditor entitled to payment, the debtor may request from the person that sent the notification to provide, within a reasonable time, adequate proof of the creation of the security right (including a security right granted by the initial or a subsequent secured creditor). If the secured creditor fails to provide such proof, the debtor may pay as if it had not received such notification. For this purpose, under paragraph 9, adequate proof includes any writing from the grantor that indicates that a security right has been created (e.g. a security agreement).

33. Paragraph 10 is intended to preserve any other grounds for discharge based on payment to the person entitled to payment under other law (e.g. payment to a competent judicial or other authority, or to a public fund).

Article 62. Defences and rights of set-off of the debtor of the receivable

34. Article 62 is based on recommendation 120 of the Secured Transactions Guide (see chap. VII, para. 21), which in turn is based on article 18 of the Assignment Convention.

35. Subparagraph 1(a) preserves for the debtor all defences and rights of set-off arising from the contract giving rise to the receivable, including any other contract that was part of the same transaction, as if the security right had never been created and the claim were made by the grantor. Subparagraph 1(b) ensures that the debtor of the receivable can assert against the secured creditor any other right of set-off that was available to the debtor at the time it received notification of the security right. This means, however, that the debtor may not assert a right of set-off that arises subsequent to such notification. Under article 63, the debtor may waive its defences and rights of set-off.

36. Under paragraph 2, paragraph 1 does not give the right to the debtor of the receivable to raise against the secured creditor as a defence or right of set-off the breach of an agreement by the grantor limiting the grantor's right to create a security right. Otherwise, the validation of a security right under article 13 notwithstanding such an agreement would be meaningless.

Article 63. Agreement not to raise defences or rights of set-off

37. Article 63 is based on recommendation 121 of the Secured Transactions Guide (see chap. VII, para. 22), which in turn is based on article 19 of the Assignment Convention. Paragraph 1 provides that the debtor of the receivable may agree, in a writing signed by it, not to raise the defences and rights of set-off permitted by article 62. The secured creditor is entitled to invoke the benefit of such an agreement even though it was not a party to it. Under paragraph 2, any modification to such an agreement must also be in a writing signed by the debtor of the receivable and is effective as against the secured creditor only if the secured creditor consents or, in the case of a receivable that has not been earned yet by performance, a reasonable secured creditor would consent (see art. 64, para. 2). To avoid abuses, paragraph 3 provides that the debtor may not waive defences based on fraud committed by the secured creditor or the debtor's incapacity.

Article 64. Modification of the original contract

38. Article 64 is based on recommendation 122 of the Secured Transactions Guide (see chap. VII, paras. 23 and 24), which in turn is based on article 20 of the Assignment

Convention. It addresses the impact of an agreement between the grantor of a security right in a receivable and the debtor of the receivable that modifies the terms of the receivable. The result depends on when the agreement is made. Under paragraph 1, if the agreement is concluded before the debtor receives notification of a security right in the receivable, it is effective against the secured creditor, but the secured creditor also enjoys any benefits derived from the agreement.

39. Under paragraph 2, even if the agreement is concluded after notification, it is also effective, even if it affects the secured creditor's rights provided that: (a) the secured creditor consents to it; or (b) the receivable has not been fully earned by performance and the modification was provided for in the contract giving rise to the receivable or a reasonable secured creditor would consent to the modification. Under paragraph 3, article 64 does not affect any right of the grantor or secured creditor arising under other law for breach of an agreement between them (such as an agreement that the grantor would not agree to any modifications of the terms of the receivable).

Article 65. Recovery of payments made by the debtor of the receivable

40. Article 65 is based on recommendation 123 of the Secured Transactions Guide (see chap. VII, paras. 25 and 26), which in turn is based on article 21 of the Assignment Convention. It addresses the situation in which the grantor of a security right in a receivable (or the transferor in an outright transfer of the receivable) fails to perform its obligations under the contract giving rise to the receivable. The article insulates the secured creditor from liability in this circumstance, by providing that the debtor of the receivable may not look to the secured creditor to recover any amount that it has paid to either the grantor or the secured creditor. As a result, the debtor of the receivable bears the risk of the insolvency of the other party to the contract (i.e. the grantor).

B. Negotiable instruments

Article 66. Rights as against the obligor under a negotiable instrument

41. Article 66 is based on recommendation 124 of the Secured Transactions Guide (see chap. VII, paras. 27-31). It is intended to preserve the rights of parties under the relevant law relating to negotiable instruments (to be specified by the enacting State). For example, under that law: (a) a secured creditor with a security right in a negotiable instrument may collect from the obligor under the instrument only in accordance with its terms; (b) even if the grantor defaults, the secured creditor may collect from the obligor only when payment becomes due under the instrument and the law relating to such instruments; (c) a secured creditor with a security right in a negotiable instrument may have greater rights against the issuer of the instrument than the payee, since the issuer may not be able to raise against the secured creditor defences based on the contract between the issuer and the payee of the instrument.

C. Rights to payment of funds credited to a bank account

Article 67. Rights as against the depositary institution

42. Article 67 is based on recommendations 125 and 126 of the Secured Transactions Guide (see chap. VII, paras. 32-37). It addresses the situation in which a security right is created in a right to payment of funds credited to a bank account.

43. Subparagraph 1(a) provides that the rights and obligations of the depositary institution are unaffected by the security right, unless the institution consents. The rationale for protecting depositary institutions in this manner is that imposing duties on a depositary institution or changing the rights and duties of a depositary institution without its consent may subject the institution to risks that it is not in a position to manage appropriately unless it knows in advance what those risks might be and to the risk of having to violate obligations imposed by regulatory or other law (see Secured Transactions Guide, chap. VII, para. 33).

44. To safeguard the confidentiality of the relationship of a depositary institution and its client that is imposed by regulatory or other law, subparagraph 1(b) also provides that the

depositary institution has no obligation to respond to requests for information (e.g. about the balance in the account, whether a control agreement exists or whether the account holder retains the right to dispose of funds credited to its bank account).

45. Finally, paragraph 2 provides that, even where the depositary institution consents to the creation of a security right in a right to payment of funds credited in a bank account held by a grantor with that institution, any right of set-off that the institution may have under regulatory or other law also remains unaffected. The rationale for this rule is the need to avoid any interference with the way depositary institutions manage risks, given the nature of the transaction and the business of their customer.

D. Negotiable documents and tangible assets covered by negotiable documents

Article 68. Rights as against the issuer of a negotiable document

46. Article 68 is based on recommendation 130 of the Secured Transactions Guide (see chap. VII, paras. 43-45). It provides that, when a secured creditor has a security right in a negotiable document, the rights of the secured creditor as against the issuer of the document or any person obligated on the document are determined by the law relating to negotiable documents (to be specified by the enacting State). This means that, for a secured creditor with a security right in the document to enforce it against the assets covered by the document: (a) at the time of enforcement, the assets covered by the document must still be in the possession of the issuer or other obligor under the document; and (b) the issuer or other obligor will have no obligation to deliver the assets to the secured creditor, unless the negotiable document was transferred to the secured creditor in accordance with the law governing negotiable documents (e.g. with a necessary endorsement).

E. Non-intermediated securities

Article 69. Rights as against the issuer of a non-intermediated security

47. As already mentioned, the Secured Transactions Guide does not address security rights in any types of securities (see rec. 4, subpara. (c)). Thus, article 69 is a new rule. In line with articles 66-68, it provides that the rights of a secured creditor holding a security right in non-intermediated securities as against the issuer of the securities are determined by other law of the enacting State. For example, registration on the books of a corporation or special enforcement procedures may be required for a security right in the shares of a corporation to be effective against the issuer.

Chapter VII. Enforcement of a security right

A. General rules

Article 70. Post-default rights

48. Article 70 is based on recommendations 133, 139, 141, 143, and 144 of the Secured Transactions Guide (see chap. VIII, paras. 10-12, 15-17, and 33-35). Paragraph 1 clarifies that, following the grantor's default, the grantor and the secured creditor may exercise any right they may have under the provisions of chapter VII, other law or the security agreement (provided that, in the last two cases, that right is not inconsistent with the provisions of the Model Law).

49. For the purposes of the Model Law, "default" includes both events described in the relevant law and events agreed to by the parties (see art. 2, subpara. (j)). It should also be noted that some of the rights under this article may be available even before default. Thus, for example, even before default: (a) the grantor may exercise its right of redemption under contract law; (b) the secured creditor may collect a receivable with the agreement of the grantor (see art. 80, para. 2); and (c) any party may apply to a court or other authority for relief under general procedural or other law (see also art. 72).

50. Paragraph 2 indicates that the exercise of one right generally does not prevent the exercise of another right, except if the exercise of one right makes impossible the exercise of another right (e.g. if the secured creditor decides to obtain possession and sell the encumbered asset, it cannot propose to acquire it in satisfaction of the secured obligation).

51. Paragraph 3 provides that the debtor (defined to include the grantor and any other person that owes payment or other performance of a secured obligation [and a transferor in an outright transfer of a receivable] (see art. 2, subpara. (h)) may not waive unilaterally or vary by agreement their rights under this chapter before default. Otherwise, the secured creditor could put pressure on the debtor to waive or vary its rights in return for concessions in the security agreement (see Secured Transactions Guide, chap. VIII, paras. 16 and 17).

Article 71. Methods of exercising post-default rights

52. Article 71 is based on recommendation 142 of the Secured Transactions Guide (see chap. VIII, paras. 18-20 and 29-33). Paragraph 1 clarifies that the secured creditor may exercise its post-default rights by applying to a court or other authority to be specified by the enacting State (e.g. a chamber of commerce, arbitral tribunal or notary public). There are many reasons why a secured creditor may decide to follow this approach. For example, judicial or similar proceedings may be sufficiently efficient, the secured creditor may wish to avoid having its self-help actions subsequently challenged, anticipate that it will have to apply to a court or other authority anyway to recover an anticipated deficiency or may fear and wish to avoid a breach of public order (see Secured Transactions Guide, chap. VIII, paras. 32 and 33).

53. Where judicial or other similar proceedings are likely to be slow and costly, and less likely to produce the highest possible amount upon the disposition of the encumbered assets, the secured creditor may decide to enforce its security right with minimal or no supervision by a court or other authority (see Secured Transactions Guide, chap. VIII, para. 29 and 31). In such a case, the Model Law introduces a number of safeguards for the grantor, the debtor and other persons the rights of whom may be affected. For example, under article 4, the secured creditor has to proceed in good faith and in a commercially reasonable manner and, under article 75, paragraph 3, ensure that the grantor has consented in writing, the grantor and any person in possession have been notified and at the time of repossession the person in possession does not object.

54. In any case, the Model Law does not introduce any limitation to the ability of the parties to avail themselves of the assistance of a court or other authority at any time to resolve a dispute arising in relation to a security agreement or the exercise of a post-default right. Quite to the contrary, under article 72, [the grantor, the debtor or any competing claimant] [any person affected by the non-compliance of the secured creditor with the provisions of this chapter] is entitled to relief from a court or other authority.

55. It should also be noted that there is nothing in the Model Law that precludes the grantor and the secured creditor from agreeing to resolve any dispute that may arise between them by arbitration, conciliation or negotiation. Depending on the efficiency of court proceedings in a particular State, these alternative dispute resolution mechanisms may provide a viable alternative to court proceedings, provided that certain issues are addressed by the relevant law, in particular with respect to arbitration, such as the arbitrability of disputes arising under a security agreement or associated with a security right, protection of rights of third parties and the confidentiality of arbitral proceedings (see also para. 58 below).

56. Under paragraph 2, the exercise of post-default rights by application to a court or other authority is subject not only to the provisions of this chapter but also to the relevant rules to be specified by the enacting State (typically, procedural in nature). Under paragraph 3, the exercise of those rights without application to a court or other authority is subject only to the provisions of this chapter.

Article 72. Relief for non-compliance

57. Article 72, which is based on recommendation 137 of the Secured Transactions Guide (see chap. VII, para. 31), addresses the availability of relief by a court or other authority in the case of a person’s non-compliance with its obligations under the provisions of this

chapter. Two options are provided. The first option addresses non-compliance only by the secured creditor, and provides that the grantor, the debtor or a competing claimant affected by that non-compliance may seek relief. The second option is broader, addressing non-compliance by any person, and giving any person affected by that non-compliance the right to seek relief. It should be noted that: (a) a violation of the secured creditor's obligations includes a violation by the secured creditor's agents, employees or service providers; and (b) persons that may be affected include 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.

58. The enacting State may wish to specify the court or other authority to which the party seeking relief should apply and the type of expeditious proceeding that would be available. That authority may include an arbitral tribunal, chamber of commerce or notary public. The resolution of a dispute arising generally from a security agreement or specifically in the context of enforcement of a security right by arbitration would be possible if: (a) the matter may be submitted to arbitration under the law of the enacting State; and (b) there is an arbitration agreement between the grantor and the secured creditor that is enforceable under the law of the enacting State. In such a case: (a) the arbitration agreement (and arbitral award) would bind only the parties thereto; and (b) if the winning party attempts to seize an encumbered asset, the law of the enacting State must provide adequate protection for the rights of persons, who are not party to the arbitration agreement, in the encumbered assets. For example, third-party creditors should be notified before an extrajudicial sale takes place (see art. 76, para. 4) and be given an opportunity to assert their rights, such as their right to take over enforcement (see art. 74), or their right to be paid from the proceeds of a sale according to their priority rank (see art. 77, para. 2).

59. As the length of time that it takes to obtain relief for non-compliance may bring about injustice or inefficiency, this article provides for the possibility of expeditious relief, the exact form of which is to be specified by the enacting State (e.g. proceedings for interim measures of protection and preliminary orders).

Article 73. Right of affected persons to terminate enforcement

60. Article 73 is based on recommendation 140 of the Secured Transactions Guide (see chap. VIII, paras. 22-24). Paragraph 1 enables any person whose rights are affected by the enforcement process to terminate it by paying or otherwise performing the secured obligation in full. This is sometimes known as "redeeming" the encumbered asset. A person that is affected by the enforcement of a security right is most likely to exercise this right when the residual value of the asset is higher than the outstanding part of the secured obligation. It should be noted that the extinguishment of a security right, which was also addressed in recommendation 140 of the Secured Transactions Guide, is addressed in article 12.

61. Full payment, for the purposes of paragraph 1, includes the reasonable cost of enforcement. Thus, in the case of enforcement before a court or other authority, the court or other authority will determine the reasonable cost of enforcement. In the case of enforcement without an application to a court or other authority, if the grantor or other interested person disputes the secured creditor's assertion as to the cost of enforcement, the grantor or other such person could seek the assistance of a court or other authority to resolve the dispute.

62. Under paragraph 2, the right to terminate enforcement may be exercised until the secured creditor has disposed of, acquired or collected the encumbered asset, or entered into an agreement for that purpose. Otherwise, the finality of acquired rights would be undermined (see paras. 79-81). Under paragraph 3, the rule in paragraph 2 does not apply in the case of a lease or licence of an encumbered asset. This means that a person affected by the enforcement may still terminate the enforcement process, if there is sufficient residual value left in the encumbered asset. However, there is one limitation, the rights of a lessee or licensee must be respected.

Article 74. Right of a higher-ranking secured creditor to take over enforcement

63. Article 74 is based on recommendation 145 of the Secured Transactions Guide (see chap VIII, para. 36). Paragraph 1 provides that a secured creditor whose security right has priority over that of the enforcing secured creditor or judgement creditor ("higher-ranking

secured creditor") has the right to take over enforcement. Inasmuch as the higher-ranking secured creditor is entitled to be paid out of the proceeds of any disposition before the other secured creditor or judgement creditor, this rule recognizes that this greater stake in the results of enforcement justifies giving the higher-ranking secured creditor the right to control the enforcement process if it so desires. The higher-ranking secured creditor may take over the enforcement process at any time before the asset is sold or otherwise disposed of, or acquired by the secured creditor or until the conclusion of an agreement by the secured creditor for that purpose.

64. Like article 73, paragraph 3, paragraph 2 of this article, allows the exercise of this right even after the encumbered asset has been leased or licensed, without, however, affecting the rights of lessees or licensees. Under paragraph 3, the right of the higher-ranking secured creditor to take over the enforcement process includes the right to enforce by any of the methods foreseen in this chapter. This means that the higher-ranking secured creditor may change the method of enforcement, for example to follow a different strategy than that followed by the original enforcing creditor (or terminate enforcement if the higher-ranking secured creditor is an outright transferee). It should be noted, however, that the exercise of this right is subject to the standard of article 4, that is, the secured creditor would be obliged to act in good faith and in a commercially reasonable manner, for example, to avoid unreasonable enforcement costs.

Article 75. Right of the secured creditor to obtain possession of an encumbered asset

65. Article 75 is based on recommendations 146 and 147 of the Secured Transactions Guide (see chap. VIII, paras. 38-48 and 51-56). Taken as a whole, this article provides a secured creditor with an important pair of options about enforcing its security right. The secured creditor may obtain possession of a tangible encumbered asset either through a judicial process or an analogous process with another authority or, in certain circumstances, the secured creditor can utilize "self-help remedies" and obtain possession of the encumbered asset without resort to a court or other authority. The rules governing each of these options are set out separately, with paragraphs 1 and 2 setting the parameters for obtaining possession by application to a court or other authority and paragraph 3 setting the parameters for the exercise of a self-help remedy by the secured creditor.

66. Paragraph 1 states that, after default, the secured creditor is entitled to obtain possession of an encumbered asset by applying to a court or other authority. The opening words of paragraph 1 however, subordinate this right to the right of another person who has a superior right to possession of the asset (e.g. a lessee or licensee; see art. 32). Paragraph 2 provides an enacting State with the opportunity to provide for additional conditions that must be satisfied in order for a secured creditor to be entitled to obtain possession of an encumbered asset through a judicial or similar process.

67. Under paragraph 3, the secured creditor is also entitled to obtain possession of an encumbered asset without applying to a court or other authority if all the conditions set out therein are met. The conditions are designed to ensure that such a self-help remedy is available only in appropriate circumstances. First, the self-help remedy is available only if the grantor has consented in writing to the secured creditor obtaining possession without resort to a court or other authority. Typically, the secured creditor will obtain the grantor's consent in the security agreement. Second, the secured creditor cannot utilize this self-help remedy unless it 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 resort to a court or other authority (the enacting State may wish to specify how long before seeking possession the secured creditor must give notice that would be in line with the good faith and commercial reasonableness standard set forth in in art. 4). Third, and perhaps most important, the secured creditor may not obtain possession without resort to a court or other authority if the person in possession of the encumbered asset objects to the secured creditor's attempt to utilize this self-help remedy. Thus, the grantor or other person in possession of the encumbered asset will always have the ability to require the secured creditor to utilize the judicial or similar process by objecting to the creditor's attempt to act without the assistance of a court or other authority, even if the grantor has already agreed to the secured creditor's self-help remedies in the security agreement.

68. Paragraph 4 recognizes that even relatively short delays associated with giving the notices required in paragraph 3 can be economically wasteful if the encumbered assets are perishable or otherwise likely to decline speedily in value. Accordingly, paragraph 4 dispenses with the requirement of notice in those cases. In addition, inasmuch as a main purpose of the notice is to give the grantor time to monitor the process of repossession and disposition of the encumbered asset, paragraph 4 also dispenses with the need for a notice when the existence of a recognized market in assets such as the encumbered asset provides a reference point by which we can measure the secured creditor's actions. "Recognized market" in this context means a market in which prices were set by the market and not by individual sellers.

69. Under paragraph 5, a lower-ranking secured creditor may not obtain possession of an encumbered asset from a higher-ranking secured creditor. The purpose of this provision is to ensure that: (a) the security right of the higher-ranking secured creditor does not cease to be effective against third parties through the relinquishment of possession to the lower-ranking secured creditor and thus lose its priority status; (b) the value of the encumbered asset does not diminish through its disposition by the lower-ranking secured creditor. It should be noted, however, that the lower-ranking secured creditor will be able to enforce its security right without obtaining possession and the buyer of the encumbered asset would acquire its rights in the asset subject to the right of the higher-ranking secured creditor (see art. 79).

Article 76. Right of the secured creditor to dispose of an encumbered asset

70. Article 76 is based on recommendations 148-151 of the Secured Transactions Guide (see chap. VIII, paras. 48 and 57-60). Paragraph 1 provides that the secured creditor may sell or otherwise dispose of, lease, or license an encumbered asset by applying to a court or other authority (to be specified by the enacting State) or may take those actions without making such an application. Paragraph 2 provides that, if the secured creditor decides to exercise its right by applying to a court or other authority, the enacting State may specify the rules that will determine the method, manner, time, place and other aspects of the sale or other disposition, lease or licence.

71. Paragraphs 3-8 deal with dispositions by the secured creditor without an application to a court or other authority. Under paragraph 3, the secured creditor may determine the aspects of the sale or other disposition, lease or licence (including whether to sell or otherwise dispose, lease or license encumbered assets individually, in groups or altogether). Under paragraph 4, the secured creditor must give to the grantor, the debtor, any person with rights in the encumbered asset that notifies in writing the secured creditor of those rights and any other secured creditor that registered a notice in the Registry or was in possession of the encumbered asset a notice that contains all the elements set out in paragraphs 5-7. Under paragraph 8, 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.

72. Subject to its obligation to act in good faith and in a commercially reasonable manner (see art. 4), the secured creditor may: (a) dispose of the encumbered assets by public or private sale, and if by public sale, through auction or tender; and (b) decide whether to dispose of the encumbered assets individually, in groups or as a whole (see art. 76, para. 3, and Secured Transactions Guide, chap. VIII, paras. 71-73).

Article 77. Right of the secured creditor to distribute the proceeds of a disposition of an encumbered asset

73. Article 77 is based on recommendations 152-155 of the Secured Transactions Guide (see chap. VIII, paras. 60-64). Paragraph 1 provides that, in the case of a sale or other disposition, lease or licence supervised by a court or other authority, the distribution of the proceeds is determined by the rules to be specified by the enacting State. However, such distribution should follow the order of priority according to the priority rules of the Model Law.

74. Under paragraph 2, the distribution of the proceeds of a sale or other disposition, lease or licence that occurs without an application to a court or other authority must follow the rules set forth in paragraph 2 that determine the order in which the proceeds are to be applied.

Subparagraph 2(b) requires payment to a subordinate competing claimant. This is so because, under article 79, paragraphs 3 and 4, the security right of a higher-ranking secured creditor is preserved even after enforcement by a lower-ranking secured creditor.

75. Under paragraph 3, if the net proceeds of disposition are insufficient to satisfy the secured obligation, leaving a shortfall, a debtor remains obligated to pay the remainder. It should be noted that damages for non-compliance with enforcement obligations are a matter for other law, in particular in relation to consumer transactions. Thus, if a sale of an encumbered asset is not commercially reasonable and the debtor has a counter-claim, the debtor may be liable to a reduced shortfall. It should also be noted that this article, as well as articles 70, paragraph 1-3, to 79, does not apply to outright transfers of receivables (see art. 1, para. 2).

Article 78. Right of the secured creditor and the grantor to propose the acquisition of an encumbered asset by the secured creditor

76. Article 78 is based on recommendations 156-159 of the Secured Transactions Guide (see chap. VIII, paras. 65-70). Paragraph 1 states the right of the secured creditor to propose in writing to acquire one or more of the encumbered assets in total or partial satisfaction of the secured obligation. Paragraph 2 indicates to whom other than the grantor the proposal must be sent. Paragraph 3 governs the content of the proposal.

77. Paragraph 4 provides rules that determine the outcome of the secured creditor's proposal. Subparagraph 4(a) provides that, in the case of a proposal for the acquisition of an encumbered asset in full satisfaction of the secured obligation, the secured creditor acquires the encumbered asset in accordance with the proposal so long as none of the persons to whom the proposal must be sent objects within a short period of time after the proposal is received by those persons (to be specified by the enacting State); if any of those parties object, however, the secured creditor may not proceed. Subparagraph 4(b) provides that, in the case of a proposal for the acquisition of the encumbered asset in partial satisfaction of the secured obligation, the secured creditor acquires the encumbered asset only if all of the addressees consent within a short period of time after the proposal is received by those persons (to be specified by the enacting State). This approach is intended to safeguard the rights of all addressees of the notice, since they will remain liable for part of the secured obligation or they may otherwise be affected by the enforcement of a security right.

78. Paragraph 5 provides a mechanism whereby the grantor can initiate this process rather than the secured creditor, by requesting a proposal from the secured creditor. If the secured creditor makes a proposal in response to the grantor's request, and the secured creditor accepts it, the secured creditor must proceed as provided in paragraphs 2-4.

Article 79. Rights acquired in an encumbered asset

79. Article 79 is based on recommendations 160-163 of the Secured Transactions Guide (see chap. VIII, paras. 74-81). It is intended to deal with the finality of rights acquired in an encumbered asset pursuant to the enforcement of a security right (e.g. whether a transferee acquires its rights free or subject to the security right). Paragraph 1 deals with sales or other dispositions under the supervision of a court or other authority and refers the finality of rights to the law to be specified by the enacting State. Paragraph 2 deals with leases and licences of encumbered assets under the supervision of a court or other authority and provides that the lessee or licensee acquires its rights to use the leased or licensed encumbered asset except against creditors with rights that have priority over the right of the enforcing secured creditor.

80. Under paragraphs 3 and 4, in the case of a sale or other disposition, lease or licence of an encumbered asset without application to a court or other authority, the buyer or other transferee acquires its rights subject only to rights that have priority over the security right of the secured creditor, and the lessee or licensee is entitled to the benefit of the lease or licence except as against creditors with rights that have priority over the rights of the secured creditor.

81. Under paragraph 5, if the sale or other disposition, lease or licence of an encumbered asset takes place in violation of the provisions of chapter VII, the buyer or other transferee,

lessee or licensee does not acquire any rights or benefits[, if it had knowledge of the violation and that the violation materially prejudiced the rights of the grantor or another person].

B. Asset-specific rules

Article 80. Collection of payment under a receivable, negotiable instrument, right to payment of funds credited to a bank account or non-intermediated security

82. Article 80 is based on recommendations 169-171, 173 and 175 of the Secured Transactions Guide (see chap. VIII, paras. 93-98, 102-108, 111 and 112). Under paragraph 1, where the encumbered asset is an obligation to pay money, the secured creditor is entitled to collect payment from the obligor after default. Under paragraph 2, the secured creditor may also exercise the right to collect before default with the agreement of the grantor. Under paragraph 3, a secured creditor that collects under paragraph 1 or 2 also has the benefit of any personal or property right that secures or supports payment of the encumbered asset.

83. Under paragraph 4, notwithstanding the general rule of this article, a depositary institution need not pay a secured creditor with a security right in a right to payment of funds credited to a bank account held with that depositary institution against its consent without a decision by a court or other authority. However, the secured creditor may collect the balance credited in a bank account without applying to a court or other authority only if the security right in the right to payment of the funds has been made effective against third parties by the security right being created in favour of the depositary institution, the conclusion of a control agreement or the secured creditor becoming the account holder (see art. 24).

Article 81. Collection of payment under a receivable by an outright transferee

84. Article 81 is based on recommendations 167-168 of the Secured Transactions Guide (see chap. VIII, paras. 99-101). It provides that, in the case of an outright transfer of a receivable, the transferee is entitled to collect the receivable either before or after default. It should be noted that the standards of good faith and commercial reasonableness do not apply to an outright transfer of a receivable without recourse to the transferor, as the grantor (transferor) has no remaining vested interest in the receivable that could be protected by a limitation on the way in which the secured creditor (transferee) could collect the receivable.

(A/CN.9/885/Add.4) (Original: English)

Note by the Secretariat on a draft guide to enactment of the draft model law on secured transactions

ADDENDUM

Contents

Chapter VIII. Conflict of laws

Introduction

1. Chapter VIII of the Model Law states the rules for determining the substantive law applicable to the issues dealt with in the other chapters. These rules are generally referred to as the conflict-of-laws rules. In a State that has enacted the Model Law, a court or other authority will use the conflict-of-laws rules of chapter VIII to determine the substantive law governing issues such as the creation, effectiveness against third parties, priority and enforcement of a security right, as well as the mutual rights and obligations of the grantor and the secured creditor and the rights and obligations between third-party obligors and secured creditors. The substantive law indicated by conflict-of-laws rules may be that of the enacting State or the law of another State. It must be stressed that in the event of litigation in a State, the court or other authority will apply: (a) the substantive secured transactions law of its own legal system to characterize an issue for the purpose of selecting the appropriate conflict-of-laws rule; and (b) the conflict-of-laws rules of its own legal system to determine the law applicable to the substance of the dispute (for a more elaborate discussion of the role of conflict-of-laws rules, see Secured Transactions Guide, chap. X, paras. 1-13).

2. The application of the conflict-of-laws rules relating to security rights should not be conditional on a prior determination that the case presents an international element. Whenever a conflict-of-laws rule refers to the law of a State, that reference should not be refused on the ground of the absence of true “internationality” in the situation. Otherwise, courts might disregard a conflict-of-laws rule enacted by a State by deciding that the case is not sufficiently international on the basis of discretionary criteria that are not part of the conflict-of-laws rules of that State. In other words, if in a given situation the rule of State A points to the law of State B, it must be presumed that the legislator of State A has considered that the situation of itself is presenting an international element. In the particular circumstances where additional criteria would be a prerequisite for the application of a conflict-of-laws rule of a State, these criteria should be spelled out in the conflict-of-laws rules of that State.

3. The conflict-of-laws rule dealing with the law applicable to the mutual rights and obligations of the parties is a non-mandatory law rule (as it is not listed in art. 3, para. 1, as a mandatory law rule). This means that the parties may choose the law applicable to their contractual rights and obligations. However, the conflict-of-laws rules dealing with the law applicable to the creation, third-party effectiveness, priority and enforcement of a security right, as well as with the rights and obligations between third-party obligors and secured creditors (or the effect of a security right on a third-party obligor), are mandatory (see art. 3, para. 1). Therefore, with respect to those matters, the parties cannot be permitted by a choice-of-law clause to avoid the substantive law provisions of the legal system to which a conflict-of-laws rule refers. This is so because security rights are property (*in rem*) rights and thus affect third parties. Allowing the parties to a security agreement to select the applicable conflict-of-laws rule would also defeat one of the main purposes of the conflict-of-laws rules, which is to identify the State whose substantive law will apply in the event of a priority dispute among competing claimants. For example, if there is a priority dispute between secured creditor X and secured creditor Y, it would be impossible to ascertain the law applicable to the resolution of the dispute if each of X and Y had been permitted to choose in their security agreement with the grantor a different governing law for the ranking of their respective security right.

A. General rules

Article 82. Law applicable to the mutual rights and obligations of the grantor and the secured creditor

4. Article 82 is based on recommendation 216 of the Secured Transactions Guide (see chap. X, para. 61). It states that the parties to a security agreement are free to choose the law applicable to their contractual relationship. Article 82 follows the approach recommended by international texts on this matter, including the Hague Principles on Choice of Law in International Contracts (the "Hague Principles"). The question of whether there should be constraints to party autonomy with respect to the law applicable to contractual relationships is not addressed in the Model Law and is left to other conflict-of-laws rules of the enacting State. These other rules will also determine the law governing the contractual relationship of the parties in the absence of a choice of law in the security agreement; these rules will often point to the law of the State most closely connected to the security agreement. It should be noted that the rule of article 82 is confined to the contractual aspects of the security agreement. As already mentioned, matters relating to the property aspects of secured transactions (e.g. the priority of a security right) are outside the scope of freedom of contract; the parties cannot select a law other than that indicated by the conflict-of-laws rules on such matters.

Article 83. Law applicable to a security right in a tangible asset

5. Article 83 is based on recommendations 203-207 of the Secured Transactions Guide (see chap. X, paras. 28-38). It deals with the law applicable to the creation, effectiveness against third parties and priority of a security right in a tangible asset. The term "tangible asset" is defined to refer generally to all types of tangible movable asset, including money, negotiable instruments, negotiable documents and certificated non-intermediated securities (see art. 2, subpara. (jj); see also Secured Transactions Guide, chap. X, para. 26).

6. Paragraph 1 states the general rule that the law applicable to these issues is the law of the State in which the encumbered asset is located (the "*lex situs*" or the "*lex rei sitae*"). Article 89 deals with the scenario where the location of the asset changes to another State after the security right has been created. The *lex situs* rule for tangible assets is subject to five exceptions that are set out in articles 83, paragraphs 2 to 4, 95 and 97, in options B and C.

7. The first exception provides that, if a tangible asset located in a State is covered by a negotiable document in the possession of a secured creditor in another State, the priority of the security right over the asset will be determined by the law of the State in which the document is located, and not by the law of the State in which the asset covered by that document is located (see para. 2). The second exception points to the law of the State in which the grantor is located for an asset of a type which may be ordinarily used in more than one State in the course of its normal use, that is, a "mobile asset" (see para. 3; for the meaning of "location", see art. 88; for the relevant time for determining location, see art. 89). The test is an objective one and does not refer to actual use. The most obvious example is an aircraft, which may fly from a State to many other States. The rule will apply even if a particular aircraft is actually operated only in one single State.

8. The third exception deals with a tangible asset (other than a mobile asset) in transit or to be exported (see para. 4). A security right in a tangible asset located in a State but which is in transit or destined to be moved to another State may be created and made effective against third parties under the law of the State of its ultimate destination, if the asset reaches that destination within the period of time to be specified by the enacting State. It should be noted that: (a) if the asset does not reach the intended destination in a timely fashion, the rule in paragraph 4 will not apply; and (b) the rule in paragraph 4 does not prevent a secured creditor from taking the necessary steps to create and make the security right effective against third parties under the law of the State in which the asset is actually located at the time such steps are taken. It should also be noted that paragraph 4 is a conflict-of-laws rule of the enacting State only and whether the security right will be treated as validly created and made effective against third parties in the State of the ultimate destination of the asset is a matter for the conflict-of-laws rules of that State.

9. The fourth exception is contained in options B and C in article 97, which refer to laws other than the law of the State in which the certificate is located for a security right in certificated non-intermediated securities. The fifth exception is contained in article 95, which refers to the law of the State in which the grantor is located for third-party effectiveness by registration with respect to certain types of tangible asset.

10. Another possible exception relates to assets, with respect to which a notice of a security right may be registered in a specialized title registry or noted on a title certificate. In the case of a security right in such an asset, the law applicable to the security right is the law of the State under whose authority the registry is maintained or the certificate is located (see Secured Transactions Guide, chap. X, paras. 37 and 38, as well as rec. 205; see also A/CN.9/885, para. 110, and A/CN.9/885/Add.2, para. 21).

Article 84. Law applicable to a security right in an intangible asset

11. Article 84 is based on recommendation 208 of the Secured Transactions Guide (see chap. X, paras. 39-47). It states the general conflict-of-laws rule for the creation, effectiveness against third parties and priority of a security right in an intangible asset. The applicable law is that of the State in which the grantor is located (for the meaning of "location", see art. 88; for the relevant time for determining location, see art. 89). It must be noted that receivables are covered by this rule, which is subject to several exceptions that are set out in articles 85, 94, 96 and 97.

12. The first exception relates to the priority of a security right in a receivable arising from a sale or lease of, or secured by, immovable property (see art. 85). The other exceptions relate to a security right in rights to payment of funds credited to a bank account (see art. 94), intellectual property (see art. 96, which refers both to the *lex protectionis* and to the law of the State of the grantor's location) and non-intermediated securities (see art. 97).

Article 85. Law applicable to a security right in a receivable relating to immovable property

13. Article 85 is based on recommendation 209 of the Secured Transactions Guide (see chap. X, para. 54). It deals with the priority of a security right in a receivable arising from a sale or lease of, or secured by, immovable property as against the rights of competing claimants. Article 85 is an exception to the general rule of article 84 and refers that matter to the law of the State under whose authority the immovable property registry is organized. For article 85 to apply, the right of a competing claimant must be registrable (but not necessarily registered) in the relevant immovable property registry.

Article 86. Law applicable to the enforcement of a security right

14. Article 86 is based on recommendation 218 of the Secured Transactions Guide (see chap. X, paras. 64-72). Subparagraph (a) deals with the law applicable to the enforcement of a security right in a tangible asset, as defined in article 2, subparagraph (jj). It refers to the law of the State [in which enforcement takes place (*lex fori*), which in most instances would be the law of the State in which the encumbered asset would be located (for the policy reasons for this approach, see Secured Transactions Guide, chap. X, para. 66)] [in which the encumbered asset is located at the time of commencement of enforcement].

15. It should be noted that enforcement may involve several distinct acts (e.g. notice of the secured creditor's intent to obtain possession of an encumbered asset without applying to a court or other authority, disposition of an encumbered asset, and distribution of the proceeds of disposition) that may take place in different States. For example, a secured creditor may take possession of the encumbered assets in one State, dispose of them in a second State, and distribute the proceeds of disposition in a third State. A similar issue arises if a security right is created in several tangible assets that are located in different States or in a less frequent case where enforcement takes place in different States because the asset has been moved to another State after commencement of enforcement.

16. Under, subparagraph (b), the law applicable to the enforcement of a security right in an intangible asset (with the exception of a right to payment of funds credited to a bank account, intellectual property and non-intermediated securities) is the law governing

priority. The main advantage of this approach is that the creation, third-party effectiveness, priority and enforcement of a security right in an intangible asset (but not the rights and obligations between the debtor of the receivable and the secured creditor; see art. 93) is referred to one and the same law (see Secured Transactions Guide, chap. X, para. 69).

Article 87. Law applicable to a security right in proceeds of an encumbered asset

17. Article 87 is based on recommendation 215 of the Secured Transactions Guide (see chap. X, paras. 55-60). The following example illustrates how article 87 operates. Assume that the original encumbered asset is inventory, which is subsequently sold, and the purchase price is paid into a bank account. Under paragraph 1, the law applicable to the question of whether the secured creditor automatically acquires a security right in the right to payment of the funds credited to the bank account as proceeds of the original encumbered inventory will be the law of the location of the inventory. Under paragraph 2, the law applicable to the third-party effectiveness and priority of the security right in the proceeds will be the law applicable to the right to payment of funds credited to the bank account (see art. 94).

18. It should be noted that this type of bifurcated rule may lead to difficulties in cases where the law governing creation recognizes a broad-based automatic proceeds rule whereas the law governing third-party effectiveness and priority recognizes no or only a very limited automatic proceeds right. It should also be noted that this article is dealing only with the law applicable to proceeds derived from the original encumbered assets as a result of a disposition by the grantor or other event prior to enforcement, whereas article 86 deals with the law applicable to the distribution of proceeds derived from a disposition of the encumbered assets pursuant to post-default enforcement proceedings.

Article 88. Meaning of "location" of the grantor

19. Article 88 is based on recommendation 219 of the Secured Transactions Guide (see chap. X, paras. 73 and 74). It should be noted that the State in which a grantor that is a legal person has its central administration is not necessarily the State in which that legal person has its statutory seat (or registered office). If the grantor is a legal person formed under the law of State A with its statutory seat in that State but has in State B a place of business where its senior management is based, then the grantor is located in State B. As a result of this approach, for example, the creation, third-party effectiveness, priority and enforcement of a security right in a receivable is referred to a single law that is easy to determine and is most likely to be the law of the State in which the main insolvency proceeding with respect to the grantor will take place.

Article 89. Relevant time for determining location

20. Article 89 is based on recommendation 220 of the Secured Transactions Guide (see chap. X, paras. 75-78). It deals with the situation where the location of the asset or the location of the grantor changes from one State (State A) to another (State B) in circumstances where the applicable law is determined by reference to that location.

21. Paragraph 1 establishes that State B will recognize the existence of the security right if the latter was validly created under the law of State A at the time the asset or the grantor was located in State A. However, if a priority dispute arises either in State A or in State B, the substantive law of State B will be applied to determine whether the security right is effective against third parties and has priority over the rights of competing claimants. As a result, for the security right to be treated as being effective against third parties either in State A or in State B, the third-party effectiveness requirements of the law of State B must have been fulfilled. This is so even if the security right had been made effective against third parties under the law of State A at the time the asset or the grantor was located in State A. Indeed, this analysis assumes that both States are enacting States.

22. Paragraph 2 constitutes an exception to the general rules of paragraph 1. In the event of a priority dispute between two security rights that have been made effective against third parties in the State of the initial location (State A, in the example), the priority dispute will be resolved under the law of the State of the initial location.

Article 90. Exclusion of *renvoi*

23. Article 90 is based on recommendation 221 of the Secured Transactions Guide (see chap. X, para. 14). Its purpose is to reject the doctrine of *renvoi* and provide greater certainty with respect to the law applicable by avoiding the complications arising from this doctrine. Under this doctrine, the applicable law as indicated by the conflict-of-laws rules of a State (State A) includes the conflict-of-laws rules of the State whose law is the applicable law. As a result of this doctrine, if the conflict-of-laws rules of State A refer the priority of a security right in a receivable to the law of the State in which the grantor is located (the law of State B) and the conflict-of-laws rules of State B refer that issue to the law governing the receivable (which is the law of State C), then a court in State A will resolve the priority dispute using the law of State C (and not the law of State B). This result, however, would create uncertainty as to the law applicable and also run contrary to the expectations of the parties. For those reasons, article 90 prohibits *renvoi* (for an exception, see art. 98, para. 3).

Article 91. Overriding mandatory rules and public policy (*ordre public*)

24. Article 91, which is based on recommendation 222 of the Secured Transactions Guide (see chap. X, para. 79) and article 11 of the Hague Principles, states generally recognized principles of private international law.

25. To illustrate how the rules in paragraphs 1 and 3 will operate, assume that the law of the forum prohibits dealings in certain types of asset (such as an asset which is the proceeds of criminal activities or is the subject of international sanctions) and that the law of the State whose law is applicable does not contain such a prohibition. In such a case, the forum court may refuse to recognize as validly created a security right created in the asset under the foreign law that is applicable under the provisions of this chapter even though that law does not contain the same prohibition. However, to do so, the forum court must conclude that the application of the foreign law would be manifestly contrary to the public policy of the forum State (see para. 3).

26. Under paragraphs 2 and 4, the forum court (if it is allowed to do so under its law) may refuse to recognize as validly created a security right permitted to be created under the applicable law (even if the law applicable is the law of the forum), if the creation of such security right would be manifestly contrary to public policy of a State which has a close connection with the situation. For example, if a law firm is located in the forum State and under the applicable law of the forum State a security right may be created in receivables arising from legal services, but the location of the client is in a foreign State, which has strict confidentiality rules prohibiting a security right in a law firm's receivables arising from legal services, the forum court may refuse the application of the applicable law of the forum State, if it finds that its application would be manifestly contrary to the public policy of the State of the location of the client.

27. Paragraph 5 is intended to make clear that the rules in paragraphs 1-4 may also be relied upon by an arbitral tribunal, although, unlike a court, it does not operate as part of the judicial infrastructure of a specific legal system. Under paragraph 5, an arbitral tribunal may take into account the overriding mandatory provisions and policies, for example, of the place of arbitration, however identified, or of the place where enforcement of any award would be likely to take place. Paragraph 5 requires an arbitral tribunal to determine whether it is required or entitled to take into account public policy or overriding mandatory provisions of another law, having regard (in particular) to the agreement of the parties, the designated or deemed seat of the arbitration, any institutional rules applicable to the arbitration, and the potentially controlling influence of State courts applying local arbitration legislation (see commentary to article 11(5) of the Hague Principles).

28. Under paragraph 6, the forum State may not displace the provisions of the law applicable to third-party effectiveness and priority of a security right on the ground that this would offend its public policy (or that of another State), and apply its own third-party effectiveness and priority provisions or those provisions of another State. This approach is justified by the need to achieve certainty with respect to the law applicable to third-party effectiveness and priority. The same approach is followed in article 23, paragraph 2, article 30, paragraph 2, and article 31 of the Assignment Convention, as well as in article 11, paragraph 3, of the Hague Securities Convention.

Article 92. Impact of commencement of insolvency proceedings on the law applicable to a security right

29. Article 92 is based on recommendation 223 of the Secured Transactions Guide (see chap. X, paras. 80-82). Its purpose is to establish that an insolvency court in the enacting State must in principle respect the law applicable to security rights under its conflict-of-laws rules. However, nothing in article 92 restricts the application of the law of the State in which insolvency proceedings are commenced (*lex fori concursus*) to matters such as the avoidance of fraudulent or preferential transactions, the treatment of secured creditors, the ranking of claims and the distribution of proceeds in the grantor's insolvency.

B. Asset-specific rules

Article 93. Law applicable to the rights and obligations between third-party obligors and secured creditors

30. Article 93 is based on recommendation 217 of the Secured Transactions Guide (see chap. X, paras. 62 and 63) and article 29 of the Assignment Convention. Its purpose is twofold. First, the conflict-of-laws rules on the third-party effectiveness or enforcement of a security right do not apply to the effectiveness or enforcement of a security right against a debtor of a receivable, an obligor under a negotiable instrument or an issuer of a negotiable document; they are not considered "third parties" for the purposes of the rules on third-party effectiveness and priority of a security right, as they are not competing claimants. Second, the law applicable to these issues is the law governing the legal relationship between the grantor and the relevant debtor of the receivable, or the relevant obligor under the instrument or the issuer of the document; the same law also applies to the question of whether any of the latter may invoke that their agreement with the grantor prohibits or limits the grantor's right to create a security right in the relevant receivable, instrument or document.

Article 94. Law applicable to a security right in a right to payment of funds credited to a bank account

31. Article 94 is based on recommendation 210 of the Secured Transactions Guide (see chap. X, paras. 49-51). It departs from the general conflict-of-laws rule on the law applicable to intangible assets (see art. 84). A right to payment of funds credited to a bank account is in the generic sense a receivable of the customer against the depositary institution but a different rule applies in this case for the determination of the applicable law. Two options are offered to the enacting State for the law applicable to the creation, third-party effectiveness, priority and enforcement of a security right in a right to payment of funds credited to a bank account, as well as to the rights and obligations between the depositary institution and the secured creditor.

32. Under option A, the applicable law is that of the State of the location of the branch or office of the depositary institution with which the account is maintained. It should be noted that a branch (or office) of a depositary institution may be considered as being located in a particular jurisdiction irrespective of whether the institution offers its services through physical offices or only through an online connection accessible electronically by customers. In this regard, it should be noted that a depositary institution must generally have a physical presence or legal address in a jurisdiction in order to be allowed by the relevant regulatory authorities to carry on business in that jurisdiction.

33. Under option B, the applicable law is the law designated in the account agreement as governing the issues that are the subject of article 94 or, in the absence of a designation of a law for these issues, the law designated by the parties to the account agreement as the law governing that agreement. To be effective for conflict-of-laws purposes, a designation must refer to the law of a State in which the depositary institution is engaged in the business of maintaining bank accounts. It must be noted, however, that the State whose law is so designated may be different than the State in which the grantor's bank account is maintained.

34. If the applicable law cannot be determined as described in the preceding paragraph, option B provides for a series of rules along the lines of the default rules contained in

article 5 of the Hague Securities Convention, which the enacting State may wish to insert in this article, if it decides to adopt option B of article 94.

Article 95. Law applicable to the third-party effectiveness of a security right in certain types of asset by registration

35. Article 95 is based on recommendation 211 of the Secured Transactions Guide (see chap. X, para. 34). This article is an exception to the conflict-of-laws rules on the third-party effectiveness of a security right in a negotiable instrument, negotiable document, right to payment of funds credited to a bank account or certificated non-intermediated security. Under articles 83, 94 and 97, the effectiveness against third parties of a security right in any of these assets is governed by the law of a State which may be different from the State of the location of the grantor. However, under article 95, if the State of the location of the grantor recognizes registration of a notice as a method of third-party effectiveness for a security right in a negotiable instrument, negotiable document, right to payment of funds credited to a bank account or certificated non-intermediated security, then the law applicable to third-party effectiveness by registration is the law of the State in which the grantor is located.

Article 96. Law applicable to a security right in intellectual property

36. Article 96 is based on recommendation 248 of the Intellectual Property Supplement (see paras. 284-337). The effect of paragraph 1 is the following. If intellectual property is protected in a particular State, the law of that State will apply to the requirements to be met for the security right in that intellectual property to be considered as having been created, made effective against third parties and enjoying priority. It should be noted that a security right in intellectual property may be granted by any person that is entitled to use the related intellectual property under the relevant intellectual property law. Therefore, the grantor may be an owner, a transferee, a licensor or a licensee of the intellectual property to be encumbered.

37. Paragraph 2 provides for an alternative way to create and make effective against certain third parties a security right in intellectual property. Under paragraph 2, the secured creditor may also use for these purposes the law of the State in which the grantor is located. The principal benefit of paragraph 2 is that if the security right has been made effective against an insolvency representative of the grantor under the law of the State in which the grantor is located, an insolvency court in the enacting State will recognize the security right even if the third-party effectiveness requirements of all States in which the intellectual property is protected have not been fulfilled.

38. Paragraph 3 refers to the law of the State in which the grantor is located for enforcement issues relating to intellectual property. If enforcement involves several acts that take place in several States, this rule would still lead to the application of one and the same law because it is unlikely that the grantor's location would change between any of those acts. Moreover, in the rare case where there would be such a change, it is assumed that a court would refer to the law of the State in which the grantor is located at the time of commencement of the enforcement. It should be noted that the effectiveness of the security right against persons other than the grantor (e.g. the licensor of the intellectual property, if the grantor is a licensee) is outside the scope of this article.

Article 97. Law applicable to a security right in non-intermediated securities

39. […].

[*Note to the Commission: The Commission may wish to note that the commentary to article 97 will be prepared after the Commission has made a decision as to which of the options is to be retained or, alternatively, whether the article should include several options, and reached an agreement as to the contents of the article*.]

Article 98. Law applicable in the case of a multi-unit State

40. Article 98 is based on recommendations 224-227 of the Secured Transactions Guide (see chap. X, paras. 83-87). Its purpose is to deal with the law applicable where the State

whose law is applicable has two or more territorial units. In such a case, paragraph 1 provides that a reference to the law of a multi-unit State is a reference to the law applicable in the relevant unit. For example, in a federal State, secured transactions laws may fall under the legislative authority of one of its territorial units. In such case, each unit will have its own substantive law and conflict-of-laws rules. Under paragraph 2, the relevant unit is to be determined on the basis of the location of the grantor or of the encumbered asset, or otherwise under the provisions of this chapter. It should be noted that paragraphs 1 and 2 are interpretative provisions and also apply where the forum State is the State whose law is applicable under the provisions of this chapter.

41. Where the applicable law is that of a multi-unit State, paragraph 3 provides that the conflict-of-laws rules in the relevant State or territorial unit will determine whether to apply the law of a different territorial unit in the State (see Secured Transactions Guide, chap. X, para. 85). This means that the forum court is required to examine the internal conflict-of-laws rules of the State of the location of the grantor or the encumbered asset. In this regard, the Assignment Convention allows a declaration by States as to the determination of the applicable priority rule as between various territorial units (on art. 37 of the Assignment Convention), but in this article there would be no declaration and the forum court would have to determine the applicable law under the conflict-of-laws rules of the multi-unit State.

42. To illustrate how the rule in paragraph 3 will operate, assume that the conflict-of-laws rules of this chapter refer to the law of the location of the grantor and that the location of the grantor under this chapter is in a territorial unit of a multi-unit State whose laws (including its conflict-of-laws rules) govern secured transactions. Also assume that the location of the grantor under this chapter is in unit A of that multi-unit State (unit A being the place of central administration of the grantor). If, however, the conflict-of-laws rules of unit A refer to the law of unit B as being the applicable law (e.g. because unit B also refers to the location of the grantor but defines the location of the grantor as its statutory seat instead of its place of central administration), then the forum court would have to apply the law of unit B if the statutory seat of the grantor is in unit B.

43. Paragraph 3 is indirectly an exception to the exclusion of the doctrine of *renvoi* (see art. 90) as it introduces "internal *renvoi*". The purpose of the exception is to ensure that where the applicable law is that of a unit of a multi-unit State, a forum court outside that multi-unit State will apply the substantive law of the same unit as a forum court in that multi-unit State.

Chapter IX. Transition

Introduction

44. This chapter has three functions. First, it provides that prior law governing security rights (the "prior law") is to be repealed (see art. 99). Second, it provides rules governing the treatment under the new secured transactions law (the "new law") of security rights that are created while the prior law is in force but continue to be effective, perhaps for extensive periods of time, after the new law enters into force (see arts. 100-104). Third, it provides for the setting of a date on which the new law goes into effect (see art. 105). Thus, this chapter provides rules by which the law governing such security rights moves in a fair and efficient manner from the prior law to the new one (see Secured Transactions Guide, chap. XI, paras. 1-3).

Article 99. Amendment and repeal of other laws

45. The Model Law is intended as a complete system of secured transactions law, replacing in its entirety the prior law, rather than a supplement to existing law. Accordingly, the enacting State should list in paragraph 1 and thus repeal the body of laws that comprise its secured transactions law. The way in which the repeal is effectuated will depend on the form of the prior law. Where the prior law is a free-standing code or the like, that code can be repealed in its entirety. Where the prior law is derived from statutes that also address other topics, though, the enacting State must determine how to excise the rules formerly

governing security rights from the rules that apply to other topics. Where part of the prior law is based on judicial opinions (as may be the case, for example, in some common law systems), the method of repeal of the prior law must be determined by the enacting State.

46. Many other bodies of law interact with secured transactions law. In some cases, provisions of those other bodies of law may be written on the assumption that prior secured transactions law is in effect. Paragraph 2 provides the enacting State an opportunity to amend those provisions so as to mesh with the new law. It should be noted that, like any other article of the Model Law, article 99 can have effects only when the new law enacting the Model Law enters into force according to article 105. Thus, the existing laws are amended or repealed only as of the date the new law enters into force (in other words, there is no time in which neither set of rules governs secured transactions).

Article 100. General applicability of this Law

47. Paragraph 1 of this article defines two terms used in this chapter. According to subparagraph 1(a), "prior law" means the law of the State (whether the enacting State or another State), whose law was applicable under the conflict-of-laws rules of the enacting State before the entry into force of the new law. As a different law may be applicable to the various security right issues (i.e. contractual rights and obligations between the grantor and the secured creditor, creation, third-party effectiveness, priority and enforcement of a security right, as well as effectiveness of the security right against a third-party obligor) prior law means the law applicable to the relevant issue.

48. According to subparagraph 1(b), "prior security right" is a right created by an agreement entered into before the entry into force of the new law, provided that the new law would treat that right as a security right. This is the case even if the agreement covers future assets (see art. 2, subpara. (n)). As a result, such a security right will be governed by the transition provisions of the Model Law.

49. Paragraph 2, which is based on recommendation 228 (second sentence) of the Secured Transactions Guide (see chap. XI, paras. 7-12), states the general rule of the applicability of the new law. It provides that, when it enters into force under article 105, the new law enacting the Model Law will apply to all security rights within its scope, including prior security rights, except as otherwise provided in this chapter (e.g. art. 101). Much of the remainder of the chapter is devoted to describing exceptions to this general rule. Read together, the rule in paragraph 2 and the exceptions in the remainder of the chapter result in a transition period during which the new law will apply to all new transactions while some aspects of the prior law will continue to apply to some issues related to prior security rights until the expiration of the period described in article 103, subparagraph 1(b).

50. As a result of paragraph 2, prior security rights may be governed, at least in part, by the new law. Inasmuch as many secured transactions endure for several years, if the new law applied only to security rights created by agreements entered into after the effective date of the new law, the prior law would persist for a lengthy period during which lenders, borrowers, attorneys, and judges would need to apply both laws and search for competing claimants under the rules of both. This result would entail additional cost as well as delaying the economic benefits of the new law.

Article 101. Applicability of prior law to matters that are the subject of proceedings commenced before the entry into force of this Law

51. Article 101 is based on recommendation 229 of the Secured Transactions Guide (see chap. XI, paras. 13-16). It introduces an exception to the rule in article 100, paragraph 2, that the new law applies to all security rights within its scope, including prior security rights. In particular, paragraph 1 provides that, if a matter with respect to a security right is the subject of litigation or arbitral proceedings commenced before the new law enters into force, the law governing the substance of the dispute will remain the prior law. This paragraph applies to all disputes arising under the prior law, whether between the secured creditor and the grantor, the secured creditor and a competing claimant, or the secured creditor and a person liable, for example, on a receivable or negotiable instrument. It should be noted that the commencement of litigation before the new law enters into force with respect to one

dispute does not preclude application of the rules of the new law to a separate dispute arising under the same security agreement.

52. Paragraph 2 provides a substantive rule about the enforcement of security rights created under prior law. Under the rule in this paragraph, if enforcement is commenced under prior law (what constitutes "enforcement" and when "enforcement" begins is a matter of prior law), the secured creditor may continue enforcement under the rules of the prior law even after the new law enters into force (what constitutes "enforcement" under the new law is addressed in chapter VII). This means that, whether any of the enforcement remedies are exercised with or without application to a court or other authority results in a clear statement that, if enforcement commenced before the new law entered into force, the secured creditor may continue under the prior law, or discontinue enforcement and commence it under the new law. Thus, even if the secured creditor enforces its security right without applying to a court or other authority, for example, by taking one of the steps necessary to obtain possession of an encumbered asset before the new law enters into force, the secured creditor may choose to have its other enforcement actions that are independent of obtaining possession (such as the disposition of the encumbered asset and the distribution of the proceeds) be governed by the prior law.

Article 102. Applicability of prior law to the creation of a prior security right

53. Article 102 is based on recommendation 230 of the Secured Transactions Guide (see chap. XI, paras. 17-19). This article contains two rules. First, paragraph 1 makes clear that prior law determines whether a security right putatively created before the new law enters into force was indeed created effectively. Second, under paragraph 2, a prior security right that was effectively created under prior law will remain effective between the parties under the new law even if the requirements for creation under the new law have not been satisfied. This rule avoids the invalidation of prior security rights and the creation of a situation in which the secured creditor would need to obtain cooperation from the grantor to take the additional steps necessary to continue the existence of the security right under the new law. Such cooperation may not be forthcoming from a grantor that has already received an extension of credit secured by the security right in the encumbered asset.

Article 103. Transitional rules for determining the third-party effectiveness of a prior security right

54. Article 103 is based on recommendation 231 of the Secured Transactions Guide (see chap. XI, paras. 20-22). Under this article, a security right created and made effective against third parties under prior law before the effective date of the new law remains effective against third parties for a period of time under the new law, even if the conditions for third-party effectiveness under the new law have not been satisfied. The period expires at the earlier of the time when the third-party effectiveness of the security right would have ceased under prior law (see subpara. 1(a)) or at the time specified in subparagraph 1(b).

55. Illustration: Under the former secured transactions law of State X, a security right in receivables could be made effective against third parties by notifying the debtor of the receivable (the "Debtor"); however, such notification would cease to be effective after one year unless the secured creditor (the "Creditor") sent a renewal notice to the Debtor, which would extend the effectiveness of the notice for another year. When State X enacted the Model Law, it inserted "three years" as the time period in subparagraph (1)(b). On 1 July of Year 1, prior to the effective date of the new secured transactions law, the Grantor created in favour of the Creditor a security right in receivables owed to the Grantor by the Debtor, and the Creditor notified the Debtor about the security right. The effective date of the new law in State X is 1 January of Year 2. Under subparagraph (1)(a), the security right of the Creditor would cease to be effective against third parties under prior law on 1 July of Year 2. Under subparagraph (1)(b), the third-party effectiveness would cease on 1 January of Year 5. As 1 July of Year 2 (the date identified in subparagraph 1(a)) is earlier than 1 January of Year 5 (the date identified in subparagraph (1)(b)), third-party effectiveness will cease on 1 July of Year 2, unless the requirements of the new law are satisfied.

56. A security right that would cease to be effective against third-parties under the rule in paragraph 1 may continue to be effective against third parties if the secured creditor takes the appropriate steps under the new law to achieve third-party effectiveness. Most often, this

result will be accomplished by registering a notice with the Registry. The secured creditor's ability to do so is aided by paragraph 4, which provides that the prior written agreement creating the security right constitutes sufficient authorization for registration of the notice.

57. Paragraphs 2 and 3 address the continuity of third-party effectiveness of a prior security right in situations in which: (a) a security right was initially effective against third parties under the new law only by operation of paragraph 1; and (b) the requirements for third-party effectiveness under the new law were satisfied only after the new law entered into force. Paragraph 2 provides that, if the requirements for third-party effectiveness under the new law are satisfied before the expiration of the period specified in paragraph 1, the prior security right continues to be effective against third parties from the time when it was made effective against third parties under prior law and, thus, priority under the relevant rules according to which priority depends on the time of third-party effectiveness will date from that time.

58. If, however, the requirements for third-party effectiveness of the prior security right are satisfied only after the expiration of the period specified in paragraph 1, there will be a gap between the expiration of third-party effectiveness under paragraph 1 and the achievement of third-party effectiveness under the new law. In that case, paragraph 3 provides that the security right is effective against third parties only from the time it is made effective against third parties under the new law and, thus, priority under the relevant rules according to which priority depends on the time of third-party effectiveness dates only from that time.

Article 104. Application of prior law to the priority of a prior security right as against the rights of competing claimants arising under prior law

[*Note to the Commission: The Commission may wish to note that the commentary to this article has been prepared on the assumption that the Commission will decide to delete article 104, paragraph 1, because it is inconsistent with article 103*.]

59. Like article 103, article 104 deals with a situation in which the priority of a security right as against competing claimants will be determined by reference to prior law. Under article 103, the time when third-party effectiveness was achieved under prior law is utilized in some circumstances in determining priority under the priority rules in the new law. Under article 104, there are some situations in which priority under the new law is determined altogether by application of prior law.

60. In particular, under the rule stated in paragraph 1, the prior law, rather than the new law, determines the priority of a prior security right against competing claimants if that security right and the rights of all competing claimants arose before the entry into force of this Law and the "priority status" of competing claimants has not changed. Paragraph 2 provides that the priority status of a security right has changed if either of the two events has occurred. First, the priority status has changed if: (a) the prior security right was effective against third parties under the new law only because of the rule in article 103(1); and (b) third-party effectiveness ceased [because the expiration of the time period described in article 103(1) occurred before the necessary actions occurred to make the security right effective against third parties under the new law.] Second, the priority status of a security right has changed if it was not effective against third parties under the prior law at the time the new law entered into force but became effective against third parties when the new law entered into force or thereafter. The purpose of this rule is to preserve priority among completing claimants that was established under the prior law when no change has occurred other than the new law becoming effective.

Article 105. Entry into force of this Law

61. Article 105 is based on recommendation 228 of the Secured Transactions Guide (see chap. XI, paras. 4-6). It leaves it to the enacting State to determine the date when or the mechanism according to which the new law will enter into force. The enacting State may also wish to determine whether this article should be placed at the beginning or at the end of the new law.

62. In determining when the new law will enter into force, careful consideration should be given both to obtaining the economic benefits of the new law as soon as possible and to minimizing dislocations that may be caused by significant changes in secured transactions practice resulting from the new law. Inasmuch as the new law will have been chosen because it is an improvement over the prior law, the new law should come into force as soon as is practical. However, some lead time is necessary in order to, inter alia: (a) publicize the existence of the new law; (b) enable establishment of the Registry (or adaptation of an existing registry to the registry system required by the new law); and (c) enable participants in the secured transactions system, particularly present and future secured creditors, to prepare, for example, for compliance with new rules and develop new forms. For example, the new law may enter into force on a specific date or a few months after a specific date, or on the date to be specified by a decree once the Registry becomes operational.

I. Note by the Secretariat on a draft model law on secured transactions: compilation of comments

(A/CN.9/886)

[Original: English]

Contents

I. Introduction

1. At its twenty-eighth and twenty-ninth sessions (Vienna, 12-16 October 2015, and New York, 8-12 February 2016, respectively), Working Group VI (Security Interests) adopted a draft model law on secured transactions (the "draft Model Law") (A/CN.9/865 and A/CN.9/871) and, at its twenty-ninth session, decided to submit it to the Commission on the understanding that the Secretariat would make the text of the draft Model Law available to States for comment (A/CN.9/871, paragraph 91).

2. This note sets forth, with minimal editorial modifications, the first comments received from Governments. Any further comments will, upon receipt by the Secretariat, be included in document A/CN.9/887.

II. Comments on the draft Model Law

A. United Kingdom of Great Britain and Northern Ireland

[Original: English]
Date: 26 April 2016

Chapter I. Scope of application and general provisions

3. Article 2(i)(ii): The words "A transferor in an outright transfer of a receivable" should be deleted. The transferor is the grantor (in the transaction) (see art. 1(2)), and not the debtor of the receivable.

4. Article 2(j): The square bracketed words should be retained outside square brackets as they make the position clearer.

5. Note to Commission after article 2(u): This is a good idea. The term "immovable property" should be retained within square brackets as a different term might be used in the law of the enacting State (e.g., English law uses the term "land").

6. Article 2(x): We note that the draft Guide to Enactment explains that the draft Model Law does not include a provision implementing the recommendations of the Secured Transactions Guide with respect to electronic communications (see Secured Transactions Guide, recs. 11 and 12) on the assumption that other law would address this matter (A/CN.9/885, para. 50), but we would like to raise the question whether the term "writing" should be defined in the draft Model Law.

Chapter II. Creation of a security right

7. Article 13(4)(a): Either the term "financial services" should be defined, or, at least, it should be made clear in the draft Guide to Enactment that it is a term which is likely to be defined elsewhere in national law and that the meaning here is to be the same.

Draft Model Registry-related provisions

8. The draft Guide to Enactment should stress that the terms, and therefore the rules, of these provisions are fully compatible with fully electronic registration, so that a "prescribed registry notice form'', for example, could be a website form, that communications from the Registry (e.g. under articles 5 and 6) could be automated messages and that the "entry of information" under article 13(2) could be automatic. Effectively, under an electronic system much of what is said to be done by the "Registry" is done by the computer programme setting up the registration system.

9. Article 5(4): Reference should be made to access "to registry services", as the heading of each article is not actually part of the law and thus its contents could not be read down into the law.

10. Note to the Commission after article 5(4): The suggestion of an extra paragraph along the lines of article 6(3) is helpful, but the requirements of article 5(3) should also be included.

11. Article 20(1)(a): The words "and the secured creditor knows that the grantor will not authorize that registration" establish an impossible test, as the secured creditor has no way of knowing what the grantor will do in the future, and it is unreasonable to put an obligation on him depending on knowledge that he cannot have (it is different if the criterion is couched in terms of a communication from the grantor that he will not register, as that is a positive measurable act). So we would suggest the following revised draft: "… and the secured creditor has been informed by the grantor that he will not authorize that registration;". The same change should be made to article 20(2)(a) and 20(3)(a)(i).

Chapter V. Priority of a security right

12. Article 36, option A (1): This is still too long and confusing. Reference should be made to equipment and its intellectual property equivalent. The same applies to article 39 Option A (1).

Chapter VI. Rights and obligations of the parties and third-party obligors

13. Article 51 and 53(1)(a): The words "and its value" should be deleted. There are many situations where the grantor (or secured creditor) cannot be expected to preserve the value of an asset. And this article cannot be contracted out of. If it is said that these situations are covered by the "reasonable" in "reasonable care", this is very unclear.

14. Article 61(2): The term "payment instruction", used here and elsewhere in this article and in other articles, should ideally be defined, as it is not clear that the instruction "subsequently by the secured creditor" is a "payment instruction" referred to here and subsequently. If "payment instruction" were not to be defined, it might be enough just to substitute "that" for "the" at the end of the paragraph.

15. Article 61(5): The phrase "its right from the initial or any other secured creditor" is confusing. It is not clear whether it is the "initial creditor" or the "initial secured creditor". If it means the initial secured creditor, the sense could be clarified by commas: "its right from the initial, or any other, secured creditor".

16. Article 61(6): Insert "either" and a comma after "notification" (an Oxford comma) to make it clear which are the two alternatives.

Chapter VII. Enforcement of a security right

17. Article 72, option A: In relation to "the debtor, the grantor or a competing claimant". To include a co-owner, say "the debtor, the grantor or any other person with a right in the encumbered asset".

18. Article 73(2): This is still unclear and does not take account of the fact that all the possibilities envisaged could happen. Revise to read as follows: "This right of termination may be exercised until the earliest of the following:

(a) The asset is sold or otherwise disposed of;

(b) The asset is acquired or collected by the secured creditor; or

(c) An agreement by the secured creditor for the sale or other disposition of the asset is concluded".

19. Article 75(1): Insert the words "or without applying" (perhaps as "either by applying or without applying to ..."), since otherwise paragraph 3 does not make sense as there is no right (established under the draft Model Law) to obtain possession without applying to a court.

20. Article 76(1): As mentioned above, the word "either" could usefully be inserted here so that it reads: "either by applying or without applying".

21. Article 76(4): The words "sell or otherwise dispose of, lease or license an encumbered asset" might be replaced with the words "exercise the right provided in paragraph 1" to be the same as in paragraphs 2 and 3.

22. Article 76(4)(b) and (c) and (5): The use of the term "notice" is potentially ambiguous. There are two notices, notice of intention to sell etc. and notification by the person with a right. Say: "before the notice of the secured creditor's intention is sent" (in article 76(5) as well).

23. Article 78(5): We would like to raise the question of what the sanction would be if the secured creditor did not proceed as indicated.

24. Note to Commission after article 78(5): A time restriction seems implicit in the wording of the Secured Transactions Guide, (see chap. VIII, para. 70).

B. United States of America

[Original: English]
Date: 27 April 2016

Chapter I. Scope of application and general provisions

25. Article 2(v): To conform exactly to the definition of "intermediated securities" in the Unidroit Convention on Substantive Rules for Intermediated Securities, the words "or interests" should be added after the words "and rights".

26. Article 2(jj): In the definition of "tangible asset", the reference to article "32" should be to article "31".

27. Article 3: A provision should be added making it clear that "Nothing in this Law affects any agreement to the use of alternative dispute resolution, including arbitration, mediation, conciliation and online dispute resolution".

[*Note to the Commission: Pursuant to a decision of the Working Group (see A/CN.9/871, para. 85), this matter was addressed in the draft Guide to Enactment (see A/CN.9/885/Add.3, paras. 55 and 58).*]

Chapter II. Creation of a security right

28. Article 6, heading: To carry out the decision of the Working Group to revise the heading of article 6 to better reflect its content (see A/CN.9/865, para. 48), the heading should be changed to "Creation of a security right; requirements for a security agreement". The reason is that article 6 deals not only with the general rules for the creation of a security right but also with the requirements for a security agreement. Alternatively, the Commission may wish to consider whether to limit article 6 to the general rules about creation and move rules about security agreements to their own article.

29. Article 6(3)(b): While this provision states that the security agreement must "describe the secured obligation", no standards are provided for the description of the secured obligation (art. 9(1) provides standards for the description of the encumbered assets). In addition, this language suggests that a security right may secure only one obligation. That point can be addressed in article 7, but we think that there should be some general guidance comparable to the standard in article 9(1) for the description of the encumbered assets. Language to the effect that "the obligations secured or to be secured must be described in the security agreement in a manner that reasonably allows their identification" would suffice.

This would make it clear, for example, that a statement that the security right secures "all obligations owed to a secured creditor at any time" will be sufficient even though the description does not identify each obligation separately.

30. Article 7: To make it clear that a security right may secure more than one obligation, the first sentence should be amended to state: "A security right may secure one or more obligations of any type, …".

31. Article 10(2)(b): This provision should be slightly rewritten so that it reads: "The security right in the commingled money or funds is limited to the amount of money or the amount of funds credited to the bank account immediately before they were commingled". The reference to the value of the money or funds in the current text is unnecessary inasmuch as money and funds do not need to be valued.

32. Article 10(2)(c): Similarly, this provision should be rewritten so that it reads: "If at any time after the commingling, the amount of commingled money or the balance credited to the bank account is less than the amount of proceeds immediately before they were commingled, the security right in the commingled assets is limited to the lowest amount between the time when the proceeds were commingled and the time when the security right is claimed".

33. Article 11(1): This provision incompletely states the situation to which it applies. It should be amended so that it reads: "A security right in a tangible asset other than money that is commingled in a mass of tangible assets of the same kind and is no longer separately identifiable or is combined with other tangible assets to create a new product extends to the mass or product".

34. Article 11[3][4]: This provision should be deleted, as the subject it addresses is addressed in article 31 (and addressed more completely there). In addition, the rule stated in this provision is a rule about the relative rights of two secured creditors and, thus, is not appropriate for this chapter, which is about the existence of a security right and not about the relative rights of that security right as against the rights of others.

35. Article 11, options A and B: These options are difficult to administer inasmuch as it will rarely be the case that encumbered assets will be valued immediately before commingling in a mass or product. In addition, in the case of encumbered assets commingled with other tangible assets to create a new product, the limit of the value of the secured creditor's interest in the product to the value of the encumbered asset before commingling with other assets may inappropriately create situations in which a product created solely from the commingling of encumbered assets is nonetheless partially unencumbered.[1]

36. Thus, an option C should be added to read: "In the case of a security right that extends to a mass, the security right is limited to the quantity of goods that were commingled. In the case of a security right that extends to a product, the security right in the product is limited to the same proportion of the value of the product as the value of the encumbered assets immediately before they became part of the product bore to the aggregate value of all of the assets that were combined to form the product".

37. According to this option: (a) in the case of tangible assets other than money that are commingled in a mass of tangible assets of the same kind, the security right will be limited to a quantity of encumbered assets commingled in the mass no greater than the quantity of its encumbered assets before the commingling (thereby eliminating the need to determine the value of those assets immediately before commingling); and (b) in the case of encumbered assets that become part of a product, the "same proportion" rule from option B, paragraph 2, will be utilized but in a way that is mathematically more precise.

38. Article 12: The current text conflates two different points. It should be amended so that it states: "A security right is extinguished when all obligations secured by the security

[1] Consider a case in which $3,000 worth of sugar that is subject to a security right of SC1 is combined with $4,000 worth of flour that is subject to a security right of SC2 to create a cake worth $12,000. Under options A and B, only $7,000 of the cake would be encumbered and the remainder would be free of any security right, even though the cake was created entirely from the combination of encumbered assets.

right have been discharged (by payment or otherwise) and there are no outstanding commitments to extend credit secured by the security right".

39. Article 13(2): To assure that this provision does not override or limit the protection given to secured creditors in the last portion of article 13(2), it should be amended to begin with the phrase: "Without limiting in any way the protection against claims provided to secured creditors in paragraph 2 …".

40. Article 13(4)(d): To avoid confusion, this provision should be more closely aligned with article 1(3)(d) which limits the scope of the draft Model Law with respect to financial contracts governed by netting agreements to payment rights arising upon the termination of all outstanding transactions.

41. Article 14: The interaction between paragraphs 1 and 2 is potentially confusing, and the article should be amended to read as follows:

> "1. A secured creditor with a security right in a receivable or other intangible asset, or a negotiable instrument, has the benefit of any personal or property right that secures or supports payment or other performance of the encumbered asset.
>
> 2. Nothing in this Law imposes any requirement of a separate act of transfer of the personal or property right referred to in paragraph 1. If, under other law, the right referred to in paragraph 1 is transferable only with a new act of transfer, the grantor is obliged to transfer the benefit of that right to the secured creditor."

Chapter III. Effectiveness of a security right against third parties

42. Article 18(1): Inasmuch as the draft Model Law does not refer to specialized registries, the reference to "the general security rights registry" should be changed to a reference to "the security rights registry."

43. Article 22(1): The phrase "as a result of a change in the location of the encumbered asset or the grantor, whichever determines the applicable law under the provisions of chapter VIII" should be deleted because there are circumstances in which a change of the applicable law may occur for reasons other than a change in the location of the encumbered asset or the grantor. For example, in the case of funds credited to a bank account, the depositary institution may change its place of business.

44. Article 23: Option A raises the possibility that, rather than a security right either being effective against third parties or not effective against third parties, a security right can be effective against some third parties and not others. Thus, the phrase "other than a buyer or other transferee, lessee or licensee" is actually a priority rule, indicating that those parties have priority over a security right made effective against third parties solely under article 23, and should be stated as such. In option B, the reference within square brackets to the "value" to be specified by an enacting State should be changed to a "price" to be specified by an enacting State. The price of goods is usually determined quite easily, while the value of those goods can be the subject of dispute.

45. Article 25(3): The security right should remain effective against third parties "for [a short period of time to be specified by the enacting State] after the document *or the asset* has been returned to the grantor or other person ...". Otherwise, the rule would not be applicable to a situation in which the secured creditor instructs the issuer to release the asset and surrenders the document directly to the issuer. In such a case, the grantor never receives the document and, under the rule as written, the secured creditor would not be protected by the grace period. We believe that there is no practical reason to treat differently these two situations: (a) return of the document to the grantor; and (b) delivery of the document to the issuer with a request that the issuer release the asset. It is essential that this rule adequately covers the existing practices, including where the negotiable document is released to a logistics provider, which is covered by the reference to an "other person."

Chapter IV. The registry system

Draft Model Registry-related provisions

46. Article 6(1)(a) and (2): These provisions should be reformulated to state that: "A notice if no information is entered in one of the mandatory designated fields or some information entered in one of the mandatory designated fields is illegible" and "The Registry must reject a search request if no information is entered in one of the fields designated for entering a search criterion or the information entered in a field designated for entering a search criterion is illegible." As presented, the rule may be interpreted to require the Registry to accept a notice if some, but not all, information in a mandatory designated field is legible, which was not the intended result. For example, an address may contain a street number that is illegible and a street name that is legible. Clarity of this provision is essential for the proper design of a registry system. The Registry would seem to have to accept such a notice under this formulation. This proposal would restore the wording of this provision as included in article 7(1) and (2) of document A/CN.9/WG.VI/WP.65/Add.1.

47. Article 8(a): It should be revised to read: "The identifier and address of the grantor in accordance with article 9 of these provisions [and any additional information that the enacting State may decide to require to be entered to assist in uniquely identifying the grantor]". The reason for moving that phrase "in accordance with article 9 of these provisions" to precede the bracketed language is that article 9 does not refer to additional information. It only prescribes rules in relation to the identifier of the grantor.

Chapter V. Priority of a security right

48. Article 28(2): For greater clarity, this provision which deals with a relatively uncommon issue, be removed from article 28 and placed in its own article.

49. Article 29: To avoid inadvertent inconsistency with articles 44-47 and 49, which give higher priority to security rights made effective by some methods (such as control) than other methods, the rule in this article should be made subject to those articles.

50. Article 30: In order to more clearly describe the topic that this article addresses, the heading should be changed to "Priority of a security right in proceeds". In addition, the text of this article should redrafted to read as follows: "If a security right in proceeds of an encumbered asset is effective against third parties as provided in article 19, the priority of the security right in the proceeds is determined by using the same date used to determine the priority of the security right in the encumbered asset against competing claimants". This is to make it clear that, if the proceeds are in the form of receivables arising from the sale of inventory, the priority of the security right in the receivables will be determined by using the same date as the date that would have been used to determine the priority of the security right in the inventory.

51. Article 31(2) and (3): As it stands, these paragraphs address matters also addressed in article 11 in a manner not consistent with that article. We have proposed deleting the inconsistent portions of article 11 (see para. 34 above). If that proposal is not accepted by the Commission, these paragraphs should be aligned with article 11.

52. Article 32: To avoid inadvertent inconsistency with articles 44-47 and 49, which provide that, in some circumstances, buyers or other transferees take free of security rights made effective against third parties by certain methods, the rule in this article should be made subject to those articles.

53. Article 35(2)(a): In order to make this provision more easily understandable, it should be reordered so that it reads: "Before the time when the secured creditor received a notice from the judgement creditor that the judgement creditor has taken the steps referred to in paragraph 1 or within [a short period of time to be specified by the enacting State] thereafter".

54. Note to the Commission after article 35: The matter raised in the notice should be addressed either by: (a) retaining the bracketed words outside square brackets in paragraph (2); or (b) rewriting paragraph 2 so that it reads: "If the right of a judgement creditor does not have priority under paragraph 1, the security right has priority but that priority is limited to the greater of the credit extended by the secured creditor".

55. Article 36, option A (2)(b)(i) and (2)(b)(ii): The word "notice" is used with two inconsistent meanings. In article 36(2)(b)(i), the term is used in the sense defined in article 1(f) of the Model Registry-related Provisions, while in article 36(2)(b)(ii) the term is used in the sense defined in article 2(x) of the draft Model Law. To avoid the confusion that will result from the use of the same term in adjoining provisions to convey different meanings, a different term, such as "notification", should be used.

56. Article 36, option A (3): The bracketed language at the end of this provision goes beyond aligning it with article 23, option B and, instead, inadvertently creates an unintended substantive rule. Article 23, option B provides that the automatic third-party effectiveness under article 23 is limited to consumer goods below a value to be specified by the enacting State. Of course, though, in such cases, the secured creditor can achieve third-party effectiveness of its security right by registration of a notice. Under the language of Article 36, option A (3), however, when the encumbered assets are above the value specified by the enacting State, the acquisition security right is ineligible for the "super-priority" provided by this article even if that security right is promptly made effective against third parties. As a result, it would be possible for a secured creditor to obtain "super-priority" for its security right in all assets subject to an acquisition security right (including high-value equipment and inventory) except for high-value consumer goods. To avoid this unintended result, option A (3) should be reworded to read: "An acquisition security right in consumer goods and intellectual property or rights of a licensee under a licence of intellectual property that is used or intended to be used by the grantor primarily for personal, family or household purposes has priority over a competing non-acquisition security right created by the grantor in the same asset [to be added only if the State has enacted article 23, option B], if the security right is effective against third parties under article 23 or a notice with respect to the acquisition security right is registered in the Registry not later than the expiry of [a short period of time to be specified by the enacting State] after the grantor obtains possession of the consumer goods, or the agreement for the sale or licence of intellectual property has been concluded".

57. Article 36, option B (1)(a) and (1)(b): The references to "consumer goods" should be deleted inasmuch as consumer goods are already excluded in the chapeau of paragraph 1.

[*Note to the Commission: The Commission may wish to note that the same issue arises in article 36, option A (1)(a) and (1)(b).*]

58. Article 39, option A (3): The phrase "the acquisition secured creditor notifying non-acquisition secured creditors" should be clarified to make explicit whether the reference is to the sending of a notification or the receipt of the notification.

Chapter VI. Rights and obligations of the parties and third-party obligors

59. Article 54(1): This provision should be amended to read: "Within [a short period of time to be specified by the enacting State] after receipt of a *written* request by a grantor …".

60. Article 57(1)(a) should be amended to read as follows: "If payment is made to the secured creditor or a tangible asset is returned to the *secured creditor* with respect to the receivable, …". Otherwise, it is essentially identical in effect to article 57(1)(b) with respect to returned tangible assets.

61. Article 60(4): The word "subsequent" qualifying a security right should be deleted as unnecessary and possibly confusing.

[*Note to the Commission: The Commission may wish to note that article 61(5) refers to "subsequent security rights in the same receivable created by a secured creditor that acquired its right from the initial or any other secured creditor".*]

Chapter VII. Enforcement of a security right

62. Article 72: It should be made clear that the words "is entitled to …" apply to both options A and B.

63. Article 75(4): The reference to assets of a kind sold on a recognized market should be deleted as it is irrelevant to the right of the secured creditor to obtain possession of the encumbered asset without notice to the grantor.

64. Article 77(3): This provision states an absolute right to a deficiency following the application of the proceeds of a disposition of an encumbered asset. It should state that the deficiency is subject to reduction to the extent the grantor suffers damage by the secured creditor's failure to follow the rules in this chapter.

Chapter VIII. Conflict of laws

65. Article 83(2): The words "a competing security right made effective against third parties by another method" should be replaced with the words "a competing claimant" so the rule also covers priority of the security right vis a vis competing claimants that are not secured creditors, such as judgement creditors who obtain a right in the encumbered asset.

66. Article 83(4): This provision is a substantive law rule rather than a conflict-of-laws rule. Otherwise, it would conflict with article 89. While it need not be relocated to another chapter because of its substantive nature, clarification is needed. In particular, it is not clear as drafted whether this rule is intended to work as a substantive rule of the State in which the assets are located at the relevant time (indicating that that State will recognize creation and third-party effectiveness achieved under the law of the destination State even before the assets are in that State and thus governed by the law of that State under the general rule of paragraph 1) or a substantive rule of the destination State (indicating that the destination State will recognize creation and third-party effectiveness achieved under the law of the State in which the assets were located at the time of putative creation even after the assets leave that State and thus are no longer governed by the law of that State under the general rule of paragraph 1). We believe that the intent is to have this rule be treated as a rule of the State in which the assets are located at the time of the putative creation of the security right. If this is correct, paragraph 4 should state this explicitly. If another result is intended, paragraph 4 should state that result explicitly.

67. Article 85: In the interest of clarity, we suggest amending the opening words of this article so that it reads as follows: "Notwithstanding article 84, in the case of a security right in a receivable that *either* arises from the sale or lease of *immovable property* or is secured by immovable property, …".

68. Article 86(a): Inasmuch as the two options were presented within square brackets for the Commission "to have time to consider the matter carefully" (see A/CN.9/865, para. 90), the language in only one of the sets of bracketed words should be retained. Our preference is to retain the wording in the first set of bracketed words but amend that wording to state "the relevant act of enforcement takes place".

69. Article 89(1)(b): We believe that the phrase "at the time the issue arises" is imprecise and, thus, uncertain. It is not clear whether the phrase refers to the time an issue arises for the first time. In such a case, the location for purposes of conflict-of-laws rules would be locked in at that time; and clarity would be required as to whether an issue "arises", for example, at the first time a party makes an assertion with respect to that issue, at the first time litigation with respect to it is instituted, or at some other time. Alternatively, this phrase could simply mean "when the issue is relevant". We think that the latter is intended, subject to the rule in paragraph 2, and the language should be clarified to make that point clearly.

70. Article 93: The chapeau should be revised so that it reads as follows: "The law … *also applies to*:". This is because, without this change, the provision is ambiguous inasmuch as it could also be read as stating that the law governing the issues described in the chapeau is determined by determining the law applicable to the three issues described in the subparagraphs and applying that law to the issues described in the chapeau.

71. Article 96(2): It is not clear whether this provision is intended to be: (a) a substantive rule of the State whose law is applicable, in which case it will apply only if the State in which the intellectual property is protected has enacted the Model Law; or (b) a "validating" conflict-of-laws rule, under which the applicable law is the law of a State that "validates" either third-party effectiveness or priority of the security right in question. In any event, it is anomalous to indicate, as does article 96(2), that a security right may be effective against some third parties but not others. Elsewhere in the draft Model Law, a security right is either effective against third parties or it is not effective against third parties, and rules preferring

one method of achieving that third-party effectiveness over other methods are styled as priority rules. That practice should be followed here as well.

72. Article 97: We propose adding a new option D. This option blends the general applicable law approach of the draft Model Law with a recognition of the important applicable law rules in entity statutes of States (like the rule on intellectual property; see article 96(2)) of the draft Model Law). We believe this option expresses the correct policy decisions concerning this extremely important topic, and also reorganizes the article in a way that we believe will be more easily understood by users of the Model Law. This option should read as follows:

> 1. Subject to article 95, in the case of a security right in certificated non-intermediated securities:
>
> (a) Except as provided in subparagraph (b), the law applicable to the creation, effectiveness against third parties and priority of the security right is the law of the State in which the certificate is located;
>
> (b) If a security right in certificated non-intermediated securities may not be created under, or does not satisfy the requirements for creation of a security right in those securities under the law of the State under which the issuer is constituted (in the case of equity securities) or the law of the State whose law governs the securities (in the case of debt securities), the security right has not been created; and
>
> (c) The law applicable to the enforcement of the security right is the law of the State in which [the relevant act of] enforcement takes place.
>
> 2. In the case of a security right in uncertificated non-intermediated securities, the law applicable to the creation, effectiveness against third parties, priority and enforcement of the security right is the law of the State under which the issuer is constituted (in the case of equity securities) or the law of the State whose law governs the securities (in the case of debt securities).
>
> 3. The law applicable to whether a security right in non-intermediated securities is effective against the issuer and whether an act of enforcement of that security right is effective against the issuer is the law of the State under which the issuer is constituted (in the case of equity securities) or the law of the State whose law governs the securities (in the case of debt securities).

73. Article 98: The current wording of this article should be replaced with the wording suggested in the Note to the Commission.

Chapter IX. Transition

74. Article 100(1)(a): The square brackets should be removed so that the term “prior law” will refer to the law that the enacting State would have applied before the entry into force of its enactment of the Model Law. Two additional issues need clarification, however. First, the reference should be to the conflict-of-laws rules that were in effect under the former law, since it was those conflict-of-laws rules that determined the State whose law governed an issue. Second, under prior conflict-of-laws rules, the law of different States might have been applicable to different issues (as in the case, for example, of a State that has different conflict-of-laws rules for creation and enforcement than for third-party effectiveness and priority), but the text of article 100(1)(a) seems to suggest that prior conflict-of-laws rules pointed to the law of a single State to apply to security rights generally. Accordingly, we suggest amending the text of article 100(1)(a) so that it reads as follows: “‘Prior law’ means the law applicable, under the conflict-of-laws rules of the enacting State existing immediately before the entry into force of this Law, to the relevant issue”.

75. Article 104(3)(a): The words “as provided in article 103, paragraph 3” should be deleted inasmuch as the priority status of a prior security right has changed if it has ceased to be effective against third parties for any reason.

J. Note by the Secretariat on a draft model law on secured transactions: compilation of comments

(A/CN.9/887 and Add.1)

[Original: English/French/Spanish]

Contents

I. Introduction

1. At its twenty-eighth and twenty-ninth sessions (Vienna, 12-16 October 2015, and New York, 8-12 February 2016, respectively), Working Group VI (Security Interests) adopted a draft model law on secured transactions (the "draft Model Law") (A/CN.9/865 and A/CN.9/871) and, at its twenty-ninth session, decided to submit it to the Commission on the understanding that the Secretariat would make the text of the draft Model Law available to States for comment (A/CN.9/871, paragraph 91).

2. This note sets forth, with minimal editorial modifications, the second compilation of comments received from Governments (the first compilation is contained in document A/CN.9/886).

II. Comments on the draft Model Law

A. Canada

[Original: English]
Date: 16 May 2016

Chapter I. Scope of application and general provisions

3. Articles 1(2) and 2(k)(ii), (o)(iii), (dd)(ii), (ee), and (ii)(ii): We suggest: (a) deleting the square-bracketed text in article 1(2) and revising the remaining text as follows: "…, this Law applies to an agreement for the outright transfer of a receivable."; (b) retaining the square-bracketed text in articles 2(k)(ii), (o)(iii), (dd)(ii) and (ii)(ii) but clarifying the text to refer to an agreement for the outright transfer of a receivable (so as to confirm that the Law only applies to transfers effected by agreement versus operation of law and because the words "in an outright transfer of a receivable" are unclear); and (c) deleting the bracketed text in the definition of "secured obligation" in article 2(ee) (as it is unnecessary).

4. Article 2(c): We support retaining the text in the second set of square brackets.

5. Article 2(j): We support retaining the text in square brackets as this best reflects common drafting practice.

6. Article 2(o)(ii): We suggest: (a) deleting the reference to "lessee or licensee" as a lessee or licensee has only a right of possession or use and cannot be a grantor even when it acquires an encumbered asset subject to a security right; and (b) revising the definition to expressly limit the inclusion of a buyer or other transferee in the definition of grantor to those articles in which the term "grantor" is truly meant to include a transferee acquiring an encumbered asset from the initial grantor (for example, the articles relating to the creation

of a security right and a grantor's liability for a post-enforcement deficiency should generally apply only to the initial grantor).

7. Article 2(r): We suggest revising the text after the word "including" to refer simply to "raw materials and work-in-process" (as the term "semi-processed materials" is included in the broader concept of "work-in-process").

8. Article 2(u), Note to the Commission: We support the suggestion to add a definition of "movable asset" to mean "a tangible or intangible asset other than immovable property" but we do not think the additional words "as defined by the enacting State" are necessary or appropriate.

9. Article 2(z): We support deleting the square-bracketed words "directly or indirectly" as their meaning is unclear and as the multimodal scenario referred to in the Note is adequately covered by the remaining wording.

10. Article 5: We support the inclusion of this article subject to the deletion from paragraph 1 of the reference to "the observance of good faith" (since, unlike the other UNCITRAL instruments from which this article is derived, article 4 of the Model Law recognizes a general obligation of good faith).

Chapter II. Creation of a security right

11. Article 6(3): We suggest deleting the words "[concluded in]" and retaining the words "evidenced by" as the latter wording best reflects our understanding of the intended substance of the article.

12. Article 8(a): We suggest deleting the words "including future assets" because: (a) "future assets" are not a "type" of movable asset but could involve any type of movable asset; and (b) article 6(2) already confirms that a security agreement may cover future assets.

13. Article 9(1): For simplicity of drafting, we suggest replacing the words "assets encumbered or to be encumbered" with the words "encumbered assets" (since, if the current wording is retained, it would be necessary to also use that wording in the many articles in which a reference to encumbered assets is meant to include future assets or assets that have not yet been encumbered because no security agreement has yet been concluded).

14. Article 11: We suggest that option A, para. 2, and option B, paras. 2 and 3, refer to "encumbered asset" and not "assets" (singular, not plural). We also note the overlap and inconsistency between article 11[3][4] and articles 31(2)-(3). To address the latter, we suggest that article 11[3][4] be deleted and articles 31(2)-(3) be revised in the manner suggested in our comment on article 31 below.

15. Article 14(2): To conform article 14 to article 10 of the United Nations Convention on the Assignment of Receivables in International Trade (the "Assignment Convention"), paragraph 2 should be revised to add the words "under the law governing it" following the word "transferable" in the first line.

Chapter III. Effectiveness of a security right against third parties

16. Article 18(1): For clarity, we suggest replacing the words "in the general security rights registry (the "Registry")" with the words "in the registry" and adding a definition of "registry" in article 2 to mean "the registry established under article 27 of this Law."

17. Article 19: While paragraph 2 incorporates the "identifiable" limitation in article 10, paragraph 1 does not do so even though it covers proceeds in the form of instruments and receivables where article 10 requires identifiability as opposed to traceability. For clarity and consistency, we suggest that the word "identifiable" in paragraph 2 be deleted and that the opening words of paragraphs 1 and 2 be revised along the following lines: "If a security right in an encumbered asset is effective against third parties, a security right in any proceeds of that asset that arises under article 10 is effective against third parties without any further act …".

18. Article 19, Note to the Commission: We support the suggestion in the Note and suggest it could be implemented by wording along the following lines: "If a security right in a tangible asset is effective against third parties, a security right in a mass or product to which

the security right extends under article 11 is effective against third parties without any further act".

19. Article 22, Note to the Commission: We agree that the effectiveness of a security right against claimants whose rights arise during the grace period should be conditioned on the secured creditor making its security right effective against third parties before the expiry of that period. This result could be implemented by revising the text that comes after the words "chapter VIII" along the following lines: "… the security right remains effective against third parties under this Law if it is made effective against third parties in accordance with this Law before the earlier of …".

20. Article 23: For clarity, we suggest that the bracketed text in option B be revised to refer to consumer goods "having an acquisition price below an amount to be specified by the enacting State" (as "value" is too vague). We also suggest that option B be revised to incorporate the special protection for buyers in option A as follows: "An acquisition security right in consumer goods [having an acquisition price below an amount to be specified by the enacting State] is effective against third parties, other than a buyer, upon its creation without any further act".

Chapter IV. The registry system

21. Article 27, title: For clarity, we suggest changing the title to "Establishment of the registry".

Draft Model Registry-related provisions

22. Article 6(2): We suggest deleting the word "mandatory", since search requests, unlike notices, do not contain "mandatory" fields.

23. Article 7: We suggest that paragraphs 1 and 2 be relocated to article 5 as they relate to subparagraph 5(1)(b) and that the title then be changed to "Scrutiny of the form or contents of a notice by the Registry".

24. Article 11: We suggest that: (a) paragraph 1 refer to "encumbered assets" not "assets encumbered or to be encumbered" (for the reasons stated in our comments on article 9 of the Law above); and (b) paragraph 2 refer to "generic category" not "particular category" (in order to align the wording with article 9 (2)).

25. Article 15: For clarity and correctness, we suggest subparagraph 2(b) be revised to refer to "the most recent address if known to or reasonably available to that person".

26. Article 20(1): To align paragraph 1 with the policy in subparagraph 3(b), we suggest adding a new subparagraph 1(c) requiring a secured creditor to register an amendment notice deleting encumbered assets in a registered notice where: "The grantor authorized the registration of a notice covering those assets but the authorization has been withdrawn and no security agreement covering those assets has been concluded".

27. Article 25: We suggest revising paragraph 2 to confirm that failure to register an amendment notice after a change in the identifier of the grantor within the grace period or at all does not prevent the secured creditor from claiming priority against a competing secured creditor or transferee on the basis of having obtained possession or control of the encumbered asset before their rights arise. To reflect this suggestion, and to further clarify the text of the entire article, we suggest dividing paragraph 2 into two paragraphs and revising article 25 along the following lines:

> "1. Subject to paragraphs 2 and 3, the third-party effectiveness and priority of a security right that was made effective against third parties by registration of a notice is not affected by a change in the identifier of the grantor after the notice is registered.
>
> 2. If the identifier of a grantor changes after a notice is registered, the registration of the notice is ineffective to give the security right to which the notice relates priority over a competing security right created by the grantor that was made effective against third parties after the change unless an amendment notice disclosing the new identifier of the grantor is registered:

(a) Before the expiry of [a short period of time to be specified by the enacting State] after the change; or

(b) If subparagraph (a) does not apply, before the competing security right is made effective against third parties.

3. If the identifier of a grantor changes after a notice is registered, the registration of the notice is ineffective to make the security right to which the notice relates effective against the right of a person to whom the grantor sells or otherwise transfers the encumbered asset after the change unless an amendment notice disclosing the new identifier of the grantor is registered:

(a) Before the expiry of the period referred to subparagraph 2(a); or

(b) If subparagraph (a) does not apply, before the encumbered asset is sold or otherwise transferred."

28. Article 26: We suggest revising paragraphs 1 and 2 in the same fashion and for the same reasons as suggested for article 25 above. We also suggest revising option B to require a secured creditor to register an amendment notice only if it acquires knowledge of the transfer and knowledge of the identifier of the transferee (since without knowing the transferee's identity, it would not be practically possible for it to take that step). We further suggest deleting the reference to subsequent transfers in option A (since the registered notice will be ineffective against a subsequent transferee of the initial transferee unless the secured creditor registers an amendment notice before the subsequent transfer occurs or before the expiry of the grace period). Finally, we suggest revising option B to clarify that if the asset is subject to subsequent transfers before the secured creditor finds out that it has been transferred, it is not required to take steps to preserve the effectiveness of its registered notice unless it has knowledge of the identifier of the most recent transferee (since it would be practically pointless to register an amendment notice identifying a prior transferee). To reflect these suggestions, we suggest that article 26, options A and B, be revised along the following lines:

"1. Subject to [paragraphs 2 and 3 (Option A)] [paragraphs 2 to 4 (Option B], the third party effectiveness and priority of a security right in an encumbered asset that was made effective against third parties by registration of a notice is not affected by a transfer of the encumbered asset after the notice is registered to a transferee that acquires its right subject to the security right under article 32 of the Law.

2. If an encumbered asset covered by a registered notice is sold or otherwise transferred to a transferee that acquires its right subject to the security right to which the notice relates under article 32 of the Law, the registration of the notice is ineffective to give the security right priority as against a competing security right created by the transferee that is made effective against third parties after [the transfer (Option A)] [the secured creditor acquires knowledge of the transfer and the identifier of the transferee (Option B)] unless the secured creditor registers an amendment notice adding the transferee as a new grantor:

(a) Before the expiry of [a short period of time to be specified by the enacting State] after [the transfer (Option A)] [acquiring knowledge (Option B)]; or

(b) If subparagraph (a) does not apply, [before (Option A)] [after acquiring knowledge and before (Option B)] the competing security right is made effective against third parties.

3. If an encumbered asset covered by a registered notice is sold or otherwise transferred to a transferee that acquires its right subject to the security right to which the notice relates under article 32 of the Law, the registration of the notice is ineffective to make the security right effective against the right of a person to whom the transferee [subsequently (option A)] sells or otherwise transfers the encumbered asset [after the secured creditor acquires knowledge of the transfer and the identifier of the transferee (option B)] unless the secured creditor registers an amendment notice adding the transferee as a new grantor:

(a) Before the expiry of the period referred to subparagraph 2(a); or

(b) If subparagraph (a) does not apply, [before (Option A)] [after acquiring knowledge and before (Option B)] the transferee sells or otherwise transfers the encumbered asset.

[4. (Option B)] If there are one or more subsequent transfers of the encumbered asset before the secured creditor acquires knowledge of the transfer, the obligation to register an amendment notice under paragraphs 2 and 3 arises only if the secured creditor has knowledge of the identifier of the most recent transferee.]

[4. (Option A)] [5. (Option B)] The third party effectiveness and priority of a security right in intellectual property that was made effective against third parties by registration of a notice is not affected by a transfer of the intellectual property after the notice is registered to a transferee that acquires its right subject to the security right under article 32 of the Law."

29. To align the wording of Option C with the revised wording of articles 25(1) and 26(1) of Options A and B above, we suggest it be revised along the following lines:

"The third-party effectiveness and priority of a security right in an encumbered asset that is made effective against third parties by registration of a notice is not affected by a transfer of the asset after the notice is registered to a transferee that acquires its right subject to the security right under article 32 of the Law".

Chapter V. Priority of a security right

30. Article 28: For clarity, we suggest that the title be changed to "Priority among competing security rights in the same encumbered asset". To clarify the substance of paragraphs 1 and 3 and their relationship, we suggest that paragraph 3 be deleted and paragraph 1 be revised along the following lines:

"Subject to articles …., competing security rights created by the same grantor in the same encumbered asset rank in priority according to:

(a) The time of third-party effectiveness; and

(b) If a security right was made effective against third parties by registration of a notice in the Registry, the time of registration without regard to the time of creation of the security right."

31. We also suggest that article 28 should only be made subject to articles 31, 36-37 and 39-41 (since articles 29-30, 32-35, 38 and 42 are not exceptions to article 28). We further suggest that paragraph 2 be made a separate article and the text be revised to: (a) state that priority is determined according to the rule in article 28 (as revised); and (b) clarify that it does not apply in the scenario where a pre-transfer secured creditor of a transferee of an encumbered asset claims priority on the basis of a security right covering after-acquired property that was made effective against third parties by registration before the transfer.

32. Article 29: To clarify the relationship of article 29 to article 28, we suggest that: (a) the opening words be revised to say that "the priority of competing security rights under article 28 is not affected …"; and (b) the title be revised to add the words "Priority among" at the beginning.

33. Article 30: To clarify its relationship with article 28, we suggest revising article 30 along the following lines: "A security right in proceeds of an encumbered asset that is effective against third parties under article 19 has the same priority as against a competing security right that the security right in the encumbered asset from which the proceeds arose has under article 28." We also suggest that the title be changed to: "Priority of a security right in proceeds against competing security rights" (so as to cover the usual case in which a secured creditor claiming a proceeds security right is competing with a secured creditor claiming the proceeds as an original encumbered asset).

34. Article 31: To clarify its relationship with article 28, we suggest revising paragraph 1 along the following lines: "If two or more security rights in the same tangible asset continue in a mass or product as provided in article 11, the priority of the security rights in the mass or product is the same as the priority that the security rights in the tangible assets had under article 28 immediately before the assets became part of the mass or product" (note that this

wording assumes that the revision suggested in the Note to the Commission on article 19, above, is adopted.) To resolve the overlap and conflict between articles 31 and 11 noted in our comment on article 11 above, we suggest that article 11[3][4] be deleted and articles 31(2)-(3) be revised along the following lines:

> "2. If more than one security right extends to the same mass or product under article 11 and each was a security right in a separate tangible asset at the time of commingling, the secured creditors are entitled to share in the mass or product according to the ratio that the obligation secured by each security right bears to the sum of the obligations secured by all the security rights.
>
> 3. For the purposes of paragraph 2, the obligation secured by a security right that extends to the product or mass is limited to the value of the security right determined in accordance with article 11 [option A, para. 2 or option B, paras. 2-3]."

35. Article 35: For clarity and simplicity, we suggest that: (a) the opening clause of paragraph 1 need only say "Subject to article 38"; (b) the opening clause of subparagraph 2(a) be revised as follows: "Before or within [a short period of time to be specified by the enacting State] after the secured creditor receives a notice …"; and (c) the title be changed to: "Priority of a security right against the rights of the grantor's judgment creditors".

36. Article 36. For clarity and substantive correctness, we suggest: (a) changing the title to "Priority between acquisition and non-acquisition security rights"; (b) qualifying the exclusion of "consumer goods" and "and intellectual property or rights of a licensee under a licence of intellectual property that are used or intended to be used by the grantor primarily for personal, family or household purposes" in the opening clause of option A, paragraph 1 (so as to cover cases where the square bracketed text in option A, paragraph 3, is adopted by a State); (c) deleting the words "other than inventory or consumer goods" in option A, subparagraph 1(a) (since this exclusion is already stated in the opening clause); (d) deleting the words "or the agreement for the sale or licence of intellectual property has been concluded" from option A, subparagraphs 1(a) and 2(a), and option B, subparagraph 1(a) (as inconsistent with subparagraph 1(b)); (e) substituting the word "before" for the words "not later than" in option A, subparagraph 1(b), and option B, subparagraph 1(b) (for drafting consistency); (f) clarifying clause 2(b)(ii) of option A along the following lines: "the non-acquisition secured creditor that has registered a notice in the Registry with respect to a security right created by the grantor in an asset of the same kind receives a notice from the acquisition secured creditor that states it has or intends to acquire an acquisition security right in the assets described in the notice and describes those assets sufficiently to enable the non-acquisition secured creditor to identify the assets that are or will be the object of the acquisition security right.";(g) revising option A, paragraph 3, as follows: "provided that the acquisition price of the asset is below [an amount to be specified by the enacting State]" (see our comment on article 23 above) and incorporating this same proviso at the end of paragraph 2 of option B; (h) qualifying the exclusion of "consumer goods and intellectual property or rights of a licensee under a licence of intellectual property that are used or intended to be used by the grantor primarily for personal, family or household purposes" in option B, chapeau of paragraph 1 (so as to cover cases where the square-bracketed text in paragraph 3 of option A, which should be added also to paragraph 2 of option B, is adopted by a State); and (i) deleting the words "other than consumer goods" from option B, subparagraph 1(a) (since this exclusion is already stated in the opening clause).

37. Article 37: For clarity, we suggest: (a) adding the words "priority between" at the beginning of the title; and (b) replacing the words "over a competing acquisition security right of a secured creditor other than a seller or lessor, or a licensor of intellectual property" with the words "over a competing acquisition security right of a secured creditor who extended credit to enable the grantor to acquire rights in the encumbered asset" (since there cannot be more than one acquisition security right in favour of a seller, lessor, or licensor).

38. Article 39, option A: For clarity, drafting simplicity and correctness, we suggest that option A be revised along the following lines:

> "1. Subject to paragraph 2, a security right in proceeds of an encumbered asset in which the secured creditor has an acquisition security right has the same priority

against a competing security right that the acquisition security right in the encumbered asset from which the proceeds arose has under article 36.

2. In the case of proceeds arising from an acquisition security right in inventory and intellectual property or the rights of a licensee under a licence of intellectual property that is held by the grantor for sale or licence in the ordinary course of the grantor's business:

(a) Paragraph 1 does not apply if the proceeds take the form of receivables, negotiable instruments, or rights to payment of funds credited to a bank account; and

(b) The priority of the security right under paragraph 1 in any other type of proceeds is conditional on the receipt by a competing non-acquisition secured creditor that registered a notice in the Registry with respect to a security right created by the grantor in an asset of the same kind as the proceeds of a notice from the acquisition secured creditor that states it has or intends to acquire an acquisition security right in assets of the same kind as the proceeds and describes those assets sufficiently to enable the non-acquisition secured creditor to identify the assets that are or will be the object of the acquisition security right."

Chapter VI. Rights and obligations of the parties and third-party obligors

39. Article 57(1): For clarity, we suggest that the words "to the debtor of the receivable" be added to the opening clause of paragraph 1. To conform paragraph 1 to article 14(1) of the Assignment Convention, we suggest: (a) deleting the words "delivery of" and replacing the word "grantor" with "secured creditor" in subparagraph 1(a); and (b) revising the first part of subparagraph 1(c) to say: "If payment is made or a tangible asset is returned to another person over whom the secured creditor has priority".

40. Article 59(2): For drafting consistency, we suggest replacing the words "original contract" in subparagraphs 2(a) and (b) with "contract giving rise to the receivable".

41. Article 60(4): To conform paragraph 4 with article 16 and the concept of "subsequent assignment" in article 2(b) of the Assignment Convention, we suggest it be revised as follows: "Notification of a security right in a receivable acquired by a secured creditor from an initial or subsequent secured creditor constitutes notification of all prior security rights in that receivable".

42. Article 61(5): To conform paragraph 5 with article 17(5) and the concept of "subsequent assignment" in article 2(b) of the Assignment Convention, we suggest that the words "created by a secured creditor that acquired its right from the initial or any other secured creditor" be replaced by the words "acquired by a secured creditor from the initial or any other secured creditor".

Chapter VII. Enforcement of a security right

43. Article 74(2): We suggest deleting paragraph 2 as it is in conflict with the general rule in article 79(2) and (4).

44. Article 76(4): We suggest deleting the references to "a short period of time" in subparagraph 4(b) and 4(c) as unnecessary and inappropriate.

45. Article 77: We suggest: (a) changing the title to "Distribution of the proceeds of disposition of an encumbered asset; debtor's liability for any deficiency" to more accurately reflect the substance of the article; and (b) replacing the term "shortfall" in paragraph 3 with the less colloquial term "deficiency".

46. Article 78: We suggest: (a) deleting the references to a "short period of time" in subparagraphs 1(b) and (c) as unnecessary and inappropriate; (b) aligning the wording of the first part of subparagraph 3(a) and the wording of article 76(5)(b); and (c) clarifying paragraph 4 by revising the text and dividing it into two paragraphs along the following lines:

"4. A secured creditor that has made a proposal for the acquisition of an encumbered asset in full satisfaction of the secured obligation acquires the encumbered asset unless a person entitled to receive the proposal under paragraph 2 objects in writing before

the expiry of [a short period of time to be specified by the enacting State] after the proposal is received by that person.

5. A secured creditor that has made a proposal for the acquisition of the encumbered asset in partial satisfaction of the secured obligation acquires the collateral only if it receives the affirmative consent in writing of all persons entitled to receive the proposal under paragraph 2 before the expiry of [a short period of time to be specified by the enacting State] after the proposal is received by each of them."

47. Article 79(1): We suggest deleting the words "except rights that have priority over the right of the enforcing secured creditor" in the square bracketed text as it is frequently the rule in the case of judicially ordered sales that the sale purges the asset of all encumbrances with the proceeds then distributed to claimants in order of priority.

48. New article: For clarity, we suggest adding a new article to chapter VII along the following lines: "If the maximum amount entered in an initial or amendment notice is lower than that indicated in the security agreement to which the notice relates, the security right to which the notice relates may be enforced only in respect of the amount entered in the registered notice".

Chapter VIII. Conflict of laws

49. Article 83(4): We suggest deleting subparagraph (a) as it is a restatement of the general rule in paragraph (1).

50. Article 85, Note to the Commission: To avoid unduly limiting the scope of the rule in article 85, we suggest that the concern expressed in the Note could be addressed by excluding cases where the immovable property to which a receivable relates is not identified or identifiable in the contract giving rise to the receivable.

51. Article 86(a): We prefer the text in the second set of square brackets as it provides greater certainty and clarity whereas the alternative text fails to state a connecting factor.

52. Article 97: We suggest deleting option C as the distinction between equity and debt securities is uncertain in many instances (for example, convertible securities).

53. Article 98: We support replacing the current text with the text suggested in the Note to the Commission as we think it more clearly states the intended substance.

Chapter IX. Transition

54. Article 100(1)(b): We suggest deleting the word "security" in the second line to align with the term "right" in the first line.

55. Article 104(1): We suggest deleting paragraph 1 as its meaning is unclear and it conflicts with article 103. If it is retained, we support its revision and relocation in line with the suggestions made in the Note to the Commission.

B. El Salvador

[Original: Spanish]
Date: 6 May 2016

Chapter VII. Enforcement of a security right

56. As discussed, the aim of article 72 of the Model Law, which is based on recommendation 137 of the Guide on Secured Transactions and is entitled "Relief for non-compliance", is to indicate that any person whose rights are affected by the non-compliance of another person with its obligations under the provisions of chapter VII regarding the enforcement of a security right is entitled to apply for relief to a court or other authority.

57. Persons that may be affected by such non-compliance include the secured creditor, a guarantor or a co-owner of the encumbered assets and it is generally the enacting State that indicates the court or authority to which the party seeking relief should apply and the type of summary procedure applicable.

58. In this regard, we consider it appropriate to propose the inclusion of an article or paragraph on the use of the various forms of alternative dispute resolution, including the use of arbitration, online dispute resolution, mediation and conciliation, in the resolution of disputes over secured transactions.

59. The purpose of the inclusion of this article is to emphasize the importance of alternative dispute resolution in States and that it will serve as an incentive to introduce a system of secured transactions in countries that do not have one or to reform an existing system.

60. There are two main reasons why alternative dispute resolution is important. First, courts in many countries around the world do not resolve disputes in a timely manner. Second, slow legal proceedings become extremely expensive. Consequently, it is proven that prolonged and costly legal proceedings adversely affect the availability and the cost of credit.

61. In this regard, it is important to mention that many jurisdictions have developed alternative dispute resolution systems that have been much faster and more cost-effective than legal proceedings.

62. Article 68 of the Model Inter-American Law on Secured Transactions, adopted by the Organization of American States (OAS) in 2002, already provides for the use of arbitration in accordance with a security agreement. A number of jurisdictions expressly include article 68 of the OAS Model Inter-American Law in their legislation on secured transactions, including Colombia, Costa Rica, El Salvador and Honduras.

63. The fundamental importance of those systems in commercial transactions was also highlighted by many delegations at the 29th session of Working Group VI, including China, El Salvador and Sierra Leone.

64. In the specific case of El Salvador, article 64 of the Law on Secured Transactions establishes that the secured creditor may choose between an arbitration process, an extrajudicial process before a notary, or legal proceedings before a competent judge. These types of provision create a much more flexible and modern legal framework that enhances the value of moveable property, since a tool, other than judicial proceedings, is made available to the creditor to enforce a security or to provide conciliation in insolvency cases, this proving a less costly process, as is the case with enforcement proceedings through a notary.

65. Effective national commercial arbitration systems and mediation or conciliation are important to investors. Lawyers and business owners know that high costs and long delays can make the resolution of commercial disputes in courts difficult and expensive and may seek dispute resolution elsewhere, and companies may pass the costs on to consumers or refrain from investing in a jurisdiction.

66. In its current wording, the Model Law does not mention the use of alternative dispute resolution as an alternative to litigation in resolving disputes over secured transactions. Mention of these procedures in an article of the Model Law will draw the attention of investors to the parties' option of using them as it will be much more effective emphasizing their importance in the context of secured transactions.

67. Taking into account that there may be proposals from other delegations and to conclude this point, we suggest drafting the article along the following lines:

> "The secured creditor may use alternative dispute resolution, including arbitration, mediation, conciliation and online dispute resolution, to resolve any dispute arising between them in connection with the exercise of rights or performance of obligations under the security agreement or [the present law] [any applicable law].

68. We consider that the need for a prior agreement between the parties to authorize such alternative measures will depend on each State and the special laws governing them.

69. Article 73 of the Model Law, which is based on recommendation 140 of the Guide on Secured Transactions and is entitled "Right of affected persons to terminate enforcement", states that any person whose rights are affected by the enforcement process is entitled to terminate the enforcement process by paying or otherwise performing the secured obligation

in full. This provision is based on the assumption that the residual value of the asset is higher than the outstanding part of the secured obligation.

70. On this point the delegation of El Salvador also discussed the need to add a subparagraph that will allow the creditor to terminate the enforcement process by means of partial payment or another form of full compliance, as there is the possibility that the secured creditor may reach an extrajudicial settlement with the debtor with partial payment, provided that the creditor is satisfied and there is a written agreement between them based on autonomy of the parties and freedom of contract.

71. With no further comments of relevance, the delegation of El Salvador commends the Secretariat of the United Nations Commission on International Trade Law on the drafting of the document presented and the excellent work carried out by the Organization.

C. Spain

[Original: Spanish]
Date: 25 May 2016

Name of the draft Model Law on Secured Transactions

72. In both the last and all the previous versions, the text in Spanish was entitled “Ley de operaciones garantizadas”. The delegation of the Kingdom of Spain hereby submits for consideration by the Commission a change of the name of the Model Law in the Spanish language. The proposed name is: “Ley Modelo sobre Garantías Reales Mobiliarias”.

73. Rationale: The title we propose to change is a literal translation of the English title “Model Law on Secured Transactions”. The English term “secured transactions” has been and continues to be widely used in the legal field, both in practice, in academia and in legislative activity. Such prolific use has endowed it with a meaning that is unequivocal. The situation is, however, quite different as regards its literal translation into Spanish. The term “operaciones garantizadas” neither has been nor is commonly used, nor has it acquired an unequivocal meaning nor, finally, is it a term that serves accurately to describe the content of the document. The Model Law deals only with security rights in moveable property, but in Spanish, “operaciones garantizadas” can refer to both movable and immovable property. Furthermore, in Spanish, “operaciones garantizadas” can signify both those transactions whose performance is secured by a right in rem (pledge, mortgage, etc.) and those that rely on a credit claim against a third party (bond, guarantee). The Model Law does not regulate the latter, thereby misleading the reader about the content of the regulations.

Draft Model Registry-related provisions

74. Article 5.4 provides that, if access to the Registry is refused, the reason must be communicated to the registrant or searcher “without delay”. We propose that “without delay” be replaced by the following: “within the time limit established by each State, which may not exceed [...] days”; and that a statement be included in the Implementation Guide indicating that the time limit should be as short as possible. The same is proposed for articles 6.4 and 13.2.

75. Rationale: The term “without delay” is highly inaccurate for use in a legal document.

76. It appears appropriate to add a paragraph (c) to article 6.1, stating: “In no case may a registrable form or document or its agreements added voluntarily by grantors contradict peremptory norms”.

77. Rationale: It appears appropriate to establish the need for that which is entered in the registry to be consistent with the applicable substantive rules, without prejudice to registration on the basis of models that have been pre-established and approved by the competent administrative authority, as grantors should be allowed to agree on or establish the specificities that best suit or interest them.

78. With regard to article 13, the following suggestions are made: (a) Replace the reference to “fecha y hora” [“date and time”] in Spanish with “momento temporal preciso” [precise time] since, given that the record should be fully electronic, the time will be fixed

in its authentic form. Note that, in Spanish, "hora" [hour or time] is not necessarily the equivalent of "time". It could be misleading, giving the impression that it is sufficient to note the hour without making reference to minutes or seconds; and (b) Since an "initial notice" or "notice" may be rejected, effectiveness should refer to the time of entry of the notice in the Registry and not the time of its entry into the registry record.

79. Article 22 sets out search criteria limiting them to data regarding the grantor or registration. We propose adding a paragraph (c) to read:

> "(c) Data identifying the assets given as security, provided that the nature of those assets allows them to be thus identified."

80. Rationale: It appears reasonable that, in the case of an asset registry, albeit essentially documentary in nature, a search of the registry record may also be carried out using such identification data, given that much movable property is provided with identifiers that persist throughout its economic life.

D. Switzerland

[Original: French]
Date: 23 May 2016

81. Switzerland welcomes the fact that the draft Model Law on Secured Transactions has been approved by Working Group VI (Security Interests) and that it has been submitted to the United Nations Commission on International Trade Law with a view to adoption at its forty-ninth session.

82. Switzerland pays tribute to the high quality work accomplished by Working Group VI: the Model Law is a remarkable step forward in the area of security rights and will undoubtedly serve as a highly useful source of inspiration for States wishing to establish a modern and effective legal regime in the matter.

83. However, it should be pointed out that the draft includes a not inconsiderable number of provisions, some of which are of a relatively high level of sophistication; it might have been desirable for the Model Law to reflect more closely the Commission's express wish for a simple, short and concise text. Moreover, one may wonder why the draft Model Law retains solely the unitary approach to acquisition security rights, abandoning the non-unitary approach, which is also proposed by the UNCITRAL Legislative Guide on Secured Transactions; each of these approaches still has its merits and it would have been preferable for the Model Law to have taken that fact into account.

84. In addition, Switzerland, after a careful analysis of the draft Model Law, submits to the Commission for its consideration the following three suggestions.

85. Under article 52 of the draft Model Law, a secured creditor in possession of an encumbered asset must return the asset to the grantor upon extinction of the security right. Pursuant to article 3, paragraph 1, of the draft Model Law, that rule is binding.

86. It is unclear, however, why the Parties should not be at liberty to derogate from the rule. Firstly, the encumbered asset may belong not to the grantor but to a third party; in such circumstances, the Parties should be able to agree that the creditor must return the asset to the owner (and not to the grantor) upon extinction of the security right. It may also be the case that the grantor intends to leave the encumbered asset in the possession of the creditor notwithstanding the extinction of the security right: why could the Parties not, for example, agree that an encumbered painting will remain deposited with the creditor once the security right is extinguished? Moreover, the asset may be encumbered with another (subordinate) security right; the Parties should be able to agree, in such a situation, that the creditor in possession must return the asset to the creditor for the benefit of the other (subordinate) security right upon extinction of its security right.

87. While article 52 provides a rule that is appropriate for the majority of cases, it is clear from the foregoing examples, however, that there are situations in which the Parties have a legitimate interest in choosing an alternative solution. In the view of Switzerland, it would

be appropriate, therefore, to remove article 52 from the list of provisions from which the parties cannot derogate.

88. Article 77, paragraph 2, subparagraph (b), provides that the enforcing secured creditor must pay any surplus (after payment of its claim) to any competing claimants and remit any balance remaining to the grantor.

89. This process can only function satisfactorily, however, if the secured creditor duly reports on how it applies the proceeds of enforcement; a detailed account should be provided not only to the grantor of the security right (cf. article 77, paragraph 2, subparagraph (b)) but also to any third-party debtor (article 77, paragraph 3), as well as to any subordinate competing claimants (article 77, paragraph 2, subparagraph (b)).

90. It would be useful, therefore, if article 77 of the Model Law specified that the creditor was obliged to report to the grantor, the debtor and any subordinate competing claimant on the distribution of the proceeds of a disposition of an encumbered asset.

91. In chapter VIII on conflicts of law, article 83, paragraph 1, of the draft Model Law makes the creation, effectiveness against third parties and priority of a security right in a tangible asset subject to the law of the State in which the asset is located. The application of lex situs is not always justified, however: location may be of no significance for the secured transaction in question; it may also be the case that the Parties do not exclude relocating the encumbered object, without such relocation presenting the degree of certainty required for the application of article 83, paragraph 4 (res in transitu, etc.).

92. The Commission might therefore consider whether it would be appropriate to grant the parties a degree of freedom to decide in the matter. Thus, it might consider adding to the Model Law a rule stating that the Parties are at liberty to submit matters referred to in article 83, paragraph 1, to the law governing the rights and obligations arising from the security agreement (i.e., in principle, the law chosen by the Parties — article 82). That would allow the Parties to settle in their best interests the aforementioned situations. If necessary, the rule could provide that such choice of law is not effective against third parties, the latter being thus able to invoke the normally applicable law (i.e., in principle, lex situs).

(A/CN.9/887/Add.1) (Original: English)

Note by the Secretariat on a draft model law on secured transactions: compilation of comments

ADDENDUM

Contents

I. Introduction

1. At its twenty-eighth and twenty-ninth sessions (Vienna, 12-16 October 2015, and New York, 8-12 February 2016, respectively), Working Group VI (Security Interests) adopted a draft model law on secured transactions (the "draft Model Law") (A/CN.9/865 and A/CN.9/871) and, at its twenty-ninth session, decided to submit it to the Commission on the understanding that the Secretariat would make the text of the draft Model Law available to States for comment (A/CN.9/871, para. 91).

2. This note sets forth, with minimal editorial modifications, the third compilation of comments received from Governments (the first compilation is contained in document A/CN.9/886 and the second in document A/CN.9/887).

II. Comments on the draft Model Law

Republic of Korea

[Original: English]
Date: 27 May 2016

Chapter I. Scope of application and general provisions

3. Article 1(2): The bracketed text should be deleted and the matter addressed in each relevant provision. On balance, this approach would provide more clarity in particular to enacting States that are not familiar with the legal framework or terminology used in the draft Model Law.

4. Article 2(j): The bracketed text in the definition of the term "default" needs to be retained as is. It clarifies that the parties may define default in their agreement.

5. Article 2(p): The definition of the term "insolvency representative" is not necessary and needs to be deleted as this term appears only in the definition of the term "competing claimant" in article 2(e). This and other insolvency terms should be left to the insolvency law of the enacting State.

6. Article 2: The term "movable asset" needs to be defined in article 2, as it is a key concept that appears frequently in the draft Model Law.

7. Article 2(z): The bracketed text in the definition of the term "possession" needs to be retained as is. As pointed out in the note, indirect possession is also a method of creation of a security right. In addition, to avoid the tautology, the term "possession" in the definition should be replaced with another term, such as "control". Moreover, the term "actual" should be deleted or replaced with another term as it may conflict with the notion of indirect possession.

Chapter III. Effectiveness of a security right against third parties

8. Article 19: A new paragraph should be added to deal with the automatic third-party effectiveness of a security right in tangible assets commingled in a mass or product. This would reflect the policy of recommendation 44 of the Secured Transaction Guide. In addition, this paragraph would complete the set of rules that deal with commingled assets (i.e. article 11 for creation issues and article 40 for priority issues).

9. Article 22, Note to the Commission: The issue addressed in the Note may be better addressed in the Guide to Enactment rather than in article 22.

Draft Model Registry Rules

10. Article 5, Note to the Commission: An additional paragraph should be inserted in article 5 to deal with the issue raised in the Note. This paragraph would emphasize the public character of the Registry and prevent registry staff from arbitrarily refusing access.

11. Article 24(6): The term "reasonable" should be added before the words "third parties" to clarify that it does not aim to provide protection for unreasonable reliance by third parties on erroneous information. A similar approach is followed in article 24(2) and (4) which refers to a "reasonable searcher". In addition, the additional words suggested in the Note to the Commission for inclusion to article 24(6) are not necessary and the current text should be retained as is. The Guide to Enactment could explain further the meaning of paragraph 6.

Chapter V. Priority of a security right

12. Article 35(1), Note to the Commission: The issue raised in the Note may be better addressed in the Guide to Enactment than in article 35.

13. Article 49(5): This provision needs to be revised to address the rights of holders of non-intermediated securities in a more upfront manner, as in articles 44(2) and 47(3).

Chapter VII. Enforcement of a security right

14. Article 78(4)(b): The deadline included in this provision adds an extra rule that is not contained in recommendation 158 of the Secured Transaction Guide, on which this provision is based. This is a welcome addition. Requiring written consent from interested persons within a short period of time seems to be a reasonable way of articulating the requirements for the acquisition of the encumbered asset in partial satisfaction of the secured obligation.

15. Article 79(5): The bracketed text needs to be deleted. This text does not appear in recommendation 163 of the Secured Transaction Guide, and appear within square brackets in this provision, which means that it has not been possible to reach a decision in this regard. In addition, the requirement in the bracketed text may be inconsistent with existing legal doctrines in some States.

Chapter VIII. Conflict of laws

16. Article 85, Note to the Commission: This provision needs to be retained as is for it to apply also to security right in receivables secured by immovable property. While a secured creditor who wishes to obtain a security right in such receivables may not know that they are secured by immovable property, this would not seriously impair the rights of the secured creditor since receivables secured by a mortgage would normally provide a higher level of security.

17. Article 98, Note to the Commission: The current version should be retained as is. It reflects the same rules as the text in the Note but in a more reader-friendly way.

Chapter IX. Transition

18. Article 101(2): This provision is problematic in the sense that it does not give definite guidance regarding the continuation of enforcement proceedings, but rather seems to present two opposite options. If the enacting State is to choose, these options should be presented as option A and option B. Recommendation 229 of the Secured Transaction Guide, on which

this provision is based and which opts for the continuation of enforcement, should also be taken into consideration.

19. Article 104(1), Note to the Commission: This provision needs to be deleted. It seems to be inconsistent with article 103(3) and the reference to advance registration may cause unnecessary confusion.

VII. FUTURE WORK

A. Note by the Secretariat on the work programme of the Commission

(A/CN.9/878)

[Original: English]

Contents

I. Introduction

A. Background

1. At its forty-sixth session, in 2013, the Commission agreed that it should reserve time for discussion of UNCITRAL's future work as a separate topic at each Commission session (A/68/17, para. 310). This Note has been prepared to assist the Commission's consideration its overall work programme and planning of its activities at this forty-ninth session.

2. This Note considers UNCITRAL's main activities, that is legislative development and activities designed to support the effective implementation, use and understanding of UNCITRAL texts. This Note also introduces possible future work in these activities.

3. The Commission may wish to consider its work programme and activities taking into account the progress reports of its Working Groups and reports from the Secretariat noted below, and the conclusions reached at its forty-eighth session under this agenda item (A/70/17, paras. 335-365). The Commission also has before it several draft texts for consideration and possible adoption. When setting UNCITRAL's work programme for the forthcoming period, the Commission may also wish to recall its decision at the forty-sixth session that it would normally plan for the period to the next Commission session, but that some longer-term indicative planning (for a three-to-five year period) may also be appropriate (A/68/17, para. 305).

4. Documents for the current Commission session are available at www.uncitral.org/uncitral/commission/sessions/49th.html.[1] They include:

(a) Progress reports of the Commission's Working Groups:

A/CN.9/860 and A/CN.9/866 — Report of Working Group I (MSMEs) on the work of its 25th and 26th sessions (Vienna, 19-23 October 2015; New York, 4-7 April 2016)

A/CN.9/861 and A/CN.9/867 — Report of Working Group II (Arbitration and Conciliation) on the work of its 63rd and 64th sessions (Vienna, 7-11 September 2015; New York, 1-5 February 2016)

[1] Titles and symbols of the documents referred to are current as at the date of submission of this Note, but are subject to change. Further documents may also be issued, and, if so, will be available at the UNCITRAL weblink indicated.

A/CN.9/862 and A/CN.9/868 — Report of Working Group III (Online Dispute Resolution) on the work of its 32nd and 33rd sessions (Vienna, 30 November-4 December 2015; New York, 29 February-4 March 2016)

A/CN.9/863 and A/CN.9/869 — Report of Working Group IV (Electronic Commerce) on the work of its 52nd and 53rd sessions (Vienna, 9-13 November 2015; New York, 9-13 May 2016)

A/CN.9/864 and A/CN.9/870 — Report of Working Group V (Insolvency Law) on the work of its 48th and 49th sessions (Vienna, 14-18 December 2015; New York, 2-6 May 2016)

A/CN.9/865 and A/CN.9/871 — Report of Working Group VI (Security Interests) on the work of its 28th and 29h sessions (Vienna, 12-16 October 2015; New York, 8-12 February 2016)

(b) Draft texts for consideration and possible adoption by the Commission, and comments by States thereon:

A/CN.9/879 — A note by the Secretariat containing the draft revised UNCITRAL Notes on Organizing Arbitral Proceedings

A/CN.9/884 and Addenda 1-4 — A note by the Secretariat containing the draft Model Law on Secured Transactions

A/CN.9/885 and Addenda 1-4 — A note by the Secretariat containing the draft Guide to Enactment of the draft Model Law on Secured Transactions

A/CN.9/886 and A/CN.9/887 — Comments by States on the draft Model Law on Secured Transactions

A/CN.9/888 — A note by the Secretariat containing the draft Technical Notes on Online Dispute Resolution[2]

(c) Reports on other events and from the Secretariat:

A/CN.9/872 and A/CN.9/877 — Technical assistance activities undertaken since the Commission's forty-seventh 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-seventh session

A/CN.9/873 — Status and progress of CLOUT, Note by the Secretariat (including updates on the current activities concerning digests)

A/CN.9/874 — Bibliography of recent writings related to UNCITRAL's work

A/CN.9/875 — Coordination activities: Brief survey of the activities undertaken by the Secretariat since the Commission's forty-seventh session to ensure coordination with the work of other organizations active in the field of international trade law, Note by the Secretariat

A/CN.9/876 — Status of conventions and model laws, Note by the Secretariat

A/CN.9/880 — A note by the Secretariat on code of ethics in international arbitration

A/CN.9/881 — A note by the Secretariat on possible future work on concurrent proceedings in international arbitration

A/CN.9/882 — Technical assistance to law reform: Compilation of comments by States on a draft guidance note on strengthening United Nations support to States to implement sound commercial law reforms

[2] As at the date of submission of this note, States have not yet had the opportunity to comment on the draft Notes. Document A/CN.9/893 — Comments by States on the draft Technical Notes on Online Dispute Resolution will be issued if such comments are received.

A/CN.9/883 — Technical assistance to law reform: Draft guidance note on strengthening United Nations support to States, upon their request, to implement sound commercial law reforms

A/CN.9/889 — A note by the Secretariat on Possible future work in procurement and infrastructure development

A/CN.9/891 — Report on the Colloquium on Identity Management and Trust Services (Vienna, 21-22 April 2016)

A/CN.9/892 — A Note by the Secretariat on a joint proposal on cooperation in the area of international commercial contract law (with a focus on sales) prepared by the Secretariat and the secretariats of the Hague Conference on Private International Law and the International Institute for the Unification of Private Law ("Unidroit")

5. Background documents from the Commission's forty-eighth session are available at www.uncitral.org/uncitral/en/commission/sessions/48th.html. The Commission may wish to refer to the following documents in particular:

A/CN.9/841 — Planned and possible future work — Note by the Secretariat

A/CN.9/850 — Planned and possible future work in procurement and infrastructure development — Note by the Secretariat

A/CN.9/854 — Possible future work in the area of electronic commerce — legal issues related to identity management and trust services

A/CN.9/855 — Proposal by the Government of Algeria: possible future work in the area of international arbitration between States and investors — code of ethics for arbitrators

A/CN.9/856 — Possible future work in the area of electronic commerce — Contractual issues in the provision of cloud computing services — Proposal by Canada

A/CN.9/857 — Possible future work in the area of online dispute resolution — Proposal by Israel

A/CN.9/858 — Possible future work in the area of online dispute resolution — Proposal by Colombia, Honduras and the United States of America

A/70/17 — Report of the Commission's forty-eighth session (especially paras. 335-365)[3]

II. Summary of current activities and proposals for future work programme

A. Legislative development

1. Current legislative programme

6. Table 1 below sets out legislative development currently under way in the Commission's Working Groups, and the envisaged completion dates of the texts concerned.

[3] Background documents from the Commission's forty-fifth to forty-seventh sessions are available at www.uncitral.org/uncitral/commission/sessions/45th.html, www.uncitral.org/uncitral/commission/sessions/46th.html and www.uncitral.org/uncitral/commission/sessions/47th.html.

Table 1
Current legislative activities

Topic	*Report and document references*	*Envisaged completion date*
MSMEs (WG I)		
Preparation of legal standards on simplified business incorporation and registration	A/CN.9/860 and A/CN.9/866	Estimated 2018 or beyond
Arbitration (WG II)		
(i) Revision of the UNCITRAL Notes on Organizing Arbitral Proceedings	A/CN.9/861 and A/CN.9/867	To be completed during the session of the Commission
(ii) Enforcement of settlement agreements resulting from international conciliation/mediation		Ongoing
Online Dispute Resolution (WG III)		
Preparation of a non-binding descriptive document reflecting elements of an ODR process	A/CN.9/868 and A/CN.9/888	Completed at Working Group level; to be considered by the Commission for possible adoption
Electronic commerce (WG IV)		
(i) Electronic transferable records	A/66/17, para. 238; A/CN.9/863 and A/CN.9/869	Estimated 2017
(ii) Electronic single window facilities	A/66/17, para. 240	Ongoing
Insolvency (WG V)		
(i) Model law or legislative provisions on selected international issues, including jurisdiction, access and recognition in the cross-border insolvency of enterprise groups	A/CN.9/691 A/65/17, para. 259(a) A/CN.9/798 A/CN.9/803 A/CN.9/829	Ongoing
(ii) Obligations of directors of enterprise group's members in the period approaching insolvency	A/CN.9/691 A/65/17, para. 259(b) A/CN.9/829	Since text overlaps with work on topic (i), finalization related to progress with that topic.
(iii) Model law or model legislative provisions on recognition and enforcement of insolvency-related judgements	A/69/17, para. 155 A/CN.9/829	Ongoing
(iv) Study on the insolvency of large and complex financial institutions	A/CN.9/691 A/65/17, para. 260 A/CN.9/763	Ongoing
(v) Convention on selected international insolvency issues – informal consultations	A/69/17, para. 158	Ongoing
Security Interests (WG VI)		
(i) Preparation of a draft Model Law on Secured Transactions	A/CN.9/865 and A/CN.9/871 A/CN.9/884 and Addenda 1-4	2016
(ii) Preparation of a draft Guide to Enactment of the draft Model Law on Secured Transactions	A/CN.9/885 and Addenda 1-4	To be confirmed

7. As noted above, the following draft texts will be presented for consideration and possible adoption at this Commission session:

Draft revised UNCITRAL Notes on Organizing Arbitral Proceedings (A/CN.9/879)

Draft Technical Notes on Online Dispute Resolution (A/CN.9/888)[4]

Draft Model Law on Secured Transactions (A/CN.9/884 and Addenda 1-4)[5]

Progress of Working Groups

8. At its forty-seventh session, the Commission requested that the progress and status of the work of each Working Group, as set out in their reports, be collated and presented to the Commission so as to allow context of each Working Group's suggestions for future work and for prioritization among existing and new topics to be clearer (A/69/17, para. 253). A brief summary of the progress of each Working Group is accordingly presented below.

MSMEs (Working Group I)

9. At its twenty-fifth session (Vienna, 19 to 23 October 2015), Working Group I continued its exploration of the legal issues surrounding the simplification of incorporation and on good practices in business registration. In respect of the latter, the Working Group decided that work should proceed along the lines of a concise legislative guide on key principles in business registration, without prejudice to considering other possible legislative texts at a later stage. In respect of the former issue, the Working Group resumed its consideration of the concepts as contained in a draft model law on a simplified business entity.

10. At its twenty-sixth session (New York, 4 to 8 April 2016), Working Group I resumed its deliberations on the issues as contained in a draft model law on a simplified business entity and decided that the legislative text on that topic should be in the form of a legislative guide (consisting of recommendations and commentary) that reflected its policy discussions to date. In respect of its discussion on key principles in business registration, the Working Group considered draft recommendations and commentary for a legislative guide. In addition, the Working Group also considered the general architecture of its work on MSMEs, and agreed that its MSME work should be accompanied by an introductory document which would form a part of the final text and would provide an overarching framework for current and future work on MSMEs. The Working Group also agreed that the current two legislative texts being considered by it could be attached to and underpin that contextual framework as legal pillars, and that the number of legal pillars could then be expanded as necessary to accommodate the adoption by the Commission of any additional legislative texts on MSMEs.[6]

Arbitration (Working Group II)

11. At its sixty-fourth session, the Working Group considered the draft revised UNCITRAL Notes on Organizing Arbitral Proceedings ("the Notes"), prepared on the basis of the deliberations and decisions of the Commission at its forty-eighth session (A/CN.9/WG.II/WP.194). In accordance with the mandate that work on the topic should be completed, the Working Group will submit the revised version of the Notes for consideration by the Commission at its current session (A/CN.9/867, para. 15).

12. Further, in line with the mandate received from the Commission, the Working Group commenced, at its sixty-third session, work on the topic of enforcement of settlement agreements with the aim of identifying relevant issues and developing possible solutions, including the possible preparation of a convention, model provisions or guidance text, on the basis of notes by the Secretariat. The Working Group considered during both its sixty-third and sixty-fourth sessions the scope of a possible instrument, the questions of validity, content and form of settlement agreements, as well as the main features of an

[4] Document A/CN.9/893 will contain a compilation of any comments by States on the Technical Notes on Online Dispute Resolution.

[5] Documents A/CN.9/886 and A/CN.9/887 contain comments by States on the draft Model Law on Secured Transactions.

[6] A/CN.9/866, paras. 86 to 87.

enforcement procedure and defences to enforcement, on the basis of notes by the Secretariat (A/CN.9/WG.II/WP.190 and A/CN.9/WG.II/WP.195). It was agreed that the Secretariat should prepare for the forthcoming session of the Working Group a document outlining the issues considered so far and setting out draft provisions without prejudice to the final form of the instrument, grouping provisions into broad categories. Further, delegations were encouraged to review the experience of those jurisdictions where the enforcement of settlement agreements had been the subject of litigation, and to report back to the Working Group on the matter.

Online dispute resolution (Working Group III)

13. At its forty-eighth session (Vienna, 29 June-16 July 2015), the Commission instructed Working Group III to continue its work towards elaborating a non-binding descriptive document reflecting elements of an ODR process, on which elements the Working Group had previously reached consensus, excluding the question of the nature of the final stage of the ODR process (arbitration/non-arbitration). It was also agreed that the Working Group would be given a time limit of one year or no more than two Working Group sessions, after which the work of the Working Group would come to an end, whether or not a result had been achieved.

14. At its thirty-second and thirty-third sessions (Vienna, 30 November-4 December 2015 and New York, 29 February-4 March 2016),[7] the Working Group conducted deliberations on a draft text entitled "Technical Notes on Online Dispute Resolution", in accordance with the Commission's instructions, and has completed its consideration thereof. The final document is submitted for consideration by the Commission at its current session.

Electronic commerce (Working Group IV)

15. At its fifty-second (Vienna, 9-13 November 2014) and fifty-third sessions (New York, 9-13 May 2015) the Working Group continued its work on the preparation of a Model Law on Electronic Transferable Records.

16. At its forty-fourth session, in 2011, the Commission welcomed the ongoing cooperation between the Secretariat and other relevant organizations on legal issues relating to electronic single-window facilities, and asked the Secretariat to contribute as appropriate, with a view to discussing relevant matters at the working group level when the progress of joint work offered a sufficient level of detail. In that respect, the Secretariat has regularly contributed to the preparation by UN/ESCAP of a Framework Agreement on Facilitation of Cross-border Paperless Trade in Asia and the Pacific. The Commission will hear an oral report on the content of that Framework Agreement and its relevance for the promotion of the adoption, use and uniform interpretation of UNCITRAL texts on electronic commerce.

Insolvency (Working Group V)

17. At its forty-eighth and forty-ninth sessions, the Working Group continued its deliberations on (a) the structure and key elements of a draft legislative text to facilitate the cross-border insolvency of multinational enterprise groups; (b) the draft commentary and recommendations on the obligations of directors of enterprise group companies in the period approaching insolvency; and (c) the draft model law on the recognition and enforcement of insolvency-related judgements. The work on (b) is well-developed, but finalization depends upon progress with topic (a), as the solutions developed with respect to the conduct of enterprise group insolvencies will have an impact upon the nature of the obligations of directors of relevant group members and the steps that might be required to discharge those obligations.

Security Interests (Working Group VI)

18. At its twenty-eighth and twenty-ninth sessions (Vienna, 12-16 October 2015, and New York, 8-12 February 2016, respectively), the Working Group adopted the draft Model Law on Secured Transactions (A/CN.9/865 and A/CN.9/871), and, at its twenty-ninth session, decided to submit it to the Commission for consideration and adoption at its

[7] A/CN.9/862 and A/CN.9/868.

forty-ninth session (A/CN.9/865, para. 14, and A/CN.9/871, paras. 15 and 91). At its twenty-eighth session, the Working Group noted that, in order to complete the draft Guide to Enactment that the Commission had decided should accompany the Model Law (A/70/17, para. 216), it might need an additional one or two sessions, and, at its twenty-ninth session, decided to request the Commission for an additional one or two sessions for that purpose (A/CN.9/865, para. 104, and A/CN.9/871, para. 91, respectively).

2. Future legislative programme

19. At its forty-sixth session, the Commission underscored the importance of a strategic approach to the allocation of resources inter alia to legislative development, in the light of the increasing number of topics referred to UNCITRAL for consideration (A/68/17, paras. 294-295). The Commission has emphasized the benefit of UNCITRAL's primary working method — that is, legislative development through formal negotiations in a working group (A/69/17, para. 249).

20. The Commission has also reaffirmed that it retained the authority and responsibility for setting UNCITRAL's workplan, especially as regards the mandates of Working Groups, though the role of Working Groups in identifying possible future work and the need for flexibility to allow a Working Group to decide on the type of legislative text to be produced were also recalled (ibid.).

21. Table 2 below sets out proposals for future work by the Commission, annotated to show whether the work is mandated or possible future work. "Mandated future work" is planned legislative development, i.e. work in respect of which the Commission has provided a mandate to a Working Group. Items denoted as "possible future work" are topics proposed to the Commission, which the Commission may wish to consider. The final column of the table identifies areas in which a proposal may involve issues of another subject area relevant to UNCITRAL.

22. The Commission may wish to consider the items set out in Table 2, the more detailed descriptions in the paragraphs following that table and the other documents referred to in this section when setting its work programme for the year to the Commission session in 2017. The Commission may also recall that further proposals seeking legislative mandates for other subject-areas may be made at the current session, by States and/or international organizations.

Table 2
Summary of mandated and possible future legislative activity

Subject area	*Proposal*	*Document reference*	*Mandated/possible future work*	*Other relevant subject areas*
Arbitration (WG II)	Concurrent proceedings in the field of investment arbitration	Para. 23 below A/CN.9/881	Possible	–
	Code of ethics in international arbitration	Para. 23 below A/CN.9/880	Possible	
Electronic commerce (WG IV)	Identity management and trust services Cloud computing Mobile commerce	Para. 24 below A/70/17, para. 358; A/CN.9/891	Mandated	MSMEs (mobile payments)
Security Interests (WG VI)	Contractual Guide on Secured Transactions Uniform law text on intellectual property licensing	Para. 25 below A/70/17, para. 217	Mandated	Arbitration, MSMEs
Procurement and Infrastructure Development (not before WG)	Revisions to the UNCITRAL texts on PFIP[8]	Para. 28 below A/CN.9/889	Possible	Arbitration/ conciliation

[8] 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.

Arbitration (Working Group II)

23. At its forty-sixth session, in 2013, the Commission identified that the subject of concurrent proceedings was increasingly important particularly in the field of investment arbitration and might warrant further consideration.[9] At its forty-seventh session, in 2014, the Commission considered whether to mandate its Working Group II (Arbitration and Conciliation) to undertake work in the field of concurrent proceedings in investment treaty arbitration, based on a note prepared by the Secretariat, briefly outlining the issues at stake (A/CN.9/816, Addendum). At that session, it was said that future work in that area could be beneficial. Further, it was suggested that UNCITRAL ought not to limit its work to parallel proceedings arising in the context of investment arbitration, but rather, in light of the implication such work might have on other types of arbitration practice, to extend that work to commercial arbitration as well. It was also said, however, that parallel proceedings in investment arbitration, and those in commercial arbitration, raised different issues and might need to be considered separately.[10] After discussion, the Commission agreed that the Secretariat should explore the matter further, in close cooperation with experts and other organizations working actively in that area. That work should focus on treaty-based investor-State arbitration, without disregarding the issue in the context of international commercial arbitration. The Commission requested the Secretariat to report to the Commission at a future session, outlining the issues at stake and identifying work that UNCITRAL might usefully undertake in the area.[11] At its forty-eighth session, in 2015, the Commission considered a note by the Secretariat in relation to concurrent proceedings in investment arbitration (A/CN.9/848) and requested the Secretariat to report to the Commission at a future session with a detailed analysis of the topic including possible work that could be carried out.[12] Document A/CN.9/881 provides further details on the proposals in this subject area.

Electronic commerce (Working Group IV)

24. At its forty-eighth session, in 2015, the Commission instructed the Secretariat to conduct preparatory work on identity management and trust services, cloud computing and mobile commerce, including through the organization of colloquiums and expert group meetings, for future discussion at the Working Group level following the current work on electronic transferable records. The Commission also asked the Secretariat to share the result of that preparatory work with Working Group IV, with a view to seeking recommendations on the exact scope, possible methodology and priorities for the consideration of the Commission at its forty-ninth session. The Commission will have before it the report on the Colloquium on Identity Management and Trust Services held in Vienna, Austria on 21 and 22 April 2016 (A/CN.9/894).

Security Interests (Working Group VI)

25. As Table 1 indicates, it is envisaged that a draft Model Law on Secured Transactions (the "draft Model Law") was completed and submitted by Working Group VI to the Commission for consideration and adoption at the present session. As to the draft Guide to Enactment, the Commission may wish to consider whether one or two sessions should be given to the Working Group to complete it and submit it to the Commission for adoption in 2017.

26. As to the contractual guide on secured transactions in particular for small and medium-sized enterprises and enterprises in developing countries, and to a uniform law text on intellectual property licensing, topics that were placed by the Commission on its future work agenda at its forty-third session (see A/65/17, paras. 264 and 273), the Commission may wish to consider them at a future session on the basis of notes to be prepared by the Secretariat, after a colloquium or expert group meeting.

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[9] *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17* (A/68/17), paras. 129-133 and 311.

[10] Ibid., para. 127.

[11] Ibid., para. 130.

[12] Ibid., *Seventieth session, Supplement No. 17* (A/70/17), para. 147.

27. The Commission may wish to consider whether, in the context of any future work on MSME finance, the draft Model Law and the draft Guide to Enactment might need to be expanded to address matters related to secured finance to MSMEs. The Commission may also wish to note the discussion by the Working Group of the issue of the resolution of disputes arising from security agreements through alternative dispute resolution mechanisms (A/CN.9/871, paras. 83-86) and consider whether that matter should also be added on its future work agenda. The Commission may wish to consider whether both those matters should be retained on its future work programme and discussed at a future session on the basis of notes to be prepared by the Secretariat, after a colloquium or expert group meeting to be held within existing resources.

Procurement and infrastructure development (not currently before a Working Group)

28. At its forty-eighth session, the Commission considered possible future work on the topic of suspension and debarment in public procurement and in public-private partnerships (PPPs). As regards suspension and debarment, the Commission instructed the Secretariat to undertake certain exploratory work on the question and to report further to the Commission at its forty-ninth session. As regards PPPs, the Commission decided to keep the topic on its agenda, that the Secretariat would continue to follow the topic to advance preparations should it eventually be taken up, and that the Secretariat would report further to the Commission again at its forty-ninth session. Document A/CN.9/889 — A note by the Secretariat on possible future work in procurement and infrastructure development — reports to the Commission accordingly, concluding that work on suspension and debarment might be appropriate at a future time, and suggesting that limited work on PPPs might be appropriate in the short term.

29. The Commission may wish to assess the need for conference time for those of the above proposals it decides to take up, and to make recommendations regarding the use of conference time and regarding informal working methods accordingly.

B. Current and possible future activities to support the adoption and use of UNCITRAL texts

30. The reports available to this forty-ninth session of the Commission describing UNCITRAL's current activities in the provision of technical assistance, promoting ways to ensure a uniform interpretation and application of UNCITRAL texts; identifying the status of and work of other bodies in promoting its texts, coordination and cooperation with other relevant bodies and promoting the rule of law at the national and international levels ("support activities") are as follows:

A/CN.9/872 and A/CN.9/877 — 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.9/873 — Promotion of ways and means of ensuring a uniform interpretation and application of UNCITRAL legal texts: Status and progress of CLOUT, Note by the Secretariat (including updates on the current activities concerning digests)

A/CN.9/874 — Bibliography of recent writings related to UNCITRAL's work

A/CN.9/875 — Coordination activities: Brief survey of the activities undertaken by the Secretariat since the Commission's forty-seventh session to ensure coordination with the work of other organizations active in the field of international trade law, Note by the Secretariat

A/CN.9/876 — Status of conventions and model laws, Note by the Secretariat

A/CN.9/882 — Technical assistance to law reform: Compilation of comments by States on a draft guidance note on strengthening United Nations support to States to implement sound commercial law reforms

A/CN.9/883 — Technical assistance to law reform: Draft guidance note on strengthening United Nations support to States, upon their request, to implement sound commercial law reforms

Oral report — Role of UNCITRAL in promoting the rule of law at the national and international levels

31. The Commission has emphasized the importance of support activities and the need to encourage such activities at the global and regional levels through the Secretariat, through the expertise available in the Working Groups and Commission, through member States and through partnering arrangements with relevant international organizations, as well as promoting increased awareness of UNCITRAL's texts in these organizations and within the United Nations system (A/69/17, paras. 263-265). It has requested the Secretariat to continue with those activities to the extent that its resources permit (A/70/17, para. 365).

32. The UNCITRAL secretariat continues undertaking activities on the rule of law in those areas of work of the United Nations and other entities that are of general relevance to UNCITRAL. It also participates in initiatives across the United Nations system relevant to the implementation of the 2030 Agenda for Sustainable Development. These activities are described in a note by the Secretariat on coordination activities (A/CN.9/875). In addition, the Commission will hear an oral report by the Secretariat on the implementation of the relevant decisions taken by the Commission at its forty-eighth session. (*Official Records of the General Assembly, Seventieth Session, Supplement No. 17* (A/70/17), paras. 300-301.)

33. As regards technical assistance activities, in addition to a note by the Secretariat on the activities undertaken since the Commission's forty-eighth session and on the technical assistance resources (A/CN.9/872), the Commission will have before it a revised draft guidance note on strengthening United Nations support to States, upon their request, to implement sound commercial law reforms (A/CN.9/883), submitted to the Commission for its consideration pursuant to its decision at its forty-eighth session (*Official Records of the General Assembly, Seventieth Session, Supplement No. 17* (A/70/17), paras. 251-252). It will also have before it the compilation of comments by States received by the Secretariat on the earlier versions of the draft guidance note (A/CN.9/882).

34. In accordance with the deliberations of the Commission at its second, third, thirty-first, forty-first, forty-fourth and forty-fifth sessions where it promoted the dissemination of information and the harmonization of the application of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention", A/CN.9/814, para. 1) as well as the preparation of a guide on that convention, the Secretariat's work on the finalization of a guide on the New York Convention, in close cooperation with experts, is scheduled for completion in the course of 2016. Some chapters of the guide are currently contained in documents A/CN.9/786, A/CN.9/814 and its addenda, as well as on the website www.newyorkconvention1958.org.

35. At its forty-eighth session in 2015, the Commission expressed support for increasing, within available resources, the number of promotional and capacity-building activities aimed at supporting adoption and effective implementation of the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980). In this regard, at its forty-ninth session, the Commission will have before it a joint proposal on cooperation in the area of international commercial contract law (with a focus on sales) prepared by the Secretariat and the secretariats of the Hague Conference on Private International Law and the International Institute for the Unification of Private Law ("Unidroit") (A/CN.9/892).

36. The Secretariat plans to prepare and distribute an accession toolkit in respect of the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (the "Rotterdam Rules"), as well as for the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration ("Mauritius Convention on Transparency"). It is anticipated that this material will assist States intending to ratify the instruments; work in relation to the Rotterdam Rules has proceeded in preparing the materials and it is expected that the text will be finalized for the Commission to note at its 50th session in 2017.

III. Commemoration of the fiftieth anniversary of the establishment of UNCITRAL in 2016

37. At its forty-eighth session, the Commission considered that a third UNCITRAL Congress should be held to commemorate UNCITRAL's fiftieth anniversary, which falls in 2016. The Secretariat was requested to undertake preparatory work towards the organization of such a Congress, which the Commission anticipated would take place in 2017 (A/70/17, para. 366). The Congress is envisaged to be held during the first week of the Commission's fiftieth session in 2017, from 4-6 July.

38. One of the objectives of the Congress is to suggest possible areas for future UNCITRAL activity for the medium-term and onwards, which the Commission may wish to consider along with its existing programme of work. It is anticipated that opening the Congress to all persons and organizations with an interest in international trade and commerce will enhance the opportunity to identify relevant topics of potential interest to UNCITRAL. In terms of context, the Congress will also consider how the work of UNCITRAL and its contribution to trade law reform and innovation can support the United Nations sustainable development goals, through reforms to encourage commerce at the national and international levels. The Congress will examine, therefore, the potential of UNCITRAL as a technical forum to discuss legal obstacles to cross-border commerce and to propose legislative solutions.

39. Initial consultations indicate five thematic areas may be of possible interest for ongoing modernization and harmonization of international trade law:

(a) The development of the digital economy, including international data transfers;

(b) Global supply chains and access to inputs — credit, transport, infrastructure;

(c) Trade in services;

(d) Finance in international trade: International capital flows, access to credit, payments;

(e) Exploitation of global public goods/"natural" and emerging resources (e.g. cyberspace, outer space).

40. Within these areas, some of which fall within the existing work programme of the Commission, and any others identified, the Congress will examine the potential for relevant legislative development within UNCITRAL. It is therefore anticipated that the Congress will identify emerging subject areas in which UNCITRAL has a role to play, whether at the level of rules for the national economy or rules addressing cross-border relationships that will be implemented domestically.

41. It is recognized that the above five broad areas are only starting points and will overlap to some degree; they are also not intended to be exclusive. It is also anticipated that cross-cutting issues such as promotion of sustainable competitiveness, inclusive trade and enhanced productivity may arise in some or all of them.

42. In this context, relevant process questions will include whether there is a clear understanding of the obstacles to cross-border commerce that an UNCITRAL text might address; whether the consensual development, within UNCITRAL, of a legislative text would be feasible, and whether a legislative text in relevant subject areas would enhance the possibilities for cross-border commerce. The Congress would also seek to identify whether other organizations are engaged in work on any such areas, not only to avoid duplication, but also in the context of the Commission's mandate to coordinate the work of organizations active in the field of international trade law.

43. As not all participants at the Congress may be familiar with the work of UNCITRAL, the Congress will also include a session exploring its objectives and methods of work. The session is designed to encourage contributions on policy and practice from all States, relevant organizations, policymakers, academics and others that can assist UNCITRAL member States in developing, revising, enacting and interpreting UNCITRAL texts.

44. The Secretariat will seek the views of the academic community, policymakers, legal practitioners and others on the thematic areas noted above, including through a call for

papers. It is anticipated that the agenda for the Commission will be set in the autumn of 2016.

45. Information about the Congress will be published on the UNCITRAL website, at www.uncitral.org/uncitral/en/commission/colloquia/50th-anniversary.html. The Secretariat will provide an oral report on the proceedings at the Congress at the 50th session of the Commission, and a written report will be issued at a later date.

B. Note by the Secretariat on settlement of commercial disputes: possible future work on ethics in international arbitration

(A/CN.9/880)

[Original: English]

Contents

I. Introduction

1. At its forty-eighth session, in 2015, the Commission had before it a proposal for future work on a code of ethics for arbitrators in investment arbitration (A/CN.9/855), which suggested that work on the topic could relate to the conduct of arbitrators, their relationship with those involved in the arbitration process, and the values that they were expected to share and convey.[1]

2. After discussion, the Commission requested the Secretariat to explore the topic in a broad manner, including in the field of both commercial and treaty-based investor-State arbitration, taking into account existing laws, rules and regulations, as well as any standards established by other organizations. The Secretariat was requested to assess the feasibility of work in that area and report to the Commission at a future session.[2]

3. In accordance with that request, the purpose of this note is to explore the concept of ethics in international arbitration, to identify existing legal frameworks in the field of international commercial and treaty-based investor-State arbitration, and to raise questions with regard to the topic as an item for possible future work by the Commission.[3] This note is limited to exploring ethics of arbitrators, and does not address other participants in the arbitration process, such as counsel, experts, or third-party funders.

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[1] *Official Records of the General Assembly, Seventieth Session, Supplement No. 17* (A/70/17), para. 148.

[2] Ibid., para. 151.

[3] Ibid., para. 150.

II. Concept of ethics and existing legal frameworks on ethics in international arbitration

A. Concept of ethics in international arbitration

1. Standard of conduct

4. The notion of legal or professional ethics refers to the norms and standards of acceptable conduct within the legal profession, involving the duties that one owes: conduct is considered unethical when it is not in conformity with moral norms and professional standards. Similarly, the concept of ethics in international arbitration usually refers to norms and standards applicable to the conduct of arbitrators as elaborated further below.

2. Impartiality and independence

5. Impartiality and independence are the core elements of integrity and ethical conduct of arbitrators. Arbitrators are expected to avoid direct and indirect conflicts of interest. Such conflicts usually fall in one of two categories: lack of impartiality or lack of independence. Usually impartiality and independence are distinguished on the basis of internal as opposed to external considerations. Impartiality means the absence of bias or predisposition towards a party. Lack of impartiality would arise, for instance, if an arbitrator appears to have pre-judged some matters. Independence usually relates to the business, financial, or personal relationship of an arbitrator with a party to the arbitration, and lack of independence usually derives from problematic relations between an arbitrator and a party or its counsel. Standards on ethics usually provide that ethical duties remain applicable throughout the duration of the proceedings (see below, section B).

3. Disclosure obligations

6. The obligation of impartiality and independence is usually accompanied by the requirement that the arbitrator shall disclose circumstances, past or present, that could give rise to justifiable doubts as to his or her impartiality or independence. It is then for the arbitrator to declare that the disclosed circumstances do not affect, in his or her opinion, his or her independence and impartiality.[4]

7. Investment treaties may contain additional elements regarding disclosure, specifying, for instance, that the arbitrators shall disclose any financial interest in the proceeding or in its outcome, and in an administrative proceeding, a domestic court proceeding or another panel or committee proceeding that involves issues that may be decided in the proceeding for which the arbitrator is under consideration.[5]

8. Specific requirements are also sometimes found in standards on ethics, such as that a prospective arbitrator shall disclose personal or business relationships with "any person known to be a potentially important witness in the arbitration".[6]

4. Other obligations possibly relevant to ethics of arbitrators

9. Requirements of fairness and diligence, as well as provisions on qualifications and confidentiality can be found in national legislation and arbitration rules, which, in substance, usually provide that the arbitrator shall: (i) perform his or her duties with fairness and diligence, thoroughly and expeditiously throughout the course of the proceeding;[7] and

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[4] See, for instance, the model statement of independence contained in the Annex to the UNCITRAL Arbitration Rules (as revised in 2010) which gives an indication as to the elements that would be required to be disclosed: "Attached is a statement made pursuant to article 11 of the UNCITRAL Arbitration Rules of (a) my past and present professional, business and other relationships with the parties and (b) any other relevant circumstances."

[5] See, for instance, Canada — European Union Comprehensive Economic and Trade Agreement (CETA).

[6] See for instance the Code of Ethics for an Arbitrator, Singapore International Arbitration Centre 2.2 (a).

[7] See, for instance, article 17 (1) of the UNCITRAL Arbitration Rules (as revised in 2010), as well as their Annex (which provides that any party may consider requesting from the arbitrator a statement confirming that "on the basis of the information presently available, that arbitrator can devote the time necessary to conduct the arbitration diligently, efficiently and in accordance with the time limits in the Rules.").

(ii) keep non-public information confidential, and not use any information to gain a personal advantage, or to affect the interest of others.

5. Challenge procedure — Non-compliance with ethical standards

10. The usual consequence of a finding of non-compliance with ethical standards after the appointment of an arbitrator is usually the resignation and replacement of the arbitrator.[8] Almost all arbitration laws and arbitration rules contain provisions on procedures for challenging arbitrators who do not comply with ethical standards. They also include safeguards aimed at avoiding that the challenge procedures be used abusively, as dilatory tactics, by parties.

B. Existing legal frameworks on ethics in international arbitration

11. With the expansion of international arbitration, a variety of texts on ethics have been developed by States, international organizations, arbitral institutions as well as local bar associations. Some have been formulated as a stand-alone text, while others have been included in national legislation, in arbitration rules and more recently, in treaties relating to investor-State dispute settlement (see below, para. 19). Some have a binding effect, whereas others are meant to provide general guidance. State courts' review of challenges to arbitrators as well as challenges to awards under national laws and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) ("New York Convention") often constitute a last resort review of the arbitrators' conduct.

1. National legislation

12. The UNCITRAL Model Law on International Commercial Arbitration ("Model Law on Arbitration") has been enacted in a large number of jurisdictions and its articles 12 and 13 on grounds for challenge and challenge procedure shed light on the ethics expected of an arbitrator.[9] It does so by imposing on each arbitrator a continuing duty to disclose to the parties circumstances that are likely to give rise to justifiable doubts as to his or her impartiality or independence.[10] The Model Law on Arbitration also makes it clear that arbitrators cannot be challenged for reasons other than those mentioned in article 12, paragraph 2.[11]

2. Guidance texts developed by international organizations and arbitral institutions

13. In line with the provisions found in national legislation and arbitration rules, professional standards addressing the question of conflict of interest generally refer to the principle that arbitrators have a continuing obligation to remain impartial and independent.[12]

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[8] See, for instance, Rule 6 (2), ICSID Arbitration Rules which provides that: "Before or at the first session of the Tribunal, each arbitrator shall sign a declaration. […] Any arbitrator failing to sign a declaration by the end of the first session of the Tribunal shall be deemed to have resigned." Similarly, under the UNCITRAL Arbitration Rules, a challenge procedure is provided for in the event arbitrators would lack impartiality and independence.

[9] Jurisdictions which have enacted legislation based on the Model Law on Arbitration can be found on the Internet at www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html.

[10] Article 12(2) of the Model Law on Arbitration provides that: "An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties. A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made".

[11] The *travaux préparatoires* show that proposals were made to delete the word "only" in article 12(2) of the Model Law on Arbitration but it was considered preferable to retain that word to clearly emphasize that possible additional grounds for challenge provided for in domestic law should not apply in the context of international commercial arbitrations (see *Official Records of the General Assembly, Fortieth Session, Supplement No. 17* (A/40/17), paras. 116-119).

[12] For example, "Code of Ethics" (AAA), "Code of Professional and Ethical Conduct" (London Chartered Institute of Arbitrators), "Code of conduct" (EU), "Guidelines on Conflict of Interests" (IBA), "Ethical Arbitration Charter" (Federation of Arbitration Centre). Code of Ethics for an Arbitrator, Singapore International Arbitration Centre.

For example, the IBA Guidelines on Conflict of Interest contain illustrations of acceptable and prohibited relationships that bifurcate into waivable and non-waivable relationships. These lists are non-exhaustive and detail specific situations that, depending on the facts of a given case, give rise to justifiable doubts as to the arbitrator's impartiality and independence. It should be noted that during the review of the IBA Guidelines, "a consensus emerged in favour of a general affirmation that the Guidelines apply to both commercial and investment arbitration, and to both legal and non-legal professionals serving as arbitrator".[13]

3. Arbitration rules

14. Most arbitration rules have statements of principle rather than detailed rules on impartiality and independence of the arbitrators. They contains specific rules on the procedure for challenging an arbitrator. The UNCITRAL Arbitration Rules (as revised in 2010, and 2013), for instance, which apply to both investor-State and commercial disputes, deal with disclosure by, and challenge of, arbitrators in articles 11 to 13. In accordance with the Rules, unless the other party agrees or the arbitrator withdraws voluntarily, the decision on the challenge will be made by the appropriate appointing authority. Decisions on challenge are usually subject to review by State courts under the applicable arbitration law or within the framework of the New York Convention.

15. Arbitration rules of institutions contain similar provisions, sometimes with slight variations. For instance, some arbitration rules make reference to "justifiable doubts" as to the arbitrator's impartiality and independence while others direct the arbitrator to consider whether the questionable circumstances would cause doubts "in the eyes of the parties", or refer to "an alleged lack of impartiality or independence".

16. In the specific situation of investor-State dispute settlement, Article 14 of the ICSID Convention requires arbitrators and conciliators to be "persons of high moral character and recognized competence (…) who may be relied upon to exercise independent judgement". This requirement is supplemented by filing a declaration of independence at the beginning of the proceedings, required under Rule 6(2) of the ICSID Arbitration Rules. Article 57 of the ICSID Convention provides a mechanism by which a party may seek disqualification of an arbitrator by showing "a manifest lack of the qualities required by paragraph (1) of Article 14." Article 39 of the ICSID Convention generally provides that an arbitrator may not have the same nationality of either party.

4. Case law

17. As mentioned above, the Model Law on Arbitration, including its articles 12 and 13, has been enacted in a number of jurisdictions. The Model Law, however, does not define terms such as "justifiable doubt", "impartiality", or "independence", and thus State courts have used their respective standards to interpret those notions. The Digest of Case Law on the Model Law on Arbitration provides an analysis of the relevant court decisions.[14] Courts have highlighted the mandatory nature of impartiality and independence and have analysed the arbitrator's duty to disclose. Some decisions have underlined that there should be objective circumstances that give rise to justifiable doubts as to the impartiality or independence of the arbitrator for a challenge to be successful.[15] For example, the notion of "justifiable doubt" has sometimes been interpreted to require a showing of objective facts that a reasonable, well-informed person would regard as constituting a bias on the part of the arbitrator. Some jurisdictions require a real manifestation of bias before an arbitrator can be removed.

18. Decisions by courts with regard to the New York Convention may also be relevant. Case law shows that there have been attempts by parties to resist enforcement of foreign arbitral awards on the basis that the arbitrators lacked independence and impartiality. While these defences to enforcement were usually presented on the basis of article V (2) (b) of the New York Convention, they have been rarely successful. Courts have underlined that the

[13] IBA Guidelines on Conflict of Interests, page ii.

[14] The Digest of Case Law on the UNCITRAL Model Law on International Commercial Arbitration Available on the Internet at: www.uncitral.org/uncitral/en/case_law/digests/mal2012.html.

[15] See Digest of Case Law on the UNCITRAL Model Law on International Commercial Arbitration, Article 12.

matter raised was not covered by public policy, and that the party should have raised the matter during the arbitral proceedings.[16]

5. Code of ethics in investment treaties

19. Some recently concluded investment treaties contain a code of conduct for arbitrators acting in investor-State dispute settlement arising under a treaty.[17] Those codes usually address the standards of conduct for arbitrators (and other persons), their duties in the conduct of the arbitration, the disclosure obligations and the obligations of confidentiality.

III. Questions in relation to possible future work

20. With the development of international arbitration and the variety of sources and texts on ethics, no guidance has been provided on which approach arbitrators should adopt, for instance whether arbitrators dealing with international arbitration should disregard their home jurisdictions' ethical rules in favour of international texts. As noted by the Commission at its forty-eighth session, arbitral tribunals could be bound by more than one standard on ethics depending on the nationality of the arbitrators, affiliation with bar associations as well as on the place of arbitration.[18] Therefore, concurrent norms may apply, without any clear indication on which one shall prevail.

21. The expansion of international arbitration has also resulted in the diversification of parties involved in the arbitration process. As such, their perspectives on ethics or conduct of arbitrators may differ significantly and what one expects may sometimes be at odds with the expectations of others from another jurisdiction or with the general practice in international arbitration. The increased complexity of recent disputes involving multiple parties and complicated transactions lead to new and more subtle questions. While there seems to be a general agreement about the fundamental ethical standards of international arbitration, in practice, the assessment of compliance with such standards may be carried out quite differently depending on the texts deemed applicable, and depending also on whether assessment is made by the arbitrators themselves, the parties, the arbitral institutions or national courts. Increased regulation of the arbitral procedure and increased transparency of the process have also an impact on parties' expectations in relation to ethical conduct of arbitrators.

22. In addition, the standards described above in section B contain statement of principles about ethical duties, and usually lack explanatory contents about their practical implications.

23. In that light, the Commission may wish to consider the following questions:

(a) Whether there is a need for a harmonized and authoritative source on ethics in international arbitration;

(b) Whether the purpose of undertaking work in the field of ethics in international arbitration would be to reduce any identified uncertainty and inconsistency in the existing ethical standards, and their application; if so, whether a new instrument should cover any or all of (i) persons concerned (in addition to the arbitrators), (ii) content of ethical standards (limited to impartiality and independence, or expanded to encompass other obligations), (iii) methods and extent of disclosure, (iv) challenge procedures, (v) effect of breach of ethical standards, (vi) enforcement mechanisms (how should ethical rules be enforced and by whom (arbitrators, parties, institutions, others))?

(c) Whether existing instruments sufficiently define the scope of disclosure and the disqualification process: what level of detail should be provided in relation to disclosure and the procedure for challenging an arbitrator? Could impartiality and independence as well as other obligations be waivable, and if so, under which conditions?

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[16] Available on the Internet at: www.newyorkconvention1958.org.

[17] See, for instance the EU — Singapore Free Trade Agreement, Annex 15-B, Code of Conduct for Arbitrators and Mediators.

[18] Ibid., para. 150.

(d) Whether the consequences of non-compliance with ethical standards are addressed in sufficient detail in existing instruments.

24. It appears from the examples in section II above that ethical standards in investor-State arbitration and in commercial arbitration largely address the same obligations with some variation. The Commission may wish to consider whether any work on the topic should encompass both commercial and treaty-based investor-State arbitration, or whether distinction should be made to take account the obvious differences between investor-State and commercial arbitration.

C. Note by the Secretariat on concurrent proceedings in international arbitration

(A/CN.9/881)

[Original: English]

Contents

I. Introduction

1. At its forty-sixth session, in 2013, the Commission identified that the subject of concurrent proceedings was increasingly important particularly in the field of investment arbitration and might warrant further consideration.[1] At its forty-seventh session, in 2014, the Commission considered whether to mandate its Working Group II (Arbitration and Conciliation) to undertake work in the field of concurrent proceedings in investment arbitration, based on a note by the Secretariat, briefly outlining the issues at stake (A/CN.9/816, Addendum). The Commission agreed that the Secretariat should explore the matter further, in close cooperation with experts and other organizations working actively in that area and that that work should focus on treaty-based investor-State arbitration, without disregarding the issue in the context of international commercial arbitration.[2] The Commission requested the Secretariat to report to the Commission outlining the issues at stake and identifying work that UNCITRAL might usefully undertake in the area.[3]

2. At its forty-eighth session, in 2015, the Commission considered a note by the Secretariat in relation to concurrent proceedings in investment arbitration (A/CN.9/848). After discussion, the Commission requested the Secretariat to report to the Commission at a future session with a detailed analysis of the topic including possible work that could be carried out.[4]

3. Accordingly, the purpose of this note is to identify and analyse the issues at stake, the current approaches that allow for the appropriate management and avoidance of concurrent

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[1] *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17* (A/68/17), paras. 129-133 and 311.

[2] Ibid., *Sixty-ninth session, Supplement No. 17* (A/69/17), paras. 126-127 and 130.

[3] Ibid., para. 130.

[4] Ibid., *Seventieth session, Supplement No. 17* (A/70/17), para. 147.

proceedings, and to suggest possible future work in that area. The note addresses concurrent proceedings in international arbitration in a general fashion, while highlighting aspects specific to commercial and to investment arbitration.[5]

II. Causes and impact of concurrent proceedings

A. Circumstances that give rise to concurrent proceedings

4. Concurrent proceedings in international arbitration may result from different factors such as (i) the involvement of multiple parties located in different jurisdictions in an investment or a contractual arrangement; (ii) the existence of multiple legal bases or causes for claims; and (iii) the availability of multiple forums and the lack of coordination among those forums.

1. Multiplicity of parties

5. In an increasingly globalized economic world, investors are developing more complex structures to carry out their investments cross-border and may seek to maximize their protection when making such investments. It is not unusual that an investment is made through a chain of entities.

6. In commercial arbitration where none of the parties is a State or State-owned entity, circumstances that could lead to concurrent proceedings would include multiple parties to the same contract taking different approaches in choosing the dispute resolution mechanism; the same parties concluding multiple contracts; and multiple parties being involved in multiple contracts (for instance, in a construction project, or other transactions where various aspects of a project are subcontracted during various phases).

7. In investment arbitration, concurrent proceedings may result from mainly two categories of situation. The first category is where different entities within the same corporate structure have a right of action against a State or state-owned entity in relation to the same investment, with regard to the same State measure and for the benefit of substantially the same interests, as long as all entities qualify as investors under an applicable investment treaty, or have a right of action under a contract or under domestic investment law. Each entity may have the possibility to commence arbitration proceedings under a different treaty, in addition to bringing claims under the dispute resolution mechanism provided for in an investment contract (see below, paras. 14 and 15). In short, one might

[5] This note is based mainly on the following documentation: *Consolidation of Proceedings in Investment Arbitration: How can multiple proceedings arising from the same or related situations be handled efficiently*, Final Report of the Geneva Colloquium held on 22 April 2006, Gabrielle Kaufmann-Kohler, Laurence Boisson de Chazournes, Victor Bonnin, Makane Moïse Mbengue; *Contract claims et clauses juridictionelles des traités relatifs à la protection des investissements*, Pierre Mayer, Lalive lecture, 22 May 2008; *Parallel Proceedings in Investor-State Treaty Arbitration: Responses for Treaty-Drafters, Arbitrators and Parties*, Robin F. Hansen, The Modern Law Review, Vol. 73, No. 4, July 2010; *Multiple Proceedings, New Challenges for the Settlement of Investment Disputes*, Gabrielle Kaufmann-Kohler, Contemporary Issues in International Arbitration and Mediation, The Fordham Papers 2013; *Investment treaties as corporate law: Shareholder claims and issues of consistency. A preliminary framework for policy analysis*, David Gaukrodger, OECD Working Papers on International Investment, No. 2013/3, OECD Investment Division; *Admissibility: Shareholder claims*, Zachary Douglas, The International Law of Investment Claims; *Parallel Proceedings in International Arbitration*, Bernardo M. Cremades and Ignacio Madalena; *The Coordination of Multiple Proceedings in Investment Arbitration*, Hanno Wehland, Oxford International Arbitration Series; *Concurrent Proceedings in Investment Disputes*, IAI Series No. 9 (E. Gaillard and D. Reich, eds., 2014); *Multiple Proceedings in International Arbitration: Blessing or Plague?*, Gabrielle Kaufmann-Kohler, Asian Arbitration Lecture, 24 November 2015, available on the Internet at http://bit.ly/Kaufmann-Kohler-Multiple; *Le concours de procedures arbitrales dans le droit des investissements*, Emmanuel Gaillard, Mélanges en l'honneur du Professeur Pierre Mayer; *Recent Developments on the Doctrine of Res Judicata in International Arbitration from a Swiss Perspective: A Call for a Harmonized Solution*, Nathalie Voser, Julie Raneda, ASA Bulletin, Vo. 33, No. 4, 2015. In addition, the Secretariat organized in January 2016 an expert group meeting hosted by the French Ministry of Foreign Affairs and International Development.

have various parties, claiming in various forums and under different sources of law, yet seeking substantially the same relief for the same measure.

8. The second category is where a measure by a State has an impact on a number of investors which are not related. States have developed policies favouring foreign investments, thereby increasing the occurrence of dealings with a wide range of investors. When a State takes a measure which potentially affects a number of investors, it may be faced with multiple claims from those unrelated investors in relation to that measure, in addition to claims from majority and minority shareholders of different nationalities of those unrelated investors with a right of action under different investment treaties. In addition, States or state-owned entities when concluding agreements with investors sometimes use standard contracts with similar provisions. A change of a State's policy impacting those provisions may affect a whole range of contracts concluded with different investors. While some issues raised in those proceedings will be identical, it is foreseeable that decisions rendered by separate tribunals may yield different outcomes.

2. Varied legal bases for claims

9. The legal bases for bringing claims may vary. In commercial arbitration, a party may start litigation in a State court and may commence arbitration on the basis of an arbitration agreement. Articles II (3) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) and article 8 (1) of the Model Law on International Commercial Arbitration are meant to prevent such circumstances, as where parties have concluded a valid arbitration agreement, the parties would be referred to arbitration.

10. In investment arbitration, the situation is potentially more complex, as described below.

(a) Treaty-based claims

11. An increasing number of bilateral and multilateral investment treaties have been concluded among States with the purpose of promoting economic activities and protecting investments and investors. And most, if not all, contain provisions on resolving disputes relating to investments. Yet, a large majority of those investment treaties do not take into consideration the potential for multiple claims resulting from a wide definition of protected investors and investments. At the time of their conclusion, negotiators of such investment treaties did not foresee the potential for multiple claims, whether by related or unrelated investors, and such treaties lack the mechanisms to appropriately deal with such claims.

12. In addition, arbitral case law has consistently recognized the right of direct and indirect shareholders of a local company to commence arbitration on the basis of an investment treaty seeking compensation for the damages incurred by the local company. By contrast, national legislation and case law generally do not permit shareholders to claim for damages incurred by the company solely on the basis that it is a shareholder.[6]

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[6] Shareholders' reflective loss is incurred as a result of injury to "their" company, typically a loss in value of the shares; it is generally contrasted with direct injury to shareholders' rights, such as interference with shareholders' voting rights; *Investment Treaties as Corporate Law: Shareholder Claims and Issues of Consistency*, OECD Working Papers on International Investment, 2013/03, David Gaukrodger; *Investment Treaties and Shareholder Claims for Reflective Loss: Insights from Advanced Systems of Corporate Law*, OECD Working Papers on International Investment, 2014/02, David Gaukrodger; *Investment Treaties and Shareholder Claims: Analysis of Treaty Practice*, OECD Working Papers on International Investment, 2014/03, David Gaukrodger; see also *Reflective Loss* (presentation to Freedom of Investment Roundtable, 16 October 2013), Eilis Ferran, available on the Internet at www.slideshare.net/OECD-DAF/ferran-oecdfoipresentation; Summary of discussion at Freedom of Investment Roundtable 18 (March 2013), pp. 4-9, available on the Internet at www.oecd.org/daf/inv/investment-policy/18thFOIRoundtableSummary.pdf; Summary of discussion at Freedom of Investment Roundtable 19 (October 2013), pp. 12-19, available on the Internet at www.oecd.org/daf/inv/investment-policy/19thFOIroundtableSummary.pdf. Earlier OECD work for the OECD Investment Committee has also considered multiple and parallel proceedings and consolidation of claims. See *Improving the System of Investor-State Dispute Settlement*, OECD Working Papers on International Investment, 2006/01, Yannaca-Small, K; OECD, *International Investment Perspectives (2006)* (chapter entitled *Consolidation of claims: A promising avenue for investment arbitration*).

(b) Contractual claims

13. It is not unusual for certain types of investments to require the conclusion of related contracts (e.g. a concession contract) between the investor or an affiliate and the State or a state-owned entity, which form the basis of contractual claims and which include a separate clause for resolving disputes arising out of such contracts.

(c) Combination of treaty and contract claims

14. An investor may wish to pursue its claim based on both an investment treaty and a contract. Certain dispute resolution clauses in investment treaties limit the offer for arbitration to claims based on a breach of the substantive clauses of the treaty, thus excluding claims based on a breach of the investment contract (which must thus be pursued under a separate arbitration or in State courts). Therefore, claims of the investor, which are based on the same facts and relate to the same harm for loss due to a measure taken by the host State, may have to be submitted to different tribunals, which may result in contradictory outcomes and double recovery.

15. As an illustration, a foreign investor may set up a local company in the host State and the local company may conclude a contract with the State. In the event that the State terminates the contract, proceedings against the host State may be commenced by the local company for unlawful contract termination under the contract in accordance with the dispute resolution clause therein and by the foreign shareholder of the local company claiming a violation of certain provisions of the investment treaty concluded between the host State and the State of the foreign shareholder. This would result in concurrent proceedings, (i) a contract-based arbitration or proceeding in State court between the local company and the host State, and (ii) a treaty-based arbitration between the foreign shareholder and the host State about the same measure (the termination of the contract). In addition, minority shareholders of the local company may file their own treaty-based claims, for instance, if they are of a nationality different from the majority shareholder, and may benefit from the protection of a separate investment treaty. It could also be possible for the shareholders of the shareholders who hold interests further up the corporate chain to file one or several treaty-based claims.[7]

16. Considering the chronology of the decisions in multiple proceedings, if the claim of the local company is decided first and damages awarded, the value of the claimant company is restored and any shareholders' claim for reflective loss (loss in the value of their shares as a consequence of the damage incurred by the company) is no longer relevant. In the reverse situation where shareholders' claims are decided and compensated first, consequences for the company and its creditors are less clear.

3. Multiplicity of forums and lack of coordination mechanism

17. There exist various forums for resolving disputes arising from commercial or investment relationship. The forums available for investors to bring claims against a State or a state-owned entity include (i) forums for contract disputes, which may be the State courts, domestic arbitration, and international arbitration; and (ii) investment treaty-based forums, generally arbitration under the auspices of various arbitral institutions or ad hoc. Parties to commercial transactions that do not involve any State or state-owned entity would have the ability to bring a claim to the forums described in (i) above. There is currently no common template to coordinate multiple proceedings arising among different forums.

B. Illustration and policy considerations

18. Taken together, there may be various causes that lead to multiplicity of proceedings.

19. The most prominent illustration in investment arbitration may be the often cited cases of Lauder v. Czech Republic on the basis of the US-Czech Republic bilateral investment

[7] See *Multiple Proceedings in International Arbitration: Blessing or Plague?*, Gabrielle Kaufmann-Kohler, Asian Arbitration Lecture, 24 November 2015, available on the Internet at http://bit.ly/Kaufmann-Kohler-Multiple.

treaty (BIT) and CME Republic BV v. Czech Republic on the basis of the Netherlands-Czech BIT. These two proceedings involved: the same measure and harm (loss caused by the revocation of a license); in part, the same claimant from an economic perspective (Mr. Lauder who claimed in his own name in one proceeding and as a shareholder of CME in the other), but different legal persons (CME and Mr. Lauder), having different nationalities (Dutch and American); and two separate investment treaties. In the end, the two arbitrations resulted in contrary outcomes (a (quasi) dismissal of the claims in one case and an award of damages in the other).

20. For ease of illustration, multiple proceedings in investment arbitration may be grouped into three categories:

(i) Where substantially related claimants initiate the same claim against the same respondent (i.e., the host State or a state-owned entity) with regard to the same host State measure before different forums;

(ii) Where unrelated claimants initiate separate proceedings against the same respondent with regard to the same measure (under an investment treaty and/or a contract); and

(iii) Where the respondent initiates a separate proceeding against the claimant in a different forum.

21. As indicated in document A/CN.9/848, paragraph 13, the multiplicity of proceedings may result in a State having to defend several claims in relation to the same measure, with possibly the same economic damage at stake, leading to a duplication of efforts, additional costs, procedural unfairness and potentially contradictory outcomes (for instance, in the situations referred to above in paragraph 20 (i) and (ii)). Similarly, investors may be faced with multiple counterclaims by States. In relation to the situation described in paragraph 20 (iii), the main problem — apart from costs and potentially conflicting outcomes — is the uncertainty as to which forum will have the final say in the event there is no coordination between the forums. Concurrent claims give rise to a risk of multiple recovery of the same damage and may create dissatisfaction among users of investment treaty arbitration, thus undermining predictability more generally.

22. Similarly, in commercial arbitration, a framework to limit the occurrence of multiple proceedings could result in more expedited and cost-efficient outcomes in addition to avoiding conflicting decisions on the same issues of law and fact.

III. Existing principles and mechanisms

23. A number of principles and mechanisms exist to deal with the situations of concurrent proceedings described in section II above and to a certain extent, they are useful. However, they lack the mechanism or framework to coordinate application in appropriate circumstances.

A. Lis pendens and res judicata

24. As indicated in document A/CN.9/848, paragraph 23, lis pendens and res judicata are principles that may be referenced as part of the lex causae of a dispute.

25. The doctrine of lis pendens, familiar to many legal systems, allows a party to request a court to stay or dismiss an action because the same action is already pending in front of a different forum. For lis pendens to apply, triple identity is required between the various actions: identity of the parties, facts, and the cause of action. That triple identity requirement may make it difficult to apply the doctrine to concurrent proceedings described in section II above. For instance, in the context of investment treaty arbitration, determining the “same parties” for the purposes of applying such a principle could present a challenge in the context of multiple shareholders bringing claims for the same harm caused to the company due to the same measure of a host State.

26. The Brussels Regulation 1215/2012 (“Brussels Regulation”) may shed some light on the application of lis pendens to concurrent proceedings as it provides less strict conditions. Article 29(1) of the Brussels Regulation provides an illustration of a lis pendens mechanism

in the context of civil litigation proceedings (as mentioned in document A/CN.9/816, Addendum, paras. 23 and 24).[8] Article 30 of the Brussels Regulation also sets out a discretionary rule for "related actions", allowing for concentration of related or connected disputes in one forum.[9] Article 30.3 provides that "actions are deemed to be related where they are so connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgements resulting from separate proceedings."

27. Pursuant to the doctrine of res judicata, a dispute cannot be adjudicated twice (a party is precluded from pursuing the same claim twice) and thus, the doctrine applies in the context of successive proceedings. In that regard, the Commission may wish to consider whether the topic of concurrent proceedings should be expanded to also include successive proceedings (see below, para. 42). The res judicata effect in international arbitration gives rise to complex issues, in particular as different legal systems may come into play to govern the application of res judicata (the law of the place of the previous arbitration; the law of the place of the subsequent arbitration; the law governing the merits of the dispute), and res judicata has different scopes in different national legal systems.

28. It may be noted that the 2006 final reports of the International Law Association (ILA) on lis pendens and on res judicata in international commercial arbitration provide that arbitral awards should have conclusive and preclusive effects in further arbitral proceedings to promote efficiency and finality of international commercial arbitrations and that such effects need not necessarily be governed by national law but may be governed by transnational rules to be developed (recommendations 1 and 2).

B. Consolidation

29. Consolidation involves the aggregation of two or more claims or pending arbitrations into one proceeding. Subject to a reasonable assessment of fairness and efficiency, consolidation can be an effective tool to reduce or avoid concurrent proceedings. Due process considerations are an important aspect of the consolidation framework. Consolidation requires a basis, whether in law or in a contract (including institutional rules) and it is usually based on parties' consent. It is necessary to differentiate between commercial and treaty-based investor-State arbitration, as the basis for consolidation may be different.

1. Commercial arbitration

30. Some jurisdictions have enacted legislation allowing State courts to consolidate different arbitral proceedings, where the cases have common issues of law and fact. Compulsory consolidation by State courts in itself may raise some challenges for arbitration. Some of these challenges relate to issues of consent, appointment of arbitrators, issues of procedure, and enforcement of the arbitration award.

31. Consolidation provisions are also increasingly found in institutional arbitration rules which permit consolidation at an early stage of the proceedings where the arbitral proceedings have started under the same set of rules. Consolidation usually requires the consent of the parties, whether in advance through the conclusion of an umbrella arbitration agreement or after the dispute has arisen. It is also usually possible where all relevant contracts contain arbitration agreements that would subject the dispute to the same set of arbitration rules, administered by the same arbitral institution. A key challenge in a multiparty context is the principle that each party to the arbitral proceedings should be given an equal opportunity to be heard and to participate in the constitution of the arbitral tribunal.

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[8] Article 29(1) provides that: "[w]here proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seized shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seized is established."

[9] Article 30(1) and (2) provide that: "1. Where related actions are pending in the courts of different Member States, any court other than the court first seized may stay its proceedings.
2. Where these actions are pending at first instance, any court other than the court first seized may also, on application of one of the parties, decline jurisdiction if the court first seized has jurisdiction over the actions in question and its law permits the consolidation thereof."

2. Treaty-based investor-State arbitration

32. Provisions on consolidation are also increasingly found in investment treaties. A review of investment treaties concluded between October 2014 and September 2015 identified 21 new treaties, out of which 18 are available in full texts. Out of these 18, 14 have investor-state dispute settlement provisions. Out of these 14, 5 have consolidation provisions.

33. Consolidation is made possible in investment treaties for instance where there is a "question of law or fact in common" (for example, NAFTA Article 1126.2),[10] or where common questions "arise out of the same events or circumstances" (for example, article 10.25 CAFTA-DR). Article 1117 NAFTA specifically calls for consolidation of actions by different shareholders for claims made on behalf of a locally incorporated entity.[11] The guidance provided to arbitral tribunals in certain investment treaties is that the tribunal must rule in the interest of fair and efficient resolution of the claims when considering whether to consolidate.

34. As mentioned above, consolidation may also be carried out under applicable institutional arbitration rules. However, it is usually not possible to consolidate proceedings which have started under different arbitration rules. In that respect, it may be interesting to note that a recent treaty allows for consolidation across dispute settlement mechanisms (see article 9.29 of the EU-Singapore Free Trade Agreement).[12]

C. Coordination mechanisms in investment treaties

35. Certain investment treaties provide for additional coordination or concentration mechanisms. For instance, the requirement that the claimant waives or terminates any other proceedings — also referred as "no U-turn" approach — is found in many recent investment treaties.[13]

36. Some examples of such treaty provisions are the so-called "fork-in-the-road" provisions, which require the claimant to make an irrevocable choice of forum between proceedings in the host State courts and investment arbitration, and waiver clauses, which require the investor to waive all other available forums before applying to investment arbitration.

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[10] Paragraph 2 provides that: "Where a Tribunal established under this Article is satisfied that claims have been submitted to arbitration under Article 1120 that have a question of law or fact in common, the Tribunal may, in the interests of fair and efficient resolution of the claims, and after hearing the disputing parties, by order: (a) assume jurisdiction over, and hear and determine together, all or part of the claims; or (b) assume jurisdiction over, and hear and determine one or more of the claims, the determination of which it believes would assist in the resolution of the others."

[11] Paragraph 3 provides that "Where an investor makes a claim under this Article and the investor or a non-controlling investor in the enterprise makes a claim under Article 1116 arising out of the same events (...), and two or more of the claims are submitted to arbitration under Article 1120, the claims should be heard together by a Tribunal established under Article 1126, unless the Tribunal finds that the interests of a disputing party would be prejudiced thereby."

[12] Article 9.29 (5) provides that: "The consolidating tribunal shall conduct its proceedings in the following manner: (a) unless all disputing parties otherwise agree, where all the claims for which a consolidation order is sought have been submitted to arbitration under the same dispute settlement mechanism, the consolidating tribunal shall proceed under the same dispute settlement mechanism; (b) where the claims for which a consolidation order is sought have not been submitted to arbitration under the same dispute settlement mechanism: (i) the disputing parties may agree on the applicable dispute settlement mechanism available under Article 9.16 (Submission of Claim to Arbitration) which shall apply to the consolidation proceedings; or (ii) if the disputing parties cannot agree on the same dispute settlement mechanism within thirty days from the request made pursuant to paragraph 3, the UNCITRAL arbitration rules shall apply to the consolidation proceedings."

[13] For instance, the Singapore-European Union and the Singapore-United States of America Free Trade Agreements.

D. Other mechanisms

37. Other mechanisms that may have the effect of limiting concurrent proceedings include class actions, joinders, as well as anti-suit and anti-arbitration injunctions.

38. Provisions allowing joinder of third parties are contained in certain institutional arbitration rules. Arbitral tribunals usually do not have the possibility to join third parties to arbitration unless expressly provided for in the applicable arbitration rules or otherwise agreed by the parties.

39. Anti-suit and anti-arbitration injunctions are mechanisms that can be used to avoid concurrent proceedings. However due to their unilateral nature, anti-suit or anti-arbitration injunctions may not necessarily constitute helpful coordination tools.

E. Conclusion

40. The available mechanisms considered above provide a means for addressing the consequences of concurrent proceedings in some cases, but also have limitations. As noted, some mechanisms require the parties' consent for their application. Others are provided in arbitration rules and with respect to investment arbitration, provided in investment treaties. Failing parties' agreement or in the absence of a particular doctrine or procedure, arbitrators may lack any basis to take the initiative when faced with concurrent proceeding situations. They may not be aware of the options available to them and of the limits of available tools or may be prevented from taking appropriate action to avoid negative consequences when the parties had not agreed on a particular approach. Other factors that may compete with concerns that arise from concurrent proceedings relate to, inter alia, the need to respect party autonomy given the consensual nature of arbitration, and the treatment of protected and confidential information submitted in the arbitration.

IV. Possible future work

41. The Commission may wish to consider whether the purpose of undertaking work on concurrent proceedings as they occur in investment and in commercial arbitration would be to create appropriate mechanisms for limiting some of the negative consequences identified with concurrent proceedings, such as undue risk of contradictory and irreconcilable decisions or awards, and to promote procedural and cost efficiency, while respecting parties' rights in resolving disputes.

42. As multiple proceedings in investment and commercial arbitration may be concurrent or successive in time, the Commission may wish to consider whether to also include in its consideration of the topic successive proceedings (see above, para. 27). The framework of international arbitration is multilayered. Possible work in relation to concurrent proceedings could thus be considered for development at different levels.

A. Providing guidance to arbitral tribunals

43. The mandate of an arbitral tribunal to resolve disputes is usually based on the parties' agreement. An arbitral tribunal should solve the dispute efficiently and within the limits of its jurisdiction. The procedural legal framework (investment treaty, arbitration rules, and arbitration law) rarely includes guidance to arbitral tribunals on how to deal with concurrent proceedings. In most cases, where there is no agreement between the parties to take into account the potential for concurrent proceedings, an arbitral tribunal may believe that it has to render a final decision on the merits without being able to coordinate with other tribunals.

44. The UNCITRAL Arbitration Rules, in article 17 (1), contain the principle that "the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case." Most institutional arbitration rules contain a similar provision. The Commission may wish to consider whether work could be undertaken with the aim of clarifying, or expanding upon,

the discretionary powers that arbitral tribunals may exercise when faced with concurrent proceedings. The purpose would be to provide arbitral tribunals with possible tools that could be used for managing such situations.

45. The work could cover in a flexible manner initiatives that an arbitral tribunal might, depending upon the circumstances, consider taking, such as:

- Seeking information from another tribunal, or ordering parties to inform the arbitral tribunal of other related proceedings,
- Coordinating parallel arbitrations (for instance, holding joint hearings or presenting a common set of evidence),
- Staying proceedings, or declining jurisdiction, for instance, based on a finding that claims are inadmissible (e.g. because a parallel action is already pending elsewhere),
- Assessing if there was an abuse of rights, and
- Ordering consolidation, when admissible.

The work would also highlight the limits of such initiatives, given the role of party consent to arbitration and its relationship to a tribunal's authority to decide matters.

46. A question for consideration is whether guidance to arbitral tribunals should identify specific measures that an arbitral tribunal could consider in determined situations. While the discretion of the arbitral tribunal to adopt a specific measure would be preserved, guidance could be provided as to the description of possible tools, with an illustration of the circumstances in which they can be used. However, as concurrent proceedings can take a wide range of forms, it may be difficult for any guidance text to provide an exhaustive list of all scenarios.

47. Guidance to arbitral tribunals could be provided in the form of a soft law instrument including a list of options for arbitrators and the methodology to deal with concurrent proceedings situations, leaving it to the tribunal to assess which option would be relevant in the case at hand. Any guidance could also clarify why the arbitral tribunal would take certain measures if the situation of concurrent proceedings is not perceived as detrimental by the parties and the basis of a tribunal's authority to take such measures in the absence of the parties' agreement for it to do so.

48. The work could also take the form of a protocol to be used by parties as part of their agreement to arbitrate.

B. Encouraging States to adopt specific mechanisms in their investment treaties

49. As indicated in section III C. above, States have begun to include provisions in investment treaties to limit certain claims. Some investment treaties contain provisions aimed at limiting the occurrence of concurrent proceedings, or providing solutions, such as consolidation. Such treaties restrict certain substantive and procedural rights of the claimants through provisions on the definitions of investors and investments, as well as the computing of damages.

50. The Commission may wish to consider whether the attention of States should be directed to those mechanisms in investment treaties, and whether work should be undertaken to supplement the work of United Nations Conference on Trade and Development (UNCTAD) in this area.[14]

[14] For instance, the UNCTAD Investor-State Dispute Settlement Sequel (2014) contains sections on consolidation of claims, "Fork-in-the Road" and "No-U-turn" clauses (with some treaty examples). Chapter IV (Reforming the International Investment Regime) of the UNCTAD World Investment Report (2015) discusses some related issues, including reform options on, for instance, the definition of investment and investor, preventing treaty "abuse" and relief for the same violation in multiple forums.

C. Coordination among arbitral institutions

51. As concurrent proceedings often commence under different arbitration rules, coordination among arbitral institutions might be considered as a useful feature for addressing concurrent proceedings.

D. Creating an international framework

52. The Commission may wish to consider whether preventing or avoiding concurrent proceedings might be an issue best dealt with at the multilateral level.

53. In that respect, the Commission may wish to consider whether the Secretariat should further explore the feasibility of a multilateral instrument with a purpose to improve the framework for the settlement of international disputes in the interest of fairness and justice.[15] The doctrine of res judicata, the priority to decide on the validity of the arbitration agreement, and the treatment of related actions could be subject matters of such a multilateral instrument.

[15] See *Multiple Proceedings in International Arbitration: Blessing or Plague?*, Gabrielle Kaufmann-Kohler, Asian Arbitration Lecture, 24 November 2015, available on the Internet at http://bit.ly/Kaufmann-Kohler-Multiple.

D. Note by the Secretariat on possible future work in procurement and infrastructure development

(A/CN.9/889)

[Original: English]

Contents

I. Introduction

1. This Note has been prepared to enable the Commission's consideration of possible future work in procurement and infrastructure development at this forty-ninth session. It addresses two possible areas of legislative development: suspension and debarment in public procurement, and public-private partnerships.

II. Proposed future work in Procurement and Infrastructure development

A. Suspension and debarment in public procurement

2. At its forty-eighth session, the Commission agreed on the importance of suspension and debarment in supporting the effective implementation of a public procurement law and in fighting corruption, and considered whether UNCITRAL might issue a legislative text on the topic to support the UNCITRAL Model Law on Public Procurement.[1]

3. The Commission noted that the UNCITRAL Model Law on Public Procurement[2] permits the exclusion of suppliers pursuant to administrative suspension or debarment proceedings, but that the Model Law did not provide any procedural rules for the process. It also noted that there remain considerable variations among suspension and debarment systems in practice, as regards the objectives, procedures and outcomes.[3]

4. The Commission instructed the Secretariat to report to the Commission at its 2016 session on the results of exploratory work to assess the feasibility of developing a harmonized UNCITRAL text on the subject, the extent to which such a text would provide an appropriate solution to the issues concerned, and the extent of the demand for such a text.[4]

5. In terms of the feasibility of developing a harmonized UNCITRAL text on suspension and debarment, there appears to be limited reduction in the divergences in approach previously reported to the Commission.[5] Some emerging examples of differences include whether bribery leads to a mandatory debarment or whether a supplier that has been found to have engaged in bribery can take steps to avoid debarment; whether a bribery conviction in one State would be sufficient to debar a supplier in another State; in the extent of detail

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[1] A/70/17, para. 362.

[2] *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17* (A/66/17), para. 192 and annex I, available at www.uncitral.org/uncitral/uncitral_texts/procurement_infrastructure.html.

[3] A/70/17, para. 362; see, also, A/CN.9/850, paras. 4-12.

[4] Ibid.

[5] Ibid.

in applicable regulation on procedure, and in the standard and burden of proof required for a sanction to be applied.

6. On the other hand, there is evidence of convergence in some areas. As regards processes, there is increasing consensus on definitions of sanctionable conduct and on compliance processes designed in part to assist in identifying such conduct. As regards the consequences of sanctionable conduct, there is some development towards enabling cross-debarment through a flexible approach (such as that recognition of sanctionable conduct in one jurisdiction need not trigger automatic debarment in another, but might lead to further investigation).

7. Against these indications and the background of consensus on the critical importance of transparency in the process, the need for due process when sanctions are being considered, and for cooperation between international bodies and national authorities, it appears that an UNCITRAL text might provide an appropriate solution to many issues in need of resolution for effective suspension and debarment systems. Many States are also seeking advice and assistance on the establishment of a national system, and indicate that they would welcome an UNCITRAL text reflecting international best practice for that purpose.

8. It may therefore be concluded that convergence on elements of an UNCITRAL text on suspension and debarment is emerging, and that there is a level of demand for such a text. However, it is also clear that further convergence on the key parameters for a suspension and debarment system would enhance the feasibility and success of an UNCITRAL text in this area. Events discussing suspension and debarment systems at the international level also indicate that dialogue facilitating such convergence is ongoing.[6]

9. The Commission may therefore consider that legislative development in UNCITRAL in this area is not presently feasible, but the developments towards convergence as noted above indicate that the item should be retained on its agenda.

B. Public-private partnerships (PPPs)

10. At its forty-eighth session, and in light of the importance of the topic for development and in the context of the Sustainable Development Goals, the Commission decided that the possibility of developing a legislative text on PPPs would be kept on the Commission's agenda. The Secretariat was instructed to follow the topic to advance preparations should the Commission decide to undertake work in this area and report further to the Commission in 2016.[7]

11. Accordingly, the Secretariat has continued to observe the activities of other bodies active in PPPs, primarily the World Bank and regional development banks, the United Nations Economic Commission for Europe (UNECE) and the Organisation for Economic Cooperation and Development, and has continued to encourage the use of the existing UNCITRAL texts on Privately-Financed Infrastructure Projects (PFIPs) in PPPs reform. In these activities, the Secretariat has continued to gather feedback on areas in which the PFIPs texts are considered to function well and, where appropriate, areas in which they may be in need of updating or amendment.[8]

12. These activities indicate that developments in three areas of PPPs should be brought to the attention of the Commission.

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[6] Examples include the "Third Suspension and Debarment Colloquium, 2015", held at the World Bank Headquarters, Washington, on 16 December 2016 (www.worldbank.org/en/events/2015/11/05/third-suspension-and-debarment-colloquium-2015) and "Towards Convergence in Transatlantic Procurement-Markets", held at King's College, University of London on 26 October 2015 (www.kcl.ac.uk/law/newsevents/eventrecords/Towards-Convergence-in-Transatlantic-Procurement-Markets-.aspx).

[7] A/70/17, para. 363.

[8] The UNCITRAL Legislative Guide (with Legislative Recommendations) and its Model Legislative Provisions on PFIP, available at www.uncitral.org/uncitral/uncitral_texts/procurement_infrastructure.html.

Procurement in PPPs

13. First, and as reported to an UNCITRAL Colloquium on PPPs held in March 2014,[9] an area of ongoing focus is the procurement of the concession or other project mechanism and the selection of the project partner. At the 2014 Colloquium, it was noted that there are overlapping public procurement and concessions laws in many jurisdictions. As consistency between PPPs laws and other relevant laws has been recognized as critical for the success of PPP projects, this fragmentation raises concerns.[10]

14. It was also recognized that traditional tendering procedures are generally unsuitable for both PPPs as well as for traditional (i.e. publicly-funded) procurement of complex infrastructure. When developing the UNCITRAL Model Law on Public Procurement,[11] Working Group I adapted and updated the selection procedure in the UNCITRAL PFIPs texts to provide a procurement method called Request for Proposals with Dialogue, which is available for the procurement of complex items and services (such as infrastructure projects).[12] The 2014 Colloquium concluded that procurement in the PPPs context would require interaction between the public authority and potential bidders, and that ensuring that any negotiations were subject to appropriate safeguards would be critical, and that these matters were provided for in the Model Law on Public Procurement.[13]

15. The activities in the organizations referred to above include addressing the procurement-related aspects of PPPs,[14] and demonstrate that many States are addressing PPPs as part of work to modernize their procurement systems. The incorporation of an appropriate selection procedure is vital, and so it is suggested that an UNCITRAL text providing a selection procedure that is harmonized with Request for Proposals with Dialogue as provided for in the Model Law on Public Procurement could contribute considerably to improving practice in the conclusion of PPPs. The 2014 Colloquium considered that the limited tailoring appropriate to the PPPs context (so as to accommodate changes in the contract terms during the project period, for example) would not pose consistency issues between publicly-funded procurement of complex infrastructure and procurement in PPPs.[15]

Terms of the project agreement

16. The second area is the terms of the concession or project agreement. This issue was also considered at the 2014 Colloquium,[16] which concluded that the extent to which contents of the agreement are prescribed by law varied among States, and that legislative provision could enhance consistency and reduce the scope and length of negotiations, balanced with the need for flexibility in negotiations to suit the project at hand. However, the Colloquium concluded that this was one area in which significant additional work to identify areas for harmonization would be required.[17]

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[9] For the proceedings of this Colloquium, which considered the Commission's discussions of an earlier colloquium in 2013, the results of an exercise to map current PPPs legislation, some preliminary findings on the main topics that might be included in any future legislative text on PPPs and the form that such a text might take, see www.uncitral.org/uncitral/en/commission/colloquia/public-private-partnerships-2014.html.

[10] See A/CN.9/819, paras. 77-92, and A/CN.9/821, para. 69.

[11] Footnote 2, supra.

[12] See articles 30 and 49 of the UNCITRAL Model Law on Public Procurement, ibid. The 2014 Colloquium noted reports that the Request for Proposals with Dialogue combined many features of the selection method in the PFIPs Instruments, two-stage tendering (itself a well-tried and tested method used by the MDBs) and the EU's Competitive Dialogue procedure and was itself therefore a harmonized method. See, further, A/CN.9/821, para. 90.

[13] See A/CN.9/820, paras. 15-20, and A/CN.9/821, paras. 90-95.

[14] See, for example, the work of the UNECE Committee on Innovation, Competitiveness and PPPs, Team of Specialists on PPPs on "Developing international standards and best practices in PPPs", and its "draft Charter on Zero Tolerance to Corruption in PPP Procurement", available at www.unece.org/fileadmin/DAM/ceci/documents/2015/PPP/TOS-PPP/ECE_CECI_PPP_2015_CRP2.pdf, and the "Draft Checklist of Zero Tolerance to Corruption in PPP Certification Elements", available at www.unece.org/ppp/forum2016.html#/.

[15] See A/CN.9/820, paras. 15-20, and A/CN.9/821, paras. 90-95.

[16] See A/CN.9/820, paras. 35-40, and A/CN.9/821, paras. 102-107.

[17] See A/CN.9/821, para. 107.

17. Since the issue of the PFIPs texts, some States have issued model clauses for PPPs contracts,[18] but they are considered to vary widely. In 2015, the World Bank issued a "Report on Recommended PPP Contractual Provisions",[19] noting that the variety of PPPs transactions means that a harmonized contract at the international level is not a realistic goal, but that certain legal issues are encountered in the overwhelming majority of PPPs contracts in practice, so that there is a commonly-encountered solution that can be identified. The areas concerned focus on changes and events that may arise in the course of the project which, by its nature involves long-term contracts — such as changes in law, force majeure, refinancing, termination, among others. These issues are also addressed in Section IV.A of the PFIPs Legislative Guide (which sets out guidance for "General provisions of the project agreement"). The work of the other organizations noted above[20] also suggests that recent experience would allow the guidance in Section IV.A to be updated by reference to current practice, and that a harmonized solution is now feasible.

Post-award disputes

18. The third area is settlement of disputes in PPPs, which is addressed in Section VI of the PFIPs Legislative Guide. At the 2014 Colloquium,[21] it was suggested among other things that the guidance should be updated to reflect the increasing use of dispute avoidance mechanisms, and of relatively informal settlement methods such as dispute boards,[22] as well as to provide guidance on disputes between shareholders, lending parties, operational consortium partners, regulators and operators and contractors and subcontractors (that is, in addition to guidance on disputes between the public authority and the project partner).[23]

19. Issuing harmonized standards for the dispute resolution process can both contribute to the stability of the contractual relationship and to the conclusion of the project agreement. In addition, as some disputes in PPPs may involve regulators or government bodies and the exercise of discretion in their settlement, an appropriate legislative or regulatory framework to ensure appropriate procedures for this type of dispute should also reduce the risks in the projects concerned. At the 2014 Colloquium, it was considered that agreeing legislative solutions on the outstanding issues would again be feasible.[24] The publications on contractual provisions referred to in the previous paragraph also indicate that dispute prevention and resolution provisions are commonly addressed in modern PPP contracts, so that there is evidence of increasing consensus on approaches that a legislative text should include, both to prevent and settle disputes.

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[18] Examples include "Standardisation of PFI Contracts", HM Treasury (UK), Version 4 (March 2007), available at http://webarchive.nationalarchives.gov.uk/20130129110402/http:/www.hm-treasury.gov.uk/ppp_standardised_contracts.htm; and a draft "Standardisation of PF2 Contracts", HM Treasury (UK), 2012, available at www.gov.uk/government/uploads/system/uploads/attachment_data/file/221556/infrastructure_standardisation_of_contracts_051212.pdf.
a "Standard Form Public Private Partnership (PPP) Project Agreement", National Infrastructure Unit of New Zealand, October 2013, available at www.infrastructure.govt.nz/publications/draftpppstandardcontract; and A Guide to the PPP contract ("Les Contracts de Partenariat: Guide Méthodologique"), France, 2011, available at www.economie.gouv.fr/files/directions_services/ppp/GuideContratPartenariat.pdf.

[19] The 2015 Edition is available at http://ppp.worldbank.org/public-private-partnership/library/wbg-report-recommended-ppp-contractual-provisions, and it is understood that the 2016 edition will include alternative recommendations to the contractual language outlined in the 2015 Report in order to recognize that different types of provisions may be required in different types of legal systems, including in common law versus civil law systems.

[20] For example that of the European PPP Expertise Center (EPEC), which has issued a "Guide to Guidance", available at www.eib.org/epec/g2g/, and other tools at www.eib.org/epec/library/, addressing (among other things) the issues discussed.

[21] See A/CN.9/820, paras. 41-51, and A/CN.9/821, paras. 108-113.

[22] The subject of a session at the World Bank-hosted Law, Justice and Development Week, 2013 — see http://ppp.worldbank.org/public-private-partnership/sites/ppp.worldbank.org/files/documents/Dispute%20Resolution%20Board%20Foundation%20-%20Dispute%20Boards%20in%20PPP%20Transactions%20by%20Kurt%20Dettman.pdf.

[23] See A/CN.9/821, para. 112.

[24] See A/CN.9/821, para. 113.

III. Conclusions

20. The Commission in 2015, while recognising the importance of PPPs, expressed concern that the scope of the possible legislative development then under consideration might exceed UNCITRAL's resources.[25]

21. As regards suspension and debarment in public procurement, the Commission may wish to confirm that the Secretariat should continue to monitor developments, and should report to the Commission on a periodic basis.

22. In light of the developments regarding PPPs set out above, the Commission may wish to consider whether a modular approach to legislative development in PPPs might enable the Commission to fulfil the indicated need for updating some aspects of the PFIPs texts within the constraints of UNCITRAL's limited resources. If so, it may wish to consider whether UNCITRAL might undertake sequential legislative development on the above aspects of PPPs.

[25] A/70/17, para. 363.

E. Note by the Secretariat on settlement of commercial disputes: presentation of a research paper on the Mauritius Convention on Transparency in Treaty-based Investor-State Arbitration as a possible model for further reforms of investor-State dispute settlement

(A/CN.9/890)

[Original: English]

Contents

I. Introduction

1. At its forty-eighth session, in 2015, the Commission noted with appreciation the ongoing cooperation and coordination efforts of the Secretariat with organizations active in the field of international arbitration and conciliation. The Commission further noted that UNCITRAL standards in that field were characterized by their flexibility and generic application to different types of arbitration, including both purely commercial arbitration and investor-State arbitration. In that light, the Commission agreed that the Secretariat should continue to coordinate with organizations in relation to the various types of arbitration to which UNCITRAL standards were applicable, and to closely monitor developments, further exploring areas for cooperation and coordination.[1]

2. In relation to investor-State arbitration, the Commission noted that the current circumstances posed a number of challenges and proposals for reform had been formulated by a number of organizations. In that context, the Commission was further informed that the Secretariat was conducting a study on whether the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration ("Mauritius Convention on Transparency" or "Mauritius Convention") could provide a useful model for possible reforms in the field of investor-State arbitration, in conjunction with interested organizations, including the Center for International Dispute Settlement (CIDS), a joint research center of the Graduate Institute of International and Development Studies and the University of Geneva Law School. In that light, the Secretariat was requested to report to the Commission at a future session with an update on that matter.[2]

[1] *Official Records of the General Assembly, Seventieth Session, Supplement No. 17* (A/70/17), para. 268.

[2] Ibid.

3. Pursuant to that request, the purpose of this note is to provide the Commission with an update on the study conducted within the framework of a research project of the CIDS (referred to as the "research paper") and to provide a short overview of its outcome.[3]

4. The purpose of the research paper is to analyze whether the Mauritius Convention on Transparency could be used as a model for implementing broader reform initiatives of the investor-State dispute settlement ("ISDS") framework, in the event that it would be decided, at a later stage, to carry out reforms at a multilateral level. As an illustration of a possible procedural reform to which the approach adopted under the Mauritius Convention could be useful, and in order to provide a basis for the analysis, the research paper examines the scope, possibilities, and challenges for an instrument similar to the Mauritius Convention, alone or in combination with other instruments, to create (i) a permanent dispute settlement body intended to replace or complement ISDS provisions in existing and future investment treaties; or (ii) an appeal mechanism for awards rendered in ISDS proceedings under existing or future investment treaties.

5. This note, however, is limited to reporting on the outcome of the legal study on the question whether the Mauritius Convention on Transparency could be used as a model for broader procedural reform initiatives in the field of ISDS should there be a decision to undertake reforms on a multilateral basis. This note contains, for information purposes only, a brief overview of legal questions raised by possible procedural reforms of ISDS, and does not provide a detailed analysis of such reforms as this would fall outside the scope of the mandate provided by the Commission. This note does not contain recommendations for possible future work on any such reforms, for which a separate decision would need to be made by the Commission.

II. Brief overview of the research paper: the Mauritius Convention on Transparency in Treaty-based Investor-State Arbitration as a possible model for further reforms of investor-State dispute settlement

A. Background: the features of the Mauritius Convention and current proposals for procedural reform

1. The "Mauritius Convention approach"

6. In 2013, UNCITRAL adopted the Rules on Transparency in Treaty-based Investor-State Arbitration (the "Transparency Rules") together with a new article 1(4) of the UNCITRAL Arbitration Rules (as revised in 2010).[4] The Transparency Rules, which came into effect on 1 April 2014, comprise a set of procedural rules that provides for transparency, and for accessibility to the public of treaty-based investor-State arbitration. The Transparency Rules apply in relation to disputes arising out of investment treaties concluded on or after 1 April 2014, when investor-State arbitration is initiated under the UNCITRAL Arbitration Rules, unless the Parties to the investment treaty have agreed otherwise.[5] The Transparency Rules apply in relation to disputes arising out of investment treaties concluded prior to 1 April 2014, when the Parties to the relevant investment treaty (i.e. States or regional economic integration organizations),[6] or the parties to the dispute (i.e. an investor and a State or a regional economic integration organization),[7] agree to their application. The Transparency Rules are also available for use in investor-State arbitrations initiated under rules other than the UNCITRAL Arbitration Rules, and in ad hoc proceedings.[8]

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[3] The research paper is available on the UNCITRAL website, in English only, at: www.uncitral.org/uncitral/commission/sessions/49th.html.

[4] *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17* (A/68/17), chapter III and annexes I and II.

[5] Transparency Rules, Article 1(1).

[6] Transparency Rules, Article 1(2)(b). For multilateral investment treaties, it is sufficient that the State of the claimant and the respondent State have reached an agreement to this avail.

[7] Transparency Rules, Article 1(2)(a).

[8] Transparency Rules, Article 1(9).

7. After the adoption of the Transparency Rules, UNCITRAL prepared a convention designed to facilitate the application of the Transparency Rules to the roughly 3,000 investment treaties concluded before the entry into force of the Transparency Rules, thereby providing States with an efficient mechanism to apply the Transparency Rules to their existing investment treaties, should they wish to do so.[9] Indeed, the Mauritius Convention on Transparency is an instrument by which Parties to investment treaties concluded before 1 April 2014 express their consent to apply the Transparency Rules to arbitrations arising out of those treaties.

8. The Mauritius Convention allows the Transparency Rules to be applied to all existing bilateral, regional, and multilateral investment treaties, and in all available arbitral fora, if both the respondent State and the investor's home State are contracting parties to the Mauritius Convention or, alternatively, if the investor (as claimant) accepts the unilateral offer of the respondent State to apply the Transparency Rules. In essence, the "Mauritius Convention approach" can be described as introducing the substantive transparency standards embodied in the Transparency Rules into the fragmented treaty-by-treaty regime by way of a single multilateral instrument. It introduces a flexible regime as it foresees a limited number of reservations that Contracting Parties may formulate.

9. The Mauritius Convention is an instrument that incorporates into the existing myriad of investment treaties the notion of transparency, a procedural aspect generally not addressed under the vast majority of investment treaties. It supplements existing investment treaties with a uniform regime on transparency embodied in the Transparency Rules. At its forty-sixth session, the Commission reaffirmed the view expressed by a great number of delegations at the fifty-ninth session of Working Group II, namely that a convention on transparency, upon coming into force, would constitute a successive treaty creating new obligations pursuant to article 30 of the Vienna Convention on the Law of Treaties (1969) (the "Vienna Convention").[10]

10. A question for consideration is whether a convention implementing new reforms to existing investment treaties, modelled on the Mauritius Convention, would constitute a successive treaty creating new obligations pursuant to article 30 of the Vienna Convention, or whether it would constitute an amendment or modification of investment treaties (pursuant to provisions of existing investment treaties and Chapter IV of the Vienna Convention). If a convention implementing new reforms were to be considered as an amendment or a modification to underlying investment treaties, there would be some additional elements to be considered when drafting the convention (for instance, on procedures for amending/modifying treaties), and States parties to the Convention would need to consider possible domestic procedures to be followed to implement such reforms.

2. Challenges faced by investor-State dispute settlement mechanisms

11. The international investment law regime is composed of more than 3,000 investment treaties, including broader bilateral or multilateral free trade agreements containing a chapter on investment protection. Although investment treaties are not identical to one another, they generally follow similar patterns with regard to their structure and are centred on a number of core principles. The broad similarities between investment treaties make it possible to speak of a "regime" of international investment protection, which is essentially based on two elements.

12. First, investment treaties provide substantive guarantees to investors in the form of international obligations placed upon Contracting States, whereby States undertake to respect certain standards of investment protection vis-à-vis foreign investors and their investments (such as fair and equitable treatment, protection from expropriation, and non-discrimination).

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[9] *Official Records of the General Assembly, Sixty-eighth session, Supplement No. 17* (A/68/17), para. 127.

[10] Ibid., *Sixty-ninth session, Supplement No. 17* (A/69/17), para. 25. When the Working Group examined that question at its fifty-ninth session, it was said that logically one could not refer to an amendment or modification to investment treaties in the context of a subsequent treaty creating new obligations between Contracting Parties, but rather, that the transparency convention would amount to a successive agreement between Contracting Parties (see A/CN.9/794, paras. 17 to 22).

13. Second, most investment treaties allow foreign investors to enforce those substantive protections through a procedural dispute resolution mechanism. While ISDS provisions show variations across the different investment treaties, they normally provide for the following features: (i) the investor may bring a claim directly against the host State; (ii) the dispute is heard by an arbitral tribunal constituted ad hoc[11] to hear that particular dispute; (iii) both disputing parties, including the investor (as claimant) and the respondent State, play an important role in the selection of the arbitral tribunal.

14. The research paper briefly outlines the diverging opinions on the merits and demerits of the foreign investment protection regime and in particular ISDS, as reported in the following paragraphs.

15. Supporters of the system normally highlight that the foreign investment protection regime has generally proven beneficial and has positively contributed to the promotion of the rule of law at the international level, the functioning of the global market, the increase of foreign investment flows, as well as the economic growth and human development in capital-exporting and capital-importing States. The development of ISDS was part of an initiative to create an institutionalized and formalized procedure on the international plane, within a broader initiative which saw investment treaties (including their provisions on dispute settlement) as instruments to foster confidence in the stability of the investment environment of developing countries.

16. Proponents also stress the novelty of the ISDS system, which allows a private subject (whether an individual or a company) to bring an international claim directly against a sovereign State, in a significant break from traditional mechanisms which were essentially founded on the institution of diplomatic protection (or diplomatic espousal). Importantly, ISDS also led to a "de-politicization" of investment disputes and drastically reduced the risk that they escalated into inter-State conflicts.

17. Numerous empirical analyses have been conducted with a view to assessing the effective impact of investment treaties on foreign direct investments.[12] Those studies have come to diverging conclusions. According to a report of the United Nations Conference on Trade and Development (UNCTAD), the majority of those studies concluded that there was indeed a positive correlation between investment treaties and foreign direct investment.[13] Others were more nuanced, and showed that this impact was dependent on the content of the investment treaties.[14] Finally, some researchers found no or insignificant investment increases due to investment treaties.[15]

18. The regime of investment treaties has also attracted strong and growing critical attention. Criticisms may be grouped into two main categories. A first series of criticism focuses on the decision makers in the ISDS system, i.e. the arbitrators (and, to a lesser extent, the arbitral institutions which may administer investor-State arbitrations). The second relates to the arbitral process, its outcome and its structural features. Concerns have been voiced regarding lack of consistency of awards issued by arbitral tribunals, length and cost of the proceedings, lack of appropriate control mechanisms, and lack of transparency.

19. Criticism of ISDS in essence reflects concerns about the democratic accountability and legitimacy of this dispute resolution process. While States themselves have established the mechanism and, therefore, their consent ensures its legitimacy under international law, this may not always be perceived as such by States and their constituencies.

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[11] "Ad hoc" here means that the dispute is not brought before a permanent body, but before a tribunal (whether or not under the auspices of an arbitral institution) constituted to hear that particular dispute (with no mandate beyond that dispute). It is not used to refer to non-institutional arbitration.

[12] UNCTAD (2014), *The Impact of International Investment Agreements on Foreign Direct Investment: An Overview of Empirical Studies 1998-2014*, IIA Issues Note, Working draft.

[13] Ibid.

[14] See, for instance, Axel Berger, Matthias Busse, Peter Nunnenkamp and Martin Roy (2010), *Do Trade and Investment Agreements Lead to More FDI? Accounting for Key Provisions Inside the Black Box*, World Trade Organization, Economic Research and Statistics Division, Working Paper, also published under the same title as Kiel Institute for the World Economy, Working Paper No. 1647.

[15] See, for instance, Mary Hallward-Driemeier (2003), *Do Bilateral Investment Treaties Attract FDI? Only a bit…and they could bite*, World Bank, Policy Research Paper WPS 3121.

20. The research paper highlights that the deficiency in terms of accountability and legitimacy calls for remediation, and that the remedies should avoid sacrificing the gains of ISDS, i.e., (i) neutrality or, in other words, distance of the decision makers from politics — the depoliticization for which investment arbitration was praised — and from business interests at the same time; (ii) finality and enforceability of the award; and (iii) the manageability and workability of the process.

3. Existing proposals for procedural reform

21. The last decade has evidenced strong debate on, and repeated calls for, the creation of permanent bodies within the investment treaty regime, both in the form of an appeal mechanism[16] and in the more radical replacement of ISDS with a permanent dispute settlement body.[17] Indeed, the creation of a permanent dispute settlement body or an appeal mechanism tailored for ISDS has been contemplated on several occasions during the last decade. The most significant of these proposals include attempts by the International Centre for Settlement of Investment Disputes (ICSID)[18] and the Organization for Economic Co-operation and Development (OECD),[19] as well as the programmatic language contained in a number of investment treaties,[20] and the pioneering innovations towards the creation of permanent investment bodies in recent investment treaties.[21]

22. It is against this backdrop of debates and of incipient reform attempts that it can be asked whether the Mauritius Convention on Transparency can serve as a model for international investment law reform in connection with the introduction of a permanent dispute settlement body and an appeal mechanism.

B. Application of the "Mauritius Convention approach" to possible procedural reforms

1. Assessment of feasibility

23. The research paper provides an insight on the advantages of adopting the Mauritius Convention approach for the implementation of reforms to existing investment treaties in respect of the setting up of a permanent dispute settlement body or an appellate mechanism as briefly outlined below.

24. First, this approach would relieve States of the burden of pursuing potentially complex and long amendment procedures set forth in their numerous existing investment treaties. Indeed, a convention implementing new procedural reforms, modelled on the Mauritius Convention (referred to below as an opt-in convention), would render the innovations directly applicable to existing investment treaties for those States that wish to embrace such innovations.

25. Second, the Mauritius Convention approach could allow for the establishment of a multilateral permanent dispute settlement system. Indeed, it would lead to the creation of one single investment body potentially competent to resolve investment disputes concerning as many States as would opt into it, and/or to the creation of one single appeal mechanism potentially competent to serve as appellate body for ISDS awards across all investment

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[16] See generally UNCTAD (2014), *Investor-State Dispute Settlement: A Sequel, Series on Issues in IIA II*, p. 192; UNCTAD (2013), *Reform of Investor-State Dispute Settlement: In Search of a Roadmap, Special issue for the Multilateral Dialogue on Investment*, International Investment Agreement Issues Note, No. 2, p. 8.

[17] See generally UNCTAD (2014), *Investor-State Dispute Settlement: A Sequel, Series on Issues in IIAs II*, p. 194; UNCTAD (2013), *Reform of Investor-State Dispute Settlement: In Search of a Roadmap Special issue for the Multilateral Dialogue on Investment*, International Investment Agreement Issues Note, No. 2, p. 9.

[18] ICSID Secretariat (2004*), Possible Improvements of the Framework for ICSID Arbitration*, Discussion Paper, p. 5.

[19] The OECD Investment Committee explored the feasibility and appropriateness of an appellate mechanism for investment disputes in 2006.

[20] See, for instance, the 2012 Model Bilateral Investment Treaty of the United States of America (Article 28(10)); or the Canada-Korea Free Trade Agreement, 1 January 2015, (Annex 8-E).

[21] See the EU-Canada Comprehensive Economic and Trade Agreement (CETA) (Chapter 8 Section F); or the European Union-Vietnam Free Trade Agreement (Chapter 8.II Section 3).

treaties. This approach could help increase the consistency in international investment law, thereby avoiding a piecemeal and treaty-by-treaty approach.

26. Third, a reform based on the Mauritius Convention approach would generally focus on a certain discrete part of the investment treaties' critical issues, i.e. the dispute settlement part, and avoid engaging in the controversies surrounding the substantive standards. By so doing it is more likely to be successful, as an attempt to unify substantive provisions may well lead to years of discussions with no guarantee of consensus.

27. In concrete terms, the outcome of a reform based on the Mauritius Convention approach would entail that the myriad of underlying investment treaties will continue to deal with the substantive obligations, and the newly established permanent dispute settlement body and/or an appeal mechanism would have the mandate to apply these different underlying investment treaties. Admittedly, no absolute uniformity would be achieved, because the applicable law — the substantive treaty standards — would continue to be anchored in different investment treaties. However, consistency would be reached in the application of the same investment treaty and of different investment treaties with identical or nearly identical wordings. And even when applying differently worded investment treaties, it would be expected that the permanent dispute settlement body's and/or appeal mechanism's pursuit of consistency will be greater as a natural consequence of the in-built elements of tradition, continuity and collegiality, which are inherent in permanent bodies as opposed to ad hoc bodies.

28. Finally, an opt-in convention modelled on the Mauritius Convention approach could allow a reform project to begin as a plurilateral one, with the possibility for other States to join at a later stage, whenever they consider it appropriate. This, too, would strengthen the chances for success of such reform.

29. Following the Mauritius Convention approach, if such a reform project were to be implemented, the first task could consist in determining the "substantive" features of the permanent dispute settlement body and appeal mechanism. This would include devising their mandate, nature, structure, and their organization. This step would reflect what was done in respect of transparency, where the content of the new transparency provisions was first agreed in the Transparency Rules. The second, logically subsequent step, would consist in the drafting of an opt-in convention (as was done with the Mauritius Convention) which would accomplish the extension of the new rules on the permanent dispute settlement body and appeal mechanism to the existing investment treaties.

30. In so doing, it should be determined whether the opt-in convention would constitute a successive treaty creating new obligations pursuant to article 30 of the Vienna Convention, or whether it would constitute an amendment or modification pursuant to provisions of existing investment treaties and Chapter IV of the Vienna Convention to investment treaties.

31. The response to that question would depend on how the reform project would concretely be implemented, and how that project would articulate with existing ISDS mechanisms provided for in investment treaties. If a reform project were to be conceived as a modification of the existing ISDS mechanisms (as opposed to an amendment to ISDS provisions in investment treaties), that would not necessarily amount to an amendment to the investment treaties. In the same manner, if a reform project would aim at providing an additional ISDS mechanism, without replacing the existing ones, an opt-in convention introducing the additional ISDS system may be considered as a successive treaty creating new obligations pursuant to article 30 of the Vienna Convention.

32. A procedural reform of ISDS could also lead to an amendment/modification of the ISDS provisions in the existing investment treaties, in particular where a reform would aim at replacing existing ISDS mechanisms by a new one. In that case, attention should be given in the opt-in convention to provisions on amendment/modification of investment treaties. If necessary, further information could be collected from States on domestic procedures that such reforms would trigger at the national level.

33. In the context of the questions of treaty law that the implementation of the opt-in convention would raise, the research paper also discusses possible "compatibility clauses" to address the relationship between the opt-in convention and existing investment treaties. In the same vein, another matter that would deserve consideration is the relationship between

an opt-in convention referring to an appeal mechanism for arbitral awards and the ICSID Convention, which excludes any appeal or other remedy, except for those provided for in the Convention itself (Article 53).

34. Moreover, if such a reform were implemented, mechanisms could be envisaged to allow for a level of flexibility of the States' commitments. Within agreed boundaries, States Parties to the opt-in convention could thus modulate the degree of their involvement in the reforms by making appropriate reservations or opt-in/opt-out declarations. These possibilities would accommodate specific concerns or objectives of States, aiming for instance at excluding particular investment treaties from the scope of the reform or at adopting the new dispute resolution bodies in addition (rather than to the exclusion of) existing ISDS options.

35. In this respect, it should be noted that the Mauritius Convention also allows for a limited number of reservations and that a similar approach could be adopted with regard to the opt-in convention.

2. Outline of questions

36. As the question whether the Mauritius Convention approach could be used as a possible model for further reforms cannot be considered in a vacuum, the research paper analyses in detail the example of using the Mauritius Convention approach for designing a permanent dispute settlement body or an appeal mechanism.

37. It would be beyond the mandate given by the Commission to the Secretariat at this stage to provide the full analysis undertaken under the research paper. For the sake of providing an illustration only, the following sections are limited to outlining the main legal issues and questions in relation to setting up a permanent dispute settlement body, and an appeal mechanism. Those questions are thoroughly analysed in the research paper.

Options

38. The creation of a permanent body composed of tenured (or semi-tenured) members, tasked with resolving investment disputes between foreign investors and host States is one possibility (see below, paras. 39 to 45). Such a permanent body could either be based on a two-tier adjudicative system and thus be provided with a built-in appeal or without one. The presence of a built-in appeal in that scenario must not be confused with the setting up of an appeal mechanism mentioned below in paras. 46 to 49, which addresses the creation of an appeal mechanism for awards rendered in the traditional ISDS setting.

Legal issues and questions in relation to setting up a permanent dispute settlement body

39. The following questions in relation to the setting up of a permanent dispute resolution body would require consideration.

40. The *first question* relates to the determination of the legal nature of the permanent dispute resolution body: would it be in the nature of "arbitration" or of an "international court". The answer to this issue will impact on the determination of the law governing the proceedings before the permanent dispute resolution body, and is further of paramount significance for purposes of recognition and enforcement of decisions/awards rendered by the permanent dispute resolution body. In relation to that question, the research paper analyses the main features that a permanent dispute resolution body would need in order to be characterized as either arbitration or an international court. In short, for a permanent dispute resolution body to qualify as arbitration rather than a court-like dispute settlement method, the most important element is that recourse to that body is based on an agreement between the State and the investor. That consent encompasses the acceptance of the tribunal members' selection method provided in the constitutive instrument.

41. A further issue connected to that first question is that of the law governing the proceedings before the permanent dispute resolution body, which has important consequences for the possible supervisory competence of domestic courts, for annulment/appeal, and for enforcement. The research paper suggests that an option that would deserve consideration is to subject the proceedings only to international law. This solution would avoid the difficulties of choosing a priori a suitable domestic arbitration law

(to which all States would be willing to agree) or of leaving the choice of the seat (and, as a consequence, of the procedural law) to the disputing parties or the permanent dispute resolution body, which could result in inconsistencies if different seats and arbitration laws are selected. By contrast, there is no reason to consider that a truly self-contained regime (as to the procedure) insulated from the supervision and control of any domestic court would pose any problem. The research paper suggests that whatever the choice, it should be clearly articulated.

42. The *second question* relates to the issue of the availability of systems of control in respect of the permanent dispute resolution body decisions/awards, in particular annulment and appeal, and the alternative options to an appeal, such as preliminary rulings, en banc determinations and consultations mechanisms. The research paper looks into the challenge of designing a framework that strikes a careful balance between conflicting demands: on the one hand, the need for an efficient and final dispute settlement mechanism and, on the other, the concern to protect the integrity of the process and the correctness of the decision-making. It further analyses the usual control options, annulment and built-in appeal (with all related questions, such as the appellate tribunal's composition, the grounds of appeal and standards of review, the effect of the appellate decision, the binding nature of the decision). The research paper also considers alternatives to a built-in appeal system, i.e., preliminary rulings, en banc determinations and consultation mechanisms.

43. A *third question* relates to enforcement of the decisions/awards of the permanent dispute resolution body, which is essential to ensure the ultimate effectiveness of the system, and is considered in the hypothesis that the permanent dispute resolution body would be characterized as arbitration (as opposed to court). The research paper considers that question in the situation where enforcement of the decisions/awards of the permanent dispute resolution body would need to be enforced in the territory of a State party to the opt-in convention, as well as the situation where enforcement would be sought in a State not party to the opt-in convention. It further considers enforcement issues under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) ("New York Convention"), and in particular (i) whether the permanent dispute settlement body would qualify as a "permanent arbitral body" under the New York Convention, (ii) whether its decisions/awards would meet the territorial requirements of the New York Convention, and (iii) the issues related to the application of the New York Convention where a built-in appeal mechanism would be provided for.

44. A *fourth question* relates to the composition of the permanent dispute resolution body, which includes the method by which the members are to become part of the new adjudicative body, i.e. the election/selection process, and the way those elected members are appointed or assigned to a panel to decide a dispute.

45. A *fifth question* relates to the jurisdiction of the permanent dispute resolution body and the relationship with other dispute settlement mechanisms with which the body may interact (such as State-to-State arbitration and committees of the contracting States, which are empowered under investment treaties to provide interpretations of the investment treaties). The research paper provides some insight on the questions surrounding the delimitation of the body's jurisdiction.

Legal issues and questions in relation to setting up an appeal mechanism

46. The research paper underlines that several issues that would arise in the establishment of the permanent dispute settlement body would also arise in connection with the creation of an appeal mechanism.

47. The research paper considers the characterization of the appeal mechanism. It underlines that despite the fact that most arbitration regimes exclude the possibility of appeals from awards (and instead only afford dissatisfied parties the limited remedies of annulment and revision), there are nonetheless examples of institutional arbitration regimes which provide for internal appellate review of arbitral awards.[22] Under some national

[22] See, for instance, Arbitrators' and Mediators' Institute of New Zealand (AMINZ) (2009), Arbitration Appeal Rules (2009); American Arbitration Association (AAA) (2013), Optional Appellate Arbitration Rules; JAMS (2003), Optional Arbitration Appeal Procedure; International

arbitration laws, parties may agree on a two-level arbitration process, and there is no suggestion that the presence of an appeal makes the process different from arbitration.

48. The research paper addresses a number of questions potentially raised by the introduction of an appeal mechanism in relation to ICSID and non-ICSID arbitrations, such as the law governing the proceedings before the appeal mechanism, the interaction of an appeal mechanism with annulment remedies normally available against investor-State arbitral awards, and enforcement.

49. Further, the research paper considers specific legal issues to be taken into account in the design of an appeal mechanism, such as (i) the definition of the types of awards which are subject to appeal (ii) the grounds of appeal and the standard of review; (iii) the effect of the appellate decision; and (iv) the binding nature of the decision.

III. Concluding remarks

50. The Commission may wish to express its appreciation to G. Kaufmann-Kohler and M. Potestà for the study and the research paper, which provides a thorough analysis of the question.

51. The Commission may wish to consider whether the Secretariat should continue to conduct the study in conjunction with the CIDS as outlined above and, if so, which topics would require further consideration.

52. The Commission may also wish to decide whether the research paper should be made available for further consideration at a future session. Lastly, the Commission may wish to engage in a discussion on whether and how future work in this field, if any, should be pursued.

Institute for Conflict Prevention and Resolution (CPR) (2015), Arbitration Appeal Procedure; European Court of Arbitration (ECA) (2015), Arbitration Rules, Article 28; in the commodity sector, see the Grain and Feed Trade Association (GAFTA) (2014), Arbitration Rules No. 125, Articles 10-15.

F. Note by the Secretariat on legal issues related to identity management and trust services

(A/CN.9/891)

[Original: English]

Contents

I. Introduction

1. At its forty-eighth session, in 2015, the Commission requested the Secretariat to conduct preparatory work on identity management and trust services, including through the organization of colloquiums and expert group meetings, for future discussion at the Working Group level following the current work on electronic transferable records on the basis of a proposal submitted to the Commission for its consideration (A/CN.9/854).[1]

2. At that session, the Commission also asked the Secretariat to share the result of such preparatory work with Working Group IV, with a view to seeking recommendations on the exact scope, possible methodology and priorities for the consideration of the Commission at its forty-ninth session.[2]

3. In furtherance of that request, the UNCITRAL Colloquium on Legal Issues Related to Identity Management and Trust Services was organized on 21 and 22 April 2016 in Vienna. Moreover, the Secretariat participated in a conference on "Open Issues on Electronic Commerce: the Digital Identity", organized by the University of Bologna (10 June 2015, Bologna, Italy); an "International Identity Management Law and Policy Meeting" co-organized by the American Bar Association (ABA) and the World Bank (Washington, United States of America, 14 January 2016); and a conference on "Identity Management and Trust Services since the eIDAS regulation" organized by the University of Namur (Namur, Belgium, 18 March 2016).[3]

4. This note provides a summary of the discussions at that Colloquium and at other relevant meetings. Materials used for presentations at the Colloquium are available on the UNCITRAL website.[4]

5. The Commission may wish to note that a document providing an overview of identity management had been submitted to Working Group IV (Electronic Commerce) at its forty-sixth session (A/CN.9/WG.IV/WP.120) and that additional considerations are contained in a document submitted to Working Group III (Online Dispute Resolution) at its thirty-second session (A/CN.9/WG.III/WP.136). The report on a prior colloquium on electronic commerce, which included a panel on identity management, is also available (A/CN.9/728, paras. 9-28).

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[1] *Official Records of the General Assembly, Seventieth Session, Supplement No. 17* (A/70/17), paras. 354-355 and 358.

[2] Ibid., para. 358.

[3] The proceedings of that Conference have been published: Hervé Jacquemin (Dir.), *L'identification électronique et les services de confiance depuis le règlement eIDAS*, Brussels, 2016.

[4] Those materials, presented in the form they were submitted by speakers, are available at: www.uncitral.org/uncitral/en/commission/colloquia/idm2016-programme.html.

II. Legal Issues Related to Identity Management and Trust Services

A. Current Legal Environment for Identity Management and Trust Services

6. Electronic identity management (IdM) is a foundational issue for the use of electronic means. Verifying the identity of remote parties, such as determining who is seeking access to an online database of sensitive information, who is trying to initiate an online transfer of funds from an account, who signed an electronic contract, who remotely authorized a shipment of product, who is seeking access to online government services, or who sent an e-mail, is often a fundamental concern. Functionally, IdM aims at answering the basic questions: "Who or what is seeking to prove identity?" and "How reliably is identity proven?" in an electronic environment.[5]

7. In that respect, it should be noted that verifying in a trustworthy manner the identity of a remote party in an electronic environment is necessarily different from verifying in a trustworthy manner the identity of a present party in a physical environment. For instance, IdM may be used remotely and simultaneously in multiple applications, while traditional means of identification may not.

8. Paper-based identity documents have been used for centuries to identify natural persons and well-established practices were developed, so that users of such documents know their reliability as identification tools and the risks associated with their use. By contrast, IdM being a relatively new process that requires correlation of electronic identity information with a person not physically present, related business practices are not yet fully established and risk assessments vary. Therefore, promoting confidence in the use of IdM systems requires clarifying, among others, various technical and legal aspects, including liability issues.

9. Given its broad relevance, IdM may have an impact on cultural, political, social and economic inclusion.[6] IdM has several implications for the Sustainable Development Goals, being directly relevant for Target 16.9 (on providing legal identity for all, including birth registration, by 2030) and an enabler to a number of other targets such as Target 1.4 (on ensuring access of the poor to economic resources, including property and finance), Target 10c (on reducing remittance costs) and Target 16.5 (on reducing corruption).

10. The ongoing transition towards online-enabled and data-driven economies requires the use of IdM for multiple business and social uses. Policymakers suggest the adoption of user-centric IdM models where users have the choice of what identity credentials and level of assurance to use.[7]

11. In the current legal environment, IdM systems and trust services are subject, on the one hand, to requirements contained in laws drafted for other purposes (e.g., commercial and civil code; privacy laws); and, on the other hand, to contractual agreements (often called "system rules", "scheme rules" or "trust frameworks"), which aim at ensuring proper functioning and trustworthiness of the system by defining the obligations of the parties.

12. Although a majority of the world's jurisdictions have adopted laws on electronic transactions and electronic signatures that often contain provisions relevant for IdM and trust services,[8] only a few laws specifically dealing with the use of IdM and trust services exist.[9]

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[5] A/CN.9/WG.IV/WP.120, paras. 6 and 8.

[6] In general, see the World Bank Identification for Development Programme at www.worldbank.org/en/programs/id4d.

[7] OECD, Digital Identity Management: Enabling Innovation and Trust in the Internet Economy, Paris, 2011, pp. 7 ff.

[8] For an overview of the current status of legislation on electronic transactions and electronic signatures, see the UNCTAD Global Cyberlaw Tracker at http://unctad.org/en/Pages/DTL/STI_and_ICTs/ICT4D-Legislation/eCom-Global-Legislation.aspx.

[9] E.g., Regulation (EU) No. 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market; Virginia Electronic Identity. Management Act, 2015 (SB 814).

Additional legislative provisions may cater to specific industry needs, such as those of the banking sector and payments services.[10]

13. Several States have indicated interest for preparing legislation on IdM or have started doing so. Those initiatives are based on differing approaches and notions. There is therefore a clear, strong and urgent need to provide guidance to legislators in order to suggest desirable options and to prevent lack of harmonization.

The scope of IdM systems

14. A number of different IdM models are currently in use to discharge several functions, which may vary significantly in purpose and requirements. Since IdM systems may involve different types of applications, services and users, it is important that their legal analysis should not be limited to certain types of transactions, such as commercial ones. Similar considerations apply to trust services.

15. IdM systems may be used to identify natural and legal persons as well as physical and digital objects. However, not all of those entities have received equal attention in the study of legal issues related to IdM. In particular, work on legal aspects of identification of objects seems to require additional attention. In that respect, it should be noted that certain technologies (e.g. radio frequency identification ("RFID") tags or other contactless technology) may be more suitable for identification of objects than others and therefore may provide user cases that could be useful to start that analysis.

16. Commercial users of IdM typically carry out an analysis of benefits and costs associated with technologies and methods used to conduct business and therefore require a significant level of flexibility. Moreover, those users require clarity and predictability on the allocation of obligations and related liability among concerned parties. The same considerations may not necessarily apply in case of use of IdM systems for providing public services.

17. IdM systems may be classified in a variety of manners, such as "commercial-driven" or "government-driven", and "centralised" or "decentralised". Another classification refers to IdM systems providing foundational or core identities, i.e. identity attributes that typically do not change, such as birth name or date, which are supposed to be multipurpose; and to IdM systems providing functional identities, i.e. identity attributes that are issued for a specific purpose.

18. Although at a global level the commercial need for IdM is a major driver of IdM systems, the importance of government IdM systems should not be underestimated. It has to be noted that traditionally a number of functions related to identity management in the physical world have been performed by civil registration and vital statistics (CRVS) registries. Those registries have been, especially in the last two centuries, managed by governments. When performing CRVS-related functions, governments typically limit their liability in line with the legal regime applicable to governmental activities and ensure the reliability of the information contained in the registry with other legal mechanisms (e.g., criminal law provisions for providing or creating false identity-related information).

19. Commercial practices regarding the identification of parties developed over centuries on the basis of identity information available from CRVS and other registries and its associated legal framework. To date, CRVS registries play an important role in providing information used in IdM. In particular, CRVS registries may be used as the basis for "breeder documents" that commercial systems rely upon in establishing the identity of natural and legal persons.

20. Further, government-driven IdM systems may be designed as extensions and improvements of traditional CRVS registries. Those systems may stress security and other features relevant to their intended main use. Moreover, in line with the traditional approach of CRVS registry operators, their providers do not necessarily operate under a full liability regime in case of non-performance or partial performance of their services.

[10] See the relevant provisions contained in the Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market.

21. Commercial identity credentials issued for different purposes may rely on the same primary identity document. Yet, those different identity credentials may offer varying levels of reliability and will be used with different methods and technologies. Hence, legal analysis of the relationship between the various identity credentials and the primary breeder identity document requires careful examination.

22. The above considerations highlight that no single model or solution for IdM exists. On the contrary, many IdM systems with different purposes co-exist. Similarly, obligations and liability of the parties involved in IdM systems may vary. This, however, does not seem to preclude the possibility of identifying common elements and of building on those elements to promote legal interoperability.

Interaction and interoperability among IdM systems

23. IdM systems are often federated. According to that model, identity information verified by one entity is made available in an agreed-upon and managed fashion to multiple parties that need such identity information for different purposes.[11] Federated IdM systems achieve interoperability among their participants by using a common technical and legal framework defined by a set of system rules. Federation of an IdM system contributes to increasing the number of users and of applications and may assist in containing IdM-related costs.

24. Currently, however, most IdM systems operate in an autonomous manner, with little or no interaction. Barriers to that interaction are both technical and legal. In particular, legal rules applicable to IdM systems may vary significantly. However, the value of an IdM system is proportional to the number of parties using it and to the number and diversity of applications in which it can be used. Hence, ideally the various IdM systems should interact seamlessly, thus implementing not only technical interoperability but also legal mutual recognition (referred to as "legal interoperability").

25. Since federation alone may not address all the issues posed by IdM, IdM systems would benefit from a harmonized legal framework. Whether federation of IdM systems as such poses specific legal challenges is a matter that requires further investigation.

26. Additional challenges to technical and legal interoperability may arise at the regional level, where specific trends may exist and where available capacity and resources may not always suffice.

27. A number of organizations aim at promoting the development and wider use of IdM systems.[12] That goal requires a combination of policy decisions, technical developments and legal provisions. Certainty and predictability of applicable legal rules — as well as, to the extent possible, their harmonization — could greatly contribute to removing barriers to the use of IdM across systems and national borders.

Trust services

28. Trust services encompass a number of different services aimed at promoting confidence in electronic transactions, including, but not limited to: digital archiving; time-stamping; signatures providing evidence of origin and integrity of the message; return receipt; guarantee to existence at a certain point in time; digital seals; authentication of electronic address (e.g. URL) and escrow.

29. UNCITRAL texts on electronic commerce contain a number of provisions relevant to trust services, such as provisions on electronic signatures, on integrity of data messages, on archiving of data messages, and on the attribution of data messages. As those texts have been widely adopted in the world,[13] a significant amount of uniform law already exists in this field.

30. Trust services may have elements in common with IdM services. However, significant differences also exist, in particular, in light of the function pursued with the use of each trust

[11] A/CN.9/WG.IV/WP.120, para. 10.

[12] See A/CN.9/WG.IV/WP.120, para. 5, for a list of several organizations engaged in the field.

[13] For the status of adoption of UNCITRAL texts on electronic commerce, see www.uncitral.org/uncitral/uncitral_texts/electronic_commerce.html.

service. It remains to be determined whether it would be feasible and desirable to jointly consider legal aspects of IdM and trust services.

B. Promoting Confidence in the Use of Identity Management and Trust Services

31. Ensuring trust in the operation of IdM systems and trust services is fundamental in order to promote their use (see paras. 6-8 above). Trust may be defined as "Firm belief in the reliability […] of […] something".[14] It is therefore an opinion influencing behaviour and the willingness to rely. In the case of IdM and trust services, trust is the opinion on the reliability of the service offered.

32. In turn, reliability may be defined as "the quality […] of performing consistently well"[15] and is the result of a process, rather than a product.

33. Lack of clarity on parties' liability is a major barrier to promoting trust in the use of IdM and trust services. Parties need to be able to clearly assess rights and obligations and to allocate risks. Currently, those terms can be clarified in contractual agreements (often contained in system rules) whose content may vary significantly. Moreover, the law may allocate liability, possibly on the basis of general rules, in absence of any agreement, or may also override those agreements. Provisions on limitation of liability contained in the law and in contractual clauses are also relevant to define risk allocation. Similarly relevant is the availability of commercial insurance to cover risks associated with the use of IdM and trust services.

34. It is of great importance that legislative and contractual provisions aimed at promoting trust should focus on the outcome of the process, e.g. providing reliable services, rather than prescribing specific processes, which could violate technology or identity system neutrality. This has important practical consequences, for instance, by ensuring that rules do not prevent use of IdM with any particular technology or method, such as mobile devices. Likewise, legislative requirements associated with reliability may refer to technical standards; however, caution is necessary to avoid favouring any technology, method or process, or to inhibit adaptability to change.

35. Specifically, the law may promote confidence in the reliability of IdM systems and trust services by rewarding compliance with certain requirements associated with reliability of the system or service.

36. In particular, the law may attach legal presumptions to the use of IdM systems or trust services that satisfy certain requirements. Such presumptions may shift the burden of proof on origin, integrity, time of despatch and receipt, etc. when electronic transactions are used with the assistance of compliant IdM systems or trust services. Parties are free to choose whether those systems and services are relevant and useful for their commercial operations, thus achieving desired flexibility.

37. Alternatively, the law may provide for limitation or exclusion of liability for certain parties involved in IdM systems and trust services as long as they comply with requirements set forth in legislation or contractual agreements. The law may also set forth that contractual agreements may not derogate or vary liability for gross negligence or wilful misconduct.

38. One important benefit arising from a clearer understanding of the obligations of the various parties in an identity system and of allocation of liability risk among them is improved assessment of cybersecurity needs, which, in turn, allows more efficient distribution of related resources in line with the parties' actual needs.

Cross-border use of IdM and trust services

39. An enabling legal environment for the use of IdM and trust services needs to take into full consideration also cross-border aspects of that use. Those aspects may pose additional challenges in the absence of a uniform legal framework promoting mutual recognition of the

[14] Oxford English Dictionary Online, "Trust", sub 1.
[15] Oxford English Dictionary Online, "Reliability", sub 1.

legal status of IdM systems and trust services. In dealing with such aspects, due consideration should be given to provisions on mutual legal recognition of authentication methods contained in international instruments such as free trade agreements.[16]

40. Currently, cross-border legal recognition may be achieved on the basis of private agreements stipulating contractually the terms of service as well as technical specifications.[17] That model is, however, subject to limits to freedom of contract set forth in applicable national law and does not apply to parties that are not contractually bound.

41. Another approach to cross-border legal recognition of IdM systems and trust services may foresee the establishment of a centralized accreditation system performing an assessment, whose result determines the legal status of the system or service and is binding on participating States. Assessment of conformity of systems and services is made before their actual use and along general categories. That model may be particularly useful when applied in the framework of regional economic integration since States pursuing that integration have an incentive to join it.

42. Yet another possibility would foresee the preparation of uniform legal provisions to pursue cross-border recognition, preferably on a multilateral basis. In that case, it would be possible to conduct the assessment of reliability only in case of actual dispute and on a case-by-case basis.[18]

43. One important consideration relates to the need for a uniform law text to interact with private international law rules. Analysis of that interaction may require special attention.

C. Relevant Issues for Future Work

44. Various stakeholders welcome UNCITRAL's decision to undertake work on legal aspects of the use of IdM systems and trust services and suggest that UNCITRAL should prepare provisions aimed at providing specific legislative guidance. The outcome shall enhance parties' confidence in the use of IdM systems and trust services and promote legal interoperability among IdM systems. That work product would, on the one hand, fill the current gap between general legislation and system rules and, on the other hand, ensure uniformity in future legislation.

45. In conducting future work, it seems particularly important to ensure coordination with relevant organizations dealing with legal and technical aspects of IdM systems and trust services. This will allow focusing the exercise on concrete issues, drawing on existing experience and expertise as well as highlighting common elements in existing and prospective laws.

46. With respect to the form of future work by UNCITRAL, while the preparation of model legislation to be enacted at the national level may be envisaged, an international text may be more appropriate to cover cross-border aspects. Non-legislative texts, such as model contractual provisions, could adequately address certain issues. Mutually reinforcing texts could be drafted.

47. With respect to the content of provisions on IdM systems and trust services, the general principles underpinning UNCITRAL texts on the use of electronic communications (technology neutrality, non-discrimination of electronic communications, functional equivalence) and other general principles of uniform commercial law, such as freedom of contract, are relevant for defining the legal framework for the use of IdM systems and trust services.

48. Moreover, several provisions contained in UNCITRAL texts on electronic commerce (e.g., provisions on electronic signatures and on archiving) and in certain other texts[19] are directly relevant for IdM systems and trust services and may provide useful guidance. A

[16] See, e.g., article 14.6 of the Trans-Pacific Partnership.

[17] This model is used by the Pan-Asian E-Commerce Alliance.

[18] This approach is adopted in article 9, paragraph 3 of the United Nations Convention on the Use of Electronic Communications in International Contracts.

[19] E.g., article 5, paragraph 2 of the UNCITRAL Model Law on International Credit Transfers, 1992.

thorough analysis of those texts may be useful for preparing future UNCITRAL work in this field.

49. In that respect, further clarification of the relationship between IdM systems and trust services, on the one hand, and electronic signatures, on the other hand, seems particularly useful. One element to consider in that analysis is that electronic signatures require an associated identity element that allows parties to rely on the signature by identifying reliably the signatory. Another element to be taken into account relates to the use of certain types of electronic signatures in delivering trust services.

50. Preparing definitions of the most relevant terms used in connection with IdM and trust services could be beneficial to clarify the various notions and ensure their uniform understanding. In doing so, existing technical standards, and definitions therein, need to be taken into consideration.[20]

51. In light of the above considerations it seems preferable that the scope of this legislative project shall cover all types of IdM systems and trust services, regardless of the nature of the provider and of the main intended purpose, function or use. It seems also desirable that it shall consider all possible entities that could be identified by an IdM system and all possible roles. Finally, the project should deal with both use of IdM systems and transactions between IdM systems.

52. With respect to specific topics, the following seem to be core issues to be discussed with respect to IdM: rights and obligations of the parties; reliability in the various steps of the IdM cycle; consequences of reliability on liability; system rules and other contractual agreements (such as service level agreements); mutual legal recognition and other matters related to legal interoperability.

53. An important aspect of IdM relates to privacy and data protection. Policy approaches to that complex topic may vary significantly and several initiatives aim at reconciling them. In practice, existing legislation on IdM recognizes the existence of specific privacy law and defers to its application. Against that background, and in view of the fact that work on IdM systems and trust services should not extend to matters outside UNCITRAL's mandate,[21] it is doubtful that UNCITRAL could efficiently deal in detail with those matters at the present stage.

54. Another aspect to be further analysed relates to the use of IdM systems and trust services in cloud computing. Cloud services may be used to provide identity management (identity as a service). Moreover, IdM (e.g., in the form of multifactor authentication) is commonly used to access cloud services, in particular to ensure compliance with privacy and other regulatory requirements. However, further investigation is needed in order to clarify whether those uses pose specific legal issues.

55. With respect to working methods, it seems particularly desirable to foster broad participation by all regions in future UNCITRAL work to better assess the current status of IdM systems and trust services as well as identify regional specific trends.[22] One possible tool to do so is the distribution of surveys. This could be done also through cooperation and coordination with relevant regional organizations, such as the Arab ICT Organization (AICTO).[23]

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[20] See documents ISO/IEC 24760-1:2011(en) and ISO/IEC 24760-2:2015(en) for examples of IdM-related definitions.

[21] *Official Records of the General Assembly, Seventieth Session, Supplement No. 17* (A/70/17), para. 355.

[22] For additional information on ASEAN member States, see Electronic Transactions Development Agency, Intra-ASEAN Secure Transactions Framework Final Report, Bangkok, July 2014.

[23] Specifically, the mandate of AICTO Working Group III (E-certification and Cybersecurity) may encompass IdM.

G. Note by the Secretariat on a joint proposal on cooperation in the area of international commercial contract law (with a focus on sales)

(A/CN.9/892)

[Original: English/French]

1. At its forty-third session in 2010, the Commission encouraged the Secretariat to explore ways of collaborating further with other organizations, such as the Hague Conference on Private International Law (the "Hague Conference") and the International Institute for the Unification of Private Law ("Unidroit"), to jointly promote related texts.[1]

2. In 2012, the Commission, the Hague Conference and Unidroit jointly published an explanatory text in the area of security interests.[2]

3. At its forty-eighth session in 2015, the Commission expressed support for increasing, within available resources, the number of promotional and capacity-building activities aimed at supporting the adoption and effective implementation of the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980).[3]

4. In furtherance of that mandate, the Secretariat has discussed with the Permanent Bureau of the Hague Conference and the secretariat of Unidroit the possibility of cooperating in preparing an explanatory text in the area of international commercial contract law (with a focus on sales).

5. The annex to this note contains a joint proposal on the preparation of an explanatory text in the area of international commercial contract law (with a focus on sales). The Council on General Affairs and Policy of the Hague Conference welcomed the proposal at its meeting from 15 to 17 March 2016.[4] On 19 May 2016, the Unidroit Governing Council recommended to the Unidroit General Assembly that work emanating from the proposal be included in the Work Programme for the triennium 2017-2019.

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[1] *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17* (A/65/17), para. 287.

[2] UNCITRAL, Hague Conference and Unidroit Texts on Security Interests: Comparison and analysis of major features of international instruments relating to secured transactions, available from www.uncitral.org/uncitral/uncitral_texts/security.html.

[3] *Official Records of the General Assembly, Seventieth Session, Supplement No. 17* (A/70/17), para. 333.

[4] Conclusions and recommendations adopted by the Council of March 2016, para. 333, available from www.hcch.net/en/governance/council-on-general-affairs.

Annex

Joint proposal on cooperation in the area of international commercial contract law (with a focus on sales)

The Hague Conference on Private International Law (the "Hague Conference"), the International Institute for the Unification of Private Law ("Unidroit"), and the United Nations Commission on International Trade Law ("UNCITRAL") regularly coordinate their activities in order to ensure a concerted approach to common issues.

Recently, that coordination has led to jointly publishing an explanatory text in the field of security interests, which lists and summarizes the work of the three organizations in that area. In particular, that explanatory text illustrates how the various instruments produced by the three organizations interact and provides a comparative understanding of the coverage and basic themes of each instrument.[5]

Similar cooperation is suggested in the area of international commercial contract law with a focus on sales in light of the renewed interest for further promoting the adoption, application and uniform interpretation of texts in that area.

Over the decades, the Hague Conference, Unidroit and UNCITRAL have prepared legislative and non-legislative instruments related to international commercial contract law. Often, those efforts have been conducted in close cooperation. One example of such cooperation may be found in the legislative history of the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980)[6] (the "CISG"). In particular, the influence on the CISG of pre-existing uniform law texts developed by other organizations is well known.[7]

The CISG is one of the most successful uniform law texts in light of State participation, application by courts and arbitral tribunals and influence on sales law reform. That success highlighted the desirability of further supporting its implementation in line with its goals and guiding principles.[8]

UNCITRAL has already developed tools providing support to CISG implementation. Those tools include cases reported in the Case Law on UNCITRAL Texts (CLOUT) information system as well as the CISG Digest. However, experience demonstrates that a number of challenges to the use, application and interpretation of the CISG arise from insufficient awareness of the relation between the CISG and other uniform law texts, including those prepared by the Hague Conference and Unidroit. It is submitted that a joint effort aimed at providing guidance on how those texts relate would be beneficial for all texts concerned.

Examples of texts closely related to the CISG include the Principles on Choice of Law in International Commercial Contracts (the "Hague Principles")[9] and the Unidroit Principles of International Commercial Contracts (the "Unidroit Principles"),[10] both of which have been endorsed by UNCITRAL. Moreover, UNCITRAL has prepared treaties that are closely related to the CISG such as the United Nations Convention on the Use of Electronic

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[5] UNCITRAL, Hague Conference and Unidroit Texts on Security Interests: Comparison and analysis of major features of international instruments relating to secured transactions, available from www.uncitral.org/uncitral/uncitral_texts/security.html.

[6] United Nations, *Treaty Series*, vol. 1489, No. 25567.

[7] See, inter alia, as to Unidroit instruments: Convention Relating to a Uniform Law on the International Sale of Goods (The Hague, 1964), available from www.unidroit.org/instruments/international-sales/international-sales-ulis-1964; Convention Relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods (The Hague, 1964), available from www.unidroit.org/instruments/international-sales/international-sales-ulfc-1964-en; or the Hague Conference: Convention of 15 June 1955 on the Law Applicable to International Sales of Goods, available from www.hcch.net/en/instruments/conventions/full-text/?cid=31.

[8] *Official Records of the General Assembly, Seventieth Session, Supplement No. 17* (A/70/17), para. 334.

[9] Available from www.hcch.net/en/instruments/conventions/full-text/?cid=135.

[10] In their most recent iteration: Unidroit Principles of International Commercial Contracts 2010, available from www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2010.

Communications in International Contracts (New York, 2005) (the "Electronic Communications Convention")[11] and the Convention on the Limitation Period in the International Sale of Goods[12] (the "Limitation Convention") as well as other instruments of legislative and non-legislative nature.

The substantive overlap and cross-fertilization of those and other texts prepared by the Hague Conference, Unidroit and UNCITRAL[13] has highlighted the desirability for greater clarification of the relationship among those instruments with a view to jointly promoting their adoption and use. It is important to recall that the primary texts in this field are of an optional nature. With this in mind, coordinated presentation and guidance as to the content and consequences of the available options would be of clear value in further developing the understanding and appropriate use of these texts.

Accordingly, the goal of the suggested document on international contracts law with a focus on sales would be to guide across a range of relevant issues, from choice of law to identification, among existing texts, of those most suitable for each type of transaction. That document would reference relevant uniform texts of legislative, contractual or other nature. It could also examine how existing texts and standards relate to emerging issues such as the legal treatment of global supply chains.

If desirable and feasible, the document could address specifically issues relevant for various legal actors, including legislators, judges and arbitrators, legal counsels and commercial operators. It could also provide a solid teaching reference.

It should be stressed that the suggested document would not require new legislative work. It would analyse existing texts, coordinate them by highlighting mutual relationships and consolidate them, including by clarifying whether texts have had limited success or have been replaced by more recent ones.

One important dimension of the suggested work would be to refer, as appropriate, to relevant texts developed by other intergovernmental organizations, including at the regional level, and by the private sector. Those references would be prepared in consultation with the relevant institutions, in line with the usual inclusive approach of the Hague Conference, Unidroit and UNCITRAL.

The outcome of the suggested project could provide an important contribution to establishing clarity in the field by taking stock of the many achievements made in the past. It could also offer a clearer picture of lessons learned and best practices for the pursuit of greater legal uniformity and broader contractual freedom.

Mindful of increasing constraints on existing resources and of concurring priorities in each organization's intense work programme, it is suggested that a significant amount of the preparatory work in drafting the guidance document be carried out in an agile yet fully inclusive manner. To this end, a small joint panel of experts could be set up to provide further details on suggested scope and methodology. One possible first step could consist of mapping the most relevant texts and arranging them according to their scope. At a second stage, the panel could provide a short description of the content and relevance of those texts and assess their interaction.

The composition of the expert panel should reflect representation from different legal traditions and levels of economic development as well as, where appropriate, from other organizations active in the field. The Hague Conference, Unidroit and UNCITRAL would oversee the work of that panel through their Secretariats and provide guidance and coordination as appropriate.

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[11] General Assembly resolution 60/21, annex.

[12] Convention on the Limitation Period in the International Sale of Goods (New York, 1974), United Nations, *Treaty Series*, vol. 1511, No. 26119; as amended by the Protocol of 11 April 1980 (Vienna), United Nations, *Treaty Series*, vol. 1511, No. 26121.

[13] Consider, for example, Uniform Rules on Contract Clauses for an Agreed Sum Due upon Failure of Performance (1983), *Official Records of the General Assembly, Thirty-eighth Session, Supplement No. 17* (A/38/17), annex I; UNCITRAL texts on electronic commerce, available from www.uncitral.org/uncitral/uncitral_texts/electronic_commerce.html; or the Hague Conference Convention of 22 December 1986 on the Law Applicable to Contracts for the International Sale of Goods (not in force), available from www.hcch.net/en/instruments/conventions/full-text/?cid=61.

The final product of the expert panel's work would be determined by the Hague Conference, Unidroit and UNCITRAL in light of the findings of that panel and of its recommendations. Appropriate venues for finalizing and adopting the project's outcome could also be considered at a later stage.

H. Note by the Secretariat on settlement of commercial disputes: proposal received from the Swiss Arbitration Association

(A/CN.9/893)

[Original: English]

1. In preparation for the forty-ninth session of the Commission, the Swiss Arbitration Association ("ASA") submitted to the Secretariat a proposal with the aim of cooperating with UNCITRAL in promoting the revised UNCITRAL Notes on Organizing Arbitral Proceedings. The text received by the Secretariat on 30 May 2016 is reproduced as an annex to this note.

Annex

Proposal by the Swiss Arbitration Association (ASA)

1. Introduction and Scope of the ASA Arbitration Toolbox

In view of a potential cooperation with UNCITRAL, this Note is aimed at presenting a project pursued by the Swiss Arbitration Association (ASA) under the working title "ASA Arbitration Toolbox".

ASA is a non-profit association with over 1,200 members, of whom a third are from outside Switzerland, all practitioners and academics engaged and/or interested in domestic and international arbitration. Membership to ASA is open to arbitration practitioners of all nationalities, irrespective of the level of experience. Since its creation in 1974, ASA has become one of the leading arbitration associations. ASA is not an arbitral institution and does not administer arbitral proceedings.

The essence of the "ASA Arbitration Toolbox" is to remind users that arbitration is a tailor-made process. There is no single "correct" or "usual" way to conduct arbitral proceedings, or even one single "best practice". Indeed, the very essence of arbitration is its flexibility: different options are available for each step of the proceedings. The "ASA Arbitration Toolbox" is thus designed to remind users (parties, arbitrators, counsel) that they have considerable freedom to customize their proceedings for each case, as is also highlighted in the UNCITRAL Notes on Organizing Arbitral Proceedings (UNCITRAL Notes).

The "ASA Arbitration Toolbox" will provide guidance on how to best adapt the proceedings to the specific needs of each individual arbitration, making the process as efficient as possible. In order to achieve this, the "ASA Arbitration Toolbox" will detail the main steps in arbitral proceedings and outline the different possible approaches for each step. It will also provide guidance on which approach might be advisable in a specific situation, as well as the consequences of the approach chosen on subsequent steps in the proceedings. At all times, the "ASA Arbitration Toolbox" will emphasize that the procedural options corresponding to each option are merely suggestions. In line with the UNCITRAL Notes, the "ASA Arbitration Toolbox" also aims at assisting arbitration practitioners by outlining the issues on which appropriately timed decisions on organizing arbitral proceedings shall be made.

The end product will be an interactive electronic handbook available online, designed for the needs of arbitrators, counsel and in-house counsel alike. The electronic tool will contain descriptive and explanatory text and guidance on how to best address specific procedural issues. Hyperlinks will allow the user to easily switch from one issue to another. In addition, and this will be the unique feature of the "ASA Arbitration Toolbox", the electronic tool will contain concrete drafting proposals for download and will show the user, by allowing him/her to make an interactive selection, how decisions made on one procedural issue may affect later options available. The details and information on how to access the prototype of the electronic tool established so far will be explained in more detail below (Section 4).

2. Background

The idea for the "ASA Arbitration Toolbox" project was aired in October 2013, when the ASA Board felt the need to remind arbitration practitioners of the flexibility of arbitration proceedings and the diversity of approaches available. At the same time, they also realized that this diversity requires guidance on which combination of approaches is recommendable. Board members pointed out that, in many cases, it was not advisable to simply employ the whole arsenal of available approaches. Instead, practitioners should be guided towards wise and efficient use of the available tools. In order to achieve this, the Board suggested the creation of a "toolbox".

From the very outset, the ASA Board recognized that the "ASA Arbitration Toolbox" should address the same fundamental concern for appropriately timed decision on the organization of arbitral proceedings and diversity that is the basis of the UNCITRAL Notes. As the UNCITRAL Notes already provide useful guidance on organizing arbitral proceedings, the goal was not to merely replicate the Notes, but to take the spirit of the UNCITRAL Notes further. It was decided that this goal could best be achieved by means of an interactive electronic tool.

3. Content of the "ASA Arbitration Toolbox"

The relevant phases in the arbitral proceedings to be covered by the "ASA Arbitration Toolbox" have been identified as follows:

(i) Regulatory and institutional framework and arbitration clauses;

(ii) Commencement of arbitration and formation of the arbitral tribunal;

(iii) Terms of Reference, financing the procedure, organization of the procedure, arbitrator's possible role as conciliator; secretary to the arbitral tribunal;

(iv) Written submissions, documentary evidence (including document production);

(v) Interim measures, emergency arbitrators, assistance from the courts;

(vi) Experts, issues of confidentiality;

(vii) Witnesses;

(viii) Hearing(s), oral opening arguments, oral closing arguments;

(ix) Post-hearing briefs, the arbitral tribunal's decisions.

4. Format and main features of the "ASA Arbitration Toolbox"

As explained, the end product will be an electronic interactive handbook available online. The electronic tool is designed as a three-layer-tool:

- The first layer features a menu showing the relevant phases in the arbitral proceedings as defined above (Section 3).
- The second layer focuses on one particular phase in the arbitral proceedings (for the time being limited to the phase "Organization of the Procedure"). It features a menu showing the topics that are relevant at the respective stage of the proceedings and the issues the parties and the arbitral tribunal may wish to consider. With regard to each topic, the second layer contains explanatory text, options and recommendations for when to choose which option. For example, in the prototype section on the "Organization of the Procedure", it is explained that the responsibility for organizing the procedure is divided between the parties and the tribunal and that different scenarios can be distinguished, e.g. that the parties can determine the procedure themselves, that the arbitral tribunal can determine the procedure after consultation with the parties, or without consulting the parties. For each scenario, the "ASA Arbitration Toolbox" provides guidance on when best to use this approach. Once the electronic tool is fully developed, the explanatory text will also contain hyperlinks to other sections of the electronic tool allowing the user to navigate easily and quickly between sections. As a unique feature, the electronic tool will also show to the user how decisions made on a procedural issue may affect later options or decisions

available. This will be implemented by interactive choices (for the time being called "Red flags") which can be activated and have the effect that the "ASA Arbitration Toolbox" will be adapted to the choice made.

- The third layer offers drafting proposals for specific documents that may be needed at any given stage. These documents will be available for download. For example, in the section on the "Organization of the Procedure", users will be able to download samples of a letter of introduction sent by the arbitral tribunal to the parties, an agenda for the organizational conference, Terms of Reference, Procedural Order No. 1 etc. In addition, arbitration rules, explanatory notes, checklists etc. will be available for download to the extent they are relevant.

For the time being, a prototype is available, but limited to the topic "Organization of the Procedure" (phase (iii) as outlined in Section 3 above), i.e. the phase in an arbitration where the arbitration proceedings have been commenced and the arbitral tribunal has been constituted. The documents for download, hyperlinks and interactive choices are not yet fully implemented. Furthermore, the explanatory text is a draft version and does not yet reflect the final wording.

The current status of the prototype can be accessed using the following links:

Title page: http://org.arbitration-ch.toolbox.u-x.ch/de/home/index.html

Section on "Organization of the proceedings": http://org.arbitration-ch.toolbox.u-x.ch/de/organization/index.html

In view of the progress made on the IT aspects of the project and the status of the substantive work completed so far, it is expected that the necessary content to the electronic tool will be added in the course of 2016. This would allow the "ASA Arbitration Toolbox" to be finalized hopefully early 2017.

5. Cooperation with UNCITRAL

Since the "ASA Arbitration Toolbox" is guided by the same spirit as reflected in the UNCITRAL Notes, and aspires at taking this spirit further and beyond, it would be beneficial to the project if it could gain the support of UNCITRAL. Cooperation with UNCITRAL would mean that the "ASA Arbitration Toolbox" could reach out to the arbitration community on a global level. UNCITRAL's support will undoubtedly provide the "ASA Arbitration Toolbox" with credibility and visibility around the world.

Cooperation with UNCITRAL will help avoid duplication of efforts in promoting flexibility but also efficiency of arbitration proceedings thereby securing consistency and coherence of approaches undertaken. In fact, it is of particular importance to have coherent guidance in an area where a multitude of approaches are available, as is the case with the organization of arbitral proceedings.

VIII. CASE LAW ON UNCITRAL TEXTS (CLOUT)

Note by the Secretariat on promotion of ways and means of ensuring a uniform interpretation and application of UNCITRAL legal texts

(A/CN.9/873)

[Original: English]

Contents

I. Case Law on UNCITRAL Texts (CLOUT)

Background

1. CLOUT continues to be an important tool to promote the uniform interpretation and application of UNCITRAL texts, as it facilitates access to decisions and awards from many different jurisdictions. Furthermore, it contributes to the promotion of UNCITRAL legal texts since it demonstrates that the texts are being used and applied in many different countries and that judges and arbitrators at different latitudes are contributing to their interpretation. CLOUT also provides the basis for the analysis of interpretation trends that is a key part of the case law Digests. Background information on CLOUT and the Digests, is provided in the Provisional Agenda of the forty-ninth session of the Commission (A/CN.9/859, paras. 53-57).

2. At present, case law on the following texts is reported in the system:

- United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (New York Convention);[1]
- Convention on the Limitation Period in the International Sale of Goods, 1974 and Convention on the Limitation Period in the International Sale of Goods as amended by the Protocol amending the Convention on the Limitation Period in the International Sale Of Goods, 1980 (Limitation Convention);
- United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg Rules);
- United Nations Convention on Contracts for the International Sale of Goods, 1980 (CISG);
- UNCITRAL Model Law on International Credit Transfers, 1992 (MLICT);
- United Nations Convention on Independent Guarantees and Stand-by Letters of Credit, 1995 (UNLOC);

[1] 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* (A/63/17), para. 360. A comprehensive database of case law on the New York Convention complementing CLOUT can be found at www.newyorkconvention1958.org (see paras. 16-19 below and *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17* (A/68/17), paras. 134-140).

- UNCITRAL Model Law on International Commercial Arbitration, 1985, as amended in 2006 (MAL);
- UNCITRAL Model Law on Electronic Commerce, 1996 (MLEC);
- UNCITRAL Model Law on Cross-Border Insolvency, 1997 (MLCBI);
- UNCITRAL Model Law on Electronic Signatures, 2001 (MLES); and
- United Nations Convention on the Use of Electronic Communications in International Contracts, 2005 (ECC).

3. Case law to be reported in CLOUT is provided by the network of national correspondents that, either as individuals or a specific organ or body, monitor and collect court decisions and arbitral awards and prepare abstracts of those considered relevant in one of the six official languages of the United Nations. The Secretariat collects the full texts of the decisions and awards in their original language and publishes them (see para. 13 below). The abstracts are edited and translated by the Secretariat into the official United Nations languages and published in all such languages as part of the regular documentation of UNCITRAL (under the identifying symbol: A/CN.9/SER.C/ABSTRACTS/...).

4. While the national correspondents are the principal support of the system, in agreement with the correspondents, contributions from scholars who are not appointed as national correspondents are also accepted, subject to control and prior notification to the relevant national correspondent, if appointed. This practice is consistent with the Commission's recommendation of utilising all available sources of information to supplement the information provided by the national correspondents. [2] National correspondents meet every two years, when the Commission is in session in Vienna, to take stock of the latest developments and challenges of CLOUT maintenance and improvement.

Maintenance of the system

5. As at the date of this note, 166 issues of CLOUT had been prepared for publication, dealing with 1,551 cases from 64 jurisdictions. [3] Of these, 830 cases related to CISG, 429 cases related to MAL (a number of cases dealt with both MAL and the New York Convention), 100 cases related to MLCBI, 144 cases primarily related to the New York Convention, 25 cases related to MLEC, 13 cases related to the Limitation Convention (4 of which related to the amended version of the Convention), 3 cases related to the Hamburg Rules, 2 cases related to EEC and 1 case each to UNLOC, MLES and MLICT. In addition, one case related to both CISG and MAL and one case to both CISG and the Limitation Convention. With reference to the five regional groups represented within the Commission, the figures coincide almost in full with the figures provided in A/CN.9/840 submitted to the forty-eighth session of the Commission, in 2015, with the majority of the abstracts referring to Western European and other States (65 per cent, approximately). The other regional groups were represented as follows: Asian States (16 per cent, approximately), Eastern European States (13 per cent, approximately), Latin American and Caribbean States (3 per cent, approximately) and African States (3 per cent, approximately). A few abstracts pertained to the awards of the International Chamber of Commerce (ICC). When compared with the figures provided in A/CN.9/840, a small increase in the figures concerning Eastern European States and a small decrease in those relating to African States can be noted.

6. Over the last twelve months, 87 new abstracts were received from national correspondents and voluntary contributors. The abstracts refer to the following texts: CISG (44 abstracts), New York Convention (19), MLCBI (11), MAL (8), MLEC (2) and

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[2] *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 17* (A/64/17), para. 371.

[3] The jurisdictions include: Albania, Argentina, Australia, Austria, Belarus, Belgium, Benin, Bermuda, Bosnia and Herzegovina, Brazil, Burkina Faso, Cameroon, Canada, Chile, China, Colombia, Croatia, Cuba, Czech Republic, Côte d'Ivoire, Denmark, Egypt, El Salvador, Finland, France, Georgia, Germany, Hong Kong (China), Hungary, India, Iraq, Israel, Italy, Japan, Kenya, Liechtenstein, Lithuania, Luxembourg, Mexico, Montenegro, the Netherlands, New Zealand, Nigeria, Philippines, Poland, Portugal, Republic of Korea, Russian Federation, Serbia, Singapore, Slovakia, South Africa, Spain, Sweden, Switzerland, Thailand, Tunisia, Uganda, Ukraine, United Kingdom of Great Britain and Northern Ireland, United States of America, Zimbabwe.

Limitation Convention (amended text, 1 abstract). Two cases refer to both CISG and the Limitation Convention (amended text). The court decisions and the arbitral awards to which the abstracts refer were rendered in the following 17 countries: Albania, Australia, Belarus, Brazil, France, Japan, Lithuania, the Netherlands, New Zealand, Poland, Portugal, Republic of Korea, Singapore, Spain, Thailand, United Kingdom, United States. In the same period, 97 abstracts were published concerning CISG (45 abstracts); New York Convention (27), MAL (11), MLCBI (11), MLEC (1), EEC (1) and one case concerning both CISG and MAL. For the first time abstracts from Albania, Bosnia and Herzegovina, Portugal and Thailand were published.[4]

The network of national correspondents

7. Eleven new national correspondents were appointed in the period under review, two of whom replaced previous correspondents. The current composition of the network is thus of 74 correspondents representing 35 countries.[5] The Commission may wish to note that pursuant to a decision taken at its forty-second session, in 2009,[6] it was agreed that States should be requested to reconfirm the appointment of national correspondents every five years as of 2012. It was said that this arrangement would enable those correspondents who wished to remain actively involved to continue their work and provide an opportunity for new correspondents to join the network. The mandate of the current network of national correspondents will thus expire the day immediately before the day on which the fiftieth Commission session will commence in 2017. The Commission may wish to note that, approaching the fiftieth Commission session, the Secretariat will officially request UNCITRAL member and observer States to appoint and/or reappoint their national correspondents.

8. Over the last twelve months, national correspondents provided approximately 47 per cent of the abstracts published.[7] The remaining abstracts were received from voluntary contributors or prepared by the Secretariat.

Meeting of the national correspondents

9. The last meeting of the national correspondents took place on 7 July 2015; 18 countries were represented, in some cases national delegates attending the Commission and representatives of the Permanent Missions to the United Nations Organizations in Vienna participated on behalf of the national correspondent(s). At the meeting, progress and challenges of the CLOUT system in the previous biennium were reviewed, and information on the promotion of CISG and MAL Digests and their updating, on the preparation of MLCBI Digest and on the UNCITRAL Secretariat Guide to the New York Convention ("New York Convention Guide") was provided. A short demonstration of the upgraded CLOUT website was also conducted to familiarize participants with the new features of the database.

10. There was agreement among the participants on the importance of the national correspondents meeting, which was said to be an opportunity for sharing views among the correspondents as well as with the UNCITRAL secretariat. In this regard it was suggested that use of remote connection facilities (e.g. videoconference) could be tested in future as a way to allow participation of those correspondents who could not travel to Vienna. There was further agreement that other UNCITRAL texts, in addition to those already included, should be added in CLOUT and it was noted that cooperation with other organizations and

[4] Abstracts from the following jurisdictions were also published: Australia, Austria, Belarus, Brazil, China, France, India, Japan, Lithuania, New Zealand, Poland, Portugal, Republic of Korea, Singapore, Spain, United Kingdom and United States.

[5] The following countries have appointed national correspondents: Australia, Austria, Belarus, Bulgaria, Canada, China, Colombia, Cuba, Czech Republic, Denmark, El Salvador, Finland, France, Germany, Greece, Guatemala, Ireland, Israel, Italy, Japan, Luxembourg, Moldova, Montenegro, New Zealand, Poland, Republic of Korea, Russian Federation, Singapore, Slovakia, Spain, Sweden, Thailand, Tunisia, United States and Uruguay.

[6] *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 17* (A/64/17), para. 370.

[7] The figure is similar to the one provided in A/CN.9/840.

institutions dealing with topics pertaining to those texts could be helpful to identify case law relating to such texts.

II. The Digests

11. A new round of updates of the CISG Digest was finalized. At the date of this Secretariat's Note the draft Digest is being formatted. It will then be published in the six official United Nations languages as an e-book and made available on the UNCITRAL website. Since the 2012 revision of the Digest resulted in the inclusion of a high volume of cases and several edits in the content of the publication,[8] the current round of updates has mainly focused on the inclusion of landmark cases in the text. The Commission may wish to note that the current revision of the Digest cites courts' decisions recognizing the significance of the Digest in assisting in the interpretation of the CISG.

12. Work to update the current edition of the MAL Digest is ongoing and finalization of the MLCBI Digest is progressing.

III. Enhancing CLOUT

13. With the upgraded CLOUT database in place,[9] the Secretariat commenced work to make accessible to the general users the full text decisions stored in the database archives. Due to the very time-consuming nature of the task and the modest resources available for CLOUT, the Secretariat joined the online volunteering programme, managed by the United Nations Volunteers (UNV),[10] which connects development organizations and volunteers over the Internet and facilitates their online collaboration.[11] A volunteer was thus identified and selected who is currently assisting the Secretariat (working from a remote connection) in making the full texts of decisions available online.

14. The Commission may wish to note that, since the new database was launched, in the first quarter of 2015, it had over 30,000 users.

15. As in previous Secretariat Notes to the Commission, (see, for instance, A/CN.9/810 and A/CN.9/840), the Commission may wish to note that the Secretariat responds to the resource intensive demands of CLOUT by stretching its available resources in order to ensure the coordination of the system. While this allows for routine maintenance of CLOUT, the system would greatly benefit from additional support in order to be further expanded through the provision of additional services and publication of an increased volume of abstracts. The Secretariat thus reaffirms the need for assistance in kind (e.g. non-reimbursable loans of personnel) or through budget contributions from States and other donors. The Commission might wish to reiterate its appeal to Member States to provide active support to the Secretariat's search for appropriate funding sources at the national level so as to ensure enhanced performance of the system.

IV. Promotion of uniform interpretation of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (New York Convention)

16. Since the Secretariat's last note to the Commission (A/CN.9/840), the website www.newyorkconvention1958.org[12] continued to expand, not only by way of increasing the

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[8] See A/CN.9/748, para. 12.

[9] See A/CN.9/840, para. 11.

[10] United Nations Volunteers (UNV) is the United Nations agency that works to integrate volunteerism into development cooperation and mobilize volunteers, including UN Volunteers, throughout the world. UNV is based in Bonn, Germany, and is active in around 130 countries every year, it is represented worldwide through the offices of the United Nations Development Programme (UNDP) and reports to the UNDP Executive Board.

[11] See www.unv.org/how-to-volunteer/online-volunteers.html.

[12] The website was launched in July 2012 to support the preparation of the Guide on the New York Convention, with which the Secretariat was entrusted by the Commission in 2008. The website

volume of case law published on the application of the Convention, but also by way of adding information about the jurisdictions which have adopted the Convention. The database currently includes concise background notes concerning 45 States parties. With regard to 33 of those States, 1,138 summaries of cases, 1,052 original-language decisions and 119 English-language translations were also made available.

17. Pending publication of the final version of the New York Convention Guide, the website publishes a detailed analysis of specific provisions of the Convention, including the relevant case law (as mentioned in para. 16 above), finalized under the supervision of the Secretariat. The travaux préparatoires of the Convention are also available as well as a bibliography on the Convention, that is the most comprehensive directory of publications relating to the application and interpretation of such text. Updated in September 2015, the bibliography lists 741 books and articles from more than 71 countries in 11 different languages; 187 of such publications are directly accessible through hyperlinks.

18. Finally, over the past twelve months, the site has technically evolved, offering a new format compatible with all mobile devices and new features. In particular, the site offers a new interactivity between contents and an indexing that enables the various elements of the site to link to one another, in a unique canvas. The search engine of the website, which already allowed a thorough search among the decisions, has now been extended to enable searching the Guide, the travaux préparatoires and the bibliography.

19. As in previous years, close coordination between the website and the CLOUT system continues to be maintained (see also A/CN.9/840, para. 14). Several cases on the application of the New York Convention were published in both systems, which allowed for such cases to be available in the six official languages of the United Nations.

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intends to make the information gathered in the preparation of such a Guide publicly available, including details on the judicial interpretation of the Convention by States Parties. See A/CN.9/777, paras. 15-16 and *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17* (A/68/17), paras. 134-140.

IX. TECHNICAL ASSISTANCE TO LAW REFORM

A. Note by the Secretariat on technical cooperation and assistance

(A/CN.9/872)

[Original: English]

Contents

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, 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.

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[1] *Official Records of the General Assembly, Forty-second Session, Supplement No. 17* (A/42/17), para. 335.

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-ninth session, see A/CN.9/876).

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-eighth session in 2015 (A/CN.9/837 of 8 May 2015), and reports on the development of resources to assist technical cooperation and assistance activities. Activities undertaken in the Asia-Pacific region by the UNCITRAL Regional Centre for Asia and the Pacific are set out in a separate document (A/CN.9/877).

7. A separate document on coordination activities (A/CN.9/875) 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.

8. The Commission is also expected to consider a draft guidance note on strengthening United Nations support to States, upon their request, to implement sound commercial law reforms (A/CN.9/882 and A/CN.9/883).

II. Technical cooperation and assistance activities

A. General approaches

9. 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.

10. 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.

11. Design and implementation of technical cooperation and assistance activities took place in line with the priorities identified for such activities, which include: stressing a regional and subregional approach in order not only to achieve economies of scale but also to complement ongoing regional integration initiatives; promoting the universal adoption of those international trade law texts already enjoying wide acceptance, and making particular efforts to disseminate information on recently adopted texts, with a view, if such texts were treaties, to fostering their early adoption and entry into force (A/66/17, para. 255).

12. Some of the key activities undertaken by the Secretariat in the relevant time period are described below. It should be noted that due to lack of resources and time constraints, some of the activities were undertaken by experts on behalf of the Secretariat. Activities denoted with an asterisk were funded by the UNCITRAL Trust Fund for Symposia.

Promotion of the universal adoption of fundamental trade law instruments

13. The Secretariat has continued to engage in promoting 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.

14. The Secretariat has jointly organized, participated in, or contributed to the following events which dealt with a number of areas to which UNCITRAL's work relates:

(a) A training on international trade law for Democratic People's Republic of Korea officials organized by the International Council of Swedish Industry (Stockholm, 18 May 2015)*;

(b) The 5th St. Petersburg International Legal Forum, in an effort to increase awareness among the Russian legal practitioners about developments in UNCITRAL of relevance to the legal framework of the Russian Federation (St. Petersburg, Russia, 26-29 May 2015)*;

(c) A training seminar on international trade law for Democratic People's Republic of Korea government officials and legal professionals (Beijing, 20-27 June 2015)*;

(d) The Centre for Small States Inaugural Conference: "Small States in a Legal World". Delivered a presentation on "the relevance of global efforts to harmonize trade law: UNCITRAL and small States" and shared experiences of UNCITRAL in supporting commercial law reform in small jurisdictions (London, 7 September 2015);

(e) A lecture on UNCITRAL texts at the Pace University online certificate program in commercial law (30 mins via video conference) (2 October 2015);

(f) A seminar regarding various UNCITRAL related topics such as international arbitration, simplified incorporation and secured transactions (Bogota, 9 February 2016); and

(g) The Conference ''UNCITRAL Contribution to International Trade Law" organized by the University of Paris 1 and Paris 2 (Paris, 12 April 2016)*.

Initiatives for a regional approach

15. The Secretariat continued its collaboration with the Asia-Pacific Economic Cooperation (APEC). At the APEC Structural Reform Ministerial Meeting (Cebu, Philippines, 7-8 September 2015)*, the APEC Ministers recognized the importance of work to develop model legal instruments and commended APEC work in this area in collaboration with the Commission. The APEC Ministers further agreed that the development of international legal instruments and their adoption will create a more conducive climate for cross-border trade and investment, thus facilitating economic growth and that the use of those instruments provides greater legal certainty in cross-border transactions, harmonization of finance and dispute resolution systems, closer economic and legal integration among cooperating economies, and the simplification of procedures involved in international transactions. The Secretary of UNCITRAL addressed the APEC Economic Committee during its plenary (Lima, 29 February and 1 March 2016)*, providing a general overview of UNCITRAL, its mandate and texts, its involvement in technical assistance and coordination and the need for continued collaboration with APEC, particularly its Economic Committee.

16. During the reporting period, the Secretariat, through the Regional Centre for Asia and the Pacific, held two joint workshops with the Department of Justice of Hong Kong Special Administrative Region of China under the auspices of the APEC Economic Committee and its Friends of the Chair Group on Strengthening Economic and Legal Infrastructure (SELI): one on Effective Enforcement of Business Contracts and Efficient Resolution of Business Disputes through the Hague Choice of Court Agreements Convention (Cebu, Philippines, 1 September 2015)* and another on Dispute Resolution — The Key to Efficient Settlement of Business Disputes (Lima, 26 February 2016)*. The Secretariat also continued its participation in the Ease of Doing Business (EoDB) project on enforcing contracts, which aims at strengthening the legislative and institutional framework for the enforcement of contracts in APEC economies. In that context, UNCITRAL participated in the International Seminar on the Ease of Doing Business (Seoul, 27 January 2016)*, which provided an opportunity to examine the past five years of participation in the project and also held joint discussion with Korean and Mexican authorities to share experience gained in the area of enforcing contracts and possibly expand it to the area of getting credit (Mexico City, 9-10 November 2015)*. The Secretariat's participation in the EoDB project was made

possible through the voluntary contribution from the Government of the Republic of Korea. It is expected that the Secretariat will also closely cooperate with the United States of America and Mexico in implementing the second APEC EoDB Action Plan (2016-2018), particularly with respect to getting credit. In addition, the UNCITRAL Regional Centre for Asia and the Pacific also took part in the APEC E-Commerce Forum: New Paradigm for Cross-Border E-Commerce and Online Shopping (Jeju, Republic of Korea, 26-28 November 2015)*.

B. Specific activities

Sale of goods

17. The Secretariat has continued to promote broader adoption, use and uniform interpretation of the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (the "United Nations Sales Convention" or "CISG"),[2] including by organizing or participating in dedicated events. Examples of such meetings include:

(a) "Legal framework for the settlement of national and international trade disputes in the Eurasian Region" organized by the Kiel Center for Eurasian Economic Law (Ekaterinburg, Russian Federation, 18 June 2015)*;

(b) Workshop on the CISG for government lawyers in Azerbaijan co-organized by the Academy of Public Administration and UNCITRAL secretariat (Baku, 29 September-1 October 2015)*;

(c) "Masterclass on the CISG" (Vienna, 9 October 2015), a session of the "Annual Conference of the International Bar Association"; and

(d) "Sixth Annual Vis Middle East Pre-Moot" and "Regional Middle East Arbitration Forum" (Manama, 11-12 February 2016).

18. At its forty-sixth session, the Commission requested the Secretariat to commence planning for a colloquium to celebrate the thirty-fifth anniversary of the CISG, to take place on a date after the forty-seventh Commission session. The Commission agreed that the scope of that colloquium could be expanded by including some of the issues raised by a proposal submitted at its forty-fifth session (A/CN.9/758).[3] That request was reiterated at the Commission's forty-seventh session.[4] Accordingly, a panel discussion was organized by the Secretariat at the forty-eighth Commission session with participation of experts in the field of international sale of goods law.[5] Pursuant to a request of the Commission, the proceedings of that panel have been published.[6]

19. Other events held in the reporting period to celebrate the thirty-fifth anniversary of the CISG include:

(a) UNCITRAL-Singapore Seminar: "35 Years of the CISG: Achievements and Perspectives" (Singapore, 23-24 April 2015);

(b) II Congreso Iberoamericano de Derecho Internacional de los Negocios: "360° de la compraventa internacional de mercaderías" — 35 años de la Convención de Viena, co-organized by Universidad Externado, Bogotá, the Government of Colombia and the UNCITRAL Secretariat (Bogotá, 16-20 October 2015);

(c) "Third International Arbitration Readings in Memory of Academician Igor Pobirchenko", organized by the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry (Kyiv, 13 November 2015)*; and

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[2] United Nations, *Treaty Series*, vol. 1489, No. 25567.

[3] *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17* (A/68/17), para. 315.

[4] Ibid., *Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 255.

[5] Ibid., *Seventieth Session, Supplement No. 17* (A/70/17), paras. 325-334.

[6] UNCITRAL, Thirty-five Years of Uniform Sales Law: Trends and Perspectives, Proceedings of the High Level Panel held during the Forty-eighth Session of the United Nations Commission on International Trade Law, Vienna, 6 July 2015, United Nations, New York, 2015.

(d) "35 Years of CISG — Present Experiences and Future Challenges", co-organized by the UNCITRAL Secretariat and Faculty of Law of the University of Zagreb (Zagreb, 1-2 December 2015).

Dispute resolution

20. The Secretariat has been engaged in the promotion of UNCITRAL texts in the field of dispute resolution including through a number of training activities and has supported ongoing law reform process in various jurisdictions. The Secretariat has also developed soft law instruments and tools to provide information on the application and interpretation of those texts. Given the high rate of adoption of those texts, the demand for technical assistance in the field of dispute resolution remains particularly acute.

Development of instruments and tools to provide information on the application and interpretation of UNCITRAL texts in the field of dispute settlement

21. Regarding the New York Convention, the website (www.newyorkconvention1958.org), which was established to make the information gathered in the preparation of the UNCITRAL Secretariat Guide on the New York Convention freely and publicly available,[7] has been expanded to include case law from additional jurisdictions as well as a comprehensive bibliographical reference. It is currently planned that the UNCITRAL Secretariat Guide on the New York Convention will be available by the end of 2016 electronically in all United Nations languages.

22. Regarding the UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006 (the "Model Law on Arbitration"),[8] the Secretariat is currently working on updating the 2012 Digest of Case Law on the Model Law on International Commercial Arbitration.[9]

Supporting ongoing legislative work and training activities

23. The Secretariat has reviewed or provided comments on legislation on arbitration and/or mediation of Albania, Bahamas, Bahrain, Barbados, Bhutan, the Democratic People's Republic of Korea, the Democratic Republic of Congo, Iraq, the Lao People's Democratic Republic, Maldives, Mongolia, Montenegro, Papua New Guinea, Saudi Arabia and Viet Nam. The Secretariat has also reviewed or provided comments on rules of certain arbitral institutions, such as those of the Istanbul Chamber of Commerce Arbitration Centre (ITOTAM), the Bhutanese Construction Board and the Afghanistan Centre for Commercial Dispute Resolution. In the field of dispute resolution, the Secretariat has jointly organized, participated in, or contributed to the following events:

(a) APEC Conference on Enforcing Contracts in Sri Lanka and Thailand (Seoul, 5-8 May 2015)*;

(b) Presentation to the Parliament of the European Union on UNCITRAL texts on transparency in investment arbitration (Brussels, 5 May 2015 and 13 July 2015);

(c) Conference on "Investment Protection and Public Interests" organized by the University of Turin (Turin, Italy, 11 May 2015);

(d) Conference on "United States of America/Cuba: Towards the end of the embargo?" (Paris, 12 May 2015)*;

(e) Capacity-building workshop on alternative dispute resolution in the context of the construction industry with the Secretariat participation focusing on the implementation of the New York Convention and the Model Law on Arbitration (Thimphu, Bhutan, 18-19 May 2015)*;

(f) Workshop on the New York Convention for the Ukrainian judiciary (Kharkiv, Ukraine, 20 May 2015);

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[7] *Official Report of the General Assembly, Sixty-seventh session, Supplement No. 17* (A/67/17), paras. 135 and 136.

[8] United Nations publication, Sales No. E.08.V.4.

[9] Available from www.uncitral.org/uncitral/en/case_law/digests.html.

(g) Panel on Consensual Dispute Resolution with the Secretariat participation focusing on UNCITRAL texts on conciliation (Vienna, 1 July 2015);

(h) Chartered Institute of Arbitrators (CIArb) Conference on Arbitration with assistance also provided with respect to the possible establishment of a regional arbitration centre (Kingston, 9-10 July 2015);

(i) Thailand Arbitration Institute Anniversary Event with the Secretariat participation focusing on the Model Law on Arbitration and the UNCITRAL Arbitration Rules (Bangkok, 23-24 July)*;

(j) BANI Arbitration Centre Conference on arbitration law reform in Indonesia (Jakarta, 12 August 2015)*;

(k) International Conference on Arbitration Discourse and Practices in Asia with the Secretariat participation focusing on its participation in the APEC EoDB project (Kuala Lumpur, 20-21 August 2015)*;

(l) Training on arbitration with the Addis Ababa Chamber of Commerce and Sectoral Associations and Chamber Trade Sweden (Addis Ababa, 27-28 August 2015);

(m) Workshop on Effective Enforcement of Business Contracts and Efficient Resolution of Business Disputes through the Hague Choice of Court Agreements Convention (Cebu, Philippines, 1 September 2015);

(n) OHADAC Congress, a launching event of the Organisation for the Harmonisation of Business Law in the Caribbean (Point à Pitre, Guadeloupe, 21-22 September 2015)*;

(o) ICC Arbitration Commission meeting with the Secretariat participation providing an update on the work undertaken by Working Group II (Arbitration and Conciliation) (Vienna, 3 October 2015);

(p) International Conference organized by the President of the Saudi Arbitration Court and the Higher Institute of Judiciary and Arbitration (Riyadh, 11-12 October 2015);

(q) Colloquia of the Association pour la promotion de l'Arbitrage en Afrique (APAA) with the Secretariat participation focusing on UNCITRAL texts on transparency in investment arbitration (Douala, Cameroon, 14-15 October 2015)*;

(r) Joint conference with the New York Branch of CIArb with the Secretariat participation focusing on the UNCITRAL Secretariat Guide on the New York Convention (New York, 21 October 2015);

(s) 9th Mediterranean and Middle East Conference organized by the European Court of Arbitration (Naples, Italy, 23 October 2015);

(t) Judicial Roundtable on the New York Convention and the Model Law on Arbitration, and the UNCITRAL Asia Pacific Judicial Summit (Hong Kong, 26-28 October 2015)*;

(u) Fifth Meeting of the Asia-Pacific Foreign Direct Investment Network for Least Developed and Landlocked Developing Countries on ''Investment Agreements and Investor State Dispute Resolution: Current Trends and Emerging Issues'' (Bangkok, 2 November 2015)*;

(v) Fourth Asia Pacific ADR Conference jointly organized with the Korean Ministry of Justice, the Korean Commercial Arbitration Board and ICC (Seoul, 3-4 November 2015)*;

(w) Training at the Energy Charter Treaty jointly with Centre for Effective Dispute Resolution (CEDR) and International Mediation Institute (IMI) on conciliation/mediation (Brussels, 4-6 November 2015);

(x) Columbia International Investment Conference with the Secretariat participation focusing on UNCITRAL texts on transparency in investment arbitration (New York, 10-11 November);

(y) 2nd International Conference for a Euro-Mediterranean Community of International Arbitration jointly organized with OECD and Cairo Regional Centre for International Commercial Arbitration (CRCICA) (Cairo, 12-13 November 2015);

(z) Workshop for the Attorney General's Office and the Law Reform and Revision Commission of the Bahamas (Nassau, 13-14 November 2015);

(aa) International Arbitration Institute (IAI) Conference on "Treaty-making in investment arbitration" with the Secretariat participation focusing on UNCITRAL texts on transparency in investment arbitration (Washington D.C., 20 November 2015);

(bb) 2nd International Conference on Arbitration with Arbitration Institute of Addis Chamber of Commerce and Chamber Trade Sweden (Addis Ababa, 23-24 November 2015);

(cc) Conference on International Investment Arbitration in the MENA Region (Manama, 9-10 December 2015);

(dd) Vienna Arbitration Day 2016, jointly organized with the Austrian Arbitration Association, the International Arbitral Centre of the Austrian Federal Economic Chamber (VIAC), the International Chamber of Commerce Austria and the Young Austrian Arbitration Practitioners (YAAP) (Vienna, 22-23 January 2016);

(ee) 2016 Vis Mid East Pre-Moot (Bahrain, 11-13 February 2016)*;

(ff) Fourth International Investment Arbitration Conference organized by the Ministry of Justice of Kuwait in association with the Permanent Court of Arbitration (Kuwait City, 17-18 February 2016)*;

(gg) Conference on "Parties' needs in arbitration" jointly organized with the Ljubljana Arbitration Centre (LAC) with the Secretariat participation focusing on enforceability (Ljubljana, 15 March 2016);

(hh) UNCTAD Expert Meeting, "International Investment Agreements (IIA) Stocktaking" with the Secretariat participation focusing on UNCITRAL texts on transparency in investment arbitration and possible future work by Working Group II (Arbitration and Conciliation) (Geneva, 16 March 2016);

(ii) Conference on "Where does arbitration go, from crisis to new perspectives" with the Secretariat participation focusing on UNCITRAL texts on transparency in investment arbitration (Istanbul, 8-9 April 2016);

(jj) Somali International Arbitration Summit (SIAS) (Mogadishu, 11 April 2016);

(kk) First annual conference "The Arab states in international arbitration: current issues" organized by the Chamber of Tunis (14-15 April 2016); and

(ll) OECD Workshop on international investment treaties, investment disputes and arbitration for Iraqi government officials (Beirut, 21 April 2016).

Electronic commerce

24. The Secretariat has continued promoting the adoption, use and uniform interpretation of UNCITRAL texts on electronic commerce, including in cooperation with other organizations[10] and emphasizing a regional approach. In that framework, the Secretariat has also informally provided comments on draft regional and national legislation and interacted with legislators and policymakers from various jurisdictions.

25. Activities relating to promoting the adoption of UNCITRAL texts on electronic commerce and their effective use and uniform interpretation where already adopted include:

(a) Presentations on current and future UNCITRAL e-commerce projects and their relevance for Arab States at the Arab Information and Communication Technologies

[10] See United Nations Conference on Trade and Development (UNCTAD), Report of the Multi-year Expert Meeting on Cyberlaws and Regulations for Enhancing E-commerce, Including Case Studies and Lessons Learned [including corrigendum] (TD/B/C.II/EM.5/3), 12 May 2015, paras. 10, 12 and 54.

Organization (AICTO) Conference "PKI & the global e-commerce law" (Tunis, 8 May 2015)*;

(b) Remote presentation on e-signatures to the European Forum on Electronic Signature (EFPE) (11 June 2015);

(c) The Regional Workshop "E-commerce Harmonization in the Caribbean", co-organized by UNCTAD, the Government of the Republic of Trinidad and Tobago, the Latin-American and Caribbean Economic System (SELA) and the Association of Caribbean States (ACS) (Port of Spain, 29 September — 2 October 2015);

(d) The UNCITRAL/ARCTEL-CPLP workshop on the promotion of the use of UNCITRAL texts and of the adoption of the United Nations Convention on the Use of Electronic Communications in International Contracts, 2005 (Praia, 7-9 October 2015); and

(e) "Tercer Congreso Internacional de Derecho del Comercio Electrónico"; participation by the Chair of UNCITRAL (San José, 3-4 March 2016).

Procurement

26. In accordance with requests of the Commission and Working Group I (under its former mandate on Public Procurement and Infrastructure Development), the Secretariat has established links with other international organizations active in public procurement reform to support the use of the UNCITRAL Model Law on Public Procurement (2011) (the "Procurement Model Law"),[11] its accompanying Guide to Enactment (2012),[12] and the UNCITRAL texts on Privately-Financed Infrastructure Projects.[13]

27. The aims of such cooperation are to ensure that reforming Governments and organizations are informed of the terms of and the policy considerations underlying those texts, including as regards regional requirements and circumstances, so as to promote a thorough understanding and appropriate use of these UNCITRAL texts.[14] The Secretariat is following a regional approach to this cooperation, engaging with the multilateral development banks and regional organizations, addressing the role of public procurement in sustainable development, good governance, the avoidance of corruption and achieving value for money in government expenditure.

Supporting ongoing legislative work and training activities

28. The Secretariat has provided advice to the Governments of Jamaica and Trinidad and Tobago (with the support of the IADB), to Afghanistan (with the support of the United States Department of Commerce Commercial Law Development Programme), and to Armenia, Egypt, the Kyrgyz Republic and Tajikistan (within the framework of the EBRD-UNCITRAL Public Procurement Initiative) on reform of their public procurement legal and regulatory framework, including on proposed legislation.

29. In this connection, the Secretariat participated in (i) a Conference on Public Procurement legislative reform in Afghanistan (Istanbul, 1-6 November 2015); (ii) rounds of consultations with drafters of primary and secondary public procurement legislation and supporting donors in Armenia, Egypt, the Kyrgyz Republic, and Tajikistan (throughout the year).

30. The Secretariat also took part in (i) the creation of a Body of Knowledge (BoK) on Public-Private Partnerships (PPP), in the context of the World Bank/APMG's work towards creating a Global PPPs Certification Program (May 2015 onwards); (ii) a steering group of a project at UNCTAD (Multi-Agency Support Team Project) addressing non-tariff measures influencing trade; policies that governments use to favour domestic firms in public procurement (November 2015 onwards); (iii) the production of a Chapter on public

[11] *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17* (A/66/17), annex I.

[12] Available at www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure.html.

[13] The UNCITRAL Legislative Guide (with Legislative Recommendations) and its Model Legislative Provisions on Privately-Financed Infrastructure Projects, available at www.uncitral.org/uncitral/uncitral_texts/procurement_infrastructure.html.

[14] See documents A/CN.9/575, paras. 52 and 67, A/CN.9/615, para. 14, and A/66/17, paras. 186-189.

procurement for an OSCE Anti-corruption Handbook (August-December 2015); (iv) an International Learning Laboratory project on Public Procurement and Human Rights, a project coordinated by International Corporate Accountability Roundtable (ICAR), the Danish Institute for Human Rights (DIHR), the Harrison Institute of Public Law at Georgetown University, and the University of Nottingham public procurement Research Group, analysing the challenges and opportunities presented for the integration of human rights considerations into public procurement (January 2016 onwards); and (v) producing a summary of the approach to sustainable procurement under the Model Law to UNEP for its technical assistance activities in this aspect of public procurement (March 2016). At the request of UNEP, the Secretariat also reviewed proposed public procurement legislation for Mongolia.

31. The Secretariat has participated as a lecturer in (i) a post-graduate degree programme — the Executive LLM in Public Procurement Law and Policy (University of Nottingham, United Kingdom of Great Britain and Northern Ireland, 9-10 January 2016; (ii) the 10th edition of the ITC-ILO Master in Public Procurement for Sustainable Development (Turin, Italy, 22-23 February 2016 and planned for 31 May 2016); and (iii) the 4th Edition of the International Master in Public Procurement Management at the University of Rome, Tor Vergata (with the support of the EBRD) (Rome, 5-6 April 2016).

32. The main activities and international events in the year to May 2016, in which the Secretariat has participated as speaker/presenter, included:

(a) The Sussex Regulatory Research Group and Advisory Committee conference establishing a "Competition and Procurement Policy Research and Knowledge Exchange Network". The purpose of forming the knowledge-exchange network is to enable an interchange of interdisciplinary academic expertise with private sector practitioners in the interdisciplinary field of competition and procurement law and governance issues (United Kingdom, 28-29 May 2015 (virtual participation));

(b) The 11th Public Procurement Knowledge Exchange Forum, with a focus on procurement oversight and monitoring as a means for efficient project implementation (Batumi, Georgia, 9-12 June 2015);*

(c) The Global Revolution VII Conference on public procurement; moderating a session which discussed the regional impact of UNCITRAL with emphasis on procurement and aid effectiveness (Nottingham, United Kingdom, 14-16 June 2015);

(d) The UNODC/UNCAC Conference of States Parties Working Group on Prevention to discuss the implementation of article 9 of the United Nations Convention against Corruption (procurement and public finances), with a focus on the management of public finance for policymakers and justice officials (Vienna, 2-4 September 2015);

(e) The International Anti-Corruption Academy (Laxenburg) for participants from various countries, providing anti-corruption tailor-made training (10 September 2015); to Audit Board of the Republic of Indonesia (5 October 2015); the Central Vigilance Commission of India (5 February 2016), the Office of Auditor General, Thailand (29 March 2016), and representatives of Eurasian Economic Union (EAEU) member States (26 May 2016);

(f) A Symposium on "The revised WTO Agreement on Government Procurement (GPA): an emerging pillar of twenty-first century trade and development" and delivered a presentation on "The revised Procurement Model Law: synergies and complementarities with the revised GPA" (Geneva, Switzerland, 17-18 September 2015);

(g) A conference on "Post-conflict states and public procurement: Strategic, economic and legal challenges and opportunities", to discuss the engagement of States in and the main challenges relating to implementing the Model Law in post-conflict States (Brussels, 30 September 2015);

(h) A presentation on public procurement to Central and Eastern Europe, Central Asian and the Caucasus Countries at a WTO workshop with the aim to encourage use of the Procurement Model Law in these countries (Vienna, 20 October 2015);

(i) The annual OSCE Economic and Environmental Dimension Implementation Meeting (EEDIM), of the OSCE, focusing on combating corruption in public procurement and delivered a presentation on the importance of transparency and accountability in public procurement processes (Vienna, 19-20 October 2015);

(j) A round-table conference on law and international trade ‘‘Towards Convergence in Transatlantic Procurement Markets”; a prelude to establishing a Post Graduate Diploma in on comparative public procurement law in 2016 (London, 26 October 2015);

(k) The World Bank-EBRD E-Procurement Forum: Enhancing Public Spending (Vienna, 1-3 December 2015); and

(l) Within the framework of an EBRD-UNCITRAL Public Procurement Initiative (i) capacity-building session for the Kyrgyz Republic and Ukraine (Nicosia, 22-24 July 2015)*, (ii) the workshop in Egypt on reforms of the local procurement review system, e-procurement and identification of training needs (Cairo, 6 and 7 April 2016)*; and (iii) a technical meeting with member States of EAEU on the comparative analysis of the WTO GPA and provisions of the EAEU Treaty related to public procurement (Podgorica, 6 May 2016)*.

Insolvency

33. The Secretariat has promoted the use and adoption of insolvency texts, particularly the UNCITRAL Model Law on Cross-Border Insolvency (1997) [15] and the UNCITRAL Legislative Guide on Insolvency Law (2004),[16] through participation as a speaker at various international meetings and conferences, including:

(a) A panel and discussions regarding current work and related insolvency matters with World Bank staff and regional offices (Washington D.C., 2-3 June 2015);

(b) The INSOL Europe/INSOL Academic Forum Joint International Insolvency Conference to discuss current approaches to corporate rescue (Nottingham, United Kingdom, 25-26 June 2015);

(c) The 2nd National Insolvency Conference “Singapore as a Key Player in the Regional and International Insolvency and Restructuring — The Way Forward”, in the context of Singapore’s adoption of the Model Law on Cross-Border Insolvency (Singapore, 11 September 2015)*;

(d) The 6th Africa Roundtable on Insolvency Law Reform 2015. As the most important insolvency reform event in Africa, this provided the opportunity to meet with key government officials and practitioners in the region where there are lots of insolvency reform activities being undertaken and to discuss UNCITRAL insolvency texts (Cape Town, South Africa, 12-13 October 2015)*; and

(e) A seminar to LLM students at Nottingham University on the UNCITRAL process and work methods with particular reference to insolvency and Working Group V (Nottingham, United Kingdom, 27 November 2015).

34. The Secretariat reviewed the enactments of the Model Law by Gibraltar, Kenya, Malawi and OHADA.

Security interests

35. 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 (2001), the UNCITRAL Legislative Guide on Secured Transactions (2007), its Supplement on Security Rights in Intellectual Property (2010) and the UNCITRAL Guide on the Implementation of a Security Rights Registry (2013)) is twofold.

[15] General Assembly resolution 52/158, annex.
[16] United Nations publication, Sales No. E.05.V.10.

Supporting ongoing legislative work and training activities

36. The first 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 in cooperation with the World Bank Group to States with respect to efforts to reform their secured transactions law (e.g. Thailand and Philippines). The objective of this cooperation is to ensure that technical assistance is provided consistent with UNCITRAL texts on security interests and in particular the UNCITRAL Legislative Guide on Secured Transactions.

37. 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. Further, the Secretariat is continuing its work with the World Bank with regard to revising the World Bank Insolvency and Creditor Rights Standard to include the key recommendations of the UNCITRAL Legislative Guide on Secured Transactions and reference to the other texts of UNCITRAL on security interests. The work with the World Bank includes, in addition, the comparison of key provisions of the draft Model Law on Secured Transactions with key provisions of Islamic finance law as part of an initiative carried out by the World Bank Global Islamic Finance Development Center.

38. Staff members of the Secretariat participated as lecturers on secured financing based on the UNCITRAL texts on security interests in a course organized by the Civil Law Institute of the University of Vienna Law School (Vienna, Winter 2015 and Spring 2016).

39. The second 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 in the following:

(a) The Factors Chain International and the International Factors Group Annual Meeting, and spoke on the work of UNCITRAL and the harmonization of the law of secured transactions (Vienna, 19-21 October 2015);

(b) The World Bank Law, Justice and Development Week, and spoke on the treatment of security interests in insolvency under the UNCITRAL Legislative Guide on Secured Transactions; also participated in a discussion on Islamic finance and MSME finance (Washington, D.C., 16-20 November 2015);

(c) A panel discussion on secured transactions law reform at the University of Warwick Law School, and spoke on the experience from the implementation of the recommendations of the UNCITRAL Legislative Guide on Secured Transactions in view of the relevant initiatives aimed at reforming the English secured transactions law (Coventry, United Kingdom, 10-11 December 2015); and

(d) A Workshop on the economic assessment of trade law in particular with respect to the UNCITRAL texts on security interests and on best practices in the field of electronic registry design and operation, organized by the Unidroit Foundation and the Commercial Law Centre at the Harris-Manchester College of the University of Oxford (Oxford, United Kingdom, 30-31 March 2016).

Micro, Small and Medium-sized Enterprises

40. The Secretariat has encouraged participation and dialogue in respect of its work on micro, small and medium-sized enterprises (MSMEs — Working Group I) through its participation, in the Corporate Registers Forum (CRF) and the European Commerce Registers' Forum (ECRF) joint annual conference, as well as presenting on the topic of "Business Registration, Registry & Legal Reform, Reducing Burdens" (Cardiff, Wales 9-12 May 2016).

III. Dissemination of information

41. 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

42. 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).

43. In 2015, the website received roughly 690,000 unique visitors, an increase from 2014 (640,000 unique visitors). Of all sessions, roughly 59 per cent were directed to pages in English and 41 per cent to pages in Arabic, Chinese, French, Russian and Spanish. 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.

44. 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. The General Assembly has welcomed "the continuous efforts of the Commission to maintain and improve its website, including by developing new social media features, in accordance with the applicable guidelines."[17] In this regard, in September 2015, a general UNCITRAL LinkedIn account was established that now has over 900 followers. This account supplements the Tumblr microblog ("What's new at UNCITRAL?") established in 2014. Both features are accessible from the UNCITRAL website.

B. Library

45. 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 2015, library staff responded to approximately 550 reference requests, originating from over 47 countries. Library visitors other than meeting participants, staff and interns included researchers from over 24 countries.

46. The collection of the UNCITRAL Law Library focuses primarily on international trade law and currently holds over 12,000 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 (there was a slight increase in 2015 over 2014).

47. The UNCITRAL Law Library maintains an online public access catalogue (OPAC) jointly with the other United Nations libraries in Vienna. The OPAC is available via the library page of the UNCITRAL website.[18] In 2015, the OPAC was updated, providing an easier to use and enhanced interface.

48. 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-ninth Commission session, see A/CN.9/874). 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.

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[17] General Assembly resolution 70/115.

[18] Available from www.uncitral.org/uncitral/publications/library.html.

49. The Library produces a consolidated bibliography of writings related to the work of UNCITRAL on the UNCITRAL website.[19] The consolidated bibliography aims to compile all entries of the bibliographical reports submitted to the Commission since 1968. It currently contains over 8,000 entries, reproduced in the English and the original language versions, verified and standardized to the extent possible.

C. Publications

50. 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.

51. The following works were published in 2015: Conference for a Euro-Mediterranean Community of International Arbitration,[20] Thirty-five Years of Uniform Sales Law: Trends and Perspectives, [21] United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (New York, 2014),[22] and the 2012 UNCITRAL *Yearbook*.[23]

52. 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 the 2012 UNCITRAL *Yearbook* was published exclusively in electronic format (CD-ROM and e-book).

D. Press releases

53. 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.

54. 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 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

55. 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. Information lectures in Vienna

56. The Secretariat provides upon request information lectures in-house and via video conference on the work of UNCITRAL to visiting university students and academics,

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[19] Available from www.uncitral.org/uncitral/publications/bibliography_consolidated.html.
[20] Available from www.uncitral.org/uncitral/publications/publications.html.
[21] Ibid.
[22] Available from www.uncitral.org/uncitral/uncitral_texts/arbitration.html.
[23] Available from www.uncitral.org/uncitral/publications/yearbook.html.

members of the bar, Government officials including judges and others interested. Since the last report, more than 20 lectures have been given to visitors from all parts of the world.

IV. Resources and funding

57. 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.

58. 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

59. 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.

60. During the period under review, a pledge of US$ 20,000 was received by the Government of Indonesia. The Government of the Republic of Korea provided a contribution of US$ 25,555.84 for the participation of the UNCITRAL Secretariat in the APEC EoDB project (see para. 16 above) and a separate contribution of US$ 46,953 for Trust Fund activities.

61. At its 48th Session (Vienna, 29 June-16 July 2015), 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/70/17, paras. 244-245). Potential donors have also been approached on an individual basis.

62. 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.

63. 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

64. 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.

65. In the period under review, a contribution in the amount of euro 5,000 was received from the Government of Austria, to whom the Commission may wish to express its appreciation.

66. During the same reporting period, the available Trust Fund resources were used to facilitate participation at the 48th session of UNCITRAL in Vienna (29 June-16 July) for delegates from Colombia, Honduras and Mexico, and for participation in the 25th and 26th sessions of Working Group I in New York (13-17 April) and Vienna (19-23 October) for delegates from Colombia and Uganda. In order to allow for broader assistance despite the limited resources of the fund, cost coverage in each case has been provided either for the air ticket, or for the DSA only.

67. 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.

68. 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.

B. Note by the Secretariat on UNCITRAL regional presence: activities of the UNCITRAL Regional Centre for Asia and the Pacific

(A/CN.9/877)

[Original: English]

1. The General Assembly, in its resolutions 67/89 of 14 December 2012, 69/115 of 10 December 2014 and 70/115 of 14 December 2015, welcomed the activities of the United Nations Commission on International Trade Law Regional Centre for Asia and the Pacific ("UNCITRAL-RCAP" or "Regional Centre"), in the Republic of Korea, towards reaching out and providing technical assistance with international trade law reforms to developing countries in the region.

2. The UNCITRAL-RCAP has carried out its activities in accordance with the priority lines of action identified in the UNCITRAL Secretariat's strategic framework for technical assistance (A/66/17, para. 255), as well as with the specific mandate identified for the Regional Centre, namely (a) to enhance international trade and development in the Asia-Pacific region by promoting certainty in international commercial transactions through the dissemination of international trade norms and standards, in particular those elaborated by UNCITRAL; (b) to provide bilateral and multilateral technical assistance to States with respect to the adoption and uniform interpretation of UNCITRAL texts through workshops and seminars; (c) to engage in coordination activities with international and regional organizations active in trade law reform projects in the region; and (d) to function as a channel of communication between States in the region and UNCITRAL.

3. The Regional Centre has established the following four annual flagship events with the objective of streamlining activities to promote UNCITRAL texts and establishing regular opportunities for substantive regional contributions to support the present and possible future legislative work of UNCITRAL:

(a) The UNCITRAL Asia Pacific Spring Conference (second edition in 2015), a regional conference, held in the host city of Incheon, Republic of Korea, comprehensively covering UNCITRAL topics except those relating to arbitration and conciliation. In 2015, the conference focused on international sales law and electronic commerce, bringing together international, regional and national organizations, government officials and legal officers, academics, entrepreneurs and business people, experts and practitioners from more than thirty jurisdictions;

(b) The Asia Pacific ADR Conference (fourth edition in 2015), a regional conference, held in Seoul, promoting all UNCITRAL standards on arbitration and conciliation, and designed to attract not only experts and practitioners from around the world, but also officials, researchers and scholars from 56 Asia Pacific States to share their opinions and research findings related to the conference themes. In 2015, the conference gathered the institutional support of the International Chamber of Commerce, as well as the Ministry of Justice of the Republic of Korea and the Korean Commercial Arbitration Board (KCAB). The conference addressed recent developments in the field of arbitration, such as ethics and corruption in international arbitration, appeal mechanisms in investment arbitration, regional implementation of the UNCITRAL Model Law on International Commercial Arbitration, the relevance of investor-State dispute settlement in the context of regional infrastructure projects, and the efficiency and effectiveness of alternative dispute resolution (ADR). The conference gathered experts, practitioners, representatives from arbitration centres and officials from the region (Australia, China, India, Japan, Malaysia, Mongolia, Qatar, the Republic of Korea and Singapore);

(c) The UNCITRAL Emergence Conference (first edition in 2015), held in Macau, China, with the support of the University of Macau, based on call for academic papers, addressing planned and possible future work of the Commission, and other emerging topics relating to the harmonization of international trade law. Entitled "Harmonizing Trade Law to Enable Private Sector Regional Development", the 2015 conference attracted more than 50 participants from 14 jurisdictions, who discussed a wide range of topics including

international contract law, electronic commerce, micro, small and medium-sized enterprises (MSMEs), cross-border insolvency and international commercial dispute resolution;

(d) The UNCITRAL Asia Pacific Day, aimed at promoting awareness and encouraging the study, discussion, and implementation of the UNCITRAL texts, and celebrating the establishment of UNCITRAL by the General Assembly on 17 December 1966. Every year, universities from across the region are invited to join the celebrations by proposing a special programme that can range from special lectures and seminars, to public conferences. In 2015, seven universities joined the celebrations, namely: the Beijing Normal University which delivered a public lecture on "International Trade Law in E-Commerce Environment" (Beijing, 1 December 2015); the University of Western Australia which delivered a special lecture on uniform commercial law reform and a seminar for continuing professional development on arbitration, international sales and electronic transactions (Perth, Australia, 10 December 2015); the China University of Political Science and Law which delivered a public lecture on "Comparison between CISG and UNIDROIT Principles and Their Impact on the Chinese Contract Law" (Beijing, 15 December 2015); Nagoya University which delivered a special lecture on online dispute resolution (Nagoya, Japan, 16 December 2015); Kobe University which delivered special lectures on UNCITRAL's initiatives on the development of international dispute resolution and an arbitration moot based on UNCITRAL texts (Kobe, Japan, 18-20 December 2015); Chuo University which delivered a special lecture on "Trade Law Reform in Asia and the Role of UNCITRAL" (Tokyo, 18-21 December 2015); and Nankai University which delivered a lecture on "Trade Law Reforms and the Pilot Free Trade Zones in China" (Tianjin, China, 19 December 2015).

4. In addition to the above events, UNCITRAL-RCAP has, during the reporting period, also delivered and/or supported the following activities aimed at promoting certainty in international commercial transactions through the dissemination of international trade norms and standards, in particular those elaborated by UNCITRAL:

(a) On UNCITRAL's mandate generally: Conference on "Doing Business across Asia: Legal Convergence in an Asian Century" organized by the Singapore Academy of Law, at which UNCITRAL-RCAP delivered a presentation on "legal convergence in Asia — learning from global harmonization initiatives" (Singapore, 19-22 January 2016); public lecture at the National University of Singapore on "Regional Development and Integration: the Role of UNCITRAL" (Singapore, 22 January 2016);

(b) In the area of the international sale of goods: Celebratory Conference on "35 Years of the CISG: Achievements and Perspectives" held with the Government of Singapore, the Singapore Management University and the National University of Singapore (Singapore, 23-24 April 2015);

(c) In the area of dispute resolution: Open Forum on Online Dispute Resolution held jointly with the Electronic Transactions Development Agency of Thailand (Bangkok, 4 April 2015); presentation on the implementation of UNCITRAL texts in Islamic law-influenced jurisdictions at Arbitration Week hosted, with the support of UNCITRAL-RCAP, by the Kuala Lumpur Regional Centre for Arbitration (Kuala Lumpur, 7-9 May 2015); lecture on UNCITRAL texts on dispute resolution at the International Arbitration Expert Programme held by KCAB (Seoul, 22 June 2015); Asia Pacific Transparency Observatory Inaugural Conference held with KCAB, the Asia Pacific Law Institute of the Seoul National University and the Seoul International Dispute Resolution Centre (Seoul, 18 December 2015); UNCITRAL Model Law Workshop delivered with the East Asian Branch of the Chartered Institute of Arbitrators (CIArb) (Shanghai, China, 1 March 2016); presentation on the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (2014) and the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (New York, 2014) at the Kuala Lumpur Regional Centre for Arbitration (KLRCA) International Investment Arbitration Conference, supported by UNCITRAL-RCAP (Kuala Lumpur, 10-11 March 2016).

Furthermore, in collaboration with the Asia Pacific Law Institute of the Seoul National University and KCAB, the Regional Centre has established the *ISDS Asia Pacific Transparency Observatory* as a framework for monitoring Asia Pacific treaty-based investor-State dispute settlements ("ISDS"). The Observatory will engage in disseminating the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration

(New York, 2014) and the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (2014); collecting relevant information and research related to ISDS in the Asia-Pacific; monitoring ongoing negotiations and current trade agreements that concerns ISDS; assisting the Secretariat, through UNCITRAL-RCAP, in respect of issues regarding ISDS in the region; and disseminating relevant information related to the project among national and international partners;

(d) In the area of electronic commerce: Seminar on "Electronisation of Transferable Documents or Instruments Used in International Trade" organized with the Attorney-General's Chambers of Singapore and the Association of Banks in Singapore (Singapore, 10-11 March 2016);

(e) In the area of procurement and infrastructure development: on the occasion of the International Anti-Corruption Day (9 December 2015), the Regional Centre issued a Call2Action for the promotion of the UNCITRAL Model Law on Public Procurement (2011), joining the global United Nations campaign #breakthechain, and considering that the Model Law was specifically designed to implement the procurement-related provisions in the United Nations Convention against Corruption (New York, 2003) ("UNCAC"). The campaign was launched in English, Korean, Chinese and Bahasa Indonesia on all RCAP's social media platforms.

5. For the promotion of the rule of law and the uniform application and interpretation of UNCITRAL texts, UNCITRAL-RCAP hosted the first UNCITRAL Asia Pacific Judicial Summit, attended by 40 judges from 18 jurisdictions, and aimed at promoting the uniform interpretation and application of the Convention on the Recognition and enforcement of Foreign Arbitral Awards (New York, 1958) ("New York Convention"). Sponsorship for attendance by judges from Least Developed Countries, Landlocked Developing Countries and Small Island Developing States in the Asia Pacific Region was provided with the support of the Government of the Hong Kong Special Administrative Region of China and the Hong Kong International Arbitration Centre. The Commission may note that the Judicial Summit is part of an initiative to establish partnerships with judiciaries and judicial training institutions across the region to facilitate the further integration of capacity-building activities, wider inclusion of UNCITRAL texts in training curricula and broader promotion of the uniform interpretation of UNCITRAL texts.

6. UNCITRAL-RCAP has also been engaged in the following capacity-building, technical cooperation and assistance activities aimed at promoting the regional use and adoption of UNCITRAL texts. These activities are priorities for UNCITRAL pursuant to a decision taken at its twentieth session (1987):[1]

(a) On UNCITRAL's work generally: the UNCITRAL South Pacific Seminar was the first event UNCITRAL-RCAP held with the support of the Department of Justice of Papua New Guinea, the Ministry of Justice of the Republic of Korea and the Centre for Small States (CSS) at the Queen Mary University of London, and specifically designed to provide capacity-building for the small island Pacific States in the fields of the international sale of goods, electronic commerce and arbitration (Port Moresby, 24-25 September 2015); the UNCITRAL DPRK Workshop (Beijing, 21-27 June 2015) was the first comprehensive training and capacity-building initiative for nineteen officials, legal officers and academics of the Democratic People's Republic of Korea on international commercial and investment arbitration, international sale of goods, e-commerce, and secured transactions;

(b) In the area of international sale of goods, in particular the United Nations Convention on Contracts for the International Sale of Goods (New York, 1980) ("CISG"): the CISG Asia Pacific Roadshow 2015-2016 aimed at promoting regional accession, ratification and implementation of the Convention with technical briefings delivered to relevant domestic stakeholders (Bangkok, 3 April 2015; Manila, 3 September 2015; Vientiane, 2 February 2016; Bandar seri Begawan, 4 February 2016);

(c) In the area of dispute resolution: UNCITRAL Bhutan Workshop on arbitration, together with a side event for the judiciary of Bhutan on the enforcement of arbitral awards (Thimphu, 18-19 May 2015); Workshop for Incheon Businesses on Prevention and

[1] *Official Records of the General Assembly, Forty-second Session, Supplement No. 17* (A/42/17), para. 335.

Resolution of Legal Disputes in Transactions, held with the Ministry of Justice of the Republic of Korea and KCAB (Incheon, Republic of Korea, 4 June 2015); upon request by the Ministry of Justice of Viet Nam and in close coordination with the International Finance Corporation (IFC), UNCITRAL provided comments on the draft Conciliation Law of Viet Nam, taking into consideration the UNCITRAL Model Law on International Commercial Conciliation (2002);

(d) In the area of electronic commerce: UNCITRAL Thailand Workshop on the United Nations Convention on the Use of Electronic Communications in International Contracts (New York, 2005) ("e-CC") held with the United Nations Economic and Social Commission for Asia and the Pacific (UNESCAP) and the Electronic Transactions Development Agency of Thailand (Bangkok, 3 April 2015); UNCITRAL Cambodia Workshop on "Legislative Framework for Safe and Sound Electronic Payments and Commerce" held with the National Bank of Cambodia (Phnom Penh, 27 April 2015); scoping mission, in collaboration with UNESCAP, to the Maldives on legislation on electronic commerce (Male, 28-29 October 2015); briefings on the e-CC with government officials of Japan (Tokyo, 21 December 2015), the Lao People's Democratic Republic (Vientiane, 2 February 2016) and Brunei Darussalam (Bandar seri Begawan, 4 February 2016).

7. Following technical assistance activities and in its capacity as a channel of communication between States in the region, UNCITRAL-RCAP has, during the reporting period, monitored the progress towards, and assisted States in, the adoption and implementation of the following UNCITRAL texts:

(a) In the area of international sale of goods:

United Nations Convention on Contracts for the International Sale of Goods, (Vienna, 1980): ratification by Viet Nam on 18 December 2015. Progress towards the adoption of the Convention was reported by Indonesia, the Philippines and Thailand;

(b) In the area of dispute resolution:

Convention on the Recognition and Enforcement of Foreign Arbitral Awards, (New York, 1958): progress towards accession to the Convention has been reported by Palau and Papua New Guinea. Australia has also amended its International Arbitration Act 1974 (Cth) to simplify provisions on the enforcement of foreign arbitral awards in Australia and to improve compliance with the Convention in 2015;

United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (New York, 2014): progress towards accession to the Convention has been reported by Australia;

UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006: new legislation based on the Model Law has been adopted in Bahrain, Bhutan and Myanmar. In the United Arab Emirates, arbitration regulations have also been reported to be enacted by the Abu Dhabi Global Market with reference to the provisions of the Model Law. Progress towards adoption of the Model Law has also been reported by Mongolia and the Republic of Korea;

UNCITRAL Model Law on International Commercial Conciliation (2002): legislation based on the Model Law has been adopted in Bhutan; progress towards adoption of the Model Law has also been reported by Viet Nam; and

UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (2014) (the "Rules"): Two agreements specifically reference the Rules, with the details of arrangements for their application to be concluded in due course. On 17 June 2015 the Governments of China and Australia concluded a free trade agreement, and on 10 February 2016 the Government of the Hong Kong Special Administrative Region of China, under the authorization of the Central People's Government of China, concluded with the Government of Canada an agreement on the promotion and protection of investments;

(c) In the area of electronic commerce:

United Nations Convention on the Use of Electronic Communications in International Contracts (New York, 2005): ratification by Sri Lanka on 7 July 2015. Progress towards ratification of or accession to the Convention was reported by Australia, the Philippines and Thailand.

8. Systematic coordination and cooperation activities that were pursued with institutions active in trade law reform during the reporting period include:

(a) United Nations Economic and Social Commission for Asia and the Pacific (UNESCAP): UNCITRAL-RCAP has been involved in the preparation of the "Framework Agreement on Facilitation of Cross-Border Paperless Trade in Asia and the Pacific" formulated under the auspices of UNESCAP, including participation in the meetings of the Intergovernmental Steering Group on Cross-Border Paperless Trade Facilitation (Bangkok, 1-3 April 2015; 21-24 March 2016). UNCITRAL-RCAP participated in the 7th Asia-Pacific Trade Facilitation Forum which was held jointly by UNESCAP, the Asian Development Bank (ADB) and the China International Electronic Commerce Centre (Wuhan, China, 20-21 October 2015). In addition, UNCITRAL-RCAP hosted a session on "Investment Agreements and Investor State Dispute Resolution: Current Trends and Emerging Issues" jointly with UNESCAP, the United Nations Conference on Trade and Development (UNCTAD) and the International Centre for the Settlement of Investment Disputes (ICSID) at the 5th Meeting of the Asia-Pacific Foreign Direct Investment Network for Least Developed and Landlocked Developing Countries (Bangkok, 2 November 2015). A capacity-building workshop on "Cross-border Paperless Trade Facilitation" was also held with UNESCAP (Bangkok, 4 November 2015);

(b) United Nations Conference on Trade and Development (UNCTAD): as mentioned above, a session on "Investment Agreements and Investor State Dispute Resolution: Current Trends and Emerging Issues" was held jointly with UNESCAP, UNCTAD and ICSID (Bangkok, 2 November 2015);

(c) United Nations Project Office on Governance (UNPOG): UNCITRAL-RCAP participated in the 2015 UNPOG Roundtable on Promoting Good Governance (Seoul, 18 December 2015);

(d) World Bank: UNCITRAL-RCAP participated in the "Entrepreneurial Talents' House of Opportunities and Supports" (ETHOS) programme organized by the World Bank and the State University of New York Korea by delivering presentations on UNCITRAL's work (Incheon, Republic of Korea, 25 January 2016). In addition, as mentioned above, a session on "Investment Agreements and Investor State Dispute Resolution: Current Trends and Emerging Issues" was held jointly with UNESCAP, UNCTAD and ICSID (Bangkok, 2 November 2015);

(e) International Finance Corporation (IFC) East Asia and the Pacific Office: as mentioned above, coordination of technical assistance on laws on conciliation to the Government of Viet Nam;

(f) Asian Development Bank (ADB): as mentioned above, UNCITRAL-RCAP participated in the 7th Asia-Pacific Trade Facilitation Forum which was held jointly by UNESCAP, the Asian Development Bank (ADB) and the China International Electronic Commerce Centre (Wuhan, China, 20-21 October 2015); representatives of the ADB Pacific Private Sector Development Initiative, also attended and provided support to the 2015 UNCITRAL South Pacific Seminar (Port Moresby, 24-25 September 2015);

(g) Asia-Pacific Economic Cooperation (APEC): The UNCITRAL-RCAP has continued its engagement with APEC in the context of the framework of cooperation with the APEC Economic Committee Friends of the Chair ("FotC") Group on Strengthening Economic and Legal Infrastructure ("SELI") to enhance the promotion of UNCITRAL texts in the fields of arbitration, international sale of goods, secured transactions and e-commerce. Specifically, the UNCITRAL-RCAP hosted the Workshop on effective enforcement of business contracts and efficient resolution of business disputes, with the Department of Justice of the Government of the Hong Kong Special Administrative Region of China and the Asia Pacific Regional Office of the Hague Conference on Private International Law (HCCH), and participated in the first meeting of the FotC Group on SELI (Cebu, Philippines,

1 September 2015). UNCITRAL-RCAP also delivered a presentation on electronic commerce at the "APEC E-Commerce Forum 2015: New Paradigm for Cross-Border E-Commerce and Online Shopping" (Jeju, Republic of Korea, 26 November 2015), and on arbitration and conciliation at the APEC International Seminar on the Ease of Doing Business (Seoul, 27 January 2016). Another APEC Workshop on Dispute Resolution was hosted in collaboration with the Department of Justice of the Government of the Hong Kong Special Administrative Region of China (Lima, 26 February-1 March 2016). UNCITRAL-RCAP also recommended experts for the 2nd Expert Council of the APEC E-Commerce Business Alliance (APEC-ECBA), which were endorsed by the Plenary Meeting of the First Senior Officials' Meeting (SOM1) Electronic Commerce Steering Group (ECSG) (Lima, 27 February 2016);

(h) Asian-African Legal Consultative Organization (AALCO): UNCITRAL-RCAP participated in the 54th Annual Session of AALCO and delivered a speech on UNCITRAL and its texts on transparency in treaty-based investor-State arbitration (Beijing, 13-14 April 2015);

(i) Hague Conference Asia Pacific Regional Office (HAPRO): UNCITRAL-RCAP collaborated with HAPRO in supporting the Conference on "The Developing World of Arbitration: A Comparative Study of Arbitration Reform in the Asia Pacific" organized by the University of Hong Kong, China (Hong Kong, China, 27 October 2015);

(j) Office of the Chief Trade Adviser of the Forum Island Countries (FICs): as mentioned above, representatives of the Office of the Chief Trade Advisers of the FICs attended and provided support to the 2015 UNCITRAL South Pacific Seminar (Port Moresby, 24-25 September 2015);

(k) Melanesian Spearhead Group (MSG): during the reporting period, UNCITRAL-RCAP engaged in cooperation with MSG to provide technical assistance to States in the South Pacific in the areas of international contracts and arbitration; MSG's representative also attended and provided support to the 2015 UNCITRAL South Pacific Seminar (Port Moresby, 24-25 September 2015);

(l) International Chamber of Commerce (ICC): ICC supported UNCITRAL-RCAP's annual flagship event — the Asia Pacific ADR Conference; UNCITRAL-RCAP delivered a presentation on UNCITRAL's work on arbitration at the ICC's arbitration workshop for government officials in the Lao People's Democratic Republic (Vientiane, 29 February-1 March 2016);

(m) International organizations based in the Republic of Korea: participating in consultation meetings organized by the Ministry of Foreign Affairs of the Republic of Korea (1 April 2015).

9. UNCITRAL-RCAP has continued its coordination efforts with the UNCITRAL National Coordination Committees for Australia (UNCCA) and India, and acknowledged the founding of the Global Private Law Forum (GPLF) of Japan as national expertise centre for international trade law. During the reporting period, the Regional Centre held the first UNCITRAL Australia Seminar with the UNCCA and the Attorney General's Department of Australia (Canberra, 29 May 2015), followed by the "International Conference on Changing Dynamics of International Arbitration in India" where the UNCITRAL National Coordination Committee for India was launched (New Delhi, 31 October 2015). A briefing on the e-CC was also conducted with Japanese stakeholders in cooperation with GPLF (Tokyo, 21 December 2015). These private sector initiatives allow for wider dissemination of international trade norms and national coordination activities, allowing the Regional Centre to allocate more resources to dissemination of UNCITRAL texts in Least Developed Countries (LDCs), Landlocked Developing Countries (LLDCs) and Small Island Developing States (SIDCs) in the region.

10. Resolution 69/115 adopted by the General Assembly on 10 December 2014 reiterated its appeal to all bodies responsible for development assistance such as the bilateral aid programmes of States, to support UNCITRAL in its technical cooperation and assistance programmes and to cooperate and coordinate their activities with those of UNCITRAL in light of the relevance and importance of such work for the promotion of the rule of law, both at the national and international levels. In light of this, the Regional Centre participated in

the Aid for Trade Seminar organized by the Department of Foreign Affairs and Trade of Australia for programme managers and policy officers in Asia from Australia and other donor countries (Singapore, 21-22 April 2016), and engaged in coordination with the Asian Development Bank (Papua New Guinea). Within this framework, the Regional Centre has engaged with agencies in charge of official development assistance to ensure further coordination of technical assistance activities in the field of trade law in the region.

11. To expand the reach of its mandate both with the hosting community and regional academia, the Regional Centre started national outreach and regional educational programmes during the reporting period, which aim to maintain regular dialogue with non-governmental organizations, local and national political stakeholders, other international organizations, academia, the media and the general public on various aspects of the UNCITRAL-RCAP, to enhance cooperation and community support, and increase awareness of UNCITRAL activities:

(a) For the national outreach programme, the Regional Centre has actively participated in the Incheon International Organizations Consultative Partnership and related events held by the Incheon Metropolitan City, and at the Incheon International City Forum (Incheon, 11 April 2016) organized by the Incheon International Relations Foundation. In addition, staff and interns have been involved in career fairs hosted by the Incheon Metropolitan City, as well as other international organizations and offices in the Republic of Korea. The Regional Centre has opened its doors to various visitors, including representatives of the Incheon Municipal Council, local students and interns from the Ministry of Justice of the Republic of Korea. Various lectures have also been delivered to local students on UNCITRAL and its work. Also, the Regional Centre is preparing a website that includes a Korean language version to facilitate the promotion of UNCITRAL's work and the dissemination of UNCITRAL texts in Korea;

(b) The Regional Centre has continued its support to international trade law moot competitions held in the region, namely: the 2015 FDI Moot Asia-Pacific Regional Rounds organized by KCAB and the Centre for International Legal Studies (Seoul, 19-21 August 2015); the 13th Annual Willem C. Vis (East) International Commercial Arbitration Moot (Hong Kong, China, 6-13 March 2016); and the 9th Vis Japan Practice Moot hosted by Kobe University and the Academy for International Business Transactions AIBT (Kobe, Japan, 14 February 2016);

(c) The Regional Centre has launched an annual online publication by the Regional Centre of articles on topics of international trade law which are selected following annual calls for papers. The goal of that online publication is to stimulate interest, research and study on UNCITRAL and its texts. It is dedicated to the city of Incheon as host of the first UNCITRAL Regional Centre. In accordance with the mandate of the UNCITRAL-RCAP, all papers considered for the publication must be relevant to the Asia Pacific region. The views expressed therein are those of the authors and do not necessarily reflect the views of the United Nations;

(d) Academic engagement was fostered by jointly organizing events or by delivering public lectures at regional institutions and universities such as: Beijing Normal University, the China University of Political Science and Law, Chuo University, Dankook University, Hanyang University, Hokkaido University, the University of Hong Kong, Incheon National University, Kobe University, Korea University, Nagoya University, Nankai University, Seoul National University, the National University of Singapore, Soongsil University, the University of Western Australia and Yonsei University.

12. The Regional Centre has consolidated the function it serves on behalf of the UNCITRAL Secretariat as a channel of communication between States in the region and UNCITRAL, setting up contact points within governments in the region and engaging in regular consultations with government officials from Australia, Cambodia, China (including the Special Administrative Regions of Hong Kong and Macau), India, Indonesia, Iran (Islamic Republic of), Japan, Malaysia, Myanmar, Mongolia, Nepal, Oman, Pakistan, Philippines, Republic of Korea, Sri Lanka, Thailand and Viet Nam (A/69/17, para. 212).

13. The Regional Centre is staffed with one professional, two team assistants and two legal experts. During this reporting period, 19 interns were hosted at the Regional Centre. The

core project budget allows for the occasional employment of experts and consultants. The Regional Centre relies on the generous financial contribution from the Incheon Metropolitan City to the Trust Fund for UNCITRAL Symposia to meet the cost of operation and programme, and on the contribution of a non-reimbursable loan of a legal expert by the Ministry of Justice of the Republic of Korea. The Regional Centre has often been able to leverage the resources of its partners, especially for contribution to the costs of travel and of meeting facilities and services. In October 2015, following a related exchange of letters between the United Nations and China, the UNCITRAL Secretariat and the Government of the Hong Kong Special Administrative Region of China concluded a memorandum of understanding for the technical and administrative arrangements relating to contribution of a non-reimbursable loan of an expert to the UNCITRAL-RCAP.

14. According to article 13.3 of the Memorandum of Understanding signed on 18 November 2011, between the United Nations, and the Ministry of Justice and Incheon Metropolitan City of the Republic of Korea, regarding the operation and financial contribution to the Regional Centre for Asia and the Pacific, the terms of such support are to be reviewed by all parties five years after the establishment of the Regional Centre, i.e. before 10 January 2017. The latest payment of the annual financial contribution by the Incheon Metropolitan City to the Trust Fund for UNCITRAL Symposia was made on November 2015.

15. It is expected that interest in UNCITRAL texts will grow with additional requests for technical assistance. Such increase will call for a corresponding increase in available resources. Governments, the relevant bodies of the United Nations system, organizations, institutions and individuals are actively encouraged 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 UNCITRAL Secretariat in carrying out technical cooperation and assistance activities. Additional contributions to the project from member States, or from interested private and public entities recommended by member States, are required to further respond to regional expectations.

C. Note by the Secretariat on technical assistance to law reform: compilation of comments by States on a draft guidance note on strengthening United Nations support to States to implement sound commercial law reforms

(A/CN.9/882 and Add.1)

[Original: English/Spanish]

Contents

I. Introduction

1. At its forty-sixth session, in 2010, the Commission requested the Secretariat to consider ways of better integrating its technical cooperation and assistance activities into activities conducted on the ground by the United Nations in particular through the United Nations Development Programme or other country offices of the United Nations.[1] At its forty-eighth session, the Commission had before it a draft guidance note on strengthening United Nations support to States to implement sound commercial law reforms, presented by the Secretariat in response to that request (A/CN.9/845).

2. After consideration at that session, the Commission requested States to provide to its secretariat any suggestion for revision of the text. It was agreed that the compilation of all comments received from States would be circulated by the Secretariat to all States together with a revised version of the text. It was understood that, if agreement of States on the revised text could be achieved before or during the consideration of the Commission's report in the Sixth Committee of the General Assembly in 2015, the Sixth Committee itself might wish to endorse the text, so as to avoid delay in issuing the document. Otherwise, the matter might need to be brought back to the Commission for consideration at its next session. The Secretariat was requested, in revising the text, to follow closely the wording of General Assembly resolution 2205 (XXI) on the establishment of UNCITRAL and avoid embarking into areas not directly linked to the UNCITRAL mandate. The Secretariat was also requested to allocate sufficient time for consideration of the revised text at the forty-ninth session if the revised text had to be considered at that time, and to make provisions for specific time to be allotted to that item in the provisional agenda of that session.[2]

3. Pursuant to those decisions, the Secretariat circulated a note verbale to States on 21 July 2015 requesting them to submit suggestions for revision of document A/CN.9/845 and, in formulating such suggestions, to keep in mind, as requested by the Commission,[3] the intended scope and purpose of the document, which, to be usable by its expected readers, should remain short, concise and simple. It was stated in the note verbale that the intended scope and purpose of the guidance note was to be a tool to increase awareness across the United Nations about the importance of sound commercial law reforms and the use of internationally accepted commercial law standards in that context.

4. The compilation of comments by States received by the Secretariat on document A/CN.9/845 in response to that note verbale is reproduced in section II of this note. In addition to those comments, the Secretariat received on 23 October 2015 a comment by a State in response to a note verbale of the Secretariat of 8 October 2015 circulating to all States, as requested by the Commission (see para. 2 above), all comments received on

[1] *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17* (A/65/17), para. 336.

[2] Ibid., *Seventieth Session, Supplement No. 17* (A/70/17), paras. 251-252.

[3] Ibid, para. 251.

document A/CN.9/845 with a version of the guidance note revised by the Secretariat pursuant to those comments (the 8 October version of the guidance note). Section III of this note reproduces that comment by a State.

5. States may wish to note that a draft guidance note on strengthening United Nations support to States, upon their request, to implement sound commercial law reforms is contained in document A/CN.9/883 that will be before the Commission at its forty-ninth session. The draft was prepared on the basis of the 8 October version of the guidance note incorporating comments on that version conveyed by States to the Secretariat, including during informal consultations in the Sixth Committee. Pursuant to the request of the Commission at its forty-eighth session (see para. 2 above), the Secretariat will allocate time in the provisional agenda of the forty-ninth session of UNCITRAL (A/CN.9/859) for the discussion of the draft guidance note.

II. Comments by States on document A/CN.9/845 received by the Secretariat in response to its note verbale LA/TL 131(9) — CU 2015/183/OLA/ITLD circulated to all States on 21 July 2015

(in the chronological order of receipt of responses by the Secretariat)

Singapore [30 July 2015; original in English]

- Proposed changes in the third sentence of para. 3, section B.2 (**The need for assistance with domestic commercial law reforms should be regularly assessed**):

  "Mechanisms for adjudicating disputes and enforcing binding commitments in the context of trade and investment must operate on the basis of internationally recognized **norms** ~~human rights~~ and should be easily accessible, affordable, efficient and effective."

[a comment accompanying the amendments read: "Adjudication of disputes and enforcing commercial commitments should properly be compliant with international norms, not just human rights."]

- Proposed changes in para.1, section B.5 (**UNCITRAL is the core legal body in the United Nations system in the field of international commercial law and as such should be relied upon in strengthening United Nations support to States to implement sound commercial law reforms**):

  "UNCITRAL is the only global and neutral international law-making body entrusted with legislating on commercial law matters on behalf of the entire international community. ~~Not only~~ States and relevant intergovernmental organizations **assisted by** ~~but also~~ **relevant** professional associations and other non-governmental organizations participate in the UNCITRAL legislative process. This contributes to the transparency and inclusiveness of the standard-making process. ~~and ensures scrutiny of legislative proposals by representatives of various economic and social interests, different legal traditions and societies at different levels of development.~~ The possible disconnect between **the perspectives** of Government delegates and **those of the** business world ~~representatives~~ is therefore minimized and adopted texts ideally reflect the optimal balance between the many competing interests. These facts together with consensus-building ensure a type of legislative due process that gives legitimacy to UNCITRAL standards as internationally accepted ones, rather than the product of any given system or country."

[a comment accompanying the first set of amendments read: "This reflects the basic principle governing UNCITRAL which is comprised of states. UNCITRAL has decided after much debate that decisions of UNCITRAL can only be taken by states, not observers such as industry groups and other NGOs with an interest in the subject matter. (see A 65/17, paras 299-306 and Annex III). The participation of these industry groups and other NGOs serve to assist the participating states to come to the best possible outcome."]

[a comment accompanying the second set of amendments read: "The original sentence is hard to read in the context of the discussion here. The first part of this sentence sufficiently captures the point sought to be made here."]

- Proposed changes in para. 2.c.ii, section C.1 (**Legal framework**):

"(ii) Identifying all stakeholders relevant to the commercial law reform, including domestic reform constituencies, international experts, various rule-of-law-assistance providers working in the same or related field, etc., and ensuring proper consultations ~~and if necessary strategic partnerships~~ with them **where necessary**;"

[a comment accompanying the amendments read: "It is not clear what is meant by entering into "partnerships" with stakeholders. The reforms are to be put in place by governments and it is for the government concerned to determine who they wish to partner with. It should not be for UN officials to "ensure" that governments enter in partnerships with entities identified by these officials."]

- Proposed changes in sub-para. (c), section C.3 (**Private sector, academia and general public**):

"(c) Maintaining regular dialogue with **non-governmental** ~~civil society~~ organizations ~~and groups~~ that represent various segments of society (e.g. consumers, local communities, end-users of public services, individual entrepreneurs, micro-, small and medium-sized enterprises and academia) as regards their views on measures required to improve the commercial law framework in the State;"

[a comment accompanying the amendments read: "For a UN instruction such as this, the proper term should be the term used in the UN Charter. (see Article 71, UN Charter)."]

- Proposed changes in para. 11 of the Annex:

~~"11. There are mechanisms to monitor and oversight actions and decisions of public authorities."~~

[a comment accompanying the amendments read: "This is not relevant for technical assistance in commercial law reform."]

Argentina [10 August 2015; original in Spanish]

"…

(1) The deletion of principles 2, 3 and 4 or their modification by the Secretariat in such a way that their language is consistent with the objective of the guidance note.

(2) The replacement of the phrase "flow of international trade" throughout the text with the phrase "extensive development of international trade", which is consistent with the language used in General Assembly resolution 2205 (XXI)...."

Ecuador [21 August 2015; original in Spanish]

"…In that regard, Ecuador wishes to reiterate how important it is that the work of UNCITRAL and all documents produced by the Secretariat adhere strictly to the terms of General Assembly resolution 2205 (XXI), which clearly sets out the Commission's mandate.

On the basis of the above, the document should have a more general focus and refer to "assistance in promoting the progressive harmonization and unification of international trade law", or simply "assistance in the implementation of international trade law". In the same spirit, the note should avoid terms that suggest intervention in the internal affairs of States, specifically with respect to their legal and legislative systems.

It is worth recalling that domestic reform processes lie exclusively within the competence of the State and that, with the exception of its conventions, instruments produced by UNCITRAL are not binding. In that regard, the document should establish with sufficient clarity that the objective of the Commission's activities is not — as the draft note appears to suggest — to impose new legislation on Member States or compel internal legislative changes, but only to develop guidelines or model laws that can be drawn upon by States in developing relevant commercial regulations.

The document should be short, concise and simple, and to that end should avoid referring to issues that are not directly linked to the Commission's mandate, such as peace, security, conflict prevention and post-conflict reconstruction. It should also avoid value judgements with respect to the activities of States.

Further proposed modifications of document A/CN.9/845 are as follows:

- References to "**domestic commercial law reforms**" and "**commercial law reforms at the country level**" ("*reforma interna del derecho mercantil*") should be removed from **all sections and paragraphs**
- It is suggested that **paragraph 2** be deleted from **section B ("Guiding Principles"), subsection 1**. It cannot be asserted that trade liberalization per se contributes to economic cooperation or the stability and well-being of peoples. Reality shows that it is precisely the economic system that has deepened differences and increased levels of poverty in certain parts of the world. International trade remains inequitable and discriminates between countries that produce raw materials and those that produce value added goods, and between States and transnational capital.
- It is suggested that **paragraph 3** be deleted from **section B, Guiding Principles, subsection 1**. The areas of activity referred to are not linked to the mandate of UNCITRAL.
- **In section B.2, paragraph 2**, it is suggested that the first part of the paragraph (up to and including the words "uniform interpretation and application", i.e. the first three sentences) be deleted. The "legal framework" refers to topics that are addressed by other international organizations and that fall within the competence of States.
- **In section B.2, paragraph 3**, it is suggested that the first part of the paragraph (up to and including the word "accountable", i.e. the first two sentences) be deleted. Only States and their legal systems may interpret legislative provisions and apply sanctions when a law is violated.
- **In section B.3, paragraph 1**, it is suggested that the second part of the paragraph (from the words "Ill-conceived policies", i.e. the final sentence) be deleted, since it constitutes an unnecessary value judgement.
- **In section B.4, paragraph 1**, it is suggested that the second part of the paragraph (from the words "There should also be ...", i.e. the final sentence) be deleted. Only States and their foreign policies may determine the coordination of their positions in international forums and the level and structure of their delegations.
- It is suggested that **paragraph 2** be deleted from **section B.4**. The reform of legal systems is not within the Commission's remit.
- **In section B.4, paragraph 3**, it is suggested that the first part of the paragraph (up to and including the words "conflicting enforcement results", i.e. the first sentence) be deleted, since it constitutes an unnecessary value judgement.
- **In section B.5, paragraph 1**, it is suggested that the first part of the paragraph be replaced with the following text: "UNCITRAL is the legal body of the United Nations system in the field of international commercial law. It is an intergovernmental forum comprising 60 member States elected by the General Assembly. Its membership is representative of the various geographic regions and the principal legal and economic systems. Intergovernmental organizations, professional associations and other non-governmental organizations also participate as observers." The paragraph would then continue up to the words "levels of development." **It is suggested that the second part of the paragraph** (from the words "The possible disconnect") **be deleted**, since it constitutes an unnecessary value judgement.
- **Under section C, Operational Framework**, it is suggested that the first part of the opening paragraph be replaced with the following text: "It is necessary to identify the needs of countries as regards assistance in the implementation of international trade law, in coordination with their respective Governments and only at their request, and to incorporate such assistance in the appropriate context of United Nations operations", the paragraph then continuing up to the words "United Nations system".

- **In section C ("Operational Framework"), section 1 ("Legal framework"), paragraph 2**, subparagraph (a) should be deleted. That text goes beyond the mandate of the United Nations and thus beyond that of UNCITRAL. In subparagraph (c) (ii) of the Spanish version of the document, the word "individualizando" should be replaced with the word "identificando". The final part of the subparagraph, from ", and ensuring", should be deleted. Such activities do not fall within the Commission's remit, as they are internal matters. In subparagraph (c) (iii), the word "preparing" should be replaced with the words "supporting the preparation of". The final part of the subparagraph, from the words "and ensuring", should be deleted. Again, such activities fall to the State rather than to UNCITRAL.
- In the Annex, it is suggested that paragraphs 10 and 11 be deleted. They bear no relation to the topic."

Belarus [24 August 2015; original in English]

"…to replace the last sentence of paragraph 2 of section 1 of chapter B of the Draft guidance note with the following sentence "Accordingly, they may contribute to the achievement of the purposes specified in the United Nations Charter and the United Nations General Assembly resolution 2205 (XXI) of 17 December 1966 'Establishment of the United Nations Commission on International Trade Law'." …"

Cyprus [24 August 2015; original in English]

"…the competent Authorities of the Republic of Cyprus acknowledged and took note of the said Note Verbale as well as the document entitled "Technical Assistance to law reform" attached therein…"

Israel [24 August 2015; original in English]

"…

General Comments

1. One important element in facilitating commercial law reform is a structured work plan which can focus on identifying the goals and objectives of the different steps (for both providing assistance and taking reform measures), setting up a schedule, developing strategies to address weaknesses or inadequacies of the different legislative norms or practices, and allocating resources. It is suggested that the Guidance Note encourages UN bodies to propose to States to adopt such an organized work plan.

2. Coordination is a key component in the commercial law reform process. In the context of the Guidance Note it could be advisable to highlight the importance of coordination between UN bodies, as well as domestic governmental departments, engaging in reform efforts. Such coordination is sometimes essential in order to avoid duplication of efforts, and can be achieved by appointing appropriate focal points in each body or agency to coordinate a specific reform initiative.

3. The use of UNCITRAL model laws and similar instruments issued by other international organizations as a basis or inspiration for legislation as part of commercial law reform should perhaps be given more prominence in the Guidance Note. At the same time, the Guidance Note could emphasize that model laws can be adapted to domestic circumstances and that States can select which provisions are most relevant to their legal systems.

4. The Guidance Note should also briefly refer to cooperation and exchanges of good practices between States, which can be supported or encouraged by UN bodies, as an instrument which can play a significant role in promoting commercial law reform. The Guidance Note emphasizes in several places throughout the text that commercial law reform is strongly linked to international legal obligations. We see that as a very important point. However, it could be considered that there is a need to clarify that the intention is to aspire

to consistency between domestic law and international obligations and not to create gaps or conflicts between the two, which the current text in the Guidance Note might be misinterpreted to construe.

Text Proposals

5. We believe that it would be preferable to refrain as much as possible from using the term "harmonization" in the Guidance Note, as it could be interpreted as a call for complete and overbroad alignment of domestic laws with international commercial law. Accordingly, please see the following suggested amendments: (suggested additions to the text are bolded/ highlighted/underlined and deletions are crossed out).

Paragraph B — Guiding Principles (1.2, p.3) — *The modern and harmonized international commercial law framework is the basis for rule-based commercial relations and an indispensable part of international trade,* ***bearing in mind the relevancy of domestic law and domestic legal systems in this regard****.*

Paragraph B — Guiding Principles, (2.2, p. 3) — *"Harmonization,* ***where appropriate,*** *of the local legal framework regulating commercial relations with internationally accepted commercial law standards should be promoted in this context since such* ~~*harmonization*~~ ***adaptation*** *facilitates fulfilling these basic requirements in the local legal framework".*

6. We suggest adding a reference to amendment of existing legislation as part of law reform as follows:

Paragraph B — Guiding Principles (2.1, p. 3), *"Often States need international assistance with building the required local capacity to enact necessary rules or* ***updating and modernizing existing rules*** *and adequately enforce, implement, apply and interpret them."*

7. We suggest, in Paragraph B — Guiding Principles (3.3, p. 4), the following rephrasing of the paragraph for the purposes of clarifying its substantive content: *Mechanisms for adjudicating disputes and enforcing binding commitments in the context of trade and investment* ~~*must operate on the basis of internationally recognized human rights and*~~ *should* ***in accordance with internationally recognized human rights,*** *be easily accessible, affordable, efficient and effective.*

8. We suggest, in Paragraph B — Guiding Principles (3.2, p. 4), to include examples of the relevant stakeholders: *"Commercial law reforms should therefore involve close consultations and coordination among all relevant stakeholders* ***including civil society (representing the general public), lawyers, legislators, judges, arbitrators and other legal practitioners such as officials responsible for drafting legislation.*** *"*

9. Engagement of domestic officials, as well as other domestic stakeholders, in designing international commercial law can also have an important contribution to promoting and facilitating reform based on international legal instruments. Accordingly, see the following proposal for an additional brief paragraph (could possibly be added as Paragraph B - Guiding Principles 5.5 in p. 6 of the Guidance Note, or as a separate paragraph under Operational Framework):

> ***Active Participation of domestic governmental and non-governmental stakeholders in international legislative forums such as UNCITRAL (the Working Groups and the Commission) can significantly contribute to the understating of the benefits of using international legal instruments to facilitate commercial law reform. Such participation can allow stakeholders to gain familiarity with drafting international commercial law and the different modalities which can be later used domestically, as well as to serve as a platform for exchange of best practices with counterparts of a wide and diverse professional and geographical background.***

10. We request to add a clarification that ultimately it is for the country accepting the assistance to decide how to implement the suggested reforms. Accordingly, we suggest the following addition after Paragraph C — Operational Framework 1.2(c)(i-iii), p.7, ***Notwithstanding sub-articles (i-iii), reform of the legal framework should be a process which is country led, country owned and country managed.***"

Peru [26 August 2015; original in Spanish]

"…In that regard, the Permanent Mission of Peru has the honour to transmit the following comments on the above-mentioned guidance note:

- As indicated in the note, its purpose is to serve as a guide for all offices, bodies, funds and programmes of the United Nations in connection with the promotion of trade law, and the note constitutes a response to the request for greater integration of the technical assistance and cooperation activities of UNCITRAL in the general activities of the United Nations, in particular through United Nations country offices and the United Nations Development Programme. Consequently, the contents of the note should be consistent with, and support the application of, the general guidelines of the United Nations in that area, in the spirit of integration of efforts and efficiency and effectiveness in the use of resources and the achievement of objectives.
- The note should take into account the post-2015 agenda and refer to the process of defining the sustainable development goals, which will serve as the future framework for action by States and international bodies.
- The document could be improved, particularly with respect to defining the relationship between development and the development of commercial law.
- All of the indicators mentioned in the note should be linked to the purpose of the document.
- The note could take into account the development of trade law, new trends in law, the present state of the international economy and the dissemination and approval of the documents produced by the Commission in relation to the information contained in document A/CN.9/843.
- Lastly, given the purpose of the note and the fact that it was submitted to the Commission for consideration and adoption after being developed and drafted solely on the basis of the views of the UNCITRAL secretariat, the note should include the views of States.

In light of the above comments, the Permanent Mission considers that the document should be considered during the forty-ninth session of the Commission ..."

Mexico [27 August 2015; original in Spanish]

"Mexico believes that the document is of high quality since it summarizes the work carried out by the United Nations Commission on International Trade Law (UNCITRAL) and the tools at its disposal in supporting countries in general. It could be a little more precise as regards the tools offered and means of accessing them, as it refers to activities, databases and the possibility of providing expert assistance but does not indicate what States can request, how requests should be made and to whom they should be addressed.

The assessment system and the list of indicators in the Annex provide good food for thought and fall within the scope of such initiatives as the World Bank's reports on the observance of standards and codes. Might it be desirable to integrate such initiatives in the joint work carried out by UNCITRAL and the World Bank? However, the following points should be made:

1. Section B.3: "Commercial law reforms should be holistic and coordinated as appropriate with other relevant initiatives." It is suggested that the text of this subsection also point out that while the laws and regulations of States cannot accommodate purely technical issues because they set out policy preferences, they always include public policies that those States seek to promote for the benefit of their peoples.

2. Section C ("Operational Framework") establishes that 'The need to identify local requirements for commercial law reforms should be recognized in United Nations operations in the appropriate context, such as in peacebuilding and development assistance frameworks. To effectively address any identified local requirements for commercial law reforms, awareness about United Nations existing standards, tools and expertise related to regulation

of commercial relations and recourse to them should be substantially increased across the United Nations system. An annex to this Guidance Note may serve as a checklist of indicators relevant in the assessment of the state of commercial law framework in a particular country.'

The appropriateness of this paragraph must be reviewed, as States should not be subject to compulsory schemes for the verification of new indicators for assessing trade regulations, especially given that the work carried out within the framework of the Commission is aimed at creating tools for States on the basis of standardization across the various legal traditions, thus leaving States to adapt those tools according to their particular needs.

It is relevant to recall that the mechanisms referred to as "soft law" (model laws and legislative guides) ensure the freedom of States to decide on regulations according to their specific circumstances, and the trade regulations of a State should not be assessed on the basis of whether or not that State has adopted the relevant model laws.

It should be noted that, at present, most economies are analysed within the framework of the "Doing Business" project, which is based on various indicators that may serve as a point of reference for the Commission with regard to the ease of doing business in different economies. Furthermore, and without prejudice to the above, the guidance note indicates neither the methodology used for selection of the indicators set out in the Annex nor the assessment to be carried out with respect to each of the responses, which leaves States in a position of insecurity.

Annex

List of indicators relevant in the assessment of the state of commercial law framework in a particular country.

1. The legal framework provides for the recognition and enforcement of property rights and legal relationships.

Response: yes, in Mexico private property rights are respected except when expropriation or application of the Termination of Ownership Act is necessary.

2. Local commercial law framework is compliant with internationally accepted commercial law standards:

Response: yes, the Code of Commerce and the trade rules deriving from it comply with international trade-law provisions and are regularly updated.

(a) Local laws regulating commercial relations are enacted on the basis of internationally accepted commercial law standards;

Response: yes, some international standards are included in the law and others are implemented through trade agreements and treaties.

3. Local capacity to implement sound commercial law reforms is continually built:

Response: yes, Mexican trade law is amended according to emerging needs, for example, in the areas of security rights and electronic commerce.

(a) Training courses on commercial law matters for government officials are held regularly [but at least twice a year];

Response: yes, general courses are offered at the National Autonomous University of Mexico and in the Ministry of Economic Affairs.

(b) Participation in such courses is improving, in particular the number of attendees, disaggregated by age, gender, specialization, affiliation (e.g. ministry or other state agency) and other relevant criteria, is steadily increasing, and assessment test results are adequate;

Response: in general, attendance is variable.

(c) The number of rule-formulating activities of regional and international bodies on commercial law issues attended by local experts is steadily increasing;

Response: yes, there is a group of advisers of the Ministry of Foreign Affairs comprised of trade-law experts who participate in the work of international bodies, particularly UNCITRAL.

(d) Local expertise on commercial law issues is centralized, readily available and easily deployed when necessary (e.g. for coordinating the State's position in rule-formulating activities of regional and international bodies on commercial law issues and for identifying and following up on local needs in commercial law reforms at the local, regional and international levels);

Response: yes, it is readily available.

(e) Local needs in commercial law reforms are assessed on a regular basis, including within the development assistance framework.

Response: yes, commercial legislation is updated regularly and such revisions are published officially.

4. Capacity of local judges, arbitrators and other legal practitioners to understand internationally accepted commercial law standards, apply them in a uniform way and achieve a better quality of judgements and awards is adequate:

Response: yes, judges and arbitrators specialize in commercial law standards and the application of those standards.

(a) Continuous learning courses for judges are held regularly [but at least twice a year] and their curricula include courses on uniform interpretation and application of internationally accepted commercial law standards;

Response: yes, the curricula of the National Autonomous University of Mexico and of other universities include international trade law and even carry out mock proceedings, including arbitral proceedings.

(b) Participation in such courses is improving, in particular the number of attendees, disaggregated by age, gender, specialization, court affiliation (e.g. court of first instance, appeal court, state or federal or supreme court) and other relevant criteria, is steadily increasing, and assessment test results are adequate;

Response: no, judicial officers study subjects individually, and only study as a group in the case of collegiate bodies, such as the collegiate circuit courts and the Supreme Court of Justice.

(c) The number of local judges participating in the international judicial colloquiums and other international and regional judicial training is steadily increasing;

Response: yes, they currently attend conferences, colloquiums and workshops.

(d) A mechanism for collecting, analysing, monitoring and publicizing national case law relating to internationally accepted commercial law standards is in place;

Response: yes, the Judicial Weekly of the Federation and the annual reports of the Supreme Court of Justice.

(e) A number of reported cases on commercial law issues referencing as appropriate internationally accepted commercial law standards is steadily increasing.

Response: yes, this information is made available in the publications referred to in 4 (d) above.

5. Mechanisms for adjudicating disputes and enforcing binding commitments in the context of trade and investment are easily accessible, affordable, efficient and effective:

Response: yes, they are accessible and affordable.

(a) Alternative mechanisms for resolution of commercial disputes (commercial arbitration, mediation and conciliation) are available as an option to seek adjudication of commercial disputes in a neutral forum;

Response: yes, courts have introduced mediation and conciliation.

(b) Those mechanisms function on the basis of internationally accepted standards;

Response: yes, they are based on international standards introduced by law or by international treaties and conventions.

(c) Mechanisms to monitor speed and effectiveness of court decisions and their enforcement as well as enforcement of arbitral awards are in place.

Response: yes, on the basis of the Federal Act on Transparency and Access to Public Government Information.

6. People are educated on international commercial law issues, basic rights and obligations arising from commercial relations and employment opportunities linked thereto:

Response: No.

(a) Subjects of commercial law are included in curricula of technical schools, universities and vocational training courses;

Response: yes, trade law subjects are taught at all of those levels.

(b) Local courses for members of academia designed to facilitate developing local legal doctrine on commercial law issues in line with internationally prevailing ones are held regularly [but at least twice a year];

Response: yes, courses and workshops on legal doctrine relating to commercial law are held.

(c) Participation in such courses is improving, in particular the number of attendees, disaggregated by age, gender, specialization, affiliation (universities and other academic institutions) and other relevant criteria, is steadily increasing, and assessment test results are adequate;

Response: participation is variable.

(d) The number of local law students, disaggregated by gender, income and other relevant criteria, participating in local, regional and international moot competitions on commercial law matters is steadily increasing.

Response: no, unfortunately the courses are focused on human rights litigation.

7. Effective mechanisms for legal empowerment on commercial matters are in place:

Response: yes, through arbitration.

(a) Internationally accepted commercial law standards are translated into local languages and the translation is made readily available to the public;

Response: yes, some are translated into Spanish and are available to the public, but none are translated into local languages.

(b) The use of readily available authoritative sources of information on international commercial law matters, including tools designed to facilitate understanding, implementation and uniform interpretation and application of internationally accepted commercial law standards, is widely promoted;

Response: yes, all of the above apply to undergraduate and postgraduate studies.

(c) There are institutions that support economic activity, such as chambers of commerce, bar associations, commercial arbitration and conciliation centres, and they are evenly distributed throughout the country.

Response: yes, they include the National Chamber of the Processing Industry, the Mexican Academy of Comparative and Private International Law, the National Bar, the National Association of Company Lawyers, the trade-law faculties of universities and the International Chamber of Commerce.

Some outcome and output indicators, such as those below, although not commercial law specific, influence the effectiveness of the commercial law framework:

8. Laws, regulations and other legal texts with any amendments thereto as well as judicial decisions and administrative rulings of general application or precedent value are:

(a) Easily understood;

Response: not by persons who are new to the subject area and do not understand the legal concepts concerned.

(b) Capable of uniform interpretation and application; and

Response: yes, but only if case law is referred to; otherwise their interpretation is subjective.

(c) Made promptly accessible to the public.

Response: yes, through the Official Gazette of the Federation and the official gazettes of the federal entities.

9. The authoritative source of legal texts and other government information is widely publicized and systematically maintained;

Response: yes, they are widely published in the Official Gazette of the Federation and the official gazettes of the federal entities and through electronic media.

10. Institutions and workforce therein are well-structured, financed and trained;

Response: no, the workforce is poorly funded and, naturally, requires training courses.

11. There are mechanisms to monitor and oversee actions and decisions of public authorities.

Response: yes, the Office of the Federal Attorney for Consumer Protection, local attorney's offices, the Council of the Judiciary, the Ministry of the Public Service and the Supreme Audit Office."

El Salvador [1 September 2015; original in Spanish]

"… In that regard, the Ministry of Economic Affairs, as the competent national authority, has communicated the following considerations: '*There are no legal observations to submit; however, it is relevant to draw attention to the fact that this Ministry has promoted several trade-related legal reforms in order to harmonize the legal framework of El Salvador with that of the international community, thus creating a situation of certainty for trade. It would therefore be very important to have access to the technical assistance referred to in the above-mentioned instrument and thus to implement best practices at the international level ...*'".

III. A comment by a State received by the Secretariat in response to its note verbale LA/TL 131(9) — CU 2015/245/OLA/ITLD circulated to all States on 8 October 2015

Chile [23 October 2015; original in Spanish]

"…In that regard, the Permanent Mission of Chile welcomes the 'Draft guidance note on strengthening United Nations support to States to implement sound commercial law reforms' and the comments submitted by a number of UNCITRAL member States, and considers the contents thereof to be a contribution to the substantive discussion on defining the role of UNCITRAL in the context of the United Nations, and to the orientation of the Commission's future work.

It also agrees with many of the comments submitted, particularly — and as already expressed during the Commission's discussions in July 2015 — with regard to the need for a concise and clear document, without value judgements, that will contribute to achievement of the objectives set out in the Charter of the United Nations and in resolution 2205 (XXI) of December 1966 of the United Nations General Assembly.

In view of the above, the Permanent Mission is of the view that the document should be reviewed once again at the next session of the Commission in July 2016…"

(A/CN.9/882/Add.1) (Original: English/Russian)

Note by the Secretariat on technical assistance to law reform: compilation of comments by States on a draft guidance note on strengthening United Nations support to States to implement sound commercial law reforms

ADDENDUM

Contents

IV. A comment by a State on the draft guidance note contained in a note by the Secretariat (A/CN.9/883)

[Original: Russian]
[Date: 21 June 2016]

Russian Federation

The Russian Federation considers it necessary to remove references to the rule of law [*верховенство права*] from the "Draft guidance note on strengthening United Nations support to States, upon their request, to implement sound commercial law reforms".

D. Note by the Secretariat on technical assistance to law reform: draft guidance note on strengthening United Nations support to States, upon their request, to implement sound commercial law reforms

(A/CN.9/883)

[Original: English]

Contents

I. Introduction

1. At its forty-sixth session, in 2010, the Commission requested the Secretariat to consider ways of better integrating its technical cooperation and assistance activities into activities conducted on the ground by the United Nations in particular through the United Nations Development Programme or other country offices of the United Nations.[1] At its forty-eighth session, the Commission had before it a draft guidance note on strengthening United Nations support to States to implement sound commercial law reforms, presented by the Secretariat (A/CN.9/845).

2. After consideration, the Commission requested States to provide to its secretariat any suggestion for revision of the text. It was agreed that the compilation of all comments received from States would be circulated by the Secretariat to all States together with a revised version of the text. It was understood that, if agreement of States on the revised text could be achieved before or during the consideration of the Commission's report in the Sixth Committee of the General Assembly in 2015, the Sixth Committee itself might wish to endorse the text, so as to avoid delay in issuing the document. Otherwise, the matter might need to be brought back to the Commission for consideration at its next session. The Secretariat was requested, in revising the text, to follow closely the wording of General Assembly resolution 2205 (XXI) on the establishment of UNCITRAL and avoid embarking into areas not directly linked to the UNCITRAL mandate. The Secretariat was also requested to allocate sufficient time for consideration of the revised text at the forty-ninth session if the revised text had to be considered at that time, and to make provisions for specific time to be allotted to that item in the provisional agenda of that session.[2]

3. Pursuant to those decisions, the Secretariat circulated a note verbale to States on 21 July 2015 requesting them to submit suggestions for revision of document A/CN.9/845 and, in formulating such suggestions, to keep in mind, as requested by the Commission,[3] the intended scope and purpose of the document, which, to be usable by its expected readers, should remain short, concise and simple. It was stated in the note verbale that the intended scope and purpose of the guidance note was to be a tool to increase awareness across the United Nations about the importance of sound commercial law reforms and the use of internationally accepted commercial law standards in that context.

4. The compilation of comments by States received by the Secretariat on document A/CN.9/845 in response to that note verbale, together with a comment by a State on a version of the guidance note prepared by the Secretariat pursuant to those comments and circulated to States in a note verbale of 8 October 2015 (the 8 October version), may be found in document A/CN.9/882. That document will be before the Commission at its forty-ninth session.

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[1] *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17* (A/65/17), para. 336.

[2] Ibid., *Seventieth Session, Supplement No. 17* (A/70/17), paras. 251-252.

[3] Ibid., para. 251.

5. This note contains a draft guidance note on strengthening United Nations support to States, upon their request, to implement sound commercial law reforms. The draft was prepared on the basis of the 8 October version incorporating comments on that version conveyed by States to the Secretariat, including during informal consultations in the Sixth Committee. Pursuant to the request of the Commission at its forty-eighth session (see para. 2 above), the Secretariat will allocate time in the provisional agenda of the forty-ninth session of UNCITRAL (A/CN.9/859) for the discussion of the draft guidance note.

II. Draft guidance note on strengthening United Nations support to States, upon their request, to implement sound commercial law reforms

"Guidance note on strengthening United Nations support to States, upon their request, to implement sound commercial law reforms

A. About this Guidance Note

6. This Guidance Note provides the guiding principles and framework for strengthening United Nations support to States, upon their request, to implement sound commercial law reforms on the basis of internationally accepted standards. It is framed within the United Nations mandate to promote higher standards of living, full employment, and conditions of economic and social progress and development, as well as solutions of international economic, social and related problems.[4] It is a contribution to the implementation of the international development agenda and General Assembly resolutions calling for: (a) enhanced technical assistance and capacity-building in the international commercial law field; (b) better integration of the work in that field in the broader agenda of the United Nations; (c) greater coordination and coherence among the United Nations entities and with donors and recipients; (d) greater evaluation of the effectiveness of such activities; (e) measures to improve the effectiveness of capacity-building activities; and (f) placement of national perspectives at the centre of United Nations assistance programmes.

7. This Guidance Note is relevant to all United Nations departments, offices, funds, agencies and programmes as well as other donors that deal with: (a) mobilizing finance for sustainable development; (b) reducing or removing legal obstacles to the flow of international trade and achieving international and/or regional economic integration; (c) private sector development; (d) justice sector reforms; (e) increasing the resilience of economies to economic crisis; (f) good governance, including public procurement reforms and e-governance; (g) empowerment of the poor; (h) preventing and combating economic crimes through education (e.g. commercial fraud, forgery and falsification); (i) addressing the root causes of conflicts triggered by economic factors; (j) addressing post-conflict economic recovery problems; (k) addressing specific problems with access to international trade by landlocked countries; and (l) domestic implementation of international obligations in the field of international commercial law and related areas.

B. Guiding Principles

1. The United Nations work in the field of international commercial law as an integral part of the broader agenda of the United Nations

8. The establishment of sound rules furthering commercial relations is an important factor in economic development. This is because commercial decisions are taken not in isolation but in the context of all relevant factors, including the applicable legal framework.

9. The modern and harmonized international commercial law framework is the basis for rule-based commercial relations and an indispensable part of international trade, bearing in

[4] The Charter of the United Nations, article 55 (a) and (b).

mind the relevance of domestic law and domestic legal systems in this regard. In reducing or removing legal obstacles to the flow of international trade, especially those affecting developing countries, it also contributes 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.[5] The implementation and effective use of such frameworks are also essential for advancing good governance, sustained economic development and the eradication of poverty and hunger.[6] Accordingly, they may contribute to the achievement of the purposes of the United Nations Charter and those specified in the United Nations General Assembly resolution 2205 (XXI) of 17 December 1966 on the establishment of the United Nations Commission on International Trade Law (UNCITRAL).

10. For these reasons, the United Nations work in the field of international commercial law should be better integrated, where and as necessary, at the headquarters and country levels in United Nations operations in development, conflict-prevention, post-conflict-reconstruction and other appropriate contexts.[7]

2. United Nations assistance to States, upon their request, with the assessment of local needs for commercial law reforms and their implementation

11. Commercial law constantly evolves in response to new business practices and global challenges. This necessitates the implementation of commercial law reforms that keep pace with those developments. States often request assistance with the assessment of the need for commercial law reforms and their implementation.

12. To achieve better integration of the United Nations work in the field of international commercial law in the broader agenda of the United Nations, United Nations entities operating on the ground should be able to respond to such requests. For that, they should be aware of standards, tools and expertise readily available in the United Nations system in the field of international commercial law. Guiding principle 5 below provides sources of information about such standards, tools and expertise, section C of this note illustrates steps that may need to be taken to assist States with the assessment and implementation of commercial law reforms, and an annex to this Guidance Note may serve as a checklist of illustrative indicators relevant to the assessment of the state of the commercial law framework and the need for commercial law reforms in a particular country.

13. United Nations entities should promote the harmonization of the local legal framework regulating commercial relations with internationally accepted commercial law standards, where appropriate. Such harmonization would: (a) facilitate recognition, protection and enforcement of contracts and other binding commitments; (b) make commercial law more easily understandable to commercial parties; (c) promote uniform interpretation and application of international commercial law frameworks; and (d) provide legal certainty and predictability in order to enable parties to commercial transactions to take commercially reasonable decisions.[8]

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[5] General Assembly resolution 69/115, the second preambular paragraph. See also earlier General Assembly resolutions on UNCITRAL reports for a similar wording.

[6] General Assembly resolution 69/115, para. 12. See also earlier General Assembly resolutions on UNCITRAL reports for a similar wording.

[7] A particular reference to the early engagement of UNCITRAL instruments and resources in post-conflict reconstruction contexts is found in paragraph 17 of General Assembly resolution 66/94; calls for better integration of UNCITRAL work in the development context are found in repetitive paragraphs like paragraph 7 (d) of General Assembly resolution 69/115; similar calls but in the rule of law context are found in repetitive paragraphs like paragraph 12 of General Assembly resolution 69/115. Such calls were also made by the Commission itself, most recently, in paragraph 301 of the report of the Commission on the work of its forty-eighth session (A/70/17), in paragraph 284 of the report of the Commission on the work of its forty-seventh session (A/69/17), paragraphs 307 and 308 of the report of the Commission on the work of its forty-sixth session (A/68/17) and paragraph 336 of the report of the Commission on the work of its forty-third session (A/65/17).

[8] Calls for promotion of use of internationally accepted legal standards resulting from the work of UNCITRAL and their effective implementation are found in General Assembly resolutions, for example in paras. 7 (a) and 19 of resolution 69/115.

14. States also often request assistance with the assessment of the effectiveness of their mechanisms for adjudicating disputes and enforcing binding commitments in the context of trade and investment, in particular commercial arbitration and alternative dispute resolution mechanisms (jointly referred to in this Guidance Note as ADR). In this context, United Nations entities should be aware of the applicable internationally accepted standards, compliance with which may help to ensure that such mechanisms operate on the basis of internationally recognized norms and are easily accessible, affordable, efficient and effective.[9] Where ADR is promoted by a State as an option to seeking adjudication of commercial disputes in a neutral forum, United Nations entities should be aware that court reforms may be needed so as to equip the judiciary to efficiently and effectively support ADR.

3. United Nations role in assisting States, upon their request, to implement holistic and properly coordinated commercial law reforms

15. Laws and regulations governing commercial relations and the accompanying institutional framework are not purely technical matters. They embody particular policy preferences. They can produce political and social impacts, including gender-unbalanced impacts, in addition to the obvious, economic impacts.

16. Commercial law reforms should therefore involve close consultation and coordination among all relevant stakeholders, including non-governmental organizations (representing the general public), lawyers, legislators, judges, arbitrators and other legal practitioners, such as officials responsible for drafting legislation. In particular, the close link between policymaking and law-making and institutional reforms needs to be ensured.

17. Commercial law reform is strongly linked to international legal obligations. Involvement of international experts may be desirable to ensure consistency between domestic law and international obligations where risks of creating gaps or conflicts between the two exist. United Nations entities should also support and encourage cooperation and exchanges of good practices between States as an important means of promoting sound commercial law reform.

18. The proper coordination among United Nations entities themselves and between them and other donors, as well as domestic governmental departments, engaging in reform efforts should also be achieved. The results of coordination and cooperation gained at the country level must be preserved at the headquarters level and vice versa. Such coordination is essential in order to avoid duplication of efforts and promote efficiency, consistency and coherence in the modernization and harmonization of international commercial law.[10]

4. United Nations support to States, upon their request, with building local capacity to effectively implement sound commercial law reforms

19. Adequate local capacity to enact, enforce, implement, apply and interpret sound commercial law frameworks is necessary for the expected benefits of rule-based commercial relations and international trade to accrue. Often States request international assistance with building the required local capacity.

20. The effective way to provide such assistance is through technical cooperation, training and capacity-building sessions aimed at strengthening local expertise to draw on readily available international standards, tools and expertise for carrying out commercial law reforms at the country level. United Nations entities should support the organization of those and similar activities and facilitate participation of local experts therein.[11]

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[9] See e.g. General Assembly resolutions 40/72 and 61/33, the fourth preambular paragraph.

[10] Calls for closer coordination and cooperation are found in General Assembly resolutions, for example, in General Assembly resolution 69/115, the fourth and fifth preambular paragraphs and paras. 6 and 7 (d). Efforts and initiatives of UNCITRAL aimed at increasing coordination of and cooperation on legal activities of international and regional international organizations active in the field of international trade law have been also endorsed in para. 89 of the Addis Ababa Action Agenda (General Assembly resolution 69/313).

[11] Calls for such support are found in General Assembly resolutions (see e.g. General Assembly resolution 69/115, para. 7 (d)).

21. In addition, active participation of domestic governmental and non-governmental stakeholders in international legislative forums such as UNCITRAL (see guiding principle 5) (at the level of both working groups and the Commission) can significantly contribute to the understanding of the benefits of using international legal instruments to facilitate commercial law reform. Such participation can allow stakeholders to gain familiarity with the drafting of international commercial law and the different modalities which can be later used domestically. It can also serve as a platform for exchange of best practices with counterparts from a wide and diverse professional and geographical background. Close coordination of a State position in various regional and international rule-formulating bodies active in the field of international commercial law helps to avoid the appearance of conflicting rules and interpretations in those bodies. All efforts should therefore be made by United Nations entities to support States in their endeavours to achieve representation of their position in a sustained and coordinated manner in UNCITRAL and other regional and international rule-formulating bodies active in the field of international commercial law.[12]

22. Achieving transparent, consistent and predictable outcomes in jurisprudence on commercial law matters in compliance with the relevant international obligations of States[13] is important for rule-based commercial relations. Judges, arbitrators, law professors and other legal practitioners play primary roles in this regard. Their capacity to interpret international commercial law standards in a way that would promote uniformity in their application and the observance of good faith in international trade should also be a continuous concern. There are tools specifically designed by the United Nations for such purposes (see guiding principle 5). United Nations entities should promote their development and use.[14]

5. UNCITRAL is the core legal body in the United Nations system in the field of international commercial law and as such should be relied upon by United Nations entities in their support to States, upon their request, to implement sound commercial law reforms

23. UNCITRAL is the law-making body of the United Nations system in the field of international commercial law. It is an intergovernmental forum composed of Member States elected by the General Assembly. Its composition is representative of the various geographic regions and the principal economic and legal systems. Additionally, intergovernmental organizations, professional associations and other non-governmental organizations with observer status participate in its work.

24. UNCITRAL standards represent what the international community considers at a given time to be the best international practice for regulating certain commercial transactions. They equip States with models and guidance to support sound commercial law reforms at lower costs. Reliance on such standards enhances the quality of enacted legislation in the long run and builds the confidence of the private sector, including foreign investors, in the ease of doing business in a country that adheres to them.

25. Most standards are adaptable to local circumstances and needs of commercial parties.[15] A particular feature of UNCITRAL model laws and similar instruments issued by other international organizations is that they can be used by States as a basis or inspiration for legislation that forms part of commercial law reform: they can be adapted to domestic

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[12] Calls for facilitation of participation of all Member States in sessions of UNCITRAL and its working groups are found in General Assembly resolutions, e.g. resolution 69/115, paras. 10 and 11.

[13] E.g. the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980), article 7. United Nations, *Treaty Series*, vol. 1489, No. 25567. Also available at www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html (accessed May 2013).

[14] Calls for raising awareness about the availability and usefulness of the CLOUT system in professional, academic and judiciary circles, for dissemination of digests of case law and for expansion and coordination of the system are found in General Assembly resolutions, e.g. paras. 18 and 20 of resolution 69/115.

[15] For the up-to-date list of the UNCITRAL standards, see www.uncitral.org/uncitral/en/uncitral_texts.html.

circumstances, and States can select which provisions are most relevant to their legal systems.

26. In addition to internationally accepted commercial law standards, UNCITRAL provides readily available technical assistance, capacity-building and other tools, such as CLOUT,[16] digests of case law,[17] databases related to the implementation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, on 10 June 1958[18] (the New York Convention),[19] and other databases and publications,[20] that aim to facilitate the understanding and use of those standards and to disseminate information about modern legal developments, including case law, in the international commercial law field. Those tools are in particular indispensable in training judges, arbitrators, law professors and other legal practitioners on commercial law matters and to the legal empowerment of people in general.

27. The areas covered by UNCITRAL work are: (a) contracts (international sale of goods, international transport of goods, electronic commerce); (b) international commercial and investment dispute settlement (arbitration, conciliation, online dispute resolution (ODR) and investor-State dispute resolution); (c) public procurement and privately financed infrastructure projects; (d) international payments; (e) insolvency law; (f) security interests; (g) commercial fraud; and (h) developing an enabling legal environment for micro-, small and medium-sized enterprises.[21]

C. Operational framework

28. Sections below and the annex to this note illustrate steps that may need to be taken by United Nations entities that are requested by States to assist with the assessment and implementation of commercial law reforms.

1. Legal framework

29. States may request technical assistance and capacity-building with their commercial law reform efforts, in particular with identification of local needs for commercial law reforms, with enactment of a law or with updating and modernizing existing rules on a particular commercial law subject. In response, the United Nations should endeavour to assist States with the following, bearing in mind that reform of the legal framework should remain a process which is country led, country owned and country managed:

(a) Preparing a structured workplan that would identify the goals and objectives of the different steps for commercial law reform (for both providing assistance and taking reform measures), set up a schedule, develop strategies to address the weaknesses or inadequacies of the different legislative norms or practices, appoint appropriate focal points to coordinate a specific reform initiative and allocate resources;

(b) Assessing the general commercial law framework and the status of its implementation in the State, e.g.: (i) whether the State is party to fundamental conventions in the commercial law field (e.g. the New York Convention), which will be conducive to other commercial law reforms; (ii) if yes, the status of their implementation; (iii) if not, measures to be taken to consider becoming a party; and (iv) whether the local commercial

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[16] www.uncitral.org/uncitral/en/case_law.html.

[17] www.uncitral.org/uncitral/en/case_law/digests.html.

[18] United Nations, *Treaty Series*, vol. 330, No. 4739. Also available at www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html (accessed May 2013).

[19] www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html.

[20] E.g. the recurrent publication on the judicial perspective on cross-border insolvency cases (www.uncitral.org/uncitral/uncitral_texts/insolvency/2011Judicial_Perspective.html), the Practice Guide on Cross-Border Insolvency Cooperation (www.uncitral.org/uncitral/en/uncitral_texts/insolvency/2009PracticeGuide.html), and Promoting confidence in electronic commerce: legal issues on international use of electronic authentication and signature methods (www.uncitral.org/pdf/english/texts/electcom/08-55698_Ebook.pdf).

[21] New areas of work may be added. For the most updated list, please contact the UNCITRAL secretariat at the addresses indicated in the end of this Guidance Note or check the UNCITRAL website (www.uncitral.org).

law framework is otherwise compliant with internationally accepted commercial law standards;

(c) In the context of a particular commercial law reform:

(i) Identifying an applicable internationally accepted commercial law standard and related readily available tools and expertise designed to facilitate its enactment;

(ii) Identifying all stakeholders relevant to the commercial law reform, including domestic reform constituencies, international experts, various donors working in the same or related field, etc., and appropriate focal points in each entity to coordinate a specific reform, in order to facilitate proper consultations with them, where necessary;

(iii) Preparing a comprehensive legislative package to accompany the adoption of a new law (e.g. other necessary laws, regulations, guidance and/or codes of conduct) and ensuring the proper expert assessment of the legislative package before the law is adopted.

2. State institutions involved in commercial law reforms

30. States may request technical assistance and capacity-building, in particular as regards:

(a) Development of capacity in various State institutions (parliamentary committees, ministries of justice, trade and economic development, public procurement agencies, monitoring and oversight bodies) to handle commercial law reforms and implement commercial law framework. Technical assistance and capacity-building in such cases may take the form of: (i) raising awareness of readily available internationally accepted commercial law standards, and tools and expertise designed to facilitate understanding, enactment and implementation of those standards; (ii) circulating texts of the relevant standards; (iii) organizing briefings or training; (iv) supporting efforts to centralize local expertise on commercial law issues, for example through the establishment of a national centre of commercial law expertise or national research centre and national databases on commercial law issues; and (v) facilitating responsible and continuous representation of local experts in international and regional commercial law standard-setting activities;

(b) Building capacity of local judges, arbitrators and other legal practitioners to better understand internationally accepted commercial law standards, apply them in a uniform way and achieve a better quality of judgements and awards. Means of assistance may include: (i) raising awareness of readily available international tools designed to facilitate understanding and uniform interpretation and application of internationally accepted commercial law standards; (ii) supporting the establishment of a mechanism for collecting, analysing and monitoring national case law related to internationally accepted commercial law standards [22] and collecting relevant statistics, e.g. on the speed of adjudication and enforcement; (iii) supporting continuous learning courses for judges and inclusion in the curricula of such courses of the relevant readily available international tools referred to above; (iv) organizing local judicial training with the participation of experts; and (v) raising awareness about international judicial colloquiums and facilitating participation of local judges therein;

(c) The establishment and functioning of arbitration and conciliation centres. Means of assistance may include: (i) attracting readily available expertise for the establishment of, and support to, such centres; (ii) facilitating access to the ADR and ODR mechanisms in those centres, for example by raising public awareness about them; (iii) organizing training for separate groups of ADR practitioners with the involvement of relevant experts to assist these mechanisms to become more responsive to the rights and needs of intended end users (e.g. arbitrators on uniform application and interpretation of international commercial standards; mediators and conciliators on conflict resolution skills; and ODR providers on issues specific to e-environment); and (iv) addressing through court reforms and other

[22] In this regard, please consult in particular the UNCITRAL CLOUT system that relies on a network of national correspondents designated by those States that are parties to a Convention, or have enacted legislation based on a Model Law, emanated from the work of UNCITRAL, or the New York Convention www.uncitral.org/uncitral/en/case_law/national_correspondents.html.

measures the role of the judiciary in providing appropriate support to ADR and ODR mechanisms.

3. Private sector, academia and general public

31. States may request assistance with:

(a) Raising public awareness, in particular among micro-, small and medium-sized enterprises and individual entrepreneurs, about internationally accepted commercial law standards, the readily available tools designed to facilitate their understanding and use, and commercial opportunities linked thereto (e.g. e-commerce, cross-border trade, access to domestic and foreign public procurement markets, access to credit, viable options for recovery in case of financial difficulties). Assistance in such cases may take the form of: (i) translation of those standards into local languages; (ii) creation of readily available local databases of those standards with links to their international source and supporting tools; and (iii) dissemination of information about those standards by other means;

(b) Supporting community-based institutions that contribute to economic activity, empowerment of the poor, private sector development, access to justice, legal education and skills-building, such as chambers of commerce, bar associations, arbitration and conciliation centres, legal information centres and legal aid clinics;

(c) Maintaining regular dialogue with non-governmental organizations that represent various segments of society (e.g. consumers, local communities, end users of public services, individual entrepreneurs, micro-, small and medium-sized enterprises and academia) as regards their views on measures required to improve the commercial law framework in the State;

(d) Assisting members of academia with developing local legal doctrine on commercial law issues in line with internationally prevailing ones, in particular by facilitating establishment of, or participation in, existing regional and international exchange platforms, including electronic ones;

(e) Educating people on international commercial law issues and increasing their awareness of basic rights and obligations arising from commercial relations as directly relevant to entrepreneurship (e.g. start-up and management of business) and employment opportunities. Means of achieving that include assistance with: (i) including international commercial law subjects in curricula of schools, vocational and technical training courses and universities; (ii) organizing moot competitions and sponsoring participation of local student teams in relevant international moot competitions;[23] and (iii) raising awareness about international courses on international commercial law matters[24] and facilitating participation of interested individuals therein; and

(f) Building capacity of various actors in informal justice systems and ADR (e.g. village elders) to use mediation and conciliation skills in accordance with internationally accepted standards and to better understand international commercial law standards, apply them in a uniform way and achieve a better quality of decisions.

The UNCITRAL secretariat [25] is interested in learning about experience with the implementation of this Guidance Note. It can be contacted on all issues addressed in this Guidance Note, including as regards provision of assistance with the identification of local needs for commercial law reforms, implementation of commercial law reforms and training on commercial law issues in countries in which the United Nations operates and across the United Nations system.

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[23] See e.g. www.cisg.law.pace.edu/vis.html.

[24] See e.g. www.itcilo.org/en/training-offer/turin-school-of-development-1.

[25] Vienna International Centre, P.O. Box 500, 1400 Vienna, Austria (e-mail: uncitral@uncitral.org, fax: (43-1-26060-5813)).

Annex

List of illustrative indicators relevant in the assessment of the state of the commercial law framework and the need for commercial law reforms in a particular country

1. The legal framework provides for the recognition and enforcement of contracts and other binding commitments.

2. The local commercial law framework is compliant with internationally accepted commercial law standards:

(a) Local laws regulating commercial relations are enacted on the basis of internationally accepted commercial law standards.

3. Local capacity to implement sound commercial law reforms is continually built:

(a) Training courses on commercial law matters for government officials are held regularly but at least once a year;

(b) Participation in such courses, in particular the number of attendees, disaggregated by age, gender, specialization, affiliation (e.g. ministry or other state agency) and other relevant criteria, and assessment test results, are adequate;

(c) Participation of local experts in rule-formulating activities of regional and international bodies on commercial law issues is adequate;

(d) Local expertise on commercial law issues is centralized, readily available and easily deployed when necessary (e.g. for coordinating a State's position in rule-formulating activities of regional and international bodies on commercial law issues and for identifying and following up on local needs in commercial law reforms at the local, regional and international levels);

(e) Local needs in commercial law reforms are assessed on a regular basis, including within the development assistance framework.

4. Capacity of local judges, arbitrators and other legal practitioners to understand internationally accepted commercial law standards, apply them in a uniform way and achieve a better quality of judgements and awards is adequate:

(a) Continuous learning courses for judges are held regularly but at least once a year and their curricula include courses on uniform interpretation and application of internationally accepted commercial law standards;

(b) Participation in such courses, in particular the number of attendees, disaggregated by age, gender, specialization, court affiliation (e.g. court of first instance, appeal court, state or federal or supreme court) and other relevant criteria, and assessment test results, are adequate;

(c) Participation of local judges in the international judicial colloquiums and other international and regional judicial training is adequate;

(d) A mechanism for collecting, analysing, monitoring and publicizing national case law relating to internationally accepted commercial law standards is in place.

5. Mechanisms for adjudicating disputes and enforcing binding commitments in the context of trade and investment are easily accessible, affordable, efficient and effective:

(a) Alternative mechanisms for resolution of commercial disputes (commercial arbitration, mediation and conciliation) are available as an option to facilitate adjudication of commercial disputes in a neutral forum;

(b) Those mechanisms function on the basis of internationally accepted standards;

(c) Mechanisms to monitor speed and effectiveness of court decisions and their enforcement, as well as enforcement of arbitral awards, are in place.

6. People are educated on international commercial law issues, basic rights and obligations arising from commercial relations and employment opportunities linked thereto:

(a) Commercial law is included in curricula of technical schools, universities and vocational training courses;

(b) Courses for members of academia designed to facilitate the development of local legal doctrine on commercial law issues in line with internationally prevailing ones are held regularly but at least once a year;

(c) Participation in such courses, in particular the number of attendees, disaggregated by age, gender, specialization, affiliation (universities and other academic institutions) and other relevant criteria, and assessment test results, are adequate;

(d) Participation of local law students, disaggregated by gender, income and other relevant criteria, in local, regional and international moot competition on commercial law matters is adequate.

7. Effective mechanisms for legal empowerment on commercial matters are in place:

(a) Internationally accepted commercial law standards are translated into local languages and the translation is made readily available to the public;

(b) The use of readily available authoritative sources of information on international commercial law matters, including tools designed to facilitate understanding, implementation and uniform interpretation and application of internationally accepted commercial law standards, is widely promoted;

(c) There are institutions that support economic activity, such as chambers of commerce, bar associations, commercial arbitration and conciliation centres, and they are evenly distributed throughout the country.”

X. STATUS AND PROMOTION OF UNCITRAL LEGAL TEXTS

Note by the Secretariat on the status of conventions and model laws

(A/CN.9/876)

[Original: English]

1. At its thirteenth session, in 1980, the United Nations Commission on International Trade Law (UNCITRAL) decided[1] that it would consider, at each of its sessions, the status of conventions that were the outcome of work carried out by it.

2. The present note sets forth the status of the conventions and model laws emanating from the work of the Commission. It also shows the status of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958),[2] which, although adopted prior to the establishment of the Commission, is closely related to the work of the Commission in the area of international commercial arbitration.

3. Technical cooperation and assistance activities aimed at promoting the use and adoption of its texts are priorities for UNCITRAL pursuant to a decision taken at its twentieth session (1987).[3] The Secretariat monitors adoption of model laws and conventions.

4. This note indicates the changes since 4 May 2015, when the last annual report in this series (A/CN.9/843) was issued. The information contained herein is current up to 17 May 2016. Authoritative information on the status of the treaties deposited with the Secretary-General of the United Nations, including historical status information, may be obtained by consulting the United Nations Treaty Collection (http://treaties.un.org), and the information on conventions in this note and on the UNCITRAL website (www.uncitral.org) is based on that information. Readers may also wish to contact the Treaty Section of the Office of Legal Affairs of the United Nations (tel.: (+1-212) 963-5047; fax: (+1-212) 963-3693; e-mail: treaty@un.org). Information on the status of conventions and model laws is made available on the UNCITRAL website as detailed tables related to specific texts and as a single table providing an overview of all texts. Information on the status of model laws is updated on the website whenever the Secretariat is informed of a new enactment.

5. This note covers the following texts, incorporating as indicated new treaty actions (the term "action" is used generically to denote the deposit of an instrument of ratification, approval, acceptance, accession, or signature in respect of a treaty, or participation in a treaty as a result of an action to a related treaty, or the withdrawal or modification of a declaration or of a reservation) and enactments of Model Laws based on information received since the last report:

(a) In the area of sale of goods:

Convention on the Limitation Period in the International Sale of Goods (New York, 1974),[4] as amended by the Protocol of 11 April 1980 (Vienna).[5] New action by Côte d'Ivoire (accession to the Convention as amended); as amended: 23 States parties; unamended: 30 States parties;

United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980).[6] New actions by Azerbaijan (accession), Hungary (withdrawal of declarations) and Viet Nam (accession); 85 States parties;

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[1] *Official Records of the General Assembly, Thirty-fifth Session, Supplement No. 17* (A/35/17), para. 163.

[2] United Nations, *Treaty Series*, vol. 330, No. 4739, p. 3.

[3] *Official Records of the General Assembly, Forty-second Session, Supplement No. 17* (A/42/17), para. 335.

[4] United Nations, *Treaty Series*, vol. 1511, No. 26119, p. 3. For the complete status of this text, see part I, sect. A.

[5] United Nations, *Treaty Series*, vol. 1511, No. 26121, p. 99. For the complete status of this text, see part I, sect. A.

[6] United Nations, *Treaty Series*, vol. 1489, No. 25567, p. 3. For the complete status of this text, see

(b) In the area of dispute resolution:

Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958).[7] New action by Andorra (accession); 156 States parties;

UNCITRAL Model Law on International Commercial Arbitration (1985),[8] with amendments as adopted in 2006.[9] New legislation based on the Model Law has been adopted in Maldives (2013), Montenegro (2015), Myanmar (2016) and Slovakia (2014). New legislation based on the Model Law as amended in 2006 has been adopted in Bahrain (2015) and Bhutan (2013);

UNCITRAL Model Law on International Commercial Conciliation (2002).[10] New legislation based on the Model Law has been adopted in Bhutan (2013);

United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (New York, 2014).[11] New actions by Belgium (signature), Congo (signature), Gabon (signature), Italy (signature), Luxembourg (signature), Madagascar (signature) and Mauritius (ratification); 1 State party;

(c) In the area of government contracting:

UNCITRAL Model Law on Public Procurement (2011);[12]

(d) In the area of banking and payments:

United Nations Convention on International Bills of Exchange and International Promissory Notes (New York, 1988)[13] (5 States parties);

UNCITRAL Model Law on International Credit Transfers (1992);[14]

United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (New York, 1995)[15] (8 States parties);

(e) In the area of security interests:

United Nations Convention on the Assignment of Receivables in International Trade (New York, 2001)[16] (1 State party);

(f) In the area of insolvency:

UNCITRAL Model Law on Cross-Border Insolvency (1997).[17] New legislation based on the Model Law has been adopted in Benin (2015); Burkina Faso (2015); Cameroon (2015); Central African Republic (2015); Chad (2015); Comoros (2015); Congo

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part I, sect. C.

[7] United Nations, *Treaty Series*, vol. 330, No. 4739, p. 3. For the complete status of this text, see part I, sect. K.

[8] *Official Records of the General Assembly, Fortieth Session, Supplement No. 17* (A/40/17), annex I. For the complete status of this text, see part II, sect. A.

[9] United Nations publication, Sales No. E.08.V.4. For the complete status of this text, see part II, sect. A.

[10] *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 17* (A/57/17), annex I. For the complete status of this text, see part II, sect. F.

[11] General Assembly resolution 69/116, annex. The Convention has not yet entered into force; it requires three States parties for entry into force. For the complete status of this text, see part I, sect. J.

[12] *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17* (A/66/17), annex I. For the complete status of this text, see part II, sect. G.

[13] General Assembly resolution 43/165, annex. The Convention has not yet entered into force; it requires ten States parties for entry into force. For the complete status of this text, see part I, sect. D.

[14] *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 17* (A/47/17), annex I. For the complete status of this text, see part II, sect. B.

[15] United Nations, *Treaty Series*, vol. 2169, No. 38030, p. 163. For the complete status of this text, see part I, sect. F.

[16] General Assembly resolution 56/81, annex. The Convention has not yet entered into force; it requires five States parties for entry into force. For the complete status of this text, see part I, sect. G.

[17] General Assembly resolution 52/158, annex. For the complete status of this text, see part II, sect. D.

(2015); Côte d'Ivoire (2015); Democratic Republic of the Congo (2015); Equatorial Guinea (2015); Gabon (2015); Guinea (2015); Guinea-Bissau (2015); Kenya (2015); Malawi (2015); Mali (2015); Niger (2015); Senegal (2015); Togo (2015); and United Kingdom of Great Britain and Northern Ireland, in Gibraltar (2014);

(g) In the area of transport:

United Nations Convention on the Carriage of Goods by Sea (Hamburg, 1978)[18] (34 States parties);

United Nations Convention on the Liability of Operators of Transport Terminals in International Trade (Vienna, 1991)[19] (4 States parties);

United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (New York, 2008)[20] (3 States parties);

(h) In the area of electronic commerce:

UNCITRAL Model Law on Electronic Commerce (1996).[21] New legislation based on the Model Law has been adopted in Bahamas (2003); El Salvador (2015); Honduras (2015); United Kingdom, in Montserrat (2009); and United Republic of Tanzania (2015);

UNCITRAL Model Law on Electronic Signatures (2001).[22] New legislation based on the Model Law has been adopted in the United Kingdom, in Montserrat (2009);

United Nations Convention on the Use of Electronic Communications in International Contracts (New York, 2005).[23] New action by Sri Lanka (ratification); 7 States parties.

6. Previous annual reports in this series also included chronological tables of actions for conventions. To avoid redundancy, this information can now be found on the UNCITRAL website.

7. UNCITRAL texts also include legislative and legal guides and contractual standards whose impact cannot be assessed by reference to their adoption by States.[24] In this regard, part III has been added to this note in an attempt to convey the impact of other selected UNCITRAL texts. Part III includes information on the use by arbitration centres of the UNCITRAL Arbitration Rules,[25] although it should be noted that the full impact of the Rules is difficult to assess since, for example, they are widely applied in ad hoc commercial arbitration where such use is generally not reported. In addition, part III includes information on the impact on investment treaties of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (effective date: 1 April 2014).[26]

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[18] United Nations, *Treaty Series*, vol. 1695, No. 29215, p. 3. For the complete status of this text, see part I, sect. B.

[19] *Official Records of the United Nations Conference on the Liability of Operators of Transport Terminals in International Trade, Vienna, 2-19 April 1991* (United Nations publication, Sales No. E.93.XI.3), part I, annex. The Convention has not yet entered into force; it requires five States parties for entry into force. For the complete status of this text, see part I, sect. E.

[20] General Assembly resolution 63/122, annex. The Convention has not yet entered into force; it requires 20 States parties for entry into force. For the complete status of this text, see part I, sect. I.

[21] United Nations publication, Sales No. E.99.V.4. For the complete status of this text, see part II, sect. C.

[22] General Assembly resolution 56/80, annex. For the complete status of this text, see part II, sect. E.

[23] General Assembly resolution 60/21, annex. For the complete status of this text, see part I, sect. H.

[24] All UNCITRAL texts are available in the six official languages of the United Nations on the UNCITRAL website, www.uncitral.org.

[25] UNCITRAL Arbitration Rules (as revised in 2010), *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17* (A/65/17), annex I; UNCITRAL Arbitration Rules (1976), Ibid., *Thirty-first Session, Supplement No. 17* (A/31/17), para. 57. For the status of this text, see part III, sect. A.

[26] Ibid., *Sixty-eighth Session, Supplement No. 17* (A/68/17), annex I. For the status of this text, see part III, sect. B.

I. Participation in conventions

A. Convention on the Limitation Period in the International Sale of Goods (New York, 1974), as amended by the Protocol of 11 April 1980 (Vienna)

State	*Signature*	*Ratification, Accession(*), Succession(§) or Participation under Article VIII or X of the Protocol of 11 April 1980(†)*	*Entry into force*
Argentina		19 July 1983(*)	1 August 1988
Belarus	14 June 1974	23 January 1997(*)	1 August 1997
Belgium		1 August 2008(*)	1 March 2009
Benin[a]		29 July 2011(*)	1 February 2012
Bosnia and Herzegovina[a]		12 January 1994(§)	6 March 1992
Brazil	14 June 1974		
Bulgaria	24 February 1975		
Burundi[a]		4 September 1998(*)	1 April 1999
Costa Rica	30 August 1974		
Côte d'Ivoire		1 February 2016(†)	1 September 2016
Cuba		2 November 1994(*)	1 June 1995
Czech Republic[b]		30 September 1993(§)	1 January 1993
Dominican Republic[d]		30 July 2010(*)	1 February 2011
Egypt		6 December 1982(*)	1 August 1988
Ghana[a]	5 December 1974	7 October 1975	1 August 1988
Guinea		23 January 1991(*)	1 August 1991
Hungary	14 June 1974	16 June 1983(*)	1 August 1988
Liberia		16 September 2005(†)	1 April 2006
Mexico		21 January 1988(*)	1 August 1988
Mongolia	14 June 1974		
Montenegro[e]		6 August 2012(*)	1 March 2013
Nicaragua	13 May 1975		
Norway[a,c]	11 December 1975	20 March 1980	1 August 1988
Paraguay		18 August 2003(*)	1 March 2004
Poland	14 June 1974	19 May 1995(†)	1 December 1995
Republic of Moldova		28 August 1997(*)	1 March 1998
Romania		23 April 1992(†)	1 November 1992
Russian Federation	14 June 1974		
Serbia[a]		12 March 2001(§)	27 April 1992
Slovakia[b]		28 May 1993(§)	1 January 1993
Slovenia		2 August 1995(†)	1 March 1996
Uganda		12 February 1992(†)	1 September 1992
Ukraine[a]	14 June 1974	13 September 1993	1 April 1994
United States of America[b]		5 May 1994(†)	1 December 1994
Uruguay		1 April 1997(†)	1 November 1997
Zambia		6 June 1986(*)	1 August 1988

Parties (as amended by the Protocol of 1980): 23
Parties (unamended): 30

For information on which States listed above are Parties to the 1980 amending Protocol, consult the United Nations Treaty Collection, http://treaties.un.org.

[a] Party only to the unamended Convention.

[b] Upon accession to the Protocol, Czechoslovakia and the United States of America declared that, pursuant to article XII of the Protocol, they did not consider themselves bound by article I of the Protocol.

[c] Upon signature, Norway declared, and confirmed upon ratification, that, in accordance with article 34, the Convention would not govern contracts of sale where the seller and the buyer both had their relevant places of business within the territories of the Nordic States (i.e. Denmark, Finland, Iceland, Norway and Sweden).

[d] From 1 August 1988 to 31 January 2011, the Dominican Republic was a Party to the unamended Convention.

[e] From 3 June 2006 to 28 February 2013, Montenegro was a Party to the unamended Convention.

B. United Nations Convention on the Carriage of Goods by Sea (Hamburg, 1978)

State	*Signature*	*Ratification, Accession(*), Approval(†), Acceptance(‡) or Succession(§)*	*Entry into force*
Albania		20 July 2006(*)	1 August 2007
Austria	30 April 1979	29 July 1993	1 August 1994
Barbados		2 February 1981(*)	1 November 1992
Botswana		16 February 1988(*)	1 November 1992
Brazil	31 March 1978		
Burkina Faso		14 August 1989(*)	1 November 1992
Burundi		4 September 1998(*)	1 October 1999
Cameroon		21 October 1993(*)	1 November 1994
Chile	31 March 1978	9 July 1982	1 November 1992
Czech Republic[a]	2 June 1993	23 June 1995	1 July 1996
Democratic Republic of the Congo	19 April 1979		
Denmark	18 April 1979		
Dominican Republic		28 September 2007(*)	1 October 2008
Ecuador	31 March 1978		
Egypt	31 March 1978	23 April 1979	1 November 1992
Finland	18 April 1979		
France	18 April 1979		
Gambia		7 February 1996(*)	1 March 1997
Georgia		21 March 1996(*)	1 April 1997
Germany	31 March 1978		
Ghana	31 March 1978		
Guinea		23 January 1991(*)	1 November 1992
Holy See	31 March 1978		
Hungary	23 April 1979	5 July 1984	1 November 1992
Jordan		10 May 2001(*)	1 June 2002
Kazakhstan		18 June 2008(*)	1 July 2009
Kenya		31 July 1989(*)	1 November 1992
Lebanon		4 April 1983(*)	1 November 1992
Lesotho		26 October 1989(*)	1 November 1992
Liberia		16 September 2005(*)	1 October 2006
Madagascar	31 March 1978		
Malawi		18 March 1991(*)	1 November 1992
Mexico	31 March 1978		
Morocco		12 June 1981(*)	1 November 1992
Nigeria		7 November 1988(*)	1 November 1992
Norway	18 April 1979		
Pakistan	8 March 1979		
Panama	31 March 1978		
Paraguay		19 July 2005(*)	1 August 2006
Philippines	14 June 1978		
Portugal	31 March 1978		
Romania		7 January 1982(*)	1 November 1992
Saint Vincent and the Grenadines		12 September 2000(*)	1 October 2001
Senegal	31 March 1978	17 March 1986	1 November 1992
Sierra Leone	15 August 1978	7 October 1988	1 November 1992
Singapore	31 March 1978		
Slovakia	28 May 1993		
Sweden	18 April 1979		
Syrian Arab Republic		16 October 2002(*)	1 November 2003
Tunisia		15 September 1980(*)	1 November 1992
Uganda		6 July 1979(*)	1 November 1992
United Republic of Tanzania		24 July 1979(*)	1 November 1992

State	*Signature*	*Ratification, Accession(*), Approval(†), Acceptance(‡) or Succession(§)*	*Entry into force*
United States of America	30 April 1979		
Venezuela (Bolivarian Republic of)	31 March 1978		
Zambia		7 October 1991(*)	1 November 1992

Parties: 34

[a] The Czech Republic declared that limits of carrier's liability in the territory of the Czech Republic adhered to the provision of article 6 of the Convention.

C. United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980)

State	*Signature*	*Ratification, Accession(*), Approval(†), Acceptance(‡) or Succession(§)*	*Entry into force*
Albania		13 May 2009(*)	1 June 2010
Argentina[a]		19 July 1983(*)	1 January 1988
Armenia[a,b]		2 December 2008(*)	1 January 2010
Australia		17 March 1988(*)	1 April 1989
Austria	11 April 1980	29 December 1987	1 January 1989
Azerbaijan		3 May 2016(*)	1 June 2017
Bahrain		25 September 2013	1 October 2014
Belarus[a]		9 October 1989(*)	1 November 1990
Belgium		31 October 1996(*)	1 November 1997
Benin		29 July 2011(*)	1 August 2012
Bosnia and Herzegovina		12 January 1994(§)	6 March 1992
Brazil		4 March 2013(*)	1 April 2014
Bulgaria		9 July 1990(*)	1 August 1991
Burundi		4 September 1998(*)	1 October 1999
Canada[c]		23 April 1991(*)	1 May 1992
Chile[a]	11 April 1980	7 February 1990	1 March 1991
China[a,b]	30 September 1981	11 December 1986(†)	1 January 1988
Colombia		10 July 2001(*)	1 August 2002
Congo		11 June 2014(*)	1 July 2015
Croatia		8 June 1998(§)	8 October 1991
Cuba		2 November 1994(*)	1 December 1995
Cyprus		7 March 2005(*)	1 April 2006
Czech Republic[b]		30 September 1993(§)	1 January 1993
Denmark[d]	26 May 1981	14 February 1989	1 March 1990
Dominican Republic		7 June 2010(*)	1 July 2011
Ecuador		27 January 1992(*)	1 February 1993
Egypt		6 December 1982(*)	1 January 1988
El Salvador		27 November 2006(*)	1 December 2007
Estonia		20 September 1993(*)	1 October 1994
Finland[d]	26 May 1981	15 December 1987	1 January 1989
France	27 August 1981	6 August 1982(†)	1 January 1988
Gabon		15 December 2004(*)	1 January 2006
Georgia		16 August 1994(*)	1 September 1995
Germany[e]	26 May 1981	21 December 1989	1 January 1991
Ghana	11 April 1980		
Greece		12 January 1998(*)	1 February 1999
Guinea		23 January 1991(*)	1 February 1992
Guyana		25 September 2014(*)	1 October 2015
Honduras		10 October 2002(*)	1 November 2003
Hungary	11 April 1980	16 June 1983	1 January 1988
Iceland[d]		10 May 2001(*)	1 June 2002
Iraq		5 March 1990(*)	1 April 1991

State	*Signature*	*Ratification, Accession(*), Approval(†), Acceptance(‡) or Succession(§)*	*Entry into force*
Israel		22 January 2002(*)	1 February 2003
Italy	30 September 1981	11 December 1986	1 January 1988
Japan		1 July 2008(*)	1 August 2009
Kyrgyzstan		11 May 1999(*)	1 June 2000
Latvia[a]		31 July 1997(*)	1 August 1998
Lebanon		21 November 2008(*)	1 December 2009
Lesotho	18 June 1981	18 June 1981	1 January 1988
Liberia		16 September 2005(*)	1 October 2006
Lithuania		18 January 1995(*)	1 February 1996
Luxembourg		30 January 1997(*)	1 February 1998
Madagascar		24 September 2014(*)	1 October 2015
Mauritania		20 August 1999(*)	1 September 2000
Mexico		29 December 1987(*)	1 January 1989
Mongolia		31 December 1997(*)	1 January 1999
Montenegro		23 October 2006(§)	3 June 2006
Netherlands	29 May 1981	13 December 1990(‡)	1 January 1992
New Zealand		22 September 1994(*)	1 October 1995
Norway[d]	26 May 1981	20 July 1988	1 August 1989
Paraguay[a]		13 January 2006(*)	1 February 2007
Peru		25 March 1999(*)	1 April 2000
Poland	28 September 1981	19 May 1995	1 June 1996
Republic of Korea		17 February 2004(*)	1 March 2005
Republic of Moldova		13 October 1994(*)	1 November 1995
Romania		22 May 1991(*)	1 June 1992
Russian Federation[a]		16 August 1990(*)	1 September 1991
Saint Vincent and the Grenadines[b]		12 September 2000(*)	1 October 2001
San Marino		22 February 2012(*)	1 March 2013
Serbia		12 March 2001(§)	27 April 1992
Singapore[b]	11 April 1980	16 February 1995	1 March 1996
Slovakia[b]		28 May 1993(§)	1 January 1993
Slovenia		7 January 1994(§)	25 June 1991
Spain		24 July 1990(*)	1 August 1991
Sweden[d]	26 May 1981	15 December 1987	1 January 1989
Switzerland		21 February 1990(*)	1 March 1991
Syrian Arab Republic		19 October 1982(*)	1 January 1988
The former Yugoslav Republic of Macedonia		22 November 2006(§)	17 November 1991
Turkey		7 July 2010(*)	1 August 2011
Uganda		12 February 1992(*)	1 March 1993
Ukraine[a]		3 January 1990(*)	1 February 1991
United States of America[b]	31 August 1981	11 December 1986	1 January 1988
Uruguay		25 January 1999(*)	1 February 2000
Uzbekistan		27 November 1996(*)	1 December 1997
Venezuela (Bolivarian Republic of)	!8 September 1981		
Viet Nam[a]		18 December 2015(*)	1 January 2017
Zambia		6 June 1986(*)	1 January 1988

Parties: 85

[a] This State declared, in accordance with articles 12 and 96 of the Convention, that any provision of article 11, article 29 or Part II of the Convention that allowed a contract of sale or its modification or termination by agreement or any offer, acceptance or other indication of intention to be made in any form other than in writing, would not apply where any party had his place of business in its territory.

[b] This State declared that it would not be bound by paragraph 1 (b) of article 1.

[c] Upon accession, Canada declared that, in accordance with article 93 of the Convention, the Convention would extend to Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland and Labrador, Nova Scotia, Ontario, Prince Edward Island and the Northwest

Territories. In a declaration received on 9 April 1992, Canada extended the application of the Convention to Quebec and Saskatchewan. In a notification received on 29 June 1992, Canada extended the application of the Convention to the Yukon Territory. In a notification received on 18 June 2003, Canada extended the application of the Convention to the Territory of Nunavut.

[d] Denmark, Finland, Iceland, Norway and Sweden declared that the Convention would not apply to contracts of sale or to their formation where the parties have their places of business in Denmark, Finland, Iceland, Norway or Sweden.

[e] Upon ratifying the Convention, Germany declared that it would not apply article 1, paragraph 1 (b) in respect of any State that had made a declaration that that State would not apply article 1, paragraph 1 (b).

D. United Nations Convention on International Bills of Exchange and International Promissory Notes (New York, 1988)

State	*Signature*	*Ratification, Accession(*), Approval(†), Acceptance(‡) or Succession(§)*
Canada	7 December 1989	
Gabon		15 December 2004(*)
Guinea		23 January 1991(*)
Honduras		8 August 2001(*)
Liberia		16 September 2005(*)
Mexico		11 September 1992(*)
Russian Federation	30 June 1990	
United States of America	29 June 1990	

Parties: 5

E. United Nations Convention on the Liability of Operators of Transport Terminals in International Trade (Vienna, 1991)

State	*Signature*	*Ratification, Accession(*), Approval(†), Acceptance(‡) or Succession(§)*
Egypt		6 April 1999(*)
France	15 October 1991	
Gabon		15 December 2004(*)
Georgia		21 March 1996(*)
Mexico	19 April 1991	
Paraguay		19 July 2005(*)
Philippines	19 April 1991	
Spain	19 April 1991	
United States of America	30 April 1992	

Parties: 4

F. United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (New York, 1995)

State	*Signature*	*Ratification, Accession(*), Approval(†), Acceptance(‡) or Succession(§)*	*Entry into force*
Belarus	3 December 1996	23 January 2002	1 February 2003
Ecuador		18 June 1997(*)	1 January 2000
El Salvador	5 September 1997	31 July 1998	1 January 2000
Gabon		15 December 2004(*)	1 January 2006
Kuwait		28 October 1998(*)	1 January 2000
Liberia		16 September 2005(*)	1 October 2006
Panama	9 July 1997	21 May 1998	1 January 2000

State	Signature	Ratification, Accession(*), Approval(†), Acceptance(‡) or Succession(§)	Entry into force
Tunisia		8 December 1998(*)	1 January 2000
United States of America	11 December 1997		

Parties: 8

G. United Nations Convention on the Assignment of Receivables in International Trade (New York, 2001)

State	Signature	Ratification, Accession(*), Approval(†), Acceptance(‡) or Succession(§)
Liberia		16 September 2005(*)
Luxembourg[a]	12 June 2002	
Madagascar	24 September 2003	
United States of America	30 December 2003	

Party: 1

It should be noted that the principles of the Convention were incorporated into the UNCITRAL Legislative Guide on Secured Transactions (2007).[27] Thus, States that substantially implement the recommendations of the Guide have, at the same time, introduced the principles of the Convention into their domestic law.

[a] Upon signature, Luxembourg lodged the following declaration:
"Pursuant to article 39 of the Convention, the Grand Duchy of Luxembourg declares that it does not wish to be bound by chapter V, which contains autonomous conflict-of-laws rules that allow too wide an application to laws other than those of the assignor and that moreover are difficult to reconcile with the Rome Convention. The Grand Duchy of Luxembourg, pursuant to article 42, paragraph 1 (c), of the Convention, will be bound by the priority rules set forth in section III of the annex, namely those based on the time of the contract of assignment."

H. United Nations Convention on the Use of Electronic Communications in International Contracts (New York, 2005)

State	Signature	Ratification, Accession(*), Approval(†), Acceptance(‡) or Succession(§)	Entry into force
Central African Republic	27 February 2006		
China	6 July 2006		
Colombia	27 September 2007		
Congo		28 January 2014(*)	1 August 2014
Dominican Republic		2 August 2012(*)	1 March 2013
Honduras	16 January 2008	15 June 2010	1 March 2013
Iran (Islamic Republic of)	26 September 2007		
Lebanon	22 May 2006		
Madagascar	19 September 2006		
Montenegro	27 September 2007	23 September 2014	1 April 2015
Panama	25 September 2007		
Paraguay	26 March 2007		
Philippines	25 September 2007		
Republic of Korea	15 January 2008		
Russian Federation[b]	25 April 2007	6 January 2014(‡)	1 August 2014
Saudi Arabia	12 November 2007		
Senegal	7 April 2006		

[27] United Nations publication, Sales No. E.09.V.12.

State	*Signature*	*Ratification, Accession(*), Approval(†), Acceptance(‡) or Succession(§)*	*Entry into force*
Sierra Leone	21 September 2006		
Singapore[a]	6 July 2006	7 July 2010	1 March 2013
Sri Lanka[c]	6 July 2006	7 July 2015	1 February 2016

Parties: 7

Information on jurisdictions enacting at the national level substantive provisions of the Convention is included in the status information for the UNCITRAL Model Law on Electronic Commerce (1996) (see part II, sect. C).

[a] Upon ratification, Singapore declared: The Convention shall not apply to electronic communications relating to any contract for the sale or other disposition of immovable property, or any interest in such property. The Convention shall also not apply in respect of (i) the creation or execution of a will; or (ii) the creation, performance or enforcement of an indenture, declaration of trust or power of attorney, that may be contracted for in any contract governed by the Convention.

[b] Upon acceptance, the Russian Federation declared:

1. In accordance with article 19, paragraph 1, of the Convention, the Russian Federation will apply the Convention when the parties to the international contract have agreed that it applies;

2. In accordance with article 19, paragraph 2, of the Convention, the Russian Federation will not apply the Convention to transactions for which a notarized form or State registration is required under Russian law or to transactions for the sale of goods whose transfer across the Customs Union border is either prohibited or restricted;

3. The Russian Federation understands the international contracts covered by the Convention to mean civil law contracts involving foreign citizens or legal entities, or a foreign element.

[c] Upon ratification, Sri Lanka declared: In accordance with Articles 21 and 19 (para. 2) of the United Nations Convention on the Use of Electronic Communications in International Contracts, the Convention shall not apply to electronic communications or transactions specifically excluded under Section 23 of the Electronic Transactions Act No. 19 of 2006, of Sri Lanka.

I. United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (New York, 2008)

State	*Signature*	*Ratification, Accession(*), Approval(†), Acceptance(‡) or Succession(§)*
Armenia	29 September 2009	
Cameroon	29 September 2009	
Congo	23 September 2009	28 January 2014
Democratic Republic of the Congo	23 September 2010	
Denmark	23 September 2009	
France	23 September 2009	
Gabon	23 September 2009	
Ghana	23 September 2009	
Greece	23 September 2009	
Guinea	23 September 2009	
Guinea-Bissau	24 September 2013	
Luxembourg	31 August 2010	
Madagascar	25 September 2009	
Mali	26 October 2009	
Netherlands	23 September 2009	
Niger	22 October 2009	
Nigeria	23 September 2009	
Norway	23 September 2009	
Poland	23 September 2009	
Senegal	23 September 2009	
Spain	23 September 2009	19 January 2011

State	*Signature*	*Ratification, Accession(*), Approval(†), Acceptance(‡) or Succession(§)*
Sweden	20 July 2011	
Switzerland	23 September 2009	
Togo	23 September 2009	17 July 2012
United States of America	23 September 2009	

Parties: 3

J. United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (New York, 2014)

State	*Signature*	*Ratification, Accession(*), Approval(†), Acceptance(‡) or Succession(§)*
Belgium	15 September 2015	
Canada	17 March 2015	
Congo	30 September 2015	
Finland	17 March 2015	
France	17 March 2015	
Gabon	29 September 2015	
Germany	17 March 2015	
Italy	19 May 2015	
Luxembourg	15 September 2015	
Madagascar	1 October 2016	
Mauritius	17 March 2015	5 June 2015
Sweden	17 March 2015	
Switzerland	27 March 2015	
Syrian Arab Republic	24 March 2015	
United Kingdom of Great Britain and Northern Ireland	17 March 2015	
United States of America	17 March 2015	

Parties: 1

K. Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)

State	*Signature*	*Ratification, Accession(*), Approval(†), Acceptance(‡) or Succession(§)*	*Entry into force*
Afghanistan[a,c]		30 November 2004(*)	28 February 2005
Albania		27 June 2001(*)	25 September 2001
Algeria[a,c]		7 February 1989(*)	8 May 1989
Andorra		19 June 2015	17 September 2015
Antigua and Barbuda[a,c]		2 February 1989(*)	3 May 1989
Argentina[a,c]	26 August 1958	14 March 1989	12 June 1989
Armenia[a,c]		29 December 1997(*)	29 March 1998
Australia		26 March 1975(*)	24 June 1975
Austria		2 May 1961(*)	31 July 1961
Azerbaijan		29 February 2000(*)	29 May 2000
Bahamas		20 December 2006(*)	20 March 2007
Bahrain[a,c]		6 April 1988(*)	5 July 1988
Bangladesh		6 May 1992(*)	4 August 1992
Barbados[a,c]		16 March 1993(*)	14 June 1993

State	*Signature*	*Ratification, Accession(*), Approval(†), Acceptance(‡) or Succession(§)*	*Entry into force*
Belarus[b]	29 December 1958	15 November 1960	13 February 1961
Belgium[a]	10 June 1958	18 August 1975	16 November 1975
Benin		16 May 1974(*)	14 August 1974
Bhutan[a,c]		25 September 2014(*)	24 December 2014
Bolivia (Plurinational State of)		28 April 1995(*)	27 July 1995
Bosnia and Herzegovina[a,c,i]		1 September 1993(§)	6 March 1992
Botswana[a,c]		20 December 1971(*)	19 March 1972
Brazil		7 June 2002(*)	5 September 2002
Brunei Darussalam[a]		25 July 1996(*)	23 October 1996
Bulgaria[a,b]	17 December 1958	10 October 1961	8 January 1962
Burkina Faso		23 March 1987(*)	21 June 1987
Burundi[c]		23 June 2014(*)	21 September 2014
Cambodia		5 January 1960(*)	4 April 1960
Cameroon		19 February 1988(*)	19 May 1988
Canada[d]		12 May 1986(*)	10 August 1986
Central African Republic[a,c]		15 October 1962(*)	13 January 1963
Chile		4 September 1975(*)	3 December 1975
China[a,c,h]		22 January 1987(*)	22 April 1987
Colombia		25 September 1979(*)	24 December 1979
Comoros		28 April 2015	27 July 2015
Cook Islands		12 January 2009(*)	12 April 2009
Costa Rica	10 June 1958	26 October 1987	24 January 1988
Côte d'Ivoire		1 February 1991(*)	2 May 1991
Croatia[a,c,i]		26 July 1993(§)	8 October 1991
Cuba[a,c]		30 December 1974(*)	30 March 1975
Cyprus[a,c]		29 December 1980(*)	29 March 1981
Czech Republic[a,b]		30 September 1993(§)	1 January 1993
Democratic Republic of the Congo		5 November 2014(*)	3 February 2015
Denmark[a,c,f]		22 December 1972(*)	22 March 1973
Djibouti[a,c]		14 June 1983(§)	27 June 1977
Dominica		28 October 1988(*)	26 January 1989
Dominican Republic		11 April 2002(*)	10 July 2002
Ecuador[a,c]	17 December 1958	3 January 1962	3 April 1962
Egypt		9 March 1959(*)	7 June 1959
El Salvador	10 June 1958	26 February 1998	27 May 1998
Estonia		30 August 1993(*)	28 November 1993
Fiji		27 September 2010(*)	26 December 2010
Finland	29 December 1958	19 January 1962	19 April 1962
France[a]	25 November 1958	26 June 1959	24 September 1959
Gabon		15 December 2006(*)	15 March 2007
Georgia		2 June 1994(*)	31 August 1994
Germany	10 June 1958	30 June 1961	28 September 1961
Ghana		9 April 1968(*)	8 July 1968
Greece[a,c]		16 July 1962(*)	14 October 1962
Guatemala[a,c]		21 March 1984(*)	19 June 1984
Guinea		23 January 1991(*)	23 April 1991
Guyana		25 September 2014(*)	24 December 2014
Haiti		5 December 1983(*)	4 March 1984
Holy See[a,c]		14 May 1975(*)	12 August 1975
Honduras		3 October 2000(*)	1 January 2001

State	Signature	Ratification, Accession(*), Approval(†), Acceptance(‡) or Succession(§)	Entry into force
Hungary[a,c]		5 March 1962(*)	3 June 1962
Iceland		24 January 2002(*)	24 April 2002
India[a,c]	10 June 1958	13 July 1960	11 October 1960
Indonesia[a,c]		7 October 1981(*)	5 January 1982
Iran (Islamic Republic of)[a,c]		15 October 2001(*)	13 January 2002
Ireland[a]		12 May 1981(*)	10 August 1981
Israel	10 June 1958	5 January 1959	7 June 1959
Italy		31 January 1969(*)	1 May 1969
Jamaica[a,c]		10 July 2002(*)	8 October 2002
Japan[a]		20 June 1961(*)	18 September 1961
Jordan	10 June 1958	15 November 1979	13 February 1980
Kazakhstan		20 November 1995(*)	18 February 1996
Kenya[a]		10 February 1989(*)	11 May 1989
Kuwait[a]		28 April 1978(*)	27 July 1978
Kyrgyzstan		18 December 1996(*)	18 March 1997
Lao People's Democratic Republic		17 June 1998(*)	15 September 1998
Latvia		14 April 1992(*)	13 July 1992
Lebanon[a]		11 August 1998(*)	9 November 1998
Lesotho		13 June 1989(*)	11 September 1989
Liberia		16 September 2005(*)	15 December 2005
Liechtenstein[a]		7 July 2011(*)	5 October 2011
Lithuania[b]		14 March 1995(*)	12 June 1995
Luxembourg[a]	11 November 1958	9 September 1983	8 December 1983
Madagascar[a,c]		16 July 1962(*)	14 October 1962
Malaysia[a,c]		5 November 1985(*)	3 February 1986
Mali		8 September 1994(*)	7 December 1994
Malta[a,i]		22 June 2000(*)	20 September 2000
Marshall Islands		21 December 2006(*)	21 March 2007
Mauritania		30 January 1997(*)	30 April 1997
Mauritius		19 June 1996(*)	17 September 1996
Mexico		14 April 1971(*)	13 July 1971
Monaco[a,c]	31 December 1958	2 June 1982	31 August 1982
Mongolia[a,c]		24 October 1994(*)	22 January 1995
Montenegro[a,c,i]		23 October 2006(§)	3 June 2006
Morocco[a]		12 February 1959(*)	7 June 1959
Mozambique[a]		11 June 1998(*)	9 September 1998
Myanmar		16 April 2013(*)	15 July 2013
Nepal[a,c]		4 March 1998(*)	2 June 1998
Netherlands[a,e]	10 June 1958	24 April 1964	23 July 1964
New Zealand[a]		6 January 1983(*)	6 April 1983
Nicaragua		24 September 2003(*)	23 December 2003
Niger		14 October 1964(*)	12 January 1965
Nigeria[a,c]		17 March 1970(*)	15 June 1970
Norway[a,j]		14 March 1961(*)	12 June 1961
Oman		25 February 1999(*)	26 May 1999
Pakistan[a]	30 December 1958	14 July 2005	12 October 2005
Panama		10 October 1984(*)	8 January 1985
Paraguay		8 October 1997(*)	6 January 1998
Peru		7 July 1988(*)	5 October 1988
Philippines[a,c]	10 June 1958	6 July 1967	4 October 1967
Poland[a,c]	10 June 1958	3 October 1961	1 January 1962
Portugal[a]		18 October 1994(*)	16 January 1995
Qatar		30 December 2002(*)	30 March 2003

State	*Signature*	*Ratification, Accession(*), Approval(†), Acceptance(‡) or Succession(§)*	*Entry into force*
Republic of Korea[a,c]		8 February 1973(*)	9 May 1973
Republic of Moldova[a,i]		18 September 1998(*)	17 December 1998
Romania[a,b,c]		13 September 1961(*)	12 December 1961
Russian Federation[b]	29 December 1958	24 August 1960	22 November 1960
Rwanda		31 October 2008	29 January 2009
Saint Vincent and the Grenadines[a,c]		12 September 2000(*)	11 December 2000
San Marino		17 May 1979(*)	15 August 1979
Sao Tome and Principe		20 November 2012(*)	18 February 2013
Saudi Arabia[a]		19 April 1994(*)	18 July 1994
Senegal		17 October 1994(*)	15 January 1995
Serbia[a,c,i]		12 March 2001(§)	27 April 1992
Singapore[a]		21 August 1986(*)	19 November 1986
Slovakia[a,b]		28 May 1993(§)	1 January 1993
Slovenia[i]		6 July 1992(§)	25 June 1991
South Africa		3 May 1976(*)	1 August 1976
Spain		12 May 1977(*)	10 August 1977
Sri Lanka	30 December 1958	9 April 1962	8 July 1962
State of Palestine		2 January 2015(*)	2 April 2015
Sweden	23 December 1958	28 January 1972	27 April 1972
Switzerland	29 December 1958	1 June 1965	30 August 1965
Syrian Arab Republic		9 March 1959(*)	7 June 1959
Tajikistan[a,i,j]		14 August 2012(*)	12 November 2012
Thailand		21 December 1959(*)	20 March 1960
The former Yugoslav Republic of Macedonia[c,i]		10 March 1994(§)	17 November 1991
Trinidad and Tobago[a,c]		14 February 1966(*)	15 May 1966
Tunisia[a,c]		17 July 1967(*)	15 October 1967
Turkey[a,c]		2 July 1992(*)	30 September 1992
Uganda[a]		12 February 1992(*)	12 May 1992
Ukraine[b]	29 December 1958	10 October 1960	8 January 1961
United Arab Emirates		21 August 2006(*)	19 November 2006
United Kingdom of Great Britain and Northern Ireland[a,g]		24 September 1975(*)	23 December 1975
United Republic of Tanzania[a]		13 October 1964(*)	11 January 1965
United States of America[a,c]		30 September 1970(*)	29 December 1970
Uruguay		30 March 1983(*)	28 June 1983
Uzbekistan		7 February 1996(*)	7 May 1996
Venezuela (Bolivarian Republic of)[a,c]		8 February 1995(*)	9 May 1995
Viet Nam[a,b,c]		12 September 1995(*)	11 December 1995
Zambia		14 March 2002(*)	12 June 2002
Zimbabwe		29 September 1994(*)	28 December 1994

Parties: 156

Declarations or other notifications pursuant to article I(3) and article X(1)

[a] This State will apply the Convention only to recognition and enforcement of awards made in the territory of another contracting State.

[b] With regard to awards made in the territory of non-contracting States, this State will apply the Convention only to the extent to which those States grant reciprocal treatment.

[c] This State will apply the Convention only to differences arising out of legal relationships, whether contractual or not, that are considered commercial under the national law.

[d] Canada declared that it would apply the Convention only to differences arising out of legal relationships, whether contractual or not, that were considered commercial under the laws of Canada, except in the case of the Province of Quebec, where the law did not provide for such limitation.

[e] On 24 April 1964, the Netherlands declared that the Convention shall apply to the Netherlands Antilles.

[f] On 10 February 1976, Denmark declared that the Convention shall apply to the Faroe Islands and Greenland.

[g] On 24 February 2014, the United Kingdom submitted a notification to extend territorial application of the Convention to the British Virgin Islands. For the following territories, the United Kingdom has submitted notifications extending territorial application and declaring that the Convention shall apply only to the recognition and enforcement of awards made in the territory of another Contracting State: Gibraltar (24 September 1975), Isle of Man (22 February 1979), Bermuda (14 November 1979), Cayman Islands (26 November 1980), Guernsey (19 April 1985), Bailiwick of Jersey (28 May 2002).

[h] Upon resumption of sovereignty over Hong Kong on 1 July 1997, the Government of China extended the territorial application of the Convention to Hong Kong, Special Administrative Region of China, subject to the statement originally made by China upon accession to the Convention. On 19 July 2005, China declared that the Convention shall apply to the Macao Special Administrative Region of China, subject to the statement originally made by China upon accession to the Convention.

Reservations or other notifications

[i] This State formulated a reservation with regards to retroactive application of the Convention.

[j] This State formulated a reservation with regards to the application of the Convention in cases concerning immovable property.

II. Enactments of model laws[28]

A. UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006

8. Legislation based on the Model Law has been adopted in 72 States in a total of 102 jurisdictions:

Armenia (2006); Australia (2010[a,c]), in New South Wales (2010[a]), Northern Territory (2011[a]), Queensland (2013[a]), South Australia (2011[a]), Tasmania (2011[a]), Victoria (2011[a]), and Western Australia (2012[a]); Austria (2006); Azerbaijan (1999); Bahrain (2015); Bangladesh (2001); Belarus (1999); Belgium (2013[a]); Bhutan (2013[a]); Brunei Darussalam (2009[a]); Bulgaria (2002[c]); Cambodia (2006); Canada (1986), in Alberta (1986), British Columbia (1986), Manitoba (1986), New Brunswick (1986), Newfoundland and Labrador (1986), Northwest Territories (1986), Nova Scotia (1986), Nunavut (1999), Ontario (1987), Prince Edward Island (1986), Quebec (1986), Saskatchewan (1988), and Yukon (1986); Chile (2004); China, in Hong Kong, China (2010[a,c]) and Macao, China (1998); Costa Rica (2011[a]); Croatia (2001); Cyprus (1987); Denmark (2005); Dominican Republic (2008); Egypt (1994); Estonia (2006); Georgia (2009[a]); Germany (1998); Greece (1999); Guatemala (1995); Honduras (2000); Hungary (1994); India (1996); Iran (Islamic Republic of) (1997); Ireland (2010[a,c]); Japan (2003); Jordan (2001); Kenya (1995); Lithuania (2012[a,c]); Madagascar (1998); Malaysia (2005); Maldives (2013); Malta (1996); Mauritius (2008[a]); Mexico (1993); Montenegro (2015); Myanmar (2016); New Zealand (2007[a,c]); Nicaragua (2005); Nigeria (1990); Norway (2004); Oman (1997); Paraguay (2002); Peru (2008[a,c]); Philippines (2004); Poland (2005); Republic of Korea (1999); Russian Federation (1993); Rwanda (2008[a]); Serbia (2006); Singapore (1994[d]); Slovakia (2014); Slovenia (2008[a]);

[28] Since States enacting legislation based upon a model law have the flexibility to depart from the text, these lists are only indicative of the enactments that were made known to the UNCITRAL Secretariat. The legislation of each State should be considered in order to identify the exact nature of any possible deviation from the model in the legislative text that was adopted. The year of enactment provided in this note 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. In addition, there may be subsequent amending or repealing legislation that has not been made known to the UNCITRAL Secretariat.

Spain (2003); Sri Lanka (1995); Thailand (2002); the former Yugoslav Republic of Macedonia (2006); Tunisia (1993); Turkey (2001); Uganda (2000); Ukraine (1994); United Kingdom of Great Britain and Northern Ireland, in Bermuda (1993[b]), British Virgin Islands (2013[a,b]), and Scotland (1990); United States of America, in California (1988), Connecticut (1989), Florida (2010[a]), Georgia (2012), Illinois (1998), Louisiana (2006), Oregon (1991), and Texas (1989); Venezuela (Bolivarian Republic of) (1998); Zambia (2000); and Zimbabwe (1996).

[a] Indicates legislation based on the text of the UNCITRAL Model Law on International Commercial Arbitration with amendments as adopted in 2006.
[b] Overseas territory of the United Kingdom of Great Britain and Northern Ireland.
[c] The legislation amends previous legislation based on the Model Law.
[d] The legislation has been further amended in 2001, 2003, 2005 and 2009.

B. UNCITRAL Model Law on International Credit Transfers (1992)

9. A directive of the European Parliament and of the Council of the European Union based on the principles of the UNCITRAL Model Law on International Credit Transfers was issued on 27 January 1997.

C. UNCITRAL Model Law on Electronic Commerce (1996)

10. Legislation based on or influenced by the Model Law has been adopted in 67 States in a total of 143 jurisdictions:

Antigua and Barbuda (2006[d]); Australia (2011[e,h]), in Australian Capital Territory (2012[e,h]), New South Wales (2010[e,h]), Northern Territory (2011[e, h]), Queensland (2013[e,h]), South Australia (2011[e,h]), Tasmania (2010[e,h]), Victoria (2011[e,h]), and Western Australia (2011[e,h]); Bahamas (2003); Bahrain (2002); Bangladesh (2006[a,d]); Barbados (2001); Belize (2003); Bhutan (2006); Brunei Darussalam (2000); Canada, in Alberta (2001[b]), British Columbia (2001[b]), Manitoba (2000[b]), New Brunswick (2001[b]), Newfoundland and Labrador (2001[b]), Northwest Territories (2011[b]), Nova Scotia (2000[b]), Nunavut (2004[b]), Ontario (2001[b]), Prince Edward Island (2001[b]), Quebec (2001[d]), Saskatchewan (2000[b]), and Yukon (2000[b]); Cape Verde (2003); China (2004), in Hong Kong, China (2000), and Macao, China (2005[d, h]); Colombia (1999[a]); Dominica (2013[e]); Dominican Republic (2002[a]); Ecuador (2002[a]); El Salvador (2015[d]); Fiji (2008); France (2000); Gambia (2009[e]); Ghana (2008[e]); Grenada (2008); Guatemala (2008[e]); Honduras (2015); India (2000[a]); Iran (Islamic Republic of) (2004); Ireland (2000); Jamaica (2006); Jordan (2001); Kuwait (2014[a,d]); Lao People's Democratic Republic (2012[a]); Liberia (2002[a]); Madagascar (2014[e]); Malaysia (2006); Mauritius (2000); Mexico (2000); New Zealand (2002); Oman (2008[a]); Pakistan (2002); Panama (2001[a]); Paraguay (2010); Philippines (2000); Qatar (2010[e]); Republic of Korea (1999); Rwanda (2010[e]); Saint Kitts and Nevis (2011[e]); Saint Lucia (2011); Saint Vincent and the Grenadines (2007); Samoa (2008); San Marino (2013[e]); Saudi Arabia (2007); Seychelles (2001[a]); Singapore (2010[e,h]); Slovenia (2000); South Africa (2002[a]); Sri Lanka (2006); Syrian Arab Republic (2014[a,d]); Thailand (2002); Trinidad and Tobago (2011[e]); United Arab Emirates (2006); United Kingdom of Great Britain and Northern Ireland, in Bailiwick of Guernsey (2000[f]), Bailiwick of Jersey (2000[f]), Bermuda (1999[g]), Cayman Islands (2000[g]), Isle of Man (2000[f]), Montserrat (2009[g]), and the Turks and Caicos Islands (2000[g]); United Republic of Tanzania (2015[e]); United States of America, in Alabama (2001[c]), Alaska (2004[c]), Arizona (2000[c]), Arkansas (2001[c]), California (1999[c]), Colorado (2002[c]), Connecticut (2002[c]), Delaware (2000[c]), District of Columbia (2001[c]), Florida (2000[c]), Georgia (2009[c]), Hawaii (2000[c]), Idaho (2000[c]), Illinois (1998), Indiana (2000[c]), Iowa (2000[c]), Kansas (2000[c]), Kentucky (2000[c]), Louisiana (2001[c]), Maine (2000[c]), Maryland (2000[c]), Massachusetts (2003[c]), Michigan (2000[c]), Minnesota (2000[c]), Mississippi (2001[c]), Missouri (2003[c]), Montana (2001[c]), Nebraska (2000[c]), Nevada (2001[c]), New Hampshire (2001[c]), New Jersey (2000[c]), New Mexico (2001[c]), North Carolina (2000[c]), North Dakota (2001[c]), Ohio (2000[c]), Oklahoma (2000[c]), Oregon (2001[c]), Pennsylvania (1999[c]), Rhode Island (2000[c]), South Carolina (2004[c]), South Dakota (2000[c]), Tennessee (2001[c]), Texas (2001[c]), Utah (2000[c]), Vermont (2003[c]), Virginia (2000[c]), West Virginia (2001[c]), Wisconsin

(2004[c]), and Wyoming (2001[c]); Vanuatu (2000); Venezuela (Bolivarian Republic of) (2001); Viet Nam (2005[e]); and Zambia (2009[e]).

[a] Except for the provisions on certification and electronic signatures.
[b] The legislation enacts uniform legislation influenced by the Model Law and the principles on which it is based, namely, the Uniform Electronic Commerce Act, adopted in 1999 by the Uniform Law Conference of Canada.
[c] The legislation enacts uniform legislation influenced by the Model Law and the principles on which it is based, namely, the Uniform Electronic Transactions Act, adopted in 1999 by the National Conference of Commissioners on Uniform State Law.
[d] The legislation is influenced by the Model Law and the principles on which it is based.
[e] The legislation also includes substantive provisions of the United Nations Convention on the Use of Electronic Communications in International Contracts, the status of which can be found in part I, sect. H.
[f] Crown Dependency of the United Kingdom of Great Britain and Northern Ireland.
[g] Overseas territory of the United Kingdom of Great Britain and Northern Ireland.
[h] The legislation amends previous legislation based on the Model Law.

D. UNCITRAL Model Law on Cross-Border Insolvency (1997)

11. Legislation based on the Model Law has been adopted in 41 States in a total of 43 jurisdictions:

Australia (2008); Benin (2015[b]); Burkina Faso (2015[b]); Cameroon (2015[b]); Canada (2005); Central African Republic (2015[b]); Chad (2015[b]); Chile (2014); Colombia (2006); Comoros (2015[b]); Congo (2015[b]); Côte d'Ivoire (2015[b]); Democratic Republic of the Congo (2015[b]); Equatorial Guinea (2015[b]); Gabon (2015[b]); Greece (2010); Guinea (2015[b]); Guinea-Bissau (2015[b]); Japan (2000); Kenya (2015); Malawi (2015); Mali (2015[b]); Mauritius (2009); Mexico (2000); Montenegro (2002); New Zealand (2006); Niger (2015[b]); Philippines (2010); Poland (2003); Republic of Korea (2006); Romania (2002); Senegal (2015[b]); Serbia (2004); Seychelles (2013); Slovenia (2007); South Africa (2000); Togo (2015[b]); Uganda (2011); United Kingdom of Great Britain and Northern Ireland, in Great Britain (2006), Gibraltar (2014[a]), and the British Virgin Islands (2003[a]); United States of America (2005); and Vanuatu (2013).

[a] Overseas territory of the United Kingdom of Great Britain and Northern Ireland.
[b] Enacting the *Acte uniforme portant organisation des procédures collectives d'apurement du passif* (OHADA), adopted on 10 September 2015 at Grand-Bassam, Côte d'Ivoire.

E. UNCITRAL Model Law on Electronic Signatures (2001)

12. Legislation based on or influenced by the Model Law has been adopted in 32 States:

Antigua and Barbuda (2006); Barbados (2001); Bhutan (2006); Cape Verde (2003); China (2004); Colombia (2012); Costa Rica (2005[a]); Gambia (2009); Ghana (2008); Grenada (2008); Guatemala (2008); Honduras (2013); India (2009[a]); Jamaica (2006); Madagascar (2014); Mexico (2003); Nicaragua (2010[a]); Oman (2008[a]); Paraguay (2010); Qatar (2010); Rwanda (2010); Saint Kitts and Nevis (2011); Saint Lucia (2011); Saint Vincent and the Grenadines (2007); San Marino (2013); Saudi Arabia (2007[a]); Thailand (2001); Trinidad and Tobago (2011); United Arab Emirates (2006); United Kingdom of Great Britain and Northern Ireland, in Montserrat (2009[b]); Viet Nam (2005); and Zambia (2009).

[a] The legislation is influenced by the Model Law and the principles on which it is based.
[b] Overseas territory of the United Kingdom of Great Britain and Northern Ireland.

F. UNCITRAL Model Law on International Commercial Conciliation (2002)

13. Legislation based on or influenced by the Model Law has been adopted in 15 States in a total of 27 jurisdictions:

Albania (2011[d]); Belgium (2005); Bhutan (2013); Canada, in Nova Scotia (2005[b]), and Ontario (2010[b]); Croatia (2003); France (2011[c]); Honduras (2000); Hungary (2002); Luxembourg (2012); Montenegro (2005[c]); Nicaragua (2005); Slovenia (2008); Switzerland

(2008[c]); the former Yugoslav Republic of Macedonia (2009); and United States of America, in District of Columbia (2006[a]), Hawaii (2013[a]); Idaho (2008[a]), Illinois (2004[a]), Iowa (2005[a]), Nebraska (2003[a]), New Jersey (2004[a]), Ohio (2005[a]), South Dakota (2007[a]), Utah (2006[a]), Vermont (2005[a]), and Washington (2005[a]).

[a] The legislation enacts uniform legislation influenced by the Model Law and the principles on which it is based, namely, the Uniform Mediation Act, adopted in 2001 (amended in 2003) by the National Conference of Commissioners on Uniform State Laws.

[b] The legislation enacts uniform legislation influenced by the Model Law and the principles on which it is based, namely, the Uniform [International] Commercial Mediation Act, adopted in 2005 by the Uniform Law Conference of Canada.

[c] The legislation is influenced by the Model Law and the principles on which it is based.

[d] The legislation amends previous legislation based on the Model Law.

G. UNCITRAL Model Law on Public Procurement (2011)[29]

14. The UNCITRAL Model Law on Public Procurement as adopted in 2011 forms the basis of or is reflected in the public procurement laws and regulations in the following States. These States have used the Model Law and accompanying Guide to Enactment in reforming their public procurement law and systems, though the extent to which the resulting regulatory framework incorporates the provisions of the Model Law varies, as that framework also reflects legal traditions, domestic policy and other objectives:

Afghanistan, Armenia, Egypt, Ghana, India, Jamaica, Kazakhstan, Kenya, Kyrgyzstan, Mexico, Myanmar, Russian Federation, Rwanda, Tajikistan, Trinidad and Tobago, Tunisia, Uganda, United Republic of Tanzania, Uzbekistan and Zambia.

15. The following organizations use the Model Law and accompanying Guide to Enactment as a benchmark for public procurement law reform in countries of their operation:

African Development Bank, Asian Development Bank, European Bank for Reconstruction and Development, Inter-American Development Bank, Organization for Economic Cooperation and Development and the World Bank.

III. Status of other UNCITRAL texts

A. UNCITRAL Arbitration Rules

16. The following table presents a non-exhaustive list of arbitration centres which (i) have institutional rules based on, or inspired by, the UNCITRAL Arbitration Rules, (ii) administer arbitral proceedings or provide administrative services under the Rules, and/or (iii) act as an appointing authority under the Rules.[30]

[29] The UNCITRAL Model Law on Public Procurement (2011) is a revision of the UNCITRAL Model Law on Procurement of Goods, Construction and Services (1994), *Official Records of the General Assembly, Forty-ninth Session, Supplement No. 17* and corrigendum (A/49/17 and Corr.1), annex I. Historical status information on the UNCITRAL Model Law on Procurement of Goods, Construction and Services (1994) is available on the UNCITRAL website, www.uncitral.org/uncitral/uncitral_texts/procurement_infrastructure.html.

[30] Arbitration centres wishing to provide updated information for this table are invited to contact the Secretariat. The contents of this table are only updated on the UNCITRAL website on an annual basis.

State	*Name of the arbitration centre*	*With institutional Rules based on or inspired by the UNCITRAL Arbitration Rules*	*Administering arbitral proceedings under the UNCITRAL Arbitration Rules or providing some administrative services*	*Acting as appointing authority under the UNCITRAL Arbitration Rules*
Australia	Australian Centre for International Commercial Arbitration (ACICA)			x
	Institute of Arbitrators & Mediators Australia (IAMA)	x	x	x
Austria	Vienna International Arbitration Centre (VIAC)		x	x
Bahrain	Bahrain Chamber for Dispute Resolution (BCDR-AAA)			x
Belgium	Belgian Centre for Arbitration and Mediation (CEPANI)	x		x
Brazil	Centro de Arbitragem e Mediação, Câmara de Comércio Brasil-Canadá (CCBC)			x
	Tribunal Arbitral de São Paulo	x		x
Canada	British Columbia International Commercial Arbitration Centre (BCICAC)			x
China	China International Economic and Trade Arbitration Commission (CIETAC)		x	x
Hong Kong, China	Hong Kong International Arbitration Centre (HKIAC)	x	x	x
	CIETAC Hong Kong Arbitration Centre		x	x
Cyprus	Cyprus Arbitration and Mediation Centre (CAMC)	x		
Czech Republic	Arbitration Court attached to the Economic Chamber of the Czech Republic and Agricultural Chamber of Czech Republic (CAC)		x	x
Denmark	Danish Institute of Arbitration	x	x	x
Egypt	Cairo Regional Centre for International Commercial Arbitration (CRCICA)	x	x	x
Finland	Arbitration Institute of the Finland Chamber of Commerce (FAI)			x
France	International Chamber of Commerce, International Court of Arbitration (ICC)			x
Germany	German Institution of Arbitration (DIS)		x	x
India	Indian Institute of Arbitration and Mediation (IIAM)	x	x	x
	Bangalore International Mediation Arbitration & Conciliation Centre (BIMACC)		x	x
Indonesia	Indonesian National Board of Arbitration (BANI)		x	x
Iran (Islamic Republic of)	Tehran Regional Arbitration Centre (TRAC)	x	x	x
Italy	Chamber of Arbitration of Milan (Camera Arbitrale Milano) of the Chamber of Commerce of Milan			x
Japan	Japan Commercial Arbitration Association (JCAA)		x	x
Malaysia	Kuala Lumpur Regional Centre for Arbitration (KLRCA)	x	x	x
Mauritius	LCIA-Mauritius International Arbitration Centre (LCIA-MIAC)			x

State	*Name of the arbitration centre*	*With institutional Rules based on or inspired by the UNCITRAL Arbitration Rules*	*Administering arbitral proceedings under the UNCITRAL Arbitration Rules or providing some administrative services*	*Acting as appointing authority under the UNCITRAL Arbitration Rules*
Mexico	Centro de Mediación y Arbitraje (CANACO)		x	x
	Centro de Arbitraje de México (CAM)			x
Mongolia	Mongolian International National Arbitration Centre (MINAC)	x		
Netherlands	Permanent Court of Arbitration at The Hague (PCA)	x	x	x
	PRIME Finance Foundation	x	x	x
Nigeria	Regional Centre for International Commercial Arbitration-Lagos	x		x
Norway	Arbitration Institute of the Oslo Chamber of Commerce		x	x
Peru	Centro de Arbitraje de la Cámara de Comercio de Lima (CCL)			x
Portugal	Centro de Arbitragem Comercial da Câmara de Comércio e Indústria Portuguesa			x
Qatar	Qatar International Center for Conciliation and Arbitration (QICCA)	x	x	x
Republic of Korea	Korean Commercial Arbitration Board (KCAB)	x	x	x
Russian Federation	International Commercial Arbitration Court (ICAC) at the Russian Federation Chamber of Commerce and Industry			x
Singapore	Singapore International Arbitration Centre (SIAC)	x	x	x
Slovenia	Ljubljana Arbitration Centre at the Chamber of Commerce and Industry of Slovenia (LAC)	x	x	x
South Africa	Arbitration Foundation of South Africa (AFSA)		x	x
Spain	Corte de Arbitraje de la Cámara Oficial de Comercio e Industria de Madrid			x
Sweden	Arbitration Institute of the Stockholm Chamber of Commerce (SCC)		x	x
Switzerland	Swiss Chambers' Arbitration Institution (SCAI)			x
	Swiss Arbitration Association	x		x
Thailand	Thailand Arbitration Center (THAC)	x	x	x
Ukraine	International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry		x	x
United Arab Emirates	DIFC-LCIA Arbitration Centre		x	x
	Dubai International Arbitration Centre (DIAC)			x
United Kingdom of Great Britain and Northern Ireland	London Court of International Arbitration (LCIA)		x	x
United States of America	International Centre for Settlement of Investment Disputes (ICSID)		x	x
	International Centre for Dispute Resolution (AAA-ICDR)			x

B. UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (effective date: 1 April 2014)

17. The following table presents a non-exhaustive list of investment treaties concluded after 1 April 2014 where the Rules on Transparency, or provisions modelled on the Rules on Transparency, are applicable in some instances of investor-State dispute resolution. The list is based on the database of international investment agreements maintained by the United Nations Conference on Trade and Development (UNCTAD).[31]

Treaty	*Signature*	*Entry into force*	*Relevant articles*
Canada-Hong Kong, China SAR BIT Agreement between the Government of the Hong Kong Special Administrative Region of the People's Republic of China and the Government of Canada for the Promotion and Protection of Investments	10 February 2016		Articles 27 and 29
Japan-Oman BIT Agreement between Japan and the Sultanate of Oman for the Reciprocal Promotion and Protection of Investment	19 June 2015		Article 15.4(c)
Eurasian Economic Union-Viet Nam FTA Free Trade Agreement between the Eurasian Economic Union and its Member States, of the one part, and the Socialist Republic of Viet Nam, of the other part	29 May 2015		Article 8.38:3(b)
Burkina Faso-Canada BIT Agreement between the Government of Canada and the Government of Burkina Faso for the Promotion and Protection of Investments	20 April 2015		Article 25.1(3) Articles 32 and 33*
Japan-Mongolia EPA Agreement between Japan and Mongolia for an Economic Partnership	10 February 2015		Article 10.13:4(c)
Japan-Ukraine BIT Agreement between Japan and Ukraine for the Promotion and Protection of Investment	5 February 2015		Article 18.4(c)
Japan-Uruguay BIT Agreement between Japan and the Oriental Republic of Uruguay for the Liberalization, Promotion and Protection of Investment	26 January 2015		Article 21.3(c)
Canada-Côte d'Ivoire BIT Canada-Côte d'Ivoire Foreign Investment Promotion and Protection Agreement	30 November 2014	14 December 2015	Article 23.1(c) Articles 30 and 31*
Canada-Mali BIT Agreement between Canada and Mali for the Promotion and Protection of Investments	28 November 2014		Article 23.1(c) Articles 30 and 31*
Canada-Senegal BIT Agreement between Canada and the Republic of Senegal for the Promotion and Protection of Investments	27 November 2014		Article 24.1(c) Articles 31 and 32*
Japan-Kazakhstan BIT Agreement between Japan and the Republic of Kazakhstan for the Promotion and Protection of Investment	23 October 2014		Article 17.4(c)
Canada-Republic of Korea FTA Free Trade Agreement between Canada and the Republic of Korea	22 September 2014	1 January 2015	Article 8.23:1(c) Articles 8.35 and 8.36*
Canada-Serbia BIT Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments	1 September 2014		Article 24.1(c) Articles 31 and 32*

[31] International Investment Agreements Navigator, available from http://investmentpolicyhub.unctad.org/IIA. The contents of this table are only updated on the UNCITRAL website on an annual basis.

Treaty	*Signature*	*Entry into force*	*Relevant articles*
Colombia-Turkey BIT Agreement between the Government of the Republic of Colombia and the Government of the Republic of Turkey concerning the Reciprocal Promotion and Protection of Investments	28 July 2014		Article 12.6(b)
Colombia-France BIT Acuerdo entre el Gobierno de la República de Colombia y el Gobierno de la República Francesa sobre el fomento y protección recíprocos de inversiones	10 July 2014		Article 15.4(b) Article 15.12
Egypt-Mauritius BIT Agreement between the Government of the Republic of Mauritius and the Government of the Arab Republic of Egypt on the Reciprocal Promotion and Protection of Investments	25 June 2014	17 October 2014	Article 10.4
Canada-Nigeria BIT Agreement between Canada and the Federal Republic of Nigeria for the Promotion and Protection of Investments	6 May 2014		Article 24.1(c) Articles 31 and 32*
Korea-Australia FTA Free Trade Agreement between the Government of the Republic of Korea and the Government of Australia	8 April 2014	12 December 2014	Article 11.16:(3)(c) Article 11.21*

* Specific treaty provision on transparency.

XI. COORDINATION AND COOPERATION

Note by the Secretariat on coordination activities

(A/CN.9/875)

[Original: English]

Contents

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 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 as an observer in the third meeting of the Unidroit Working Group on Long-Term Contracts (Oslo, 3-4 March 2016), which was established

[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.
[4] See A/CN.9/775.

for the purpose of formulating proposals for possible amendments and additions to the black-letter rules and comments of the Unidroit Principles of International Commercial Contracts 2010 (see also A/CN.9/838, para. 5). UNCITRAL participation aimed to ensure coordination of the topics under discussion with relevant UNCITRAL texts.

Hague Conference on Private International Law (HccH)

6. The Secretariat attended the Council on General Affairs and Policy of the Hague Conference (The Hague, The Netherlands, 15-17 March 2016) at which, inter alia, a "joint proposal of the Secretariats of UNCITRAL, Unidroit and HccH for cooperation in the area of international commercial contract law (with a focus on sales)" was discussed. The HccH Council directed its Permanent Bureau to further cooperate with the Secretariats of UNCITRAL and Unidroit on this matter (see also para. 8 below).

Joint activities with Unidroit and HCCH

7. The 2016 tri-partite coordination meeting of UNCITRAL, Unidroit and HccH was hosted by Unidroit (Rome, 19-20 April 2016). As in the past, the meeting provided the opportunity to discuss current work of the three organizations, areas of mutual interest and possible joint activities.

8. At its forty-ninth session, the Commission will have before it a joint proposal on cooperation in the area of international commercial contract law (with a focus on sales) prepared by the UNCITRAL secretariat and the secretariats of HccH and of Unidroit (A/CN.9/892, see also para. 6 above).

B. Other organizations

9. The Secretariat undertook other coordination activities with various international organizations. Most of such activities included provision of comments on documents drafted by those organizations, and 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

10. The Secretariat continued its collaboration with the Asia-Pacific Economic Cooperation (APEC) (see also A/CN.9/872). At the APEC Structural Reform Ministerial Meeting (Cebu, Philippines, 7-8 September 2015), the APEC Ministers recognized the importance of work to develop model legal instruments and commended APEC work in this area in collaboration with UNCITRAL. The APEC Ministers further agreed that the development of international legal instruments and their adoption would create a more conducive climate for cross-border trade and investment, thus facilitating economic growth and that the use of those instruments provides greater legal certainty in cross-border transactions, harmonization of finance and dispute resolution systems, closer economic and legal integration among cooperating economies, and the simplification of procedures involved in international transactions. The Secretary of UNCITRAL addressed the APEC Economic Committee during its plenary (Lima, 29 February-1 March 2016), providing a general overview of UNCITRAL, its mandate and texts, its involvement in technical assistance and coordination and the need for continued collaboration with APEC, particularly its Economic Committee.

11. The Secretariat attended the Annual Meeting of the Advisory Committee on Private International Law held under the aegis of the United States State Department (Washington D.C., 24-25 September 2015), which brings together senior representatives from international organizations involved in private international law, representatives of Governments and NGOs. The Secretariat provided an update on the activity of UNCITRAL and participated in discussions over recent achievements and future work of the main international organizations involved in private international law.

12. The Secretariat remained actively involved in the Inter-Agency Cluster on Trade and Productive Capacity. Among others, it took part (remote participation) in the annual meeting

of the Cluster (Geneva, Switzerland, 12 November 2015) at which the establishment of a Global Multi Donor Trust Fund on Trade and Productive Capacity was discussed and follow-up actions were proposed (see also A/CN.9/838, para. 10).

13. The Secretariat continued to be involved in the Global Forum on Law, Justice and Development (GFLJD), a permanent global forum, established at the initiative of the World Bank, that aims to exchange and disseminate innovative legal solutions for development. As explained in A/CN.9/838 para. 11, the GFLJD is intended to spur both South-South and North-South collaboration and its multidisciplinary activities address economic, legal and technical dimensions of the targeted issues. The UNCITRAL secretariat was appointed as co-leader of the Law and Economy Working Group, with effect from September 2014.

14. One of the GFLJD activities is the Law, Justice and Development Week at which the Secretariat participated in sessions on public procurement and public-private partnerships (Washington, D.C., 16-20 November 2015), addressing systems for review or challenges to decisions in public procurement in the context of the international financial institutions (IFIs), on suspension and debarment in sanctions and debarments in IFIs, United Nations organizations and other international organizations; and on enhancing the quality of decisions in PPP transactions in a variety of areas.

15. The Secretariat participated in an academic workshop on the Economic Assessment of International Commercial Law Reform held at Harris Manchester College, University of Oxford jointly with the Unidroit Foundation (Oxford, United Kingdom of Great Britain and Northern Ireland, 29-31 March 2016).

16. The Secretariat attended the eighty-eighth regular session of the Inter-American Juridical Committee (IAJC) as an observer (Washington, D.C., 4 April 2016). The IAJC "serves the [Organization of American States] OAS as an advisory body on juridical matters of an international nature and promotes the progressive development and the codification of international law." The meeting, attended by members (academics and other legal experts) and observers from member States and international organizations, aimed to generate ideas for legislative projects which could be put before OAS member States.

Rule of Law

17. The UNCITRAL secretariat undertook or facilitated several coordination activities on the rule of law in those areas of work of the United Nations and other entities that are of general relevance to UNCITRAL. The Secretariat continued contributing to a rule of law newsletter and annual report of the Secretary-General to the General Assembly on strengthening and coordinating United Nations rule of law activities. It also contributed to a joint report by the Office of the High Commissioner for Human Rights (OHCHR), Office of Legal Affairs (OLA) and United Nations Office on Drugs and Crime (UNODC) to the Rule of Law Coordination and Resource Group (RoLCRG) prepared pursuant to the 2012 decision of the Secretary-General's Policy Committee relating to the United Nation's rule of law arrangements (Decision No. 2012/13). The decision, in particular, called for the cooperation of OHCHR, OLA and UNODC, in consultation with all other relevant entities in the RoLCRG and with the assistance of the Rule of Law Unit, in order to strengthen the Organization's institutional response to trends and challenges in the application of the rule of law at the international level. The joint report is intended as a basis for discussion by the RoLCRG. It outlines some examples of institutional cooperation that have taken place among the three offices since September 2012, identifies trends and challenges in the application of the rule of law at the international level, as requested by the above-mentioned Policy Committee decision, and suggests areas of possible future collaboration among OHCHR, OLA and UNODC in strengthening the rule of law at the international level.

18. It may be recalled that, at its forty-sixth to forty-eighth sessions, in 2013 to 2015, the Commission learned about initiatives across the United Nations system to formulate sustainable development goals and a post-2015 international development agenda.[5] At that time, the Commission noted the relevance of UNCITRAL work to these initiatives and

[5] *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17* (A/68/17), paras. 274-275; ibid., *Sixty-ninth Session, Supplement No. 17* (A/69/17), paras. 220-233; and ibid., *Seventieth Session, Supplement No. 17* (A/70/17), paras. 298-231.

requested its Bureau 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. Pursuant to those requests, efforts were made to ensure that the message of UNCITRAL was conveyed to the States negotiating the post-2015 development agenda. As a result, in the Addis Ababa Action Agenda (General Assembly resolution 69/313, para. 89) (the AAAA), which is an integral part of the 2030 Agenda for Sustainable Development (General Assembly resolution 70/1, para. 40), States endorsed "the efforts and initiatives of the United Nations Commission on International Trade Law, 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." Pursuant to those requests of the Commission, efforts were made to ensure that the message of UNCITRAL was conveyed to the States negotiating global indicators that would accompany the 2030 Agenda for Sustainable Development, to be adopted in September 2016.

19. At the Secretariat level, the UNCITRAL secretariat has joined the Inter-Agency Task Force (IATF) on Financing for Development (FfD), convened by the Secretary-General to: (a) review progress in implementing the AAAA; and (b) advise the intergovernmental follow-up process thereon. The UNCITRAL secretariat contributed to the 2016 Inaugural Report of IATF, which set out options for monitoring the commitments covered in the Trade Chapter of the AAAA. The submission by the UNCITRAL secretariat in particular stated that achievement of the targets covered by paragraph 89 of the AAAA could be monitored through data that is already collected on:

(a) Treaty actions and enactments of UNCITRAL texts;

(b) Relevant court and arbitral decisions applying and interpreting UNCITRAL texts that are reported and publicized through the Case Law on UNCITRAL texts system (CLOUT);

(c) Participation in UNCITRAL sessions by States, IGOs and NGOs;

(d) Cooperation and coordination activities involving UNCITRAL participation;

(e) Technical assistance activities conducted by UNCITRAL;

(f) Dissemination activities conducted by UNCITRAL (website, digests and other publications);

(g) Teaching, training and capacity-building activities; and

(h) Other activities not covered above that are reported as being, or having been, conducted by States and organizations (both IGOs and NGOs) at the national, regional and international levels that refer to the use of UNCITRAL texts.

Data collected can be disaggregated, as appropriate, by reference to factors such as type of activity, topic, gender, country, region, level of development and the IGOs and NGOs involved. Where relevant, information relating to activities conducted by UNCITRAL would include those conducted jointly with States, IGOs and NGOs. These indicators can be monitored every four years. It is not expected that such monitoring would impose any additional reporting burden on States, except with respect to tracking the use of UNICTRAL texts.

20. The new web page of the UNCITRAL website, which became operational from 5April 2016, provides an overview of the relevance of UNCITRAL to the 2030 Agenda for Sustainable Development.

21. It may be recalled that, at its forty-eighth session, in 2015, the Commission recalled its call to its secretariat to continue exploring synergies and expanding outreach to delegations of States to various United Nations bodies with the view of increasing their awareness of the work of UNCITRAL and its relevance to other areas of work of the United Nations. Support was expressed in that context at that session for outreach to various bodies of the United Nations system operating at a country level with the mandate to assist with local law reforms, be it in the promotion of the rule of law, development or other context, so

that they appropriately factor in their work the promotion of the rule of law in commercial relations generally and UNCITRAL standards in particular.[6] The draft guidance note on strengthening United Nations support to States, upon their request, to implement sound commercial law reforms (contained in document A/CN.9/883 that will be before the Commission at its forty-ninth session), is aimed at becoming a tool to increase awareness across the United Nations about the importance of sound commercial law reforms and the use of internationally accepted commercial law standards in that context.

2. Micro, small and medium-sized enterprises (MSMEs)

22. The Secretariat has encouraged participation and dialogue in respect of its work on micro, small and medium-sized enterprises (MSMEs — Working Group I) through its participation in the Corporate Registers Forum (CRF) and the European Commerce Registers' Forum (ECRF) joint annual conference, as well as presenting on the topic of "Business Registration, Registry and Legal Reform, Reducing Burdens" at such a conference (Cardiff, United Kingdom, 9-12 May 2016) (see also A/CN.9/872).

3. Procurement

23. In accordance with requests of the Commission and Working Group I (under its former mandate on Public 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 (see A/CN.9/838, para. 26).

24. To this end, the Secretariat participated, among others, in the following activities:

(a) The work of the World Bank's International Advisory Group on Procurement, which has advised the World Bank on its Procurement Policy Review, including participation in a final meeting held in Cairo, to review and comment on the proposed implementation of the reforms (Washington, D.C., 21-22 September 2015);

(b) The development of a World Bank system for benchmarking public procurement, including participation in discussions on expansion of the scope of the system (Washington, D.C., 22 September 2015);

(c) The "Third Suspension and Debarment Colloquium, 2015", held at the World Bank Headquarters, addressing (inter alia) the prospects for harmonization in systems for sanctions and debarment in public procurement (Washington, D.C., 16 December 2015);[7]

(d) The work of the team of specialists in Public-Private Partnerships (PPPs) of the United Nations Economic Commission for Europe (UNECE), which meets and reviews policy issues in PPPs, including on the Role of PPPs in financing the post-2015 United Nations Development Agenda;

(e) The work of the Meeting of Leading Practitioners on Public Procurement of the Organization for Economic Co-operation and Development (OECD), focusing on possible revisions to the draft OECD Recommendation on Public Integrity and to the 1998 OECD Recommendation on Improving Ethical Conduct in the Public Service, under the OECD Public Governance Committee;

(f) The work of the Sustainable Public Procurement Initiative Network established by the United Nations Environment Programme (UNEP), including serving on its working groups on developing principles for sustainable public procurement, addressing legal

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[6] *Official Records of the General Assembly, Seventieth Session, Supplement No. 17* (A/70/17), para. 301.

[7] See www.worldbank.org/en/events/2015/11/05/third-suspension-and-debarment-colloquium-2015.

barriers, and promoting collaboration between international organizations (see also A/CN.9/872, para. 30);

(g) The work of the World Trade Organization regarding its Agreement on Government Procurement, including through the issue of a joint publication on the treatment of small and medium-sized enterprises in public procurement and joint technical assistance activities (see also A/CN.9/872, para. 32).[8]

4. Dispute settlement

25. As noted by the Commission at its forty-eighth session, in 2015, UNCITRAL standards in the field of dispute settlement are characterized by their flexibility and generic application to different types of arbitration, including both purely commercial arbitration and investor-State arbitration.[9] In line with the decision of the Commission that the Secretariat should continue to coordinate with organizations in relation to the various types of arbitration to which UNCITRAL standards were applicable, and to closely monitor developments, further exploring areas for cooperation and coordination,[10] the Secretariat activities in the area of international commercial arbitration and conciliation included:

(a) Coordination with United Nations Conference on Trade and Development (UNCTAD) in the field of international investment arbitration, including participation in the expert group meeting on investor-State dispute settlement (ISDS) reforms "International Investment Agreements (IIA) Stocktaking" to provide information on UNCITRAL instruments on transparency and on possible future work (Geneva, Switzerland, 16 March 2016);

(b) Coordination with United Nations Department of Economic and Social Affairs (UNDESA) on resolution of disputes between States arising under tax conventions and in connection with relevant issues such as transfer pricing, base erosion and profit shifting.

(c) Coordination with OECD, including the organization of the Second International Conference for Euro-Mediterranean Community of International Arbitration (also with Cairo Regional Centre for International Commercial Arbitration (CRCICA)) addressing topical issues in both commercial and investment arbitration, and a workshop on international investment treaties, investment disputes and arbitration for Iraqi government officials;

(d) Cooperation with the World Economic Forum and the International Centre for Trade and Sustainable Development (ICTSD) on the E15 Initiative Task Force on Investment Policy, a project aimed at "strengthening the global trade and investment system";

(e) Coordination with the International Centre for Settlement of Investment Disputes (ICSID) and with the Permanent Court of Arbitration at The Hague (PCA) on matters related to international investment arbitration;

(f) Coordination with the International Chamber of Commerce (ICC) with regard to possible cooperation on joint conferences, training, and use of resources in relation to international arbitration, particularly in the Asia-Pacific region;

(g) Coordination with a wide range of arbitral institutions and organizations with respect to use of the UNCITRAL Arbitration Rules as well as the revision of the UNCITRAL Notes on Organizing Arbitral Proceedings;

(h) Coordination with the Energy Charter Treaty (ECT) secretariat and participation in their expert groups including the group on mediation;

(i) Coordination with the European Union and the OPEC Fund for International Development (OFID) with respect to the financing of the UNCITRAL Transparency Registry; and

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[8] The title of the publication is: "SME participation in government procurement markets — legal and policy considerations under the WTO Agreement on Government Procurement and the UNCITRAL Model Law on Public Procurement" (forthcoming).

[9] *Official Records of the General Assembly, Seventieth Session, Supplement No. 17* (A/70/17), para. 268.

[10] Ibid.

(j) Coordination with the International Bar Association (IBA) and participation in its committee on investment arbitration.

5. Electronic commerce

26. The Secretariat carried out coordination activities with international and regional organizations involved in the formulation of legal standards in the field of electronic commerce in order to ensure their compatibility with UNCITRAL texts and their underlying principles. Among others, coordination with the Arab Information and Communication Technologies Organization (AICTO), which included participation in the Conference "PKI & the global e-commerce law" (Tunis, 8 May 2015), and with the World Bank, which included participation in the "International Identity Management Law and Policy Meeting" (Washington, D.C., 14 January 2016), are to be noted.

27. In the context of the preparation by the United Nations Economic and Social Commission for Asia and the Pacific (UN/ESCAP) of a Framework Agreement on Facilitation of Cross-border Paperless Trade in Asia and the Pacific, the Secretariat participated as an observer in the Second Meeting of the Intergovernmental Steering Group on Cross-border Paperless Trade Facilitation (the "Steering Group", Bangkok, 4-6 November 2015), in the Interim Meeting of the Legal Working Group of the Steering Group (Bangkok, 19-21 January 2016 — remote participation) and in the Third Meeting of the Legal Working Group of the Steering Group and in the Second Meeting of the Steering Group on: (Bangkok, 21-25 March 2016). The Commission will hear an oral report on the content of that Framework Agreement and its relevance for the promotion of the adoption, use and uniform interpretation of UNCITRAL texts on electronic commerce.

6. Insolvency

28. The Secretariat coordinated with the International Insolvency Institute (III) by attending its fifteenth annual conference (Naples, Italy, 14-16 June, 2015) and participating as a panellist in a session entitled "UNCITRAL: A Treaty On Insolvency-Related Judgements?". Several additional topics of relevance to the work of UNCITRAL's Working Group V on Insolvency (in which III participates as an NGO) were discussed on panels and in breakout sessions at the III conference, including the following: The European Insolvency Reform and the New Approach to Business Failure; Financial Derivatives in Bankruptcy: Containing or Creating Systemic Risk?; Sovereign Debt Restructuring: Current Developments and Proposals for Reform; Judicial Panel: Issues and Answers in Coordinating Cross-Border Cases; Solving Corporate Group Insolvencies; Three Dimensional Chess: Directors' and Officers' Responsibilities in Distressed Company Groups; and Resolving IP Issues in Insolvency and Restructurings.

29. The Secretariat attended various sessions of the annual conference of the International Bar Association (IBA) (Vienna, 4-9 October, 2015). With respect to insolvency law, the Secretariat participated in two sessions discussing the feasibility of developing an international convention on selected aspects of cross-border insolvency law, a topic that is being studied, together with the potential for wider adoption of the Model Law on Cross-Border Insolvency, by an open-ended, informal group reporting to Working Group V (Insolvency Law).[11]

7. Security interests

30. Coordination with relevant organizations was pursued to ensure that States were offered comprehensive and consistent guidance in the area of secured transactions law.

31. Specific activities of the Secretariat included:

(a) Coordination with III on the current work of UNCITRAL on security interests in the context of its fifteenth Anniversary Conference (Naples, 15-16 June 2015) (see also para. 28 above);

[11] See A/CN.9/798, para. 19, A/CN.9/803, para. 39 and the *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 17* (A/69/17), paras. 152 and 158.

(b) Coordination with IBA on UNCITRAL texts on security interests in the context of its Annual Conference (Vienna, 4-9 October 2015) (see also para. 29 above);

(c) Coordination with the Factors Chain International and the International Factors Group on the harmonization of the law of secured transactions in the context of their Annual Meeting (Vienna, 19-21 October 2015) (see also A/CN.9/872, para. 39);

(d) Coordination with Unidroit to ensure that the Mining, Agriculture and Construction (MAC) Protocol being prepared by the relevant Unidroit Study Group does not overlap or conflict with the security interests texts prepared by UNCITRAL (Rome, 19-21 October 2015 and 7-9 March 2016);

(e) Coordination with the United Nations Global Compact initiative on the Finance Chapter of the United Nations and Global Commerce publication with regard to UNCITRAL and its work on security interests (February-April 2016); and

(f) Coordination with the World Bank to prepare a revised version of the joint UNCITRAL-World Bank Standard on Insolvency and Creditor Rights to include the key recommendations of the UNCITRAL Legislative Guide on Secured Transactions, (Washington, D.C., 19 November 2015).

World Bank Insolvency and Creditor Rights Standard (ICR Standard)

32. At its forty-eighth session, in 2015, the Commission took note with appreciation of the report of the Secretariat about the progress achieved in: (a) the revision the World Bank Insolvency and Creditor Rights Standard (the "ICR Standard") to take into account the key recommendations of the Secured Transactions Guide; (b) the coordination efforts with the European Commission with a view to ensuring a coordinated approach to the law applicable to the third-party effects of assignments of receivables, taking into account the approach followed in the Assignment Convention, the Secured Transactions Guide and the draft Model Law; (c) the coordination efforts with Unidroit with respect to a fourth Protocol to the Convention on International Interests in Mobile Equipment on matters specific to agricultural, construction and mining equipment; and (d) the coordination efforts with the International Finance Corporation and the Organization of American States in providing technical assistance and assistance with respect to local capacity-building in the area of security interests.[12] It was widely felt that such coordination and cooperation efforts were extremely important and should continue with a view to ensuring that the work of the Commission on security interests was reflected to the maximum extent possible in the relevant texts of other organizations. After discussion, the Commission renewed its mandate to the Secretariat to continue its coordination and cooperation efforts in the area of security interests.[13]

33. The Commission may wish to note that, further to the agreement reached at a meeting held in Washington, D.C., on 19 November 2015, the Secretariat provided comments on the World Bank Secured Transactions Principles that are part of the ICR Standard and is expecting to receive the comments of the World Bank on the revised version of the ICR Standard prepared jointly by the Secretariat and the World Bank that includes references to the key recommendations of the Secured Transactions Guide. The Commission may wish to consider this matter and confirm or revise the mandate given to the Secretariat to coordinate with the World Bank so as to include in the revised ICR Standard the key recommendations of the Secured Transactions Guide and references to the other UNCITRAL texts on secured transactions. In this connection, the Commission may wish to take into account the need for both duplication of effort and divergence in the texts to be avoided, with due respect for the different mandates of the Commission and the World Bank.[14]

[12] *Official Records of the General Assembly, Seventieth Session, Supplement No. 17* (A/70/17), para. 218.

[13] Ibid., para. 219.

[14] Ibid., *Forty-eighth Session, Supplement No. 17* (A/48/17), para. 174.

8. Commercial Fraud

34. No development occurred in the area of commercial fraud since A/CN.9/838 was prepared. For easy reference of the Commission, the relevant paragraph (para. 37) of that Secretariat's Note is reproduced here below.

35. Further to the request of the Commission (A/63/17, para. 347; A/64/17, para. 354, and A/68/17, para. 312) in relation to commercial fraud, the Secretariat continued to coordinate with the United Nations Office on Drugs and Crime (UNODC) in its work on economic crime and identity fraud. In particular, the Secretariat remains a member of 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. Work planned by UNODC core group of experts on the development of model legislation on identity-related crime did not proceed due to a lack of extrabudgetary resources, however the Secretariat will continue to participate in the core group of experts once its work proceeds. The Commission may also wish to note that UNODC also plans to develop, again subject to the availability of extrabudgetary funds, a web-based repository of information on identity-related crime, as well as a comprehensive package of training tools (see E/CN.15/2014/17, paras. 72 to 75 for more details).

Part Three

ANNEXES

I. SUMMARY RECORDS OF THE MEETINGS OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Finalization and adoption of a draft Model Law on Secured Transactions

Summary record of the 1024th meeting, held at Headquarters, New York, on Monday, 27 June 2016, at 10.30 a.m.

[A/CN.9/SR.1024]

Temporary Chairperson: Mr. Sorieul (Secretary of the Commission)
Chairperson: Mr. Labardini Flores (Vice-Chair) (Mexico)

The meeting was called to order at 10.45 a.m.

Agenda item 1: Opening of the session

1. **Mr. de Serpa Soares** (Under-Secretary-General for Legal Affairs, The Legal Counsel) said that Sustainable Development Goal 16, "Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels", was closely related to the Commission's mandate to modernize and harmonize the rules on international business. The pivotal role of trade in reducing poverty and promoting sustainable development was widely recognized. At the third International Conference on Financing for Development, States had specifically recognized the role of the Commission in that regard and the General Assembly had repeatedly confirmed that the implementation and effective use of modern private law standards in international trade were essential for advancing good governance, sustained economic development and the eradication of poverty and hunger. The Commission's work contributed directly to the realization of those goals.

2. The current session would be a busy yet productive one, involving the finalization and adoption of three different texts. Years of work by Working Group VI were expected to culminate in the adoption of a Model Law on Secured Transactions, which would assist States in developing modern legislation on secured transactions to enhance the availability of secured credit using movable assets as collateral. Working Group III (Online Dispute Resolution) had completed its work and had submitted the resulting technical notes for consideration and finalization by the Commission. The Commission would also be updating its Notes on Organizing Arbitral Proceedings to reflect recent developments in arbitration practice.

3. The Commission had made progress on the enforcement of settlement agreements and on the Model Law on Electronic Transferable Records. Nonetheless, it would continue to deliberate on a range of other matters, including conciliation, electronic commerce, insolvency, concurrent proceedings, ethics for arbitrators, use of the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration as a model for further reform of investor-State dispute settlement, identity management and cloud computing.

4. At a time of limited resources, it was particularly important to address the future work of the Commission from a strategic perspective. In that connection, the notes by the Secretariat on the Commission's overall work programme and on specific topics, as well as the progress reports of working groups, would provide a sound basis for deciding how best to deploy those limited resources while meeting the increased demands from States for capacity-building and technical assistance in the implementation of UNCITRAL standards.

5. He looked forward to the Commission's continued consideration of the draft guidance note on strengthening United Nations support to States, upon their request, to implement sound commercial law reforms. A key priority was support and technical cooperation in areas relating to capacity-building for local and national institutions and for joint planning and implementation of programmes through multi-stakeholder partnerships. Support for capacity development at the country level required the right combination of knowledge and expertise within United Nations country teams. The draft guidance note would indeed achieve that goal and help in mobilizing knowledge and expertise to assist countries in the early phase of the implementation of special development goals.

6. The Commission had a role to play in promoting the rule of law at the national and international levels, and it had been firmly established that promotion of the rule of law in commercial relations should be an integral part of the broader United Nations rule of law agenda. To continue efforts to integrate the work of UNCITRAL into the activities of the United Nations, the Rule of Law Unit would organize a biennial briefing and a panel discussion focusing on State practices in implementing multilateral treaties influenced by the work of UNCITRAL and on practical measures to facilitate access to justice in the context of commercial law, in particular for micro-, small and medium enterprises.

7. There were also a number of noteworthy projects being managed by the International Trade Law Division on behalf of the Commission. The Transparency Registry, one of the pillars of transparency standards in investor-State arbitration, had become fully operational thanks to generous donations from the European Union and the OPEC Fund for International Development. Furthermore, the UNCITRAL Regional Centre for Asia and the Pacific was in its fifth year of operation and had exceeded expectations. He commended the Government of the Republic of Korea for its contribution to the Centre, and thanked the Chinese Government for its support in approving the contribution by the authorities of Hong Kong, China, of a legal expert to the Centre.

Tribute to the memory of former Commission members Sergei Nikolaevich Lebedev and Jean Stoufflet

8. **The Temporary Chair** paid tribute to the memory of Mr. Sergei Nikolaevich Lebedev of the Russian Federation and Mr. Jean Stoufflet of France for their outstanding contribution to the work of the Commission.

Agenda item 2: Election of officers

9. **The Temporary Chair** said that it was the turn of the Group of African States to nominate a candidate for the office of Chair of the Commission.

10. **Mr. Katota** (Zambia), speaking on behalf of the Group of African States, said that the Group wished to nominate Mr. Kenfack Douajni (Cameroon) for the office of Chair of the Commission.

11. **Mr. Dennis** (United States of America) and Mr. Bellenger (France) seconded the nomination.

12. *Mr. Kenfack Douajni (Cameroon) was elected Chair by acclamation.*

13. **Mr. Tommo Monthe** (Cameroon), speaking in the absence of Mr. Kenfack Douajni, thanked the Group of African States and the members of the Commission for honouring his country with the election of Mr. Kenfack Douajni as Chair of the Commission.

14. **Mr. Garros** (Argentina) said that the Group of Latin American and Caribbean States wished to nominate Mr. Labardini Flores (Mexico) for the office of Vice-Chair of the Commission.

15. **Mr. Dennis** (United States of America), **Mr. Kwon** Young Joon (Republic of Korea) and **Mr. Tirado Martí** (Spain) seconded the nomination.

16. *Mr. Labardini Flores (Mexico) was elected Vice-Chair by acclamation.*

17. *Mr. Labardini Flores (Mexico), Vice-Chair, took the Chair.*

18. **The Chair** said that the other members of the Bureau would be elected later during the session.

Agenda item 3: Adoption of the agenda (A/CN.9/859)

19. *The agenda was adopted.*

Agenda item 4: Consideration of issues in the area of security interests

(a) Finalization and adoption of a draft Model Law on Secured Transactions (A/CN.9/865, A/CN.9/871, A/CN.9/884, A/CN.9/884/Add.1, A/CN.9/884/Add.2, A/CN.9/884/Add.3, A/CN.9/884/Add.4, A/CN.9/886, A/CN.9/887 and A/CN.9/887/Add.1)

20. **The Chair** invited the Commission to consider the revised text of the draft Model Law (A/CN.9/884, A/CN.9/884/Add.1, A/CN.9/884/Add.2, A/CN.9/884/Add.3 and A/CN.9/884/Add.4), with a view to its adoption. He suggested proceeding article by article, with the Secretariat presenting any outstanding issues, after which members could make brief comments, beginning with the articles contained in document A/CN.9/884.

Article 1

21. **Mr. Bazinas** (Secretariat) said that the text in square brackets in paragraph 2 had been added to adjust the terminology of the Model Law so that it covered outright transfers of receivables, which were covered by the Model Law even though they were not secured transactions as such. Following consultations and comments from States, however, the Secretariat felt that the text could be deleted, since it referred to terminological issues, which should be left to article 2. He also suggested that paragraph 2 should be revised to refer to articles 70-80 and that the words "by agreement" should be included after the word "receivables", to clarify that the Model Law applied only to consensual security interests; in other words, to transfers of receivables by agreement and not by law.

22. **The Chair s**uggested that the square brackets in paragraph 4 should be removed.

23. **Ms. Sabo** (Canada) said that her delegation understood that paragraph 4 was intended to remain in square brackets, to account for the specific laws of the enacting State.

24. **Mr. Celarie Landaverde** (El Salvador) said he agreed that all definitions and rules of interpretation should be left to article 2, as recommended by the Secretariat, and that the text in square brackets in paragraph 2 of article 1 should therefore be deleted.

25. **The Chair** suggested that the outer square brackets around paragraph 4 should be removed, and that the inner square brackets should be retained, as they referred to the law of the enacting State.

26. **Ms. Sabo** (Canada) said that it was her delegation's understanding that both sets of square brackets in paragraph 4 should be retained, on the assumption that the text in that paragraph was related to the text in subparagraph 3 (e).

27. **Mr. Bazinas** (Secretariat) said that paragraph 4 was in square brackets because the text had not yet been finalized; nonetheless, as it reflected the policy in recommendation 6 of the UNCITRAL Legislative Guide on Secured Transactions, the square brackets could be deleted.

28. **The Chair** said he took it that the Commission wished to revise paragraph 2 to refer to articles 70-80; to include the words "by agreement" after the word "receivables"; to delete the text in square brackets; and to retain paragraph 4 outside square brackets.

29. *It was so decided.*

Article 2

30. **Mr. Bazinas** (Secretariat) said that a number of changes had been suggested with regard to the terms used in the Model Law. The square bracketed text in the definition of the term "bank account" showed different ways of referring to institutions authorized to receive deposits. The Commission might wish to adopt the term "authorized

deposit-taking institution" to cover all such institutions, which would require the fewest changes to be made to terminology used elsewhere in the Model Law in reference to bank accounts.

31. The definition of the term "competing claimant" contained the words "to be specified by the enacting State" in square brackets. However, that text could be deleted if examples of creditors were provided in the commentary, making it unnecessary for the Model Law to indicate that the matter should be referred to the enacting State, although it would still be subject to the law of the enacting State.

32. In the definition of the term "debtor of the receivable", the reference to a "transferor in an outright transfer" should be deleted; it contained a factual error, because the debtor of a receivable could never be the transferor in an outright transfer.

33. In the definition of the term "default", the text that appeared within square brackets could be revised to read "any other event that under the terms of the security agreement constitutes default", or words to that effect. The change was being suggested because it had been brought to the attention of the Secretariat that grantors and secured creditors often listed events of default in their agreements without necessarily defining the word "default". The corresponding note to the Commission should therefore also be deleted.

34. In the definition of the term "encumbered asset", the words "by agreement" should be added after the words "outright transfer", in line with the Commission's decision on article 1, paragraph 2, and the text should be retained outside square brackets. In the definition of the term "grantor", the word "and" in square brackets and the words "lessee or licensee" should be deleted. The draft Guide to Enactment of the draft Model Law on Secured Transactions could instead explain that lessees and licensees could not be grantors of security interests merely because they were transferees. Furthermore, in subparagraph (iii) the word "in" should be replaced with the word "under", and the words "by agreement" should be added after the word "receivable".

35. The definition of the term "insolvency representative" should be deleted, as it did not appear anywhere else in the Model Law. It could, however, be briefly explained in the Guide to Enactment. Other terms included in the note to the Commission could also be explained by referral to their definitions both in the *UNCITRAL Legislative Guide on Insolvency Law* and in chapter X of the *UNCITRAL Legislative Guide on Secured Transactions.*

36. With regard to the definition of the term "inventory", it had been brought to the attention of the Secretariat that the expression "work-in-process" was general enough to cover "semi-processed materials", a term that was not widely used in all jurisdictions. In that regard, the words "semi-processed materials" should be deleted and the parentheses around "work-in-process" should be taken out.

37. The Commission might wish to include a definition of the term "movable asset", as it appeared multiple times in the Model Law and defined the scope of the Model Law. It could be defined along the following lines: "'movable asset' means a tangible or intangible asset other than immovable property", with the phrase "as defined in the law of the enacting State" kept in square brackets.

38. The definition of the term "non-intermediated securities" should be aligned with the Convention on Substantive Rules for Intermediated Securities of the International Institute for the Unification of Private Law (UNIDROIT), on which it was based, in order to avoid any conflict or overlap with existing law on securities and that Convention. To that end, the words "or interests" should be added after the word "rights".

39. In the definition of the term "possession", the words "directly or indirectly" were redundant and should be deleted, along with the corresponding note to the Commission.

40. As had been suggested by States, the term "registry", which was referred to frequently in the Model Law, should be defined, possibly along the following lines: "'registry' means the registry established under article 27 of this Law".

41. In the definition of the term "secured creditor", the square brackets should be deleted and, in subparagraph (ii), the word "in" should be replaced with "under", and the words "by agreement" should be added after the word "receivable". In the definition of the term "secured obligation", the second sentence, which appeared in square brackets, could be deleted and the draft Guide to Enactment could instead explain that there was no secured obligation in an outright transfer of a receivable. However, in the definition of the term "securities", the square brackets could be retained, as the text contained a reference to the law of the enacting State determining additional rights that should qualify as securities.

42. The square brackets in the definitions of the terms "security agreement" and "security right" should be deleted and in subparagraph (ii) in both cases, the word "in" should be replaced with "under", and the words "by agreement" should be added after "receivable".

43. Lastly, in the definition of the term "tangible asset", reference should be made to subparagraph (l) instead of subparagraph (k) and, in addition, to article 31, where the term was also used.

44. **Ms. Gullifer** (United Kingdom), supported by **Mr. Deschamps** (Canada), **Mr. Kwon** Young Joon (Republic of Korea), **Mr. Whittaker** (Australia) and **Mr. Garros** (Argentina), said that the proposed reference to a "security agreement" in the definition of the term "default" might be too limiting, as the events of default in the context of secured transactions could be defined, inter alia, in a separate loan agreement. A more general reference to "the agreement" between the grantor and the secured creditor, or words to that effect, would be preferable, especially since the words in square brackets in the text as currently drafted referred only to "their agreement".

45. **Mr. Tirado Martí** (Spain), supported by **Mr. Adamov** (Belarus) and **Mr. Whittaker** (Australia), said that in the definition of the term "bank account", the term "authorized deposit-taking institution" should be retained, as opposed to "depositary institution", which was broader and could be understood to include institutions that received securities.

46. **Mr. Deschamps** (Canada), while supporting the use of the expression "authorized deposit-taking institution", said that his delegation did not object to the use of the term "depositary institution" in the definition of the term "control agreement", because it was clear from that context that the term referred to an institution authorized to receive deposits, as set out in the definition of the term "bank account".

47. **Mr. Whittaker** (Australia), supported by **Mr. Deschamps** (Canada), **Ms. Gullifer** (United Kingdom) and **Mr. Garros** (Argentina), said that there was no need to include the words "or interests" in the definition of the term "non-intermediated securities", because the UNIDROIT Convention on Substantive Rules for Intermediated Securities (Geneva Securities Convention) used the expression "rights and securities", while the Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary (Hague Securities Convention) used a different expression. In addition, that would be the only occurrence of the phrase "rights or interests" in the Model Law, thus potentially giving rise to difficulties of interpretation. Strict adherence to the wording of the Geneva Securities Convention was not essential in that context.

48. **Mr. Adamov** (Belarus) said he agreed that a definition of "movable assets" should be included in article 2, because other terms such as "tangible assets" and "intangible assets" were defined by reference to movable assets. Article 2 should logically contain a definition of the concept of "competing security rights," which was the subject of chapter V, article 28, of the Model Law.

49. **Mr. Bazinas** (Secretariat) said that article 28 dealt with the issue of priority among competing security rights. As article 2 already included definitions of the terms "priority" and "competing claimants", who were the holders of competing security rights, it was not necessary to define the concept of competing security rights in article 2. The Working Group had not followed the suggestion that a definition of the term "in writing" that included electronic records should be included in the Model Law, in line with recommendation 11 of the Secured Transactions Guide, because the relevant definition would be subject to the legislation of the enacting State.

50. **Mr. Celarie Landaverde** (El Salvador) said that, as the text in square brackets in the definition of the term "default" was intended to clarify the meaning of the term, which should be explained in greater detail in the Secured Transactions Guide, it should not be included in article 2. The definition of the term "insolvency representative" should be retained, with the clarification suggested in the corresponding note to the Commission. In addition, the terms "insolvency proceedings" and "insolvency estate" should be defined in article 2, for the reasons outlined in the same note.

51. The term "movable assets" should not be defined in article 2, to avoid possible confusion, as different enacting States defined the term in different ways in their national legislation or used different words to capture that same concept. Lastly, the inclusion of "directly or indirectly" in the definition of the term "possession" was not necessary, as the definition clearly referred to possession by the creditor, a third party or various designated persons responsible for the performance of a contract.

52. **Mr. Whittaker** (Australia) said that his delegation would support the inclusion of a definition of the term "movable assets" in the Model Law, as the term could have different meanings in various jurisdictions.

53. **Ms. Gullifer** (United Kingdom) said that the suggested change to the definition of the term "default" to refer to an agreement instead of a security agreement should state clearly that it was referring to an agreement between the grantor and the secured creditor, not just any agreement. Her delegation was in favour of including in the Model Law a definition of "in writing" to include electronic communications.

54. **Mr. Dennis** (United States of America) said that his delegation supported the proposed changes as well as the proposal to include a specific definition of the term "in writing".

55. **Mr. Wang** Yi (China) said that the definition of the term "bank account" was too narrow and did not cover all types of institutions in the banking system. Subparagraph (c) could be redrafted to include not only accounts maintained by deposit-taking institutions but also accounts to which funds could be credited or from which funds could be debited, or accounts that contained security interests.

56. **Mr. Bazinas** (Secretariat) said that the definition of a bank account in the Model Law was based on the one given in the Secured Transactions Guide and was broad enough to encompass all types of institutions in the banking system. The use of the term "authorized deposit-taking institution" did not mean that all accounts in such an institution were deposit accounts. The specific definition of the terms "bank" and "bank account" in each country would be left to the enacting State.

57. **Mr. Garro** (Argentina) said that, given the differing views concerning the definition of the term "movable asset", it would be prudent to define it in a manner that specifically excluded immovable assets. In the definition of the term "non-intermediated securities", the word "rights" was already sufficiently broad to include the concept of interests, and was used in such contexts in other UNCITRAL documents, including model laws. It was therefore unnecessary to add the words "or interests".

58. **Mr. Kwon** Young Joon (Republic of Korea) said that his delegation supported the suggestion by the Secretariat to delete the definition of the term "insolvency representative", since that term did not appear anywhere else in the Model Law and the concept might already be defined in the insolvency laws of an enacting State.

59. **Mr. Tirado Martí** (Spain) said that his delegation also supported the suggestion to delete the definition of "insolvency representative" and would resist any effort to define the term "insolvency proceedings", as that would be an exceedingly complicated and time-consuming exercise.

60. **Mr. Morse** (Commercial Finance Association) said that the Commission should strive to avoid any overlap between the Model Law and the Geneva Securities Convention in its definition of the term "non-intermediated

securities", as the scope of the Model Law differed from that of the Convention.

61. **Mr. Medina Mejías** (Bolivarian Republic of Venezuela) said that the term used to refer to security rights throughout article 2 of the Spanish translation of the Model Law, "garantía real", was problematic, since in his country that term applied only to immovable assets. He therefore proposed that it should be replaced with the term "garantía mobiliaria", which specifically referred to security rights in movable assets.

62. **Mr. Tirado Martí** (Spain) said that the term "garantía real" could refer to either immovable or movable assets. While it was not strictly necessary to distinguish between the two in the context of article 2, which referred to security rights in movable assets only, his delegation would not object to the use of the term "garantía real mobiliaria".

63. **The Chair**, after suggesting that any proposed translation changes should be submitted to the Secretariat, said he took it that the Commission agreed that in article 2, the amendments proposed by the Secretariat to the definition of the terms "debtor of the receivable", "encumbered asset", "grantor", "inventory", "secured creditor", "secured obligation", "security agreement" and "tangible asset" should be retained, and that the definition of the term "insolvency representative" and the corresponding note to the Commission should be deleted. Definitions of the terms "movable assets" and "registry" would be added to the article. The phrasing to be used in the definition of the term "bank account" would be "an authorized deposit-taking institution"; and subparagraph (i) in the definition of the term "debtor of the receivable" would remain, while subparagraph (ii) would be deleted.

64. Furthermore, in the definition of the term "default", the bracketed text would remain outside square brackets and would read "and any other event that, under the terms of the agreement between the grantor and the secured creditor, constitutes default"; the corresponding note to the Commission would also be removed. Regarding the definition of "grantor", subparagraph (iii) would read "A transferor under an outright transfer of a receivable by agreement". The definition of the term "inventory" would be amended to read "'Inventory' means tangible assets held by the grantor for sale or lease in the ordinary course of the grantor's business, including raw materials and work-in-process". The phrase "or interests" would not be included in the definition of the term "non-intermediated securities", and the bracketed phrase "directly or indirectly" in the definition of the term "possession", as well as the corresponding note to the Commission, would be deleted. Lastly, in the definition of the term "secured creditor", subparagraph (ii) would be amended to read "A transferee under an outright transfer of a receivable by agreement", and the square brackets would be removed. The Commission had also agreed to include a definition of the term "in writing" in article 2.

65. *It was so decided.*

Article 3

66. **Mr. Bazinas** (Secretariat) said that no comments had been received on article 3, and therefore no changes to the article had been suggested.

67. **Mr. Dennis** (United States of America) said that his delegation had made a proposal regarding alternate dispute settlement procedures (A/CN.9/886, paragraph 27), which differed from the proposal made by El Salvador (A/CN.9/887, paragraph 67). He therefore suggested that a group of friends of the Chair should be given more time to consult in an effort to resolve the differences between the two proposals.

68. **Mr. Medina Mejías** (Bolivarian Republic of Venezuela) said that his delegation supported the proposal and would like to participate in the consultations.

69. **The Chair** said he took it that the Commission agreed to retain article 3 as proposed, pending the outcome of the work of the group of friends of the Chair.

70. *It was so decided.*

The meeting rose at 1 p.m.

Finalization and adoption of a draft Model Law on Secured Transactions
(*continued*)

Summary record of the 1025th meeting, held at Headquarters, New York, on Monday, 27 June 2016, at 3 p.m.

[A/CN.9/SR.1025]

Chairperson: Mr. Labardini Flores (Vice-Chair) (Mexico)

Contents

In the absence of Mr. Kenfack Douajni (Cameroon), Mr. Labardini Flores (Mexico), Vice-Chair, took the Chair.

The meeting was called to order at 3.05 p.m.

Agenda item 4: Consideration of issues in the area of security interests (*continued*)

(a) Finalization and adoption of a draft Model Law on Secured Transactions (*continued*)
(A/CN.9/865, A/CN.9/871, A/CN.9/884, A/CN.9/884/Add.1, A/CN.9/884/Add.2, A/CN.9/884/Add.3, A/CN.9/884/Add.4, A/CN.9/886, A/CN.9/887 and A/CN.9/887/Add.1)

1. **The Chair**, drawing attention to document A/CN.9/884, invited the Commission to continue its article-by-article consideration of the draft Model Law.

Article 4

2. *Article 4 was approved.*

Article 5

3. **Mr. Tosato** (Italy) said that the word "observance" in paragraph 1 should be deleted and the paragraph should simply indicate that regard was to be had to good faith in the interpretation of the Model Law. That would replicate the language used in other Commission texts.

4. **Mr. Sono** (Japan) said that paragraph 1 was modelled on article 7, paragraph 1, of the United Nations Convention on Contracts for the International Sale of Goods and other UNCITRAL texts and should therefore be retained as it stood.

5. **The Chair** said he took it that the Commission wished to approve article 5 as currently drafted.

6. *It was so decided.*

7. **Mr. Bazinas** (Secretariat), drawing attention to the title of chapter II, section A, said that one State had noted that throughout the Model Law the general rules should be subject to the asset-specific rules. In fact, the Model Law was structured in such a way that the general rules were by definition subject to the asset-specific rules. However, to make that point absolutely clear within the text, the Commission might wish to add a footnote to the title, along the following lines: "In this chapter and all other chapters, the general rules are subject to the asset-specific rules. The enacting State may wish to include in its law a provision reflecting this principle or otherwise address the relationship between general and asset-specific provisions".

8. **The Chair** said he took it that the Commission wished to add the proposed footnote to the title of chapter II, section A.

9. *It was so decided.*

Article 6

10. **Mr. Bazinas** (Secretariat) said that, in line with the comments of one State, it was suggested that the title of the article should be changed to "Creation of a security right and requirements for a security agreement" so as to better reflect the article's content. In addition, if the Commission decided to refer to secured obligations in article 9, it might be appropriate to refer to that article in paragraph 3 (b) of article 6. The square brackets in paragraph 3 were intended to remain in the text of the Model Law because they indicated options to be chosen by the enacting State, as explained in footnotes 3 and 4.

11. **The Chair** said he took it that the Commission wished to accept those suggestions.

12. *It was so decided.*

Article 7

13. **Mr. Bazinas** (Secretariat) said that one State had proposed that the opening phrase of the article should be amended to read "A security right may secure one or more obligations of any type", so as to make it clear that more than one obligation might be secured.

14. **The Chair** said he took it that the Commission wished to accept that proposal.

15. *It was so decided.*

Article 8

16. **Mr. Bazinas** (Secretariat) said that one State had proposed that the words "including future assets" in subparagraph (a) should be deleted because future assets were not a "type" of movable asset and because article 6,

paragraph 2, already addressed the security rights that could be created in future assets in a comprehensive manner.

17. **The Chair** said he took it that the Commission wished to accept that proposal.

18. *It was so decided.*

Article 9

19. **Mr. Bazinas** (Secretariat) said it had been suggested that the words "assets encumbered or to be encumbered" in paragraph 1 should be replaced with the words "encumbered assets" and that a reference to secured obligations should be added to that paragraph. Furthermore, a third paragraph should be added to the article along the following lines: "A description of secured obligations that indicates that the security right secures all obligations owed to the secured creditor at any time satisfies the standard in paragraph 1".

20. **Mr. Kwon** Young Joon (Republic of Korea) said that, if those changes were made, a reference to secured obligations would need to be added to the title of the article and the words "as provided in article 9" to article 6, paragraph 3 (b).

21. **Mr. Foëx** (Switzerland) asked whether the broad description of secured obligations in the proposed new paragraph 3 also covered obligations acquired by a secured creditor from third parties.

22. **Mr. Bazinas** (Secretariat), drawing attention to the definitions of the terms "secured obligation", "security right" and "grantor" in article 2 of the Model Law, said that a secured obligation could be that of the grantor or that of another person.

23. **The Chair** said he took it that the Commission wished to approve article 9 with the proposed amendments and to make the consequent change to article 6, paragraph 3 (b).

24. *It was so decided.*

Article 10

25. **Mr. Bazinas** (Secretariat) said that, on the basis of comments received from one State, it was suggested that paragraph 2 (a) should be amended to read along the following lines: "The security right extends to the commingled money or funds, notwithstanding that they have ceased to be identifiable". Paragraph 2 (b) should be amended to read along the following lines: "The security right in the commingled money or funds is limited to the amount of the money or funds immediately before they were commingled". Lastly, paragraph 2 (c) should be amended to read "If at any time after the commingling, the amount of the commingled money or funds is less than the amount of the money or funds immediately before they were commingled, the security right in the commingled money or funds is limited to the lowest amount between the time when the money or funds were commingled and the time when the security right is claimed".

26. **Ms. Gullifer** (United Kingdom) said that a more accurate wording for the title of the article would be "Right to proceeds taking the form of commingled funds".

27. **Mr. Bazinas** (Secretariat), noting that the title of the article reflected the conclusions of the Working Group, said that the right to proceeds and the right to commingled funds were two separate issues, covered by paragraphs 1 and 2 of the article respectively. In the title of the article, the word "funds" was considered to include money; however, the word "money" could be added if the Commission so wished.

28. **Mr. Kwon** Young Joon (Republic of Korea) said that, for the sake of consistency with the body of the article, it would be preferable to refer to commingled money and funds in the title.

29. **Mr. Riffard** (France) said that, unless the article was to be divided into two separate articles, one containing the text of paragraph 1 and the other containing the text of paragraph 2 — a change which his delegation considered unnecessary — the current title should be retained. The addition of a reference to money would make the text even more dense than it already was.

30. **Ms. Gullifer** (United Kingdom), supported by **Mr. Riffard** (France), noted that paragraph 2 of the article dealt only with proceeds in the form of money or funds. There was therefore no provision for initial encumbered assets in the form of money or funds.

31. **Ms. Walsh** (Canada) said she agreed that the rule set out in paragraph 2 did not cover commingled money and funds exhaustively. It was her delegation's understanding that if a person had a security right in money or funds credited to a bank account as an initial encumbered asset, paragraph 2 did not apply, as the text was intended to address commingled money or funds only where they were proceeds of some other asset, without creating a rule for other commingled money or funds.

32. **Mr. Cohen** (United States of America) said that money as original collateral should be covered by the article.

33. **Mr. Bazinas** (Secretariat) noted that the *UNCITRAL Legislative Guide on Secured Transactions* and the draft Model Law had been the subject of lengthy consideration by the Commission and the Working Group respectively. Paragraphs 1 and 2 of the article reflected recommendations 19 and 20 of the Guide, which related, respectively, to continuation of a security right in proceeds and to commingled proceeds. Where money or funds were original encumbered assets, article 9 of the Model Law covered the way in which they should be described and the question of whether there was a security right in them. He hoped that the Commission would not be too quick to change provisions that represented the fruit of many years' work.

34. **Mr. Weise** (American Bar Association) said that the gap identified was a small one; situations where original collateral was commingled with other assets of the same kind could arise, but were relatively infrequent. The Commission might therefore conclude that the gap was permissible. If not, the logical approach would be for original collateral to be covered by a provision analogous to paragraph 2.

35. **Mr. Jin** Saibo (China) said he agreed that, since the transactions in question were infrequent, it might not be necessary to address the gap.

36. **Mr. Riffard** (France) said that, if the gap was to be addressed, a new article on money commingled in a mass would be needed. However, as suggested by previous speakers, it might be acceptable not to address the gap at all. The courts of individual countries would thus be responsible for dealing with the rare cases that arose.

37. **Ms. Gullifer** (United Kingdom) said that a possible solution would be to change the word "proceeds" in the chapeau of paragraph 2 to "encumbered assets or proceeds".

38. **Ms. Walsh** (Canada) said that her delegation supported that suggestion. Perhaps the Commission could return to it once delegations had had an opportunity to consult on it.

39. **The Chair** said that it might be preferable to address the gap in the draft Guide to Enactment of the draft Model Law on Secured Transactions rather than in the text of the Model Law itself. He took it that the Commission wished to approve the amendments to article 10 outlined by the Secretariat; to retain the title of the article unchanged; and to consult further on the amendment proposed by the representative of the United Kingdom.

40. *It was so decided.*

Article 11

41. **Mr. Bazinas** (Secretariat) said that one State had proposed that, since the word "asset" was used in the singular in paragraph 1, the word "assets" in option A, paragraph 2, and option B, paragraph 3, should be changed to "asset". The word "they" in both paragraphs should consequently be changed to "it".

42. **Mr. Riffard** (France) said that his delegation was in favour of adding the proposed new option C to the article (A/CN.9/886, paragraph 36). The section on the article in the Guide to Enactment would require significant elaboration, with practical numerical examples, so as to help legislators choose from among options A, B and C.

43. **Mr. Cohen** (United States of America), supported by **Ms. Walsh** (Canada), said that paragraph [3][4.] should be deleted, since the issue it addressed was dealt with more comprehensively in article 31. Regarding options A and B, it would be preferable not to have different options in the final text of the article; moreover, neither option was adequate as it currently stood. The rule set out in option A would be difficult to administer because the objects in a mass were unlikely to have been valued at the precise moment of commingling. The cap should be based on quantity rather than on value, since parties typically knew how many objects they had a security right in. Option B, paragraph 2, which currently referred only to a mass, appeared to provide the best rule for products too. A group of friends of the Chair should be convened to discuss those issues.

44. **Mr. Tosato** (Italy) said he agreed with the representative of France that, irrespective of the outcome of the current discussion, the Guide to Enactment should contain examples illustrating how options A, B and C, if retained, would work.

45. **Mr. Medina Mejías** (Bolivarian Republic of Venezuela) said he agreed that paragraph [3][4.] of the article should be deleted, and that the cap referred to in paragraph 2, under both option A and option B, should be based on the quantity of assets commingled in a mass rather than their value. The principle that applied to assets commingled in a mass under option B, paragraph 2, should also apply to assets commingled in a product under option B, paragraph 3.

46. **The Chair** said he took it that the Commission wished to resume consideration of article 11 once the outstanding issues had been discussed by a group of friends of the Chair.

47. *It was so decided.*

Article 12

48. **Mr. Bazinas** (Secretariat) said that, on the basis of comments received from one State, it was suggested that the article should be amended to read along the following lines: "A security right is extinguished when all secured obligations have been discharged and there are no outstanding commitments to extend credit secured by the security right". That reflected the policy approved by the Working Group.

49. **Mr. Weise** (American Bar Association) suggested that the words "no outstanding commitments" should be changed to "no outstanding commitments by the secured creditor".

50. **Mr. Whittaker** (Australia) said that care must be taken not to exclude security trusts, in which a security was held by one person for the benefit of other lenders.

51. **Ms. Walsh** (Canada) said that the wording suggested by the Secretariat was sufficiently clear and did not need to be changed.

52. **The Chair** said he took it that the Commission wished to amend article 12 along the lines suggested by the Secretariat.

53. *It was so decided.*

Article 13

54. **Mr. Bazinas** (Secretariat) said it was suggested that the phrase "as between the grantor and the secured creditor and as against the debtor of the receivable" should be deleted from paragraph 1, since it was clear without those words that the effectiveness of a security right in a receivable was limited to the parties to the transaction. Furthermore, that change would make the paragraph more consistent with article 9, paragraph 1, of the United Nations Convention on the Assignment of Receivables in International Trade, on which it was based.

55. Some States had expressed concern that the meaning of the term "subsequent secured creditor" in paragraph 1 was unclear. It was therefore suggested that a definition of the term "subsequent security right" should be added to article 2, drawing on the language relating to the term "subsequent assignment" in article 2 of the Convention, to read along the following lines: "'Subsequent security right' means a security right created by the initial or any other secured creditor".

56. **Ms. Walsh** (Canada) asked how such a definition would help clarify article 13, paragraph 1, since the term "subsequent security right" was not used there.

57. **Mr. Bazinas** (Secretariat) said that it would be obvious that a subsequent secured creditor was a holder of a subsequent security right, on the basis that a secured creditor was a holder of a security right. The point could also be explained in the Guide to Enactment if necessary. Furthermore, the proposed definition would have the added benefit of clarifying articles 60 and 61, where the term "subsequent security right" was used.

58. **Ms. Gullifer** (United Kingdom) said that it would not be obvious to the reader that a subsequent secured creditor was a holder of a subsequent security right; the term could be interpreted to mean a second secured creditor, particularly since the word "subsequent" was used with that meaning in the phrase "the initial or any subsequent grantor" earlier in the same paragraph. It was not satisfactory for the understanding of the term "subsequent secured creditor" to be dependent on the definition of another term that did not itself appear in the article in question. Perhaps the problem could be resolved by including a definition of the term "subsequent secured creditor" in the Model Law, provided that that term was not used in any other context in the text.

59. **Mr. Deschamps** (Canada) said that the current formulation of paragraph 1 had been included in the Model Law for years without raising issues; nonetheless, his delegation could agree to the deletion of the phrase referred to by the Secretariat. There was no need to add a definition of "subsequent security right" to article 2; the issue could be resolved by deleting the word "subsequent" from the phrase "subsequent secured creditor" so that the text referred simply to "any secured creditor".

60. **Ms. Gullifer** (United Kingdom) and **Mr. Whittaker** (Australia) expressed support for that proposal.

61. **Mr. Cohen** (United States of America) said that both paragraph 2 and paragraph 3 provided some protection for third parties in the event of a breach of an anti-assignment clause. However, paragraph 3 could be interpreted as limiting the protection provided to secured creditors under paragraph 2. He therefore proposed that a phrase should be added to the beginning of paragraph 3 along the following lines: "Without limiting in any way the protection provided to secured creditors in paragraph 2".

62. **Ms. Walsh** (Canada) said that, while she understood the concern raised by the previous speaker, the proposed amendment would make the text unnecessarily complex.

63. **Mr. Brink** (Factors Chain International and European Union Federation for the Factoring and Commercial Finance Industry) said that the language in paragraphs 2 and 3 was based on the equivalent provisions of the United Nations Convention on the Assignment of Receivables in International Trade. He cautioned against any changes that might lead to conflicting interpretations.

64. **Mr. Dennis** (United States of America) said that, in order to be fully consistent with article 10, paragraph 3, of the Convention and to avoid any potential ambiguity, paragraphs 2 and 3 of article 13 of the Model Law should be merged into a single paragraph.

65. **Ms. Walsh** (Canada) said that her delegation did not mind whether paragraphs 2 and 3 remained separate or were merged into a single paragraph, provided that the language was consistent with the relevant provisions of the Convention.

66. **The Chair** said he took it that the Commission wished to delete the words "as between the grantor and the secured creditor and as against the debtor of the receivable" in paragraph 1; to change the phrase "any subsequent secured creditor" in paragraph 1 to "any secured creditor"; and to merge paragraphs 2 and 3.

67. *It was so decided.*

Article 14

68. **Mr. Bazinas** (Secretariat) said that one State had suggested that the words "under the law governing it" should be inserted after the word "transferable" in paragraph 2, for the sake of consistency with article 10, paragraph 1, of the United Nations Convention on the Assignment of Receivables in International Trade. That change would make it clear that nothing in the Model Law affected whether a supporting right was transferable with or without a new act of transfer.

69. **Mr. Kwon** Young Joon (Republic of Korea) said that the two paragraphs of the article should be combined in order to follow the structure of the Convention, since that had been the approach taken to article 13.

70. **Ms. Walsh** (Canada) said that, where articles of the Model Law corresponded to articles of the Convention, their structure should be brought into line with the Convention, unless there was a good reason not to do so.

71. **The Chair** said he took it that the Commission wished to add the words proposed by the Secretariat and to merge the two paragraphs of the article into one.

72. *It was so decided.*

Articles 15-17

73. *Articles 15-17 were approved.*

Article 18

74. **Mr. Bazinas** (Secretariat) said that, since the Commission had decided to add a definition of the term "registry" to article 2, the phrase "general security rights registry (the 'Registry')" in paragraph 1 could be replaced with the word "Registry". The footnote in article 18 should be moved to article 2 and reworded to state simply that, if a State adopted a secured transactions law and registry-related provisions in a single law, it would need to include a definition of the term "registry" only once in that law. If two separate laws were adopted, the definition would have to be included in both.

75. **The Chair** said he took it that the Commission wished to accept those suggestions.

76. *It was so decided.*

Article 19

77. **Mr. Bazinas** (Secretariat) said that one State had noted that paragraph 2 of the article referred to "identifiable proceeds", while paragraph 1 simply mentioned "proceeds". For the sake of clarity and consistency, it was suggested that the word "identifiable" should be deleted from paragraph 2 and that both paragraphs 1 and 2 should be amended to refer to a security right in proceeds arising under article 10.

78. **The Chair** said he took it that the Commission wished to accept those suggestions.

79. *It was so decided.*

80. **Mr. Bazinas** (Secretariat), drawing attention to the note to the Commission under article 19, said that the Commission might wish to insert a new article, which could be referred to as 19 bis, on the third-party effectiveness of a security right in tangible assets commingled in a mass or product, in line with recommendation 44 of the *UNCITRAL Legislative Guide on Secured Transactions*. The title of such a new article could be "Tangible assets commingled in a mass or product" and the body of the article could read along the following lines: "If a security right in a tangible asset is effective against third parties, a security right in a mass or product to which the security right extends under article 11 is effective against third parties without any further act".

81. **Ms. Gullifer** (United Kingdom) said that both article 19 and the proposed article 19 bis dealt only with proceeds, not original encumbered assets. Therefore, if article 10, paragraph 2, was amended to refer to both original encumbered assets and proceeds, as she had proposed, there would be a lacuna in articles 19 and 19 bis. That might constitute a reason not to amend article 10.

82. **Ms. Walsh** (Canada), expressing agreement with the previous speaker, said that the lacuna could not be resolved by a simple drafting change.

83. **The Chair** said that, in the absence of specific proposed wording to address the lacuna identified, he took it that the Commission wished to approve a new article 19 bis as proposed by the Secretariat and that, for the sake of consistency, the words "encumbered assets or" should not be added to article 10, paragraph 2.

84. *It was so decided.*

Articles 20 and 21

85. *Articles 20 and 21 were approved.*

Article 22

86. **Mr. Bazinas** (Secretariat) said that one State had proposed that the phrase "as a result of a change in the location of the encumbered asset or the grantor, whichever determines the applicable law under the provisions of chapter VIII" should be deleted from the chapeau of paragraph 1, since there were other circumstances that could also result in a change of the applicable law. Another State had proposed that the remainder of the chapeau should be amended to read along the following lines: "The security right remains effective against third parties under this Law if it is made effective against third parties in accordance with this Law before the earlier of…". Lastly, paragraph 1 (b) could be amended to read "The expiry of [a short period of time to be specified by the enacting State] after this law becomes applicable".

87. **The Chair** said he took it that the Commission wished to accept those proposals.

88. *It was so decided.*

Article 23

89. **Mr. Bazinas** (Secretariat) said that, on the basis of a proposal made by one State, it was suggested that option B should be made clearer by replacing the phrase "[below a value to be specified by the enacting State]" with wording along the following lines: "with an acquisition price below [an amount to be specified by the enacting State]".

90. **Ms. Walsh** (Canada) said that her delegation supported that suggestion. Since the only intended difference between option A and option B was that, under the latter, automatic third-party effectiveness applied only to goods below a certain acquisition price, she proposed that option B should be amended to incorporate the special protection for buyers provided for in option A by inserting the words "other than a buyer or other transferee, lessee or licensee" after the words "effective against third parties".

91. **Mr. Weise** (American Bar Association) said he agreed that the same set of persons should be protected under options A and B. However, the Commission might wish to consider moving those provisions to chapter V, on priority of a security right.

92. **Mr. Bazinas** (Secretariat), noting that options A and B had both been adopted by the Working Group, said that option B was inconsistent with recommendation 179 of the Secured Transactions Guide, since the recommendation did not mention any value-based limitations on automatic third-party effectiveness. The Commission might therefore wish to consider whether to retain both options.

93. **Mr. Dennis** (United States of America) said he agreed that chapter V was a more appropriate place for the provisions in question and that the Commission should opt to retain either option A or option B, not both.

94. **Ms. Walsh** (Canada) said that the Working Group had decided to add option B because some members had felt that option A went too far in that it took no account of the value of the goods in question. The Commission should not reverse that decision by eliminating option B.

95. Her delegation was not averse to addressing the issue of special protection for buyers in chapter V, but the phrase "other than a buyer or other transferee, lessee or licensee" should nonetheless be retained in options A and B of article 23, as it indicated to readers that they should consult the general rules, not the asset-specific rules, on the question of third-party effectiveness against buyers, transferees, lessees and licensees.

96. **Mr. Kwon** Young Joon (Republic of Korea) said he agreed that option B should be retained, as some enacting States would need to restrict the scope of automatic third-party effectiveness. Option B was not inconsistent with

recommendation 179, as it did not deny automatic effectiveness but simply qualified it.

97. **Mr. Riffard** (France) said that the article was based on the application of a cost-benefit ratio. The nature and usual value of the vast majority of consumer goods did not justify an obligation for the creditor to register a notice in the Registry, or for third parties to consult the Registry. His delegation was therefore in favour of retaining option A and would not object to the elimination of option B. If option B was retained, the Guide to Enactment should make it clear that the threshold value should be high enough to allow only rare exceptions to the general rule of automatic third-party effectiveness. Otherwise, option B could undermine the very principle that the article aimed to establish.

98. **Mr. Whittaker** (Australia) said that option B should be retained. Having two options should not be seen as a sign of indecision on the part of the Commission but rather as a means of enabling enacting States to choose the option that was most appropriate for their domestic circumstances.

99. His delegation would prefer the exception for buyers and other transferees, lessees and licensees to be dealt with as a priority rule, rather than as a qualification of effectiveness against third parties in article 23, so as to avoid creating confusion about the general rule that security rights were effective against third parties.

100. **Mr. Garro** (Argentina) said that the reference to the lessee or licensee should be removed from option A. Option B should be retained, as it did not conflict with the principle of automatic effectiveness of acquisition security rights in consumer goods but simply gave enacting States discretion to determine the value of the goods to which it should apply. While the option was in some ways inconsistent with recommendation 179 of the Secured Transactions Guide, it did not negate it, since the underlying principle was the same. The Guide to Enactment should clearly set out the reasons for the inclusion of the option.

101. **Ms. Walsh** (Canada) said that if a priority rule were to replace the reference to buyers, transferees, lessees and licensees in article 23, it would presumably have to indicate that an acquisition security right in consumer goods was not effective against a buyer or other transferee, lessee or licensee unless it had been made effective against third parties in accordance with the general rule. Thus, the priority rule would simply lead back to the third-party effectiveness rule. Her delegation could not, therefore, support the deletion of the reference to buyers and other transferees, lessees or licensees from article 23 without having an opportunity to see the proposed wording of the priority rule intended to replace it.

102. **Mr. Tirado Martí** (Spain) said that option B should be retained and that option A should be deleted, since its provisions were covered by option B. He agreed that it should be made clear to legislators that the value specified in option B should be high.

103. **Mr. Cohen** (United States of America) said he agreed that, if the rule protecting buyers and other transferees, lessees or licensees was placed in article 23, it would create confusion about the general rule of effectiveness of security rights against third parties. While acknowledging the concerns expressed by the representative of Canada, his delegation was confident that appropriate language could be found for a priority rule. Such a rule might simply indicate that a buyer or other transferee, lessee or licensee acquired its rights free of a security right made effective against third parties solely under article 23. That would make it clear that if the only way the security right was effective against third parties was under article 23 — so-called automatic effectiveness — then the protected parties would prevail. Since the difference of opinion was partly a matter of drafting, perhaps a solution could be sought by a group of friends of the Chair in order to save time.

104. **Mr. Weise** (American Bar Association), expressing agreement with the previous speaker, said that he was confident that the Secretariat could draft an appropriate rule.

105. **Mr. Bazinas** (Secretariat), drawing attention to the note to the Commission under article 23, said that the note referred to option A but raised an issue that would still need to be addressed if the Commission decided to delete option A and add the phrase “other than a buyer or other transferee, lessee or licensee” to option B. Where there was a buyer, lessee or licensee, value was implied; that was in line with the Secured Transactions Guide, which explained that someone who received goods as a gift — a donee — would not be a transferee in the ordinary course of business. On that basis, the exception in article 23 should not apply to transferees; it should be limited to buyers, lessees and licensees.

106. **Ms. Walsh** (Canada) requested an explanation of the reference to the ordinary course of business, since the rule in question did not relate to buyers in the ordinary course of business.

107. **Mr. Bazinas** (Secretariat) said that the proposed reference to a buyer or other transferee, lessee or licensee in article 23 was based on language in other parts of the Model Law, such as article 32, which referred to buyers or other transferees, licensees or lessees in the ordinary course of business. In article 32, it was clear that no gift was involved, whereas in article 23, that point was not clear, as there was no reference to the ordinary course of business. It was therefore not clear that the transferee referred to would not be a donee. For that reason, the Commission might wish to omit the words “or other transferee” in article 23. Alternatively, the term “transferee for value” could be used.

108. **Mr. Whittaker** (Australia) said he agreed that article 32 referred to transferees only in situations where the secured creditor was consenting to the transfer; it was therefore irrelevant whether or not there was value in such a transaction. Value was implicit, however, in the terms “buyer”, “lessee” and “licensee”. Perhaps the best solution would be to omit the words “or other transferee” in article 23.

109. **Mr. Weise** (American Bar Association), expressing agreement with the previous speaker, said that the policy question for the Commission was whether donees should be protected when an acquisition security right in consumer goods was made effective by third parties “automatically” under article 23.

110. **Mr. Tosato** (Italy) asked what was meant by the word "licensee" in the context of consumer goods.

111. **The Chair** said that a buyer of a laptop, for example, would be buying not only the physical object but also a licence for the software installed on the machine. Perhaps that point should be made clearer in the text.

112. He took it that the Commission wished to delete option A in article 23 and to retain option B, amending it to read along the following lines: "An acquisition security right in consumer goods with an acquisition price below [an amount to be specified by the enacting State] is effective against third parties other than a buyer, lessee or licensee upon its creation without any further act". In the Guide to Enactment, legislators would be encouraged to specify a reasonably high price in the cases in question. He also took it that delegations would consult in order to draft a new priority rule for inclusion in chapter V of the Model Law.

113. *It was so decided.*

Article 24

114. *Article 24 was approved.*

Article 25

115. **Mr. Bazinas** (Secretariat) said that, on the basis of comments made by one State, it was suggested that the phrase "or the asset covered by the document" should be added after the words "after the document" in paragraph 3 in order to cover situations in which a secured creditor delivered not the document but the assets themselves. If that change was made, the words "covered by the document" at the end of the paragraph could be deleted. The Commission might also wish to consider whether to delete the words "ultimate sale or exchange, loading or unloading, or otherwise" near the end of the paragraph; the Guide to Enactment could explain that the phrase "dealing with the assets" covered all those operations. Lastly, for the sake of consistency with the rest of the article, the Commission might wish to change the word "assets" to "asset".

116. **Mr. Medina Mejías** (Bolivarian Republic of Venezuela) said that, if the words "ultimate sale or exchange, loading or unloading, or otherwise" were deleted, a footnote should be added to explain that those were the kinds of operations covered by the phrase "dealing with the asset", so as to avoid any confusion about the meaning of the provision.

117. **The Chair** said that a footnote might not be the appropriate place for such a clarification. As suggested by the Secretariat, an explanation could be provided in the Guide to Enactment.

118. He took it that the Commission wished to approve article 25 with the amendments suggested by the Secretariat.

119. *It was so decided.*

Article 26

120. *Article 26 was approved.*

Article 27

121. **The Chair** drew attention to document A/CN.9/884/Add.1, which contained article 27 relating to the establishment of a registry for the registration of notices with respect to security rights, including draft Model Registry-related Provisions.

122. **Mr. Bazinas** (Secretariat) said that, since the Commission had agreed to add a definition of the word "registry" to article 2 of the Model Law, the title of article 27 could be changed to "Establishment of the Registry".

123. **The Chair** said he took it that the Commission wished to accept that suggestion.

124. *It was so decided.*

125. **The Chair** invited the Commission to consider the Model Registry-related Provisions article by article. He recalled that the substance of the text had already been approved by the Commission the previous year.

126. **Mr. Bazinas** (Secretariat) said that the Commission might wish to consider changing the title of the Provisions to "Model Registry Provisions".

127. **The Chair** said he took it that the Commission wished to accept that suggestion.

128. *It was so decided.*

Article 1

129. **Mr. Bazinas** (Secretariat) said that the definition of the term "registered notice" in subparagraph (g) had been placed in square brackets because the Working Group had not reached agreement on whether it should be included. As the term was used several times in the draft Provisions, the Commission might wish to retain the definition and remove the square brackets from subparagraph (g) and from the letters identifying the subsequent subparagraphs.

130. **The Chair** said he took it that the Commission wished to accept that suggestion.

131. *It was so decided.*

Articles 2-4

132. *Articles 2-4 were approved.*

Article 5

133. **Mr. Bazinas** (Secretariat), drawing attention to the note to the Commission under the article, which suggested the addition of a new paragraph (3 bis) stating that the Registry could not refuse access to registry services if a person complied with the requirements of paragraphs 1 and 2, said that one State had proposed that the requirements of paragraph 3 should also be mentioned. That State had also proposed that the phrase "If access is refused" in paragraph 4 should be amended to read "If access to registry services is refused". Lastly, the Commission might wish to consider whether secure access requirements, such as a user code or identification number, should be mentioned in paragraph 1. At its previous session, the Commission had

decided that that matter could be addressed in the Guide to Enactment.

134. **Ms. Gullifer** (United Kingdom), noting that, under paragraph 2, a person submitting an amendment or cancellation notice had to satisfy the secure access requirements specified by the Registry, said that, if a paragraph 3 bis was added to the article, a similar reference to secure access requirements would need to be added to paragraph 1. Otherwise a registry would not be able to refuse access to a person submitting an initial notice who did not meet those requirements. Paragraph 1 (b) was not necessarily sufficient to cover such requirements in the case of an electronic registry. One solution would be to include a generic reference to secure access requirements in paragraph 1; alternatively, the Guide to Enactment could state that paragraph 1 (b) covered such requirements and provide further information as to their precise nature. It was important to address the issue because, in the future, registry services in enacting States were likely to include fully electronic registers.

135. **Ms. Walsh** (Canada), having expressed agreement with the previous speaker, said that the word "also" in paragraph 2 could suggest that the secure access requirements referred to in that paragraph were an alternative to the requirements of paragraph 1. Her delegation therefore proposed that the principle set out in paragraph 2 should instead be placed in a new subparagraph 1 (d). It would also be prudent to state explicitly what the secure access requirements were.

136. **Mr. Bazinas** (Secretariat) said that, as far as he recalled, the *UNCITRAL Guide on the Implementation of a Security Rights Registry* did not state that secure access requirements had to be met because that would constitute an undue restriction on public access to registry services.

137. **Mr. Tirado Martí** (Spain) said that the proposed paragraph 3 bis should not be included unless a reference to secure access requirements was added to paragraph 1.

138. **Ms. Walsh** (Canada) said she agreed that no restrictions should be placed on access for the registration of initial notices. Secure access was not a precondition for initial registration; it was assigned as part of the process of initial registration and then had to be used in order to register any subsequent amendment or cancellation notice.

139. **Mr. Dennis** (United States of America) said that his delegation agreed with the comments made by the representative of the United Kingdom regarding paragraph 1. Paragraph 2 should be retained, but a reference to additional access requirements for amendments or cancellations should be added.

140. **Mr. Kwon** Young Joon (Republic of Korea) said that his delegation wished to retain paragraph 1 as it stood. The question of secure access requirements could be addressed in the Guide to Enactment in relation to paragraph 1 (b).

141. **The Chair** said he took it that the Commission wished to continue consideration of article 5 at its next meeting.

142. *It was so decided.*

The meeting rose at 6.05 p.m.

Finalization and adoption of a draft Model Law on Secured Transactions
(*continued*)

Summary record of the 1026th meeting, held at Headquarters, New York, on Tuesday, 28 June 2016, at 10 a.m.

[A/CN.9/SR.1026]

Chairperson: Mr. Labardini Flores (Vice-Chair) (Mexico)

Contents

In the absence of Mr. Kenfack Douajni (Cameroon), Mr. Labardini Flores (Mexico), Vice-Chair, took the Chair.

The meeting was called to order at 10.05 a.m.

Agenda item 4: Consideration of issues in the area of security interests (*continued*)

(a) Finalization and adoption of a draft Model Law on Secured Transactions (*continued*) (A/CN.9/884, A/CN.9/884/Add.1, A/CN.9/884/Add.2, A/CN9/886, A/CN.9/887 and A/CN.9/887/Add.1, A/CN.9/XLIX/CRP.5)

1. **The Chair** drew attention to article 27 of the draft Model Law (A/CN.9/884/Add.1), relating to the establishment of a registry for the registration of notices with respect to security rights, including draft Model Registry-related Provisions. He invited the Commission to resume its consideration of those Provisions article by article.

Article 5

2. **The Chair** recalled that at its previous meeting the Commission had discussed secure access requirements, in particular whether they should be included in article 5 in the form of a paragraph 3 bis.

3. **Ms. Sabo** (Canada) said that there was no call to address those requirements in article 5; they could be covered in the Guide to Enactment of the Model Law on Secured Transactions. Secure access requirements needed to apply only to amendment or cancellation notices and not to the registration of an initial notice. For that reason, it might not be appropriate to include a paragraph 3 bis.

4. **Ms. Walsh** (Canada) said that it would be preferable not to include a paragraph 3 bis so as to allow for procedural steps by registry staff in relation to electronic filing. Paragraph 2 might usefully be incorporated in paragraph 1, as a fourth condition.

5. **Mr. Tirado Martí** (Spain), supported by **Ms. Gullifer** (United Kingdom), said that, for the reasons already stated, and also because of a duplication with article 6, paragraph 3, there was no need for a paragraph 3 bis.

6. **Mr. Kwon** Young Joon (Republic of Korea) said that a separate paragraph on secure access requirements was not needed, particularly as such requirements frequently related to the identity of the person submitting the notice, which was covered by subparagraph 1 (b). It would be better to address the matter in the Guide to Enactment.

7. **Mr. Dennis** (United States of America) said that there was merit in a proposed paragraph 3 bis; it was important to signal that the Registry could not simply exercise discretion as to whether or not to accept a request, but must make a substantive determination following a review of the documentation. He wondered whether the proposed paragraph might be submitted to a group of friends of the Chair for further discussion.

8. **Ms. Gullifer** (United Kingdom) said she wondered whether the concerns expressed by the delegation of the United States were not adequately addressed by article 6, which provided for the rejection of a registration for lack of information, as opposed to article 5, which dealt with the conditions for access.

9. **The Chair** said he took it that the Commission wished to approve the text as it stood, without the addition of the proposed paragraph 3 bis.

10. *It was so decided.*

Article 6

11. **Mr. Bazinas** (Secretariat) said that some States had indicated that, as currently drafted, article 6 might require the Registry to reject a notice or a request if some but not all the information was illegible, which was not the intention. It was therefore suggested that subparagraph 1 (a) should read "A notice if no information is entered in one of the mandatory designated fields, or if information entered in one of the mandatory designated fields is illegible", and that paragraph 2 should read "The Registry must reject a search request if no information is entered in one of the fields designated for entering a search criterion, or if information entered in one of the fields designated for entering a search criterion is illegible". The new wording would provide for two separate requirements, namely, that the information should be entered and that the information entered should be legible.

12. **The Chair** said he took it that the Commission wished to approve those changes.

13. *It was so decided.*

Article 7

14. *Article 7 was approved.*

Article 8

15. **Mr. Bazinas** (Secretariat) said that one State had commented that, as the words "in accordance with article 9 of these Provisions" following the square brackets in subparagraph (a) could create the false impression that article 9 dealt with additional information, those words should more appropriately be placed before the bracketed wording.

16. **The Chair** said he took it that the Commission wished to approve those changes.

17. *It was so decided.*

Articles 9 and 10

18. *Articles 9 and 10 were approved.*

Article 11

19. **Mr. Bazinas** (Secretariat) said that, for the sake of consistency with article 9 of the draft Model Law, which dealt with the same issue in the context of the security agreement, paragraph 1 of article 11 should refer simply to "encumbered assets" and not to "assets encumbered or to be encumbered", and in paragraph 2, the phrase "within a particular category" should be replaced by "within a generic category".

20. **The Chair** said he took it that the Commission wished to approve those changes.

21. *It was so decided.*

Articles 12, 13 and 14

22. *Articles 12, 13 and 14 were approved.*

Article 15

23. **Mr. Bazinas** (Secretariat) said that one State had proposed that, in the interests of greater clarity, subparagraph 2 (b) should be reworded to read "If that person knows that the address has changed, at the most recent address, if known or reasonably available to that person".

24. **The Chair** said he took it that the Commission wished to approve those changes.

25. *It was so decided.*

Articles 16, 17, 18 and 19

26. *Articles 16, 17, 18 and 19 were approved.*

Article 20

27. **Mr. Bazinas** (Secretariat), responding to comments received from many States on the article, proposed a number of parallel changes. It had been noted that it was impossible for a creditor to know that the grantor would not authorize registration, as stipulated in subparagraph 1 (a); moreover, that provision conflicted with the approach followed in the Model Law, which was to base actions on written notices rather than on subjective criteria. Accordingly, in subparagraph 1 (a), the words "the secured creditor knows that the grantor will not authorize that registration" might usefully be replaced by "the secured creditor has been notified in writing by the grantor that the grantor will not authorize that registration". Similarly, in subparagraph 2 (a), the words "the secured creditor knows that the grantor will not authorize the registration" should be replaced by "the secured creditor has been notified in writing by the grantor that the grantor will not authorize the registration", and again, in subparagraph 3 (a) (i), the words "the secured creditor knows that the grantor will not authorize" should be replaced by "the secured creditor has been notified in writing by the grantor that the grantor will not authorize".

28. **Mr. Foëx** (Switzerland) said that he welcomed the proposed changes but wondered whether it was necessary for the notification to be in writing; no such requirement appeared either in the comments by States or in the *UNCITRAL Guide on the Implementation of a Security Rights Registry*.

29. **Mr. Riffard** (France) likewise questioned the need for the notification to be in writing, particularly in subparagraph 3 (a) (i), wondering whether, in a case where a creditor requested a registration in advance without any subsequent security agreement being concluded, the creditor must wait for a notification in writing from the grantor before proceeding with cancellation. In such a case, the creditor would indeed know that the grantor would not authorize registration if there was a breakdown in negotiations. Accordingly, while notification in writing might be justified in paragraphs 1 and 2, it would not be in paragraph 3.

30. **Mr. Tirado Martí** (Spain) said that his delegation also supported the inclusion of a notification requirement but considered that such notification did not need to be in writing; he was therefore in favour of the removal of any such stipulation in the article.

31. **Ms. Gullifer** (United Kingdom) said that her delegation had proposed that the secured creditor should be "informed" that the grantor would not give authorization, but likewise saw no need for notification to be in writing.

32. **Mr. Weise** (American Bar Association) asked whether deleting the "in writing" stipulation would still leave the requirement of notification.

33. **Mr. Bazinas** (Secretariat) said that one State, noting the separate paragraphs devoted to amendment notices and cancellation notices, had pointed to an element lacking in paragraph 1, as compared with paragraph 3, which, in its subparagraph (b), covered the possibility of an authorization being withdrawn without a security agreement having been

concluded; the obligation of registration still remained. It would make sense to include a similar provision in paragraph 1 through the addition of a new subparagraph (c) that would read "The grantor authorized the registration of a notice covering those assets but the authorization has been withdrawn and no security agreement covering those assets has been concluded". The word "or" at the end of subparagraph (a) should be deleted and inserted following a semicolon at the end of subparagraph (b). Paragraph 4 should accordingly include a reference to the new subparagraph 1 (c), which like the other provisions mentioned would not allow any payment for the creditor's compliance with its obligation.

34. **Mr. Sono** (Japan), after asking whether the "in writing" requirement was to be omitted not only in paragraph 3 but also in paragraphs 1 and 2, said that it might be better to use the word "informed", rather than "notified", which implied a written communication.

35. **Mr. Weise** (American Bar Association), referring to the possibility of pre-registration mentioned by the representative of France, said he wondered whether the proposed new subparagraph 1 (c) should be broadened so that an authorization for registration without an agreement being concluded would constitute a requirement for cancellation and not just for an amendment in relation to specific assets.

36. **Mr. Bazinas** (Secretariat) said that such a scenario was already addressed in subparagraph 3 (b), which required the creditor to register a cancellation notice if the authorization had been withdrawn and no security agreement had been concluded. The reason for the difference in language between subparagraphs 3 (b) and 1 (c) was that the former related to all the assets and the latter to only some assets.

37. **Ms. Gullifer** (United Kingdom) said that if the "in writing" requirement was to be omitted the word "notified" should be replaced by "informed".

38. **The Chair** said he took it that the Commission agreed that subparagraphs 1 (a), 2 (a) and 3 (a) (i) should be amended to refer to the secured creditor's having been informed, rather than knowing, and that a new subparagraph 1 (c) should be included.

39. *It was so decided.*

Articles 21, 22 and 23

40. *Articles 21, 22 and 23 were approved.*

Article 24

41. **Mr. Bazinas** (Secretariat) drew attention to the note to the Commission included after paragraph 6 concerning the phrase "except to the extent it seriously misled third parties that relied on the erroneous information in the registered notice", noting that the Commission might wish to leave the text unchanged, so long as it was aware of the disparity between the text and the explanation provided in the Registry Guide; alternatively, it might prefer to delete the qualifying clause.

42. **The Chair** suggested that it was perhaps the Guide that should be amended and not the article.

43. **Mr. Whittaker** (Australia) said that it was preferable not to include unnecessary language in the Model Law.

44. **Ms. Walsh** (Canada) said that it was difficult to disagree with that view. Nevertheless, the Commission must be sure that the language in question was truly unnecessary before deciding to delete it. If it did so decide, that fact should be noted in the Guide to Enactment with an explanation, as it would represent a departure from the Registry Guide.

45. **Mr. Kwon** Young Joon (Republic of Korea) said that his delegation's preference was to leave the text unchanged, with perhaps an explanation of the phrase in the Guide to Enactment.

46. **Mr. Foëx** (Switzerland) said he concurred with that view and drew the Commission's attention to paragraph 220 of the Registry Guide, which recommended that creditors should be entitled to enforce their security right as against a third party only up to the maximum amount erroneously stated in the registered notice.

47. **The Chair** said he took it that the Commission wished to approve the article without change and to provide a clarification in the Guide to Enactment.

48. *It was so decided.*

Article 25

49. **Ms. Walsh** (Canada), introducing her delegation's proposal on article 25 (A/CN.9/887), said that the proposed drafting changes were intended to make it clear that, even if a secured creditor did not register an amendment notice after a change in the identifier of the grantor or failed to do so within the grace period, the secured creditor still retained its priority against a competing secured creditor or transferee. The comments were also intended to clarify the difference between the scenario where the amendment notice was registered before the expiry of the grace period and the scenario where it was registered subsequently.

50. **Mr. Weise** (American Bar Association), referring to a situation where the grantor's name changed and where, during the grace period that would have been available for amending the registration, the secured creditor was able to make its security right effective against third parties by other means — namely, not by amending the grantor's name but, for example, by possession — asked whether the right would continue to be effective against third parties and would not be subject to another security right by another secured creditor that was made effective before the first secured creditor took possession.

51. **Ms. Walsh** (Canada) said that the issue was addressed in the proposed redraft, paragraph 1 of which set out the general rule that the third party's priority was not affected by a change in the identifier, except in the specific circumstances set out in paragraph 2. Accordingly, registration of the notice was ineffective only against subsequent secured creditors and subsequent buyers and then only if the amendment notice was not registered before

the expiry or before the competing security right was made effective.

52. **Mr. Whittaker** (Australia), referring to paragraph 3 of the proposed redraft, recalled that in the discussion on article 23 of the draft Model Law, dealing with acquisition security rights in consumer goods, it had been agreed to convert what had previously been a qualifier on the concept of "effective against third parties" into a priority rule, since such effectiveness was a condition of the security right itself and did not apply only to some third parties and not to others. He wondered whether, in line with that principle, proposed paragraph 3 might similarly be converted into a priority rule.

53. **Ms. Walsh** (Canada) said that, elsewhere in the Guide to Enactment, in situations where assets were taken free of a security right, there was no reference to a transferee having priority over the secured creditor but simply to the question whether a security right was effective against the buyer or licensee. Since the tendency was not to use the language of priority and subordination in relation to transferees, it seemed appropriate in the proposal to speak simply of the ineffectiveness of registration against a person's rights.

54. **Mr. Whittaker** (Australia) explained that he had indeed been concerned more with the idea of taking assets free of a security right than with any priority rule.

55. **Ms. Walsh** (Canada) stressed how difficult it had been to draft a satisfactory proposal and that it might well be further improved. Nevertheless, the possibility of third-party effectiveness still remained, whether through possession or control or any other mechanism. Her delegation had no difficulty with article 23 of the draft Model Law or with the idea of a security right being effective against some parties and not against others.

56. **Mr. Cohen** (United States of America) said that some confusion might indeed result from the concept of effectiveness against some third parties but not against others. It might be advisable to take up the discussion of that issue informally in respect of article 23 of the draft Model Law and at the same time to reconsider the Canadian proposal, since they presented the same drafting challenge.

57. **The Chair** suggested that a group of friends of the Chair should discuss the issue further to see if they could arrive at a consensus.

58. *It was so decided.*

Article 26

59. **Ms. Walsh** (Canada), introducing her delegation's proposed redraft of the article (A/CN.9/887), which sought to address a situation similar to that encountered in article 25, said that it envisaged a scenario where there was no change in the identifier but the encumbered asset was transferred and the transferee then sold or granted security in the transferred asset. Option A would require the secured creditor to register an amendment notice naming the transferee as a new grantor within a set period following the transfer. Option B carried the same obligation to preserve priority against subsequent secured creditors and transferees, but only where the secured creditor acquired knowledge that the transfer had occurred. Since the concerns addressed were analogous in the two articles, the proposed options were also analogous.

60. However, option B took up an issue not clearly enunciated in the previous draft. It required the secured creditor to register an amendment notice only if it acquired knowledge not merely of the transfer but also of the identity of the transferee, since without such knowledge it could not very well perform its obligation of registration. A further difference was the deletion in option A of the reference to subsequent transfers, since a registered notice would be ineffective against a subsequent transferee unless the secured creditor managed to register the amendment notice before the subsequent transfer occurred. A final clarification in option B was that if the asset was subject to subsequent transfers before the secured creditor found out that it had been transferred, the secured creditor was not required to take steps to preserve the effectiveness of the registered notice unless it had knowledge of the identifier of the most recent transferee. She recognized that some delegations considered it conceptually suspect for a security right to be effective against some but not other third parties and might wish to consider other drafting changes.

61. **The Chair** suggested that a group of friends of the Chair could discuss the proposal further, along with the redrafted article 25, with a view to further improvements.

62. *It was so decided.*

Article 27

63. **Mr. Tirado Martí** (Spain) said that the title of the article, "Appointment of the registrar", was misleading, because the article also dealt with dismissal, determination of duties and monitoring of performance. More importantly, it required the appropriate authority to determine the registrar's duties. In many jurisdictions those duties were determined, or indeed predetermined, only by law or regulation, not by any authority.

64. **Mr. Dubovec** (National Law Center for Inter-American Free Trade) said that the Guide to Enactment might usefully explain how in practice the registrar's duties would be determined, which would typically be by way of regulation or law. Another solution would be to replace the word "determine" with "prescribe".

65. **The Chair** said he took it that the Commission wished to approve the article, on the understanding that a clarification would be provided in the Guide to Enactment.

66. *It was so decided.*

Article 28

67. *Article 28 was approved.*

Article 29

68. **Mr. Dubovec** (National Law Center for Inter-American Free Trade) said that article 18, option B, required the Registry to amend information by registered notice at the request of the person concerned; article 20, paragraph 7, stipulated that the Registry must register a notice upon a court order. He therefore wondered whether article 29

should not also include a reference to those other two exceptions.

69. **Mr. Riffard** (France) said that the exceptions provided for in article 29 concerned cases where the Registry amended information on its own initiative, without any external request.

70. **Mr. Kwon** Young Joon (Republic of Korea) said that article 29 dealt specifically with the integrity of information in the Registry record and that the basic intention was to prevent the Registry from amending or removing such information on its own. The other possible exceptions cited did not appear to involve any impairment of the integrity of that information.

71. **Ms. Gullifer** (United Kingdom) said that article 18, option B, did appear to concern an amendment of information already registered and might therefore be suitably referred to as an exception in article 29, paragraph 1. Article 20, paragraph 7, however, concerned the registration of an amendment or cancellation notice and did not entail any removal or amendment of registered information.

72. **The Chair** said he took it that the article could be approved as written, with the Guide to Enactment providing the necessary clarification.

73. *It was so decided.*

Article 30

74. **Mr. Bazinas** (Secretariat) said that one State had noted that the reference to article 20 at the end of paragraph 1 of option A might unintentionally create the impression that, in order to remove information from the public registry office, the Registry must verify compliance with the conditions laid down in article 20. It had therefore been proposed that the last line of that paragraph should be amended to read "in accordance with article 19, including any cancellation notice registered in accordance with article 20, paragraphs 3 or 7, of these Provisions".

75. **The Chair** said he took it that the Commission wished to approve the new wording.

76. *It was so decided.*

Articles 31, 32 and 33

77. *Articles 31, 32 and 33 were approved.*

78. **The Chair** said he took it that the Commission wished to approve the draft Model Registry-related Provisions, as amended, as a whole.

79. *It was so decided.*

80. **The Chair** invited the Commission to resume its consideration of the articles of the draft Model Law contained in document A/CN.9/844/Add.2.

Article 28

81. **Ms. Walsh** (Canada), introducing her delegation's proposal on article 28 (A/CN.9/XLIX/CRP.5), said that the proposal addressed two scenarios. In the first, there was a priority contest between security rights created by the same grantor in the same encumbered asset (article 28); in the second, there was a priority contest between security rights created by different grantors in the same encumbered asset (article 28 bis). In the first scenario, two options were proposed in order to clarify the agreed rule, namely, that priority was determined by the order in which third-party effectiveness was achieved, except in the case of a security right that was made effective against third parties by registration of a notice. Option B closely tracked recommendation 76 of the *UNCITRAL Legislative Guide on Secured Transactions*; option A had the advantage of being short and was not substantively different from option B.

82. **Mr. Riffard** (France) said that his delegation had no reservations as to the substance of the Canadian proposal, but only as to its wording. The article already set out the agreed rule on the order of priority in language that was straightforward and easily understandable. He therefore questioned the usefulness of a more cumbersome formulation which, because of its attention to detail, might not be readily understood. The ideal should be short, simple, concise rules. It might therefore be better to retain the original wording, with a more detailed exposition if necessary in the Guide to Enactment.

83. **Ms. Gullifer** (United Kingdom) said that her delegation supported option A, which was both clear and elegant. Option B was perhaps more comprehensive but was also longer and more difficult to understand. She took it that the suggested options would replace the current paragraphs 1 and 3 of the article.

84. **Ms. Walsh** (Canada) confirmed that the proposed new wording was intended to replace current paragraphs 1 and 3. The new wording had been proposed because of the potential for confusion in the current draft. Current paragraph 1 set out the general rule that priority was determined according to the order of third-party effectiveness but contained no cross reference to current paragraph 3, which set out a different rule for security rights made effective by registration. The object had been to clarify the relationship between the two ways of determining priority.

85. **Mr. Tirado Martí** (Spain) expressed a preference for option B, which was not so much complicated as detailed and clearly set out the possibilities, whereas option A required fuller prior knowledge. Option B would be more helpful to users and was, in addition, more consistent with the Secured Transactions Guide.

86. **Mr. Dennis** (United States of America) said that his delegation could support either option but had minor drafting concerns about both. Option A correctly stated that priority was determined by order of occurrence of two events but did not clearly state that the earlier of those two events would determine which of two competing security rights would have priority. Option B might give rise to confusion in situations where both registration and other methods were used to make security rights effective against third parties. For example, subparagraph (b) of that option concerned the case where security rights were made effective otherwise than by registration, but it was not clear whether the rule applied when the secured creditor took possession of

collateral and then registered a notice covering such collateral, since the security rights could be made effective in both ways.

87. **Mr. Kwon** Young Joon (Republic of Korea) said that the current article required comprehensive knowledge of modern law in order to be understood and that the Canadian proposal better reflected its intention. His delegation had a slight preference for option B; although longer than option A, it was more reader-friendly and was also more closely aligned with the recommendation in the Secured Transactions Guide. Its subparagraph (c) appropriately addressed the situation where a security right was made effective against third parties by registration and otherwise. Where it was made effective both by registration and by possession, the party might well be expected to rely on the most favourable method. In any case, not all situations could be addressed in the Model Law; some were better left to the Guide to Enactment.

88. **Ms. Gullifer** (United Kingdom) said that her delegation still preferred option A, which did not raise the same problems as option B. It probably required only a little tweaking, as indeed did the other option.

89. **Mr. Weise** (American Bar Association) echoed that view and said that drafting changes might perhaps be agreed on in informal consultations.

90. **Ms. Walsh** (Canada) said that, in option A, the stipulation that priority would be determined according to order of occurrence made it unnecessary to spell out that it would be determined according to whichever of the two events mentioned came first. Since no specific indication had been given as to what drafting changes might be required, she was not in favour of convening a group of friends of the Chair. Regarding option B, which appeared to have more general support than option A, she agreed that security rights sometimes fell within the scope of more than one rule in the Model Law and that the secured creditor would be likely to choose the rule most advantageous to its position.

91. **Mr. Dennis** (United States of America) said that the issue he had raised would be resolved by the insertion in option B of the word "first" in subparagraphs (a) and (c), the beginning of which would then read "(a) As between security rights that were first made effective" and "(c) As between the security right that was made effective against third parties by registration and a security right that was first made effective against third parties".

92. **Mr. Kwon** Young Joon (Republic of Korea) said that he was still concerned, however, about the exceptional situation dealt with in option B, where a party obtained third-party effectiveness by different methods, for instance, first by possession, then by registration. The Model Law should not be tailored to exceptional situations but should lay out general principles. Such situations might more appropriately be dealt with in the Guide to Enactment or be left to the parties. For the sake of clarity, a chapeau like that appearing in option A, stating that priority between competing security rights created by the same grantor in the same encumbered asset was determined according to order of occurrence, should also be inserted in option B.

93. **Mr. Sono** (Japan) also expressed a preference for option B. However, the proposed insertion of the word "first" would create the undesirable impression of a supremacy of registration over possession as a means of establishing third-party effectiveness. The current wording of the proposal was adequate. His delegation agreed with the proposed insertion of a chapeau in that option.

94. **Ms. Walsh** (Canada) said that a chapeau like that appearing in option A should also have been included in option B, with the wording "Subject to articles 31, 36, 37 and 39-41, priority between competing security rights created by the same grantor in the same encumbered asset is determined by the following rules:". Insertion of the word "first" in subparagraphs (a) and (c) would create more confusion. It would be better to explain in the Guide to Enactment that the secured creditor would choose the rule fitting the facts that would give the most favourable result.

95. **The Chair** said he took it that the Commission wished to approve option B without the addition of the word "first" but with the inclusion of a chapeau, it being understood that an explanation would be provided in the Guide to Enactment.

96. *It was so decided.*

97. **The Chair** said he took it that the Commission wished to approve article 28 bis as proposed.

98. *It was so decided.*

Article 29

99. **Mr. Bazinas** (Secretariat) suggested that, in line with the two preceding articles, the title of article 29 should be changed to "Priority between competing security rights". In addition, the words "provided that there is no time period during which" should be replaced by "provided that there is no time when".

100. **The Chair** said he took it that the Commission wished to approve those changes.

101. *It was so decided.*

Article 30

102. **Ms. Walsh** (Canada), introducing her delegation's proposal on article 30 (A/CN.9/XLIX/CRP.5), said that the proposal did not signal a policy change but was intended merely to clarify that competition between security rights in proceeds would normally be with a party claiming a security right in the same original encumbered asset. One delegation had wondered whether the rule should be subject to article 39, concerning rights in proceeds claimed by an acquisition secured creditor, as in some cases the rule set out in that article might produce different results. Since, however, article 39 set out a more specific rule, it would override article 30. If there still remained a concern, article 30 might say that the security right had the same priority, subject to article 39, but her delegation did not see the need for it.

103. **Mr. Dennis** (United States of America) said that article 39 did indeed give a different result as compared with article 30. Should the Commission fail to address that point, a court might well find subsequently that article 30 trumped

article 39. The Model Law would be more user-friendly and less susceptible to interpretative error if it was clearly stated that article 30 was subject to article 39.

104. **The Chair** said he took it that the Commission wished to approve the article as redrafted, with the addition of the words "subject to article 39".

105. *It was so decided.*

Article 31

106. **Ms. Walsh** (Canada) said that the proposed redraft (A/CN.9/XLIX/CRP.5) sought to clarify the relationship between article 31 and the general rule in article 28 and to address the overlap, and to some extent the conflict, between article 31 and article 11, paragraphs 3 and 4 of which the Commission had earlier decided to delete because of that overlap.

107. **Mr. Riffard** (France) said that the question of security rights in a mass or product was one of the most difficult in the draft Model Law, especially in terms of the link between articles 11 and 31. His delegation had advocated a very didactic treatment of article 11 in the Guide to Enactment and could only request a similar approach to article 31. Discussions with other delegations had revealed that both articles were not always understood in the same way. His delegation supported the new, clearer wording proposed by the representative of Canada for paragraphs 1 and 2, but was less convinced by the new paragraph 3, which seemed less clear than the previous version, particularly in the light of the reference to the vague and questionable concept of the "value" of the security right. A clarification of the consequences of the proposed change would be appreciated.

108. **Ms. Walsh** (Canada) said that there was no difference in substance between the old and the new versions of paragraph 3. The reference in the proposed redraft to the obligation secured by a security right aligned it more closely with the wording of proposed paragraph 2.

109. **Mr. Dennis** (United States of America) said that his delegation supported the new wording proposed by the Canadian delegation. A huge amount of time had already been devoted to the issues raised, which related to a relatively rare situation. The new paragraph 3, combined with the agreed deletion of paragraph [3] [4] of article 11, provided a precise answer to a complicated question and was therefore itself complicated.

110. **Mr. Whittaker** (Australia), expressing support for the proposed new wording, said that the wording used regarding the concept of "value" in proposed paragraph 3 was already in the existing draft and that it also referred back to article 11, which likewise revolved around the concept of "value".

111. **Mr. Bazinas** (Secretariat) recalled that the text of article 11 had not yet been finalized. As currently worded, article 11 referred to the value of the encumbered asset in relation to the value of the mass or product at the time of commingling, as well as to the value of the encumbered assets before they became part of the mass or product. It remained unclear whether the value of the encumbered assets was the same as the value of the security right. In any case, the final wording of article 11 would have to be reconciled with the wording of article 31.

112. **Mr. Kwon** Young Joon (Republic of Korea) noted that paragraph 2 of the original article referred to the value of the security right, while the Canadian proposal referred to the obligation secured by the security right. It would be useful to know whether that proposal was essentially the same as paragraph 2 of the original article and, if not, whether the Commission would have to decide which was more important in determining the ratio of the security right for secured creditors.

113. **Ms. Gullifer** (United Kingdom) noted in turn that paragraph 3 of the proposed redraft limited the obligation referred to in paragraph 2 to the value of the security right determined in accordance with article 11, where the value of the security right was limited to the value of the encumbered asset, making everything rather unclear. It would perhaps be better to replace the word "value" with another word.

114. **Mr. Dennis** (United States of America) said he agreed that the phrase "value of the security right" was obscure in relation to article 11. There did not seem to be any policy issue, simply a matter of terminology. It might be advisable not to finalize paragraph 3 until exact language had been agreed on for article 11.

115. **Mr. Sono** (Japan) said he concurred with that view. Nevertheless, to overcome the difficulty posed by the concept of the "value of the security right", he suggested that paragraph 3 should read "For the purposes of paragraph 2, the obligation secured by a security right that extends the mass or product is subject to the limitation determined in accordance with article 11".

116. **The Chair** said he took it that the Commission wished to approve the article, subject to any adjustments that might be required by the final wording of article 11.

117. *It was so decided.*

Articles 32, 33 and 34

118. *Articles 32, 33 and 34 were approved.*

Article 35

119. **Mr. Bazinas** (Secretariat) suggested that, for the sake of consistency with the titles of the other articles, the title of article 35 should be changed to "Priority of security rights over the rights of judgment creditors". The first clause of paragraph 1 should be condensed to read "Subject to article 38". Several suggestions had been made to improve the wording of subparagraph 2 (a), one of which would read "(a) Before the secured creditor received a notice from the judgment creditor that the judgment creditor has taken the steps referred to in paragraph 1 or within [a short period of time to be specified by the enacting State] thereafter". As for the rare situation referred to in the corresponding note to the Commission, where the time that the security right became effective coincided with the time that the judgment creditor took the steps referred to in paragraph 1, the Commission might wish to retain the words between square brackets in the chapeau of paragraph 2, but without the

square brackets. An explanation might be provided in the Guide to Enactment.

120. **The Chair** said he took it that the Commission wished to approve those suggestions.

121. *It was so decided.*

Article 36

122. **Ms. Walsh** (Canada), introducing her delegation's proposed revised version of article 36 (A/CN.9/XLIX/CRP.5), said that the proposal should be read in conjunction with the comments from her delegation (A/CN.9/887), which detailed and explained the reasoning behind the proposed changes. The proposed revised text retained the basic structure and approach of the current text; the intention of the reworded text was simply to provide clarification.

123. **Ms. Gullifer** (United Kingdom) asked for clarification as to the proposed deletion of the words "or the agreement for the sale or licence of intellectual property has been concluded" from option A, subparagraph 1 (a). Since proposed subparagraph 1 (b) still showed two alternatives, namely, registration after possession or conclusion of an agreement, she wondered whether there should not also have been two alternatives in subparagraph 1 (a).

124. **Ms. Walsh** (Canada) explained that the proposed chapeau for the article referred to acquisition security rights in two types of assets, namely, equipment and intellectual property or rights of a licensee. In the current wording, the acquisition secured creditor had priority over a non-acquisition secured creditor, provided that the acquisition secured creditor was in possession of the assets, or that a notice had been registered, or that the necessary agreement had been concluded. There would have been a contradiction had the words in question been retained in proposed subparagraph 1 (a) since, in the case of equipment, the agreement would already have been concluded. The secured creditor would have priority in respect of equipment by possession or by first registering a notice before giving up possession to a grantor. In the case of intellectual property or licensee rights, the secured creditor could not be in possession and would therefore not have priority until a notice was registered. There was consequently no mention of an agreement in proposed subparagraph 1 (a).

125. **Mr. Tosato** (Italy) requested that, if the Canadian proposal was accepted, it should refer throughout to intellectual property being "held" rather than "used".

126. **Ms. Walsh** (Canada) said that her delegation would have no objection to the suggested change.

127. **Mr. Bazinas** (Secretariat) said that the language in question came from the *UNCITRAL Legislative Guide on Secured Transactions: Supplement on Security Rights in Intellectual Property*, which defined consumer goods to include intellectual property used or intended by the grantor to be used for personal, family or household purposes. In the definition of the term "inventory", the Supplement referred to intellectual property being "held". The Commission might wish to decide which of the two terms it preferred.

128. **Ms. Gullifer** (United Kingdom) said that the reference in the original article to assets other than inventory, consumer goods and intellectual property or rights held by a grantor was rather confusing. The challenge was to find words that could apply to both intellectual property and equipment. If satisfactory wording could not be found, it might be necessary to revert to the original wording.

129. **Mr. Dennis** (United States of America) said that the wording used had been borrowed from the Supplement, which had been agreed to after many years of discussion in the Working Group and the Commission. If one element of wording was changed, it might be harder to understand the unchanged elements. The wording should be changed only if the Commission could be confident that another word better expressed the intent.

130. **Mr. Weise** (American Bar Association) said that the Supplement employed the word "used" by analogy with goods or equipment. It would not be inappropriate to replace that word with "held" if intellectual property could be considered along the same lines as goods or equipment.

131. **Mr. Bazinas** (Secretariat) said that the original wording of paragraph 3 limited the value of the consumer goods and intellectual property or rights in question. No such limitation appeared in paragraph 3 of the proposed text. He wondered whether that was intentional or whether the proposal might be subsequently revised to include a limitation of value, in the light of the outcome of the discussions on article 23.

132. **Ms. Walsh** (Canada) said that her delegation had considered that option B of article 23, referring to minimum acquisition value, had no implication for article 36. It had therefore decided not to include any such limitation.

133. **The Chair** said he took it that that the Commission wished to approve article 36 as redrafted by the Canadian delegation (A/CN.9/XLIX/CRP.5).

134. *It was so decided.*

Article 37

135. **Mr. Bazinas** (Secretariat) suggested that, in paragraph 1, the definite article should be deleted before the word "priority". In response to a question raised by one State in its written comments, he noted that paragraph 2 restated a rule of the Secured Transactions Guide that where two parties held acquisition security rights, one a seller, the other a bank, the seller had priority. It had been pointed out that the wording "other than a seller" in the article could inadvertently give the impression that there could be two sellers. The Commission might wish to consider whether or not to delete the words "of a secured creditor other than a seller or lessor, or a licensor of intellectual property", since any competing acquisition security right would by definition be that of a non-seller.

136. **Ms. Gullifer** (United Kingdom) said that, if those words were deleted, an explanation should be provided in the Guide to Enactment.

137. **Mr. Bazinas** (Secretariat) referred to recommendation 182 of the Secured Transactions Guide, which read "the supplier's acquisition security right has priority as against all

competing acquisition security rights". A seller, lessor or licensor would accordingly have priority over any other holder of an acquisition security right.

138. **The Chair** said he took it that the Commission wished to approve the article as amended, including the deletion of the last words of paragraph 2 following "has priority over a competing acquisition security right", it being understood that the Guide to Enactment would provide the necessary clarification.

139. *It was so decided.*

Article 38

140. **The Chair** said that the title of the article should be adjusted for the sake of consistency to read "Priority of acquisition security rights over the rights of judgment creditors".

141. **Mr. Weise** (American Bar Association) said that it would be desirable to align the titles of all the comparative priority rules. Most of them said "priority between… and…"; others said "priority of… over…". It might be preferable to use the formulation "priority between", which was most frequently found in the Model Law.

142. **The Chair** said he took it that the Commission wished to approve that suggestion and to approve article 38.

143. *It was so decided.*

The meeting rose at 1.05 p.m.

Finalization and adoption of a draft Model Law on Secured Transactions
(*continued*)

Summary record of the 1027th meeting, held at Headquarters, New York, on Tuesday, 28 June 2016, at 3 p.m.

[A/CN.9/SR.1027]

Chairperson: Mr. Labardini Flores (Vice-Chair) (Mexico)

Contents

In the absence of Mr. Kenfack Douajni (Cameroon), Mr. Labardini Flores (Mexico), Vice-Chair, took the Chair.

The meeting was called to order at 3 p.m.

Agenda item 4: Consideration of issues in the area of security interests (*continued*)

(a) Finalization and adoption of a draft Model Law on Secured Transactions (*continued*) (A/CN.9/865, A/CN.9/871, A/CN.9/884, A/CN.9/884/Add.1, A/CN.9/884/Add.2, A/CN.9/884/Add.3, A/CN.9/884/Add.4, A/CN.9/886, A/CN.9/887 and A/CN.9/887/Add.1; A/CN.9/XLIX/CRP.5)

1. **The Chair** invited the Commission to resume its consideration of the draft Model Law, focusing on the articles contained in documents A/CN.9/884/Add.2 and A/CN.9/884/Add.3.

Article 39

2. **Ms. Walsh** (Canada), introducing her delegation's proposal (A/CN.9/XLIX/CRP.5), said that the proposal was not intended to modify existing policy, but rather to reduce potential overlap and inconsistencies between paragraphs 2 and 3 of option A as currently drafted, and to align the text with the relevant recommendation of the *UNCITRAL Legislative Guide on Secured Transactions*. The wording of paragraph 2 (b) had been adjusted to align more closely with article 35, which dealt with the need to notify secured creditors with respect to acquisition security rights in original encumbered assets. The original wording of option B, which defined the priority given to security rights in proceeds in negative terms, had been revised to state, in positive terms, that a security right in the proceeds of an asset subject to an acquisition security right had the same priority as a non-acquisition security right. Lastly, the title of article 39 should be revised to align it with that of article 30. The new title would read "Priority between competing security rights in proceeds of an asset subject to an acquisition security right", to reflect the fact that the article concerned competition between a security right in the proceeds of an asset subject to an acquisition security right and a non-acquisition security right.

3. **Mr. Cohen** (United States of America) asked whether the proposed version of article 39, option A, paragraph 1, might be eliminated, as it appeared to restate the rule set out in article 30. Should that rule need to be restated in the context of article 39, the wording of paragraph 1 might need to be aligned as closely as possible with article 30, to avoid any implications of differences in meaning between the provisions.

4. **Ms. Walsh** (Canada) said that the difficulty with allowing the rule in article 30 to also cover the scenario in option A, paragraph 1, of article 39 was that article 36 included a number of priority rules for acquisition security rights in different types of assets. The proposed version of paragraph 1 should therefore be retained, as it referred directly to article 36, which stipulated not only the effectiveness of an acquisition security right against the rights of third parties, but also the specific conditions to which the super-priority status of an acquisition security right was subject. She agreed with the suggestion that article 30 should be made subject to article 39.

5. **Ms. Gullifer** (United Kingdom) said she agreed that paragraph 1 should be retained, if only to clarify the rule to which paragraph 2 was an exception. However, article 39 should track the language of article 30 more closely, particularly its reference to article 19.

6. **Ms. Walsh** (Canada) said that, were article 39, paragraph 1, to be revised to reflect the language of article 30, it would inaccurately suggest that the priority status of an acquisition security right depended only on its effectiveness against third parties, which was the basis for any competition among security rights. It was therefore critical to retain the existing reference to article 36, which indicated the specific rules governing priority status of third-party-effective security rights, such as those pertaining to inventory.

7. **Mr. Cohen** (United States of America) said he agreed that the current wording of article 30 would need to be adjusted to fit the context of article 39, paragraph 1. Indeed, aligning article 39 more closely with article 30 would avoid some unintended side effects. Article 30 did not simply assume that an acquisition security right had priority status based on its effectiveness against third parties, but referred to the rules set out in article 19. The proposed version of article 39, paragraph 1, might usefully be redrafted, without the reference to article 36, to indicate that a security right in

the proceeds of an asset subject to an acquisition security right had the same priority over a competing security right as the acquisition security right in the assets from which the proceeds had arisen, given that that priority status resulted from the application of article 36. A few small adjustments would be required to ensure that articles 30 and 39 appeared as consistent statements of the same rule rather than as independently drafted provisions.

8. **The Chair** said he took it that the Commission wished to approve the article as presented by the representative of Canada, subject to the Secretariat subsequently assessing any potential discrepancies between the proposed version of paragraph 1 and article 30.

9. *It was so decided.*

Article 40

10. **The Chair** suggested that the title could be adjusted to read "Priority among acquisition security rights in tangible assets commingled in a mass or product competing with non-acquisition security rights in the mass or product", or words to that effect, to reflect the focus on the concept of priority among competing rights, in line with the proposed changes to the titles of the other articles under chapter V, section A.

11. *It was so decided.*

Articles 41, 42 and 43

12. *Articles 41, 42 and 43 were approved.*

Articles 44, 45, 46, 47 and 48

13. **Ms. Gullifer** (United Kingdom) asked whether, in the light of the proposed revisions to the titles of the other articles in chapter V, section A, the titles of the articles in chapter V, section B (Asset-specific rules), could also be modified to reflect the fact that they dealt with priority between competing security rights.

14. **Mr. Bazinas** (Secretariat) said that the titles of all the asset-specific provisions in the Model Law referred simply to the type of asset involved. If the titles of the asset-specific provisions were changed to reflect the issue under discussion rather than the type of asset involved, substantial changes would also need to be made to the titles of many articles of the Model Law.

15. **Mr. Whittaker** (Australia) said that the existing titles referring to the specific types of assets discussed in chapter V, section B, were adequate and that there was no reason to expand them further.

16. **Mr. Weise** (American Bar Association) said that all the asset-specific rules were based on the belt-and-suspenders approach, which allowed secured parties to use more than one method to make their security rights effective against third parties. Some of the rules, including those set out in article 28, seemed to suggest that only one method of third-party effectiveness could be used, when, in some cases, secured parties could ensure priority more effectively by using two methods. For example, article 44, paragraph 1, was only accurate in the event that the security right made effective against third parties by registration was not made effective by other methods as well, such as possession, in which case priority between the competing rights referred to would be determined by possession rather than by registration. Hence, while modifications to the provisions themselves were not necessary, such clarifying explanations, along with specific examples, could usefully be included in the Guide to Enactment with regard to each of the asset-specific rules.

17. **Mr. Riffard** (France) said that future readers of the Model Law could easily decipher the subject addressed in each article based on the chapter or section heading ("priority" in the case of chapter V). It was therefore unnecessary to include repeated references to the subject in each individual title under the chapter.

18. **The Chair** said he took it that the Commission wished to approve articles 44, 45, 46, 47 and 48 and that it did not wish to have the words "priority between" included in the title of each of the articles.

19. *It was so decided.*

Article 49

20. **Mr. Bazinas** (Secretariat), drawing attention to the note to the Commission following the article, said that the Commission might wish to decide how to resolve the difference in approach with respect to various types of paper set out in article 44, paragraph 2, article 47, paragraph 3, and article 49, paragraph 5.

21. **Mr. Deschamps** (Canada) said that the difference stemmed from the relative simplicity of the rules governing the acquisition of rights by buyers or transferees of negotiable instruments and negotiable documents compared with the complexity of such rules in the case of non-intermediated securities. As no solid consensus had been established with regard to the rules protecting transferees of non-intermediated securities, further consideration of the laws applicable to non-intermediated securities would be required before such a rule could be meaningfully established in the Model Law.

22. **Mr. Weise** (American Bar Association) said that to encourage broad acceptance of the Model Law, the current approach reflected in article 49, paragraph 5, should be retained; article 44, paragraph 2, and article 47, paragraph 3, instead of establishing substantive rules that could come into conflict with the existing laws of enacting States, should refer to the relevant "taking free" rules to be specified by the enacting State. Indeed, it was unnecessary to include "taking free" rules in a Model Law which had already established rules upholding the priority status of secured parties in possession of negotiable instruments.

23. **The Chair** said he took it that the Commission wished to approve the article as drafted and that the Secretariat had the information required to incorporate any necessary explanations in the Guide to Enactment.

24. *It was so decided.*

Article 50

25. *Article 50 was approved.*

Article 51

26. **Mr. Bazinas** (Secretariat), drawing attention to the wording "reasonable care to preserve the asset and its value", said that it had been suggested during the discussions in the Working Group and in comments from States that the words "and its value" should be deleted from both article 51 and article 53, subparagraph 1 (a), on the understanding that preservation of the asset also covered preservation of the value of the asset. Even in situations where preservation of the asset did not cover preservation of the value of the asset, as in the case of securities, the value of which was determined not by the person in possession but by the market, reference to "and its value" would create an impossible obligation for the person in possession, since that person would be not able to determine the value of the asset.

27. **Mr. Riffard** (France) recalled that his delegation had previously expressed reservations with respect to the addition of the words "and its value", for the same reasons noted by the Secretariat.

28. **Mr. Kwon** Young Joon (Republic of Korea), noting that the words "and its value" were used in recommendation 111 of the *UNCITRAL Legislative Guide on Secured Transactions*, said that there could be a difference between preserving the asset itself and preserving its value and that reference to "and its value" in the article might be necessary. Furthermore, the words "reasonable care" could cover cases where preserving the value of an asset was beyond the control of the grantor or secured creditor, because if such care was exercised there would be no violation of obligation. His delegation therefore had reservations about deleting the words "and its value" from the article.

29. **Ms. Gullifer** (United Kingdom), expressing support for the deletion of the words "and its value" from the article, said that there was little likelihood of situations in which either party would have to take action beyond preserving the asset in order to preserve its value. In addition, there was no provision for parties to contract out of their obligations under the article. While the words "reasonable care" could theoretically cover any problems, should the need for the preservation of value ever become contentious, that could put significant strain on the qualification "reasonable" and raise issues that would be difficult to resolve in practice.

30. **Mr. Tosato** (Italy) said that the words "and its value" should be deleted; that matter had been addressed by the general criteria of "good faith" and "commercial reasonableness" approved by the Commission, and could possibly be covered in the Guide to Enactment, in which it could be specified that preservation of the asset extended also beyond the mere preservation of the physical integrity of the asset.

31. **Mr. Weise** (American Bar Association) said he agreed that the meaning of the word "value" was quite different to and went beyond preserving the asset. It added too much to the obligation of preserving the physical integrity of the asset. A secured creditor might not have the skill or knowledge required to preserve the ultimate value of what could be a non-intermediated security. It should be sufficient to preserve the physical asset to avoid the burden of having to take other actions to preserve the market value of the asset.

32. **Mr. Kohn** (Commercial Finance Association) said he agreed that requiring a lender to preserve the value of an asset would create too much ambiguity and would probably result in additional costs of credit that would be passed on to the borrower, making credit more expensive.

33. **The Chair** said he took it that the proposal to delete the words "and its value" from article 51 and subparagraph 1 (a) of article 53 was acceptable.

34. *It was so decided.*

Article 52

35. **Mr. Foëx** (Switzerland), recalling the comments submitted by his delegation (A/CN.9/887), said that under article 52, a secured creditor in possession of an encumbered asset must return the asset to the grantor upon extinction of the security right, and that pursuant to article 3 that rule was binding. While there was no need to amend the article, it was unclear why the parties should not be at liberty to derogate from that rule. After all, there were a number of situations in which the parties had a legitimate interest in choosing an alternative solution, such as when the encumbered asset belonged not to the grantor but to a third party. It would be appropriate, therefore, to remove article 52 from the list of provisions contained in article 3 from which the parties could not derogate.

36. **Mr. Weise** (American Bar Association) said that in all cases, the owner of the encumbered asset would, by definition, be the grantor. However, if the grantor wanted the asset to be given to a third party, the Commission might wish to consider including wording to the effect that the asset must be returned to the grantor or at the grantor's direction.

37. **Mr. Riffard** (France) said that while his delegation agreed with the points raised by the representative of Switzerland in substance, it was not in favour of removing article 52 from the list of mandatory rules given that the obligation to return an asset was fundamentally binding. In the interest of compromise, he agreed that adding the words "or to any person designated by the grantor" at the end of the article should satisfy the concerns raised by the representative of Switzerland while maintaining the binding nature of the article.

38. **Ms. Gullifer** (United Kingdom) said that the parties or the grantor must be given the opportunity to derogate from article 52, to the extent that the asset must be returned to a third party. However, rather than removing the article from the list in article 3, the compromise solution proposed by the observer for the American Bar Association could be adopted.

39. **Mr. Kwon** Young Joon (Republic of Korea) said that while his delegation did not oppose the proposed solution, that proposal could raise legal doctrine issues. In some jurisdictions, including his own, when returning an asset to a third party at the request of the grantor, the secured creditor was legally deemed to be returning it to the grantor, who then delivered it to the third party. In that connection, there was no further need for the addition of the proposed wording or language to that effect.

40. **The Chair** suggested that the matter might be resolved with an explanation in the Guide to Enactment.

41. **Mr. Sono** (Japan) asked whether secured creditors returning an encumbered asset would have to cover the cost of return and whether they had to follow directions given by the grantor.

42. **Mr. Cohen** (United States of America) said that the drafting change should not imply that the asset could be returned wherever the grantor directed. It must be specified that the asset should be returned to the grantor or to a third party agreed to by the secured creditor and the grantor. His delegation had understood that the provisions on the return of assets would not necessarily apply in all States and was therefore confused by the Chair's suggestion to deal with the issue in the Guide to Enactment. It was a point of substance that merited more than an explanation; his delegation would therefore prefer for it to be addressed in the Model Law.

43. **Mr. Morse** (Commercial Finance Association) said that it was common for first-ranking and second-ranking security rights holders to conclude agreements to the effect that the holder of the first priority would turn over the collateral to the second priority holder. Another possible scenario was that creditors would take the asset in satisfaction of the debt, in which case they should not have an obligation to return the asset to the grantor. There might also be a statutory decision or ruling by an insolvency court that would require the return of the asset to be addressed otherwise.

44. **Mr. Tirado Martí** (Spain) said that a possible solution could be found by the application of the "commercial reasonableness" and "good faith" standards.

45. **Ms. Walsh** (Canada) said that the proposed addition would introduce an unnecessary complication and her delegation would prefer to have "or to any person designated by the grantor" or words to that effect added to the article and an explanation given in the Guide to Enactment.

46. **The Chair** said that it was clear from the discussion that the asset could be returned to the grantor or a person designated by the grantor. The Commission could request the Secretariat to clarify that in the Guide to Enactment or indicate that there must have been a clear, prior agreement between the grantor and the creditor.

47. **Ms. Gullifer** (United Kingdom) suggested that the article could read "Upon extinction of a security right in an encumbered asset, a secured creditor in possession must deliver the asset to the grantor, or otherwise as agreed by the grantor and secured creditor", and that the words "or as the grantor directs" could be placed after the words "return the asset to the grantor".

48. **Mr. Jin** Saibo (China) said that the requirement to return the asset to the grantor was too rigid. If a debtor was unable to return an asset, the grantor typically performed the obligation and the encumbered asset was then returned to the compensating grantor, by agreement of the debtor, creditor and grantor, or the situation was dealt with by other means.

49. **Mr. Kwon** Young Joon (Republic of Korea) asked whether article 52 would remain in the list of mandatory rules outlined in article 3.

50. **Mr. Riffard** (France) said that replacing the word "return" with another word would weaken the article and cause it to lose its instructional value and commercial appeal.

51. **Mr. Weise** (American Bar Association) said that a compromise could be to leave out any reference to an agreement in the text of the article but include in the Guide to Enactment a note that the grantor must act in a commercially reasonable manner and could not impose inconvenient directions on the secured creditor. Further, the Guide could note that it could be appropriate for the parties to agree that the cost of sending the encumbered asset to a third party would be borne by the grantor.

52. **The Chair** said he took it that the Commission wished to approve the proposed additional wording, along with an explanation in the Guide to Enactment as to possible differences in practice in various jurisdictions.

53. *It was so decided.*

Article 54

54. **Mr. Bazinas** (Secretariat) suggested that, in line with the relevant notices and notifications provided for in the Model Law, the request referred to in paragraph 1 should be a written request so that both the secured creditor and the grantor had evidence of the request. Furthermore, in line with the language adopted by the Commission for article 2, the word "in" in the second line of the paragraph should be replaced by "under" and the phrase "by agreement" should be added after the word "receivable".

55. **The Chair** said he took it that the Commission wished to approve that suggestion.

56. *It was so decided.*

The meeting was suspended at 4.25 p.m. and resumed at 4.50 p.m.

Articles 55 and 56

57. *Articles 55 and 56 were approved.*

Article 57

58. **Mr. Bazinas** (Secretariat) suggested that, to align the article with its counterpart article in the United Nations Convention on the Assignment of Receivables in International Trade (article 14, paragraph 1), the phrase "or a tangible asset is returned to the grantor with respect to the receivable" in subparagraph 1 (a) should be deleted, and the phrase "to delivery of the asset" should be replaced with "any tangible asset returned with respect to the receivable". Subparagraph 1 (b) should be amended to read "If payment with respect to the receivable is made to the grantor, the secured creditor is entitled to payment of the proceeds of the payment and any asset returned to the grantor with respect to the receivable". With regard to subparagraph 1 (c), the phrase "or a tangible asset is returned to the grantor with respect to the receivable" should be deleted and the phrase "delivery of the asset" should be replaced with "any asset returned to that person with respect to the receivable".

59. **Ms. Gullifer** (United Kingdom) said that the proposed language for subparagraph 1 (a) was unsuitable, as it gave

the impression that the secured creditor was entitled to retain the tangible asset, although the tangible asset had been returned to the grantor.

60. **Mr. Bazinas** (Secretariat) said that, in line with article 14, subparagraph 1 (a), of the Convention, the proposed text said that the secured creditor was entitled to retain the proceeds of payment and was also entitled to any tangible asset returned with respect to the receivable. It did not refer to the retention of a returned tangible asset. The Convention did not refer to a return to the grantor because, where payment was made to the secured creditor, the buyer of goods might return the goods to the secured creditor, or to the seller. The text therefore covered both situations in which payment was made to the secured creditor, who was entitled to retain the proceeds of the payment and any tangible asset returned whether to the secured creditor or to the grantor with respect to the receivable.

61. **Mr. Cohen** (United States of America) said that the both the Commission and the Working Group were in agreement as to the intent of subparagraph 1 (a). However, the proposed language did not necessarily match that intent. For the sake of clarity, subparagraph 1 (a) could be drafted as a mirror image of subparagraph 1 (b). Whereas subparagraph 1 (b) referred to the secured creditor's right in respect of both the payment to the grantor and the return of the tangible asset to the grantor, subparagraph 1 (a) only referred to the secured creditor's right when payment was made to the secured creditor. The second part of the proposed language was overly vague, as it referred to the return of a tangible asset without indicating to whom the asset would be returned.

62. **Mr. Deschamps** (Canada), supported by **Ms. Gullifer** (United Kingdom), said that, in the proposed wording of subparagraph 1 (a), the word "retain" seemed to qualify both the proceeds of the payment and the tangible asset, when the subparagraph actually contemplated a case in which the tangible asset had not been delivered or might not have been delivered to the secured creditor. The text could be redrafted to indicate clearly that the secured creditor was entitled both to the proceeds of the payment and to any tangible asset returned.

63. **The Chair** said he took it that the Commission agreed with the proposed changes to the article.

64. *It was so decided.*

Article 58

65. *Article 58 was approved.*

Article 59

66. **Mr. Bazinas** (Secretariat) said that subparagraph 2 (b) of article 59 referred to an "original contract", following the language used in the United Nations Convention on the Assignment of Receivables in International Trade. However, as, unlike the Convention, the Model Law did not contain a definition of an "original contract", a number of States had suggested that the words "original contract" should be replaced by the phrase "contract giving rise to the receivable". The same change should also be made to subparagraph 2 (a), article 61, paragraph 1, and the title of article 64.

67. **The Chair** said he took it that the Commission wished to approve the proposed changes.

68. *It was so decided.*

Article 60

69. **Mr. Bazinas** (Secretariat), recalling that the Commission had decided in the context of article 13 that there should be no definition of the expression "subsequent security right", said that it would be useful if the word "subsequent" was deleted from paragraph 4, which would now read "Notification of a security right in a receivable created by the initial or any other secured creditor constitutes notification of all prior security rights in that receivable". Such wording would help to explain what a subsequent right was without using the word "subsequent", and would be consistent with the language adopted by the Commission in article 13.

70. **Mr. Kwon** Young Joon (Republic of Korea) said he wished to know how there could be a subsequent security right in a receivable if the receivable was created by an initial creditor. A subsequent security right would exist only if the receivable was acquired by a secured creditor from the initial creditor.

71. **Mr. Bazinas** (Secretariat) said that an initial security right was created by the grantor; a security right created by the initial secured creditor was therefore a subsequent security right because it would be subsequent to the security right created by the grantor. Throughout the Model Law rights were "created"; if the word "acquired" was used, that would be the first time that the term appeared in the Model Law and, as it would follow the word "receivable", it would cause confusion by implying that it was the receivable that was being acquired, rather than the security right in the receivable.

72. **Ms. Walsh** (Canada) said that, if "acquired" was a problematic term, the article could instead refer to a security right in a receivable "granted to" a secured creditor by an initial or subsequent secured creditor. In any event, her delegation found nothing wrong with a security right in a receivable being "acquired" or "obtained" from an initial or subsequent secured creditor, either expression to be read as referring to a security right in a receivable, rather than to the receivable itself.

73. **Mr. Whittaker** (Australia) said that, while it was important for the wording of the Model Law to track the wording of the Convention on the Assignment of Receivables in International Trade as closely as possible, it might be useful if the intent behind the provision was explained in the Guide to Enactment.

74. **Mr. Brink** (Factors Chain International and European Union Federation for the Factoring and Commercial Finance Industry) said that, as in the Convention on the Assignment of Receivables in International Trade, the article described a situation in which there was a chain of assignments. It was challenging to put the simple concept under discussion into

the complex language of the Model Law. However, the proposed wording was suitable.

75. **Mr. Kwon** Young Joon (Republic of Korea) said that there remained some confusion regarding the creation of a security right, as it could not be asserted that only the grantor was involved, since the first security right was created by the grantor and the initial secured creditor.

76. **Mr. Deschamps** (Canada) suggested that the text could be amended to read "Notification of a security right in a receivable obtained by the initial or subsequent secured creditor constitutes notification of all prior security rights in that receivable".

77. **Mr. Weise** (American Bar Association) said that the point of the provision was not that the grantor and the secured creditor created the security right together, but that when the original grantor sold the receivable to the original secured creditor, one security right was created in favour of the first secured creditor; however, when the first secured creditor sold the receivable to the second secured creditor, the first secured creditor would not be acting as a secured creditor at that point but as a new grantor, granting the security right to the second buyer, who, upon selling the receivable, would become a grantor with respect to that step of the transaction. Although the process seemed confusing, the wording proposed by the representative of Canada seemed to clarify the situation.

78. **Mr. Whittaker** (Australia) said he wondered whether it was correct to still refer to the "initial secured creditor" when security rights acquired by the initial secured creditor were in fact security rights granted by the grantor.

79. **Mr. Bazinas** (Secretariat), recalling the Commission's decision in its consideration of article 13 to avoid using the terms "subsequent secured creditor" and "subsequent security right", suggested the following wording in an effort to resolve the confusion: "Notification of a security right in a receivable created in favour of a secured creditor by the initial or any other secured creditor constitutes notification of all prior security rights in that receivable".

80. **The Chair** said he took it that the Commission agreed with the proposed wording.

81. *It was so decided.*

Article 61

82. **Mr. Bazinas** (Secretariat) said that, in light of the Commission's decision regarding the use of the expression "subsequent security rights", the Secretariat suggested that paragraph 5 should be amended to read "If the debtor of the receivable receives notification of one or more security rights in the same receivable created in favour of a secured creditor by the initial or any other secured creditor, it is discharged by paying in accordance with the notification of the last of such security rights". In paragraph 6, the word "either" should be inserted after the word "discharged". The first sentence of paragraph 8 should be amended to read "If the debtor of the receivable receives notification of a security right in the receivable from the secured creditor, the debtor is entitled to request the secured creditor to provide within a reasonable period of time adequate proof of its security right and, if the security right is created in favour of a secured creditor by the initial or any other secured creditor, adequate proof of the security right created by the initial grantor in favour of the initial secured creditor, and of any intermediate security right".

83. **Mr. Deschamps** (Canada) said he wondered whether the new wording of paragraph 5 might not inadvertently contradict the provisions of paragraph 4.

84. **Mr. Bazinas** (Secretariat) said that, in contrast to paragraph 4, which concerned situations where one grantor granted security rights to a number of different people, paragraph 5 concerned situations where security rights were transferred from one party to another party, who then transferred them to another party, and so on and so forth, representing the classic subsequent security rights scenario. Therefore, the two paragraphs addressed two dissimilar situations.

85. **The Chair** said that article 61 would be held in abeyance.

Articles 62, 63, 64, 65, 66, 67, 68, 69, 70 and 71

86. *Articles 62, 63, 64, 65, 66, 67, 68, 69, 70 and 71 were approved.*

Article 72

87. **Mr. Bazinas** (Secretariat) said that the concerns raised by some States regarding the use of the expression "competing claimant" in option A in reference to the joint owner of an encumbered asset whose rights were affected by non-compliance with the provisions of chapter VII could be addressed by referring instead to "any other person with a right in the encumbered asset". Option B referred more generally to any person whose rights were affected by such non-compliance. The Commission might wish to decide whether to retain one of the two options or to keep both. If it ultimately decided to include both options, then the piece following option B should also be incorporated in option A.

88. **Ms. Walsh** (Canada) said that her delegation preferred option B, because certain parties, such as creditors or their representatives, including insolvency administrators, might not have a property right in the encumbered asset but might still have their rights affected by the non-compliance, depending on the approach taken by the enacting State. While option A referred to a debtor, grantor and any other person with a right to the encumbered asset, it was worth noting that a debtor who was not the grantor might have an obligation but not necessarily a right in respect of the encumbered asset. Although her delegation preferred option B, if the Commission decided to retain option A, the text should be adjusted to ensure that it did not imply that the debtor necessarily had a right in the encumbered asset. One solution might be to simply delete the word "other" from the phrase "any other person with a right in the encumbered asset".

89. **Mr. Whittaker** (Australia) said that his delegation preferred to retain both options, but if one had to be chosen, then option A was preferred, since option B might expand, beyond the scope recognized in the laws of an enacting State,

the definition of persons entitled to claim judicial relief. The reference to the debtor in option A could also be moved to the end of the paragraph, in order to make it clear that the debtor did not have the same rights as the grantor or any other person who had a right in the encumbered asset.

90. **Mr. Riffard** (France) said that option A might, in certain legal systems, be considered to be a limitation of the basic principle of access to a court. Therefore, his delegation preferred option B.

91. **Ms. Gullifer** (United Kingdom) said that her delegation preferred to retain both options. Instead of removing the word "other" in option A, which would give the impression that the grantor did not have a right to the encumbered asset, reference could be made to the debtor, the grantor or any other person who had a right in the encumbered asset.

92. **Mr. Weise** (American Bar Association) said that the word "affected" in option B was too open-ended to be appropriate for seeking relief for non-compliance. For instance, if a business was the grantor and the secured creditor was enforcing its security right, a supplier to the business could claim that it had been "affected" by the actions of the secured creditor. In such a case, the supplier was relatively far removed from the transaction which the secured creditor had entered into, and therefore should not be considered to have rights that would be affected by non-compliance under option B. Furthermore, the rights of an insolvency administrator would be adequately covered under option A in most jurisdictions, since the insolvency administrator would, in effect, be "stepping into the shoes" of the debtor or the grantor or whoever the administrator was representing. Therefore, only option A should be retained.

93. **Ms. Walsh** (Canada) said that when the Model Law referred to a "right" in an asset, that should be understood as a proprietary right, as opposed to a right with respect to that asset, and under the insolvency laws of many jurisdictions, although the insolvency administrator acted as the debtor, the debtor remained the owner of the asset and the administrator, while acting in the debtor's stead, had no proprietary right in the asset, which was why her delegation preferred option B. Nonetheless, it was also open to more specific and limiting wording for the phrase "any person whose rights are affected".

94. **The Chair** said he took it that the Commission wished to retain options A and B and to have option A revised to refer to the grantor, any other person with a right in the encumbered asset or the debtor, and option B revised to cover people who did not have a right in the encumbered asset and to somehow narrow the number of people that could be considered as "affected" by the non-compliance of another person with the provisions of chapter VII. In addition, both options should include the wording at the end that applied to both of them, beginning with the phrase "is entitled to apply for relief".

95. *It was so decided.*

The meeting rose at 6.05 p.m.

Finalization and adoption of a draft Model Law on Secured Transactions
(*continued*)

Summary record of the 1028th meeting, held at Headquarters, New York, on Wednesday, 29 June 2016, at 10 a.m.

[A/CN.9/SR.1028]

Chairperson: Mr. Labardini Flores (Vice-Chair) (Mexico)

Contents

In the absence of Mr. Kenfack Douajni (Cameroon), Mr. Labardini Flores (Mexico), Vice-Chair, took the Chair.

The meeting was called to order at 10.05 a.m.

Agenda item 4: Consideration of issues in the area of security interests (*continued*)

(a) Finalization and adoption of a draft Model Law on Secured Transactions (*continued*) (A/CN.9/865, A/CN.9/871, A/CN.9/884, A/CN.9/884/Add.1, A/CN.9/884/Add.2, A/CN.9/884/Add.3, A/CN.9/884/Add.4, A/CN.9/886, A/CN.9/887 and A/CN.9/887/Add.1)

1. **The Chair** invited the Commission to resume its consideration of the draft Model Law, focusing on the articles contained in documents A/CN.9/884/Add.3 and A/CN.9/884/Add.4.

Article 73

2. *Article 73 was approved.*

Article 74

3. **Mr. Bazinas** (Secretariat) said that one delegation, in its written comments, had highlighted an inconsistency between article 74, paragraph 2, and article 79, paragraphs 2 and 4. The former stated that the right in question was subject to the right of the lessee or licensee, while the latter stated that, in the same situation, the lessee or licensee was entitled to the benefit of the lease or licence except as against creditors with rights that had priority over the right of the enforcing secured creditor. Article 79 was based on recommendations in the *UNCITRAL Legislative Guide on Secured Transactions*, and Working Group VI had approved it before approving article 74; perhaps, therefore, paragraph 2 should be amended or deleted.

4. **Mr. Deschamps** (Canada) said that he supported the deletion of paragraph 2. It was illogical for a higher-ranking creditor to be bound by a lease, for example, which had been established by a lower-ranking creditor.

5. **Mr. Weise** (American Bar Association) said that the purpose of paragraph 2 of article 74 was not to create a hierarchy of rights but, in conjunction with paragraph 1, to establish when secured creditors with priority could take over enforcement from other secured creditors. Paragraph 1 meant that a higher-ranking secured creditor could take over enforcement until such time as a lower-ranking secured creditor finished its foreclosure or disposition, and paragraph 2 meant that a higher-ranking creditor could take over until a lease or licensing agreement had been entered into. Paragraph 2 simply needed to be reformulated, without mentioning priority, to better express that idea and to eliminate the inconsistency with article 79.

6. **Mr. Whittaker** (Australia) said that his delegation could not agree to a reformulation of paragraph 2 if the result would be that a senior secured creditor could be bound by something that a junior secured creditor had done, other than selling or disposing of the encumbered assets.

7. **Mr. Weise** (American Bar Association) explained that the notion behind paragraph 2 of article 74 was that a senior secured creditor could take over the enforcement right from a junior secured creditor only until such time as the junior secured creditor completed enforcement, such as by entering into a lease agreement. Along with paragraph 1, it was intended to define the point in time at which a junior secured creditor would be considered to have completed enforcement. It did not preclude senior secured creditors from enforcing their security rights in accordance with the terms of article 79.

8. **Mr. Bazinas** (Secretariat) suggested that the words "lease or licence" should be added to paragraph 1 of article 74 after the words "the earlier of the sale or other disposition" and again after the words "by that creditor for the sale or other disposition". The rationale for including two paragraphs instead of one had been that, if an encumbered asset had been disposed of, there was nothing left to take over, whereas if a lease or licence agreement had been entered into, there was still an asset and it was still possible to take over enforcement. The Commission must decide what its policy would be for those different situations.

9. **Mr. Deschamps** (Canada) said that, according to that interpretation, a senior secured creditor would still be able to enforce its right against a lessee, if a lease agreement had been entered into. The article would thus lead to the same end result as article 79. That understanding was unclear from paragraph 2 as currently worded.

10. **Mr. Weise** (American Bar Association) said that he agreed with the representative of Canada that the end result was the same. In his view, the Commission could reconcile articles 74 and 79 by reformulating paragraph 2 to align it with paragraph 1; it should relate not to different creditors' priority, but only to the point at which a senior creditor took over enforcement, as opposed to initiating enforcement. Paragraph 2 had been intended as a modest rule to cover leases and licences under conditions similar to those laid down in paragraph 1; it did not relate to priority or take free, the rules for which were set out in article 79.

11. **The Chair** said he took it that the Commission wished to approve article 74, with the deletion of paragraph 2.

12. *It was so decided*.

Article 75

13. **Mr. Bazinas** (Secretariat) said that one delegation had proposed an addition to article 75, paragraph 1, to clarify that secured creditors were entitled to obtain possession of encumbered assets without applying to a court, as well as by applying to a court; that would make article 75 consistent with articles 76 and 77. Paragraph 2 was in square brackets because it had been provisionally added for the sake of consistency with the other articles relating to enforcement. If approved, paragraph 2 should be taken out of square brackets.

14. **Mr. Dennis** (United States of America) said that, in paragraph 4, his delegation did not understand the logic behind the reference to assets "of a kind sold on a recognized market"; perhaps the phrase could be deleted.

15. **Mr. Tirado Martí** (Spain) said he agreed that the term "recognized market" was unclear. Paragraph 4 made sense, however, if "recognized market" meant a market where prices were determined publicly. "Official market" might be a good alternative term.

16. **Mr. Bazinas** (Secretariat) explained that Working Group VI had decided that the term "recognized market" should be included, in line with recommendation 149 of the Secured Transactions Guide. The Working Group had further decided that the Guide to Enactment of the Model Law on Secured Transactions should explain that "recognized market" referred to a market in which prices were set by the market and not by individual sellers.

17. **Mr. Riffard** (France) said that the sense of paragraph 4 was clear and was explained in the draft Guide to Enactment. However, the proposed paragraph 2 was problematic. It was obvious that, if a secured creditor applied to a court or other authority to obtain possession of an encumbered asset, it must follow civil procedures. If there were no additional conditions to be met, then paragraph 2 did not serve any purpose. If, however, there were additional conditions to be met, the Commission should list them.

18. **Mr. Bazinas** (Secretariat) pointed out that paragraph 2 provided for the insertion of specific conditions by enacting States. The structure reflected that of other articles; if paragraph 2 was deleted, then paragraph 2 of article 76, paragraph 1 of article 77 and paragraphs 1 and 2 of article 79 should likewise be removed.

19. **Mr. Riffard** (France) said that there was a clear purpose behind the other paragraphs mentioned, which were essential to the Model Law; paragraph 2 of article 75, on the other hand, did not appear to be necessary.

20. **The Chair** said that the idea was to maintain consistency in the Model Law's structure. The paragraphs mentioned all referred to elements "to be specified by the enacting State".

21. **Ms. Walsh** (Canada) said that she agreed with the representative of France that paragraph 2 could be deleted. States would impose the same conditions on secured creditors as they would on any others seeking to obtain possession of property. Paragraph 4 should remain unchanged, since assets sold on markets with publicly determined prices might need to be sold quickly, and the Guide to Enactment provided sufficient clarification of the term "recognized market".

22. **Mr. Kwon** Young Joon (Republic of Korea) said that the term "recognized market" should be retained in paragraph 4. It was important because the possessor of an asset of a kind sold on a recognized market would not be severely disadvantaged by a lack of notice and would easily be able to acquire another such asset at the market-determined price. The paragraph was consistent with recommendation 149 of the Secured Transactions Guide, and the details of the concept could be explained in the Guide to Enactment. His delegation had a slight preference for keeping paragraph 2: some enacting States might, in fact, have special conditions for obtaining possession of an encumbered asset, and providing for such conditions would facilitate those States' implementation of the Model Law.

23. **Mr. Whittaker** (Australia) said that he agreed with the United States delegation that the reference to assets "of a kind sold on a recognized market" was not appropriate in paragraph 4. The paragraph was designed to protect secured creditors from the risk of a rapid decline in the value of secured assets by ensuring that they would not be constrained by a notice period, and would thus be able to rapidly recover the money they were owed. However, it was not logical to waive the requirement of notice for all assets sold on a recognized market. Listed shares, for example, might decline rapidly in value, but would in that event be covered by the reference to assets which "may decline in value speedily". The argument that a grantor would readily be able to replace an asset sold on a recognized market and thus would not be disadvantaged by a lack of notice was not watertight. That would not be the case if, for example, the security given by the grantor consisted of a controlling stake in a listed entity.

24. **Ms. Gullifer** (United Kingdom) said that she shared the position of the representative of the Republic of Korea in relation to paragraph 2. She disagreed with regard to paragraph 4, however, for the reasons given by the representative of Australia, and also because recommendation 149 of the Secured Transactions Guide concerned disposition, not taking possession; the relevant recommendation was actually recommendation 147, which did not provide for any exceptions to the requirement of notice. In addition, the three exceptions mentioned in paragraph 4 served different purposes: the first two covered

situations where the secured creditor might need to act speedily to avoid losing money, but the last did not. A secured creditor might decide to take possession of stocks because of changes in their market value. There were many conceivable scenarios in which a secured creditor might want to sell an asset quickly, but not all of them justified an exemption from the requirement to give notice in order to protect the debtor.

25. **Mr. Bazinas** (Secretariat) said that, if the Commission wished to retain paragraph 2, the wording within square brackets could be made more specific in order to make its purpose clearer and to make it consistent with similar placeholder paragraphs in articles 76, 77 and 79, which gave more precise indications of what needed to be specified by the enacting State. He suggested changing the words within square brackets to read "any conditions, or provisions of other law, to be specified by the enacting State". That would make it clear that enacting States were to insert any specific provisions of their civil law which applied.

26. **Mr. Tosato** (Italy) said that the word "recognized" in paragraph 4 should be deleted or changed. If it was retained, the Guide to Enactment should make it very clear that "recognized markets" did not refer specifically to stock markets.

27. **Ms. Walsh** (Canada) said that paragraph 4 should be deleted, as its provisions did not belong in article 75. They should appear only in article 76, in line with recommendation 149 of the Secured Transactions Guide.

28. **Mr. Tirado Martí** (Spain) said that his delegation had changed its opinion and was now in favour of deleting the reference to recognized markets in paragraph 4. References to listed markets were not applicable, as the provision did not apply to intermediated securities. The term "recognized market" had no intrinsic meaning in Spanish or in his country.

29. **Mr. Bazinas** (Secretariat) said that the Working Group had made a deliberate decision to include paragraph 4 so that articles 75 and 76 would take the same approach with regard to giving notice and preventing delays in repossession in cases where a delay could have a negative impact on the value of the encumbered asset.

30. **Mr. Dennis** (United States of America) asked for clarification of the intention of paragraph 2. If it referred only to rules of procedure that a State might have, it could probably be deleted. If it referred to substantive limitations on the right to take possession, it might need to be included, but that would require further discussion.

31. With regard to paragraph 4, his delegation's intention was not to reverse the Working Group's decision but merely to ensure that the paragraph was clearly worded.

32. **Mr. Whittaker** (Australia) said that the reference to recognized markets should be deleted from paragraph 4, but the rest of the paragraph should be retained, as there would be little point in giving secured creditors the right to dispose of perishable assets quickly if article 75 did not enable them to take possession of those assets quickly. For example, under paragraph 3 (c), a grantor in possession of the assets could potentially prevent the secured creditor from taking possession and thus from exercising the right to dispose of the assets that was provided for in article 76.

33. **Ms. Walsh** (Canada) said that it made little difference whether paragraph 4 was retained or not, since it did not specify how far in advance the notice of the intent to obtain possession had to be given and therefore did not impose a significant restriction on the secured creditor, who could presumably provide the notification a very short time before taking possession of the goods. It was not clear from article 75 whether or not secured creditors had to give notice of default if they did not intend to obtain possession of the assets.

34. **Mr. Tirado Martí** (Spain) said that paragraph 4 should be retained; his delegation had only proposed removing the reference to recognized markets. Paragraph 2 should also be retained.

35. **Mr. Weise** (American Bar Association) said that the first two exceptions mentioned in paragraph 4 of article 75 were very important, as they supported and reinforced the right established in article 76, paragraph 8, to sell assets before they declined speedily in value.

36. **Ms. Gullifer** (United Kingdom) said that paragraph 4 should remain, but without the reference to recognized markets.

37. **The Chair** said he took it that the Commission wished to approve article 75, removing paragraph 2 in its entirety and deleting the phrase "or is of a kind sold on a recognized market" from paragraph 4.

38. *It was so decided*.

Article 76

39. **Mr. Bazinas** (Secretariat) suggested a number of editorial changes to article 76. In paragraph 1, the word "either" should be inserted before the words "by applying or without applying". In the chapeau of paragraph 4, the phrase "decides to sell or otherwise dispose of, lease or license an encumbered asset" should be replaced by the phrase "decides to exercise the right provided in paragraph 1", to mirror the wording in paragraphs 2 and 3. Paragraphs 5, 6 and 8 should be amended to begin with the words "The notice referred to in paragraph 4" instead of "The notice".

40. The Commission might also wish to consider a substantive amendment to paragraph 7 to take into account all the recipients of the notice, not just the grantor. The wording of paragraphs 6 and 7 was taken from recommendation 151 (c) of the Secured Transactions Guide, which had been modelled on article 16, paragraph 1, of the United Nations Convention on the Assignment of Receivables in International Trade. The second sentence of article 16, paragraph 1, of the Convention, which corresponded to paragraph 7 of article 76 of the draft Model Law, established a safe harbour rule protecting the secured creditor. Article 16 of the Convention provided that notice was sufficient if it was given "in the language of the original contract", because the recipient of the notice was a single "debtor", who was a party to the original contract. However, recommendation 151 (c) of the Secured Transactions Guide referred to "recipients" of the notice. Similarly, although

paragraph 7 of article 76 of the draft Model Law referred to only one recipient, "the grantor", paragraph 4 of that article listed multiple recipients. Recommendation 151 (c) and paragraph 7 of article 76 both stated that notice was sufficient if it was given "in the language of the security agreement", but that might not be the most appropriate language for the notice if multiple recipients were taken into account. One possible solution would be to stipulate that the language of the notice should be the official language of the enacting State. However, such a provision would not be useful if the applicable law was a law other than that of the enacting State. Another option would be to provide that the notice should be given in the language of the relevant Registry.

41. **Ms. Gullifer** (United Kingdom) said that the suggested new wording for paragraphs 5, 6 and 8 was problematic, as paragraph 4 referred to more than one notice. She proposed using the phrase "The notice of the secured creditor's intention" instead.

42. **Ms. Walsh** (Canada) proposed using the wording suggested by the Secretariat for paragraphs 5, 6 and 8 but changing the word "notifies" to "informs" in subparagraph 4 (b) to avoid confusion.

43. **Mr. Bazinas** (Secretariat) said that changing the wording of subparagraph 4 (b) would not, in itself, solve the problem, as paragraph 4 would still refer to more than one notice: the notice of the secured creditor's intention and, in subparagraph 4 (c), a notice in the Registry. He therefore suggested using the wording proposed by the representative of the United Kingdom.

44. **Ms. Gullifer** (United Kingdom) said that the amendment to subparagraph 4 (b) proposed by the delegation of Canada would address her concerns. The reference to a notice in subparagraph 4 (c) was unlikely to confuse the reader, as it referred to a registered notice, whereas paragraphs 5, 6 and 8 clearly referred to a notice between the parties.

45. **Ms. Walsh** (Canada) said that stipulating, in paragraph 7, that the language of the notice should be the language of the relevant Registry would only establish a partial safe harbour, as the security right being enforced could have been made effective through a method other than registration. Her delegation therefore did not support the suggested amendment.

46. **Mr. Weise** (American Bar Association) said that it would be better to provide a partial safe harbour than no safe harbour at all. Otherwise, there would be no guideline other than that the language must be "reasonably expected to inform the recipient". Since secured creditors receiving the notice must have chosen to enter into a transaction that required registration in a particular State, it would not be unfair for them to receive the notice in a language determined on the basis of that registration. The Model Law could not cover every contingency; its purpose was to establish general rules that would be applicable most of the time. Therefore, it would be useful to include in paragraph 7 a clear and objective rule covering the vast majority of circumstances.

47. **Mr. Sono** (Japan) proposed that the words "referred to in paragraph 4" should be inserted after the word "notice" in paragraph 7, in line with the amendments that had been made to paragraphs 5, 6 and 8.

48. **Ms. Walsh** (Canada) said that the phrase "at least [a short period of time to be specified by the enacting State] before the notice is sent" should be deleted from subparagraphs 4 (b) and (c), as her delegation had indicated in its written comments. Third parties whose rights would be affected by the enforcement action should be entitled to notice of the intent of the secured creditor as long as they registered or provided notice of their security right at any time before the notice from the secured creditor was sent, in line with the approach taken in national laws that included similar requirements. If States were given the option of specifying the period of time, the Guide to Enactment should state that the period should be no more than 24 hours, in order to avoid prejudicing the rights of third parties with a direct interest in the collateral against which enforcement action was being exercised. The same problem existed in article 78, subparagraphs 2 (b) and (c).

49. **Mr. Whittaker** (Australia) said that he understood the concerns expressed by the representative of Canada but felt that the secured creditor should be allowed some time to organize the sending of the notices. It would be appropriate to specify in the Guide to Enactment that the period of time should be very short. He also proposed that the reference to recognized markets should be deleted from paragraph 8, in line with the amendments that had been made to article 75, paragraph 4.

50. **Ms. Walsh** (Canada) said that, if the references to a short period of time to be specified by the enacting State were retained in subparagraphs 4 (b) and (c), the Guide to Enactment should highlight the potential prejudice to third parties if the period was not extremely short.

51. Her delegation did not support the deletion of the reference to recognized markets in paragraph 8, because that paragraph was useful and had been copied directly from recommendation 149 of the Secured Transactions Guide. The normal requirement to give 30 days' notice of disposition of assets was unnecessary and should be dispensed with when the goods were sold on a market where the prices were determined by objective forces beyond the control of the buyer and seller.

52. **Ms. Gullifer** (United Kingdom) said that her delegation supported the retention of the reference to recognized markets in paragraph 8, for the reasons set out by the representative of Canada.

53. **Mr. Whittaker** (Australia) said that he had proposed removing the reference to recognized markets from paragraph 8 for the same reasons that had motivated his similar proposal in relation to article 75, paragraph 4. For example, if shares over which a security right had been granted constituted a controlling stake in a company, the grantor should be given the opportunity to pay the secured creditor in full and retain the controlling stake, since the grantor might not be in a position to acquire a fresh controlling stake on the market.

54. **Mr. Kwon** Young Joon (Republic of Korea) said that the reference to recognized markets should be retained in paragraph 8, for the reasons his delegation had given concerning article 75, paragraph 4. In many jurisdictions the notification process was very lengthy, and not requiring notification would facilitate the swift enforcement of the security right.

55. His delegation supported the deletion of the reference to a short period of time in subparagraphs 4 (b) and (c), for the reasons set out by the representative of Canada.

56. **Mr. Riffard** (France) said that his delegation wished to retain paragraph 8 of article 76. Although the reference to a "recognized market" was open to discussion, it was essential for the reasons previously mentioned. Its removal would jeopardize 14 years of discussion on the issue. The price of the asset in question was fixed in the case of an official market; it was therefore not necessary to protect the secured creditor by requiring advance notice.

57. **Mr. Henning** (United States of America) said that his delegation supported the retention of paragraph 8. The point made by the representative of Australia could be accommodated in the Guide to Enactment. While there was a recognized market for shares in a company, there was not a recognized market for a controlling stake. Paragraph 8 would not justify selling a controlling stake without giving the appropriate notices. The issue concerned the interpretation of the paragraph; there was no justification for removal of the entire rule, which covered many other simpler situations.

58. **The Chair** said he took it that the Commission wished to approve article 76, incorporating the editorial changes to paragraphs 1, 4, 5, 6 and 8 suggested by the Secretariat and the editorial change to paragraph 7 proposed by the representative of Japan; changing "notifies" to "informs" in subparagraph 4 (b); and retaining the text in square brackets in subparagraphs 4 (b) and (c) while including an explanation, in the Guide to Enactment, that the period of time referred to in those subparagraphs should be very brief. He also took it that the Commission wished to retain paragraph 8 and to clarify what was meant by "recognized market" in the Guide to Enactment.

59. *It was so decided*.

Article 77

60. **Mr. Bazinas** (Secretariat), referring to the title of article 77, said that one State had pointed out that the manner in which a secured creditor distributed proceeds was not necessarily a right but an obligation. Moreover, paragraph 3 dealt not with distribution but with the debtor's liability for any deficiency. Accordingly, it had been suggested that the title should be changed to read "Distribution of the proceeds of a disposition of an encumbered asset and debtor's liability for any deficiency".

61. There were two issues with paragraph 3. Firstly, the point had been made that the word "shortfall" should be replaced with the word "deficiency". However, if the word "amount" were to replace the word "shortfall", the rest of the sentence would retain the same meaning and avoid the use of a term that might not fit or translate well into other languages. Secondly, if the debtor had a claim against the secured creditor, either under the agreement or for violations of the standards of conduct set out in article 4 or of the provisions contained in chapter VII of the Model Law, the debtor would have a right of set-off. A claim for deficiency should thus be reduced by any amount owed to the debtor by the secured creditor for failure to comply with those provisions. Should the Commission decide to address that issue, it could do so in article 77, paragraph 3, or in article 4. It could also refer to such set-offs of counterclaims that the debtor might have against the secured creditor in the Guide to Enactment.

62. **Mr. Tirado Martí** (Spain) said that there appeared to be a redundancy in subparagraph 2 (a). The phrase "net proceeds" meant precisely that proceeds were deducted from the original cost of enforcement. The Commission should delete either the word "net" or the phrase "after deducting the reasonable cost of enforcement". As it stood, the subparagraph conveyed the idea that preferential claims might have priority over the costs of enforcement. However, the cost of enforcement should be paid before anything else.

63. With respect to the Secretariat's suggestion concerning paragraph 3, the definition of the term "set-off" varied from one country to another. The inclusion of such a rule in that location seemed odd; his delegation would prefer to see it in the Guide to Enactment.

64. **Ms. Gullifer** (United Kingdom) said that her delegation supported the Spanish delegation's proposal to resolve the redundancy in subparagraph 2 (a) by removing the word "net". With respect to paragraph 3, it was understood that the amount owing would be reduced by any set-off that applied. It would be odd to mention one particular cross-claim but not other cross-claims that could be set off under particular laws.

65. **Mr. Kwon** Young Joon (Republic of Korea) said he agreed that the issue of set-offs arising from non-compliance should be covered in the Guide to Enactment, not in paragraph 3.

66. **Mr. Foëx** (Switzerland) said that his delegation preferred not to modify paragraph 3.

67. **Mr. Weise** (American Bar Association) said that the concept behind the suggested additional wording in paragraph 3 was important. The Model Law contained elaborate provisions to protect grantors, yet article 4 referred only vaguely to consequences for non-compliance by a secured creditor. The type of set-off and whether it was characterized as a set-off or a liability for the secured creditor did not matter. However, the kind of set-off under discussion was unlike others where there might be cross-claims between the grantor and the secured creditor. In practice, a huge proportion of the disputes that arose between grantors and secured creditors concerned the secured creditor's compliance with both the specific requirements of notice and commercially reasonable requirements in connection with the enforcement of the security right. Beyond the Guide to Enactment, and in addition to the general reference contained in article 4, it would be useful to indicate that there was a consequence if the secured creditor failed to follow the rules in question.

68. **Mr. Foëx** (Switzerland) said that the system outlined in paragraph 2 (b) could work properly only if the enforcing secured creditor reported on how the proceeds of disposition had been applied. That was an action explicitly required by some laws. The secured creditor had an implicit obligation to provide a breakdown when remitting a balance, which could be mentioned in the Guide to Enactment.

69. **The Chair** said he took it that the Commission wished to approve article 77, deleting the word "net" from subparagraph 2 (a) and retaining paragraph 3 as it stood, while providing additional clarification in the Guide to Enactment.

70. *It was so decided*.

Article 78

71. **Mr. Bazinas** (Secretariat) said that one State had commented that the first part of subparagraph 3 (a) of article 78 should be modified to read "A statement of the amount required at the time the proposal is given to satisfy the secured obligation", so as to align the text with that of article 76, subparagraph 5 (b). It had also been suggested that the cases covered in paragraph 4 should be addressed in two separate paragraphs, rather than two subparagraphs. The beginning of paragraph 4 would read "A secured creditor that has made a proposal for the acquisition of an encumbered asset in full satisfaction of the secured obligation acquires the encumbered asset unless it receives an objection in writing from any person entitled to receive the proposal under paragraph 2", and the rest of the text would be taken from subparagraph 4 (a). Subparagraph 4 (b) would then become paragraph 5, and would read "A secured creditor that has made a proposal for the acquisition of the encumbered asset in partial satisfaction of the secured obligation acquires the encumbered asset only if it receives the affirmative consent in writing of all persons entitled to receive the proposal under paragraph 2 within [a short period of time to be specified by the enacting State] after the proposal is received by each of them". The following paragraph would then be renumbered as paragraph 6.

72. The issue referred to in the note to the Commission after article 78 should also be addressed. It could be argued that the time period mentioned in subparagraph 4 (b) was discussed in the commentary of the Secured Transactions Guide and that the Working Group had approved it. The Secretariat was not necessarily suggesting that the time period should be deleted, but rather sought to inform the Commission of the issue.

73. Finally, with regard to the existing paragraph 4 (b), the term "affirmative consent" raised the question of whether it was possible to have "negative consent". It might be sufficient to say "consent in writing" or "explicit consent in writing".

74. **Mr. Kwon** Young Joon (Republic of Korea) said that the word "affirmative" was unnecessary and should be deleted. The idea of consent in writing was sufficient.

75. **Mr. Whittaker** (Australia) said he agreed that the word "consent" should be used without a qualifying adjective, as had been done in a number of places in the draft Model Law.

76. **Mr. Weise** (American Bar Association) said that the phrase "in writing" ensured that silence could not be construed as consent.

77. **The Chair** said he took it that the Commission wished to approve article 78, deleting the word "affirmative" from subparagraph 4 (b) and adopting the amendments read out by the Secretariat.

78. *It was so decided*.

Article 79

79. **Mr. Bazinas** (Secretariat) said that one State had proposed that, in paragraph 1 of article 79, which dealt with judicial enforcement, the words "except rights that have priority over the right of the enforcing secured creditor" should be deleted. To make it clear that the text in the square brackets was a question put to the enacting State, the words "or not" could be added after the word "whether". The same change was also suggested for paragraph 2. Concerning paragraph 5, he drew attention to the note to the Commission after article 79, in which the Commission was asked to decide whether the bracketed text should be retained.

80. **Mr. Whittaker** (Australia) said that his delegation saw value in retaining the bracketed text in paragraph 5. If the buyer from the secured creditor was aware of any non-compliance with the chapter under discussion, in particular non-compliance in bad faith, the buyer should not necessarily acquire the rights free of any third-party rights.

81. **The Chair** said he took it that the Commission wished to approve article 79, incorporating the amendments read out by the Secretariat and retaining the bracketed text in paragraph 5 outside square brackets.

82. *It was so decided*.

Article 79 bis

83. **Mr. Bazinas** (Secretariat) said that the draft Model Law contained several references to the possibility of setting, in the security agreement and in the notice to be registered, a maximum amount up to which the security right could be enforced, yet there was no equivalent provision in the chapter on enforcement. Consequently, one State had proposed the addition of an article 79 bis, entitled "Enforcement of a security right up to a maximum amount". The text would read "If the maximum amount entered in an initial or amendment notice is lower than that indicated in the security agreement to which the notice relates, the security right to which the notice relates may be enforced only in respect of the amount entered in the registered notice". Article 79 bis could be accompanied by a footnote indicating that the provision would be necessary if the enacting State included in its legislation article 6, subparagraph 3 (d), and article 42, paragraph 3, of the draft Model Law, as well as article 8, paragraph (e), article 20, subparagraph 2 (b), and article 24, paragraph 4, of the draft Model Registry-related Provisions.

84. **Mr. Riffard** (France) said that, while the issue should be covered in the Model Law, his delegation had some reservations with respect to the proposed wording of the new article, which might work in a situation with several competing creditors but not with just one. Where there were

a number of competing creditors, it was reasonable that the rights of the enforcing secured creditor should be limited to the amount mentioned in the notice, as that was the only document to which the other creditors could refer. However, his delegation did not understand why, in the relationship between the grantor and the secured creditor, the amount cited in the notice should prevail over the one established in the security agreement. The proposed new article should distinguish between the two cases, namely the relationship between a secured creditor and other competing creditors and the relationship between a secured creditor and the grantor.

85. **Mr. Whittaker** (Australia) said that his delegation saw merit in the observation made by the representative of France. In addition, the text of the proposed article 79 bis referred several times to a "notice", but concluded with a reference to a "registered notice". The word "registered" should perhaps be deleted.

86. **Mr. Kwon** Young Joon (Republic of Korea) said that his delegation understood the proposed article 79 bis as addressing the discrepancy between the maximum amount indicated in the security agreement and the maximum amount actually entered in an initial or amendment notice. For example, if a security agreement indicated a maximum amount of 10 million euros, but a maximum amount of 8 million euros was entered in a notice, then the latter amount would prevail.

87. There was also a potential discrepancy between the incurred amount of a secured obligation and the maximum amount entered in a notice. For example, if the amount of the obligation was 10 million euros, but the maximum amount entered in a notice was only 8 million euros, then the security right could only be enforced up to 8 million euros. Such cases should be addressed if the Commission planned to insert a new provision relating to the maximum enforceable amount.

88. **Ms. Walsh** (Canada), addressing the point raised by the delegation of the Republic of Korea, proposed amending article 79 bis to read "enforced only up to the amount entered in the registered notice". The Guide to Enactment could then explain that, if the current outstanding secured obligation was less than the amount stated in the notice, enforcement could occur only up to the amount that was still owing.

89. She agreed with the representative of France that the amount in a registered notice should bind only the secured creditor in a competition. When there were other competing claimants, the wording should perhaps be modified to state that the "security right may be enforced as against competing claimants only in respect of the amount entered in the notice". In a purely bilateral context, however, the amount stated in the security agreement was the relevant amount.

90. **Mr. Cohen** (United States of America) said that his delegation was uncertain whether a reference to "competing claimants" was the most appropriate wording, and called on the Secretariat to address that issue. The key point was that the limitation in the registered notice had to do with priority. If there was one secured creditor and the amount incurred by a grantor was greater than the amount shown in the registered notice, then the contractually incurred amount must be the amount to which the secured creditor was entitled.

91. **Mr. Whittaker** (Australia) said that it was not strictly a question of the amount in respect of which a secured creditor could enforce its security right, but rather of the order in which enforcement proceeds were applied. Where there was a maximum amount for a particular secured creditor, that creditor should receive only the amount that it was owed up to the amount stipulated in the register, ahead of other secured claimants. However, it might be able to recover the balance at the end of the process, once other creditors had been paid.

92. **Ms. Walsh** (Canada) said that her delegation did not understand the maximum amount limitation in that way, but rather as limiting the amount for which a given party was secured if there were any other creditors. If there were no competing claimants, the amount contractually agreed should be recoverable through secured enforcement mechanisms. However, if there were competing claimants, the purpose of specifying a maximum amount in the registered notice was to limit the amount for which a particular claimant was secured. Her delegation did not wish to allow the security to be recovered over and above the amount entered in the registered notice, except as against the grantor and when there were no other creditors or buyers.

93. **Mr. Sono** (Japan) said that if the application of the new article was limited to situations where there were competing claimants, as proposed by the delegation of France, then such a provision would not be necessary. In situations where there were no competing claimants, a secured creditor with a maximum limit could always exceed the limit as an unsecured creditor.

94. **Mr. Brink** (Factors Chain International and European Union Federation for the Factoring and Commercial Finance Industry) said that unsecured creditors might have an interest in preserving certain assets free of encumbrances. If article 79 bis was adopted as proposed, it would address the situation of unsecured creditors. However, if the changes proposed by the delegation of France were incorporated, the article would fall short of protecting unsecured creditors or other parties interested in preserving assets free of encumbrances.

95. **Mr. Bazinas** (Secretariat) said that if there were no competing creditors with a right in the asset, the secured creditor might be able to recover as an unsecured creditor. However, that did not address the fact that the secured creditor had a secured claim against the grantor. If there were no competing claimants with rights in the asset, in principle there was no reason why secured creditors should be treated as unsecured creditors. The indication of different maximum amounts in the registered notice and in the security agreement did not mean that the higher amount listed in the security agreement was not the amount of the secured obligation or that the lower amount listed in the notice would require the secured creditor to be treated as an unsecured creditor for the additional amount exceeding the amount stipulated in the notice.

96. **Mr. Weise** (American Bar Association) said that the rule should apply only with respect to competing claimants.

If there were other unsecured creditors and they obtained a judicial lien of some kind, they would become competing claimants and be entitled to protection. He suggested that the words "against competing claimants" should be added after the words "the security right to which the notice relates may be enforced" in article 79 bis. If there was a discrepancy between the amounts indicated in the security agreement and the notice, and if all other competing claimants had been paid, there was no reason not to let the secured creditor enforce up to the maximum amount stated in the security agreement. Once all other competing claimants had been paid, the situation became identical to one in which there had been no competing claimants.

97. **Ms. Gullifer** (United Kingdom) said that the Secured Transactions Guide, in recommendation 14, supported the possibility of including a maximum amount, "if the State determines that such an indication would be helpful to facilitate subordinate lending". That clearly referred to competing claimants. More time was required to reflect on the wording "enforced as against competing claimants", as it was actually a matter of enforcing against the debtor.

98. **Ms. Walsh** (Canada) said that, if all competing claimants had been paid, the rule would apply and there was no need to elaborate further. Her delegation proposed the wording "enforced only in respect of the amount entered into the registered notice, unless there are no competing claimants".

99. **The Chair** said that the group of friends of the Chair would meet to address those issues.

Article 80

100. *Article 80 was approved.*

Article 81

101. **Mr. Bazinas** (Secretariat) said that, in light of the amendments made to article 2, it might be advisable to add the words "by agreement" after the phrase "In the case of an outright transfer of a receivable". The same words could also be added to the title of the article.

102. In view of the Commission's decision that articles 70 to 80 should not apply to outright transfers, he suggested that paragraphs 3 and 5 of article 80 should be reiterated in article 81 to ensure that they would apply to outright transfers.

103. **Ms. Gullifer** (United Kingdom) asked whether the wording of the new paragraphs to be added to article 81 would be identical to, or adapted from, the wording in article 80.

104. **Ms. Walsh** (Canada) said that, for the sake of brevity, article 81 could include a cross reference to article 80, paragraphs 3 and 5, rather than repeating their wording in full.

105. **Mr. Whittaker** (Australia) said that incorporating article 80, paragraph 3, by cross-referencing it in article 81 would not work, as article 80, paragraph 3, in turn cross-referenced secured creditors' right to collect under article 80, paragraphs 1 and 2, and was not relevant to outright transfers. It would be better to restate those principles in new paragraphs in article 81.

106. **Mr. Weise** (American Bar Association) said that the use of the word "default" in article 81 was not quite appropriate, as the default of the grantor was irrelevant to the rights of the secured creditor. The paragraph should be reformulated to indicate that the right of the secured creditor (the buyer) to enforce existed regardless of anything the transferor did. As the owner, the buyer could disregard the status of the transferor.

107. **Ms. Walsh** (Canada) said that it would suffice to say "at any time" rather than "before or after default of the transferor". That would be a rule subject to contrary agreement. If the agreement between the transferor and the transferee imposed conditions on the entitlement to collect, those would override the default rule.

108. **Mr. Bazinas** (Secretariat) said that, if the proposals made by delegations were adopted, article 81 would read "In the case of an outright transfer of a receivable by agreement, the transferee is entitled to collect the receivable at any time". A new paragraph 2 would read "An outright transferee exercising the right to collect under paragraph 1 is also entitled to enforce any personal or property right that secures or supports payment of the receivable". A new paragraph 3 would read "The right of the outright transferee to collect under paragraphs 1 and 2 is subject to articles 59 to 69".

109. **Mr. Weise** (American Bar Association) said that perhaps the Guide to Enactment should explain that the phrase "at any time" did not override any provisions of the assigned receivable regarding the time at which payment was due. The buyer could not accelerate the payment to a date earlier than that provided for in the contract for the assigned receivable.

110. **Ms. Walsh** (Canada) asked whether it was necessary to repeat "outright" in paragraphs 2 and 3, since the word was already used in paragraph 1.

111. **Mr. Brink** (Factors Chain International and European Union Federation for the Factoring and Commercial Finance Industry) said that it was preferable to be specific so as to distinguish outright transferees from the secured creditors mentioned in article 80. As the draft Model Law was full of confusing cross references, the Commission should make the text clearer for legislators by preserving the word "outright".

112. **Mr. Bazinas** (Secretariat) said that the reference to an outright transferee in the title and in paragraph 1 might be sufficient. He suggested that paragraph 1 should clarify that the transferee was entitled "to collect the receivable at any time, in accordance with the contract giving rights to the receivable", in order to avoid giving the impression that "at any time" applied irrespective of when the receivable became due under the contract giving rights.

113. **Ms. Gullifer** (United Kingdom) said that it was necessary to exercise caution in referring to the contract giving rights, as the terms of the contract giving rights to the receivable might in fact state that the receivable could not be assigned at all. While that was overridden by the previous section, it might be necessary to refer specifically to the terms on when the receivable was due. She proposed that the end of the sentence should be reworded to read "the transferee is entitled to collect the receivable at any time after payment has become due".

114. **The Chair** said he took it that the Commission wished to approve the new version of article 81 read out by the Secretariat, with the amendments made to paragraph 1 and without the repetition of "outright" in new paragraphs 2 and 3.

115. *It was so decided*.

Article 82

116. *Article 82 was approved*.

The meeting rose at 1 p.m.

Finalization and adoption of a draft Model Law on Secured Transactions
(*continued*)

Summary record of the 1029th meeting, held at Headquarters, New York, on Wednesday, 29 June 2016, at 3 p.m.

[A/CN.9/SR.1029]

Chairperson: Mr. Labardini Flores (Vice-Chair) (Mexico)

Contents

In the absence of Mr. Kenfack Douajni (Cameroon), Mr. Labardini Flores (Mexico), Vice-Chair, took the Chair.

The meeting was called to order at 3.05 p.m.

Agenda item 4: Consideration of issues in the area of security interests (*continued*)

(a) Finalization and adoption of a draft Model Law on Secured Transactions (*continued*) (A/CN.9/865, A/CN.9/871, A/CN.9/884, A/CN.9/884/Add.1, A/CN.9/884/Add.2, A/CN.9/884/Add.3, A/CN.9/884/Add.4, A/CN.9/886, A/CN.9/887 and A/CN.9/887/Add.1)

1. **The Chair** invited the Commission to resume its consideration of the draft Model Law, focusing on the articles contained in document A/CN.9/884/Add.4.

Article 83

2. **Mr. Cohen** (United States of America), supported by **Mr. Deschamps** (Canada), said that, in paragraph 2, the words "as against a competing security right made effective against third parties by another method" should be replaced with the words "as against a competing claimant", to ensure that the conflict-of-laws rule also covered competing claimants that were not secured creditors, such as judgment creditors that obtained a right in the tangible asset.

3. **Mr. Li** Zhi (Wuhan University Institute of International Law) asked whether, in subparagraph 4 (b), the "short period of time" referred to in the square brackets corresponded to an existing international standard or normal practice.

4. **The Chair** said that the time period would be determined by each State.

5. **Mr. Bazinas** (Secretariat) suggested that, in paragraph 4, the words "may be created and made effective" should be amended to read "may also be created and made effective". In addition, the Commission might wish to delete subparagraph 4 (a), as it merely repeated the *lex situs* rule in paragraph 1, and retain subparagraph 4 (b) as a special rule for goods in transit, security rights in which could be created and made effective against third parties under the laws of the destination country even before the goods arrived in that country. Each State was responsible for establishing an appropriate time period, taking into account such factors as mode of transport.

6. While the Commission had yet to decide on the United States proposal concerning paragraph 2, he suggested that the proposed wording should be changed from "as against a competing claimant" to "as against the right of a competing claimant", since the sentence concerned the priority of one right over another right.

7. **The Chair** said he took it that the Commission wished to approve article 83, incorporating the amendment to paragraph 2 that had been proposed by the representative of the United States and modified at the suggestion of the Secretariat, as well as the Secretariat's suggestions that the word "also" should be added to paragraph 4, subparagraph 4 (a) should be deleted and the wording of subparagraph 4 (b) should be included in the chapeau.

8. *It was so decided.*

Article 84

9. *Article 84 was approved.*

Article 85

10. **Mr. Bazinas** (Secretariat) said that, in order to improve the clarity of article 85, the Commission might wish to amend the words "a receivable that arises from the sale or lease of, or is secured by, immovable property" to read "a receivable that either arises from the sale or lease of immovable property or is secured by immovable property".

11. In addition, to resolve the policy issue referred to in the note to the Commission after article 85, the Commission could decide either that the rule in that article should not apply to any receivables secured by immovable property, or that the rule should be limited to receivables secured by immovable property that was identified or identifiable in the contract giving rise to the receivable, which the secured creditor must be aware of and have an opportunity to examine. Such a change would allow the secured creditor to know whether a different law would apply in a given situation.

12. **Mr. Whittaker** (Australia), supported by **Mr. Tirado Martí** (Spain), said that his delegation preferred the existing wording. While he agreed that it was preferable for the secured creditor not to be surprised by the fact that its priority was regulated in part by the law of a jurisdiction of which it had previously been unaware, if the secured creditor had not been aware of the existence of the land as being part of its security package it would not have taken the value of that land into consideration in deciding how much financing to provide initially. On the other hand, a competing claimant with a registered right in the land registry of one country might be very surprised to find that it was subject to a priority competition with a claim of which it had previously been unaware and which was regulated by the laws of another country. Priority should be given to the immovable land registry in such cases.

13. **Mr. Deschamps** (Canada) said that his delegation supported the changes suggested by the Secretariat, for the reasons stated by the Secretariat.

14. **Mr. Cohen** (United States of America) and **Mr. Kwon** Young Joon (Republic of Korea) said that the words "either" and "immovable property" should be added but no other changes should be made.

15. **The Chair** said he took it that the Commission wished to approve article 85, amending the words "a receivable that arises from the sale or lease of, or is secured by, immovable property" to read "a receivable that either arises from the sale or lease of immovable property or is secured by immovable property" but making no further changes.

16. *It was so decided.*

Article 86

17. **Mr. Bazinas** (Secretariat), drawing attention to the note to the Commission after article 86, said that the Commission might wish to retain the wording of only one of the two optional phrases in square brackets in subparagraph (a).

18. **Mr. Deschamps** (Canada) said that his delegation preferred the text in the second set of square brackets, as it provided greater certainty and made it possible to locate the connecting factor at a particular time.

19. **Mr. Henning** (United States of America) said that his delegation preferred the text in the first set of square brackets, which should be amended to read "the relevant act of enforcement takes place".

20. **Mr. Tirado Martí** (Spain) said that his delegation preferred the text in the second set of square brackets, as it provided greater certainty by establishing where enforcement would take place.

21. **Mr. Whittaker** (Australia) said that his delegation preferred the text in the second set of square brackets. It reflected the fact that, in most cases, the enforcement action would need to be taken against the asset, making it more practical to use the law of the State where the asset was located.

22. **Ms. Yamanaka** (Japan) said that her delegation preferred the text in the second set of square brackets.

23. **Mr. Kwon** Young Joon (Republic of Korea) asked whether there was any practical difference between the contents of the two sets of square brackets and whether, for instance, enforcement could take place somewhere other than the location of the asset.

24. **Mr. Weise** (American Bar Association) said that there could be significant differences if assets were located in more than one State. If the text in the first set of square brackets was adopted, the grantor could have tangible assets in many different States but the secured creditor could choose to conduct the auction in a State that was not one of those States. However, if the text in the second set of square brackets was adopted, the secured creditor would have to conduct the auction in each State where there was a physical asset.

25. **Mr. Deschamps** (Canada) said that, if the secured creditor wished to sell assets located in different States, the text in the second set of square brackets would not require the secured creditor to conduct several different sales. The secured creditor could bring together and sell the assets in one State, but the law applicable to the sale as an enforcement remedy would be the law of the State where the encumbered assets were located at the time of commencement of the enforcement. However, if the assets were located in different States at the time of commencement of the enforcement, it was unclear whether the enforcement would commence at the same time in all States or whether there would be a prevailing time.

26. Furthermore, while the change proposed by the representative of the United States would make the text more precise, it would imply that a different law could apply to each act of enforcement, without defining what was meant by an act of enforcement. Enforcement would have be divided into several components, as some lawyers would consider a series of actions to constitute a single act, while others would require a series of actions to be divided into a certain number. The text in the first set of square brackets would therefore not provide greater certainty.

27. **Mr. Riffard** (France) said that his delegation preferred the text in the second set of square brackets. With regard to the question posed by the representative of the Republic of Korea, there would not be a significant practical difference between the options in square brackets in modes of enforcement relating only to the repossession and sale of assets, as *lex loci rei sitae* would apply. However, in situations involving a proposal to acquire assets in satisfaction of the secured obligation, if the creditor and the assets were located in different States, the text in the second set of square brackets provided clarity by giving an objective indication that the place of enforcement was the place where the assets were located.

28. **Mr. Henning** (United States of America) said that enforcement might typically begin with the repossession of an asset. In a situation where encumbered assets were located in multiple States, the conditions set out in the second set of square brackets would require the use of the procedures of the States in which repossession took place, even if the assets were combined and sold in one location. It would be a difficult and complicated situation in which multiple, potentially inconsistent, procedures would need to be followed.

29. Regarding the Canadian delegation's comments on the proposal to refer to "the relevant act of enforcement", he agreed that different courts could interpret the phrase in different ways, but believed that the potential ambiguities were not as significant as had been suggested. The relevant act of enforcement would determine how repossession took place and provide guidance for the secured creditor, while the issue of how to give notification could be easily resolved.

30. **Mr. Weise** (American Bar Association) said that, under the text in the second set of square brackets, while the secured creditor could conduct a single physical foreclosure sale when assets were located in multiple States, that sale would have to comply with the laws of those States on an asset-by-asset basis. Compliance with multiple laws could therefore pose a problem if different States had different sets of rules on enforcement of a security right, and could interfere with the ability to sell the encumbered assets as a whole or as an operating business. Under the text in the first set of square brackets, on the other hand, one set of laws would apply to all assets. Nonetheless, a secured creditor could potentially manipulate the law under that option by referring to the State where enforcement took place, although that situation could be managed through the rules established in article 4.

31. **Mr. Bazinas** (Secretariat) said that, under the text in the second set of square brackets, if the secured creditor repossessed assets in different jurisdictions before bringing those assets into one jurisdiction and conducting a sale, that sale would have to follow the laws of the different jurisdictions. However, it was unclear what would happen under that option if the court in the State where the assets were brought and enforcement took place considered enforcement to be a procedural issue and applied *lex fori*. He asked if the forum must determine whether such issues were substantive and could be referred to the laws of another jurisdiction, and therefore whether the texts in the first and second sets of square brackets would have the same effect. While enforcement normally involved procedural issues, it could also entail substantive ones, and the qualification of those issues was decided by each forum.

32. **Mr. Deschamps** (Canada) said it was his assumption that the article dealt with substantive issues. It should be noted that the matter under discussion was irrelevant to federal countries; for example, if assets were located in different states of the United States. However, in cases of assets located in different countries, the parties would reasonably expect that the law applicable to the enforcement would be the law where the assets were located at the time when the secured creditor commenced enforcement.

33. **Mr. Henning** (United States of America) said that, although the comments made by the Secretariat were correct in the context of a judicial action, the discussion concerned private actions. *Lex fori* would not be applied, as there would not be a forum until litigation occurred at a later stage, and parties would need to know which law was applicable in order to comply with it and plan their foreclosure proceedings. It was assumed that substantive law was under discussion.

34. **The Chair** said he took it that the Commission wished to approve article 86, retaining the text in the second set of square brackets.

35. *It was so decided.*

Articles 87 and 88

36. *Articles 87 and 88 were approved.*

Article 89

37. **Mr. Cohen** (United States of America) said that, while his delegation agreed with the policy set out in article 89, the meaning of the phrase "at the time the issue arises" in subparagraph 1 (b) was unclear. Third-party effectiveness and priority issues could arise when parties were considering what action to take and which State's laws they should follow, when action was taken or when action was first challenged in litigation. More precise wording must be found for the Model Law, such as "when the issue first becomes relevant". A clear explanation should also be given in the Guide to Enactment, as parties to secured transactions must be able to identify the applicable law in order to comply with it.

38. **Mr. Deschamps** (Canada) said that his delegation preferred the current formulation, as the wording proposed by the United States would not provide greater clarity. The provision would require explanations and examples in the Guide to Enactment, although the rule was already found in the national laws of some countries, including Canada and the United States. In cases concerning the effectiveness of a security right against a trustee in bankruptcy, for example, it seemed clear that, if at the time of bankruptcy the security right had not been made effective, then it was not effective against the trustee. If there was a priority contest between two secured creditors, then the time the issue arose would be the time the priority contest arose; if there was litigation, the court would examine the facts as they stood at the commencement of the litigation, and a change in circumstances after the start of legal proceedings would therefore not alter the applicable law.

39. **Mr. Cohen** (United States of America) said that subparagraph 1 (b) could be fully understood only in relation to article 83, paragraph 1, and article 9. The rules in the Model Law governing the movement of assets between States assumed that once the assets had moved to a different State they were governed by the laws of the new State, including conflict-of-laws rules, but the current wording of subparagraph 1 (b) did not make that clear. As the issue could arise in non-judicial contexts, the current wording could prompt different interpretations, making it difficult for readers of chapter III (Effectiveness of a security right against third parties) and of the Registry-related Provisions to determine which State's law governed effectiveness against third parties or which State's law must be followed in registering a notice. It was inadvisable to put enacting States in such a position; an unambiguous phrase that did not require extensive explanation should therefore be found.

40. **Mr. Weise** (American Bar Association) said that determining the relevant time could be very complicated. For instance, in an insolvency proceeding, if an encumbered asset was moved from one State to another and, under the rule of continuity in third-party effectiveness, the security right in that asset temporarily remained effective in the new State, it would be expected that the court considering it in connection with the insolvency would look to the location of

the asset at the time the security right had first been made effective against third parties. The concept of relevance, as opposed to when the issue arose, would give courts more guidance and the Guide to Enactment could provide a series of examples based on the hypothetical scenarios discussed.

41. **The Chair** said he took it that the Commission wished to approve article 89 while retaining subparagraph 1 (b) in its current form, provided that the Secretariat reviewed the exact wording and the Guide to Enactment gave further clarification on the matter.

42. *It was so decided.*

Article 90

43. *Article 90 was approved.*

Article 91

44. **Mr. Tirado Martí** (Spain) said that article 91 was clearly based on the work of the Hague Conference on Private International Law with respect to the law applicable to contracts. The Model Law, however, applied only to security rights and was based on objective connections. Paragraph 4 was particularly excessive: it was unclear why, if there was an objective connection, reference would need to be made to the law of a State other than the forum State. His delegation considered that the article should be drastically reduced or deleted, but would not stand in the way of a consensus if other delegations did not agree.

45. **The Chair** said that the article resulted from the recommendations of Working Group VI. As there were no other objections, he took it that the Commission wished to approve the article without change.

46. *It was so decided.*

Article 92

47. *Article 92 was approved.*

Article 93

48. **Mr. Bazinas** (Secretariat) said that the Commission might wish to consider replacing the words "is the law applicable to" with the words "also is the law applicable to" in the chapeau of article 93, as it would provide greater clarity and align the article with the wording of recommendation 217 of the *UNCITRAL Legislative Guide on Secured Transactions*.

49. **Mr. Sono** (Japan) said that, for asset-specific rules in other chapters, it had been decided that the name of the specific asset would be referred to in the article titles. The words "Law applicable to" should therefore be deleted from the title of article 93 and all other articles in the asset-specific rules section of chapter VIII.

50. **The Chair** said he took it that the Commission wished to approve article 93, incorporating the changes put forward by the Secretariat and the representative of Japan.

51. *It was so decided.*

Articles 94, 95 and 96

52. *Articles 94, 95 and 96 were approved.*

Article 97

53. **Mr. Deschamps** (Canada), supported by **Mr. Cohen** (United States of America), **Mr. Tirado Martí** (Spain) and **Ms. Gullifer** (United Kingdom), said that his delegation supported the retention of option C, which was very straightforward, and the deletion of options A and B.

54. **Mr. Kohn** (Commercial Finance Association) said he agreed that option C was a straightforward rule; having only one option would simplify enactment and promote uniformity among States. Moreover, having the same rule for certificated and uncertificated securities would eliminate the possibility that, in the case of certificated securities, the applicable law could be that of a State in which the certificate was located but which had no relationship to the transaction in question.

55. *Article 97, as amended, was approved.*

Article 98

56. **Mr. Henning** (United States of America) said that his delegation supported the deletion of the three existing paragraphs and their replacement with the wording suggested in the note to the Commission. However, the subparagraph (b) suggested in the note was overly complicated and could be deleted. If subparagraph (b) was considered necessary, it could end after the phrase "internal conflict-of-laws rules of the State".

57. **Mr. Deschamps** (Canada) said he agreed that the existing wording should be replaced with the wording suggested in the note, including subparagraph (b). The wording in subparagraph (b) suggested in the note would address situations in federal States where internal conflict-of-laws rules might not exist at the federal level. If less detailed wording was desired, the phrase "internal conflict-of-laws rules of the State" could be replaced with "internal conflict-of-laws rules in effect in the State", although such wording might be unclear to an uninformed reader.

58. **Mr. Henning** (United States of America) said that he supported the wording proposed by the Canadian delegation. The concern over subparagraph (b) stemmed from the reference to the "law in force in the relevant territorial unit" in subparagraph (a), as the subsequent reference to "the law in force in that territorial unit" in the absence of internal conflict-of-laws rules must mean the law of the aforementioned "relevant territorial unit". As confusion could potentially arise, the Secretariat could try to align the wording more closely with recommendation 225 of the Secured Transactions Guide.

59. **Mr. Deschamps** (Canada) said that, instead of referring to "the law in force in that territorial unit", subparagraph (b) should refer to "the internal conflict-of-laws rules in force in the State or, in the absence of such rules, the internal conflict-of-laws rules in that territorial unit".

60. *The meeting was suspended at 4.30 p.m. and resumed at 4.55 p.m.*

61. **Mr. Bazinas** (Secretariat) said it was his understanding that the Commission members wished to delete the three paragraphs of article 98 and replace them with the text in the note to the Commission. The wording of subparagraph (b) would be altered to read "the internal

conflict-of-laws rules in force in that State or, in the absence of such rules, in that territorial unit", or words to that effect. Further changes to the wording might be necessary.

62. **Mr. Deschamps** (Canada) said that the intention had been to make express provision both for cases where there were federal rules and for cases where there were only rules of territorial units. However, if the phrase "in that State" was used, it would include both sets of rules. Subparagraph (b) should therefore read "the internal conflict-of-laws rules of that State or, in the absence of such rules, of that territorial unit determine the relevant territorial unit whose substantive law is to apply". With that alteration, the entire text of article 98 should be replaced with the text in the note to the Commission.

63. **Mr. Henning** (United States of America) said that he agreed with the changes proposed by the Canadian delegation, which reflected recommendation 225 of the Secured Transactions Guide.

64. **Mr. Bazinas** (Secretariat) asked whether the words "or, in the absence of such rules," were necessary. If there were no conflict-of-laws rules at the federal level, the rules of the territorial unit would apply.

65. **Mr. Deschamps** (Canada) said that the words "or, in the absence of such rules," should be retained, as otherwise the provision would mean that either the federal conflict-of-laws rules or the rules of the territorial unit could apply. The rules of the territorial unit should apply only in the absence of conflict-of-laws rules at the federal level.

66. **Mr. Henning** (United States of America) said that he agreed with the representative of Canada, as the provision should not suggest that there should be freedom of choice between federal or territorial rules.

67. **Mr. Sono** (Japan) said that, as article 98 was not an asset-specific rule, it should be moved to the end of section A of chapter VIII after article 92.

68. **The Chair** said he took it that the Commission wished to approve article 98, amending it as proposed by the representative of Canada and moving it to the end of section A of chapter VIII.

69. *It was so decided.*

Article 99

70. *Article 99 was approved.*

Article 100

71. **Mr. Cohen** (United States of America) proposed that, while the square brackets in subparagraph 1 (a) should be removed, the wording should be retained, as it allowed articles 101 and 102 to work correctly by referring to the law that the State would have applied before the effective date. The additional comments submitted in writing by his delegation (A/CN.9/886) could be addressed in the Guide to Enactment.

72. **Ms. Walsh** (Canada) said that the wording of paragraph 1 (a) should be amended to read "the law that applied under the conflict-of-laws rules of the enacting State to prior security rights immediately before the entry into force of this Law". The existing wording did not reflect the fact that the provision referred to the conflict-of-laws rules that had determined the applicable law under the prior law, rather than those that determined the applicable law under the Model Law.

73. **Mr. Cohen** (United States of America) said that he agreed with the Canadian delegation with regard to which conflict-of-laws rules were referred to in the provision. While his delegation had suggested that the point could be addressed in the Guide to Enactment, it could instead be addressed in the Model Law itself.

74. **Ms. Gullifer** (United Kingdom), supported by **Mr. Tosato** (Italy), said that the current wording of the text in square brackets should be retained. The fact that the word "applied" was in the past tense was sufficient to indicate that it did not relate to new conflict-of-laws rules. If considered necessary, the provision could be clarified in the Guide to Enactment.

75. **Ms. Walsh** (Canada) said that a phrase along the lines of "the law applicable to prior security rights under the conflict-of-laws rules of the enacting State that were in force immediately before the entry into force of this Law" might provide greater clarity.

76. **The Chair** said he took it that the Commission wished to approve article 100, removing the square brackets in subparagraph 1 (a) but retaining the wording they contained.

77. *It was so decided.*

Articles 101, 102 and 103

78. *Articles 101, 102 and 103 were approved.*

Article 104

79. **Mr. Bazinas** (Secretariat), drawing attention to the note to the Commission after article 104, said that the Commission might wish to delete the existing version of paragraph 1 and place the revised version of paragraph 1, as contained in the note, at the end of article 103, and to approve article 104 as amended.

80. *It was so decided.*

Article 105

137. *Article 105 was approved.*

The meeting rose at 5.25 p.m.

Finalization and adoption of a draft Model Law on Secured Transactions
(*continued*)

Summary record of the 1030th meeting, held at Headquarters, New York, on Thursday, 30 June 2016, at 10 a.m.

[A/CN.9/SR.1030]

Chairperson: Mr. Labardini Flores (Vice-Chair) (Mexico)

Contents

In the absence of Mr. Kenfack Douajni (Cameroon), Mr. Labardini Flores (Mexico), Vice-Chair, took the Chair.

The meeting was called to order at 10 a.m.

Agenda item 4: Consideration of issues in the area of security interests (*continued*)

(a) Finalization and adoption of a draft Model Law on Secured Transactions (*continued*) (A/CN.9/884, A/CN.9/884/Add.1, A/CN.9/884/Add.2, A/CN.9/884/Add.3 and A/CN.9/884/Add.4)

Draft article 79 bis

1. **Mr. Weise** (American Bar Association), supported by **Ms. Walsh** (Canada), **Mr. Tirado Marti** (Spain), **Mr. Henning** (United States of America), **Ms. Gullifer** (United Kingdom) and **Mr. Whittaker** (Australia), suggested that the proposed draft article 79 bis should be omitted, as the scenario it envisaged was adequately addressed in draft article 24, paragraph 6, of the draft Model Registry-related Provisions, which set out the potential consequences of an erroneous indication in a registered notice of the maximum amount to which a security right could be enforced. While the consequences provided for in draft article 24, paragraph 6, were not identical to those proposed in draft article 79 bis, the former would be adequate to address the relatively rare instances in which such errors were committed.

2. **Ms. Walsh** (Canada) said that, in limiting the maximum amount to which a security right could be enforced to the amount indicated in the financing statement when it was lower than the amount stated in the security agreement, draft article 79 bis achieved the same effect as draft article 24, paragraph 6, provided that there were competing secured creditors that had relied on the lower amount entered in the notice in making lending decisions. Buyers were also protected and would acquire the residual value of the encumbered asset in the event that they had relied upon the lower amount in the notice. Moreover, insofar as it dealt only with the scenario in which a party had relied on the amount indicated in the financing statement, draft article 24, paragraph 6, adequately addressed the concern previously expressed by the representative of France with regard to the need to ensure the enforceability of a security right up to the amount stated in the security agreement in the event that there were no competing creditors, as no grantor subject to such an agreement could claim that it had relied on the amount indicated in the financing statement. Some Commission members had expressed concern that the original proposed version of draft article 79 bis provided for the enforceability of a security right up to the amount indicated in the financing statement against all third parties, even those who could not demonstrate reliance on that amount, and that it was thus inconsistent with draft article 24, paragraph 6. It had therefore been judged preferable to eliminate draft article 79 bis and retain draft article 24, paragraph 6, on the understanding that a more extensive explanation of the consequences stemming from draft article 24, paragraph 6, would be included in the Guide to Enactment.

3. **Mr. Kwon** Young Joon (Republic of Korea) said that, as draft article 24, paragraph 6, focused only on the effectiveness of the registered notice in the event of errors in the required information, its relevance to the policy decisions contained in draft article 79 bis regarding competing claimants and the enforceability of a security right up to the maximum amount indicated in the registered notice was not immediately apparent. While the implications of draft article 24, paragraph 6, with respect to competing claimants and enforceability could be inferred by members of the Commission on close consideration of the text, the provision should be drafted to ensure that non-specialists could readily draw the same conclusion.

4. **Ms. Gullifer** (United Kingdom) said that, while draft article 24, paragraph 6, stipulated that, for a registered notice to be rendered ineffective on account of errors in the required information, third parties must have been seriously misled by the erroneous information, the original version of draft article 79 bis treated the maximum amount indicated in the registered notice as an absolute limit, irrespective of whether third parties had been misled. Hence, if draft article 79 bis were included in order to clarify the issue of enforceability, it would have to be radically redrafted to ensure consistency with draft article 24, paragraph 6. It did not need to be included, however, as it seemed logical, on the basis of draft article 24, paragraph 6, that the maximum amount indicated in the registered notice would only be enforceable to the extent that the notice was effective. Moreover, draft article 24, paragraph 6, did address the issue of competing

claimants insofar as competing secured creditors were the only third parties that could justifiably claim to have been misled; unsecured creditors could make no such claim, as their position could have been jeopardized at any point, had the debtors entered into other advances after the notice had been registered.

5. **Ms. Walsh** (Canada) said that the inclusion of draft article 79 bis had been proposed by Canada in its comments on the draft Model Law (A/CN.9/887) with the aim of concretizing draft article 24, paragraph 6. It had become apparent, however, that the proposed draft article had failed to achieve its intended purpose, in view of the inconsistency pointed out by the representative of the United Kingdom. Consequently, removing draft article 79 bis would not change any existing rule, but rather would entail a reversion to the original rule.

6. **Mr. Weise** (American Bar Association) said that the Commission's deliberations on draft article 79 bis had demonstrated the difficulty of drafting a concise and direct provision on the matter under consideration. Although the Guide to Enactment could provide further explanations as needed, it could be extrapolated from draft article 24, paragraph 6, that the persons who would rely on erroneous information in the registered notice would normally be competing claimants and that their reliance on that information would necessarily have the effect of limiting the enforceability of the security right to the amount stated in the registered notice. Draft article 24, paragraph 6, was therefore adequate to address the rare circumstances in which erroneous information was entered by the secured creditor in the registered notice.

7. **Mr. Bazinas** (Secretariat) said that the implications of draft article 24, paragraph 6, could, of course, be explained in greater detail in the Guide to Enactment. However, it was his understanding that the original proposed version of draft article 79 bis had been revised in order to bring it into line with draft article 24, paragraph 6, the revised text to read: "If the maximum amount entered in an initial or amendment notice is lower than that indicated in the security agreement to which the notice relates, the security right to which the notice relates may be enforced only up to the amount entered in the notice, unless there are no other competing claimants that relied on the maximum amount entered in the notice." He wondered whether that version was still under consideration. He believed that it presented a clearer solution for non-specialists reading the draft Model Law.

8. **Mr. Whittaker** (Australia) said that draft article 79 bis was problematic in that it presupposed that the security agreement in question indicated the specific amount secured, whereas, in the case of an "all monies" security agreement, for example, no specific amount was required that could be compared with the amount entered in the registered notice. The draft article also failed to account for the possibility of a shortfall in the amount entered in the notices registered by junior secured creditors, who should be subject to the same rules as the first-ranking secured creditor responsible for enforcing the security right. It was therefore simpler to accept the principle set out in draft article 24, paragraph 6, than to draft a more specific solution that did not apply to all relevant situations.

9. **The Chair** recalled that a law was, by definition, general in nature and would not necessarily specify every possible scenario. While the Commission's technical approach was commendable, the main objective was to draft a Model Law that was internally consistent and general enough to satisfy the relevant legal conditions, on the understanding that any inadequacies would be addressed by the courts when dealing with specific cases. The Commission should not focus unduly on exceptional circumstances but should ensure that draft article 79 bis and draft article 24, paragraph 6, were mutually consistent, should both articles be included in the draft Model Law. The difficulties faced by the experts of the Commission in seeking precise language that would address all potential scenarios was perhaps an indication that their concerns transcended the scope of the draft Model Law and that the issue should be left open-ended.

10. **Mr. Kwon** Young Joon (Republic of Korea) said that, at least in his country, the indication of a maximum secured amount in a secured transaction did not constitute an exceptional circumstance. While the commission of an error in the registered notice might be exceptional, the situation envisaged in draft article 24, paragraph 6, was, by extension, also exceptional; that did not obviate the need to address such a scenario in the draft Model Law. Given that other draft articles referred to the maximum amount for which a security right could be enforced, a provision outlining the rules for enforcing a security right in transactions in which the maximum amount indicated in the security agreement exceeded the amount indicated in the registered notice would improve the consistency of the draft Model Law. A general provision could not address every potential scenario, and draft article 24, paragraph 6, was just as inadequate as draft article 79 bis in that regard. He therefore supported the version of draft article 79 bis presented by the Secretariat, as it effectively addressed his delegation's concerns and was consistent with draft article 24, paragraph 6.

11. **Ms. Sabo** (Canada) said that both article 24, paragraph 6, and article 79 bis were to be enacted only by States that required the indication of a maximum amount in the security agreement. The problem arose in exceptional cases where the secured creditor indicated a different amount, which could only occur as the result of an error. In its current wording, article 79 bis did not make it clear that it was directly addressing that scenario and was simply a restatement of article 24, paragraph 6. For the purpose of clarification, it would therefore be necessary to redraft 79 bis to say that if the secured creditor, in error, indicated a different amount than that stated in the agreement, that amount could not be enforced against third parties that relied on the error. Not only was article 79 bis redundant, but its explanation in the Guide was also unnecessary because it expressed the general rule that a secured creditor could not claim priority over a competing claimant.

12. **Mr. Whittaker** (Australia) said that the group of Friends of the Chair was aware that the Commission could not and should not attempt to achieve a one-size-fits-all solution in drafting article 79 bis; the general rule that was already set out in article 24, paragraph 6, of the draft Model Law sufficed.

13. **Ms. Gullifer** (United Kingdom), endorsing the comments of the representatives of Canada and Australia, said that she was not sure that the draft read out by the Secretariat was consistent with article 24, paragraph 6. The redrafting that would be required to align the proposed article 79 bis with article 24, paragraph 6, was fraught with difficulty and, ultimately, unnecessary.

14. **Mr. Riffard** (France) said that he could not agree with the conclusion of the representative of Canada that the scenario in article 79 bis could arise only in error. Citing article 9 (e), which required an initial notice to contain a statement of the maximum amount for which the security right could be enforced, he said that, in France, creditors could conclude a security agreement with a debtor for an unspecified amount but that, in some cases, the legislature could enact provisions requiring that an amount be specified for purposes of publicity. In such cases, the difference between the maximum amount indicated in the notice and what was due under the agreement was not an error. Consequently, if the Commission decided to maintain article 79 bis, his delegation supported the initial draft read out by the Secretariat.

15. **Mr. Bazinas** (Secretariat) said that the Commission would recall that, during the session, the Secretariat had expressed some misgivings with regard to the words "except to the extent it seriously misled third parties" in article 24, paragraph 6, in view of the explanations given in the UNCITRAL Guide on the Implementation of a Security Rights Registry. The Guide made it clear that third parties were not misled because, if the maximum amount indicated in the notice was greater than the maximum amount agreed, they were bound by the amount in the notice; if the amount was less, the notice was effective up to that amount. However, according to the article in question, parties that relied on the information in the notice were protected. The Commission might wish to consider amending article 24, paragraph 6, and decide whether to refer to the priority rule on the matter, as set out in article 42, paragraph 3. He would have thought that draft article 79 bis, without any reference to error, was complementary and that the issue of reliance had to be addressed.

16. **Mr. Kwon** Young Joon (Republic of Korea) said that while the general principles were clear, a number of issues relating to creation, effectiveness, priority and enforcement still needed to be addressed. While article 24, paragraph 6, dealt with the effectiveness of a notice if there was an error in the maximum amount specified therein, it did not automatically address enforcement. Draft article 79 bis served to settle the question of what amount a secured creditor could enforce. His delegation therefore reiterated its support of the suggestion by the Secretariat.

17. **Ms. Gullifer** (United Kingdom) said that, if the Commission agreed to any of the proposals to amend article 24, paragraph 6, it should bear in mind that the paragraph dealt also with errors in the period of effectiveness of registration and that the relevant provisions would also need to be amended. In that regard, the Commission might wish to consider redrafting paragraph article 79 bis to read: "The obligation secured by a security right to which an initial or amendment notice which specifies a maximum amount relates is limited to the amount entered in the registered notice, unless there are no other competing claimants." While her suggestion was an attempt to synthesize the previous day's discussions, it might, however, need to be adjusted if issues were the priority of a creditor or the existence of a senior competing claimant.

18. **Mr. Bazinas** (Secretariat), drawing the Commissions attention to recommendation 66 of the Legislative Guide on Secured Transactions, said that the second sentence of that recommendation, regarding the protection of third parties, was of particular interest for article 24, paragraph 6, because it focused on reliance. There was no reference to misinformation; the words "seriously misleading" had been added in the Working Group.

19. **Mr. Sono** (Japan), endorsing the comments made by the representative of the Republic of Korea and by the Secretariat, said that the amendment suggested by the United Kingdom might work but would require further consideration. There was a clear need for the provisions, which would be better placed in the section on enforcement. His preference was to keep draft article 79 bis, possibly with the wording suggested, and either remove article 24, paragraph 6, which worked well with regard to an error in the period of effectiveness, or delete from that paragraph the bracketed language pertaining to error relating to maximum amounts.

20. **Mr. Henning** (United States of America) said that while the Commission was getting bogged down in a drafting exercise. He suggested focusing on how to express the rule governing a registered notice that contained an amount that was too low, and nothing more. The Secretariat had helpfully drawn attention to recommendation 66. The second sentence of that recommendation was a good illustration of the difference between a legislative guide and a model law, as it provided guidance on what practice States should adopt. It was now up to the Commission to determine what that practice was, and the amendment suggested by the representative of the United Kingdom took care of that point. An additional clause might be needed at the end to cover situations where competing claimants had higher priority than the secured creditor who had entered an incorrect amount, because that claimant would not be prejudiced and would be paid in full. The representative of Japan had raised important points about where the rule should be placed and his delegation believed that that could be agreed on once the Commission had ironed out the rule.

21. **Ms. Walsh** (Canada) reiterated that the draft Model Law required parties to limit the maximum amount of the secured obligation in order to facilitate the buyer's ability to use the same encumbered assets as security with a subsequent lender. The maximum amount required in the agreement had to be indicated in the registered notice. The issue at hand was the situation in which the secured creditor incorrectly entered an amount in the registered notice that was either lower or higher than the amount in the security agreement. As against the grantor and competing claimants, the secured creditor should be limited to the amount in the security agreement. However, the language proposed by the representative of the United Kingdom did not solve the problem. The time spent on the matter was indicative of the

difficulty of attempting to create a subset of rules to address various scenarios. Any new wording proposed was deficient because it was either too broad or too narrow and failed to address all possibilities. Her delegation maintained that article 24, paragraph 6, with the words "seriously misleading" deleted, sufficiently addressed all possible scenarios. If the Commission did not find that acceptable and wished to have a new rule that spelled out everything, there would be a need to revise article 24, paragraph 6, and article 42, paragraph 3, and reformulate 79 bis, which would require further consultation and drafting before the Commission could decide.

22. **Mr. Foëx** (Switzerland) said that if his delegation understood it correctly, the draft proposed by the representative of the United Kingdom would limit the secured obligation to the amount indicated in the registered notice. If that was so, the proposal went beyond article 79 bis in its current iteration, which was limited to enforcement. He would be hesitant to allow the indication of a maximum amount to limit the secured obligation outside of any enforcement procedure.

23. **Ms. Gullifer** (United Kingdom), recalling that the issue had been raised earlier, said that the idea was that it was not just the obligation, but the obligation secured by a security right, for which a secured creditor would get paid; the word enforcement had been removed because there might be a different secured creditor enforcing, leading to a waterfall of payments. She had proposed the draft, which she agreed might not be necessary, in response to the case mentioned by the representative of France in which a security agreement had been drafted in very general terms but, for reasons that might be very deliberate, a limited amount had been indicated in the registered notice and, by agreement with the debtor, only that amount would be enforced.

24. **Mr. Tirado** (Spain), endorsed by Mr. Tosato (Italy), said that while his delegation appreciated the points raised by the representative of the Republic of Korea and the Secretariat, it was not convinced that the issue was significant and reiterated its position that article 24, paragraph 6, should be retained and article 79 bis eliminated.

25. **Ms. Sabo** (Canada) asked the Secretariat to clarify the proposals for amending the draft article.

26. **Mr. Bazinas** (Secretariat) said that the phrase "to the extent that they were seriously misled" should be deleted and that a phrase along the lines of "except as against third parties that relied" should be included. Such wording would protect the reliance of third parties, in line with recommendation 66 of the UNCITRAL Legislative Guide on Secured Transactions. The amount referred to in the text was the amount to which the notice was effective and, in accordance with paragraph 3 of draft article 42, the priority of the security right was limited to that amount.

27. **Ms. Walsh** (Canada) said that the draft article should state that registration of the notice was effective only to the extent that a third party relied on the amount in the notice. The present wording suggested that the registration was entirely ineffective against third parties that relied on the amount in the notice. In that regard, the words "to the extent" or some similar wording should be included.

28. **Mr. Bazinas** (Secretariat) said that, if the intent of the draft article was to clarify that the registration of the notice was not completely ineffective, then it was suitable in its present form with the additional deletion of the phrase "seriously misled". The draft article would thereby only protect third parties relying on the amount in the notice because, as explained in the UNCITRAL Guide on the Implementation of a Security Rights Registry, third parties were not being misled.

29. **Mr. Dennis** (United States of America) said that the registration should not be made entirely ineffective. In that regard, part of paragraph 6 of draft article 24 could form a new paragraph 7. Paragraph 7 could be entirely bracketed and address the maximum amount in the notice. In addition, it could state that the registration was effective only up to the amount in the notice as against third parties that relied on it.

30. **Ms. Gullifer** (United Kingdom) said that the wording read out by the Secretariat seemed to suggest that the registration of the notice was ineffective, except to the extent that third parties relied on it. The suggestion made by the United States delegation would make it clear that registration of the notice was effective up to the amount stated in the notice, rather than making the effectiveness of the notice dependent on reliance.

31. **The Chair** suggested that the Commission might wish to revert to draft article 79 bis at a subsequent meeting.

32. *It was so decided.*

Draft article 10

33. *Draft article 10 was adopted*.

Draft article19

34. **The Chair** said that the Commission might wish to address draft article 19 in the draft Guide to Enactment of the draft Model Law on Secured Transactions.

35. **Ms. Gullifer** (United Kingdom), responding to comments made by **Ms. Walsh** (Canada), said that draft article 19 was to be retained in its present form.

The meeting was suspended at 11.30 a.m. and resumed at 12.15 p.m.

36. **Mr. Medina Mejías** (Bolivarian Republic of Venezuela), speaking on behalf of the Group of Friends of the Chair, said that the draft Model Law was highly important for developing countries. The availability of legal instruments that could facilitate business loans for small and medium-sized commercial enterprises would enhance market development, providing growth opportunities for those that required, inter alia, loans secured by their cash flow, accounts receivables and movable assets.

37. The draft Model Law must not affect any agreement made by the parties on the use of alternative dispute resolution (ADR), including arbitration, mediation, conciliation and online dispute resolution. A provision to that effect should be included in draft article 3, highlighting

the autonomy of the parties under consensual agreements and respecting the principle of pacta sunt servanda. The document would be incomplete without such a provision.

38. The slow pace of the judicial process in developing countries could be mitigated if the parties involved in private commercial operations agreed to avoid, inter alia, perishables spoiling and contracts being breached. The protection of agreements between parties was a reason to include a provision in the draft Model Law, which would reinforce the autonomy of agreements on ADR in the field of secured transactions.

39. The delegations of Algeria, Brazil, Costa Rica, the Dominican Republic, El Salvador, Honduras, Indonesia, Italy, Mexico, Namibia, Nigeria, Panama, the Philippines, Sierra Leone, Singapore, Spain, Thailand, the United Kingdom, the United States and the Bolivarian Republic of Venezuela supported the inclusion of such a provision, to read as follows: "Nothing is this law affects any agreement by the parties to the use of alternative dispute resolution, including arbitration, mediation, conciliation and online dispute resolution."

40. **Ms. Sabo** (Canada) said that her delegation was seriously concerned about the inclusion of such a provision in the draft Model Law. Issues related to arbitrability were outside the scope of Working Group VI (Security Interests) and should be taken up by Working Group II (Arbitration and Conciliation). It would be unwise for the Commission to include the proposed provision in the draft Model Law, because Working Group II might at a later date take different decisions on the matter that might conflict with the provision. Working Group VI had recommended that the provision should be included in the draft Guide to Enactment (A/CN.9/885).

41. **Mr. Riffard** (France) said that his delegation agreed with the view expressed by the representative of Canada. There was no need to state explicitly that nothing in the draft Model Law would prohibit arbitration, since that was already clear. A provision concerning matters of procedural law had no place in a Model Law relating to secured transactions. Including it could give the impression that the Commission was twisting the arm of legislators, which was an inappropriate message to send. Therefore the provision should be included only in the draft Guide to Enactment.

42. **Mr. Chan** (Singapore) said that, while his country unequivocally supported the inclusion of the provision, there was concern that it would create a precedent requiring a similar provision to be included in all legislation. Although legislators would be free to leave out the provision when enacting national laws on the basis of the draft Model Law and while it was important to make users of the draft Model Law aware that no restrictions should be placed on the right of parties to use ADR methods, such a clause might not be necessary. In that regard, the draft Guide to Enactment could perhaps indicate that the provision was merely a suggestion to legislators.

43. A further consideration was that some countries might prohibit the use of ADR in disputes over secured transactions. As that issue had not been discussed by the Working Group, the draft Model Law should not bar legislators from taking such action. Nonetheless, there should be both a provision in the text of the draft Model Law and a reference in the draft Guide to Enactment to underscore that the best practice with regard to disputes over secured transactions was to allow ADR, rather than rely solely on litigation.

44. **Mr. Kwon** Young Joon (Republic of Korea) said that, although ADR had become an enormous industry and had its strengths, there was no need to include a specific provision on it in the draft Model Law. If the Commission were to approve the proposal, it would then, for the sake of consistency, have to add such a provision to other laws and codes, where it would be out of place. While the Commission should provide a sound legal framework for ADR, it should avoid stressing one form of dispute resolution over another. The issue of ADR could be addressed in the draft Guide to Enactment.

45. **Mr. Tosato** (Italy) said that in the view of his delegation, the Commission was the ideal forum for resolving issues that had been left unsettled by a working group. Although it had been claimed that the provision proposed by the Friends of the Chair was unnecessary, many sections of the draft Model Law were, in fact, pedagogical in nature. From that perspective, the provision would be very beneficial. The draft Model Law contained several provisions relating to litigation, and, in the interest of balance, some mention should be made of ADR. The language of the proposed provision was so simple and anodyne that it should not be seen as creating any risks, nor should it give rise to any procedural concerns.

46. **Mr. Foëx** (Switzerland) said that his delegation did not support the inclusion of the proposed provision in the draft Model Law. It would be advisable to consult with Working Groups II and III, which were competent in the matter, before taking such a decision. The provision could be included in the draft Guide to Enactment.

47. **Mr. Medina Mejías** (Bolivarian Republic of Venezuela) said that each enacting State was responsible for deciding which provisions to introduce into its national legislation. The provision under consideration did not change the substance of the draft Model Law. In fact, it highlighted and broadened the possibilities for dispute resolution. In some developing countries, it was not unusual for it to take between two and four years to resolve a dispute through the judicial system. The inclusion of the provision would be useful for enacting States. His delegation strongly supported the statement by the representative of Singapore in favour of mentioning ADR in the draft Guide to Enactment. If the working groups had been unable to resolve the matter, then the Commission was the appropriate forum for doing so.

48. **Mr. Dahlkamp** (Germany) said that his delegation had reservations about including the proposed provision, because it related essentially to a procedural question that had nothing to do with security interests. Including it would only raise further questions regarding arbitrability and other issues. He did not believe it was the Commission's intention to signal that ADR methods were preferred. One possible compromise was to leave the draft Model Law text as it was, mention ADR in the Guide to Enactment, and, in recognition

of the fact that more work needed to be done in that area, place ADR on the agenda of Working Group VI or Working Group II.

49. **Mr. Sorieul** (Secretary of the Commission) said that in its discussion of the proposed provision, the Commission should be careful not to trespass into the area of arbitrability. That should be left to the competent Working Group; otherwise the Commission might end up speaking with several voices and thus send an unclear message. In fact, the question of arbitrability was already on the agendas of the Commission and Working Group II, and had been for several years. Although the value of ADR was recognized by the Commission, the Secretariat recommended including the ideas contained in the proposed provision in a document other than the Model Law itself. That would allow the Commission to expand the discussion of arbitration and ADR. Regardless of the solution the Commission ultimately chose, it was important to make it abundantly clear that any additional provision would not affect existing prohibitions under the law, the rights of third parties, or the right of a party to recourse to the national courts.

50. **Mr. Celarie Landaverde** (El Salvador) said that the proposal under discussion had considerable merit insofar as it addressed the problem of different legal traditions in some developing countries. Since the Commission's aim was to facilitate international trade between all commercial actors, an academic approach to the draft Model Law should be avoided and the practical aspects of trade and the needs and experiences of traders should be borne in mind. Alternative dispute resolution methods were recognized in the Model Inter-American Law on Secured Transactions and in the national legislation of several countries, inter alia, Colombia, Costa Rica, Honduras and El Salvador. Given the deficiencies of the judicial systems in some developing countries, the availability of ADR mechanisms benefited all the parties to secured transactions.

51. Lastly, since working groups were answerable to the Commission and not vice versa, the Commission could deal directly with the proposal.

52. **Mr. Remaoun** (Observer for Algeria) said that his delegation supported the proposed provision, which was a pragmatic measure intended to combat the procedural delays common in many developing countries. Indeed mediation and arbitration facilitated resolution of disputes in developing and developed countries alike. The proposal was not controversial, and many African and other developing countries would doubtless also support it.

53. **Mr. Sono** (Japan) said that, given the concerns expressed by the delegations of Canada, France, the Republic of Korea, Germany, Switzerland and the Secretariat, which his delegation shared, the wording of the proposed provision was inadequate. If the Commission did not address the shortcomings of ADR at the same time as its merits, the educational and practical value of the proposed provision would be limited. It should not be included in the draft Model Law, but might be appropriate in the draft Guide to Enactment.

54. **Mr. Aprianto** (Indonesia) said that his delegation supported the inclusion of the proposed provision in the draft Model Law, in view of its importance for many developing countries.

55. **Ms. Gullifer** (United Kingdom) said that her delegation supported the statement made by the representative of Italy. The proposed provision should be included because of its pedagogical value. If it was seen as too broad in scope, then it could be modified to limit it to the rights and obligations of the parties to a security agreement and included in Section I of Chapter VI of the draft Model Law.

56. **Ms. Lephilibert** (Thailand) said that her delegation supported the statements made by the representatives of Italy, Singapore and El Salvador, and recognized the benefit of including a provision on ADR in the draft Model Law.

57. **Mr. Dennis** (United States of America) said that his delegation supported the inclusion of the proposed provision in article 3 of the draft Model Law.

58. **Mr. Tirado** (Spain) said that the users of the draft Model Law were more likely to be developing countries whose courts did not perform satisfactorily in resolving commercial disputes. They would therefore benefit from a clear indication in the Model Law that ADR mechanisms were available. His delegation strongly supported the inclusion of the proposed provision, but could also support the alternative, and perhaps less ambitious, drafting proposed by the representative of the United Kingdom.

The meeting rose at 1.05 p.m.

Finalization and adoption of a draft Model Law on Secured Transactions
(*continued*)

Summary record of the 1031st meeting, held at Headquarters, New York, on Thursday, 30 June 2016, at 3 p.m.

[A/CN.9/SR.1031]

Chairperson: Mr. Labardini Flores (Vice-Chair) (Mexico)

Contents

The meeting was called to order at 3.05 p.m.

Agenda item 4: Consideration of issues in the area of security interests (*continued*)

(a) Finalization and adoption of a draft Model Law on Secured Transactions (*continued*) (A/CN.9/884 and A/CN.9/884/Add.1)

Article 3 (*continued*)

1. **Mr. Medina Mejías** (Bolivarian Republic of Venezuela), speaking on behalf of the Group of Friends of the Chair, recalled that at the preceding meeting, the Group of Friends had proposed adding in article 3 of the draft Model Law a new sentence, to read: "Nothing in this Law affects any agreement to the use of alternative dispute resolution, including arbitration, mediation, conciliation and online dispute resolution."

2. **Ms. Sabo** (Canada) said that the fact that the Model Inter-American Law on Secured Transactions contained a provision similar to the one proposed by the Group of Friends was not sufficient justification for the inclusion of such a provision in the UNCITRAL Model Law. The Model Inter-American Law was a regional instrument, whereas the Commission's Model Law must take into account the international scope of the Commission's work, in particular in the area of arbitration.

3. The proposed provision could encourage arbitration, a topic that had not yet been fully explored, and have a negative effect if arbitration were to be used to the detriment of the rights of third parties. Her delegation welcomed the suggestion by the representative of Germany that the Commission should carry out a more in-depth study on arbitration in the context of secured transactions. The Commission should not include a provision that risked doing harm in the Model Law, but rather should set out the issues that might arise and note the need for further exploration of the matter in the draft Guide to Enactment of the draft Model Law on Secured Transactions.

4. **Ms. Muñóz Flor** (Mexico) said that her delegation supported the proposal by the Group of Friends. In her country, creditors would be unlikely to accept certain types of goods as security unless they had access to flexible methods of alternative dispute resolution (ADR).

5. **Mr. Hamunyela** (Namibia) said that his delegation fully supported the proposal.

6. **Mr. Cavalcanti** (Brazil) said that ADR was essential to ensure a timely resolution of disputes over certain matters in some States. The issue was of major concern in Brazil and had been addressed in recent legislative reforms. Highlighting ADR as an option was thus of the utmost importance and should not be prevented because of concerns about procedural issues.

7. **Ms. Gullifer** (United Kingdom) said that her delegation supported the proposal as drafted by the Group of Friends. However, given the concerns that had been expressed, the Commission might wish to consider an alternative provision with a narrower scope.

8. **Ms. Cerrato** (Honduras) said that her delegation fully supported the addition of a provision highlighting ADR and the agreed with the United Kingdom delegation that such a provision might be drafted in a different way that might be acceptable to all delegations.

9. **Mr. Nawana** (Sri Lanka) said that it was of paramount importance to include a provision of the kind proposed by the Group of Friends in the Model Law in order to ensure the expeditious resolution of disputes in developing countries.

10. **Mr. Riffard** (France) said that the inclusion of the provision proposed by the Group of Friends would do nothing to ensure the effectiveness or validity under national law of agreements reached through ADR. In contrast, the Guide to Enactment could draw the attention of legislators to the need to take measures to facilitate and ensure the effectiveness of ADR in support of the implementation of the Model Law. Thus, the proposal by the delegation of Canada to address the issue in the Guide to Enactment represented not only a compromise that should satisfy all delegations but also a means of enabling States that wished to promote ADR to do so much more effectively than by including the proposed provision in the Model Law.

11. **Mr. Filippov** (Russian Federation) said that, while access to ADR was very important, the inclusion of the proposed provision in the Model Law would do nothing to promote it, as the provision would have no effect on national legislation on ADR.

12. **Mr. Kwon** Young-Joon (Republic of Korea) said that there were several reasons why the proposed provision should not be included in the Model Law. First, it gave the impression that all disputes arising out of the Model Law were arbitrable, which was not the case. Second, if such a provision were inserted into the Model Law, a similar clause would have to be added to every instrument produced by the Commission relating to disputes. That would not be efficient and was unnecessary, given that there was a specific instrument on arbitration. Third, the inclusion of the provision would mean that new clauses would have to be inserted to cover everything else that was not precluded by the Model Law, such as the parties agreeing to a liability exemption clause. The matter could be dealt with in the Guide to Enactment, if necessary, but the insertion of the provision in the Model Law, which was intended to be a simple and concise instrument dealing exclusively with secured transaction law, was not appropriate.

13. **Mr. Rangreji** (India) said that his delegation felt strongly that reference to ADR should be made in the Guide to Enactment, not the Model Law.

14. **Mr. Medina Mejías** (Bolivarian Republic of Venezuela) said that a great many developed and developing countries had stressed the importance of incorporating the provision into the Model Law. His delegation therefore firmly supported the inclusion of the provision as proposed and requested the Chair to take a decision based on the prevailing view within the Commission.

15. **Mr. Kohn** (Commercial Finance Association) said that his delegation supported the proposal, as it sent a very important signal to lenders considering cross-border lending, in particular to developing countries, who were very much concerned with the enforceability of security interests. The points raised by the Secretariat at the previous meeting, including the need to make it clear that the provision did not affect arbitrability, could be addressed in the Guide to Enactment.

16. **Mr. Dubovec** (National Law Center for Inter-American Free Trade) said that he supported the proposal for the reasons stated by the representative of Spain at the 1030th meeting of the Commission. Access to expeditious means of dispute resolution was very important for the practical implementation of the Model Law, but was also an element that could be easily overlooked by States undertaking legislative reform. Flagging the critical issue of ADR lawmakers by including the proposed provision in the Model Law would thus maximize the chances of the Model Law being widely implemented.

17. **Mr. Weise** (American Bar Association) said that the provision should be included, since a significant number of the users of the Model Law would be developing countries and many developing countries had expressed support for the proposal.

18. **The Chair** said that all delegations seemed to agree that the Guide to Enactment should make it clear that the Model Law did not affect arbitrability, the rights of third parties or recourse to the courts. It should be noted that many treaties, including the Vienna Convention on the Law of Treaties, expressly stated that their provisions did not prevent States from resolving disputes through other agreed means. Since the prevailing view was that the proposal should be accepted, he took it that the Commission wished to include the provision proposed by the Group of Friends of the Chair in the Model Law as article 3, paragraph 3.

19. *It was so decided*.

20. *Article 3, as amended, was approved*.

21. **Ms. Sabo** (Canada) said that the report on the current session should reflect the significant strong opposition to the inclusion of the provision.

22. **Mr. Medina Mejías** (Bolivarian Republic of Venezuela) said that the report should also note that developing countries had been overwhelmingly in favour of the proposal.

Articles 2 and 11 (*continued*)

23. **Ms. Gullifer** (United Kingdom) proposed amendments to articles 2 and 11 to reflect the difference between mass and product. The definition of "mass or product" in article 2 (t) should be split into two in order to define mass and product separately. The revised definitions should read: "'Mass' means a tangible asset which results when tangible assets are so commingled with other tangible assets of the same kind that they have lost their separate identity"; and "'Product' means a tangible asset which results when tangible assets are so physically associated or united with other tangible assets of a different kind, or when one or more tangible assets are so manufactured, assembled or processed, that they have lost their separate identity".

24. To reflect that difference, article 11, paragraph 1, should be amended to read: "A security right in a tangible asset that is commingled in a mass of assets extends to the mass. A security right in a tangible asset that is transformed into a product extends to the product." In the same article, option A should be deleted in its entirety and paragraph 2, which was currently under option B, should be amended to read: "A security right that extends to a mass is limited to the same proportion of the mass as the quantity of the encumbered asset or to the quantity of the entire mass immediately after the commingling." In paragraph 3, the word "assets" should be changed to "asset" and "they" to "it", since a product could be formed through the transformation of a single asset.

25. **The Chair** said that he took it that the Commission wished to accept the proposed amendments to articles 2 and 11.

26. *It was so decided*.

27. *Articles 2 and 11, as amended, were approved*.

Article 31

28. **Ms. Gullifer** (United Kingdom) said that article 31 did not need to be changed. It simply provided, as did article 11, paragraph 1, that security rights to assets commingled in masses or products remained the same.

29. **Mr. Cohen** (United States) said that article 31, as it stood, fitted in well with the amended article 11 and the new definitions.

30. **Ms. Walsh** (Canada) said that article 31, paragraph 3, might need to be adjusted to reflect the fact that the new article 11 based security rights which extended to masses on quantity, rather than on value.

31. **Mr. Sono** (Japan) said that the title of article 31 should be changed to reflect the changes made to article 11. The phrase "commingled in a mass or product" should be replaced wherever it occurred in the draft to "…commingled in a mass or transformed into a product".

32. **Mr. Whittaker** (Australia) proposed amending paragraph 3 of article 31, which had already been amended at an earlier session, to read as follows: "For the purposes of paragraph 2, the obligation secured by a security right that extends to the mass or product is subject to the limitation determined in accordance with article 11".

33. *Article 31, as amended, was adopted.*

34. **The Chair** said that the Secretariat would be requested to revise all references in the Model Law to assets "commingled in a mass or product".

Article 27

35. **Ms. Gullifer** (United Kingdom) explained that the Friends of the Chair proposed splitting paragraph 6 of article 24 of the draft Model Registry-related Provisions into two paragraphs. The first would read: "Notwithstanding paragraph 4, an error in the period of effectiveness of registration entered in an initial or amendment notice, does not render the registration of the notice ineffective, except to the extent that third parties relied on the erroneous information in the registered notice." Consequently, footnote 13 would now apply to the entire paragraph. The second paragraph, new paragraph 7, would read: "Notwithstanding paragraph 4, an error in the maximum amount for which the security right may be enforced entered in an initial or amendment notice does not render the registration of the notice ineffective. However, the registration is not ineffective as against third parties who relied on the amount stated in the notice, but only up to either that amount or the maximum amount indicated in the security agreement, whichever is the lower." Although it was inelegant, the wording "not ineffective" had been used as opposed to "effective" in the second sentence to make it clear that the paragraph related only to errors in amounts entered in registration notices, and would not preclude a registration being ineffective on completely different grounds. The second option in the second sentence, "or the maximum amount indicated in the security agreement", had been included so that the paragraph would apply to incorrect amounts that were either too high or too low. If the entered amount was too low, the registration would be effective up to that amount; if it was too high, the registration would be effective up to the amount indicated in the security agreement. Footnote 14 would now apply to the entire paragraph 7.

36. **Mr. Deschamps** (Canada) said that he broadly supported the proposal, but did not believe that the use of "not ineffective" in the second sentence of the proposed paragraph 7 was necessary. In the context, the sentence could not be misconstrued if it was rendered in the positive and simply said "is effective". The word "but" should be removed from the same sentence, so that the second part of the sentence would read: "…amount stated in the notice, only up to…".

37. **Ms. Walsh** (Canada) suggested that the words "for which the security right may be enforced" should be deleted from the first sentence of proposed new paragraph 7. The Commission had not always included those words in other registry-related provisions and the sentence would be more readable without them. In both of the new paragraphs, 6 and 7, the comma after "an initial or amendment notice" was unnecessary.

38. **Mr. Cohen** (United States), supported by **Mr. Whittaker** (Australia), expressed general support for the ideas behind the proposed new paragraphs, but agreed with the representative of Canada that the second sentence of proposed paragraph 7 was awkward. It could be reworked to read: "However, its effectiveness against third parties who relied on the amount stated in the notice is limited to that amount or the maximum amount indicated in the security agreement, whichever is lower."

39. **Ms. Gullifer** (United Kingdom) endorsed the suggestions made by the representatives of the United States and Canada.

40. **Mr. Bazinas** (Secretariat) said that he had understood that Canada had proposed that the references to the "maximum amount for which the security right may be enforced" should be made consistent throughout the entire draft Model Law. That would mean making a number of changes. For instance, the word "monetary" in article 6, paragraph 3(d), would have to be deleted. Other articles in the draft Model Registry-related Provisions contained similar references, such as article 8, paragraph (e), article 24, paragraph 6, and article 42, paragraph 3. It was up to the Commission to decide how to deal with those references and any others that might need to be revised.

41. **The Chair** that the Secretariat would no doubt check the entire draft Model Law for consistency.

42. **Ms. Walsh** (Canada) said that, specifically in the context of article 27, containing the registry-related provisions, the Commission had not felt it necessary to refer always to "the maximum amount for which the security right may be enforced specified in a registered notice". In article 20 for example, paragraph 2 simply referred to the "maximum amount specified in a registered notice". Her delegation's proposal had not been to remove the words "for which the security right may be enforced" in every occurrence, but only where the context made them unnecessary.

43. **Ms. Gullifer** (United Kingdom) said that proposed new paragraphs 6 and 7 of article 24 referred to errors in amounts and periods "entered" in initial or amendment notices; perhaps the Secretariat should consider replacing "entered" with "specified" for the sake of consistency with article 20 of the draft Registry-related Provisions.

44. *New paragraphs 6 and 7 of article 24 of the draft Registry-related Provisions contained in article 27 of the draft Model Law, as amended, were approved.*

Article 23

45. **Mr. Cohen** (United States of America) said that the Friends of the Chair had suggested rewording article 23 so that the sorts of parties described in option A were protected through a priority rule rather than a third-party effectiveness rule. The paragraph should read: "An acquisition security right in consumer goods with an acquisition price below [an amount to be specified by the enacting State] is effective against third parties upon its creation without any further act." A new paragraph should be added to article 32 in order to create an additional exception to protect buyers. It should read: "A buyer takes free of, and the rights of a lessee are not affected by, an acquisition security right in consumer goods unless the security right is made effective against third parties other than under article 23 before the buyer or lessee acquires its right in the goods."

46. **Ms. Walsh** (Canada) said that the only alternative methods of third-party effectiveness that the secured creditor could take to prevail over the buyer were registration or possession, as stipulated in article 18.

47. **Mr. Cohen** (United States) said that the Guide to Enactment could and should reflect the point made by the representative of Canada to make more clear the import of articles 23 and 32.

48. **Mr. Bazinas** (Secretariat) said that the expression "the buyer takes free" had given rise to problems of translation and should thus be replaced with the expression "a buyer acquires its rights free", as already contained in article 32, paragraph 2.

49. As confusion was anticipated regarding the clause "unless the security right is made effective against third parties other than under article 23"; since "other than" could be taken to refer to other third parties, it might be better to reword the provision along the lines of "made effective against third parties by a method other than" or "otherwise than".

The meeting was suspended at 4.35 p.m. and was resumed at 4.55 p.m.

50. **Mr. Cohen** (United States) said that the omission of a reference to licensees in article 23 was intentional, in order to reflect the Commission's previous discussions, during where doubt had been expressed as to whether there existed such a thing as a licensee of consumer goods.

51. *Article 23, as amended, was approved*.

Articles 25 and 26

52. **Ms. Walsh** (Canada), noting the Secretariat's suggestion that the expression "takes free of" created problems and that the expression "acquires its rights free of" was preferable, pointed out that articles 25, paragraph 3, and 26, paragraph 3, under both option A and option B, would have to be revised accordingly. The Commission had decided that when a provision was not meant to cover donees, the phrase "a buyer or other transferee" should be avoided. As a result, "or other transferee" should be deleted from article 25, paragraph3, article 26, paragraph 3, under options A and B, and article 25, paragraph 1, under both option A and option B. The Secretariat should examine all articles containing the phrase "buyer or other transferee" to ensure that the expression was not used when donees were not included.

53. The Commission had agreed with the substance of the proposal contained in document A/CN.9/XLIX/CRP.9, but had expressed the desire for a redrafting of the text. Accordingly, the Friends of the Chair were proposing that article 25 should be revised to read:

"1. Subject to paragraphs 2 and 3, the third-party effectiveness and priority of a security right that was made effective against third parties by registration of a notice is not affected by a change in the identifier of the grantor after the notice is registered.

2. If the identifier of the grantor changes after a notice is registered, a competing security right created by the grantor that was made effective against third parties after the change has priority over the security right to which the notice relates unless the security right to which the notice relates is made effective against third parties by another method or an amendment notice disclosing the new identifier of the grantor is registered:

(a) Before the expiry of [a short period of time to be specified by the enacting State] after the change; or

(b) After the expiry of the period referred to in paragraph 2 (a) but before the competing security right is made effective against third parties.

3. If the identifier of the grantor changes after a notice is registered, a buyer to whom the encumbered asset is sold after the change acquires its right free of the security right to which the notice relates unless it is made effective against third parties by another method or an amendment notice disclosing the new identifier of the grantor is registered:

(a) Before the expiry of the period referred to in subparagraph 2 (a); or

(b) After the expiry of the period referred to in subparagraph 2 (a) but before the buyer acquires its right in the asset."

54. Consequently, draft article 26, paragraph 1, under both option A and option B, as well as all of option C, would be mirrored in article 25, paragraph1. Likewise, article 25, paragraphs 2 and 3, would be mirrored in article 26 paragraphs 2 and 3, under options A and B. Paragraph 4 of article 26 under option A and paragraph 5 of article 26 under option B confirmed that the rules did not apply in the context of a security right in intellectual property. Moreover, paragraph 4 of article 26 under option B addressed the specific problem of the subsequent sale of an encumbered asset before the secured creditor acquired knowledge of the sale and the identifier of the buyer.

55. **Mr. Cohen** (United States) said that article 25, paragraphs 2 and 3, subparagraphs (a) and (b), did not address the situation in which an event happened on a given date, rather than before or after that date. The word "before" should, therefore, be changed to "no later than".

56. In article 25, paragraph 2, the clause "unless the security right to which the notice relates is made effective

against third parties by another method" should, for the sake of clarity, be expanded to read "by a method other than registration of a notice".

57. **The Chair**, underscoring the need for consistency, recalled that the Commission had previously decided to replace the phrase "no later than" with "before" in other articles.

58. **Mr. Weise** (American Bar Association), referring to article 25, paragraph 2, said he wondered whether the clause "if the identifier of the grantor changes after a notice is registered" should be reworded to read "if the identifier of the grantor changes so that it is no longer sufficient under article 24". Such a rewording would allow for minor errors in some cases. If the change was so small that the grantor could still be found by a search, pursuant to article 24, paragraph 1, there should be no risk of losing the effectiveness of the registration as against buyers or other secured parties under article 25, paragraphs 2 and 3.

59. **Ms. Walsh** (Canada) said that the word "before" did not change the meaning of the text and was brief. The phrase "method other than registration" was more exact and should be used in all relevant provisions. With regard to the point made by the Observer for the American Bar Association, the Commission was implicitly referring to the identifier of the grantor as determined under the draft Registry-related Provisions and such a change would alter the application of the rules thereunder. The issue could be addressed in the Guide to Enactment, but should not be included in the draft Model Law.

60. **Mr. Cohen** (United States of America) asked the representative of Canada to clarify her remarks. The Observer for the American Bar Association had been referring to States that had chosen option B under article 23 and wished to reflect the existence of that option in the rule.

61. **Ms. Walsh** (Canada) said it was unfortunate that the issue now before the Commission had not been raised during consultations. It was inadvisable to formulate a rule based on the assumption that a State had adopted a system under which close matches found by a search could be retrieved. The matter should be addressed in the Guide to Enactment; the many contingencies made it unfeasible to do so in the draft Model Law. As a matter of policy, if the identifier of the grantor changed in such a manner that it no longer qualified as the identifier under the rules, than the amendment order should be registered.

62. **Mr. Weise** (American Bar Association) said that if despite a minor name change the original registration notice filed by the first secured creditor could be found, there was no policy reason why the second secured creditor or buyer should have priority over the rights of the first. The Commission might consider drafting an amendment. A cross reference to the relevant articles would be sufficient, and the issue could be dealt with in greater detail in the Guide to Enactment.

63. **Mr. Cohen** (United States of America) said that the phrase "such that the name no longer satisfies the requirements of article 24" could be added in the appropriate places. Provided that the rule was approved by the Commission, he was ready to work with interested delegations, in particular Canada, to find acceptable language.

64. **Ms. Walsh** (Canada) asked the Observer for the American Bar Association whether his point could be addressed in the Guide to Enactment. The Commission should not make such an amendment without also defining in the relevant paragraphs what constituted a misleading identifier notice. A misleading identifier was one that no longer satisfied the test for a sufficient identifier, while a sufficient identifier was one that could still be retrieved through a search using the correct name. If the Observer for the American Bar Association did not believe that to be sufficiently clear, then the Commission should defer a decision on the matter.

65. **Mr. Cohen** (United States of America) said that he agreed with the Observer for the American Bar Association. He was ready to work with the latter and the representative of Canada in order to formulate appropriate language. Only several words would need to be changed. It would be made clear that the text in question applied only to States that had chosen option B under article 23. Since the point was substantive, it should not be handled solely in the Guide to Enactment.

66. **Mr. Tirado Martí** (Spain) asked whether he should wait until the following day to raise a translation-related issue.

67. **The Chair** said that the issue should be examined the following day.

68. **Ms. Gullifer** (United Kingdom) suggested that in article 25 after the words "if the identifier of the grantor changes after a notice is registered", the Commission might wish to add, "such that a search carried out in accordance with article 23 of these provisions would not reveal the security right mentioned in paragraph 1 of this article."

69. **Mr. Whittaker** (Australia) said that the proposal should specify whether the search had been performed using the grantor's previous or new identifier.

70. **Mr. Weise** (American Bar Association) endorsed the proposals made by the representatives of the United Kingdom and Australia.

71. **Ms. Walsh** (Canada) said that persons dealing with a grantor under a new name would conduct searches using that name. The issue was whether a search using the new identifier would retrieve the registered notice, which was why the reference to the misleading error test had been included in article 24, paragraph 1. The Commission should not burden paragraphs 2 and 3 of the draft text with additional language. A new paragraph 4 stating that paragraphs 2 and 3 did not apply to searches using new identifiers could be added.

72. **Mr. Whittaker** (Australia) said that instead of adding a paragraph that qualified rules already applied in previous paragraphs, the text proposed by the representative of the United Kingdom offered a viable, user-friendly solution.

73. **Ms. Walsh** (Canada) said that reference should be made to the draft Registry-related Provisions rather than to article 23. What determined whether an error in the grantor's

identifier was seriously misleading was whether the information could be retrieved using the correct identifier as a search criterion. Language to that effect should be included. Although there was no specific objection to lengthening paragraphs 2 and 3, doing so would result in duplication.

74. **Mr. Weise** (American Bar Association) said that he agreed with the representative of Canada that the new identifier was the appropriate reference. The simplest solution was to add a separate paragraph.

75. **Mr. Whittaker** (Australia) said that his delegation agreed with the proposal to add a new paragraph 4.

76. **The Chair** said that the proposed text would read: "Paragraphs 2 and 3 do not apply if the information in the registered notice would be retrieved by a search using the new identifier of the grantor as the search criterion".

77. **Ms. Gullifer** (United Kingdom) said that the article in question was lengthy and referred to a variety of notices. In the interest of clarity, the Commission should add the phrase "referred to in paragraph 1" after "if the information in the registered notice".

78. **Mr. Cohen** (United States of America) said that his delegation agreed with the United Kingdom proposal. It would also be helpful to include a footnote indicating that the paragraph was only necessary for States that had chosen option B of article 23.

79. **The Chair** reassured the Commission that the Secretariat would review the articles of the draft Model Law for consistency. It was important to clarify that proposed paragraph 4 would be added to article 25, not article 26.

80. *Articles 25 and 26, as amended, were approved*.

The meeting rose at 6 p.m.

Finalization and adoption of a draft Model Law on Secured Transactions
(*continued*)

Summary record of the 1032nd meeting, held at Headquarters, New York, on Friday, 1 July 2016, at 10 a.m.

[A/CN.9/SR.1032]

Chairperson: Mr. Labardini Flores (Vice-Chair) (Mexico)

Contents

In the absence of Mr. Kenfack Douajni (Cameroon), Mr. Labardini Flores (Mexico), Vice-Chair, took the Chair.

The meeting was called to order at 10 a.m.

Agenda item 4: Consideration of issues in the area of security interests (*continued*)

(a) Finalization and adoption of a draft Model Law on Secured Transactions (*continued*) (A/CN.9/884, A/CN.9/884/Add.1, A/CN.9/884/Add.2, A/CN.9/886, A/CN.9/887, A/CN.9/887/Add.1; and A/CN.9/XLIX/CRP.2)

1. **The Chair** invited the Commission to resume its consideration of pending issues concerning the draft Model Law on Secured Transactions. Specifically, he requested the Commission to resume consideration of article 24 of the Draft Model Registry-related Provisions, contained in article 27 of the draft Model Law.

2. **Mr. Deschamps** (Canada) said that the version of paragraph 7 of article 24 which the Commission had approved the previous day was unclear because it did not indicate for what amount a registration was effective. The first sentence stated that the registration was not ineffective, meaning that it was effective, but it did not specify an amount. The second sentence provided an exception to the general rule established by the first sentence: it stated that the registration was effective and for what amount, but it applied uniquely to third parties that had relied on the registration. There was thus no clarity with regard to the amount in the case of a third party that had not relied on the registration. If a judgement creditor were to seize an asset subject to a security right in favour of a secured creditor, for instance, and if the judgement creditor did not rely on the registration because the amount in it was incorrect, the first sentence would apply. The secured creditor would be paid first, because the judgement creditor would not have a security interest, but the amount up to which the secured creditor would be paid was unspecified. To resolve the problem, the paragraph should consist only of the existing second sentence, minus the clause concerning reliance on the registration: it should indicate that if there was an error in the amount, the registration was effective up to the amount inserted in the registration or the amount inserted in the security agreement, whichever was lower.

3. **Ms. Gullifer** (United Kingdom) said that paragraph 4 of article 24 provided the general rule about errors in registered information, and the original paragraph 6 had set out an exception to it. The first sentence of the new paragraph 6 essentially restated the general rule, which was unnecessary. Removing the notion of reliance, while sensible, would require further consideration. In addition, there must be some indication of which third parties effectiveness was limited against. The second sentence as it currently stood read “However, the effectiveness of the notice against third parties who relied on the amount stated in the notice is limited to that amount or the maximum amount indicated in the security agreement, whichever is lower”; reliance on the notice was therefore used to identify the people against whom effectiveness was limited. In response to the problem highlighted by the representative of Canada, she proposed that paragraph 7 should read: “Notwithstanding paragraph 4, where there is an error in the maximum amount for which the security right may be enforced entered in an initial or an amendment notice, the effectiveness of the notice against third parties …”, with the rest of the sentence remaining unchanged.

4. **Mr. Bazinas** (Secretariat) asked whether the policy underlying paragraph 7, or merely its drafting, was being discussed. Any change to the policy regarding reliance was a serious matter that would require further discussion in the Commission. For years the Working Group had considered relying parties to be protected.

5. **Mr. Deschamps** (Canada) clarified that his delegation simply wanted to know the amount for which the registration

was effective under the first sentence, which related to parties that had not relied on the registration.

6. **Mr. Bazinas** (Secretariat) said that the meaning of the previous version of paragraph 6 had been clear: an error in the maximum amount in the notice did not render the registration ineffective, meaning that the registration was effective up to the maximum amount entered in notice — based on the general rule. The new second sentence, in saying that registrations were effective up to the maximum amount entered in the notice or the security agreement, whichever was the lower, had changed the paragraph's meaning, and appeared to establish a different rule.

7. **Mr. Whittaker** (Australia) said that paragraph 3 of article 42, part of the chapter of the Model Law that dealt with priority governed how much a party that had not relied on the registration was entitled to. It established that a security right was limited to the maximum amount set out in the notice, without any reference to whether another person had relied on the notice.

8. **Ms. Gullifer** (United Kingdom) said that she had understood the rule to mean that if someone had not relied on the registration, and therefore was not a competing claimant, the registration was valid up to the amount in the security agreement, and not the amount in the notice. In a scenario such as that mentioned by the representative of Canada, where there was one secured creditor and one judgement creditor who had not relied on the notice, and the amount in the notice was lower than that in the security agreement, the secured creditor could enforce up to the amount in the security agreement, and whatever was left was what remained for the judgement creditor. If the rule was otherwise, it was not important whether or not people relied on the registration, because where there was an error, the registration was only valid up to the amount in the notice, against everyone. There appeared to be two different interpretations: first, that the security right was limited vis-à-vis competing claimants, and second, that it was limited against everyone else. If the first interpretation was the correct one, then it was true that the current two-sentence formulation of paragraph 7 was confusing.

9. **Mr. Cohen** (United States of America) said that the representative of Australia was correct in suggesting that article 42 was the appropriate place to deal with the issue of competing rights in the event of an error entered into the registration notice. Including the matter under article 27 was illogical and could lead to unintended complications.

10. **The Chair** suggested that the interested delegations should discuss the matter further informally, in order to enable the Commission to move ahead with its agenda.

11. **Mr. Deschamps** (Canada) said it was true that article 42 provided part of the answer. However, the text agreed upon the previous day qualified article 42. There was still no clear answer to the question concerning the applicable amount under the current paragraph 7. The Secretary had said that the registration was effective for the amount that had been stated in the notice, which worked if there was no second sentence. The second sentence, which related to competing claimants who had relied on the registration, said that the registration was effective for the lower of the two amounts. However, according to the Secretariat, that meant that for a party that had not relied on the registration, the amount that mattered would be the amount entered on the registration notice. That interpretation would create a bizarre situation, if the amount inserted in the registration notice was higher than the amount in the security agreement. Clarity was needed; the easiest solution was for the second sentence to state that the security right was enforceable up to the lower of the amounts stated in the registration notice and in the security agreement respectively.

12. **Mr. Bazinas** (Secretariat) said that the article under discussion dealt with third party effectiveness, and hence competing claimants, and not with the effectiveness of a security agreement between parties. The addition of a reference to the security agreement was thus puzzling. A coordination problem had arisen between article 24, paragraph 7, and article 42, paragraph 3, as a result of the change of the rule in paragraph 7. The new text referred to the maximum amount in the security agreement in relation to effectiveness against third parties, when previously paragraph 7 had related only to third parties and competing rights.

13. **The Chair** suggested suspending discussion of article 24 of the Draft Model Registry-related Provisions, contained in article 27 of the draft Model Law, in order to give the interested delegations time to agree on an amendment that would resolve the difficulty.

A/CN.9/XLIX/CRP.2

14. **Mr. Bazinas** (Secretariat) said that A/CN.9/XLIX/CRP.2 contained the draft decision of the Commission on the adoption of the *UNCITRAL Model Law on Secured Transactions*. The text of A/CN.9/XLIX/CRP.2, as revised and as amended by Member States, would be included in the report of the Commission. In that connection, the Commission might wish to consider the title of the Model Law in languages other than English.

15. **Mr. Tirado Martí** (Spain), supported by **Mr. Garro** (Argentina), proposed that the Spanish title of the Model Law should be "Ley modelo sobre garantías reales mobiliarias". The translation of "secured transactions" as "operaciones garantizadas" was too vague, and was much broader than that of "secured transactions". However, throughout the text "secured transactions" could be translated simply as "garantías mobiliarias".

16. **Ms. Flor** (Mexico) also expressed support for the proposal, but suggested deleting the word "reales" in order to avoid confusion that might arise as a result of the meaning of "real" in the context of Mexican legislation.

17. **Mr. Riffard** (France) said that the remarks made by the representative of Spain applied equally to the French translation of "secured transactions". "Opérations garanties" did not mean very much in French; "sûretés (réelles) mobilières" reflected the meaning of the English much more precisely. However, "opérations garanties" had been the accepted term for 14 years; it was used in the *UNCITRAL Legislative Guide on Secured Transactions*, subsequent technical guides and various articles. It had begun to take root and changing it might make the relationship between the

different texts unclear, confusing users. It was a difficult decision: a more legally correct translation was desirable, but the history of "opérations garanties" and the coherence between the texts produced by Working Group VI on security interests were important considerations.

18. **Mr. Bazinas** (Secretariat) said that, firstly, the term "secured transaction" was defined in the Legislative Guide as "a transaction that creates a security right". If the law was called "Model Law on Security Interests" in Spanish or French, that would not create any confusion. "Secured transaction" was not defined in the Model Law. Secondly, the equivalent law of the Organization of American States was called "Model Inter-American Law on Secured Transactions" in English, and in Spanish "Ley Modelo Interamericana sobre Garantías Mobiliarias". The important thing was that the Model Law should be clear to readers in all languages.

19. **Mr. Tirado Martí** (Spain), responding to the point made by the representative of France regarding tradition, said that the translation of "secured transactions" as "operaciones garantizadas" was wrong and therefore it was perhaps time to break with tradition. The change could be explained in the Legislative Guide or in a footnote in the Spanish version of the Model Law. "Operaciones garantizadas" did not have any history in Spanish-speaking countries, where laws referred to "garantías mobiliarias", therefore no one would be confused by the change. With regard to the proposal by the representative of Mexico, he said that his delegation proposed to use "reales" only in the title of the Model Law; its inclusion was appropriate as it made it clear that the Model Law addressed proprietary security rights as opposed to personal ones. However, it could be left out of the title if that was the unanimous preference of the delegations of the Spanish-speaking countries.

20. **Mr. Garro** (Argentina) said that "operaciones garantizadas" was a literal translation that did not convey the intended meaning. It must be changed, to either "garantías mobiliarias" or "garantías reales mobiliarias".

21. **Ms. Sabo** (Canada) said that the translation "opérations garanties" had not posed problems over the course of 14 years. For the sake of continuity in the work of Working Group VI it made sense to maintain it. The Guide to Enactment of the Model Law on Secured Transactions could contain an explanation of the precise meaning of "secured transactions" in different languages. Alternatively, other versions of the Model Law could use different translations if the relevant delegations deemed it appropriate, but her delegation would prefer the French version to remain unchanged.

22. **Mr. Foëx** (Switzerland) said that without consultations between the French-speaking delegations having taken place, he did not have a firm proposal regarding the French translation of "secured transactions". However, two precedents for the use of "sûreté" existed: the *UNCITRAL Guide on the Implementation of a Security Rights Registry* was "Le Guide de la CNUDCI sur la mise en place d'un registre des sûretés réelles mobilières" in French, and the French title of the *UNCITRAL Legislative Guide on Secured Transactions: Supplement on Security Rights in Intellectual Property* used "sûretés réelles mobilières" for "security rights".

23. **Mr. Tirado Martí** (Spain) said that his proposal was concerned only with the Spanish translation of "secured transactions", not its translation in other languages, and there was agreement among the Spanish-speaking delegations to adopt it. The only sticking point was whether or not to include "reales", but his delegation was happy for it to be omitted if that meant there would be consensus.

24. **Ms. Flor** (Mexico) said that changing the translation was important because many Latin American countries which were developing laws on security rights used the term "garantías mobiliarias". The representative of Spain had said that his delegation could be flexible with regard to the inclusion of "reales" in the title of the Model Law; her delegation favoured omitting it.

25. **Mr. Cavalcanti** (Brazil) said that in Portuguese the same problem of "secured transactions" being translated literally existed. A similar change was therefore needed.

26. **Mr. Cohen** (United States) said that the title of the Model Law should be consistent with the wording used by Governments that had enacted secured transactions reform, in particular the terminology used in many Latin American countries that ranked among the top 15 economies globally in terms of access to credit and secured transactions reform according to the World Bank's *Doing Business* report. The Secretariat should therefore consult with those countries' Governments.

27. **Mr. Remaoun** (Observer for Algeria) said that the issue was relevant to Arabic as well, as the term used in Arabic was also a literal translation that was not strictly correct.

28. **Mr. Tirado Martí** (Spain), returning to the comment made by the representative of the United States, said that in Latin American countries secured transactions laws used the term "garantías mobiliarias".

29. **Ms. Sabo** (Canada) said that her earlier intervention had been based on a desire to see continuity in the Commission's work. On reflection, however, it did make sense to change the title of the Model Law, at least in French — and the Secretariat should investigate whether similar changes to other language versions were needed.

30. **Mr. Riffard** (France) said that the French delegation had been involved in reforming secured transactions legislation in various French-speaking countries, using the *UNCITRAL Legislative Guide on Secured Transactions*. Although the Legislative Guide used "opérations garanties", the reformed national legislation used the correct term "sûretés réelles mobilières", and the difference had not caused confusion. However, if the Commission chose to adopt "sûretés réelles mobilières", it must make clear the link between the Model Law and all its work of the last 14 years. That could be done by giving the Model Law a subtitle which referenced the Legislative Guide, on which it was based, or including a footnote explaining the change.

31. **Mr. Tirado Martí** (Spain) said that his delegation would support the inclusion of a footnote or other form of explanation; what mattered was changing the title of, and the

references throughout, the Spanish version of the Model Law.

32. **The Chair** suggested that "secured transactions" should be translated in the title of the Spanish Model Law as "garantías mobiliarias". A footnote or other form of explanation should be included to explain the change, and there should likewise be a note in the Guide to Enactment of the Model Law on Secured Transactions. Once a mistake had been recognized, there was a duty to correct it. He asked for clarification of the exact wording proposed for the French version.

33. **Mr. Riffard** (France) said that, on the basis of tradition, legal specialists used "sûretés réelles mobilières". However, "réelles" was redundant, so purists preferred to use simply "sûretés mobilières". His preference would be to align the French version with the versions in other languages, in particular the Spanish version; if the longer form was going to be used in the Spanish title, then the French title should refer to "sûretés réelles mobilières".

34. **Mr. Foëx** (Switzerland) expressed a preference for "sûretés réelles mobilières" for consistency with the *UNCITRAL Guide on the Implementation of a Security Rights Registry* and the *UNCITRAL Legislative Guide on Secured Transactions: Supplement on Security Rights in Intellectual Property.*

35. **Ms. Sabo** (Canada) said that the choice facing French-speaking delegations was whether to make the French version of the Model Law consistent with earlier texts on secured transactions or with the other language versions of the same text. Her delegation's slight preference was for the latter. Assuming that the Chair's suggestion to use the shorter version of the Spanish in the title would be accepted, the title of the French version would thus refer to "sûretés mobilières".

36. **The Chair** suggested that the French version of the Model Law should use "sûretés mobilières" and requested the Secretariat to look into potential changes to be made to the other language versions.

Draft decision on the adoption of the UNCITRAL Model Law on Secured Transactions *(A/CN.9/XLIX/CRP.4)*

37. **Ms. Sabo** (Canada) proposed that, in the sixth preambular paragraph of A/CN.9/XLIX/CRP.2, in order to clarify that it was not the Model Law alone which provided comprehensive guidance to States, but the entire body of UNCITRAL work on secured transactions, she proposed adding the words "with those texts", so that the sentence would read "… the draft Model Law is based on the recommendations of the *UNCITRAL Legislative Guide on Secured Transactions* and consistent with all texts prepared by UNCITRAL on secured transactions, and, with those texts, thus provides comprehensive guidance to States …".

38. *The draft decision, as orally amended, was adopted.*

(b) Consideration of the draft Guide to Enactment of the draft Model Law on Secured Transactions (A/CN.9/885, A/CN.9/885/Add.1, A/CN.9/885/Add.2, A/CN.9/885/Add.3 and A/CN.9/885/Add.4)

39. **Mr. Bazinas** (Secretariat) said that preparation of the draft Guide to Enactment of the draft Model Law on Secured Transactions had been entrusted to Working Group VI. At its twenty-ninth session, the Working Group had requested one or two more sessions to finalize the draft Guide to Enactment. The Commission might wish to heed that recommendation to allow the Working Group to complete its work, which was already far advanced, with a view to considering and adopting the draft Guide to Enactment at its fiftieth session in 2017.

40. **Ms. Sabo** (Canada) said that in its deliberations on the draft Model Law the Commission had identified many issues that the Guide to Enactment would need to address. Given the importance of the Guide, the Working Group should be allowed the extra sessions it had requested.

41. **Mr. Tirado Martí** (Spain) said that the Working Group should be allowed two extra sessions to complete its work. The draft Guide to Enactment contained many necessary explanations and was a vital tool that would support legislators in their implementation of the Model Law.

42. **The Chair** suggested that the Commission could approve the Working Group's request for one or two additional sessions.

43. **Mr. Cohen** (United States) expressed support for the suggestion.

44. **Mr. Bazinas** (Secretariat) said that, if the Working Group did not need a full two sessions to finish its work on the draft Guide to Enactment, it could use the time remaining to it to discuss its future work — either as a Working Group or by organising a colloquium. He reminded the Commission that publication of the Guide to Enactment would have to come from the UNCITRAL publications budget. Therefore, the Commission might wish to request the Secretariat to reflect its decision in its publications programme and to take the necessary steps to ensure publication of the final version of the Guide to Enactment, in paper and electronic form, in the six official languages of the United Nations.

45. **Ms. Sabo** (Canada) said that a colloquium on future work would be a valuable use of the Working Group's time, if it finished ahead of schedule. Even if it did not finish early, a colloquium should not be ruled out. Her delegation supported the Secretary's suggestions regarding the publication of the Guide to Enactment.

46. **Mr. Dennis** (United States) expressed support for a colloquium on future work, preferably to be held within the Working Group's allotted two weeks. If the Working Group did not complete its work ahead of schedule, however, it should nevertheless be allocated separate conference room time to discuss future work. The Guide to Enactment was due to be complete by the Commission's 2017 session, so it would soon be necessary for the Working Group to take up a new area of work. Some important potential areas of work

had been listed under agenda item 4 (c), including a contractual guide on secured transactions. The Working Group might also consider topics which were not listed, such as warehouse receipt financing fraud.

47. **Mr. Bellenger** (France) said that if the Working Group did have time left over, it should not necessarily dedicate it to secured transactions; it could, as the representative of the United States had proposed, examine other topics. However, the use of the Working Group's time should be considered under agenda item 16: Work programme of the Commission, and not as an isolated issue during the current meeting.

48. **Mr. Garro** (Argentina) expressed support for the suggestions regarding publication of the Guide to Enactment. It was critical to the success of the Model Law, as it would facilitate the translation of its principles and rules into new legislation that would change centuries-old practices. His delegation also supported a colloquium, which should address not only theoretical questions but practical enactment-related ones as well. UNCITRAL should consider coordinating with the Organization of American States, which had its own model law on secured transactions, to discuss issues related to implementation.

49. **Mr. Tirado Martí** (Spain) agreed with the representatives of Canada and the United States: even if the Working Group used up its allocated two weeks, it should still hold a colloquium separately.

50. **The Chair** suggested that the Commission might wish to grant the Working Group one or two additional sessions for it to complete the Guide to Enactment, and to approve the holding of a colloquium, regardless of whether the Working Group finished its work on schedule, to address practical implementation issues. It might also wish to add the publication of the Guide to Enactment, in paper and electronic form, to the Commission's publications schedule and budget.

51. *It was so decided.*

(c) Possible future work in the area of security interests (A/CN.9/871)

52. **Mr. Bazinas** (Secretariat) said that in 2010 the Commission had placed on its future work agenda the preparation of a contractual guide on secured transactions and a uniform law text on intellectual property licensing. In 2015 the Commission had decided to retain those items on its future work programme and consider them at a future session on the basis of notes to be prepared by the Secretariat, following a colloquium or expert group meeting, which should be held within existing resources. The Commission might also wish to consider suggestions for its future work that had been made by Working Group VI and by other Working Groups.

53. One potential area of work was finance to micro, small and medium-sized enterprises. The topic was linked not only to the work of Working Group I on micro, small and medium-sized enterprises, but also to the work of Working Group VI, in two ways. First, it might be necessary to review the Model Law to determine whether its provisions were well adapted to microfinance. Second, the Working Group could examine the issue of providing contractual guidance and transparency with regard to complex financial terms for the benefit of parties to financial transactions involving small and medium-sized enterprises when those parties lacked expert knowledge of such matters or did not have access to the advice of sophisticated counsel. The topic was also related to the possible future work on a contractual guide to enactment that would provide guidance to parties to transactions. In that connection, the Commission might wish to recall that its contractual guide on major industrial contracts had been very well received.

54. The Commission had touched on another potential area of future work the previous day when it had decided to add a paragraph to article 3 of the Model Law stating that parties could agree to resolve their disputes by arbitration. The topic was relevant to the work of Working Groups II and V, on dispute settlement and insolvency respectively, because it was important to decide whether disputes concerning security rights were arbitrable in the context of insolvency. The issue called for joint work by experts on arbitration, insolvency and secured finance. The Commission might wish to take note of the new potential topic and place it on its agenda for future consideration on the basis of a note to be prepared by the Secretariat, possibly following an expert group meeting or colloquium held within existing resources, and subject to the general discussion of the work of the Commission as a whole which was scheduled for later in the current session.

The meeting was suspended at 11.35 a.m. and resumed at 12.05 p.m.

55. **Mr. Dennis** (United States) expressed support for a colloquium for the selection of future topics of work. A contractual guide on secured transactions was a good idea, but all potential areas of work, including warehouse receipt financing, should be discussed. Although it was covered by the Model Law, there had been substantial fraud in warehouse receipt financing; it might be useful for the Commission to develop an instrument to address that.

56. **Ms. Sabo** (Canada) also supported convening a colloquium, which could benefit from expert input, to decide on future areas of work. Although not convinced that warehouse receipt financing was a priority, her delegation thought that it and all other potential topics should be considered. Before giving a mandate to the Working Group, the Commission had to determine the parameters of its chosen topic. It was important, first, to have a clear idea of the problem to be addressed and to evaluate the likelihood of reaching a consensual solution — the temptation to find a solution and then look for the problem later must be avoided.

57. **Ms. Flor** (Mexico) expressed support for the suggestion made by the representative of the United States for the Working Group to work on warehouse receipt financing fraud. Mexico was doing work on that issue, which was related closely to secured transactions.

58. **The Chair** said that the topics mentioned by the Secretariat, along with warehouse receipt financing, could be discussed at a colloquium as suggested.

(d) Coordination and cooperation

59. **Mr. Bazinas** (Secretariat) said that the Commission might wish to recall that considerable effort had been put

into cooperating with other organizations in the area of secured transactions. One outcome was the joint publication, with the International Institute for the Unification of Private Law (Unidroit) and the Hague Conference, of texts on security interests. The Secretariat currently had a mandate, which it would like the Commission to renew, to coordinate and cooperate on four projects. Coordination served to prevent duplication of efforts, and overlaps and conflicts among texts; make the best use of public resources; and ensure that the results of the Commission's work were adopted and appropriately used.

60. The first project involved collaboration with the World Bank on the Creditor Rights and Insolvency Standard. A few years earlier the Secretariat had worked with colleagues at the World Bank to prepare a revised version of the Standard, which combined the World Bank Principles for Effective Insolvency and Creditor/Debtor Regimes and relevant recommendations from the *UNCITRAL Legislative Guide on Insolvency Law*. The Secretariat was also seeking to have the Standard include references to the relevant recommendations of the *UNCITRAL Legislative Guide on Secured Transactions*. Collaborative efforts were ongoing: the Secretariat had provided extensive comments on the World Bank Principles, and was currently waiting to hear back from the World Bank regarding progress on the revised Standard.

61. The second project, with the European Commission, was designed to ensure a coordinated approach to the law applicable to third-party effects of the assignment of receivables, taking into account the United Nations Convention on the Assignment of Receivables in International Trade, the *UNCITRAL Legislative Guide on Secured Transactions* and the newly adopted Model Law. At the latest meeting a few years earlier, there had been a discussion of how the Commission could implement recommendations made on the basis of a study prepared by the British Institute of International and Comparative Law, while also ensuring that there was one basic rule for third-party effects of assignments, on the understanding that if there were conflicting rules everyone stood to lose. The Commission agreed that it was important to have a coordinated approach, and a single rule, but it had not yet seen the study or the European Commission's proposal. When the proposal was ready it would probably be translated into a legislative initiative. A number of European Union members which were parties to the Unidroit Convention on International Factoring, or were interested in the Receivables Convention for other reasons, were delaying their ratification, which was of concern. The ongoing coordination between the Secretariat and the European Commission would be pursued.

62. The third project involved collaboration with Unidroit on development of a fourth Protocol to the Convention on International Interests in Mobile Equipment (the Cape Town Convention), which would address international interests in mining, agricultural and construction equipment. The Protocol might cover items that were not included in previous protocols, namely low-value items and items that were not uniquely identifiable, which would create overlap and potential conflict with the Commission's work on security interests. The Secretariat was cooperating with Unidroit to avoid such conflict. The Unidroit Governing Council had recently referred the matter to an intergovernmental group of experts, which would meet in 2017; the Secretariat thus hoped that its mandate for coordination with Unidroit would be renewed.

63. The fourth coordination effort related to the implementation of the Commission's texts on security interests. The Secretariat was working with various organizations — primarily the World Bank Group, but also the Organization of American States — to provide technical assistance to States interested in implementing such texts; as well as to develop local capacity, in particular in the area of security interest registries, but also on secured transactions law more generally, as the benefits of a modern registry and a modern secured transaction law could not be realized unless the users of the law took full advantage of them.

64. The Commission might wish to take note of the efforts undertaken thus far and renew the Secretariat's coordination and cooperation mandate.

65. **Ms. Sabo** (Canada) said that her delegation supported the renewal of the Secretariat's coordination and cooperation mandate. It was important for the Secretariat to participate in the meeting of the intergovernmental group of experts on the proposed mining, agriculture and construction Protocol being developed by Unidroit. The inclusion of low-value equipment was of less concern, given the way that the draft Protocol had been structured, but it was nevertheless worth UNCITRAL participating in the proceedings. Coordination between UNCITRAL and Unidroit in the area of security interests was crucial, primarily to ensure consistency between the instruments they produced.

66. **Mr. Garro** (Argentina) expressed strong support for the renewal of the Secretariat's coordination and cooperation mandate. The coordination that had led to the joint publication *UNCITRAL, Hague Conference and Unidroit Texts on Security Interests* was valuable; similar efforts should be made to coordinate the implementation of the Model Law with that of the Model Inter-American Law on Secured Transactions of the Organization of American States, which had already underpinned reforms in six countries in the region. Collaboration would not only mean that efforts were not duplicated, but would also facilitate learning from different countries' enactment experiences and mistakes. The Secretariat had a great re-education challenge ahead of it: the restructuring of registers and legal systems which were based on entirely different principles to those underlying the Model Law was a huge undertaking.

67. **Mr. Dennis** (United States) agreed that the Commission should renew the Secretariat's mandate. The Secretariat had been actively assisting Asia-Pacific Economic Cooperation with the implementation of the *UNCITRAL Legislative Guide on Secured Transactions*, and would hopefully also support its implementation of the new Model Law. Therefore, the Secretariat should consider extending its existing coordination with the International Finance Corporation and the Organization of American States to also include Asia-Pacific Economic Cooperation.

Agenda item 21: Adoption of the report of the Commission (A/CN.9/XLIX/CRP.1/Add.1, A/CN.9/XLIX/CRP.1/Add.2, A/CN.9/XLIX/CRP.1/Add.3 and A/CN.9/XLIX/CRP.1/Add.4)

68. **The Chair** invited the Commission to consider the paragraphs of the draft report relating to the Commission's deliberations so far on agenda item 4, as contained in documents A/CN.9/XLIX/CRP.1/Add.1 and 2.

A/CN.9/XLIX/CRP.1/Add.1

69. **Mr. Bazinas** (Secretariat) drew attention to revisions that had been made to A/CN.9/XLIX/CRP.1/Add.1. The first was to add an additional sentence to paragraph 16, referring to article 13 of the Model Law, which was based on article 9 of the United Nations Convention on the Assignment of Receivables in International Trade. The Commission had decided to delete the term "subsequent" as a qualifier of "secured creditor" in article 13, on the understanding that it was a drafting change that would not affect the interpretation of the Convention. It was an important point, so a decision had been taken to include it in paragraph 16 of A/CN.9/XLIX/CRP.1/Add.1. A new subparagraph, (b), would read: "As the meaning of the term 'subsequent' was not clear (unlike the Receivables Convention, which defined the term 'subsequent assignment' in article 2, subparagraph (b), the draft Model Law did not contain a definition of the term 'subsequent security right') and on the understanding that the meaning of paragraph 1 would not change, reference should be made to 'any secured creditor' rather than to 'any subsequent secured creditor'". The previous subparagraph (b) would become subparagraph (c). The second revision was to add "20, 21," in paragraph 26, after the word "articles" and before "24 and 26 unchanged".

70. Within parentheses in article 23 of the Model Law, there would be cross references to the paragraphs of the draft report in A/CN.9/XLIX/CRP.1/Add.4 which reflected the discussion on article 23 that had taken place the previous day.

71. **Mr. Weise** (American Bar Association) said that paragraph 6 (h), which defined the term "inventory", should specify that reference should not be made to "semi-processed".

72. *A/CN.9/XLIX/CRP.1/Add.1, as orally revised and amended, was adopted.*

A/CN.9/XLIX/CRP.1/Add.2

73. **Mr. Bazinas** (Secretariat) said that in paragraph 30, after "57", "61" had been added.

74. **Ms. Gullifer** (United Kingdom) said that the Commission had not yet finalized article 24 and therefore paragraph 7 of A/CN.9/XLIX/CRP.1/Add.2 might need to be changed.

75. **Mr. Bazinas** (Secretariat) said that the point applied to all the matters were still pending. The summary of the deliberations on those matters would be contained in A/CN.9/XLIX/CRP.1/Add.5. Cross references would be included in paragraph 7 of A/CN.9/XLIX/CRP.1/Add.2 and in A/CN.9/XLIX/CRP.1/Add.5 to give readers a full picture of the discussion on article 24.

76. **Mr. Dennis** (United States) proposed that the following sentence should be added to paragraph 12 after the quoted language about the new text: "It was noted that the Guide to Enactment could explain the application of this rule in cases in which the secured creditor registers a notice and takes actions necessary to achieve third-party effectiveness by another means."

77. **Mr. Bazinas** (Secretariat) said that the report reflected decisions taken, so rather than "It was noted …", the new sentence should begin "It was agreed …", and the rest of the sentence should be in indirect speech.

78. **Ms. Gullifer** (United Kingdom) said that her delegation thought that the Commission had agreed to replace the word "return" with "deliver" throughout paragraph 25, which related to article 52 of the Model Law. The paragraph referred to assets sometimes not being returned to the grantor, but being given to a person designated by the grantor who had not possessed them originally; the verb "return" was therefore not appropriate.

79. **The Chair** said that his recollection of the debate was different. The word "return" would remain unchanged in paragraph 25.

80. *A/CN.9/XLIX/CRP.1/Add.2, as orally revised and subject to agreed redrafting, was adopted.*

A/CN.9/XLIX/CRP.1/Add.3

81. **Mr. Bazinas** (Secretariat) said that there was a mistake in paragraph 11. The reference to "subparagraph 4(b)" should be deleted and replaced by subparagraph 4(a)".

82. **Mr. Tirado Martí** (Spain), referring to point (b) of paragraph 3, which concerned article 75 of the Model Law, said that as far as he remembered three delegations had supported the deletion of paragraph 2 and three delegations had spoken in favour of retaining it. It was thus unclear why it was being deleted.

83. **The Chair** said that he recalled that the Commission had decided to delete paragraph 2 of article 75; the draft report accurately reflected that decision.

The meeting rose at 1 p.m.

Summary record of the 1033rd meeting, held at Headquarters, New York, on Friday, 1 July 2016, at 3 p.m.

[A/CN.9/SR.1033]

Chairperson: Mr. Labardini Flores (Vice-Chair) (Mexico)

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In the absence of Mr. Kenfack Douajni (Cameroon), Mr. Labardini Flores (Mexico), Vice-Chair, took the Chair.

The meeting was called to order at 3.05 p.m.

Agenda item 21: Adoption of the report of the Commission (A/CN.9/XLIX/CRP.1/Add.3 and A/CN.9/XLIX/CRP.1/Add.4)

1. **The Chair** drew attention to the section of the draft report relating to the Commission's deliberations on the draft Model Law on Secured Transactions in documents A/CN.9/XLIX/CRP.1/Add.3 and A/CN.9/XLIX/CRP.1/Add.4.

Document A/CN.9/XLIX/CRP.1/Add.3

2. **Mr. Cohen** (United States of America) said that, while the Commission's decision to delete the reference in paragraph 3 (c) to recognized markets was reported correctly, the rationale for the decision was not accurately reflected. His delegation would be in favour of removing the explanation, in keeping with the Commission's usual practice. However, if the Commission preferred to retain it, he suggested that the text should be amended by inserting after the word "unclear" the words "and are not applicable in the context of the procedure for obtaining possession of the encumbered assets".

3. **Mr. Weise** (American Bar Association) said that the language in paragraph 14 (b) was open-ended and he suggested replacing it with a new text, to read: "the issue of priority of a security right as against another security right would arise when the acts that gave rise to the priority conflict arose".

4. *A/CN.9/XLIX/CRP.1/Add.3, as orally amended, was adopted.*

Document A/CN.9/XLIX/CRP.1/Add.4

5. **Mr. Bazinas** (Secretariat) said that in the second line of paragraph 5 (1), the word "right" should be inserted after the word "security" and the word "asset'' after "tangible". In paragraph 8, the words "other than a buyer, lessee or licensee" should be deleted, as the issue had given rise to the priority rule reflected in paragraph 9.

6. **Mr. Dennis** (United States of America) said that the last line of paragraph 4 referred to the "exercise of the constitutional right to justice", but he had understood that the Secretariat's statement and the ensuing discussion had related to the right of access to justice. He was therefore unclear why the word "constitutional" had been inserted.

7. **The Chair** suggested amending the end of the sentence to read "the protection of the rights of third parties or access to justice".

8. **Mr. Cohen** (United States of America) said that his delegation had understood that the Commission had agreed to replace, in paragraph 15, the word "Before" in subparagraph 3 (a) under Option A by "No later than".

9. **The Chair**, supported by **Ms. Sabo** (Canada), said that, after some discussion, it had been agreed that the subparagraph would not be changed, to keep it in line with the language used in similar provisions elsewhere in the text. As it was clearly in the Commission's interest that its reports should be well drafted, the fine points of drafting might be left to native English speakers. With respect to article 24, paragraph 7, of the Registry-related Provisions, he asked the representative of the United Kingdom whether there was consensus on a final draft.

10. **Ms. Gullifer** (United Kingdom) said that all interested parties had been consulted and article 24, paragraph 7, had been redrafted on the basis of the discussions. The provisions of article 24 and the Registry-related provisions dealt with effectiveness against third parties, not as against the grantor, since the rights and obligations between the grantor and the secured creditor were governed by the security agreement. Where there was a discrepancy between the maximum amount in the security agreement and the notice, the security right for a competing claimant was limited to the amount stated in the notice. Article 24, paragraph 7, could therefore be simplified, to read: "Notwithstanding paragraph 4, an error in the maximum amount specified in an initial or amendment notice does not render the registration ineffective, but the priority of the security right is limited to the maximum amount specified in the notice or the maximum amount indicated in the security agreement, whichever is lower." There was a consensus that that wording should replace the text appearing in paragraph 11 of document A/CN.9/XLIX/CRP.1/Add.4.

11. Furthermore, it had been agreed that article 42, paragraph 3, should be deleted, because, as had been pointed out, it should not say that the priority was limited to the amount in the registered notice, but to the amount in the security agreement, and that should be subject to the rule governing what happened when there was a discrepancy and the amount in the notice was registered in error. Amending the paragraph thus amounted to saying that the priority was

based on the security agreement and it therefore became redundant.

12. **The Chair** took it that the Commission agreed to include new article 24, paragraph 7, in paragraph 11 and to delete article 42, paragraph 3.

13. *It was so decided.*

14. **Mr. Sono** (Japan) asked for clarification on whether the decision on the use of the word "return" in article 52 would be left to the English speaking representatives. Turning to the last line in paragraph 6 of document A/CN.9/XLIX/CRP.1/Add.4, he asked whether the word "separate" was illogical and should not be replaced by "original", especially in the case where there was one tangible asset that was transformed, such as gold being transformed into a gold ring.

15. **The Chair** said that the Commission had decided to maintain the word "return" in article 52 and that the word "separate" could be retained as it conveyed the desired notion.

16. *A/CN.9/XLIX/CRP.1/Add.4, as orally amended, was adopted.*

The meeting rose at 3.50 p.m.

Summary record of the 1034th meeting, held at Headquarters, New York, on Tuesday, 5 July 2016, at 10 a.m.

[A/CN.9/SR.1034]

Chairperson: Mr. Labardini Flores (Vice-Chair) (Mexico)
Later: Mr. Kenfack Douajni (Cameroon)
Later: Mr. Chan (Rapporteur) (Singapore)

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In the absence of Mr. Kenfack Douajni (Cameroon), Mr. Labardini Flores (Mexico), Vice-Chair, took the Chair.

The meeting was called to order at 10.25 a.m.

Agenda item 21: Adoption of the report of the Commission (*continued*) (A/CN.9/XLIX/CRP.1/Add.5)

1. **The Chair** invited the Commission to resume its consideration of the section of the draft report concerning the draft Model Law on Secured Transactions (A/CN.9/XLIX/CRP.1/Add.5).

2. **Mr. Bellenger** (France) said, with respect to paragraph 13, that it was his understanding that no formal decision to hold a colloquium had been taken and that such a decision would not be taken until the Commission discussed its future programme of work as a whole at the end of the current session.

3. **Mr. Dennis** (United States of America), supported by **Ms. Sabo** (Canada), said that, as the issue of the colloquium was appropriately dealt with in the last sentence of paragraph 10 of the report, and as the colloquium was to be held within the Commission's existing conference servicing resources, paragraph 13 needed no modification.

4. **Mr. Wang** Jianbo (China) said that his delegation agreed with the representative of France. A decision to hold a colloquium could not be taken without further discussion.

5. **Mr. Chan** (Singapore) recalled that, during the relevant discussion, some delegations had expressed the view that the colloquium should take place whether or not Working Group VI completed its work during the next two sessions, while others had said that a decision on the colloquium should be deferred until the Commission had achieved a holistic view of its work for the coming year. His delegation had taken the latter position.

6. **The Chair** said that paragraph 10 accurately reflected the agreement reached in the past week's discussions. It therefore seemed unnecessary to change either paragraph 10 or paragraph 13.

7. *The section of the draft report contained in document A/CN.9/CRP.1/Add.5 was approved.*

8. *Mr. Kenfack Douajni (Cameroon) took the Chair.*

Agenda item 2: Election of officers (*continued*)

9. **Mr. Sorieul** (Secretary of the Commission) invited the Commission to elect a member of the Asia-Pacific Group to serve as Rapporteur.

10. **Ms. Mangklatanakul** (Thailand) nominated Mr. Chan (Singapore) to serve as Rapporteur of the Commission.

11. **Ms. Sabo** (Canada), **Mr. Wang** Jianbo (China), **Mr. Dennis** (United States of America) and **Mr. Apter** (Israel) seconded the nomination.

12. *Mr. Chan (Singapore) was elected Rapporteur by acclamation.*

13. **Mr. Sorieul** (Secretary of the Commission) said that it had been suggested that the newly elected Rapporteur, in his capacity as Chair of Working Group III, which dealt with the issue of online dispute resolution, should preside over the discussions on agenda item 6. While it was unusual for a Rapporteur to chair the discussions of a General Assembly body, he took it that the Commission agreed to that course of action.

14. *It was so decided.*

15. *Mr. Chan (Singapore), Rapporteur, took the Chair.*

Agenda item 6: Consideration of issues in the area of online dispute resolution: finalization and adoption of Technical Notes on Online Dispute Resolution (*continued*) (A/CN.9/888; A/CN.9/XLIX/CRP.3)

16. **The Chair** said that the Technical Notes on Online Dispute Resolution (A/CN.9/888), prepared by Working Group III, were of a different nature from the rules on that subject which the Working Group had originally intended to formulate. They represented a balanced compromise among competing views. In discussing the Technical Notes on Online Dispute Resolution, the Commission would be well advised to bear in mind that it would be difficult to make changes to the underlying principles of the document without reopening issues on which consensus had already been achieved.

17. **Ms. Nicholas** (Secretariat) said that five drafting changes to the Technical Notes had been proposed in informal consultations. In the first sentence of paragraph 19, the words "The ODR proceeding may commence" should be deleted, as paragraph 34 defined the time when online dispute resolution proceedings were deemed to have commenced. Secondly, and also so as not to undermine paragraph 34, the first sentence of paragraph 33 should be amended to read, "In order that an ODR proceeding may commence, it is desirable…". Thirdly, for the sake of consistency throughout the document, the word "claimant's" before "notice" in paragraphs 36 and 51 should be deleted. Fourthly, the words "as described in paragraph 46 below" should be added to the end of paragraph 42 for greater clarity. Lastly, in paragraph 53, the words "due process" should be deleted and, after "standards", the words "of confidentiality and due process" should be added, so as to better reflect the consensus reached by Working Group III at its thirty-third session.

18. **Mr. Apter** (Israel) said that paragraph 6 did not explain the relationship between the Technical Notes and domestic law, particularly laws relating to consumers and arbitration. He proposed that the sentence "The Technical Notes are not intended to supplement or override domestic law" should be added at the end of paragraph 6.

19. **Mr. Decker** (Observer for the European Union) said that it was entirely clear that the Technical Notes were intended to be descriptive and not prescriptive, and that they did not supplement or override domestic law. The proposed addition was therefore unnecessary; moreover, it might imply that other paragraphs without such a caveat did take precedence over domestic law. To address the concern expressed by the representative of Israel, however, he proposed that the report of the current session should clearly state that the Technical Notes could not supplement or override domestic law.

20. **Mr. Maradiaga** (Honduras) said he agreed that the proposed addition was not necessary; technical notes, by definition, did not override domestic laws. Nevertheless, he did not object to the proposal to include, in the report of the current session, a note specifying that the Technical Notes could not supplement or override domestic law.

21. **Mr. Dennis** (United States of America) said that his delegation fully supported the proposed drafting changes read out by the representative of the Secretariat. He agreed that the proposal made by the representative of Israel was unnecessary: paragraph 6 already stated that the Technical Notes did not "impose any legal requirement binding on the parties". A note in the report of the session, as suggested by the observer for the European Union, would be acceptable.

22. **Mr. Wang** Jianbo (China) said that he did not see the need for either the proposed addition to paragraph 6 or a special note in the report of the current session.

23. **Mr. Nawana** (Sri Lanka) said he concurred that the proposed addition was not necessary, nor was a specific note in the report of the session.

24. **The Chair** said that, because the issue was being discussed, there would naturally be a record of it in the report of the current session.

25. **Mr. Wijnen** (Observer for the Netherlands) said he agreed that the proposed addition was unnecessary, but supported the inclusion of a note in the report of the session.

26. **Mr. Fang** (China Society of Private International Law) said he agreed that the suggested addition was unnecessary, given the non-legislative, non-binding nature of the Technical Notes.

27. **Mr. Schoefisch** (Germany) said that he supported the drafting changes presented by the Secretariat, but agreed that the additional sentence proposed by the representative of Israel should not be included, as it could lead to confusion. The Israeli proposal would be reflected in the report of the session, as the Chair had indicated. To address the concern of the representative of Israel, a note could be included in the report stating that technical notes could never override domestic law.

28. **Ms. Menéndez González** (Spain) said that her delegation did not support the proposal made by the delegation of Israel, as the proposed addition to paragraph 6 was unnecessary and could in fact engender confusion. Although her delegation did not believe that it was absolutely necessary to refer to the issue in the report, it would support the proposal of the European Union in the interest of consensus.

29. **Mr. Decker** (Observer for the European Union) said that there was some confusion regarding his delegation's proposal. It had not meant to include a specific note in the report, but rather to reflect the Commission's understanding that the Technical Notes were purely descriptive in nature and could not override applicable domestic laws.

30. **Mr. Chander** (India) said that his delegation did not support the Israeli proposal, as the additional wording would dilute the meaning of paragraph 6. However, the views of the delegation of Israel should be properly reflected in the report.

31. **Mr. Apter** (Israel) said that his delegation was willing to take the approach suggested by the observer for the European Union. At a later date, the Commission might wish to discuss the possibility of referring to the issue in the preamble to the resolution on the adoption of the Technical Notes.

32. His delegation wished to propose another change to the Technical Notes. As the issue of language was very important for Israel, his delegation suggested that the sentence "The ODR administrator may utilize technical means to accommodate this selection" should be added to the end of paragraph 51.

33. **The Chair** said that the current wording was the result of a compromise achieved in the Working Group meetings.

34. **Mr. Fornell** (Ecuador) requested clarification of the proposal made by the delegation of Israel.

The meeting was suspended at 11.50 a.m. and resumed at 12.10 p.m.

35. **Mr. Apter** (Israel) said that his delegation's proposed wording was intended to make it clear that the online dispute resolution administrator should assist parties with language

issues. However, as that proposal had not gained support, his delegation would withdraw it.

36. In paragraph 53, his delegation suggested that the words "standards of confidentiality and due process that apply to that process" should be replaced with "confidentiality and due process standards that apply to dispute resolution proceedings".

37. **Mr. Dennis** (United States of America), **Ms. Dostie** (Canada), **Mr. Decker** (Observer for the European Union) and **Ms. Matias** (Jerusalem Arbitration Center) said that they supported the proposal as a useful clarification of the text.

38. *Paragraph 53, as amended, was approved.*

39. **Ms. Nicholas** (Secretariat) said that in the course of the informal consultations the Chinese delegation had drawn attention to an inconsistency in the Technical Notes concerning the commencement of online dispute resolution proceedings. While paragraphs 19 and 33 indicated that online dispute resolution proceedings commenced when a claimant submitted a notice through the online dispute resolution platform to the online dispute resolution administrator, paragraph 34 stated that the proceedings could be deemed to have commenced when the online dispute resolution administrator notified the parties that the notice was available on the platform. During the informal consultations, it had been suggested that paragraphs 19 and 33 should be amended, as Working Group III preferred the language of paragraph 34, which referred to a clear and unambiguous point in time.

40. The Working Group's understanding was that the administrator would notify the parties of the availability of the notice on the platform within a reasonable time. However, while the notion of reasonable time was mentioned in paragraph 35, in connection with action by the respondent, it did not appear in paragraph 34. The Commission might therefore wish to amend paragraph 34 to make that understanding explicit.

41. **Mr. Wang** Jianbo (China) said that the inconsistency between paragraphs 19 and 33, on the one hand, and paragraph 34, on the other, must be resolved. Furthermore, in its current formulation, paragraph 34 conferred an enormous amount of responsibility on the administrator and could create delays, as the proceedings could not commence until the administrator had notified the parties that the claimant's notice was available on the platform. If the administrator failed to publish the notice, the proceedings might never begin. That ran counter to the intention of the Technical Notes, which was to ensure that disputes were resolved as quickly as possible. Leaving the entire procedure in the hands of the administrator could compromise the efficiency of the proceedings. He therefore proposed that paragraph 34 should be amended to read, "ODR proceedings may be deemed to have commenced when the claimant communicates a notice to the ODR administrator. It is desirable that the administrator notify the parties that the notice is available at the ODR platform within a reasonable time".

42. **Mr. Schoefisch** (Germany) said that the Chinese proposal was problematic, as under such a system one of the parties might not be aware that proceedings had begun. Proceedings should not be deemed to have commenced until both parties had been notified.

43. **Mr. Decker** (Observer for the European Union) said that there was no need to add a reference to timely processing by the administrator to paragraph 34; it would be appropriate for that expectation to remain implicit. The concern that delayed action by the administrator could hinder the proceedings might merit further discussion, but the solution could not be to advance the moment at which proceedings were deemed to have commenced to the time of the communication of the claimant's notice to the administrator. Such a change to paragraph 34 would undermine the consensus of the Working Group.

44. **Mr. Zhang** (Asia Pacific Regional Arbitration Group) said that he supported the views of the Chinese delegation with regard to the time when online dispute resolution proceedings should be deemed to have commenced. However, the Commission should consider replacing the word "may" with the word "shall" or "should" in paragraph 34, to avoid ambiguity. Furthermore, that paragraph should state that the notice submitted to the administrator must fulfil the requirements set out in paragraph 33.

45. **Ms. Matias** (Jerusalem Arbitration Center) said that online dispute resolution proceedings should be deemed to have commenced when the administrator notified the parties that the notice was available. As online dispute resolution was a new process, it was not yet clear how platforms would be regulated and monitored or how efficient they would be. It would therefore be risky to deem proceedings to have commenced when the claimant submitted a notice. To address the concerns expressed by the representative of China, language could be added to paragraph 34 to indicate that the administrator should notify the parties promptly when a notice was received.

46. **Mr. Dennis** (United States of America) said that paragraph 34 was consistent with article 3, paragraph 2, of the Commission's Arbitration Rules, which stated that arbitral proceedings should be deemed to commence on the date on which the notice of arbitration was received by the respondent. While the Technical Notes were not rules, they should not imply anything that was inconsistent with the Arbitration Rules. It should also be noted that the need for the administrator to give prompt notice to the parties was dealt with in paragraph 31 (b) of the Technical Notes.

47. **Mr. Wang** Jianbo (China) said that contradictions within the text must be resolved, even if the contradictory paragraphs had been agreed upon by the Working Group. Thus, the text must be amended to reconcile paragraphs 19 and 34. His delegation had therefore proposed a minor change to paragraph 34, which would make it possible to preserve paragraphs 19 and 33 as they stood. The amendment should be made in paragraph 34, since that paragraph came later in the text than paragraphs 19 and 33. His delegation was not attempting to undermine the consensus of the Working Group but simply to make the text coherent.

48. **Mr. Apter** (Israel) said that his delegation strongly preferred to retain the current wording of paragraph 34, which accurately reflected the consensus reached by the Working Group.

The meeting rose at 1 p.m.

Summary record of the 1035th meeting, held at Headquarters, New York, on Tuesday, 5 July 2016, at 3 p.m.

[A/CN.9/SR.1035]

Chairperson: Mr. Chan (Rapporteur) (Singapore)
Later: Mr. Kenfack Douajni (Cameroon)

Contents

In the absence of Mr. Kenfack Douajni (Cameroon), Mr. Chan (Singapore), Rapporteur, took the Chair.

The meeting was called to order at 3.15 p.m.

Agenda item 6: Consideration of issues in the area of online dispute resolution: finalization and adoption of Technical Notes on Online Dispute Resolution (*continued*) (A/CN.9/888; A/CN.9/XLIX/CRP.3)

1. **The Chair** invited the Commission to resume its consideration of the Technical Notes on Online Dispute Resolution (A/CN.9/888).

2. **Ms. Nicholas** (Secretariat) said that informal consultations had taken place on the amendments that had been proposed, at the Commission's preceding meeting (A/CN.9/SR.1034), to paragraphs 19, 33 and 34 of the Technical Notes; those proposals were aimed at removing an element of ambiguity regarding the commencement of online dispute resolution proceedings. During the informal consultations, delegations had agreed that the overall dispute resolution process began when a claimant notified the online dispute resolution administrator of a claim, but formal dispute resolution proceedings could not begin until the notice was actually received by the system. Thus, the clearest point at which the first stage of dispute resolution proceedings could begin was when the administrator notified all parties of the receipt of the notice. All delegations had agreed that that was what took place in practice and that the wording of paragraphs 19, 33 and 34 of the Technical Notes could be improved to make that clearer, but an agreement had not been reached on precisely how the text should be amended.

The meeting was suspended at 3.20 p.m. and resumed at 4.10 p.m.

3. **Ms. Nicholas** (Secretariat) said that no consensus had been reached on the proposed amendments to paragraphs 19, 33 and 34, and suggested that those paragraphs should therefore remain unchanged.

4. **Mr. Schoefisch** (Germany) said that it would have been possible to achieve a consensus if all parties had been willing to do so.

5. **Mr. Dennis** (United States of America) requested that the report of the Commission should indicate that all delegations but one had agreed that online dispute resolution proceedings could be deemed to have commenced when, following a claimant's communication of a notice to the online dispute resolution administrator, the online dispute resolution administrator notified the parties that the notice was available at the online dispute resolution platform, as stated in paragraph 34, and that the majority of delegations that had expressed a view had considered that the point in time when online dispute resolution proceedings began was not regulated by paragraph 19.

6. **The Chair** said that it would be difficult to include the wording proposed by the representative of the United States in the report, since not all delegations had spoken in the same terms. The report would, however, reflect the views expressed by the United States and other delegations.

7. **Mr. Apter** (Israel) said that he shared the view expressed by the United States delegation. Many States represented in Working Group III had agreed that the point in time when proceedings commenced was regulated by paragraphs 33 and 34, not paragraph 19.

8. **Mr. Wang** Yi (China) said that if a State were to be singled out in the report, that State should be named. In any case, it was not true that the amendments had been blocked by a single delegation. The reason that no amendments were being made to the three paragraphs under joint consideration was that the majority of delegations were opposed to the amendment which his delegation had proposed in relation to paragraph 34.

9. **Ms. Matias** (Jerusalem Arbitration Center) said that her delegation concurred with the comments of the representatives of the United States and Israel regarding paragraph 34. It was important for that paragraph to be consistent with article 10 of the United Nations Convention on the Use of Electronic Communications in International Contracts.

10. **Mr. Schoefisch** (Germany) said that he endorsed the comments of the representative of the United States. As no delegation had submitted written comments expressing concerns prior to the discussion of the text, it was accurate to say that most or all delegations approved of it. Since there was broad support for the proposed amendments to paragraphs 19 and 33 but not for the proposed amendment to paragraph 34, paragraphs 19 and 33 should be amended and paragraph 34 should remain as it stood.

11. **Mr. Decker** (Observer for the European Union), supported by **Mr. Wijnen** (Observer for the Netherlands),

said that his delegation was in favour of amending paragraphs 19 and 33 as proposed at the preceding meeting, while retaining the current wording of paragraph 34. He agreed that the report should reflect the common understanding that the point in time at which online dispute resolution proceedings commenced was addressed in paragraphs 33 and 34.

12. **Ms. Nicholas** (Secretariat) said that the proposals made at the 1034th meeting concerning paragraphs 19 and 33 had been provisionally approved, pending a final decision on the proposed amendments to paragraph 34. Since there was no consensus on the proposed amendment to paragraph 34, it was the Secretariat's understanding that there was no longer any agreement to amend paragraphs 19 and 33.

13. **Mr. Wang** Yi (China) said that his delegation's understanding was consistent with that of the Secretariat and that, therefore, paragraphs 19 and 33 should not be amended.

14. **Mr. Schoefisch** (Germany) said that, in accordance with the past practice of the Commission, a broad majority constituted a consensus. Therefore, if the Chinese delegation was the only one to object to the proposed amendments to paragraphs 19 and 33, a consensus had been reached and the text should be amended accordingly.

15. **The Chair** said that he shared the German delegation's understanding of what constituted a consensus.

16. **Mr. Maradiaga** (Honduras) said that the most expedient path would be to accept the amendments read out by the Secretariat at the Commission's 1034th meeting. It should be borne in mind that the Technical Notes were simply technical standards setting out the principles of dispute resolution; as such, they did not affect domestic or international law.

17. **Mr. Bellenger** (France) said that his delegation was in favour of the amendments to paragraphs 19 and 33. Since the Technical Notes did not constitute a legally binding text, the exact wording was less important than ensuring that the intention was clear.

18. **Mr. Decker** (Observer for the European Union), **Mr. Popovici** (Romania), **Mr. Dennis** (United States of America), **Mr. Rangreji** (India), **Mr. Wijnen** (Observer for the Netherlands), **Mr. Milassin** (Hungary), **Mr. Apter** (Israel), **Ms. Dostie** (Canada), **Ms. Menéndez González** (Spain), **Mr. Özsunay** (Turkey) and **Mr. Yang** Jai-Ho (Republic of Korea) expressed support for the proposed amendments to paragraphs 19 and 33.

19. **The Chair** said he took it that, in accordance with the consensus, the Commission wished to approve paragraphs 19 and 33, as amended, and paragraph 34 without change.

20. *It was so decided.*

21. **Mr. Wang** Yi (China) said that he wished to know the basis on which certain paragraphs of the text approved by the Working Group had been reopened for discussion and amendment. He also requested clarification on whether a consensus could be considered to exist in cases where there was strong opposition from a single delegation or region.

22. **The Chair** said that in the practice of the Commission and many other United Nations forums, unanimity was not a condition for a consensus. In the case of the Technical Notes, the Commission had considered proposed amendments to resolve drafting issues identified in the text approved by the Working Group. The majority of delegations supported the proposed drafting changes to paragraphs 19 and 33, and that consensus must be respected.

23. **Ms. Nicholas** (Secretariat) recalled that a proposal had been made, in informal consultations, to add the words "as described in paragraph 46 below" to the end of paragraph 42.

24. *Paragraph 42, as amended, was approved.*

25. **Ms. Nicholas** (Secretariat) recalled that another proposal had been made to change the phrase "the claimant's notice" in paragraphs 36 and 51 to "the notice", for the sake of consistency.

26. *Paragraphs 36 and 51, as amended, were approved.*

27. *The Technical Notes on Online Dispute Resolution, as amended, were adopted.*

Draft decision on the adoption of the Technical Notes on Online Dispute Resolution (A/CN.9/XLIX/CRP.3)

First, second and third preambular paragraphs

28. **Mr. Apter** (Israel), supported by **Ms. Dostie** (Canada), proposed that, in the second preambular paragraph, the words "online cross-border transactions" should be replaced with "online cross-border high-volume, low-value transactions" to reflect the language used in various reports of the Working Group. He also proposed that, in the third preambular paragraph, the words "simple, fast, flexible and secure manner" should be replaced with the words "simple, fast, flexible, efficient, low-cost and secure manner".

29. **Ms. Matias** (Jerusalem Arbitration Center) suggested that the Commission might wish to leave the second preambular paragraph unchanged, since it consisted of a general description of online dispute resolution, the use of which was not limited to high-volume, low-value transactions.

30. **Mr. Decker** (Observer for the European Union), supported by **Mr. Wijnen** (Observer for the Netherlands), said that the text should not refer to high-volume transactions, as the Working Group had dropped the term. With that exception, his delegation supported the proposals made by the representative of Israel.

31. **Mr. Wang** Yi (China) said that, as the preamble was sufficiently clear, his delegation did not support the proposed amendments.

32. **Mr. Apter** (Israel) said that he wished to modify his proposal in line with the suggestion made by the observer for the European Union. The reference to low-value transactions should be included in order to make it clear that the Technical Notes were intended to regulate such transactions. The proposed amendment would not preclude the use of online dispute resolution for other types of transactions.

33. **Mr. Fang** (China Society of Private International Law) said that it would be preferable not to add to the preamble, in order to ensure that the text remained concise. Readers would understand the purpose of the Technical Notes without a specific reference to low-value transactions in the adopting decision.

34. **Mr. Schoefisch** (Germany) said that the draft decision should reflect the fact that the Working Group's discussions had concerned low-value transactions. His delegation had no objection to the addition of the words "efficient, low-cost" to the third preambular paragraph.

35. **Mr. Rangreji** (India) said that his delegation did not support the proposals. The second preambular paragraph should remain general and, in any case, there was a reference to low-value contracts in the penultimate preambular paragraph. The addition of the words "efficient" and "low-cost" in the third preambular paragraph would not add any value to the text.

36. **Mr. Dennis** (United States of America) said that he agreed with the representatives of China and India. He recalled that paragraph 22 of the Technical Notes, on the scope of the online dispute resolution process, mentioned low-value transactions but did not limit the use of online dispute resolution to such transactions. Thus, an amendment to the draft decision indicating that the Technical Notes applied only to low-value transactions would be inconsistent with the text of the Technical Notes.

37. **The Chair** said he took it that the Commission wished to leave the paragraphs as they stood.

38. *It was so decided.*

39. *The first, second and third preambular paragraphs were approved.*

Fourth, fifth and sixth preambular paragraphs

40. *The fourth, fifth and sixth preambular paragraphs were approved.*

Seventh and eighth preambular paragraphs

41. **Mr. Wang** Yi (China) said that the terms "accountability" in the seventh preambular paragraph and "development of systems" in the eighth preambular paragraph had not been translated correctly in the Chinese version of the text.

42. **The Chair** said that the Secretariat would work with the language services to resolve the problem.

43. *The seventh and eighth preambular paragraphs were approved.*

Ninth preambular paragraph

44. *The ninth preambular paragraph was approved.*

Paragraphs 1, 2 and 3

45. *Paragraphs 1, 2 and 3 were approved.*

Paragraph 4

46. **Mr. Apter** (Israel) proposed inserting the words "and intergovernmental organizations" after the word "States".

47. **Mr. Sorieul** (Secretary of the Commission) said that he was not sure whether the Commission could make direct requests to intergovernmental organizations. The report could state that it had been suggested that intergovernmental organizations, in particular those belonging to the United Nations system, could be involved in the promotion of the Technical Notes, and the Secretariat could examine precedents before the matter came under discussion by the Sixth Committee at the seventy-first session of the General Assembly.

48. **Mr. Apter** (Israel) said that he agreed to the suggestion made by the Secretary of the Commission.

49. **The Chair** said he took it that the Commission wished to adopt the draft decision on the adoption of the Technical Notes on Online Dispute Resolution (A/CN.9/XLIX/CRP.3).

50. *It was so decided.*

51. **Mr. Apter** (Israel) proposed that the Technical Notes should be endorsed by the General Assembly in the form of a dedicated resolution, rather than as part of the omnibus resolution on the report of the Commission, in order to draw attention to their importance and facilitate their use as a reference document. The Sixth Committee could perhaps take the final decision on whether or not to adopt a separate draft resolution on the Technical Notes.

52. He also proposed holding a side event during the seventy-first session of the General Assembly to highlight the achievement represented by the conclusion of the text, especially since the Commission would not undertake any work in the area of online dispute resolution for some decades.

53. **Mr. Sorieul** (Secretary of the Commission) said that there were no procedural or technical obstacles to the submission of a separate draft resolution on the Technical Notes. However, the Commission might wish to take a decision in that regard, as the Sixth Committee would be unlikely to approve anything that was not clearly set out in the report.

54. **Mr. Bellenger** (France) said that the adoption of a separate resolution on a non-binding text could set a problematic precedent. He asked whether the adoption of a dedicated resolution on the Technical Notes would necessitate the adoption of a similar resolution on the revised Notes on Organizing Arbitral Proceedings.

55. **Mr. Schoefisch** (Germany) said that a separate resolution should not be submitted unless there were precedents, in order to avoid future confusion as to what matters should be the subject of dedicated resolutions.

56. **Mr. Sorieul** (Secretary of the Commission) said that it was not necessary to give great weight to issues of precedent, as past practice had varied and had often been determined by practical concerns rather than matters of principle. If the Commission submitted a dedicated draft resolution on the Technical Notes, it might wish to do the same for the revised Notes on Organizing Arbitral Proceedings, since the latter was a more ambitious text.

57. **Mr. Dennis** (United States of America) said that he agreed with the representative of Israel regarding the importance of highlighting the Commission's work on online dispute resolution, but also felt that practice should be consistent. He suggested that the matter should be left with the Secretariat.

58. **Ms. Sabo** (Canada) said that there was no established practice with regard to separate resolutions. It might be appropriate to use dedicated resolutions to draw particular

attention to certain texts. She suggested that the Secretariat should determine whether it would be feasible to submit a dedicated draft resolution on any of the texts adopted at the Commission's current session.

59. **Ms. Matias** (Jerusalem Arbitration Center) said that she hoped that the Commission would carry out further work on online dispute resolution. A dedicated resolution on the Technical Notes would send a clear signal that they represented a new and significant development that could benefit many States, in particular developing countries and those affected by conflict.

60. **The Chair** said that there was no clear consensus on the appropriateness of a dedicated resolution on the Technical Notes. He suggested that the Secretariat could continue to consult with States when preparing submissions for the Sixth Committee, which he understood to be the suggestion made by the representative of the United States. He recalled that no action or decision by the Commission would prevent a Member State from submitting a draft resolution on the Technical Notes to the Sixth Committee at its own initiative.

61. **Mr. Moran Morales** (Grupo Latinoamericano de Abogados para el Derecho del Comercio Internacional) said that a dedicated resolution would draw attention to the usefulness of online dispute resolution as an efficient, low-cost tool, particularly for developing countries.

62. **The Chair** suggested that delegations that were in favour of the submission of a dedicated draft resolution on the adoption of the Technical Notes should engage in consultations with the Secretariat. If there proved to be insufficient support, the Commission's adoption of the Technical Notes would be mentioned in the omnibus resolution.

63. *It was so decided.*

64. **The Chair** said that the Commission had concluded its work on the Technical Notes. Online dispute resolution was becoming increasingly important, as the exponential growth in e-commerce and cross-border online transactions meant that there was an urgent need for means of expeditiously and effectively resolving disputes arising from those transactions. Owing to the divergence of views, the Commission's work on the matter had taken more time and effort than initially expected and had resulted in the drafting of the Technical Notes rather than the rules on online dispute resolution that had originally been envisaged. Much had been achieved, considering the differences of opinion, although it was unfortunate that consensus had not been reached on certain critical issues.

65. **Mr. Wang** Yi (China) said that despite the diverging views of member States, all delegations had engaged positively and sincerely in the work on online dispute resolution.

66. *Mr. Kenfack Douajni (Cameroon) took the Chair.*

Agenda item 17: Congress 2017 (A/CN.9/878)

67. **Ms. Nicholas** (Secretariat) recalled that, at its forty-eighth session, the Commission had instructed the Secretariat to begin preparations for a Congress to mark the fiftieth anniversary of the Commission. The Congress would be held in Vienna during the first week of the Commission's fiftieth session, from 4 to 6 July 2017. The Secretariat had created a web page dedicated to the Congress on the Commission's website, and a call for papers had been issued.

68. The Congress would be open to all persons and organizations with an interest in the Commission's areas of activity. The event would be targeted primarily at legal professionals, but relevant policymakers could also participate. One objective of the Congress would be to suggest possible areas of work for the Commission, which might include the development of the cross-border digital economy, global supply chains and access to inputs such as credit, transport and infrastructure, resolution of climate and resource disputes, and the exploitation of global public goods. Participants would also be encouraged to describe commercial law reform activities taking place at the national and regional levels in order to provide the Commission with a holistic view of the types of work it might wish to undertake in the future.

69. **Mr. Dennis** (United States of America) said that States should be given the opportunity to comment on the proposed agenda for the Congress to ensure that the topics covered were in line with the mandate of the Commission and did not impinge on the work of other international organizations.

70. **Mr. Sorieul** (Secretary of the Commission) said that informal consultations on the draft agenda would be held with member States. The Congress could also provide an opportunity to revise or improve the interpretation and understanding of existing texts.

71. **Mr. Schoefisch** (Germany) said that the topics for future work that would be discussed at the Congress should be determined by the Commission, not the Secretariat.

72. **Ms. Sabo** (Canada) said that the Congress should focus not only on future work but also on lessons that could be drawn from past endeavours. She hoped that the agenda would be as broad as possible, and agreed that it should be distributed to member States for comment. She also encouraged the Secretariat to identify and extend invitations to speakers who might have a valuable contribution to make rather than limiting itself to the responses to the call for papers.

73. **Mr. Apter** (Israel) said he agreed that the draft agenda for the Congress should be circulated to member States. He suggested that the items on the agenda should relate to concrete past or future Commission projects, and requested the Secretariat to avoid highly sensitive topics.

The meeting rose at 6.10 p.m.

Summary record of the 1036th meeting, held at Headquarters, New York, on Thursday, 7 July 2016, at 10 a.m.

[A/CN.9/SR.1036]

Chairperson: Mr. Kenfack Douajni (Cameroon)
Later: Mr. Schneider (Vice-Chair) (Switzerland)

Contents

The meeting was called to order at 10.15 a.m.

Election of officers (*continued*)

1. **The Chair** said that it was the turn of the Group of Western European and Other States to nominate a Vice-Chair.

2. **Mr. Schnabel** (United States of America), speaking on behalf of the Group of Western European and Other States, said that the Group nominated Mr. Michael Schneider (Switzerland) for the office of Vice-Chair.

3. *Mr. Schneider (Switzerland) was elected Vice-Chair of the Commission by acclamation.*

4. *Mr. Schneider (Switzerland) took the Chair.*

Tribute to the memory of Sergey N. Lebedev, representative of the Russian Federation in the United Nations Commission on International Trade Law

5. *At the invitation of the Chair, the members of the Commission observed a minute of silence.*

Consideration of issues in the area of arbitration and conciliation

(a) Finalization and adoption of the revised UNCITRAL Notes on Organizing Arbitral Proceedings (A/CN.9/879)

6. **The Chair** said that, at its forty-eighth session, the Commission had approved, in principle, the draft revised UNCITRAL Notes on Organizing Arbitral Proceedings, which had subsequently been revised on the basis of comments from delegations and organizations, and input from experts of the Secretariat. The version of the Notes before the Commission (A/CN.9/879) was the product of the deliberations conducted by the Working Group at its sixty-fourth session, during which it had focused on aligning the Notes with modern practices in the area of arbitration. Note 5 and Notes 14 to 18 had been identified as specific issues for consideration by the Commission at its current session.

Note 5. Costs of arbitration (paragraphs 39 to 49)

7. **The Chair** said that many Working Group members had expressed support for the inclusion of in-house costs in the list of recoverable costs of arbitration, as they felt that parties should freely decide whether to allocate responsibility for work performed in connection with arbitration to external or in-house counsel, and because in-house costs were often a substantial component of the arbitration costs incurred by parties. While current practices reflected an increasing understanding of the significance of in-house costs and support for their inclusion, the differing views on the subject indicated that such acceptance could not be treated as automatic. The Working Group had therefore added a new paragraph (paragraph 40) to Note 5, which reflected a balanced and cautious treatment of the issue of in-house costs, highlighting that support for including them among recoverable costs, though widespread, was not universal.

8. **Mr. Popovici** (Romania) proposed adding at the end of the last sentence of paragraph 40 a new sentence, to read: "When assessing the reasonableness of the amount of such costs, the arbitral tribunal should take into account all the relevant circumstances, inter alia, if necessary, the costs that would have been incurred by the party for the same services or activities had they been provided by an independent provider."

9. **Ms. Dostie** (Canada) said that the issue of in-house costs had been raised for the first time at the Working Group's sixty-fourth session owing to the lack of uniform practice in the matter. In that regard, Note 5 should clearly indicate that the legal representation in respect of which recoverable costs were incurred was not limited to external counsel. For example, government lawyers were typically hired to represent Canada in investment arbitration proceedings, while external legal counsel was rarely used. The recoverability of the costs of legal representation was also in line with the UNCITRAL Arbitration Rules. A clear distinction should be made between those and other in-house costs, including those incurred for work performed by managing directors and other staff members, which should not be recoverable.

10. **The Chair** emphasized that, in certain cases, companies used their own technical and accounting departments rather than outside experts to perform substantial work in connection with arbitration proceedings. He questioned whether such costs should indeed be unrecoverable and whether outsourcing such activities should be favoured over having those activities performed in-house.

11. **Ms. Dostie** (Canada) said that, while the costs of legal representation, including general counsel in the case of commercial arbitration, should be recoverable, making other in-house costs recoverable was a slippery slope that could lead to overbilling for time spent by managing directors and staff members at various levels.

12. **The Chair** said that, while the Working Group had concluded that recoverable costs should not be limited to legal representation, the Commission could discuss whether the Notes should prescribe such a limitation. Paragraph 40 had been drafted to reflect the differing views on that subject; it also addressed some of the considerations underscored by the representative of Romania.

13. **Mr. Apter** (Israel) agreed with the inclusion of the reference to in-house counsel in paragraph 40. Although the Notes did not include references to States, paragraph 40 should be amended to reflect the fact that in-house costs could also be incurred by Governments. He therefore proposed that the words "including States and State agencies" should be inserted in first sentence of paragraph 40, after the word "parties" and before the words "may incur."

14. **Ms. Palacios** (Spain) said that paragraph 40 should be revised to cover situations in which parties, including States, defended claims regarding the use of in-house legal services in the context of investment arbitration proceedings, as was the case in Spain and other countries. It was logical that such costs, which were incurred by the State, should be included among the costs of arbitration, particularly if the Notes were to reflect prevailing international practices. To that end, she proposed the inclusion of a new sentence in paragraph 40, to read: "In particular, some arbitral tribunals have granted reimbursement of the costs of in-house legal counsel when one of the parties organized its defence using primarily its own in-house lawyers."

15. **The Chair** wondered whether the final sentence of paragraph 40, which referred to the practice of some arbitral courts with respect to reimbursement of arbitration costs, would be sufficient to meet Spain's concerns.

16. **Mr. Komarov** (Russian Federation) said that the Notes embodied the experience accumulated over many years by a large number of countries and would play an important role in reforming arbitration legislation in countries by reflecting the complex international standards emerging in the field. Furthermore, while the issue of covering in-house costs was multifaceted and many different aspects related to it could be addressed in the Notes, the text as it stood provided a balanced and accessible formulation, which his delegation fully supported.

17. **Mr. Zhang** Zhenan (Asia Pacific Regional Arbitration Group) said that legal fees of a company or government attorney involved in arbitration proceedings were treated differently in different legal jurisdictions. In China, for instance, the losing party to a dispute was typically not required to pay the fees of the other party's attorney or other in-house counsel; the relevant regulations were specified in China's arbitration law. Given that legal advisers' fees were already included in a company's management costs, he wondered how those fees would be defined for the purposes of the new provision. There should be clear guidelines regarding the conditions under which the costs of legal or other relevant personnel would be borne by the losing party.

18. **The Chair** said that a prescriptive approach to the reimbursement of in-house costs would not be in keeping with the spirit of the Notes. The last sentence of paragraph 40 indicated the practice of some tribunals in that respect; while its exact wording was open to discussion, introducing a prescriptive element would be at odds with the indicative purpose of the Notes.

19. **Ms. Kaufmann-Kohler** (Switzerland) said that paragraph 40 should be amended to clarify that the costs generally accepted as recoverable were not limited to external legal counsel but could also include in-house representation in cases where Government lawyers acted as sole counsel in arbitration proceedings. Such a clarification would reflect the current practice of States that typically hired in-house counsel in investment arbitration proceedings, the costs of which did not fall within the category of in-house costs subject to the different practices indicated in paragraph 40.

20. **The Chair** said that, while Governments might typically use in-house representation, commercial parties were often represented by their general counsel or, in the case of individuals, were self-represented. The Notes should be drafted to leave open such options and to avoid favouring the use of external counsel. It was his understanding that the representatives of Canada and Switzerland wished to ensure that the reference to legal representation in respect of which recoverable costs were incurred was broad enough to reflect the various forms of representation used by different parties.

21. **Mr. Chen** Jian (China) said that a balanced approach was needed, taking into account circumstances that differed from country to country. The document as a whole should be descriptive in nature, not prescriptive, as it was intended to provide information on methods used in various jurisdictions and to draw attention to factors that should be taken into consideration. Under certain conditions, descriptions of those methods would be acceptable and could serve as reference material to be consulted by parties and arbitrators before they took decisions. Recent developments in the Chinese court system were such that a claimant could now receive varying amounts of compensation from the losing party to a dispute. The Commission's current discussion would result in a document that was better aligned with the interests of all parties to a dispute subject to commercial arbitration.

22. **The Chair** said that differentiating between admissible and inadmissible in-house costs was a challenging task. While the last sentence of paragraph 40 outlined some of the criteria used to determine admissibility, for instance, that the relevant costs had to be substantiated in sufficient detail to be distinguished from ordinary staffing

expenses and be reasonable in amount, such criteria often depended on the specific circumstances of each case. Introducing further specifications might therefore be counterproductive, inasmuch as such requirements could only be meaningfully determined in practice.

23. **Mr. Schöfisch** (Germany) said that his delegation supported paragraph 40 and the text, as a whole, as they stood.

24. **Mr. Medina Mejías** (Bolivarian Republic of Venezuela) said that his delegation would appreciate clarification as to whether the Notes covered investor-State arbitration, which, differed greatly from those governing commercial arbitration and should be addressed differently since they affected individuals as opposed to commercial, for-profit, entities. Investor-State arbitration proceedings were frequently compromised when dealt with as commercial issues. He reiterated his delegation's position on arbitration costs and endorsed the proposal that the option for States to use in-house legal counsel in investment arbitration proceedings should not be excluded.

25. **The Chair** said that it was understood that the Notes had the same scope as the UNCITRAL Arbitration Rules and addressed both investor-State and commercial arbitration. In drafting the Arbitration Rules, there had been extensive discussion of whether a distinction should be made between those two categories and the Commission had clearly decided, on several occasions, that the rules should be of a generic nature, while specific points concerning investor-State arbitration, in particular transparency, should be dealt with separately. Those rules having been adopted, any suggestion to limit the scope of the Notes to commercial arbitration would be a matter of principle that should have been raised at the outset, as it would require a review of the Notes in their entirety. As some delegates had pointed out, the Commission should take care not to limit the scope of the Notes inadvertently and he would be reluctant to open such a debate if it contradicted the previous work of the Commission. He therefore took it that the Commission would ensure that the final version of the Notes did not contain any provisions that addressed arbitration in a manner that would cause problems for investor-State arbitration.

26. **Mr. Medina Mejías** (Bolivarian Republic of Venezuela) said that while his delegation would follow the guidance of the Chair, it considered that there were many problems with investor-State arbitration that required reform, such as when States found themselves cornered or when their sovereignty was abused. The issue of transparency could perhaps be dealt with through third-party funding or through the relations between legal counsel and arbitrators, which his delegation deemed important aspects of transparency.

27. **The Chair** drew attention to the report of the Commission's discussion of the previous year, contained in paragraph 19 of document A/CN.9/826.

28. **Ms. Dostie** (Canada) said that her delegation had serious concerns regarding the references to "internal legal, management and other costs" and to the costs relating to "managing directors". Such costs should be recoverable only when framed as in-house legal representation. However, business costs such as salaries, staffing, or witness preparation for company executives or employees should not be recoverable. The notion that there was no principle prohibiting the recovery of in-house costs left the door wide open to the acceptance of a broad range of management and business costs that should not be covered under the UNCITRAL Arbitration Rules. She wondered whether categorizing in-house costs as legal costs might be a solution.

29. **The Chair** said that the view taken by Canada raised a general question of whether the Notes should exclude internal costs. He had seen cases in which a company appointed an employee to deal with an arbitration, and such in-house costs could be recoverable. He invited comments on the matter, inasmuch as practice in that respect differed. The question remained why a company hiring outside experts to conduct technical reports or studies should receive more favourable treatment than one that relied on internal experts. Turning to the issue of costs incurred by "external legal counsel" in paragraph 40, he suggested that the phrase could be replaced with "legal representation". As to the proposal by Israel, he asked the representative of Israel to clarify why there would be a need to distinguish between "State" and "State organizations".

30. **Mr. Apter** (Israel) said that, as it stood, the paragraph was not clear. As he understood from the discussions in the Working Group, reference to in-house legal counsel or legal representation usually concerned companies or corporations; State or State organizations did not automatically come to mind. His delegation therefore deemed it necessary to send a clear message to arbitrators that government representation also came within the purview of the rule, which would justify a departure from the Commission's established practice.

31. **Mr. Komarov** (Russian Federation) said that the issue of covering in-house costs was topical and including it in the Notes was a positive development. However, it would not make sense to state unequivocally that costs should always be covered, given the great variety of circumstances that might occur. Ultimately, the arbitral tribunal would decide whether or not costs should be covered on the basis of the general criteria used to assess the conduct of the parties and the magnitude of the costs claimed with a view to striking a fair balance between the interests of the parties.

32. **The Chair** said that the suggestion for a general reference to costs was relevant in the light of the growing importance of the topic and the increasing costs being claimed and awarded.

33. **Mr. Komarov** (Russian Federation) said that the intent of the text should not be to address all specific issues that could arise with regard to costs, but to establish a basic principle that an arbitral tribunal could use as a basis for making decisions in the light of the circumstances of each case.

34. **The Chair** said that the point raised by the representative of the Russian Federation might be better addressed in paragraph 41, which contained specific reference to in-house costs and could perhaps be given a more general scope. He suggested that the Commission might wish to return to that issue after concluding its discussion of paragraph 40.

35. **The Chair**, replying to the representative of the United States, said that it was proposed to replace "external legal counsel" with "legal representation" and to redraft the rest of the sentence to make clear that "legal representation" also included the in-house services of a company or a Government. The redrafting could be left to the Secretariat.

36. **Mr. Schöfisch** (Germany), supported by **Mr. Maradiaga** (Honduras), said that the balanced draft had already gone through the Working Group and was now before the Commission in its second iteration. The Commission could not therefore address new questions or consider the Notes at another session. He reiterated his delegation's support for the text as it stood and its opposition to reopening the discussion on several points. Germany would support the changes proposed by Canada, subject to final redrafting by the Secretariat.

37. **The Chair** said that the Working Group itself had had concerns regarding in-house legal costs. The text before the Commission reflected those discussions and urged greater caution. At the outset, he had flagged the provision that might require closer attention.

38. He took it that the Commission was not in favour of the amendment proposed by the representative of Israel. He also took it that the Commission rejected the suggestion by the representative of Canada to include a general statement that costs that were not related to legal representation should not be admitted.

39. *It was so decided.*

40. **The Chair**, turning to the Romanian proposal regarding the last sentence of the paragraph, asked whether the Commission wished to expand the paragraph as proposed.

41. **Mr. Popovici** (Romania) said that his delegation's aim was to provide arbitrators with a means of assessing the reasonableness of in-house costs, which should never be higher than similar services provided externally. The Notes should be general enough to be helpful without being prescriptive.

42. **The Chair** said that, although comparing the internal and external costs of the parties was an intelligent method for assessing overall costs, he had not seen it in practice and was therefore hesitant to include it in the Notes. While there appeared to be no support for a separate provision on the issue, it could be useful to include a more general comment on costs as the topic had been of great concern to the arbitral community. Such a comment could be added in paragraph 41, 47, 48 or 49.

43. **Mr. Komarov** (Russian Federation) said that, in the absence of general rules on recovering in-house costs, a reference could be added to the last sentence of paragraph 47 to indicate that in-house costs were taken into account when fixing the recoverable costs.

44. **The Chair** said that it might be useful to highlight the desirability of cost control, in addition to the existing reference to in-house costs in paragraph 47.

45. **Mr. Chen** Jian (China) said that the question of controlling costs was very important, especially given criticisms of the increasing costs of arbitration. Arbitration did have its own unique advantages and was especially effective in practice in the business world. Clear descriptions of costs would certainly be beneficial to practitioners.

46. **The Chair** said that the Secretariat would add a reference on the desirability of cost control to the text.

Introduction (paragraphs 1 to 8)

47. **The Chair** said that the Secretariat would decide whether "2016" should be included in the title of the UNCITRAL Notes on Organizing Arbitral Proceedings. With regard to the introductory section of the Notes, efforts had been made to make it clear that the primary purpose of the Notes was to preserve the diversity and flexibility of arbitration proceedings without creating a prescriptive text.

48. **Mr. Castello** (United States of America) said that the last sentence in paragraph 5 on the non-binding character of the Notes should be modified as, if a tribunal sensed that a matter might become relevant during the proceedings, it should be encouraged to raise that matter at the first procedural conference. The present formulation could imply that such matters should not be addressed until it was considered necessary.

49. **The Chair** said that the suggestion made by the United States brought the text in the right direction by highlighting that the parties should consider what might need to be addressed.

50. **Mr. Pytalev** (Belarus) said that, at the end of paragraph 8, it would be useful to include a provision stating that the arbitral tribunal should take into account the legal traditions of the location of the dispute as far as possible when selecting a set of arbitration rules.

51. **The Chair** said that the proposal of the delegation of Belarus could create new difficulties, as it was unclear which tradition would be examined in cases where multiple States were represented in the parties. While a tribunal was free to refer to the traditions of the place of arbitration, it might wish to avoid doing so.

52. *The Introduction, as amended, was approved.*

Note 1. Consultation regarding the organization of arbitral proceedings; Procedural meetings (paragraphs 9 to 19)

53. **The Chair** said that subsection (a) in Note 1 had been made more general in order to avoid the problems that had previously arisen in interpreting the text.

54. *Note 1 was approved.*

The meeting was suspended at 11.55 a.m. and resumed at 12.35 p.m.

Note 2. Language or languages of the arbitral proceedings (paragraphs 20 to26)

55. *Note 2 was approved.*

Note 3. Place of arbitration (paragraphs 27 to 31)

56. **Mr. Castello** (United States of America) said that his delegation wished to remove the words "the nature and

frequency of" from paragraph 29 (ii) (a) of Note 3 because the concept expressed by those words was already covered in the same sentence by the word "practices".

57. *Note 3, as amended, was approved.*

Note 4. Administrative support for the arbitral tribunal

58. *Note 4 was approved.*

Note 5. Costs of the arbitration (paragraphs 39 to 49)

59. **Mr. Pytalev** (Belarus) said that, with regard to paragraph 49, the rationale behind costs potentially being paid after the award on the merits was unclear. It was more logical for a decision on the costs to be made at the same time as the award and for the Notes to include a statement to that effect.

60. **The Chair** said that decisions on costs were generally made with the final award on the merits, but were sometimes made in the course of proceedings. However, in some jurisdictions the costs were decided by a body or institution other than the judge. That practice was sometimes reflected in arbitration when the decision on the merits was taken before proceedings on the costs took place. The advantage of that practice was that the parties already knew the outcome of the case, but the disadvantage was that the losing party could use the issue of costs to attack the principal award. Therefore, the reference to taking the decision on costs after the award on the merits had been rendered should remain in the text, even though it was not universally considered to be the most effective practice.

61. **Mr. Pytalev** (Belarus) said that he was satisfied with the Chair's explanation.

62. *Note 5 was approved.*

Note 6. Possible agreement on confidentiality; transparency in treaty-based investor-State arbitration (paragraphs 50 to55) and Note 7. Means of communication (paragraphs 56 to 59)

63. *Notes 6 and 7 were approved.*

Note 8. Interim measures (paragraphs 60 to 64)

64. **Mr. Castello** (United States of America) said that paragraph 61 addressed the specific situation of *ex parte* requests for interim measures, while paragraphs 60 and 62 made provisions that were more general in scope. Therefore it would be sensible to reverse the order of paragraphs 61 and 62.

65. **Ms. Van Lith** (International Chamber of Commerce) said that it was unclear whether the scope of Note 8 covered the question of emergency arbitral proceedings, which were typically initiated by an emergency arbitrator in situations where it was not possible to await the constitution of an arbitral tribunal.

66. **The Chair** said that emergency arbitrators indeed operated on the basis of a different set of rules, and reminded the Commission that it had previously addressed the issue raised by ICC and had reached the conclusion that emergency arbitral proceedings were a preliminary step which took place prior to the arbitration proceedings themselves. Therefore a reference to emergency arbitral proceedings was unnecessary in the context of Note 8.

67. *Note 8, as amended, was approved.*

Note 9. Written submissions, witness statements, expert reports and documentary evidence ("submissions") (paragraphs 65 and 66) and Note 10. Practical details regarding the form and method of submissions (paragraph 67)

68. *Notes 9 and 10 were approved.*

Note 11. Points at issue and relief or remedy sought (paragraphs 68 to 71)

69. **Mr. Castello** (United States of America) said that in the interest of clarity, his delegation proposed modifying paragraph 71 so that it would read: "… to ensure the enforceability of any arbitral award that might grant such relief, the arbitral tribunal ...".

70. *Note 11, as amended, was approved.*

Note 12. Amicable settlement (paragraph 72)

71. *Note 12 was approved.*

Note 13. Documentary evidence (paragraphs 73 to 85)

72. **Mr. Castello** (United States of America) proposed modifying the first sentence in paragraph 77 to read: "… but also the reasons for the request, and often, as well, a statement as to why the requested documents are believed to be in the possession of the other party and are not otherwise available to the requesting party." The last sentence of paragraph 78 should also be modified to read: "The arbitral tribunal will often add to the schedule a record of its decision whether to order disclosure on any contested requests."

73. *Note 13, as amended, was approved.*

The meeting rose at 1 p.m.

Summary record of the 1037th meeting, held at Headquarters, New York, on Thursday, 7 July 2016, at 3 p.m.

[A/CN.9/SR.1037]

Chairperson: Mr. Schneider (Vice-Chair) (Switzerland)

Contents

In the absence of Mr. Kenfack Douajni (Cameroon), Mr. Schneider (Switzerland), Vice-Chair, took the Chair.

The meeting was called to order at 3.10 p.m.

Agenda item 5: Consideration of issues in the area of arbitration and conciliation (*continued*)

(a) Finalization and adoption of the revised UNCITRAL Notes on Organizing Arbitral Proceedings (*continued*) (A/CN.9/879; A/CN.9/XLIX/CRP.4)

Note 14. Witnesses of fact (paragraphs 86 to 93)

1. **Mr. Apter** (Israel) said that the wording of the second sentence in paragraph 92 of the Notes (A/CN.9/879) was somewhat strange. Indeed, a practice that was so rare should not even be addressed in the Notes. In addition, the word "securing" in the second sentence was potentially misleading. He suggested keeping only the first sentence of paragraph 92, or replacing "securing" with a word that had a less specific legal connotation.

2. **The Chair** said that the second sentence of paragraph 92 described situations where a party wanted a witness not under its control to appear at a hearing; in such cases, an invitation by the tribunal might help to persuade the witness to appear. It seemed that there was no support for the suggestion made by the delegation of Israel to delete the second sentence. Since the word "securing" might imply that the arbitral tribunal had greater power than it actually had, it could be replaced by "lending support to".

3. **Mr. Castello** (United States of America) suggested that the word "inviting" could be used.

4. **The Chair** said that it could be left to the Secretariat to finalize the wording of paragraph 92 in the light of the comments by Israel and the United States.

5. *It was so decided*.

6. **Mr. Castello** (United States) said that, since the draft revised Notes did not deal with the issue of how a tribunal should decide which witnesses should appear until paragraph 125, paragraphs 91 and 92 should perhaps be combined with that paragraph.

7. **The Chair** said that there appeared to be no objections to the United States suggestion to combine paragraphs 91 and 92 with paragraph 125. He took it that the Commission agreed to the change.

8. *It was so decided*.

9. *Note 14, as amended, was approved*.

Note 15. Experts (paragraphs 94 to 109) and Note 16. Inspection of a site, property or goods (paragraphs 110 to 115)

10. *Notes 15 and 16 were approved*.

Note 17. Hearings (paragraphs 116 to 136)

11. **Mr. Popovici** (Romania) suggested inverting the order of the penultimate and final sentences of paragraph 125 in order to avoid any implication that some weight had already been given to a witness's written statement.

12. **The Chair** said that the third sentence of the paragraph described a situation where the tribunal decided that a witness did not need to testify in the case when there was no request for the witness to appear, whereas the penultimate sentence described a situation where the tribunal chose, for reasons of efficiency or otherwise, to dispense with the testimony of a witness even though the witness had been requested. The last sentence of the paragraph addressed the consequences of a witness not being called and therefore applied to both situations.

13. **Mr. Popovici** (Romania) said that his delegation had understood that the final sentence applied only to the

situation described in the third sentence. Otherwise, it would be implied that a certain amount of weight had been placed on the witness's written statement, namely, sufficient weight to reject the witness's appearance.

14. **Mr. Castello** (United States of America) said that his delegation was concerned not about the penultimate sentence's placement, but rather its wording. As the sentence stood, it appeared to say that, while a tribunal could refuse a witness, if it did so, it might be denying a party the opportunity to present its case. He proposed that, in the penultimate sentence, the words "while this may raise concerns about the requesting party's opportunity to present its case" should be replaced with the words "if the arbitral tribunal deems the proposed testimony, for example, immaterial or purely cumulative, having regard to the requesting party's reasonable opportunity to present its case".

15. **The Chair** said that although the proposed change was an improvement, it did not solve the problem. Moreover, limiting the application of the penultimate sentence to cross-examination might be too restrictive, as it could also apply to any appearance of the witness that might be considered immaterial or cumulative. A more general formulation was therefore needed. While there was some overlap between paragraph 88 and paragraph 125, the submission of a witness statement and the appearance of witnesses were two different issues.

16. In revising the Note, the Commission should clarify the grounds on which a tribunal could decide not to have a witness testify. It must also decide whether the last sentence applied to both the third and fourth sentences equally. Regarding the United States proposal, an alternative would be to invoke the more general notion of concern for efficiency in the proceedings as a justification for dispensing with a witness. He asked whether the changes proposed by the United States clarified the application of the final sentence or whether the order of the last and the penultimate sentence should still be reversed.

17. **Mr. Popovici** (Romania) asked for clarification with regard to the phrase "reasonable opportunity".

18. **The Chair** said that the tribunal's power to decide not to hear a witness was qualified by the words "having regard to the requesting party's reasonable opportunity to present its case".

19. **Mr. Popovici** (Romania) said that there was a contradiction inherent in the idea that the decision not to hear oral testimony would not alter the weight given by the tribunal to a written statement. Though agreeing with the redrafting of the fourth sentence, his delegation maintained that the order should be changed.

20. **The Chair** said that the last sentence would apply in situations where the tribunal had already heard multiple witnesses.

21. **Mr. Popovici** (Romania) said that the draft text had become unbalanced. Concerns could be raised about the requesting party's opportunity to present its case, especially by means of cross-examination. If that party's request was the only one denied, the final sentence of the draft text would only accentuate its unfavourable situation.

22. **The Chair** said that was precisely the reason for including the word "cumulative". If witnesses, including those who did not appear before the tribunal, provided the same testimony, such testimony could be considered cumulative.

23. **Mr. Popovici** (Romania) said his delegation still felt that, if the tribunal considered testimony to be cumulative in such situations, that meant it had already given a certain amount of weight to the written statement, which appeared to be a contradiction.

24. **Mr. Castello** (United States of America), responding to the comments made by the representative of Romania, said that his delegation had understood the wording in question to mean that not cross-examining a specific witness would not change the weight the tribunal would otherwise give to that witness's statement. That reasoning applied to the fourth sentence as well.

25. **The Chair** said he took it that the Commission agreed to the United States amendment.

26. *It was so decided*.

27. *Note 17, as amended, was approved*.

Note 18. Multiparty arbitration (paragraphs 137 and 138)

28. *Note 18 was approved*.

Note 19. Joinder and consolidation (paragraphs 139 to 146)

29. **Mr. Apter** (Israel) said that Note 19 should also make reference to delays in the process and the relevance of the new party. The aim was to introduce a reason against accepting a joinder, since the addition of a new party would delay the process.

30. **Mr. Alcott** (American Bar Association) said that the Commission might wish to refer to conditions that the tribunal could impose with regard to the acceptance of a joinder.

31. **The Chair** said that that proposal went a step further than the proposal made by the representative of Israel, who wished simply to point out that joinder did not necessarily result in improved efficiency. The Commission might deem it sufficient to add a reference, in the penultimate sentence of paragraph 140, to the disadvantages related to joinder and to ask the Secretariat to come up with appropriate wording.

32. *It was so decided*.

33. *Note 19, as amended, was approved*.

Note 20. Possible requirements concerning form, content, filing, registration and delivery of the award (paragraphs 144 to 146)

34. **The Chair** noted that the Working Group had had doubts about addressing the topics covered by Note 20, but there were a number of points relating to the award that did have a bearing on the organization of proceedings.

35. **Mr. Medina Mejías** (Bolivarian Republic of Venezuela) asked whether the Commission would discuss annulments or the setting aside of awards.

36. **The Chair** said that the Note merely provided guidance on organizing the proceedings. The setting aside of awards was not an organizational matter.

37. *Note 20 was approved*.

38. **Mr. Castello** (United States of America) said that his delegation had neglected to raise a point with respect to paragraph 25. The phrase "such that multiple languages could be used during the proceedings, but procedural orders and arbitral awards, for example, would be issued only in the authoritative language" could be interpreted as a requirement to provide translations of all submissions in each language. To make it clear that any of the multiple languages could be used during the proceedings, the Commission could replace "multiple" with the words "any of these".

39. **The Chair** said that the point made by the representative of the United States clarified the meaning of the text.

40. **Mr. Möller** (Observer for Finland) endorsed the United States amendment.

41. *The proposed amendment to paragraph 25 was adopted*.

Draft decision adopting the UNCITRAL Notes on Organizing Arbitral Proceedings
(A/CN.9/XLIX/CRP.4)

42. *The draft decision was adopted*.

(b) Progress report of Working Group II (A/CN.9/861 and A/CN.9/867)

43. **Ms. Montineri** (Secretariat) recalled that during its forty-eighth session, the Commission had decided that Working Group II should begin work on the implementation of agreements that were the outcome of arbitration. The Working Group had been given a broad mandate to take into account a variety of approaches and concerns. During its sixty-third and sixty-fourth sessions, the Group had looked at the scope and possible content of an instrument covering the implementation of agreements resulting from arbitration and it planned to continue its work in those areas.

44. **Ms. Morris-Sharma** (Singapore) said that potential model provisions, guidance texts or legally binding instruments on the enforcement of settlement agreements should be limited to international and commercial conciliated settlement agreements of a commercial nature. Following deliberations, Working Group II had agreed that for the upcoming session later that year the Secretariat should prepare a document of draft provisions grouped into broad categories, without prejudice to the final form of the instrument. Delegations would also report back to the Working Group on their review of and experience with the enforcement of settlement agreements that had been the subject of arbitration.

(c) Establishment and functioning of the transparency repository

45. **Mr. Sorieul** (Secretary of the Commission), referring to the Rules on Transparency in Treaty-based Investor-State Arbitration, recalled the Commission's decision to have the United Nations Secretary-General, or some other institution of its choice, act as the repository of published information. The Commission had expressed its intent to have the Secretariat of the Commission fulfil that role; however, the General Assembly had failed to "request" the Secretary-General to establish and operate the Transparency Registry, leading the Commission to reiterate its wish. Accordingly, the General Assembly had adopted a resolution clearly requesting the Secretary-General to establish and operate through the Commission's Secretariat the repository of published information under the Rules on Transparency (General Assembly resolution 70/115).

46. Voluntary contributions had been received from the OPEC Fund for International Development, which had provided a grant of $125,000, and from the European Union, which had contributed 100,000 euros. A staff member had been recruited in 2016 to oversee the operation of the Transparency Registry.

47. The Commission had received, on a voluntary basis, Canadian cases rendered under the North American Free Trade Agreement. The Transparency Registry listed two cases in which the parties had agreed, in principle, to the application of the Rules on Transparency. An increasing number of enquiries had been received by the Secretariat on how to apply the Rules and submit information. There had also been an increase in the number of capacity-building and technical assistance activities relating to the Commission's standards for transparency, accountability and good governance.

48. The Secretariat was engaged in dialogue with the European Commission and the OPEC Fund for International Development in the hope of obtaining renewed funding. States, international organizations and other interested entities were urged to contribute to the Registry, preferably in the form of multi-year contributions. With the funds remaining from the 2016 contributions, the Secretariat might be able to continue operations until the end of 2017. The Commission might wish to recommend to the General Assembly that it should request the Secretariat of the Commission to continue operating the repository of published information. The Secretariat would keep the General Assembly and the Commission informed of any significant developments in the funding and budgetary situation of the repository.

49. **Mr. Bellenger** (France) asked whether the Transparency Registry received any funding from the United Nations budget. Voluntary contributions could not be relied upon indefinitely.

50. **Mr. Sorieul** (Secretary of the Commission) said that the Registry did not receive any resources from the regular budget of the United Nations. The voluntary contributions that had been received thus far should make it possible to maintain the Registry until the end of 2017. However, the new legal officer post could only continue to exist as long as

the contributions received each year were sufficient to cover the associated salary for the following year. He therefore urged delegations to continue, or to begin, to contribute funds. It would also be useful to receive contributions for more than one year at a time, as questions about the viability of the project would begin to arise if the feasibility of maintaining the Registry had to be reviewed every year.

51. **Ms. Dostie** (Canada) suggested that the Commission should formally reiterate its support for the Transparency Registry.

52. **The Chair** said he took it that the Commission wished to express its strong support for the Transparency Registry and to recommend to the General Assembly that it should request the Secretariat to continue operating the Registry.

53. *It was so decided.*

The meeting was suspended at 4.25 p.m. and resumed at 5.15 p.m.

(e) Secretariat Guide on the New York Convention

54. **Ms. Montineri** (Secretariat) recalled that the Secretariat, in collaboration with two experts and their teams, had been developing a guide on the interpretation and application of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) for some years. The guide had recently been completed and had been published in an easily navigable format on the website newyorkconvention1958.org. The guide was currently available in English and would be translated into the other official languages of the United Nations by the end of 2016. The website also included case law documents, in their original languages with English translations, and a multi-language library that would be expanded over the course of the year. All of the information on the website was available to the public free of charge.

(f) International commercial arbitration and mediation moot competitions

55. **Mr. Lee** (Secretariat), briefing the Commission on the international commercial arbitration and mediation moot competitions that had been held with the support of the Commission, said that the Association for the Organization and Promotion of the Willem C. Vis International Commercial Arbitration Moot had held its twenty-third Moot, the oral arguments phase of which had taken place in Vienna from 18 to 24 March 2016. A total of 311 teams from 67 jurisdictions had participated in the competition, which had been based on the United Nations Convention on Contracts for the International Sale of Goods. The first-place award for oral arguments had been awarded to the team from the University of Buenos Aires. The twenty-fourth competition would be held in Vienna from 7 to 13 April 2017.

56. The oral arguments phase of the thirteenth William C. Vis East International Commercial Arbitration Moot had taken place in Hong Kong from 6 to 13 March 2016, with the participation of 115 teams from 29 jurisdictions. The best team in oral arguments had been the team from the Singapore Management University. The fourteenth Moot would be held in Hong Kong from 26 March to 2 April 2017.

57. The Carlos III University of Madrid had organized the eighth International Commercial Arbitration Competition, which had been held in Madrid from 25 to 29 April 2016. The legal issues addressed had related to the international sale of goods. A total of 24 teams from 11 jurisdictions had participated in the Moot, which had been conducted in Spanish. The Universidad Peruana de Ciencias Aplicadas had won first prize for oral arguments. The ninth Moot was scheduled to take place from 3 to 7 April 2017.

58. **Mr. Thivierge** (Moot Alumni Association) thanked the Commission for its continued support for the Willem C. Vis International Commercial Arbitration Moot, which was an extremely valuable initiative.

Agenda item 6: Consideration of issues in the area of online dispute resolution: finalization and adoption of Technical Notes on Online Dispute Resolution

(*continued*) (A/CN.9/XLIX/CRP.1/Add.7)

59. **Mr. Chan** (Singapore), Rapporteur, presented the relevant section of the draft report of the Commission on its forty-ninth session (A/CN.9/XLIX/CRP.1/Add.7) for adoption by the Commission.

60. **Mr. Wang** Jianbo (China) said that the draft report did not fully reflect certain concerns that had been expressed during the discussion with regard to paragraphs 19, 33 and 34 of the Technical Notes. In particular, it did not indicate that the reason those paragraphs had had to be revised was because they were contradictory with respect to the actions that marked the commencement of online dispute resolution proceedings. The Commission had opted to deem online dispute resolution proceedings to have commenced when an administrator notified the parties to the dispute. That was a critical decision, but the discussion leading up to it was not reflected in the draft report. It was unclear whether receipt of a notice from one party alone was sufficient to mark the initiation of online dispute resolution proceedings, and the draft report did not reflect that issue either.

61. The Commission should determine at what point in time an electronic notice was considered to have been received. In so doing, it should seek to conform to the relevant existing conventions. His delegation considered that that was an important issue to address.

62. **The Chair** said that, as he had understood it, the Chinese delegation maintained that the draft report did not fully reflect the discussion that had taken place and that the Commission had not fully addressed certain points in its discussion. The purpose of the draft report was to record what had actually been said, not discuss things that should have been said but had not been. Some representatives were scheduled to leave the following day and there was thus some pressure to adopt the report at the current meeting.

63. **Mr. Schoefisch** (Germany) said he agreed that the draft report could not contain anything that had not been said during the discussion. It was preferable to adopt the report at the current meeting to ensure that delegations which had to leave the following day could participate in its adoption. Therefore, the Chinese delegation should propose its additional sentences right away. There was no issue with introducing a few extra sentences to the draft report in order

to make it more fully reflect the Chinese contribution to the discussion. There was, however, a need for the Commission's report to be balanced. If the additions were extensive, it might be necessary to also include other delegations' responses to what the Chinese delegation had said, and time was pressing.

64. **Mr. Decker** (Observer for the European Union), supported by **Mr. Apter** (Israel) and **Mr. Horna** (Observer for Peru), said that the draft report should be adopted at the current meeting. Consultations should be held with the aim of finding, with the help of the Secretariat, wording that would address China's concerns and be acceptable to all delegations.

The meeting was suspended at 5.45 p.m. and resumed at 6 p.m.

65. **The Chair** announced that wording had been found which was a compromise and would allow the draft report to be adopted.

66. **Mr. Lemay** (Secretariat) read out the proposed changes to paragraphs 7 and 8 of document A/CN.9/XLIX/CRP.1/Add.7. A new paragraph 7 would read "The Commission heard the following proposals to amend the draft text which, it was suggested, would remove a contradiction between paragraph 34, on the one hand, and paragraphs 19 and 33, on the other hand, in document A/CN.9/888". Paragraph 8 would read as it currently appeared, but with the addition of a new sentence, to read "It was said that this view better reflected that both paragraphs 19 and 34 reflect consensus regarding how commencement should be measured; however, as there was a conflict in the approach taken in the two paragraphs the approach taken in paragraph 19 is preferable because it is more efficient".

67. *Document A/CN.9/XLIX/CRP.1/Add.7, as amended, was adopted.*

The meeting rose at 6.05 p.m.

Summary record of the 1038th meeting, held at Headquarters, New York, on Friday, 8 July 2016, at 10 a.m.

[A/CN.9/SR.1038]

Chairperson: Mr. Schneider (Vice-Chair) (Switzerland)

Contents

In the absence of Mr. Kenfack Douajni (Cameroon), Mr. Schneider (Switzerland), Vice-Chair, took the Chair.

The meeting was called to order at 10.15 a.m.

Agenda item 5: Consideration of issues in the area of arbitration and conciliation (*continued*)

(d) Possible future work in the area of arbitration and conciliation

Proposal received from the Swiss Arbitration Association (A/CN.9/893)

1. **The Chair** invited the Commission to consider proposals for future work in the area of arbitration and conciliation. He drew the Commission's attention to the proposal received from the Swiss Arbitration Association on the settlement of commercial disputes, contained in document A/CN.9/893.

2. **Mr. Geisinger** (Swiss Arbitration Association) said that the Swiss Arbitration Association (ASA) was a non-profit organization which promoted arbitration as a method of dispute resolution worldwide and around one third of its 1,200 members were based outside Switzerland. However, ASA was a scientific and academic think tank rather than an arbitration institution, as it did not have arbitration rules and did not administer arbitration cases.

3. The ASA toolbox, as presented in document A/CN.9/893, would be an electronic tool that would be available for download free of charge from the organization's website. For each of the main phases of arbitral proceedings, it would describe the various approaches and methods found in practice for addressing the procedural issues that could arise in each phase. The toolbox would have a structure similar to that of the UNCITRAL Notes on Organizing Arbitral Proceedings and each method described would be accompanied by a recommendation as to when it should be used, taking into account the cultural background of the parties and their counsel. The toolbox would also provide drafting proposals and would have a system of electronic red flags to alert parties or tribunals if options they were considering were, for instance, duplicative or mutually incompatible. Owing to resource constraints, the toolbox would be available in English only.

4. Development of the toolbox, which would be tailored to international commercial arbitration rather than investment arbitration, had been a priority for ASA. Since ASA would be using its own resources to carry out the toolbox project, what it was asking of the Commission was to decide whether and how UNCITRAL wished to collaborate with ASA. ASA and the Commission shared a conviction that the main strength of arbitration was diversity rather than standardization, as well as the belief that such diversity must be promoted, which the toolbox would do by providing its users with different ways to tackle the procedural issues arising in arbitration. While the toolbox was closely related to the UNCITRAL Notes in that regard, any collaboration between ASA and the Commission would not involve revisiting or making changes to the Notes. The toolbox was an independent project that would have no direct impact on the Notes and the Commission would not need to allocate any additional resources to the project.

5. As to the form the Commission's support for the toolbox project should take, ASA hoped that the Commission would welcome the project as a useful instrument for the promotion and development of international commercial arbitration and particularly of the diversity of approaches in that area, and that the Commission would task the UNCITRAL secretariat with engaging in discussions with ASA on the details of collaboration between the two bodies. The Commission would not need to endorse the content of the toolbox at the current stage, since developing the content was still a work in progress.

6. In future, the Commission could use the toolbox for its educational training programmes worldwide and, since collaboration should be a two-way street, ASA would be willing to provide trainers. The toolbox could also be hosted on a website developed jointly between ASA and UNCITRAL, although that would imply endorsement of the toolbox content, which would therefore need to be reviewed and discussed within a reasonable time frame.

7. **Mr. Schnabel** (United States of America) said that the toolbox would be useful, especially as it would be freely accessible. His delegation supported coordination and cooperation between UNCITRAL and ASA, which could take many forms. Informal work between ASA and the Secretariat was also desirable and could involve the assistance of experts, while more extensive work could take place in future depending on how the project developed. Before implying or explicitly stating any kind of UNCITRAL endorsement of the substantive content of the toolbox, Working Group II would need to discuss the matter

and that could not take place until the present work on conciliation had been concluded.

8. **Mr. Maradiaga** (Honduras) said that the ASA proposal was reasonable and would provide a comprehensive overview of approaches to arbitration. The Commission should associate itself with the project, but would need to review carefully the related content.

9. **Mr. Moollan** (Mauritius) said that his delegation shared the views of the United States concerning the Commission's support for the ASA project.

10. **Mr. Apter** (Israel) agreed with the statements made by the delegations of the United States, Honduras and Mauritius.

11. **Mr. Medina Mejías** (Bolivarian Republic of Venezuela) said that his delegation supported the toolbox project, which had the merit of being educational and affording access to applied technology.

12. **Mr. Tommo Monthe** (Cameroon) said that his delegation agreed with the approach suggested by the United States, which would allow the Commission to advance work on the project, while reviewing its content at a later stage.

13. **Mr. Sorieul** (Secretary of the Commission), recalling that the Commission conducted a technical assistance programme targeted to developing States in particular, said that the majority of requests for assistance relating to arbitration had come not from arbitration practitioners, but from judicial officials wishing to become familiar with arbitration techniques. It was therefore important to have a range of instruments, such as the Guide to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) and the Commission' system for collecting case law (CLOUT). The revised UNCITRAL Notes were also important as they would assist in the implementation of a training programme based on the ASA toolbox. The toolbox itself would be particularly valuable and it was hoped that work would proceed on its further development and use.

14. **Mr. Chan** (Singapore) said that his delegation supported the proposal of ASA insofar as it reinforced the Commission's efforts to promote international commercial arbitration. However, while ASA was a very reputable organization, its approaching the Commission for support might encourage other organizations to seek the Commission's collaboration or endorsement for their initiatives and products. As the Commission could not possibly work with every organization that approached it, the Secretariat should develop guidelines and clear criteria for determining when collaboration with external organizations would serve the Commission's interests and objectives.

15. **Mr. Sorieul** (Secretary of the Commission) said that the Secretariat shared the understandable concern expressed by the representative of Singapore. The draft Guide on the New York Convention was also an instrument developed on the initiative of the Secretariat in cooperation with arbitration experts. When selecting potential partnerships, the Secretariat took great care to ensure that the principle of neutrality and the objective of promoting arbitration were upheld. The Secretariat had not yet developed criteria for the consideration of the Commission because, so far, it had not received many requests for collaboration. Upon receiving the current request from ASA, the Secretariat had brought the matter to the Commission's attention as transparently and as soon as possible, while attempting to obtain all of the information necessary for the Commission to evaluate the request.

16. **Mr. Moollan** (Mauritius) said that the Commission should actively promote awareness on the part of arbitration institutions worldwide, including in African countries, of the possibilities for cooperation with the Commission.

17. **Mr. Fornell** (Ecuador) said that the Commission must be extremely cautious when endorsing any institution's ongoing or future project when the Commission had not been involved in the project's development and had no say in the decision-making process. Many other institutions might also be interested in collaborating with the Commission; it would be better therefore to develop a guide on opportunities for collaboration that could be made available to entities in all regions; such a guide would be particularly useful for Latin American and African countries. The Secretariat seemed to have assessed the ASA request on the basis of subjective criteria. The Commission should therefore confine itself to taking note of the ASA proposal; it should study the proposal further and establish guidelines that would promote accessibility and democratization for all regions with regard to cooperation with the Commission.

18. **Mr. Moollan** (Mauritius) supported the proposal made by the representative of the United States, as it adequately addressed the legitimate concerns expressed by the representative of Ecuador. Every proposal must, of course, be assessed on its merits.

19. **The Chair** said he took it that at the current stage the Commission wished to agree to cooperate only in development of the ASA toolbox and that any endorsement of external content would require a separate decision by the Commission.

20. *It was so decided*.

Concurrent proceedings (A/CN.9/881)

21. **Mr. Lee** Jae Sung (Secretariat) reminded the Commission that in 2014 it had agreed to explore concurrent proceedings with a focus on treaty-based investor-State arbitration but without excluding international commercial arbitration. In 2015, the Commission had considered document A/CN.9/848 and had agreed to keep concurrent proceedings on the Commission's agenda, while taking note of developments in that field. In accordance with the Commission's request for the Secretariat to explore the topic further in cooperation with experts and organizations working in that area, an expert group meeting had been held in January 2016. On the basis of the expert group's discussions, the Secretariat had developed document A/CN.9/881 for consideration by the Commission at its current session.

22. **Mr. Schnabel** (United States of America) said that document A/CN.9/881 drew the Commission's attention to the options for UNCITRAL action with respect to concurrent

proceedings in investment arbitration. However, it was not clear whether any of the options suggested merited the time and resources that would be required to develop a new instrument in that field, especially considering that the most prominent case cited as demonstrating problems in the area had occurred over 15 years earlier.

23. Problems did not seem to arise frequently enough in practice for Working Group II to spend several sessions attempting to address them. Furthermore, the various proposed solutions, if developed by the Commission, would seemingly be relevant to only a subset of the few cases in which the issues could arise.

24. A further consideration was that the Commission could provide guidance to arbitral tribunals only in the case of concurrent proceedings conducted under the UNCITRAL Arbitration Rules.

25. In addition, existing investment treaties already provided mechanisms that States could adopt when negotiating new treaties. The option of developing a new multilateral instrument on the topic would be a significant undertaking and it was not certain that States would be willing to become parties to an instrument that would cover only a handful of cases. In that regard, the work carried out by the Secretariat in the past amply demonstrated that efforts by Working Group II to address the topic would probably not be worthwhile. To the extent that it had sufficient time and resources, the Secretariat should instead focus on the topic of ethics in international arbitration.

26. **Mr. Von Walter** (Observer for the European Union) said that addressing concurrent and multiple proceedings in investment dispute settlement was important and challenging. The European Union had held discussions with its partners on tackling scenarios that involved claims initiated by the same claimant in different forums, claims initiated by related claimants on the same dispute, and claims initiated by unrelated claimants. However, as most existing investment treaties contained no guidance for dealing with such situations, the Commission should conduct further work on how tribunals could effectively address the concerns that could emerge from concurrent claims under those treaties. Such work could take the form of soft law guidance for tribunals, as suggested in document A/CN.9/881.

27. It would also be useful to give wider publicity to existing treaty provisions targeted to Governments that had negotiated or might wish to renegotiate investment treaties. Action could be taken in conjunction with the work already carried out by other organizations, such as the United Nations Conference on Trade and Development, but a multilateral instrument could be envisaged if such work proved insufficient. As suggested in paragraph 42 of document A/CN.9/881, future work should cover not only concurrent proceedings but also successive proceedings on the same dispute. The title of the topic could be altered accordingly.

28. While concurrent proceedings in the context of investment dispute settlement should be investigated, it would be less useful to expand work on commercial arbitration given the difficulty of finding solutions, as had been demonstrated in the negotiations on revising European Council Regulation No. 44/2001. The future work of Working Group II should therefore focus on concurrent claims in investment arbitration, which differed from commercial arbitration in terms of both the applicable legal basis and the policy implications for Governments.

29. **Ms. Dostie** (Canada) said that, while her delegation supported work along the lines proposed in section IV (A) of document A/CN.9/881, the Working Group should not take up the topic at the current stage. The Secretariat should instead convene a small group of experts to prepare a first draft of a guidance document that could be examined by the Commission to determine the next steps.

30. **Mr. Moollan** (Mauritius) said that the issue of concurrent proceedings was not hypothetical or historical, but one that occurred in everyday practice, for example through cascading claims. The approach that had been discussed at the expert group level was promising, as it did not involve creating new standards but explaining to new arbitrators, who might have come from commercial arbitration, that there were means they could use to manage concurrent proceedings under article 17 of the UNCITRAL Arbitration Rules.

31. The Commission should continue to focus on investor-State arbitration, but the next area of work should be investment arbitration for concurrent proceedings or a code of ethics for arbitrators, although the latter issue was not a pressing one.

32. **Mr. Apter** (Israel) said that concurrent proceedings, both generally and specifically in investment arbitration, could raise concerns and occurred in practice, albeit sporadically. As the existing bilateral work on concurrent proceedings was sufficient, the topic should not be studied further by UNCITRAL at present. While there might be a need to examine the subject further in future, the Commission should begin work on other more pressing projects.

33. **Ms. Kaufmann-Kohler** (Switzerland) said that concurrent proceedings were an important subject which arose frequently in practice. However, the existing rules and legal framework did not provide guidance for arbitrators on how to deal with concurrent proceedings and the Commission could therefore make a contribution by taking up the topic. While there might be a greater need for guidance in investment arbitration, there were unresolved issues in commercial arbitration, such as what res judicata was or whether an award could be made when there had already been an award on the same issue or a similar one. It would be sensible also to examine successive proceedings and perhaps to refer to multiple proceedings in the title of the Note by the Secretariat. The Brussels I Regulation (European Council Regulation No. 44/2001) laid down detailed rules on how national courts must deal with lis pendens, res judicata and related issues. Nothing of the sort existed for international arbitration, which confirmed the need for UNCITRAL to study the matter.

34. **Mr. Möler** (Observer for Finland) said that examination of concurrent proceedings should not be limited to investment arbitration. There was a particular need for

guidance in the European Union as commercial arbitration was governed by domestic laws. The Brussels I Regulation did not address concurrent arbitration proceedings, but rather only referred to the practice of some courts in certain European States to disregard arbitration agreements. Questions remained concerning the relationship between the Brussels I Regulation and the New York Convention.

35. **Mr. Tufte-Kristensen** (Denmark) agreed that, if the Commission decided to take up the topic of concurrent proceedings, its work should cover commercial arbitration. Although fundamental differences existed between commercial and investment arbitration, the differences were not so great in terms of concurrent proceedings to justify focusing only on investment arbitration.

36. **Mr. Bellenger** (France) said that work should be carried out on concurrent proceedings along the lines suggested in document A/CN.9/881 but not immediately since Working Group II had still not completed its ongoing work.

37. **Mr. Komarov** (Russian Federation) said that, while the issue of concurrent proceedings was topical, the most urgent area of work was outlined in Section IV (B) of document A/CN.9/881. As a review process was under way and new agreements were being created, the inclusion of a provision encouraging States to adopt specific mechanisms in their investment treaties would be desirable. There were many instruments relevant to concurrent proceedings and the most sensible action would be to identify provisions that States could use when concluding new or reviewing existing agreements in order to avoid or solve the problems that could arise in concurrent proceedings. Furthermore, while the development of a multilateral instrument to improve the framework for international dispute settlement would be the most effective approach, it would be a very lengthy undertaking, given the complexity of the issues involved.

38. **Ms. Mackielo** (Argentina) said that issue of concurrent proceedings was a priority because of the frequency with which they occurred and the harm they could cause to the system. At the very least, guidelines would be required to address such situations. As developing countries were both most affected by investment proceedings and least equipped to deal with them, concurrent proceedings should be included on the Commission's agenda with special emphasis on helping those countries.

39. **Mr. Schoefisch** (Germany) said that Working Group II could begin work on concurrent proceedings after the completion of its current mandate. The Working Group could then follow a cumulative approach and ask how the parties to an arbitration agreement or an investment treaty could avoid concurrent proceedings from the outset, and how arbitrators could successfully address concurrent proceedings in order to avoid contradictory decisions by other tribunals and courts. As a result, the Working Group could formulate special clauses for arbitration agreements or investment treaties, and develop best practices for arbitrators dealing with concurrent proceedings in the framework of article 17 of the UNCITRAL Arbitration Rules. The Commission should develop legal and practical advice for companies, legislators and arbitrators on how to avoid concurrent proceedings, rather than elaborate a binding multilateral instrument.

40. **Mr. Medina Mejías** (Bolivarian Republic of Venezuela) said that concurrent proceedings were an important and pressing issue, particularly in investor-State arbitration. He endorsed the views expressed by the delegations of Mauritius and Switzerland, without prejudging the form that the Commission's involvement should take, an issue that should be addressed by Working Group II.

41. **Mr. Ghia** (Italy) said that the Commission should continue to study concurrent proceedings because it was an important issue. By developing provisions governing such proceedings, UNCITRAL would be advancing one of its major objectives, namely to promote efficient and effective arbitration of international commercial disputes.

Possible future work on ethics in international arbitration (A/CN.9/880)

42. **Mr. Lee** Jae Sung (Secretariat) said that in 2015, on the basis of document A/CN.9/855, the Commission had requested that the Secretariat explore the topic of a code of ethics for arbitrators in commercial and investment arbitration taking into account existing laws, rules and regulations as well as any other standards established by other organizations. Accordingly, the Secretariat had prepared the Note in document A/CN.9/880,which examined how ethics in international arbitration were understood and the existing legal framework, and contained suggestions of issues for the Commission's consideration.

43. **Mr. Schnabel** (United States of America) said that the situation in which more than one set of ethical rules could potentially apply in an international arbitration, which arose quite often, should be further studied. In addition to the rules that might be applicable under the law of the place of arbitration, each individual involved might be subject to one or more sets of rules from their home jurisdiction or licensing jurisdiction. The issue was relevant not only for arbitrators but for any attorneys for the parties. Neither that situation and the choice-of-law problems that might emerge from differing or conflicting standards, nor the question of which standards applied if an ethics issue arose had been looked at from a multilateral perspective. While it was not yet clear what UNCITRAL might be able to develop on that topic or what type of instrument might help address those issues, the topic was worth further exploration. Pending completion by Working Group II of its work on conciliation, the Secretariat should focus its future work on a code of ethics for arbitrators, and specifically on the interaction of multiple sets of ethics rules applicable to arbitrators and other lawyers participating in both commercial and investor-State arbitration. With regard to the content of particular standards, any attempt to develop a harmonized substantive standard would be premature, particularly before the interaction of the existing rules was better understood. Investigation should therefore be limited to conflict-of-laws issues and the Secretariat could provide the Commission with a document in 2017 to help determine whether Working Group II could address the topic.

44. **Mr. Apter** (Israel) agreed with the representative of the United States that UNCITRAL should continue to explore the topic and that the Commission could decide in 2017 whether the Secretariat or Working Group II should conduct the work. Furthermore, it would not be sensible to work on harmonizing the standards of ethics for arbitrators; work should be focused instead on resolving potential conflicts between different sets of ethics rules. There should also be an attempt to develop universal minimum ethical standards for arbitrators, particularly in respect of conflict of interest. The Secretariat could look into the possibility of developing such standards, although further work might reveal that it would not be practicable to do so.

45. **The Chair** said that the initial proposal by Algeria at the forty-eighth session had referred specifically to ethics for arbitrators. Ethics for counsel was a different issue and might lead to conflict, whereas, apart from questions of conflict of interest, there were no existing regulations for arbitrators. The Commission should therefore decide whether to broaden the subject to include lawyers generally.

46. **Mr. Schoefisch** (Germany) said that his delegation supported further work on a code of ethics for arbitrators provided that sufficient resources were available in the Secretariat. However, there was no urgent need for such a code, since the principles of impartiality and independence were already incorporated in arbitration rules, including the UNCITRAL Arbitration Rules. If the parties required more personal or substantive qualifications from an arbitrator or wished to regulate the consequences of arbitrators not complying with ethical requirements, they could include special clauses in their agreements or treaties. For example, the European Union proposal for investment protection in the Transatlantic Trade and Investment Partnership (TTIP) included a code of conduct for the judges of the investment court. Parties to an arbitration agreement or international treaty that included arbitration could also agree to apply existing codes of conduct, such as the International Bar Association rules.

47. **Mr. Von Walter** (Observer for the European Union) said that there was a critical need to address potential conflicts of interest of arbitrators or adjudicators in international investment arbitration, especially since such issues could assume importance in negotiations. In its recent investment negotiations, the European Union had included detailed rules on ethics, often as a code of conduct annexed to the agreement, setting forth procedures for challenges, which would be decided by independent external parties. However, other existing sets of rules could be used to address potential conflicts of interest, and the contracting partners in TTIP were working on a code of conduct for investment arbitration. Consequently, it did not seem appropriate for UNCITRAL to develop another set of ethical rules, which might differ from existing instruments. Some work could be done on the interrelation of different instruments, including domestic law obligations, and the resolution of potential conflicts or incompatibilities.

48. **Ms. Kaufmann-Kohler** (Switzerland) said that further work on the topic was not necessary at present as it was already widely regulated. The choice-of- law issue was not particularly relevant to arbitrators, as it was clear that arbitrators were subject to the ethical rules within the framework applicable to a specific arbitration.

49. Further work was also unnecessary due to the content and type of rules. In practice, ethics involved legal norms rather than moral rules. For example, the principles of independence and impartiality, among others that would be included in a code of ethics, were embodied in all national legislation, all international arbitration rules and many soft law texts. A great many institutions had existing codes of ethics or codes of conduct that were often annexed to international treaties. Furthermore, the World Trade Organization had a code of conduct for inter-State dispute settlement, Accordingly, a review of the existing hard and soft law texts, national legislation and institutional rules governing an arbitration would not be a good use of the Commission's time and resources. While issues of conflict of interest, largely relating to arbitrators additionally acting as counsel in investment arbitration, had rightly attracted criticism, they did not justify general work on a code of ethics.

50. **Mr. Komarov** (Russian Federation) said that the issue of ethics in international arbitration was timely, since questions about the ethics of arbitral tribunals were being raised with increasing frequency. In previous decades, it had been routine for questions to be raised about an arbitrator's compliance with ethical demands. The independence and impartiality of arbitrators were required by all legislation. However, a few documents, mainly soft law documents, approached those concepts on the basis of cultural considerations that influenced the situation of arbitrators. In international arbitration cases involving participants from different countries and when intercultural discord was the issue, arbitrators could face different ethical requirements. In such cases, a code of ethics would be desirable to unify ethical requirements and prevent cultural differences from influencing the overall situation. Any such code should not be binding, but rather should recommend ethical standards to which all arbitrators in international arbitration should be held. The work of UNCITRAL would be very useful in that regard and should proceed, bearing in mind the potentially sensitive national and intercultural factors that could arise in international arbitration.

51. **Ms. Pierotic** (Chile) said that work on ethics in international arbitration was particularly relevant in multilateral contexts. Given the existing number of ethical rules, it was necessary to standardize ethical norms in both commercial arbitration and investor-State arbitration. Her delegation supported continued study of the subject by the Secretariat so that Working Group II could take up the topic at a later date.

52. **Mr. Wang** Jianbo (China) said that the idea of code of conduct for international arbitrators was attracting increasing attention. In the absence of a unified standard, UNCITRAL could carry out work to ensure the independence and impartiality of arbitration. The ethics of arbitrators should be emphasized when arbitrators faced external pressures, since it was crucial for them to be able to set aside their personal interests and resist the influence of their ties to specific countries in order to make the correct

legal decisions. The Secretariat should continue to work on the topic.

53. **Ms. Bensaoula** (Observer for Algeria) said that a code of conduct for arbitrators was a necessity given the current realities. There was no good reason why UNCITRAL should not develop its own code of conduct for international arbitration. International arbitrators must resist any attempt from any quarter whatsoever to interfere with the aim of influencing their final decision and eschew any exclusionary attitudes. In addition to demonstrating competence, impartiality, loyalty and independence, the arbitrator must not enter into any agreement with or accept the advice of a party with respect to professional fees. Any violation of the code of conduct would damage the arbitrator's reputation, but should also result in a sanction such as forfeiture or reduction of fees or being removed from the list of arbitrators.

54. **Mr. Alcott** (American Bar Association) said that it would be extremely useful for Working Group II and the Commission to address the issues discussed in the context of the standards governing arbitrators and the standards governing counsel and the parties they represented. The many existing ethical codes presented a problem rather than a solution as it was unclear which would apply in a particular case.

55. **Mr. Hamamoto** (Japan) said that, while the issue of ethics in international arbitration was interesting and important, it was unclear whether the Commission should study it given the volume of work that had already been carried out by other bodies.

56. **Ms. Mackielo** (Argentina) agreed that the number of existing instruments was a problem as it would not necessarily be clear which would be applicable. Since there were a number of unresolved questions, UNCITRAL should continue its work on the topic.

57. **The Chair** said that it remained unclear whether the scope of a code of ethics would concern only arbitrators or whether it would extend to lawyers and the parties involved in an arbitration. The questions of whether a potential code would consist of either substantive rules or conflict rules, and to what extent cultural diversity would be reflected also remained unresolved. Similarly, given the large number of existing regulations and soft law rules on the issue of conflict of interest, opinion differed as to whether UNCITRAL should develop its own additional set of rules or combine the existing rules into an overarching set of rules on conflict of interest.

Presentation of a research paper on the Mauritius Convention on Transparency in Treaty-based Investor-State Arbitration as a possible model for further reforms of investor-State dispute settlement (A/CN.9/890)

58. **Ms. Montineri** (Secretariat) said that, in 2014, the Commission had prepared the Mauritius Convention with the aim of applying the UNCITRAL Rules on Transparency in Investor-State Arbitration to existing investment treaties. Questions had then been asked about use of the approach of the Mauritius Convention for further reforms, and the Secretariat had therefore considered the topic in cooperation with the Center for International Dispute Settlement (CIDS), which had produced its own report (available on the UNCITRAL website). Document A/CN.9/890 did not contain any recommendations for possible future work as that would require the Commission to take a separate decision on whether reforms were to be undertaken on a multilateral basis.

59. **Mr. Potestà** (Center for International Dispute Settlement) said that CIDS had prepared a report, available on the UNCITRAL website, intended to provide a framework for discussion should States decide to consider reforming investor-State arbitration. The report offered a roadmap for possible reform initiatives aimed at either replacing or supplementing the investor-State arbitration regime with a permanent investment tribunal and/or an appeals mechanism for investor-state arbitral awards. As States and both governmental and non-governmental organizations were exploring avenues for reforming the investor-State arbitration regime, the CIDS paper aimed to identify the main legal challenges and potential differences that might arise in designing such a tribunal or mechanism.

60. The report presented the background to the criticism of investor-State arbitration that had developed over the alleged lack of impartiality and accountability of adjudicators, the lack of transparency of the procedure, and the absence of consistency in the case law, all of which had triggered a growing demand for change from States, international organizations and civil society groups. The report also outlined the main options available to States for the reform of investor-State dispute settlement by referencing the experiences of various international courts and tribunals including inter-State dispute settlement bodies, such as the International Court of Justice or the dispute settlement system of the World Trade Organization, as well as such other dispute resolution mechanisms as the Iran-United States Claims Tribunal and regional courts.

61. The creation of an appeals mechanism for investor-State arbitral awards would maintain most of the basic features of current investor-State arbitration. In contrast, the creation of a permanent investment tribunal with features similar to a court would entail a more radical change to the existing model. With regard to the design of an investment tribunal, the report examined whether such a body would be characterized as arbitral or whether it would be considered an international court, as well as considering which law would govern the proceedings. Enforcement of the body's decisions was also examined in the report.

62. Similar issues were explored with regard to an appeals mechanism for arbitral awards, and consideration had been given to whether some of the objectives that were normally pursued through an appeal could be addressed through alternative reform options, such as preliminary rulings. As each of the options envisaged for the new dispute resolution bodies would have strengths and weaknesses, the report did not seek to provide a best solution but to offer a framework for the discussion by identifying difficulties and outlining potential solutions.

63. The report also addressed how States could extend the new dispute resolution options to their existing and future investment treaties. That could be achieved through development of an opt-in convention model based on the

Mauritius Convention. States might also decide to include the new dispute settlement options in their future investment treaties if they deemed it appropriate.

64. A mechanism based on a multilateral opt-in convention would avoid the situation in which States had to pursue the potentially long and complex amendment procedures set out in many bilateral and multilateral investment treaties. Nonetheless, drafting such a convention would raise a number of treaty-law issues. Elements of flexibility could be inserted into the convention to allow States to modulate their level of involvement in the new reforms. The report therefore reviewed options for reservations and opt-in and opt-out declarations which might accommodate State-specific concerns, such as a State's wish not to abandon investor-State arbitration altogether while retaining the permanent investment tribunal as an alternative option in its treaties.

65. **Mr. Moollan** (Mauritius) said that the subject addressed in document A/CN.9/890 should be added to the list of possible future work for consideration by the Commission. Work should also be carried out to make Governments aware of that area of future work so that UNCITRAL could make an informed decision in 2017 as to whether it should be the Commission's next project.

66. The investor-State dispute settlement system had been widely criticized and a number of developing countries had taken unilateral or multilateral steps to try to reform it. The accuracy of the criticism was irrelevant as the topic had a significant impact outside its field, for example with regard to the Transatlantic Trade and Investment Partnership. Accordingly, the proposal for future work would address multiple issues, including concurrent proceedings, although it would be limited to procedure in order to increase the possibility of a successful outcome. The current favourable confluence of circumstances, with developed and developing countries seemingly having shared interests, augured well for such work, which success in reaching political consensus.

67. UNCITRAL was the right organization to carry out work on investor-State dispute settlement given its experience with the Mauritius Convention. It would be more effective than any other body in building a fair and representative consensus. Work on such a substantive issue would require collaborating with other bodies and the representatives of investors.. The subject was too important and the potential benefits too significant for any party to protect only its own vested interests.

68. While future work would raise significant questions for major institutions, all parties should act in the interest of the broader international dispute settlement system. Roles would need to be found for such institutions and their talents and expertise. Other bodies, such as the Organisation for Economic Co-operation and Development and the United Nations Conference on Trade and Development had already been central to the discussion and would continue to contribute to resolving outstanding questions.

69. While trade negotiators and experts who had already worked on the matter, particularly at the European Commission, were understandably wary of opening up a new front, when the existing problems continued to resist solution; they should, however, beware of creating a new fragmented system, one applicable to the European Union alone, before any effort was made to develop a new multilateral system for all. While success was not guaranteed, the potential rewards were greater than those to be gained by establishing yet another code of ethics for arbitrators with limited application or addressing concurrent proceedings in investment arbitration.

70. **Mr. Medina Mejías** (Bolivarian Republic of Venezuela) said that a consequence of using the existing investor-State dispute settlement system had been the development of a body of international law with few checks and balances and little transparency or consistency. Such shortcomings were a cause of serious concern for many developed and developing countries, and many significant claims had already been brought against various States. Additionally, the problem had been exacerbated by a trend toward "megacases", which could result in previously unimaginable multibillion dollar awards against States, as in the case between the shareholders of the Yukos oil company and the Russian Federation.

71. Consequently, some States had reconsidered entering into investment treaties, or had even denounced treaties; others had developed proposals for a new investor-State dispute settlement system. The European Commission, for example, had proposed the creation of an international investment court to replace the existing dispute settlement mechanisms in all of the European Union's ongoing and future investment negotiations, including the Transatlantic Trade and Investment Partnership.

72. The investor-State dispute settlement system was central to national sovereignty, trade and development, including the development of international law, and it was a crucial subject for the exchange of ideas among Member States within Working Group II. The inclusion of misleading terms, such as the "most-favoured-nation" (MFN) clause, occurring in thousands of bilateral investment treaties and international investment agreements, the majority of which had been signed in the 1990s, needed to be addressed. Most-favoured-nation clauses were dangerous and should be avoided owing to the possibility of creating unintended protections for investors. An MFN clause allowed foreign investors to selectively use provisions from other treaties, as in the two multibillion dollar claims brought by the Swedish energy company Vattenfall against the German Government.

73. Billion dollar claims were becoming standard as, for instance, in Ecuador, where the Government owed over a billion dollars, a very large amount for any developing country, to the multinational oil company Occidental. A reading of the facts of that case indicated that mistakes had been made and a different panel of arbitrators could easily have rendered a different decision.

74. The lack of consistency of decisions, alongside the excessive length of procedures and excessive costs, was among the reasons that structural reform at least was required in the existing investor-State dispute settlement system. The absence of an effective appellate mechanism, for instance, made it impossible to reverse incorrect decisions and sanction incompetent arbitrators, while the

lack of transparency affected the disclosure of third-party funding and conflicts of interests among arbitrators, law firms and their clients. Working Group II would be the right forum to consider reforms and alternatives to the investor-State dispute settlement system, and it should take up the topic the following year.

The meeting was suspended at 12.15 p.m. and resumed at 12.50 p.m.

75. **Mr. Schoefisch** (Germany) said that the report of the Center for International Dispute Settlement provided excellent preliminary reflections on reforming the investor-State dispute settlement system. Preliminary work on the topic could continue and a report should be presented to the Commission for discussion in 2017. That report should outline a coherent and workable reform of the investor-State dispute settlement system, enjoying support from a majority of UNCITRAL members and other interested States. It should also explain why UNCITRAL was the appropriate forum for such a complex reform of investment treaties. It was unclear whether all of the proposed changes to existing investment treaties and significant adaptations envisaged for the ICSID Convention were realistic. There were various unresolved questions including how the available options could be combined sensibly and without contradiction or duplication in order to ensure the functioning of the proposed permanent investment tribunal and appeals mechanism; where a permanent investment tribunal should have it seat; and how the recognition and enforcement of judgements would be secured, for example under the New York Convention system or special regulations. A new report would have to provide answers to such questions on the basis of a convincing assessment of all available options in terms of their legal and political viability.

76. **Mr. Rangreji** (India) said that the ambitious proposals described in the CIDS report would not only involve work on a permanent institutional framework for investor-State arbitration, but would also have repercussions for other existing dispute settlement procedures and mechanisms. Nonetheless, UNCITRAL was the right body to undertake a study on the subject, which should be placed on the Commission's agenda for 2017.

77. **Mr. Von Walter** (Observer for the European Union), responding to the representative of Mauritius, said that the European Union had also proposed the idea of a multilateral approach to reforming investment dispute settlement. It had also been explicitly outlined in the concept paper "Investment in TTIP and beyond — the path for reform", which described the European Union's ultimate goal of establishing a multilateral, global dispute settlement system that could replace existing bilateral dispute settlement systems. Furthermore, in the European Union's free trade agreements with Canada and Viet Nam, the contracting parties had a clear commitment to work with other interested countries to create a multilateral investment court.

78. Such commitments were taken seriously and the report of the Center for International Dispute Settlement had provided useful information on the legal and technical aspects of such a project, while also confirming that the Mauritius Convention approach could be used to reform investment dispute settlement further. Any project should adopt an inclusive approach and draw on the expertise of countries, experts and institutions. A number of issues needed to be resolved, including how an inclusive approach could be developed; how adjudicators should be appointed in such a setting; and how a review system, whether at the review, appeal or preliminary ruling stage, could be established. An informal intergovernmental dialogue should be held between all interested countries and governments before a decision was taken on whether the Secretariat or Working Group II should carry out such work.

79. **Mr. Schnabel** (United States of America) said that no more of the Secretariat's resources should be devoted to the subject. As Working Group II had focused on transparency and conciliation, UNCITRAL had not been able to deal with commercial arbitration issues, except to update the UNCITRAL Notes on Organizing Arbitral Proceedings. As other organizations were conducting work on investor-State arbitration, UNCITRAL should explore topics related to commercial arbitration, such as choice-of-law issues concerning ethics in international arbitration or cooperation with the Swiss Arbitration Association.

80. Furthermore, document A/CN.9/890 made it clear that any work on projects such as a dispute settlement body or an appellate mechanism would involve a significant institutional design component to create an organization for those types of functions. Such a project did not seem suitable for UNCITRAL, especially as it was unlikely that any body that might be created would operate under the auspices of UNCITRAL.

81. **The Chair** said that it had been suggested that other organizations could collaborate with UNCITRAL on such a project and asked which other parties the United States delegation would choose in that instance.

82. **Mr. Schnabel** (United States of America) said that the candidates for such work would include the United Nations Conference on Trade and Development and the Organisation for Economic Co-operation and Development, as well as the many other States and stakeholder organizations that had carried out work on the issue. Identifying such parties would be a key issue going forward. Given the discussions on the matter under way elsewhere, UNCITRAL should focus on other topics.

83. **The Chair** asked if the United States delegation could consider the possibility of UNCITRAL partnering with another organization that would take the lead.

84. **Mr. Schnabel** (United States of America) said that it was difficult to speculate on what specific type of involvement might be appropriate, although the Secretariat should continue to be informed of what other organizations were doing on topics relevant to UNCITRAL.

The meeting rose at 1.05 p.m.

Summary record of the 1039th meeting, held at Headquarters, New York, on Friday, 8 July 2016, at 3 p.m.

[A/CN.9/SR.1039]

Chairperson: Mr. Schneider (Vice-Chair) (Switzerland)

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In the absence of Mr. Kenfack Douajni (Cameroon), Mr. Schneider (Switzerland), Vice-Chair, took the Chair.

The meeting was called to order at 3.25 p.m.

Agenda item 5: Consideration of issues in the area of arbitration and conciliation (*continued*)

(d) Possible future work in the area of arbitration and conciliation (*continued*) (A/CN.9/890)

1. **The Chair** recalled that the three proposed areas of the Commission's future work in the area of international arbitration and conciliation were concurrent proceedings, a code of ethics for arbitrators and possible work on the reform of the investor-State dispute settlement system. He invited the Commission to resume its consideration of the note by the Secretariat presenting a research paper on the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (Mauritius Convention) as a possible model for further reforms of investor-State dispute settlement, contained in document A/CN.9/890.

2. **Mr. Wang** Jianbo (China) said that his delegation supported the inclusion of the reform of the investor-State dispute settlement system in the future work of the Commission. There were shortcomings in the existing system that must be overcome, but further work was needed to determine whether the solutions set out in the research paper were appropriate.

3. **Mr. Fornell** (Ecuador) said that an appeal mechanism and a permanent investment tribunal should be established and, therefore, the Commission's future work should include the matter of investor-State dispute settlement. However, the focus should not be solely on the Mauritius Convention, given that not all States were parties to that instrument.

4. **Mr. Apter** (Israel) said that his delegation had not yet determined its position on a multilateral investment tribunal or appeal mechanism. The Commission could potentially help to bring the necessary inclusiveness to the investor-State dispute settlement system. However, the reform of the system might be beyond the capacity of the Commission to address. He proposed that the topic should remain on the Commission's work programme for another year in able to enable Member States to take a more informed and considered decision at the fiftieth session of the Commission.

5. **Ms. Mackielo** (Argentina) said that the reform of the investor-State dispute settlement system was a priority for her country. The Commission's work in that area should address the appointment and transparency of arbitrators and the consistency of decisions. The prestige and membership of the Commission made it the most suitable forum for addressing the matter, but it could work with other relevant organizations. She suggested that delegates could meet to identify the key topics for consideration before the next session of the Commission.

6. **Ms. Pierotic** (Chile) said that the idea of creating a permanent investment tribunal had gained traction in recent years. The Comprehensive Economic and Trade Agreement between the European Union and Canada and the Free Trade Agreement between the European Union and Viet Nam were pioneering initiatives but, in the interest of inclusiveness, it would be better to create a multilateral mechanism. The Commission was therefore the most appropriate forum for work on the reform of the investor-State dispute settlement system. Its efforts could be supported by interested organizations.

7. **Mr. Maradiaga** (Honduras) said that the Commission should take the lead in the matter of investor-State dispute settlement, as it had the capacity to develop an instrument that would meet the requirements of a constantly evolving society.

8. **Mr. Milassin** (Hungary) said that Working Group II (Arbitration and Conciliation) should complete its current work before undertaking any new initiatives. If it took up the matter of the reform of the investor-State dispute settlement system in the future, it should take care to draw a distinction between commercial arbitration and investment arbitration.

9. **Mr. Moollan** (Mauritius) said that it should be noted that the proposal was not that the Commission should operate an investment court but rather that it should lead the process of designing a potential new court. He suggested the Secretariat should be given a broad mandate to work on all three proposed topics so that the Commission would be in a position to make a decision at its next session on whether to mandate Working Group II to undertake work in any of those

areas. It would be useful for the Secretariat to conduct broad consultations with stakeholders and consider the best way to move forward with the project, should it be taken on, in an inclusive manner. A greater amount of preparatory work would be necessary on the reform of the dispute settlement system than on the other two proposed areas of work.

10. **Mr. Bellenger** (France) said that his delegation would support the continuation of the work on the reform of investor-State arbitration.

The meeting was suspended at 3.55 p.m. and resumed at 4.25 p.m.

11. **Ms. Montineri** (Secretariat) said that, as a result of the consultations during the suspension, agreement had been reached to mandate the Secretariat regarding preparatory work on the possible reform of the investor-State dispute settlement system in the following terms: "The Commission will mandate the Secretariat to review how the project described in document A/CN.9/890 may best be carried forward, if approved as the next topic of future work at the forthcoming session of the Commission, taking into consideration the views of all stakeholders, including how this project may interact with other initiatives in this area and which format and processes should be used. In carrying out this mandate, the Secretariat should consult broadly."

12. **Mr. Mejías** (Bolivarian Republic of Venezuela) proposed replacing the word "stakeholders" with the words "Member States and other stakeholders".

13. **Ms. Dostie** (Canada) said that the term "Member States" excluded observer States and regional organizations with observer status. In response to a suggestion from the Chair, she said that phrase "States and stakeholders" would be acceptable.

14. **Mr. Moollan** (Mauritius) said that the wording of the mandate should not put an emphasis on States, as involvement in the process should be as inclusive as possible.

15. **Mr. Mejías** (Venezuela) said that States should be mentioned to make it clear that while other stakeholders were welcome to participate, the process was primarily an intergovernmental one.

16. **Mr. Schöfisch** (Germany) expressed concern that the Secretariat would not have the capacity to carry out preparatory work on all three topics and that the efforts of the Secretariat would be primarily focused on the investor-State arbitration system even though there appeared to be more support for future work on concurrent proceedings. Any work on concurrent proceedings should differentiate between commercial arbitration and investor-State arbitration.

17. **The Chair** said that the only reason the work of the Secretariat would focus on the investor-State arbitration system was that a significant amount of preparatory work had already been done on the other two topics.

18. **Mr. Sorieul** (Secretary of the Commission) said that the Working Group would complete its current projects before undertaking work on any of the proposed initiatives. The Secretariat was in a position to carry out preparatory work on all three potential topics for future work in the coming year.

19. **Mr. Decker** (Observer for the European Union) agreed that any work on concurrent proceedings should draw a distinction between investment arbitration and commercial arbitration. He suggested that the term "Governments" could be used instead of "States" in the request to the Secretariat concerning the preparatory work on investor-State arbitration reform, in order to include the European Union. However, his delegation did not have a strong view on the matter and would not object to being referred to as a stakeholder.

20. **The Chair** took it that the Commission wished to amend the word "stakeholders" to "States and stakeholders" in the proposed wording for the request to Secretariat concerning the preparatory work for possible work on the reform of the investor-State dispute settlement system.

21. *It was so decided*.

Agenda item 13: Coordination and cooperation (*continued*)

(b) Reports of other international organizations (*continued*)

22. **Mr. Șerban** (International Road Transport Union) said that the Arbitration Court for Transport had been established by the Romanian Association of International Road Transports as a private independent body specializing in the settlement of international disputes concerning transport and transport-related activities. The Court fully applied the UNCITRAL Model Law on International Commercial Arbitration. To further the global promotion of specialized arbitration in the field of transport, it was developing a growing international transport arbitration network through partnerships and agreements with national, regional and international bodies. It also supported the sustainable development of the business environment through public-private partnerships around the world.

Agenda item 21: Adoption of the report of the Commission (*continued*)

Consideration of issues in the area of arbitration and conciliation (A/CN.9/XLIX/CRP.1/Add.6)

23. **Mr. Chan** (Singapore), Rapporteur, introduced document A/CN.9/XLIX/CRP.1/Add.6.

24. **Ms. Montineri** (Secretariat), responding to questions that the Secretariat had received from delegations, said that the unusually formal wording in paragraph 34 was simply intended to enable the Secretariat to access the necessary resources to publish the instrument that would result from the Commission's work on mediation.

25. *Document A/CN.9/XLIX/CRP.1/Add.6 was adopted*.

The meeting rose at 4.45 p.m.

Summary record of the 1040th meeting, held at Headquarters, New York, on Monday, 11 July 2016, at 10 a.m.

[A/CN.9/SR.1040]

Chairperson: Mr. Kenfack Douajni (Cameroon)

Contents

The meeting was called to order at 10.10 a.m.

Agenda item 7: Micro-, small- and medium-sized enterprises: progress report of Working Group I (A/CN.9/860 and A/CN.9/866)

1. **Ms. Clift** (Secretariat), introducing the reports of Working Group I on the work of its twenty-fifth and twenty-sixth sessions respectively (A/CN.9/860 and A/CN.9/866), said that, following its discussion of the documents prepared by the Secretariat on the key principles of business registration, the Working Group had decided to prepare a legislative guide on the subject, without prejudice to its deciding at a later date whether draft legislative provisions or a model law would be more appropriate. It would consider the guide at its spring 2017 session. On the other main focus of its work, namely, the legal issues surrounding the creation of a simplified business entity, it had likewise decided to develop a legislative guide, which would include a discussion of the policy considerations, a commentary and legislative recommendations and which it would consider at its fall 2016 session. The Working Group had also been considering how best to provide an overall context for users of the proposed new texts and of any other texts that might be developed on the subject. It was studying the possibility of preparing an introductory text along the lines of A/CN.9/WG.I/WP.92 that would address issues such as the importance of micro-, small- and medium-sized enterprises (MSMEs) for economic development and the need for a holistic approach to their regulation.

2. **Ms. Malaguti** (Italy), Chair of Working Group I, said that the purpose of the introductory text would be to provide a framework for the preparation of the two legislative guides by the Working Group. Since the Working Group had a broader mandate, it might also address other issues, while taking care not to overlap with the work of other Working Groups; where appropriate, it would explore the possibility of a joint, coordinated approach.

3. **Ms. Fernández** (Chile) recalled that at the recent summit meeting of the Pacific Alliance in Chile, its four member States (Chile, Colombia, Mexico and Peru) had stressed the need for greater financial integration among Latin American countries and, in particular, the importance of broader negotiating mechanisms to finance MSMEs. That would be a prime concern in the coming period, especially for the least developed among them.

4. **Mr. Chan** (Singapore) said that the principles underpinning the work of the Working Group and its intended outcomes were of general relevance. Its title was therefore too narrow and did not reflect its actual work, which was not confined to MSMEs. Its current concern, which was to simplify processes for the establishment of business entities, was crucial and would benefit all business entities, small and large alike. The outcomes would therefore apply not only to MSMEs, which might in any case be expected to become larger and perhaps international in scope.

5. **Mr. Bellenger** (France) said that his delegation continued to be concerned about the scope of the Working Group's work, which should not be confined to establishing a simplified legal status for businesses but should also address the question of individual or single-person enterprises. It had repeatedly raised that question, which had still not been addressed by the Working Group. It would be appreciated if the Secretariat could include as soon as possible consideration of the substantive aspects of the question within the framework of business registration.

6. **Mr. Schnabel** (United States of America) commended the Working Group for its ongoing work on the legislative guides, which needed to be completed as soon as possible; the question of it being allotted additional time for that purpose might usefully be considered. MSMEs were engines of economic growth and job creation in every country, but in the developing world 90 per cent of them operated in the informal sector. It was therefore important to develop an enabling legal environment, particularly as simplified business registration and incorporation would be a gateway for such businesses to enter the formal economy, reach

previously inaccessible markets and compete and seek fair treatment under the law. Benefits would not be limited to the businesses themselves: once in the formal sector, they would be required to pay taxes and comply with labour laws. Moreover, easier start-up laws were conducive to the establishment of new businesses, lower prices and increased product availability.

7. **Mr. Apter** (Israel) said that his delegation welcomed the decision to consider the two proposed draft legislative guides separately. Israel had taken part for the first time in the Working Group's discussions at its most recent session earlier in the year and had noted the low participation of government officials. He called on the Commission to highlight through the Secretariat how crucially important it was that government officials, especially those in charge of company registration, should participate in the discussions, so as to ensure that practitioners could allow countries without company registrars to benefit from their experience.

8. **Ms. Fernández-Tresguerres** (Spain) expressed concern about the lack of coordination between the Working Group and the European Union, which was similarly engaged in efforts concerning a simplified business entity. Her delegation remained favourable to the preparation of a legislative guide rather than a model law; such a guide would be less invasive and would not affect the rights-based systems of European Union States, where a notarial tradition prevailed. What was important was to work in coordination with the European Union with regard to currency controls and statistics and to guard against any increase in costs.

9. **Mr. Maradiaga** (Honduras) said that countries like his own, characterized by a precarious economic situation and very high unemployment, set great hopes on the development of an instrument on business registration. Whether it took the form of a legislative guide or a model law, what was important was that it should give momentum to the development of MSMEs and ensure financing for them, particularly in view of the multiplier effects that would thereby be generated.

10. **Mr. Chandra** (India) said that his Government supported partnerships with MSMEs; they were a crucial source of employment opportunities at comparatively low capital cost and thus played an important role in the industrialization of rural areas, thereby ensuring a more equitable distribution of national income and wealth. His delegation trusted the Secretariat to resolve any problems of overlap with the other Working Groups, in particular in the area of insolvency law.

11. **Ms. Damayanti** (Indonesia) said that MSMEs were the backbone of her country's economy. Her delegation hoped therefore that the Working Group would define their scope, including their registration procedure, in a way best suited to promote their business activities.

12. **Mr. Plakhov** (Russian Federation) said that, judging by States' comments, Working Group I had been right to focus on issues of business registration and a simplified business entity, rather than seeking to address the many issues arising under the broad rubric of MSMEs. He commended the Italian delegation for so ably steering its work.

13. **Ms. Lephilibert** (Thailand) welcomed the progress made in the work to simplify business registration, which was particularly useful for MMEs in her country. Thailand was currently revising its bankruptcy law in the light of that work in order to simplify the debtor process. Once the Working Group had completed its work on the subject, it would be useful to develop a linkage with the work of Working Group V on insolvency law.

14. **Mr. Sorieul** (Secretary of the Commission), responding to the comments made regarding the mandate and title of Working Group I, said that, as a matter of convenience, it was referred to as the Working Group on MSMEs but its official title was Working Group I. It was concerned essentially with matters of corporate law, as had been suggested by the representative of Singapore. The question whether that should be specifically stated or, following the comments made by the representative of France, that there should be an explicit reference to single-person enterprises could be left to the discretion of the Working Group itself as any such additions would remain in parentheses, outside the official title.

15. **Ms. Escobar Pacas** (El Salvador) said that her delegation supported the Working Group's work, which was very important to her country, particularly for the development of legal standards, as reflected in its recent adoption of a law on MSMEs, which included a section on business registration.

Agenda item 8: Consideration of issues in the area of electronic commerce

(a) Progress report of Working Group IV (A/CN.9/863 and A/CN.9/869)

(b) Other work: report of the colloquium on identity management and trust services (A/CN.9/856 and A/CN.9/891)

16. **Mr. Lee** (Secretariat), introducing the reports of Working Group IV on the work of its fifty-second and fifty-third sessions respectively (A/CN.9/863 and A/CN.9/869), said that the Working Group was currently considering the preparation of a Model Law on Electronic Transferable Records, focusing on domestic aspects of the use of such records, equivalent to paper-based transferable records. The international aspects and the use of transferable records existing only in electronic environment would be dealt with at a later stage. It was expected that the draft Model Law together with an explanatory note would be submitted for the Commission's consideration at its next session in 2017.

17. At its forty-eighth session, the Commission had instructed the Secretariat to conduct preparatory work on identity management and trust services, cloud computing and mobile commerce for further discussion in the Working Group, following the current work on transferable records. The Commission had before it a note by the Secretariat on legal issues related to identity management and trust services (A/CN.9/891), summarizing discussions in the UNCITRAL colloquium on the subject held in Vienna in April 2016. Work on the contractual aspects of cloud computing had also begun at the expert level on the basis of a proposal submitted at the Commission's last session (A/CN.9/856). States and

other entities were invited to share with the Secretariat their expertise and other resources in respect of cloud computing. The Commission might wish to confirm the decision to take up work in the fields of identity management and cloud computing as and when the Working Group completed its work on the draft Model Law, which was expected to be finalized at its next session.

18. Work was continuing in the field of paperless trade, including the legal aspects of electronic single window facilities, conducted in cooperation with the United Nations Economic and Social Commission for Asia and the Pacific (ESCAP). UNCITRAL had participated in the preparation of the Framework Agreement on Facilitation of Cross-border Paperless Trade in Asia and the Pacific, adopted by ESCAP at its seventy-second session, and had ensured that the final text was consistent with the principles contained in UNCITRAL texts on electronic commerce. The Framework Agreement, which would be open for signature in October 2016 and would enter into force upon its ratification by five member States of UNESCAP, was designed to complement the World Trade Organization's Trade Facilitation Agreement.

19. **Ms. Sabo** (Canada) welcomed the progress being made on the draft Model Law and the expected timetable for the Commission's work in the area of electronic commerce. That had implications for the priorities and efficiency of its work. The Working Group might wish to use its spring session to focus on the more mature topic of cloud computing and thus allow the Secretariat more time to conduct preparatory work on issues of identity management, which were indeed important in relation to electronic commerce, whether domestic or cross-border. It was not clear, however, what specific work might be undertaken in that area.

20. **Mr. Bellenger** (France) said that his delegation unreservedly supported the upcoming work on issues of identity management and trust services. Those issues were crucial and had arisen repeatedly in the course of the Working Group's current work, where they had proved to be a missing part of the draft Model Law. It would therefore be desirable for such work to be initiated at the earliest opportunity. Necessary documents would soon be prepared. Since it was expected that meeting time would be made available, such time might profitably be allotted to the Working Group so that it could begin the far-reaching work that would be needed on those issues.

21. **Mr. Apter** (Israel) said that Israel stood ready to share its expertise in the area of cloud computing and would appreciate information on the consultations already begun in that regard. It might be useful to seek information from States through a short questionnaire on their relevant legislation and practices, along the lines of the questionnaire used for Working Group II on conciliation and settlement, which had received many responses. His delegation looked forward to the development of a model law or guidelines on identity management and had no objection to the allotment of extra time for that purpose. As to whether work should begin first on identity management or cloud computing, that could be decided in the light of the state of preparation of the two issues. One possibility would be to hold a preliminary discussion on both issues at the February meeting in order to determine their relative maturity so that work could begin accordingly in 2017.

22. **Mr. Chan** (Singapore) said that his delegation appreciated the Secretariat's support for Working Group IV and the Working Group itself: it had set an example to other UNCITRAL Working Groups through its professionalism and mastery of the issues and the efficiency of its work, remaining well within the time frame allotted for electronic transferable records. With regard to future work on the two issues of identity management and cloud computing, already begun by the Secretariat, their order of priority could be left to the Working Group to determine. The deciding factor should not be interest but rather need; nor should the matter be decided on the basis of the comparative state of preparation of the two issues. It would be useful for the Secretariat to make an assessment of the environment to be regulated in order to determine where there was the most pressing need for rules to be developed.

23. **Mr. Schnabel** (United States of America), noting that, while the Working Group was expected to complete its work on the draft Model Law on Electronic Transferable Records soon, it would still be necessary to prepare an accompanying commentary. His delegation would support work by the Working Group on such a commentary parallel to its taking up a new topic. As for identity management and trust services, it was important to distinguish between the two topics. His delegation continued to support work by the Commission in the area of identity management, which had become a critical requirement for most substantive electronic commerce transactions and was also a foundational requirement referred to in UNCITRAL texts on electronic commerce but had yet to be addressed. Identity management was also a subject of legislative efforts across the globe and was therefore an appropriate topic for work by the Commission. Before undertaking any normative work in that area, the Working Group should analyse existing relevant law, including UNCITRAL instruments, so as to be in a position to recommend specific subtopics of identity management on which particular work would be required. The Commission could then discuss and approve a specific and focused mandate on the topic, which was currently lacking. His delegation believed that any work on trust services should be deferred. It supported a renewal of the request made at the Commission's forty-eighth session to the Secretariat to compile information on cloud computing.

24. **Mr. Nawana** (Sri Lanka) said that since 2006, Sri Lanka had legislation on electronic commerce in place, which was currently being updated in line with the United Nations Convention on the Use of Electronic Communications in International Contracts, the primary objective of which was to ensure sustainable development while preserving the global environment. Developing countries like Sri Lanka needed technical assistance in incorporating electronic commerce into their development agenda. His delegation consequently urged the Commission to make robust efforts to extend its technical cooperation to strengthen electronic commerce as appropriate, particularly in developing countries.

25. **Mr. Maradiaga** (Honduras) said that his delegation had been closely following the work on electronic transferable records and look forward to its completion. The draft Model Law was indeed of particular interest to Honduras, which had already adopted a number of laws relating to electronic commerce. It would be appreciated if the Secretariat could determine priorities for the Working Group's future work.

26. **Mr. Chandra** (India) said that the draft Model Law on Electronic Transferable Records was one more example of the Commission's important contribution in the area of electronic data exchange and would help to achieve the goals of increased speed and accuracy and lower business costs. India had already enacted a law on direct benefit transfers and electronic procurement and was currently seeking to establish electronic record interoperability through the introduction of administrative guidelines. His delegation now looked forward to the Secretariat's future work on cloud computing and identity management, with a particular focus on privacy-related laws.

27. **Ms. Castillo Aransaenz** (Observer for Peru) said that since 2000 her country had in place a digital identity platform operated by an autonomous technical body responsible for protecting the digital identity of its citizens, particularly in the context of cross-border transfers. Peru could offer related know-how and technical assistance if so required and would be happy to provide the Secretariat and the Commission with drafts of the laws it was currently developing in that connection. It attached particular importance to the principle of interoperability between States.

28. **Mr. Fernández Valoni** (Argentina) welcomed the progress made in developing the draft Model Law on Electronic Transferable Records while noting that his delegation would seek further discussion regarding the concept of good faith and its inclusion in article 3, on which it reserved its position. Turning to the future work of the Commission, he said that cloud computing was a new business model that deserved to be studied by Working Group I, particularly in terms of its impact. As for the topic of identity management, it was to be hoped that the Working Group would seek to establish a legal framework which, if applied uniformly, would help to promote the development of electronic commerce. Careful attention must be given in that context to the matter of privacy rights on the Internet.

29. **Ms. Sabo** (Canada), responding to comments on the importance of privacy issues in relation to identity management, said that the Commission had a particular mandate, which lay in the area of international trade law. It was important that the Working Group should not exceed that mandate; that would be a difficult in the context of identity management. The challenge for the Working Group would be to work on the topic without touching on privacy issues.

30. **Ms. Malaguti** (Italy) said that the topics of identity management and cloud computing were compatible and could be taken forward together. In any case, the Secretariat was currently drafting preparatory documents on both topics and, once those documents were before the Commission, priorities could be discussed in terms of need and interest, and also of efficiency.

31. **Ms. Damayanti** (Indonesia) said that a number of technical issues still needed to be discussed before an agreement could be reached on the draft Model Law.

32. **Mr. Sorieul** (Secretary of the Commission) said that the Secretariat was, of course, giving priority to the completion of work already begun and that the draft Model Law should consequently be placed before the Commission at its next session in 2017. With regard to its future work, the Secretariat had already begun working on the two new topics of identity management and cloud computing, and expected to continue doing so throughout 2017, under what he hoped would continue to be a flexible mandate from the Commission. It would avail itself of every means for that purpose, including the compilation of information on existing laws; the use of a questionnaire might be envisaged, but it was too early to say. In the past, the Secretariat had found that questionnaires sometimes gave mixed results. On the question of priorities, notably in terms of a possible need, and also in the light of feasibility, he asked the Commission to reserve its position until a higher degree of certainty had been achieved. As for the use to which any possible additional time might be put, that might best be considered when the Commission came to discuss more generally the priorities to be assigned to the work of the various Working Groups. Concerning the possibility of technical assistance for developing countries, and also the offers of such assistance from other countries, and having regard to the chronic shortage of resources available to the Commission, he suggested that the matter be left in abeyance until the Secretariat's technical assistance programme was discussed.

33. **Mr. Apter** (Israel) requested clarification as to how the work on cloud computing would be developed.

34. **Mr. Sorieul** (Secretary of the Commission) said that, unless otherwise instructed, the Secretariat would proceed in the usual manner, by convening meetings of informal groups of experts according to a timetable yet to be determined. Delegations would be duly informed of the meetings.

Agenda item 9: Insolvency law: progress report of Working Group V (A/CN.9/864 and A/CN.9/870)

35. **Ms. Clift** (Secretariat), introducing the reports of Working Group V on the work of its forty-eighth and forty-ninth sessions respectively (A/CN.9/864 and A/CN.9/870), said that, on the first of the three topics on which it was currently working, "Facilitating the cross-border insolvency of multinational enterprise groups", the Working Group had agreed on a set of key principles and the structure of a draft text consolidating the issues addressed through the incorporation of a set of articles on cooperation and coordination based on part three of the UNCITRAL Legislative Guide on Insolvency Law, together with provisions facilitating the development and recognition of a group insolvency solution and the treatment of foreign claims in accordance with applicable law. She recalled that, on the topic of recognition and enforcement of insolvency-related judgements, a text had been developed that would not be referred to the Commission for finalization and approval pending the further development of work on

enterprise groups, mainly because of further obligations that might be added to the text. The Working Group had also considered three drafts of a model law on its third topic, "Obligations of directors of enterprise group companies in the period approaching insolvency". Steps had been taken in that connection to coordinate closely with the work of the Hague Conference on Private International Law, including through attendance at the meeting of its Special Commission on the Judgements Project, held in June 2016. A number of articles being developed in the Hague Conference text on judgements had been included in the UNCITRAL draft model law, but as insolvency was not covered by the Hague text, there were several points of departure for the Commission's work on those provisions. The Secretariat would continue to monitor the work of the Hague Conference as it proceeded to develop its judgements text.

36. Noting that considerable support had been expressed in the Working Group for work on the insolvency of MSMEs, she drew the Commission's attention to paragraph 87 of document A/CN.9/870, which provided possible wording aimed at clarifying its mandate in that connection. It might be appropriate for the Secretariat to prepare in 2017 a note summarizing work on the subject carried out by other international organizations, in particular the International Monetary Fund and the World Bank, as well as a number of States, such as Thailand. Its purpose would be to indicate to the Working Group how it might move forward in its work on insolvency. As for the possibility of a colloquium on the feasibility of negotiating a convention on selected issues of cross-border insolvency, the proposal to that effect had been withdrawn; the Secretariat was nevertheless continuing to study the issue informally, subject to constraints of time and resources.

37. **Mr. Schnabel** (United States of America), expressing strong support for the work of Working Group V, said that the development of legal provisions on enterprise groups could have a significant economic impact as most large cross-border insolvency cases involved groups, while the development of a model law on recognition and enforcement of insolvency-related judgements would help to reduce duplicative and wasteful relitigation of issues in such cases. Both topics were complex and involved difficult issues owing to the different approaches considered appropriate in the different legal cultures. His delegation welcomed the inclusion of relevant aspects of MSMEs in the Commission's work on insolvency issues in view of their significant role globally and supported the proposed clarification of the Working Group's mandate in that regard. The Working Group should give priority to determining what kind of instrument would be most likely to ensure that the end product of its work on the topic merited the resources expended on it. As for the withdrawal of the proposal to hold a colloquium on the feasibility of an international convention in that area, and given that no State had ever asserted that the development of a binding treaty would make any difference to its own adoption of the legislative approach embodied in the proposed model law, there would indeed appear to be good grounds for setting the proposal aside for the time being, with the possibility of reconsidering it later if deemed appropriate.

38. **Ms. Sabo** (Canada) said that Working Group V had made commendable progress on a particularly demanding set of topics. Her delegation supported the proposed clarification of its mandate and welcomed the coordination with the work of the Hague Conference on Private International Law relating to the recognition and enforcement of judgements. The Commission should continue to follow that work closely as it was essential to ensure coordination between the respective texts, even though the UNCITRAL text would not be binding. The idea of a colloquium on the feasibility of a convention was premature. While it was not a priority, the Secretariat might wish, nevertheless, to pursue the matter informally by collecting useful information or organizing expert meetings.

39. **Ms. Morris-Sharma** (Singapore) said that, as a recent member of the Working Group, Singapore looked forward to engaging in particular with the topics on recognition and enforcement of insolvency-related judgements and facilitating the cross-border insolvency of multinational enterprise groups. His delegation supported the revised mandate while reiterating the importance of a clear definition of MSMEs.

40. **Mr. Bellenger** (France) said that, while there was agreement on the progress made by Working Group V, there appeared to be several schools of thought as to the direction in which it should proceed. Caution was therefore in order. His delegation shared the view that, for the time being, it was not advisable to seek to develop a convention on international insolvency issues. It supported the clarified mandate proposed for the Working Group.

41. **Ms. Lephilibert** (Thailand) said that her delegation remained committed to working in the Working Group, especially in regard to the recognition and enforcement of insolvency-related judgements. Thailand was currently revising its Bankruptcy Act in the light of the UNCITRAL Model Law on Cross-border Insolvency. She emphasized the importance of continuing to coordinate with the ongoing work of the Hague Conference on the recognition of foreign judgements in commercial matters.

42. **Ms. Sender** (Observer for the Hague Conference on Private International Law) expressed appreciation of the efforts to guard against any overlap or gaps in the work of the Hague Conference to develop a convention on recognition and enforcement of judgements in civil and commercial matters and the UNCITRAL work on a model law on the recognition and enforcement of insolvency-related judgements. The Hague Conference welcomed the representation of UNCITRAL at its meetings and would continue its efforts to maintain its fruitful cooperation with the Commission.

43. **Mr. Apter** (Israel) noted the positive developments in the work of the Working Group and stressed the importance of continuing coordination with the work of the Hague Conference.

44. **Ms. Escobar Pacas** (El Salvador) joined in commending the Working Group for the work it had carried out and thanked the Secretariat for producing documents that helped States to grapple with the difficult issues under consideration. El Salvador was following the work on

insolvency with particular interest as it was currently developing a law on insolvency with the support of the World Bank Group. Her delegation welcomed the inclusion of MSMEs in the Working Group's mandate for insolvency issues.

45. **Ms. Fernández** (Chile) said that the work of the Working Group was also of particular interest to Chile, which had adopted a bankruptcy law that incorporated a number of its norms. Coordination with the work of the Hague Conference was important not only to ensure complementarity with the work of the Commission but also, as had been noted, to guard against any gaps.

46. **Ms. Clift** (Secretariat), responding to comments about possible work on an insolvency convention, said that it remained to be seen what time and resources might be available to the Secretariat within the limits of its current work programme. The clarification of the Working Group's mandate regarding MSMEs was welcome and would allow the Secretariat to start exploring the topic in 2017 with a view to determining how it might go forward. As it followed the Working Group's efforts to draft a model law on the recognition and enforcement of insolvency-related judgements, the Secretariat would continue to coordinate with the work of the Hague Conference to develop a convention on foreign judgements. In particular, it hoped to attend the next meeting of the Special Commission on the Judgements Project in 2017.

47. The enterprise groups topic had proved particularly difficult in terms both of approach and of the policy goals that might be sought by a draft model text. There was now a firm basis for developing a text and moving forward towards a draft model law for the next session of the Working Group. There appeared to be agreement on the direction of the text and how it fitted in with other UNCITRAL texts on cross-border insolvency. Efforts would therefore focus on the development of a draft model law, while options would remain open.

The meeting was suspended at 11.55 a.m. and resumed at 12.40 p.m.

Agenda item 10: Technical assistance to law reform

(a) General (A/CN.9/872, A/CN.9/874, A/CN.9/882, Add.1 and Add.1/Corr.1, and A/CN.9/883)

48. **Mr. Lemay** (Secretariat) said that the Secretariat's continuing ability to respond to requests from States and regional organizations for technical cooperation and assistance depended on the availability of funds to cover the associated costs. Despite the Secretariat's efforts to seek new donations, the funds available in the Trust Fund for UNCITRAL Symposia were limited. Accordingly, requests for technical cooperation and assistance activities were carefully weighed and were increasingly offered on a cost-share or no-cost basis. The Commission might wish the Secretariat to continue exploring alternative sources of extrabudgetary funding, in particular through permanent missions and other possible public and private sector partners. The Commission might also wish to reiterate its appeal to all States, international organizations and other entities to consider making contributions to the Trust Fund for UNCITRAL Symposia, if possible in the form of multi-year contributions or specific-purpose contributions in order to facilitate planning and meet the increasing number of requests for technical cooperation and assistance activities.

49. The Commission might wish to express its appreciation to the Government of the Republic of Korea and the Government of Indonesia for contributing to the Trust Fund since its forty-eighth session, again to the Government of the Republic of Korea for contributing in respect of the Asia-Pacific Economic Cooperation (APEC) Ease of Doing Business project, to the Government of Austria for contributing to the Trust Fund for Granting Travel Assistance to Developing States Members of UNCITRAL and to organizations that had contributed to the programme by providing funds or hosting seminars.

50. With regard to the UNCITRAL Law Library and web presence and its publications programme, and beyond what was set out in the Secretariat's note on technical assistance (A/CN.9/872), the bibliography of recent writings related to the work of UNCITRAL, available as document A/CN.9/874, reflected the potentially influential academic interest in UNCITRAL texts and was widely used in the law librarian profession. The UNCITRAL Law Library had continued to develop the website in new ways, for example by adding in the preceding year a feature highlighting the Commission's role in support of the Sustainable Development Goals. Furthermore, in line with the Commission's request at its forty-eighth session, the Secretariat had continued to explore social media tools as a means of disseminating information on the work of UNCITRAL. Since its establishment of a microblog and a LinkedIn presence, there had been a nearly 15 per cent increase in users of the UNCITRAL website, attributable in part to the traffic generated by those initiatives. The Secretariat would continue, with the Commission's approval, to experiment with the use of social media, as appropriate.

51. **Ms. Sabo** (Canada) expressed appreciation of the Secretariat's efforts to provide technical cooperation and assistance and its work in connection with the APEC meetings and the development of the UNCITRAL website which, in view of current budgetary constraints on paper publications, was a particularly important communication tool. Her delegation would encourage the Secretariat to continue looking for alternative sources of funding, while exercising its good judgement as to where funding could be appropriately received and where it might raise questions.

52. **Mr. Schnabel** (United States of America) likewise commended the Secretariat for its detailed reporting and technical assistance activities over the preceding year and, particularly, for its continued cooperation with APEC. His delegation looked forward to the Secretariat's participation in the forthcoming APEC workshop on supply chain financing sponsored by the United States in Lima, Peru; that would be a further opportunity to highlight the importance of UNCITRAL texts on cross-border trade. The Commission should reaffirm its support for the Secretariat's action to expand cooperation in promoting the implementation of UNCITRAL instruments in APEC member economies. His delegation supported its efforts to raise the visibility of those instruments and commercial law reform generally within the

United Nations system through the work on a guidance note on strengthening the United Nations support to States, upon their request, to implement sound commercial law reforms (A/CN.9/883) and welcomed the incorporation of States' comments into the draft text. It might be appropriate for the Commission to endorse the text of the draft.

53. **Mr. Chan** (Singapore) expressed appreciation to the Secretariat for its assistance in organizing consultations on the draft Model Law on Electronic Transferable Records. The feedback thereby obtained from people who would be directly using the text would be valuable in finalizing the draft at the next session of the Working Group.

54. **Mr. Apter** (Israel) added his delegation's voice to the expression of thanks for the work of the Secretariat and expressed the hope that it would continue to explore new ways of making the Commission's work more widely known. One way of raising its visibility would be online updates, in particular upon the completion of work on individual topics and the final adoption of texts by the Sixth Committee and the General Assembly.

55. **Mr. Sorieul** (Secretary of the Commission) said that the Secretariat welcomed the support for and trust in it expressed by UNCITRAL members and recognized the need for wider dissemination of information about the Commission's work, particularly in developing countries, which could benefit significantly from it and which all too often remained unaware of its activities. A press release concerning the Commission's adoption of three texts in the preceding two weeks had already been issued in Vienna and appeared on the UNCITRAL website. It should be understood in that connection that model laws and other normative texts were adopted by the Commission, whose decisions were sovereign and final. The General Assembly took note of and expressed support for the Commission's work, to which it lent its prestige. The situation was different in regard to draft Conventions prepared by the Commission: they were either referred to a diplomatic conference or adopted directly by the General Assembly. That being said, the Secretariat would continue to make every effort to give maximum publicity to the decisions of the General Assembly regarding the work of UNCITRAL.

56. On the question of technical cooperation and assistance to Member States, the rather disastrous situation of the two UNCITRAL Trust Funds allowed the Commission to respond only partially to requests, helping either with travel costs or with subsistence costs but not with both. Indonesia was the only country that contributed regularly to the Trust Fund for Symposia, which was almost depleted, while for several years the only country that had contributed to the Trust Fund for Travel Assistance was Austria, through an annual contribution. The Secretariat extended its thanks to those two donor countries and to recipient countries that had agreed to co-financing arrangements. The Secretariat was continuing to seek alternative sources of financing while indeed remaining aware of the need for prudence.

The meeting rose at 1 p.m.

Summary record of the 1041st meeting, held at Headquarters, New York, on Monday, 11 July 2016, at 3 p.m.

[A/CN.9/SR.1041]

Chairperson: Mr. Kenfack Douajni (Cameroon)

Contents

The meeting was called to order at 3.15 p.m.

Agenda item 14: UNCITRAL regional presence (A/CN.9/877)

1. **Mr. Ribeiro** (UNCITRAL Regional Centre for Asia and the Pacific), introducing the note by the Secretariat on the activities of the Regional Centre (A/CN.9/877), said that the note presented the activities undertaken since the Commission's forty-eighth session in support of international trade law reform in States of the region. The main highlights included the ratification by Viet Nam of the United Nations Convention on Contracts for the International Sale of Goods (CISG), which was expected to be soon followed by similar action by several other States, and the ratification by Sri Lanka of the United Nations Convention on the Use of Electronic Communications in International Contracts (e-CC); the enactment of the UNCITRAL Model Law on International Commercial Arbitration, with amendments as adopted in 2006, by Bahrain, Bhutan, Myanmar, the Republic of Korea and by the Abu Dhabi Global Market jurisdiction in the United Arab Emirates; the enactment of the UNCITRAL Model Law on International Commercial Conciliation in Bhutan and Malaysia; 18 technical assistance and capacity-building activities delivered in 12 States; and four annual flagship events, namely, the UNCITRAL Asia-Pacific Spring Conference, the Asia-Pacific Alternative Dispute Resolution Conference, the UNCITRAL Emergence Conference and the UNCITRAL Asia-Pacific Day. The Commission might also note the Regional Centre's hosting of the first UNCITRAL Asia-Pacific Judicial Summit in October 2015. It had been attended by 40 judges from 18 jurisdictions in the region and had sought to promote the uniform interpretation and application of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

2. The Regional Centre had also hosted the UNCITRAL South Pacific Seminar in September 2015, specifically designed to provide capacity building for the small island Pacific States in the fields of the international sale of goods, electronic commerce and arbitration, as well as a workshop for officials, legal officers and academics of the Democratic People's Republic of Korea on international commercial and investment arbitration, international sale of goods, e-commerce and secured transactions. A conference to celebrate 35 years of the United Nations Convention on Contracts for the International Sale of Goods had been held in Singapore in April 2015 and the Regional Centre had conducted the CISG Asia-Pacific Roadshow 2015-2016 to promote the regional accession, ratification and implementation of the Convention through technical briefings to domestic stakeholders. The Regional Centre had similarly been active in promoting the e-CC Convention, particularly in the light of the Framework Agreement on Facilitation of Cross-border Paperless Trade in Asia and the Pacific, holding workshops and briefings for that purpose in several countries. Moreover, in building and participating in regionally based trade-law alliances and partnerships, the Regional Centre had stepped up its efforts to promote UNCITRAL texts in the context of regional economic integration and cooperation. Such efforts were increasingly focusing on three core areas, namely, integrated trade law reforms, sustainable development goals and aid for trade.

3. He drew the Commission's attention to the academic partnership between the Regional Centre and the Asia-Pacific Law Institute of the Seoul National University for the establishment of a transparency observatory to

monitor Asia-Pacific treaty-based investor-State dispute settlements. Growing regional awareness of the Regional Centre's work was reflected in the success of its internship programme and in the increased number of applications for job openings. There was a strong commitment in the region to trade law reform and, while much of the momentum was occurring under the auspices of the World Trade Organization, a growing number of legal reforms related to the fields of arbitration, contract law, e-commerce, secure transactions and insolvency; States were becoming increasingly aware how they could benefit from the Regional Centre's expertise and capacity-building programmes. In 2012, 15 out of 56 States in the region had introduced legislation based on the UNCITRAL Model Law on International Commercial Arbitration; the number now stood at 20 States and the enactment of additional laws was expected in the current year. Furthermore, following the recent promulgation of the new arbitration law in the Republic of Korea, the region accounted for 40 per cent of all States and 56 per cent of all jurisdictions to have adopted the Model Law. As for the Model Law on International Commercial Conciliation, the region's first recognized enactments had been seen in Bhutan and Malaysia, while the number of States parties to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards had risen by four since 2012, more than doubling the rate of ratification in the previous five years.

4. Later in the year, the Regional Centre's five-year pilot project would be ending; should the Commission so approve, the Centre would pursue fund-raising activities based on its ten-year plan. It would then engage with stakeholders in the Asia-Pacific region in order to evaluate its achievements and lessons learned during that initial period. He urged States to make voluntary contributions towards its future operations. Following the signing in 2011 of the Memorandum of Understanding between the United Nations and the Ministry of Justice and Incheon Metropolitan City of the Republic of Korea, the Secretariat had received an offer from the Republic of Korea to extend its financial contribution for the operation of the Regional Centre, while the Incheon Metropolitan City had offered an annual contribution of $450,000 to the Trust Fund for UNCITRAL Symposia for a further five years. A Memorandum of Understanding had also been concluded between the UNCITRAL secretariat and the Government of the Hong Kong Special Administrative Region of China for the loan of a legal expert to the Regional Centre. Moreover, since the opening of the Regional Centre, the latter's work had been well received and supported by States in the region, as reflected in their increasing requests for technical assistance and capacity-building services. Its ability to meet those requests would depend largely on the contributions of States.

5. **Mr. Choi** Taeeun (Republic of Korea) said that his country had greatly benefited from the UNCITRAL regional presence and support, particularly for developing its arbitration system on the basis of the Model Law on International Commercial Arbitration. Over the past five years, his Government had contributed $2.5 million to the Regional Centre, apart from the provision of premises and other facilities. It was disappointing that the Republic of Korea was still the sole contributor to the project. Its annual contribution of $500,000 had been intended as seed money and not as the only means of financing the Centre's operation. His delegation called on other States in the Asia-Pacific region to actively support and participate in UNCITRAL activities and to contribute financially to the project. His country's Ministry of Justice and Incheon Metropolitan City had decided to extend their financial contribution to the project for a further five years, with, however, a 10 per cent reduction due to the current financial situation. The Republic of Korea remained committed to the Regional Centre and hoped that the seed money it had provided would soon grow into the plant it had wished to nurture five years earlier.

6. **Mr. Chirapant** (Thailand) said that, since its opening in 2012, the Regional Centre had played a significant role in providing Member States with technical assistance for the adoption and promotion of UNCITRAL texts. In the past year, Thailand had cooperated closely with the Centre, in particular by hosting workshops on arbitration, e-commerce and cross-border insolvency. The Foreign Ministry and Ministry of Justice of Thailand were currently working with the Regional Centre to organize a conference in Bangkok under the joint auspices of UNCITRAL and the Association of Southeast Asian Nations (ASEAN). His Government remained committed to supporting the harmonization of international trade law among ASEAN member States, since it would greatly contribute to the promotion of trade and investment in the South-east Asia region.

7. **Ms. Damayanti** (Indonesia) noted with appreciation the efforts of countries and jurisdictions to facilitate and host the activities of the Regional Centre. The Commission should continue to support the Centre's capacity-building and technical assistance services in order to promote and enhance international trade law reform and provide the specific assistance required by individual countries.

8. **Mr. Mita** (Japan) expressed his Government's continuing support for the work of the Regional Centre and its appreciation of the efforts of the Government of the Republic of Korea to facilitate the Centre's work.

9. **Mr. Chan** (Singapore) said that his delegation, too, appreciated the work of the Regional Centre, which had exceeded the initial expectations of the countries in the region, in particular by allowing them to benefit from its expertise in developing their trade laws in line with international norms. The Regional Centre had given significant support to the promotion of development of trade law in Singapore, notably in matters of international commercial arbitration. The many events organized by the Centre in the Republic of Korea were greatly appreciated by his Government, especially the annual spring conference, which had become a regular feature of the international trade law calendar in the region. Singapore looked forward to continuing collaboration with the Regional Centre.

10. **Mr. Kang** Yingjie (China) said that his country, too, at UNOV supported the activities of the Regional Centre and had posted one of its experts to work with it for one year. The Chinese Ministry of Commerce had sent officials to the United Nations Office at Vienna (UNOV) at in order to clarify the future forms of its collaboration with the Commission.

11. **Mr. Kim** (United States of America) said that the Commission's provision of technical assistance and its promotion of trade law reform through its Regional Centre were strongly supported by the United States, which recognized the important role played by the Republic of Korea in the Centre's work. His delegation encouraged the Secretariat to expand such efforts through the establishment of further regional centres in other locations.

12. **Mr. Sorieul** (Secretary of the Commission) said that the Commission might wish to renew its appeal to countries in other regions to continue to explore the possibility of setting up similar UNCITRAL regional centres, bearing in mind that additional resources would be required for that purpose, not only in the regions concerned but also in the International Trade Law Division at UNOV. He reminded delegations in that connection that a note verbale had been circulated, requesting them to rate and make suggestions regarding the Secretariat's support for the Commission's work.

Agenda item 11: Promotion of ways and means of ensuring uniform interpretation and application of UNCITRAL legal texts (A/CN.9/873)

(a) Case Law on UNCITRAL texts (CLOUT)

(b) Digests of case law relating to UNCITRAL legal texts

13. **Mr. Lemay** (Secretariat), introducing the note by the Secretariat on the agenda item (A/CN.9/873), said that the note reported on the performance of the CLOUT system since the last note by the Secretariat in 2015. In the intervening period, 97 new abstracts on the various UNCITRAL texts had been published in 166 issues, bringing the total number of abstracts available in the system, established in 1988, to 1,551. The database also contained information, including the full text of decisions, on a limited number of cases for which abstracts had yet to be prepared; such information would henceforth be regularly available to users prior to the publication of abstracts. All UNCITRAL texts were covered, but CLOUT was especially focused on the United Nations Convention on Contracts for the International Sale of Goods (CISG) and the UNCITRAL Model Law on International Commercial Arbitration (MAL). In addition, the case law from the Western European countries continued to predominate, despite efforts to increase information from underrepresented regions.

14. Following the launch of the upgraded CLOUT database in 2015, there had been more than 30,000 users and, as CLOUT now contained full-text decisions, the Secretariat had begun to make those texts accessible to general users, compensating for the scant resources available by resorting to the services of the United Nations Volunteers programme.

15. With regard to the Digests, the revised CISG Digest had been formatted and was to be published in the six official United Nations languages as an e-book; the Digest on the Model Law on Cross-Border Insolvency was in the process of being finalized.

16. He drew the Commission's attention to the information contained in the Secretariat's note regarding the network of national correspondents, stressing that, following the expiry of the mandate of the current members of the network in 2017, the Secretariat would officially request UNCITRAL member and observer States to appoint and/or reappoint their national correspondents.

17. The note, like previous similar documents, provided a brief but informative commentary on the performance of the UNCITRAL-supported website on the New York Convention, launched in 2012 with the aim of making information gathered in the preparation of the related Guide publicly available.

18. The Secretariat wished once again to draw the Commission's attention to the issue of the scant resources available for CLOUT; with increased support. it should be possible to expand services and publish a greater volume of abstracts. The Commission might wish therefore to reiterate its appeal to Member States to actively support the Secretariat's search for appropriate funding sources at the national level so as to ensure the continued and enhanced performance of the CLOUT system.

19. Replying to the Chair, he explained that CLOUT was a system whereby cases were collected and summaries or abstracts of those cases were made available in a database under each of the UNCITRAL legal texts. The Digests, on the other hand, were essentially analytical compilations of cases that discussed the main points arising therefrom on a thematic basis.

20. **Ms. Sabo** (Canada), noting that CLOUT and the Digests were an important means of promoting uniformity of application of the legal instruments covered, commended the Secretariat for its efforts and ingenuity in finding ways within existing resources, including through the use of volunteers, to make information available. Her delegation encouraged it to continue to develop those tools.

21. **Ms. Escobar Pacas** (El Salvador) wondered about how the information on the Model Law on Electronic Signatures had been collected. Her country had used it as a basis for a law that it had recently enacted, but El Salvador was not listed among the countries that had adopted the Model Law. El Salvador was one of the countries with a national correspondent and, while not participating actively in meetings of the network, it nevertheless followed them closely. Her delegation considered it important to maintain that link with the CLOUT system and looked forward to having its national correspondent reconfirmed.

22. **Mr. Sorieul** (Secretary of the Commission) said that the question of a State's inclusion in the list of those applying particular UNCITRAL instruments would be addressed under agenda item 12. With regard to the network of national correspondents, he recalled that, following the decision to establish the CLOUT database and to publish the related abstracts, the network had been put in place as a means of assisting in that undertaking. As the Secretariat had subsequently found that not all the desired information regarding a country's case law could be obtained solely through the network, States had been informed that they were free to appoint several national correspondents and, in particular, to make each one responsible for a particular UNCITRAL text. In addition to the network, the Secretariat had for several years been stressing the importance of

seeking other partnerships, notably with bar associations and academic bodies in a position to collect relevant case law in each country. The network had thus been supplemented by other information sources and the Secretariat continued to welcome all useful contributions from whatever quarter. The Commission might therefore wish to renew its appeal to States to pursue all possible avenues, including but not limited to national correspondents, to provide the fullest possible information on their case law.

23. **Mr. Plakhov** (Russian Federation) asked if there was any UNCITRAL document that clearly explained how the Secretariat understood the concept of case law. For civil law States such as his own, questions might arise. The main concern was whether case law was considered to be universally binding.

24. **Mr. Sorieul** (Secretary of the Commission) said that none of the Commission's documents contained a definition of case law, or "jurisprudence", as it was known in French. However, the concept itself did not imply any position as to whether or not a precedent was binding. While precedent did not have the same weight in all countries, that was not an important consideration in relation to the UNCITRAL texts. The main text covered by the CLOUT system, for which indeed it had first been put in place, was the 1980 United Nations Convention on Contracts for the International Sale of Goods. CLOUT did not require that a precedent should be regarded as binding; it sought merely to meet the obligation set out in article 7 of the relevant Convention that it should be interpreted with regard to its international character and therefore in the light of related judicial decisions handed down in foreign countries. The same reasoning applied to all the legal texts covered by CLOUT and the Digests, notably the Model Law on International Commercial Arbitration and the Model Law on Cross-Border Insolvency. CLOUT had been designed to bring together in one place, in all official languages of the United Nations, relevant decisions taken in different countries, in a form that was readily accessible to all. What judges in any particular country did with that information — whether they used it as a precedent or were simply guided by it — would depend on the national legal system; that was in no way related to the international instrument itself, which remained neutral in that regard.

25. **Mr. Schoefisch** (Germany), responding to a question put by the delegation of the Russian Federation, said that, in order to avoid any confusion, it might be better in future to refer not to "Digests of case law", as in the heading of sub-item 12 (b), but rather to "Digests of cases", as in the commentary on that sub-item in the annotated provisional agenda (document A/CN.9/859), which spoke of an "analytical digest of court and arbitration cases".

Agenda item 12: Status and promotion of UNCITRAL legal texts (A/CN.9/876)

26. **Mr. Lemay** (Secretariat), introducing the note by the Secretariat on the status of conventions and model laws (A/CN.9/876), said that information was provided in the note concerning signatures or ratifications of UNCITRAL conventions or the enactment of legislation on the basis of UNCITRAL model laws in the period since the last note on the subject (A/CN.9/843). The same information was also available and regularly updated on the UNCITRAL website.

27. Since the preparation of the note, the Netherlands had signed the United Nations Convention on Transparency in Treaty-based Investment-State Arbitration; the Republic of Korea had enacted a law based on the UNCITRAL Model Law on International Commercial Arbitration, with amendments as adopted in 2006; and Malaysia had enacted a law based on the UNCITRAL Model Law on International Commercial Conciliation.

28. As requested by the Commission, the status note continued to include a section intended to provide a fuller, albeit still limited, picture of the impact of other selected UNCITRAL texts, namely, the Arbitration Rules and the Rules on Transparency in Treaty-based Investor-State Arbitration. He reminded the Commission that the note was at best but one indicator of the total impact of the various UNCITRAL texts. Another useful indicator was the bibliography of recent writings related to the work of UNCITRAL (A/CN.9/874), which reflected potential academic interest in UNCITRAL texts. Recognizing the importance of that bibliography and wishing to make it as comprehensive as possible, the Commission at its last session had requested NGOs attending its sessions and those of its Working Groups to donate copies of their journals, reports and other publications to the UNCITRAL law library. The Commission might wish to express its appreciation of the many donations it had subsequently received, in particular of high-cost academic and professional journals, and might also wish to reiterate its request for such donations, which were particularly welcome in view of the limited budget available for such acquisitions. They allowed the Secretariat and the Commission to keep abreast of the activities of the NGOs concerned and also helped to build up the UNCITRAL law library.

29. **Mr. Chirapant** (Thailand) said that, as an active member of UNCITRAL for nearly 30 years, Thailand had benefited from the sharing of best practices with other countries, thereby demonstrating its commitment to the promotion of the harmonization and unification of international trade law. His country's recently adopted Secured Transactions Act (2015), which had just entered into force, had been based on the UNCITRAL draft Model Law on Secured Transactions; a ministerial declaration was currently being drafted on registry systems, limited initially to domestic registration, but subsequently to be expanded; the UNCITRAL Model Law on Cross-border Insolvency was being used as a reference in revising the Bankruptcy Act; and Thailand was currently considering legislation to enable it to become a party to the United Nations on Contracts for the International Sale of Goods. His delegation would continue to give its full support to UNCITRAL, which remained an important tool for countries to bring their legislation into line with international norms.

30. **Mr. Apter** (Israel) said that Israel was currently reforming its insolvency legislation in the light of the UNCITRAL Model Law on Cross-border Insolvency and would inform the Secretariat once the process had been completed.

31. **Mr. Sorieul** (Secretary of the Commission) thanked the delegations of El Salvador, Thailand and Israel for the information on legislative developments in their respective countries; it would be duly reflected in the next issue of the status note. Reverting to the question raised by the delegation of El Salvador as to why the annual status note did not always include such information, he said that, while it was easy to keep track of States' participation in UNCITRAL conventions, it was more difficult for the Secretariat to decide whether a particular legislative development implemented a UNCITRAL model law. It had sought to develop objective criteria for the purpose but was not always sufficiently informed. The Secretariat depended on States to let it know when a new law was being prepared or an existing law being revised on the basis of a UNCITRAL text. The status note was compiled annually from information available, which was not always complete. The Commission might wish to draw the attention of States to the matter and invite them not only to inform the Secretariat of the enactment of relevant laws but also to say why they considered the new law to be an implementation of an UNCITRAL text.

32. **Mr. Maradiaga** (Honduras) said that the UNCITRAL legal instruments had been very helpful to his country, which had adopted a number of laws based on UNCITRAL texts, including the Model Law on Public Procurement, the Model Law on Electronic Commerce, the Model Law on International Commercial Arbitration and the Model Law on International Commercial Conciliation.

Agenda item 13: Coordination and cooperation

(a) General (A/C.9/875)

33. **Mr. Lemay** (Secretariat), introducing the note by the Secretariat on coordination activities (A/CN.9/875), said that the note provided information on the activities of international organizations relating to international trade law in which the Secretariat had participated over the previous year. The purpose of such participation was to share information and expertise with those organizations and avoid duplication of work and the resultant work products. The Secretariat usually contributed to the work of those organizations by commenting on documents drafted by them, and by presenting the work of UNCITRAL or providing an UNCITRAL perspective at their meetings and conferences.

34. In the period under review, coordination activities had included ongoing cooperation with the International Institute for the Unification of Private Law (Unidroit) and the Hague Conference on Private International Law. The Secretariat had also been increasingly involved in the initiatives of other organizations, both within and outside the United Nations system: that was a trend in recent years that was consistent with the increase in its technical assistance activities and was expected to continue and even grow in future.

35. **Mr. Lee** Jae Sung (Secretariat) said that since the submission of document A/CN.9/875, the Commission had participated in the May 2016 conference of the International Council for Commercial Arbitration. It had taken the opportunity to ensure coordination with arbitration institutions in the African continent and would be taking steps to enhance such coordination in the future.

(b) Reports of other international organizations

36. **Mr. Faria** (Observer for the International Institute for the Unification of Private Law (Unidroit)) said that in the past year Unidroit had completed the Legal Guide on Contract Farming, prepared in cooperation with the Food and Agriculture Organization of the United Nations (FAO) and the International Fund for Agricultural Development (IFAD). Published in English and French, with a Spanish edition forthcoming, it had already attracted considerable interest and been cited as a source of inspiration for recent legislation on the topic, such as the rules for business venture agreements adopted by the Department for Agrarian Reform of the Philippines.

37. The Unidroit Convention on International Interests in Mobile Equipment has attracted several new accessions, bringing the total number of States parties to 71, while the Aircraft Protocol thereto currently counted 64 States parties. The Rail Protocol had been approved by the European Union and was thus well on the way to being ratified. Progress had also been made on the Space Protocol, for which a preparatory commission had been established; regulations for the international registry had already been approved. Productive study group meetings had been devoted to the future fourth Protocol on matters specific to agricultural, mining and construction equipment, with the valuable cooperation of UNCITRAL. The Governing Council had considered the project to be sufficiently developed to warrant the convening of a committee of governmental experts in early 2017, to which non-member States of Unidroit would be invited as observers.

38. The Governing Council had also approved amendments and additions to the black-letter rules and comments of the current edition of the Unidroit Principles of International Commercial Contracts, which would in future be known as the 2016 Principles. Progress had likewise been made in the development of model Rules on Transnational Civil Procedure adapted to the European context, in cooperation with the European Law Institute, and in the drafting of a proposed legislative guide on principles and rules capable of enhancing trading in securities in emerging markets, which had attracted considerable attention from European Union organs and member States.

39. Other important projects including the preparation in cooperation with the Hague Conference on Private International Law of a guidance document on existing texts in the area of international sales and a project on land investment contracts, to be carried out in cooperation with the Rome-based organizations.

40. Nor could he fail to mention that a succession of important events and conferences had been held in the past year to celebrate the 90th anniversary of Unidroit as an institute of the League of Nations and that many United Nations system bodies had been represented at a high level on those occasions. Unidroit took special care to avoid any overlaps or conflicts in its work with that of other organizations, in particular UNCITRAL, whose continued participation in its activities was as always highly appreciated.

41. **Ms. Pertegás Sender** (Observer for the Hague Conference on Private International Law), noting that some of the most important projects of the Hague Conference had already been referred to under other agenda items, said that her organization provided additional support for the Commission's work in a number of specific ways. Its particular focus was on questions of conflicts of laws, applicable law and the recognition and enforcement of decisions as they sometimes arose in the context of much broader UNCITRAL projects. The Hague Conference sought to the best of its ability and within the limited resources available to engage in a constant dialogue with the Secretariat, as illustrated in particular by the joint proposal on cooperation between the secretariats of UNCITRAL, the Hague Conference and Unidroit in the publication of an explanatory text in the area of international commercial contract law (document A/CN.9/892), to be considered under agenda item 16.

42. The work of the Hague Conference, like that of UNCITRAL and Unidroit, was conducted on two fronts: it developed new instruments, in consultation with the secretariats of those other two organizations, and it conducted surveys downstream, particularly through its regional offices. She noted in particular the very successful cooperation between the Asia and Pacific offices of the Hague Conference and UNCITRAL and looked forward to the inclusion of relevant work of the Commission in the activities of the organization's regional office in Latin America.

(c) International governmental and non-governmental organizations invited to sessions of UNCITRAL and its Working Groups

43. **Ms. Musayeva** (Secretariat) recalled that, in paragraph 9 of the summary of conclusions on UNCITRAL rules of procedure and methods of work, adopted by the Commission in 2010, 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 and its working groups. At its last session, the Commission had requested the Secretariat, when presenting its oral report at future sessions of the Commission on the topic of organizations invited to UNCITRAL, to provide comments on the manner in which invited organizations fulfilled the criteria applied by the Secretariat in making its decision to invite non-governmental organizations.

44. Since the Commission's forty-eighth session, the Caribbean Court of Justice had been added upon its request to the list of invited intergovernmental organizations. One non-governmental organization, the Commonwealth Association of Law Reform Agencies, had been removed upon its request from the list of invited organizations. There had been 12 requests for observer status, of which six had been accepted, five had been rejected and one remained pending. The pending request was from the Chamber of Commerce and Industry of the Republic of Abkhazia, which had been requested by the Secretariat to submit documents proving its international membership and activities, its relevance to the work of UNCITRAL and its ability to make a meaningful contribution to the Commission's deliberations.

45. The six accepted requests were from: the European Commerce Registers' Forum (Working Group I); the Florence International Mediation Chamber (Working Group II), restricted to sessions on arbitration matters; Arbitral Women (Working Group II); the International Academy of Mediators (Working Group II); the International Arbitration Court of the Belarusian Chamber of Commerce and Industry (Working Groups II and V); and the GSM Association (Working Group IV). All those organizations had been found by the Secretariat to fulfil the agreed criteria, namely: they were international in focus and membership; they could be expected to contribute meaningfully to the respective Working Groups' sessions; legal or commercial experience on which they would be reporting was not yet represented by other organizations participating in those sessions; a more balanced representation of major viewpoints or interests in the relevant yield from all areas and regions of the world would thereby be achieved.

46. The five requests for observer status that had been rejected were from: the Association pour le Développement de la Pratique de l'Arbitrage en République Démocratique du Congo (Working Group II), being considered to be not international in focus and membership; the Centre pour l'Environnement et le Développement (Working Group I), being considered to be not relevant to the work of UNCITRAL; the Hong Kong Federation of eCommerce (Working Group IV), being considered to be not international in focus and to have no particular interest in UNCITRAL texts; the Dispute Resolution Foundation (Working Group II), being considered to be not international in membership and to offer no added value to the Working Group; and Xalgorithms Foundation (Working Group IV), being considered to have no established reputation, experience or expertise or to have a demonstrated international focus and membership.

47. Invitations to States and organizations to attend sessions of UNCITRAL and its Working Groups would, in accordance with paragraph 7 of General Assembly resolution 70/115, contain a reminder of the rules of procedure and methods of work of the Commission by way of a reference to a dedicated webpage on the UNCITRAL website.

48. **Ms. Sabo** (Canada) said that the detailed information just provided by the Secretariat was precisely what had been requested by the Commission and adequately conveyed the reasons for the acceptance or rejection of the requests for observer status.

The meeting was suspended at 5.10 p.m. and resumed at 5.45 p.m.

Agenda item 16: Work programme of the Commission (A/CN.9/878, 889 and 892; A/CN.9/XLIX/CRP.1Add.5, Add.7 and Add.8)

49. **Mr. Sorieul** (Secretary of the Commission), introducing the agenda item, drew the Commission's attention to the note by the Secretariat on the joint proposal

on cooperation in the area of international commercial contract law (with a focus on sales) (A/CN.9/892), the note by the Secretariat on the work programme of the Commission (A/CN.9/878), and the note by the Secretariat on possible future work in procurement and infrastructure development (A/CN.9/889).

50. **Mr. Lemay** (Secretariat), introducing the note on possible future work in procurement and infrastructure development (A/CN.9/889), said that the Commission had discussed the topics of suspension and debarment at previous sessions and had agreed on their importance in supporting the effective implementation of a public procurement law and in fighting corruption. Over the past year, the Secretariat had been monitoring related developments and had found that there remained several areas where policy differences were such that it did not yet seem feasible to develop a harmonized text. The differences related to the issue of discretionary as opposed to mandatory debarment, cross-border and inter-system recognition of sanctions and procedural matters such as standards of proof. However, harmonization in definitions of sanctionable conduct and other areas revealed an emerging consensus on desirable policy goals. Continued monitoring was therefore recommended, but legislative activity by the Commission was perhaps still premature.

51. On the question of public-private partnerships (PPPs), the Secretariat had found that three areas might usefully be brought to the Commission's attention. First was the question of the harmonization of the UNCITRAL Model Law on Public Procurement with procurement-related aspects of UNCITRAL texts on Privately Financed Infrastructure Projects (PFIPs). It would be important to allow PPPs to benefit from modern procurement techniques, encourage good capacity development in government and reduce transaction costs for suppliers. The Secretariat felt that it was capable of undertaking such work, which was expected to be straightforward and could be completed for the Commission's 2017 session.

52. A second area where work was required concerned the development of standard contractual provisions. The World Bank, in particular, had surveyed standard clauses such as force majeure, termination and step-in rights, and had found limited variation. In view of the possibility that some developing countries were disadvantaged by onerous terms, it would seem appropriate for the Commission to support Section IV.A of the PFIPs Legislative Guide so that it could be updated by reference to current practice. A harmonized solution was now feasible. The objective was not to regulate the commercial terms of PPPs: freedom of contract and party autonomy must be respected. It was important to ensure that standard clauses reflected all legal traditions. Standard clauses did, however, skew the commercial balance of the contract towards bankers at the expense of developing countries. That was perhaps one of the reasons why work on the topic had not been undertaken in the 1980s. Again, the work envisaged would be limited in scope and would not duplicate capacity-building efforts in, for example, the Economic Commission for Europe. It was recommended that the Secretariat should develop a formal proposal for the Commission to consider in 2017.

53. The third area of interest was the sensitive one of dispute resolution, where the proposal was to update the PFIPs Legislative Guide. There seemed to be an emerging consensus on how to address that issue, notably with regard to the prevention of disputes and the use of informal resolution mechanisms such as dispute boards. Again, the recommendation would be to develop a formal proposal for consideration in 2017.

The meeting rose at 6 p.m.

Summary record of the 1046th meeting, held at Headquarters, New York, on Friday, 15 July 2016, at 10 a.m.

[A/CN.9/SR.1046]

Chairperson: Mr. Kenfack Douajni (Cameroon)

Contents

The meeting was called to order at 10.15 a.m.

Adoption of the report of the Commission (*continued*) (A/CN.9/XLIX/CRP.1, A/CN.9/XLIX/CRP.1/Add.8, A/CN.9/XLIX/CRP.1/Add.9, A/CN.9/XLIX/CRP.1/Add.10, A/CN.9/XLIX/CRP.1/Add.11, A/CN.9/XLIX/CRP.1/Add.12, A/CN.9/XLIX/CRP.1/Add.13, A/CN.9/XLIX/CRP.1/Add.14, A/CN.9/XLIX/CRP.1/Add.15, A/CN.9/XLIX/CRP.1/Add.16, A/CN.9/XLIX/CRP.1/Add.17, A/CN.9/XLIX/CRP.1/Add.18, A/CN.9/XLIX/CRP.1/Add.19, A/CN.9/XLIX/CRP.1 /Add.20, A/CN.9/XLIX/CRP.1/Add.21, A/CN.9/XLIX/ CRP.1/Add.22 and A/CN.9/XLIX/CRP.1/Add.23)

A/CN.9/XLIX/CRP.1/Add.8

1. **Mr. Bellenger** (France) proposed that the word "However" should be removed from paragraph 7, to avoid giving the impression that the Commission had reached the conclusion that the view expressed in that sentence should prevail over the view expressed in the preceding sentence.

2. **Mr. Schoefisch** (Germany) said that his delegation was in favour of the proposed amendment.

3. **Mr. Chan** (Singapore), Rapporteur, suggested that the Commission should decide whether or not to retain the sentence in square brackets in paragraph 1.

4. **Mr. Sorieul** (Secretary of the Commission) said that the square brackets were in paragraph 1 because the document had been drafted before the discussion referred to in the sentence had taken place. He suggested that the square brackets should be removed and the sentence retained, as the sentence was an accurate account of the discussion.

5. **Mr. Schoefisch** (Germany) said that his delegation supported the deletion of the square brackets.

6. **The Chair** said that he took it that the Commission wished to delete the square brackets in paragraph 1 and the word "However" in paragraph 7.

7. *It was so decided.*

8. **Ms. Fernández** (Bolivarian Republic of Venezuela) proposed inserting the word "other" before the word "stakeholders" in paragraph 18.

9. **Mr. Schnabel** (United States of America) proposed that a new sentence should be inserted between the two existing sentences in paragraph 19, to read: "It was also stated that UNCITRAL should not do further work on investor-State arbitration, as this topic is already being adequately addressed elsewhere.".

10. **Ms. Sabo** (Canada) said that her delegations supported the amendment proposed by the representative of the United States.

11. **Mr. Schoefisch** (Germany) said that the proposal by the United States accurately reflected the discussion and should therefore be included in the report.

12. **Mr. Fornell** (Ecuador) proposed that the new sentence should begin "Other delegations stated" rather than "It was stated", to make it clear that there not all delegations had taken that view.

13. **Mr. Meier** (Switzerland) suggested that the sentence could begin with the words "Some delegations stated".

14. **Mr. Sorieul** (Secretary of the Commission) suggested that the Commission should use "Some delegations" because "Other delegations" could give the impression that the delegations in question did not agree with the view expressed in the first sentence of the paragraph.

15. **Ms. Sabo** (Canada) said that the view that the delegation of Ecuador wished to see reflected in the report was already covered in paragraph 17.

16. **Ms. Escobar Pacas** (El Salvador) said that the proposed new sentence should begin with the words "Some delegations".

17. **The Chair** said that he took it that the Commission wished to add between the two sentences of paragraph 19 a new sentence, to read: "Some delegations stated that UNCITRAL should not do further work on investor-State arbitration, as this topic is already being adequately addressed elsewhere.".

18. *It was so decided.*

19. **Mr. Chan** (Singapore) said that his delegation wished to see a new paragraph added as paragraph 21 bis, to read: "It was observed that this conclusion may encourage other organizations to also request UNCITRAL's collaboration in their initiatives. The Secretariat should bear this in mind and work out what the proper responses to such requests should be.".

20. **Mr. Fornell** (Ecuador) said that his delegation supported the proposal made by the representative of Singapore in principle but suggested that the words "The Secretariat" should be replaced by the words "The Commission and the Secretariat".

21. **Mr. Sorieul** (Secretary of the Commission) said that it went without saying that the Commission and the Secretariat must decide how to respond to any requests that

were made. If the intention of the proposal made by the representative of Singapore was to ask the Secretariat to follow up on such requests during the inter-sessional period, he suggested that the Commission might wish to add a paragraph along the proposed lines but to use the phrase "and report to the Commission accordingly" instead of "work out what the proper responses to such requests should be".

22. **Mr. Chan** (Singapore) withdrew his delegation's proposal to add a paragraph 21 bis, as the point his delegation had wished to have included in the report was contained in paragraph 25.

23. **Mr. Schnabel** (United States of America) proposed that the words "at its next session" in the first sentence of paragraph 22 should be replaced by the words "after conclusion of the work on conciliation" to ensure that it was clear that priority should be given to the current work on the enforcement of settlement agreements resulting from conciliation.

24. **Mr. Sorieul** (Secretary of the Commission) said that the existing wording was an accurate reflection of the views expressed during the session. Furthermore, the wording of the United States proposal was problematic, as it would permit the Commission to avoid considering the topics in question at its next session by prolonging the work on conciliation.

25. **Ms. Sabo** (Canada) said that the proposal made by the representative of the United States seemed to be based on a misreading of the text. The intention of the proposal seemed to be to ensure that Working Group II would complete the work on conciliation before taking up any other matters, but the session referred to in paragraph 22 was the next session of the Commission, not the next session of the Working Group.

26. **Mr. Sorieul** (Secretary of the Commission) said that the next Working Group session would take place in September 2016 and would focus on conciliation.

27. **Mr. Schoefisch** (Germany) said paragraph 22 was clearly referring to the next session of the Commission. He proposed that a phrase along the lines of "with a view to deciding on further work" should be inserted at the end of the first sentence of the paragraph to make it clear that no decision had been taken yet on which of the three possible topics for future work would be selected.

28. **Mr. Sorieul** (Secretary of the Commission) said that the proposal made by the representative of Germany was covered in paragraph 21.

29. **Mr. Fornell** (Ecuador) said that paragraph 22 gave the impression that Working Group II could not begin work on investor-State arbitration until the work on conciliation had been completed. He proposed that the paragraph should be amended to make it clear that the Commission had not taken a definitive decision in that regard.

30. **Mr. Schoefisch** (Germany) said that the change suggested by the representative of Ecuador would not accurately reflect the discussions, as the Commission had decided that the Working Group II should complete its current work before the Commission took a decision on next topic for its consideration.

31. **Mr. Sorieul** (Secretary of the Commission) said that paragraphs 21 and 22 accurately reflected the compromise that had been negotiated by delegations, which was that the matter would be discussed at the Commission's session in 2017.

32. *Document A/CN.9/XLIX/CRP.1/Add.8, as orally revised, was adopted.*

A/CN.9/XLIX/CRP.1/Add.9

33. **Mr. Schoefisch** (Germany), supported by **Mr. Schnabel** (United States of America), proposed that the phrase "the Congress would seek to identify new areas" in paragraph 3 should be replaced by "There were proposals that the Congress could seek to identify new areas", or words to that effect, given that a final decision had not been taken. He also proposed that the reference in paragraph 6 to "the usual channels" should be replaced by a statement explicitly indicating that States should receive a note verbale.

34. **Mr. Sorieul** (Secretary of the Commission) suggested that proposed amendment to paragraph 3 should be reworded to make it clear that the proposals in question had not been made during the session of the Commission.

35. **Mr. Schoefisch** (Germany) proposed beginning the amendment to paragraph 3 with a phrase such as "During the call for papers, proposals had been made…".

36. **The Chair** said that he took it that the Commission agreed to the German proposals for amending paragraphs 3 and 6.

37. *It was so decided.*

38. *Document A/CN.9/XLIX/CRP.1/Add.9, as amended, was adopted.*

39. **Mr. Plakhov** (Russian Federation) said that his delegation had not received document A/CN.9/XLIX/CRP.1/Add.9 and therefore wished to reserve the right to comment on it at a later stage.

A/CN.9/XLIX/CRP.1/Add.10

40. **Mr. Schnabel** (United States of America) said that there appeared to be a mistake in footnote 4 in paragraph 5, as document A/CN.9/WG.I/WP.87 did not mention any agreement reached by Working Group I. If the sentence was referring to paragraph 20 of the report of the Working Group on the work of its twenty-fourth session (A/CN.9/831), the reference in the footnote should be corrected and, in line with the language used in the Working Group's report, the wording of the draft report of the Commission should state that the Working Group had tentatively agreed to include a discussion of such options in its further work.

41. **Mr. Sorieul** (Secretary of the Commission) said that the reference to document A/CN.9/WG.I/WP.87 was an error and should therefore be corrected.

42. **Ms. Sabo** (Canada) said that all of the footnotes in the draft report that did not refer General Assembly documents should be deleted, in line with established practice.

43. **Mr. Chan** (Singapore) said that his delegation did not recall anyone saying during the discussions that "…the

Working Group should take care to ensure that its work had a broader impact and would assist enterprises of all sizes", as stated in paragraph 5. If that sentence was intended to reflect the comments made by his delegation, he suggested that it should be reworded to read: "the issues addressed by the Working Group were of a general nature and not specific to MSMEs. Consideration thus can be given to whether the description of this working group as the Working Group on MSMEs reflects correctly the nature of its work.".

44. **Mr. Schoefisch** (Germany) said that some of the footnotes in the draft report must be deleted while others, such as footnote 2, provided references to texts that had been mentioned during the discussions and should therefore be retained.

45. **Mr. Sorieul** (Secretary of the Commission) said that the Commission might wish to delete footnotes 3 and 4 from paragraph 5. The last sentence of that paragraph accurately reflected the discussions during the session, but the text following the words "the Working Group had agreed" could be slightly amended to ensure that it was consistent with the report of the Working Group.

46. **Mr. Schoefisch** (Germany) said that his delegation had no objection to the proposal made by the representative of Singapore; it agreed that footnotes 3 and 4 should be deleted and that the Secretariat should bring the last sentence of paragraph 5 in line with the report of the Working Group.

47. **The Chair** said that he took it that the Commission wished to delete footnotes 3 and 4, amend the first sentence of paragraphs 5 as proposed by the representative of Singapore and request the Secretariat to amend the last sentence of paragraph 5 to ensure that it was consistent with the report of Working Group I.

48. *It was so decided.*

49. *Document A/CN.9/XLIX/CRP.1/Add.10, as amended and revised, was adopted.*

A/CN.9/XLIX/CRP.1/Add.11 and A/CN.9/XLIX/CRP.1/Add.13

50. *Documents A/CN.9/XLIX/CRP.1/Add.11 and A/CN.9/ XLIX/CRP.1/Add.13 were adopted.*

A/CN.9/XLIX/CRP.1/Add.14 and A/CN.9/XLIX/CRP.1/Add.17

51. *Documents A/CN.9/XLIX/CRP.1/Add.14 and A/CN.9/XLIX/CRP.1/Add.17 were adopted.*

The meeting was suspended at 11.30 a.m. and resumed at 12.15 p.m.

A/CN.9/XLIX/CRP.1/Add.12, A/CN.9/XLIX/CRP.1/ Add.15 and A/CN.9/XLIX/CRP.1/Add.16

52. *Documents A/CN.9/XLIX/CRP.1/Add.12, A/CN.9/ XLIX/CRP.1/Add.15 and A/CN.9/XLIX/CRP.1/Add.16 were adopted.*

A/CN.9/XLIX/CRP.1/Add.18

53. **Mr. Schoefisch** (Germany) said that, in the interests of clarity, the beginning of the paragraph 8 should be amended to read: "The Commission also in its final debate about the work programme reaffirmed the decision…".

54. **The Chair** said he took it that the proposal with regard to paragraph 8 was acceptable to the Commission.

55. *It was so decided.*

56. **Ms. Clift** (Secretariat) said that, for the sake of completeness, an additional sentence should be added at the end of paragraph 12, to read: "In addition, the Commission recalled the mandate given to Working Group V on the insolvency of MSMEs." It should be accompanied by a cross reference to paragraph 6 of document A/CN.9/XLIX/CRP.1/Add.12.

57. **Mr. Chan** (Singapore) said that his delegation had referred to the need for a definition of what constituted an MSME. A sentence reflecting that position should be added.

58. **Ms. Clift** (Secretariat) said that it might be more appropriate to include the additional sentence at the end of paragraph 6 of document A/CN.9/XLIX/CRP.1/Add.12, rather than in the context of the work programme.

59. **Ms. Sabo** (Canada) said that she had concerns about including the proposed new sentence in paragraph 12. The report should not give the impression that the working group had been directed to provide such a definition because the working group had discussed the issue and had been unable to produce a definition owing to the difficulty of the task. She agreed with the Secretariat's suggestion.

60. **Mr. Bellenger** (France) said that he felt that the Commission had come to a firmer conclusion regarding the future work on public-private partnerships (PPPs). The third sentence in paragraph 20 could be amended to read that "With regard to PPPs, it was agreed that the Secretariat would update all or parts of the UNCITRAL Legislative Guide…".

61. **Ms. Sabo** (Canada) and **Mr. Meier** (Switzerland) said that they preferred the text as submitted by the Secretariat.

62. **Mr. Rangreji** (India) said that his delegation, along with many others, agreed with the delegation of France. The Secretariat had highlighted the fact that it had been requested to update the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects. The wording "consider the possibility" diluted the text; "update" would be a more appropriate word.

63. **Ms. Escobar Pacas** (El Salvador) said that "update" was preferable to "consider the possibility".

64. **Mr. Schnabel** (United States of America) said that his delegation agreed with Canada and Switzerland, in particular because, given that the Legislative Guide was an instrument approved by the Commission, it could not be updated by the Secretariat on its own. The Secretariat could do that work, but the Commission would later have to make the decision. Changing the wording to "the Secretariat should update" would be inconsistent with the discussion and would suggest

that the Secretariat could update a Commission document. The existing wording should therefore be retained.

65. **Mr. Meier** (Switzerland) said that the wording "update where necessary" was an option since it had been said that it would be necessary to consider whether there was a need to update or amend the document, but it had not been specifically stated that it would actually be necessary.

66. **Mr. Sorieul** (Secretary of the Commission) said that the current wording of the paragraph was possibly an excessively cautious compromise. The decision to give the Secretariat the responsibility for updating the Legislative Guide when necessary was in any event qualified and limited by the wording of the end of the paragraph, according to which the activities should be undertaken taking into account the resources available to the Secretariat. The Secretariat would also have to pursue its work on promoting the Model Law on Public Procurement and would have no resources to work on updating the Guide. That work would require external expertise. The mandate given to the Secretariat should perhaps be accompanied by the proviso that it was not being given the full update task, since the Commission was ultimately responsible for taking a decision. Consequently, the mandate should perhaps be expressed in terms of "consider updating, where necessary, the UNCITRAL Legislative Guide". In any event, no matter how the decision of the Commission was expressed in the document, the work actually done by the Secretariat in the coming year and before the next Commission session would be the same and fairly limited.

67. **Ms. Sabo** (Canada) and **Mr. Bellenger** (France) said that they accepted the suggestion made by the Secretary.

68. *Document A/CN.9/XLIX/CRP.1/Add.18, as revised, was adopted.*

A/CN.9/XLIX/CRP.1/Add.19

69. **Ms. Mangklatanakul** (Thailand) said that her delegation suggested adding in paragraph 2 a new sentence, along the lines of "It should be noted that the objective is to assist Member States and in no way to impose on Member States the adoption of the guidance note.".

70. **The Chairperson** said that he took it that the Commission agreed to the proposed amendment.

71. *It was so decided.*

72. *Document A/CN.9/XLIX/CRP.1/Add.19, as amended, was adopted.*

A/CN.9/XLIX/CRP.1/Add.20, A/CN.9/XLIX/CRP.1/ Add.21 and A/CN.9/XLIX/CRP.1/Add.22

73. *Documents A/CN.9/XLIX/CRP.1/Add.20, A/CN.9/XLIX/CRP.1/Add.21 and A/CN.9/XLIX/CRP.1/Add.22 were adopted.*

A/CN.9/XLIX/CRP.1/Add.23

74. **Mr. Plakhov** (Russian Federation) expressed concern at any reduction in the available meeting time that would occur if an official holiday fell during any of the future session of the Commission or its working groups.

75. **Mr. Sorieul** (Secretary of the Commission) said that every effort was made to avoid the situation referred to by the representative of the Russian Federation. However, the official holidays for 2017 had not yet been announced.

76. *Document A/CN.9/XLIX/CRP.1/Add.23 was adopted.*

A/CN.9/XLIX/CRP.1

77. *A/CN.9/XLIX/CRP.1 was adopted.*

78. *The draft report as a whole, as amended and revised, was adopted.*

79. After the customary exchange of courtesies, **the Chair** declared the forty-ninth session of the Commission closed.

The meeting rose at 12.55 p.m.

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X. International construction contracts

[No publications recorded under this heading.]

XI. International countertrade

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XII. Privately financed infrastructure projects

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III. CHECK-LIST OF DOCUMENTS OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Document Symbol	*Title or description*	*Location in Present Volume*
	A. List of documents before the Commission at its forty-ninth session	
	1. General series	
A/CN.9/859	Provisional agenda, annotations thereto and scheduling of meetings of the forty-ninth session	Not reproduced
A/CN.9/860	Report of Working Group I (MSMEs) on the work of its twenty-fifth session (Vienna, 19-23 October 2015)	Part two, chap. I, A
A/CN.9/861	Report of Working Group II (Arbitration and Conciliation) on the work of its sixty-third session (Vienna, 7-11 September 2015)	Part two, chap. II, A
A/CN.9/862	Report of Working Group III (Online Dispute Resolution) on the work of its thirty-second session (Vienna, 30 November-4 December 2015)	Part two, chap. III, A
A/CN.9/863	Report of Working Group IV (Electronic Commerce) on the work of its fifty-second session (Vienna, 9-13 November 2015)	Part two, chap. IV, A
A/CN.9/864	Report of Working Group V (Insolvency Law) on the work of its forty-eighth session (Vienna, 14-18 December 2015)	Part two, chap. V, A
A/CN.9/865	Report of Working Group VI (Security Interests) on the work of its twenty-eighth session (Vienna, 12-16 October 2015)	Part two, chap. VI, A
A/CN.9/866	Report of Working Group I (MSMEs) on the work of its twenty-sixth session (New York, 4-8 April 2016)	Part two, chap. I, E
A/CN.9/867	Report of Working Group II (Arbitration and Conciliation) on the work of its sixty-fourth session (New York, 1-5 February 2016)	Part two, chap. II, F
A/CN.9/868	Report of Working Group III (Online Dispute Resolution) on the work of its thirty-third session (New York, 29 February-4 March 2016)	Part two, chap. III, E
A/CN.9/869	Report of Working Group IV (Electronic Commerce) on the work of its fifty-third session (New York, 9-13 May 2016)	Part two, chap. IV, C
A/CN.9/870	Report of Working Group V (Insolvency Law) on the work of is forty-ninth session (New York, 2-6 May 2016)	Part two, chap. V, E
A/CN.9/871	Report of Working Group VI (Security Interests) on the work of its twenty-ninth session (New York, 8-12 February 2016)	Part two, chap. VI, D
A/CN.9/872	Technical cooperation and assistance	Part two, chap. IX, A
A/CN.9/873	Promotion of ways and means of ensuring a uniform interpretation and application of UNCITRAL legal texts	Part two, chap. VIII
A/CN.9/874	Bibliography of recent writings related to the work of UNCITRAL	Part three, chap. II
A/CN.9/875	Coordination activities	Part two, chap. XI
A/CN.9/876	Status of conventions and model laws	Part two, chap. X
A/CN.9/877	UNCITRAL regional presence – activities of the UNCITRAL Regional Centre for Asia and the Pacific	Part two, chap. IX, B
A/CN.9/878	Work programme of the Commission	Part two, chap. VII, A
A/CN.9/879	Settlement of commercial disputes: revision of the UNCITRAL Notes on Organizing Arbitral Proceedings	Part two, chap. II, J

A/CN.9/880	Settlement of commercial disputes: possible future work on ethics in international arbitration	Part two, chap. VII, B
A/CN.9/881	Concurrent proceedings in international arbitration	Part two, chap. VII, C
A/CN.9/882 and Add.1	Technical assistance to law reform: compilation of comments by States on a draft guidance note on strengthening United Nations support to States to implement sound commercial law reforms	Part two, chap. IX, C
A/CN.9/883	Technical assistance to law reform: draft guidance note on strengthening United Nations support to States, upon their request, to implement sound commercial law reforms	Part two, chap. IX, D
A/CN.9/884 and Add.1-4	Draft Model Law on Secured Transactions	Part two, chap. VI, G
A/CN.9/885 and Add.1-4	Draft Guide to Enactment of the draft Model Law on Secured Transactions	Part two, chap. VI, H
A/CN.9/886	Draft Model Law on Secured Transactions: compilation of comments	Part two, chap. VI, I
A/CN.9/887 and Add.1	Draft Model Law on Secured Transactions: compilation of comments	Part two, chap. VI, J
A/CN.9/888	Online dispute resolution for cross-border electronic commerce transactions: Technical Notes on Online Dispute Resolution	Part two, chap. III, G
A/CN.9/889	Possible future work in procurement and infrastructure development	Part two, chap. VII, D
A/CN.9/890	Settlement of commercial disputes: presentation of a research paper on the Mauritius Convention on Transparency in Treaty-based Investor-State Arbitration as a possible model for further reforms of investor-State dispute settlement	Part two, chap. VII, E
A/CN.9/891	Legal issues related to identity management and trust services	Part two, chap. VII, F
A/CN.9/892	Joint proposal on cooperation in the area of international commercial contract law (with a focus on sales)	Part two, chap. VII, G
A/CN.9/893	Settlement of commercial disputes: proposal received from the Swiss Arbitration Association	Part two, chap. VII, H

2. Restricted series

A/CN.9/XLIX/CRP.1 and Add.1-23	Draft report of the United Nations Commission on International Trade Law on the work of its forty-ninth session	Not reproduced
A/CN.9/XLIX/CRP.2	Draft decision adopting the UNCITRAL Model Law on Secured Transactions	Not reproduced
A/CN.9/XLIX/CRP.3	Draft decision adopting the Technical Notes on Online Dispute Resolution	Not reproduced
A/CN.9/XLIX/CRP.4	Draft decision adopting the UNCITRAL Notes on Organizing Arbitral Proceedings	Not reproduced
A/CN.9/XLIX/CRP.5	Proposal by the delegation of Canada on articles 28, 28bis, 30, 31, 36 and 39 of the draft UNCITRAL Model Law on Secured Transactions (A/CN.9/884/Add.2)	Not reproduced
A/CN.9/XLIX/CRP.6	Proposal by the Institute of International Banking Law & Practice and the International Law Institute: to conduct a two-day Colloquium “Updating Developments on Commercial Fraud”	Not reproduced
A/CN.9/XLIX/CRP.7	Proposal submitted by the governments of Israel, Switzerland and the United States of America	Not reproduced

3. Information series

A/CN.9/XLIX/INF/1	List of participants	Not reproduced

B. List of documents before the Working Group on MSMEs at its twenty-fifth session

1. Working papers

A/CN.9/WG.I/WP.91	Annotated provisional agenda	Not reproduced
A/CN.9/WG.I/WP.92	Reducing the legal obstacles faced by micro, small and medium-sized enterprises (MSMEs)	Part two, chap. I, B
A/CN.9/WG.I/WP.93 and Add.1-2	Key principles of business registration	Part two, chap. I, C
A/CN.9/WG.I/WP.94	Observations by the Government of the French Republic	Part two, chap. I, D

2. Restricted series

A/CN.9/WG.I/XXV/ CRP.1 and Add.1-4	Draft report of Working Group I (MSMEs) on the work of its twenty-fifth session	Not reproduced
A/CN.9/WG.I/XXV/ CRP.2	Proposal submitted by the Russian Federation: Draft model law on registration of legal persons	Not reproduced

3. Information series

A/CN.9/WG.I/XXV/ INF/1	List of participants	Not reproduced

C. List of documents before the Working Group on MSMEs at its twenty-sixth session

1. Working papers

A/CN.9/WG.I/WP.95	Annotated provisional agenda	Not reproduced
A/CN.9/WG.I/WP.96 and Add.1	Draft recommendations on key principles of business registration	Part two, chap. I, F

2. Restricted series

A/CN.9/WG.I/XXVI/ CRP.1 and Add.1-4	Draft report of Working Group I (MSMEs) on the work of its twenty-sixth session	Not reproduced

3. Information series

A/CN.9/WG.I/XXVI/ INF/1	List of participants	Not reproduced

D. List of documents before the Working Group on Arbitration and Conciliation at its sixty-third session

1. Working papers

A/CN.9/WG.II/WP.189	Annotated provisional agenda	Not reproduced
A/CN.9/WG.II/WP.190	Settlement of commercial disputes: international commercial conciliation: enforceability of settlement agreements	Part two, chap. II, B
A/CN.9/WG.II/WP.191	Settlement of commercial disputes: enforcement of settlement agreements: compilation of comments by Governments	Part two, chap. II, C
A/CN.9/WG.II/WP.192	Settlement of commercial disputes: enforceability of settlement agreements: comments by Israel and the United States of America	Part two, chap. II, D
A/CN.9/846 and Add.1-5	Settlement of commercial disputes: enforcement of settlement agreements resulting from international commercial conciliation/mediation: compilation of comments by Governments	Part two, chap. II, E

2. Restricted series

A/CN.9/WG.II/LXIII/ CRP.1 and Add.1-4	Draft report of Working Group II (Arbitration and Conciliation) on the work of its sixty-third session	Not reproduced

3. Information series

A/CN.9/WG.II/LXIII/ INF/1	List of participants	Not reproduced

E. List of documents before the Working Group on Arbitration and Conciliation at its sixty-fourth session

1. Working papers

A/CN.9/WG.II/WP.193	Annotated provisional agenda	Not reproduced
A/CN.9/WG.II/WP.194	Settlement of commercial disputes: revision of the UNCITRAL Notes on Organizing Arbitral Proceedings	Part two, chap. II, G
A/CN.9/WG.II/WP.195	Settlement of commercial disputes: international commercial conciliation: enforceability of settlement agreements	Part two, chap. II, H
A/CN.9/WG.II/WP.196 and Add.1	Settlement of commercial disputes: enforcement of settlement agreements: compilation of comments by Governments	Part two, chap. II, I

2. Restricted series

A/CN.9/WG.II/LXIV/ CRP.1 and Add. 1-4	Draft report of Working Group II (Arbitration and Conciliation) on the work of its sixty-fourth session	Not reproduced

3. Information series

A/CN.9/WG.II/LXIV/ INF/1	List of participants	Not reproduced

F. List of documents before the Working Group on Online Dispute Resolution at its thirty-second session

1. Working papers

A/CN.9/WG.III/WP.135	Annotated provisional agenda	Not reproduced
A/CN.9/WG.III/WP.136	Online dispute resolution for cross-border electronic commerce transactions: submission by the Russian Federation	Part two, chap. III, B
A/CN.9/WG.III/WP.137	Online dispute resolution for cross-border electronic commerce transactions: notes on a non-binding descriptive document reflecting elements and principles of an ODR process	Part two, chap. III, C
A/CN.9/WG.III/WP.138	Online dispute resolution for cross-border electronic commerce transactions: submission by Israel	Part two, chap. III, D

2. Restricted series

A/CN.9/WG.III/XXXII/ CRP.1 and Add. 1-4	Draft report of Working Group III (Online dispute resolution) on the work of its thirty-second session	Not reproduced
A/CN.9/WG.III/XXXII/ CRP.2	Online dispute resolution for cross-border electronic commerce transactions: submission by the Russian Federation (Addendum 2)	Not reproduced
A/CN.9/WG.III/XXXII/ CRP.3	Online dispute resolution for cross-border electronic commerce transactions: submission by Colombia and the United States of America	Not reproduced

3. Information series

A/CN.9/WG.III/XXXII/ INF/1	List of participants	Not reproduced

G. List of documents before the Working Group on Online Dispute Resolution at its thirty-third session

1. Working papers

A/CN.9/WG.III/WP.139	Annotated provisional agenda	Not reproduced
A/CN.9/WG.III/WP.140	Online dispute resolution for cross-border electronic commerce transactions: draft outcome document reflecting elements and principles of an ODR process	Part two, chap. III, F

2. Restricted series

A/CN.9/WG.III/XXXIII/ CRP.1 and Add. 1-4	Draft report of Working Group III (Online dispute resolution) on the work of its thirty-third session	Not reproduced

3. Information series

A/CN.9/WG.III/XXXIII/ INF/1	List of participants	Not reproduced

H. List of documents before the Working Group on Electronic Commerce at its fifty-second session

1. Working papers

A/CN.9/WG.IV/WP.134	Annotated provisional agenda	Not reproduced
A/CN.9/WG.IV/WP.135 and Add.1	Draft Model Law on Electronic Transferable Records	Part two, chap. IV, B

2. Restricted series

A/CN.9/WG.IV/LII/ CRP.1 and Add.1-4	Draft report of Working Group IV (Electronic Commerce) on the work of its fifty-second session	Not reproduced

3. Information series

A/CN.9/WG.IV/LII/ INF.1	List of participants	Not reproduced

I. List of documents before the Working Group on Electronic Commerce at its fifty-third session

1. Working papers

A/CN.9/WG.IV/WP.136	Annotated provisional agenda	Not reproduced
A/CN.9/WG.IV/WP.137 and Add.1	Draft Model Law on Electronic Transferable Records	Part two, chap. IV, D

2. Restricted series

A/CN.9/WG.IV/LIII/ CRP.1 and Add.1-4	Draft report of Working Group IV (Electronic Commerce) on the work of its fifty-third session	Not reproduced

3. Information series

A/CN.9/WG.IV/LIII/ INF.1	List of participants	Not reproduced

J. List of documents before the Working Group on Insolvency Law at its forty-eighth session

1. Working papers

A/CN.9/WG.V/WP.132	Annotated provisional agenda	Not reproduced
A/CN.9/WG.V/WP.133	Facilitating the cross-border insolvency of multinational enterprise groups: key principles	Part two, chap. V, B
A/CN.9/WG.V/WP.134	Facilitating the cross-border insolvency of multinational enterprise groups: revised draft legislative provisions	Part two, chap. V, C
A/CN.9/WG.V/WP.135	Cross-border recognition and enforcement of insolvency-related judgements	Part two, chap. V, D

2. Restricted series

A/CN.9/WG.V/XLVIII CRP.1 and Add. 1-4	Draft report of Working Group V (Insolvency Law) on the work of its forty-eighth session	Not reproduced
A/CN.9/WG.V/XLVIII CRP.2	Proposal from Switzerland, the United Kingdom, the United States and INSOL Europe	Not reproduced

3. Information series

A/CN.9/WG.V/XLVIII/ INF/1	List of participants	Not reproduced

K. List of documents before the Working Group on Insolvency Law at its forty-ninth session

1. Working papers

A/CN.9/WG.V/WP.136	Annotated provisional agenda	Not reproduced
A/CN.9/WG.V/WP.137 and Add.1	Insolvency law - facilitating the cross-border insolvency of multinational enterprise groups: summary	Part two, chap. V, F
A/CN.9/WG.V/WP.138	Cross-border recognition and enforcement of insolvency-related judgements	Part two, chap. V, G
A/CN.9/WG.V/WP.139	Directors' obligations in the period approaching insolvency: enterprise groups	Part two, chap. V, H
A/CN.9/WG.V/WP.140	Cross-border recognition and enforcement of insolvency-related judgements - proposal by the United States of America	Part two, chap. V, I

2. Restricted series

A/CN.9/WG.V/XLIX/ CRP.1 and Add. 1-4	Draft report of Working Group V (Insolvency Law) on the work of its forty-ninth session	Not reproduced

3. Information Series

A/CN.9/WG.V/XLIX/ INF/1	List of participants	Not reproduced

L. List of documents before the Working Group on Security Interests at its twenty-eighth session

1. Working papers

A/CN.9/WG.VI/WP.64	Annotated provisional agenda	Not reproduced
A/CN.9/WG.VI/WP.65 and Add.1-4	Draft Model Law on Secured Transactions	Part two, chap. VI, B
A/CN.9/WG.VI/WP.66 and Add.1-4	Draft Guide to Enactment of the draft Model Law on Secured Transactions	Part two, chap. VI, C

2. Restricted series

A/CN.9/WG.VI/XXVIII/ CRP.1 and Add.1-4	Draft report of Working Group VI (Security Interests) on the work of its twenty-eighth session	Not reproduced

3. Information series

A/CN.9/WG.VI/XXVIII/ INF/1	List of participants	Not reproduced

M. List of documents before the Working Group on Security Interests at its twenty-ninth session

1. Working papers

A/CN.9/WG.VI/WP.67	Annotated provisional agenda	Not reproduced
A/CN.9/WG.VI/WP.68 and Add.1-2	Draft Model Law on Secured Transactions	Part two, chap. VI, E
A/CN.9/WG.VI/WP.69 and Add.1-2	Draft Guide to Enactment of the draft Model Law on Secured Transactions	Part two, chap. VI, F

2. Restricted series

A/CN.9/WG.VI/XXIX/ CRP.1 and Add.1-4	Draft report of Working Group VI (Security Interests) on the work of its twenty-ninth session	Not reproduced
A/CN.9/WG.VI/XXIX/ CRP.2	Draft Model Law on Secured Transactions: proposal of the delegation of Canada to clarify the drafting of articles 26 and 27 of the registry-related provisions (A/CN.9/WG.VI/WP.65/Add.1)	Not reproduced

3. Information series

A/CN.9/WG.VI/XXIX/ 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 to1971); Privately Financed Infrastructure Projects (2001 to 2003); Procurement (2004 to 2012); Micro, Small and Medium-sized Enterprises (as of 2014)

   (b) Working Group II:

   International Sale of Goods (1968 to 1978); International Contract Practices (1981 to 2000); Arbitration and Conciliation (2000 to 2016)

   (c) Working Group III:

   International Legislation on Shipping (1970 to 1975); Transport Law (2002 to 2008); Online Dispute Resolution (2010 to 2016)

   (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)[*]

   (f) Working Group VI:

   Security Interests (as of 2002)[**]
7. Summary records of discussions in the Commission
8. Texts adopted by Conferences of Plenipotentiaries
9. Bibliographies of writings relating to the work of the Commission.

[*] For 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).

[**] At its 35th session, the Commission adopted one-week sessions, creating six working groups.

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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
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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
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A/40/17 (eighteenth session)	Volume XVI: 1985	Part one, A
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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
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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 (forty-first session)	Volume XXXIX:2008	Part one, A
A/64/17 (forty-second session)	Volume XL:2009	Part one, A
A/65/17 (forty-third session)	Volume XLI:2010	Part one, A
A/66/17 (forty-fourth session)	Volume XLII:2011	Part one, A
A/67/17 (forty-fifth session)	Volume XLIII:2012	Part one, A
A/68/17 (forty-sixth session)	Volume XLIV:2013	Part one, A
A/69/17 (forty-seventh session)	Volume XLV: 2014	Part one, A
A/70/17 (forty-eighth session)	Volume XLVI: 2015	Part one, A

2. Resolutions of the General Assembly

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2205 (XXI)	Volume I: 1968-1970	Part one, II, E
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3316 (XXIX)	Volume VI: 1975	Part one, I, C
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A/7747	Volume I: 1968-1970	Part two, II, B, 2
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5. Documents submitted to the Commission, including reports of meetings of working groups

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A/CN.9/830	Volume XLVI: 2015	Part two, VI, A
A/CN.9/831	Volume XLVI: 2015	Part two, I, E
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A/CN.9/835	Volume XLVI: 2015	Part two, V, E
A/CN.9/836	Volume XLVI: 2015	Part two, VI, C
A/CN.9/837	Volume XLVI: 2015	Part two, IX, A

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A/CN.9/838	Volume XLVI: 2015	Part two, XI
A/CN.9/839	Volume XLVI: 2015	Part three, II
A/CN.9/841	Volume XLVI: 2015	Part two, VII, A
A/CN.9/843	Volume XLVI: 2015	Part two, X
A/CN.9/845	Volume XLVI: 2015	Part two IX, B
A/CN.9/850	Volume XLVI: 2015	Part two, VII, B
A/CN.9/854	Volume XLVI: 2015	Part two, VII, C
A/CN.9/855	Volume XLVI: 2015	Part two, VII, D
A/CN.9/856	Volume XLVI: 2015	Part two, VII, E
A/CN.9/857	Volume XLVI: 2015	Part two, VII, F
A/CN.9/858	Volume XLVI: 2015	Part two, VII, G

6. Documents submitted to Working Groups

(a) Working Group I

(i) Time-limits and Limitation (Prescription)

A/CN.9/WG.1/WP.9	Volume II: 1971	Part two, I, C, 1

(ii) Privately Financed Infrastructure Projects

A/CN.9/WG.I/WP.29 and Add.1-2	Volume XXXIV: 2003	Part two, I, B

(iii) Procurement

A/CN.9/WG.I/WP.31	Volume XXXVI: 2005	Part two, II, B
A/CN.9/WG.I/WP.32	Volume XXXVI: 2005	Part two, II, C
A/CN.9/WG.I/WP.34 and Add.1-2	Volume XXXVI: 2005	Part two, II, E
A/CN.9/WG.I/WP.35 and Add.1	Volume XXXVI: 2005	Part two, II, F
A/CN.9/WG.I/WP.36	Volume XXXVI: 2005	Part two, II, G
A/CN.9/WG.I/WP.38 and Add.1	Volume XXXVII: 2006	Part two, III, B
A/CN.9/WG.I/WP.39 and Add.1	Volume XXXVII: 2006	Part two, III, C
A/CN.9/WG.I/WP.40 and Add.1	Volume XXXVII: 2006	Part two, III, D
A/CN.9/WG.I/WP.42 and Add.1	Volume XXXVII: 2006	Part two, III, F
A/CN.9/WG.I/WP.43 and Add.1	Volume XXXVII: 2006	Part two, III, G
A/CN.9/WG.I/WP.44 and Add.1	Volume XXXVII: 2006	Part two, III, H
A/CN.9/WG.I/WP.45 and Add.1	Volume XXXVII: 2006	Part two, III, I
A/CN.9/WG.I/WP.47	Volume XXXVIII: 2007	Part two, II, B
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A/CN.9/WG.I/WP.51	Volume XXXVIII: 2007	Part two, II, F
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A/CN.9/WG.I/WP.59	Volume XXXIX: 2008	Part two, II, G
A/CN.9/WG.I/WP.61	Volume XL: 2009	Part two, I, B
A/CN.9/WG.I/WP.62	Volume XL: 2009	Part two, I, C
A/CN.9/WG.I/WP.63	Volume XL: 2009	Part two, I, D
A/CN.9/WG.I/WP.64	Volume XL: 2009	Part two, I, E
A/CN.9/WG.I/WP.66 and Add.1-5	Volume XL: 2009	Part two, I, G
A/CN.9/WG.I/WP.68 and Add.1	Volume XL: 2009	Part two, I, I
A/CN.9/WG.I/WP.69 and Add.1-5	Volume XL: 2009	Part two, I, J
A/CN.9/WG.I/WP.71 and Add.1-8	Volume XLI: 2010	Part two, IV, B
A/CN.9/WG.I/WP.73 and Add.1-8	Volume XLI: 2010	Part two, IV, D
A/CN.9/WG.I/WP.75 and Add.1-8	Volume XLII: 2011	Part two, II,B
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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	(iv) Micro, Small and Medium-Sized Enterprises (MSMEs)	
A/CN.9/WG.I/WP.81	Volume XLV: 2014	Part two, VI, B
A/CN.9/WG.I/WP.82	Volume XLV: 2014	Part two, VI, C
A/CN.9/WG.I/WP.83	Volume XLV: 2014	Part two, VI, D
A/CN.9/WG.I/WP.85	Volume XLVI: 2015	Part two, I, B
A/CN.9/WG.I/WP.86 and Add.1	Volume XLVI: 2015	Part two, I, C
A/CN.9/WG.I/WP.87	Volume XLVI: 2015	Part two, I, D
A/CN.9/WG.I/WP.89	Volume XLVI: 2015	Part two, I, E
A/CN.9/WG.I/WP.90	Volume XLVI: 2015	Part two, I, F
	(b) Working Group II	
	(i) International Sale of Goods	
A/CN.9/WG.2/WP.1	Volume I: 1968-1979	Part three, I, A, 2
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
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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
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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
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A/CN.9/WG.2/WP.28	Volume IX: 1978	Part two, I, B
	(ii) International Contract Practices	
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)
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

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A/CN.9/WG.II/WP.76 and Add.1	Volume XXIV: 1993	Part two, II, B, 1
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A/CN.9/WG.II/WP.80	Volume XXV: 1994	Part two, II, B
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A/CN.9/WG.II/WP.87	Volume XXVIII: 1997	Part two, II, B
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A/CN.9/WG.II/WP.105	Volume XXXI: 2000	Part two, I, C
A/CN.9/WG.II/WP.106	Volume XXXI: 2000	Part two, I, D
	(iii) International Commercial Arbitration	
A/CN.9/WG.II/WP.108 and Add.1	Volume XXXI: 2000	Part two, IV, B
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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
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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
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A/CN.9/WG.II/WP.186	Volume XLVI: 2015	Part two, II, E
A/CN.9/WG.II/WP.187	Volume XLVI: 2015	Part two, II, F
A/CN.9/WG.II/WP.188	Volume XLVI: 2015	Part two, II, G
	(c) Working Group III	
	(i) International Legislation on Shipping	
A/CN.9/WG.III/WP.6	Volume IV: 1973	Part two, IV, 2
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A/CN.9/WG.III/WP.11	Volume V: 1974	Part two, III, 3
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A/CN.9/WG.III/WP.23	Volume XXXIV: 2003	Part two, IV, B
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A/CN.9/WG.III/WP.26	Volume XXXIV: 2003	Part two, IV, E
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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
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A/CN.9/WG.III/WP.66	Volume XXXVII: 2006	Part two, IV, S
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A/CN.9/WG.III/WP.128	Volume XLV: 2014	Part two, II, G
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A/CN.9/WG.III/WP.134	Volume XLVI: 2015	Part two, III, F
	(d) Working Group IV	
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A/CN.9/WG.IV/WP.2	Volume IV: 1973	Part two, II, 2
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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.51	Volume XXIII: 1992	Part two, II, B
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	(iii) Electronic Data Interchange	
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A/CN.9/WG.IV/WP.60	Volume XXV: 1994	Part two, III, D
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	(i) New International Economic Order	
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