

**United Nations
Commission on
International
Trade Law**

YEARBOOK

Volume XXXII: 2001



United Nations

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International
Trade Law**

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NOTE

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

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

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

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INTRODUCTION

This is the thirty-second 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 thirty-fourth session, which was held in Vienna from 25 June-13 July 2001, and the action thereon by the United Nations Conference on Trade and Development (UNCTAD) and by the General Assembly.

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

Part three contains the draft United Nations Convention on the Assignment of Receivables in International Trade, the UNCITRAL Model Law on Electronic Signatures and the corresponding Summary Records, a bibliography of recent writings related to the Commission's work, a list of documents before the thirty-fourth session and a list of documents relating to the work of the Commission reproduced in the previous volumes of the *Yearbook*.

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

<i>Volume</i>	<i>Years covered</i>	<i>United Nations publication Sales No.</i>
I	1968-1970	E.71.V.1
II	1971	E.72.V.4
III	1972	E.73.V.6
III Suppl.	1972	E.73.V.9
IV	1973	E.74.V.3
V	1974	E.75.V.2
VI	1975	E.76.V.5
VII	1976	E.77.V.1
VIII	1977	E.78.V.7
IX	1978	E.80.V.8
X	1979	E.81.V.2
XI	1980	E.81.V.8
XII	1981	E.82.V.6
XIII	1982	E.84.V.5
XIV	1983	E.85.V.3
XV	1984	E.86.V.2
XVI	1985	E.87.V.4
XVII	1986	E.88.V.4
XVIII	1987	E.89.V.4
XIX	1988	E.89.V.8
XX	1989	E.90.V.9
XXI	1990	E.91.V.6
XXII	1991	E.93.V.2
XXIII	1992	E.94.V.7
XXIV	1993	E.94.V.16
XXV	1994	E.95.V.20
XXVI	1995	E.96.V.8
XXVII	1996	E.98.V.7
XXVIII	1997	E.99.V.6
XXIX	1998	E.99.V.12
XXX	1999	E.00.V.9
XXXI	2000	E.02.V.3

Part One

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

THE THIRTY-FOURTH SESSION (2001)

A. Report of the United Nations Commission on International Trade Law on the work of its thirty-fourth session (Vienna, 25 June-13 July 2001) (A/56/17) [Original: English]

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INTRODUCTION

1. The present report of the United Nations Commission on International Trade Law (UNCITRAL) covers the thirty-fourth session of the Commission, held at Vienna from 25 June to 13 July 2001.

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

I. ORGANIZATION OF THE SESSION

A. Opening of the session

3. UNCITRAL commenced its thirty-fourth session on 25 June 2001. The session was opened by Mr. Jeffrey Chan Wah Teck (Singapore), immediate past Chairman of the Commission.

B. Membership and attendance

4. In its resolution 2205 (XXI), the General Assembly established the Commission with a membership of 29 States, elected by the Assembly. In its resolution 3108 (XXVIII) of 12 December 1973, the Assembly increased the membership of the Commission from 29 to 36 States. The current members of the Commission, elected on 24 November 1997 and on 16 October 2000, 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 Austria (2004), Benin (2007), Brazil (2007), Burkina Faso (2004), Cameroon (2007), Canada (2007), China (2007), Colombia (2004), Fiji (2004), France (2007), Germany (2007), Honduras (2004), Hungary (2004), India (2004), Iran (Islamic Republic of) (2004), Italy (2004), Japan (2007), Kenya (2004), Lithuania (2004), Mexico (2007), Morocco (2007), Paraguay (2004), Romania (2004), Russian Federation (2007), Rwanda (2007), Sierra Leone (2007), Singapore (2007), Spain (2004), Sudan (2004), Sweden (2007), Thailand (2004), the former Yugoslav Republic of Macedonia (2007), Uganda (2004), United States of America (2004), United Kingdom of Great Britain and Northern Ireland (2007) and Uruguay (2004, alternating annually with Argentina).

5. With the exception of Benin, Paraguay and Uganda, all the members of the Commission were represented at the session.

6. The session was attended by observers from the following States: Argentina, Australia, Azerbaijan, Belgium, Bulgaria, Croatia, Cuba, Cyprus, Czech Republic, Democratic People's Republic of Korea, Ecuador, Egypt, Finland, Greece, Guatemala, Indonesia, Iraq, Ireland, Kuwait,

¹Pursuant to General Assembly resolution 2205 (XXI), the members of the Commission are elected for a term of office of six years. Of the current membership, 19 were elected by the General Assembly at its fifty-second session, on 24 November 1997 (decision 52/314) and 17 at its fifty-fifth session, on 16 October 2000. Pursuant to resolution 31/99 of 15 December 1976, the term of office of those members elected by the Assembly at its fifty-second session will expire on the last day prior to the opening of the thirty-seventh session of the Commission, in 2004, while the term of office of those members elected at the fifty-fifth session will expire on the last day prior to the opening of the fortieth session of the Commission, in 2007.

Lebanon, Libyan Arab Jamahiriya, Luxembourg, Malawi, Malaysia, Nigeria, Panama, Peru, Philippines, Poland, Portugal, Qatar, Republic of Korea, Saudi Arabia, Slovakia, Slovenia, Switzerland, Turkey, Ukraine, Venezuela, Viet Nam, Yugoslavia and Zimbabwe.

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

(a) *United Nations system*: International Monetary Fund; United Nations Conference on Trade and Development.

(b) *Intergovernmental organizations*: Asian-African Legal Consultative Organization; European Bank for Reconstruction and Development; European Centre for Peace and Development; International Institute for the Unification of Private Law; Organisation for Economic Cooperation and Development; Organisation intergouvernementale pour les transports internationaux ferroviaires; Permanent Court of Arbitration; Southeast European Cooperative Initiative.

(c) *International non-governmental organizations invited by the Commission*: Association internationale des jeunes avocats; Association of the Bar of the City of New York; Cairo Regional Centre for International Commercial Arbitration; Chartered Institute of Arbitrators; Commercial Finance Association; European Banking Federation; European Federation of Factoring Associations; European Law Students Association; European Lawyers' Union; Factors Chain International; Institute for International Legal Information; International Chamber of Commerce; International Law Association; International Maritime Committee; International Swaps and Derivatives Association; Moot Alumni Association; University of the West Indies.

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

C. Election of officers²

9. The Commission elected the following officers:

Chairman: Mr. Alejandro Ogarrio
RAMIREZ-ESPAÑA (Mexico)

Vice-Chairmen: Mr. Louis-Paul ENOUGA (Cameroon)
Mr. Xiaoyan ZHOU (China)
Mr. David MORÁN BOVIO (Spain)

Rapporteur: Ms. Victoria GAVRILESCU (Romania)

²In accordance with a decision taken by the Commission at its first session, the Commission has three Vice-Chairmen, so that, together with the Chairman and the Rapporteur, each of the five groups of States listed in General Assembly resolution 2205 (XXI), sect. II, para. 1, will be represented on the bureau of the Commission (see the report of the United Nations Commission on International Trade Law on the work of its first session, *Official Records of the General Assembly, Twenty-third Session, Supplement No. 16 (A/72/16)*, para. 14 (*Yearbook of the United Nations Commission on International Trade Law*, vol. I: 1968-1970 (United Nations publication, Sales No. E.71.V.1), part two, chap. I, sect. A)).

D. Agenda

10. The agenda of the session, as adopted by the Commission at its 711th meeting, on 25 June 2001, was as follows:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Draft Convention on Assignment of Receivables in International Trade.
5. Draft UNCITRAL Model Law on Electronic Signatures and draft Guide to Enactment.
6. Possible future work on electronic commerce.
7. Insolvency law.
8. Settlement of commercial disputes.
9. Monitoring implementation of the 1958 New York Convention.
10. Possible future work on transport law.
11. Possible future work on security interests.
12. Possible future work on privately financed infrastructure projects.
13. Enlargement of membership of the Commission.
14. Working methods of the Commission.
15. Case law on UNCITRAL texts (CLOUT).
16. Digest of United Nations Sales Convention case law: interpretation of texts.
17. Training and technical assistance.
18. Status and promotion of UNCITRAL legal texts.
19. General Assembly resolutions on the work of the Commission.
20. Coordination and cooperation.
21. Other business.
22. Date and place of future meetings.
23. Adoption of the report of the Commission.

E. Establishment of two Committees of the Whole

11. The Commission established two Committees of the Whole (Committee I and Committee II) and referred to them for consideration agenda items 4 and 5, respectively. The Commission elected Mr. Leonel Perez-Nieto Castro (Mexico) Chairman of Committee I and Mr. José María Abascal Zamora (Mexico) Chairman of Committee II. Committee I met from 25 June to 2 July and held 12 meetings. Committee II met from 3 to 6 July and held 8 meetings. On 2 July, Mr. David Morán Bovio (Vice-Chairman of the Commission) substituted for the Chairman of Committee I.

F. Adoption of the report

12. At its 722nd, 730th, 737th and 738th meetings, on 2, 6 and 13 July 2001, the Commission adopted the present report by consensus.

II. DRAFT CONVENTION ON ASSIGNMENT OF RECEIVABLES IN INTERNATIONAL TRADE

A. Introduction

13. Pursuant to a decision taken by the Commission at its twenty-eighth session in 1995,³ the Working Group devoted its twenty-fourth to thirty-first sessions to the preparation of a uniform law on assignment of receivables (for the reports of those sessions, see documents A/CN.9/420, A/CN.9/432, A/CN.9/434, A/CN.9/445, A/CN.9/447, A/CN.9/455, A/CN.9/456 and A/CN.9/466). The work was carried out on the basis of background papers prepared by the secretariat.

14. At its thirty-first session, the Working Group completed its work and submitted to the Commission, at its thirty-third session, a draft Convention on Assignment of Receivables in International Trade (for the report of the Working Group, see A/CN.9/466). At that session, the Commission adopted draft articles 1-17 of the draft Convention and referred the remaining draft articles back to the Working Group.⁴ The Commission had before it:

(a) Text of the draft Convention as adopted by the Working Group (A/CN.9/466, annex I);

(b) An analytical commentary on the draft Convention prepared by the secretariat (A/CN.9/470);

(c) Comments by Governments and international organizations (A/CN.9/472 and Add.1-5).

The Working Group met in December 2000 and completed the task assigned to it by the Commission (for the report of the Working Group, see A/CN.9/486).

15. At its current session, the Commission had before it:

(a) Consolidated version of the draft Convention as adopted by the Working Group (A/CN.9/486, annex I);

(b) A revised version of the analytical commentary on the draft Convention prepared by the secretariat (A/CN.9/489 and Add.1);

(c) Comments by Governments and international organizations (A/CN.9/490 and Add.1-5);

(d) Report on pending and other issues prepared by the secretariat (A/CN.9/491).

In view of the fact that the Commission had considered and adopted draft articles 1-17 at its thirty-third session, it decided to begin its considerations with draft article 18.

B. Consideration of draft articles

Article 18. *Notification of the debtor*

16. The text of draft article 18 as considered by the Commission was as follows:

“1. Notification of the assignment or a payment instruction is effective when received by the debtor if it is

in a language that is reasonably expected to inform the debtor about its contents. It is sufficient if notification of the assignment or a payment instruction is in the language of the original contract.

“2. Notification of the assignment or a payment instruction may relate to receivables arising after notification.

“3. Notification of a subsequent assignment constitutes notification of all prior assignments.”

17. The suggestion was made that notification of the assignment should be exclusively in the language of the original contract. It was widely felt, however, that the more flexible formulation of paragraph 1, which allowed for a notification to be given in any language that was “reasonably expected” to be understood by the debtor, was preferable. After discussion, the Commission approved the substance of article 18 unchanged and referred it to the drafting group.

Article 19. *Debtor's discharge by payment*

18. The text of draft article 19 as considered by the Commission was as follows:

“1. Until the debtor receives notification of the assignment, the debtor is entitled to be discharged by paying in accordance with the original contract.

“2. After the debtor receives notification of the assignment, subject to paragraphs 3 to 8 of this article, the debtor is discharged only by paying the assignee or, if otherwise instructed in the notification of the assignment or subsequently by the assignee in a writing received by the debtor, in accordance with such payment instruction.

“3. If the debtor receives more than one payment instruction relating to a single assignment of the same receivable by the same assignor, the debtor is discharged by paying in accordance with the last payment instruction received from the assignee before payment.

“4. If the debtor receives notification of more than one assignment of the same receivable made by the same assignor, the debtor is discharged by paying in accordance with the first notification received.

“5. If the debtor receives notification of one or more subsequent assignments, the debtor is discharged by paying in accordance with the notification of the last of such subsequent assignments.

“6. If the debtor receives notification of the assignment of a part of or an undivided interest in one or more receivables, the debtor is discharged by paying in accordance with the notification or in accordance with this article as if the debtor had not received the notification. If the debtor pays in accordance with the notification, the debtor is discharged only to the extent of the part or undivided interest paid.

“7. If the debtor receives notification of the assignment from the assignee, the debtor is entitled to request the assignee to provide within a reasonable period of time adequate proof that the assignment from the initial assignor to the initial assignee and any intermediate assignment have been made and, unless the assignee does so,

³Official Records of the General Assembly, Fiftieth Session, Supplement No. 17 (A/50/17), paras. 374-381.

⁴Ibid., Fifty-fifth Session, Supplement No. 17 (A/55/17), paras. 186-192.

the debtor is discharged by paying in accordance with this article as if the notification from the assignee had not been received. Adequate proof of an assignment includes but is not limited to any writing emanating from the assignor and indicating that the assignment has taken place.

“8. This article does not affect any other ground on which payment by the debtor to the person entitled to payment, to a competent judicial or other authority, or to a public deposit fund discharges the debtor.”

19. With respect to paragraph 2, the question was raised whether the debtor would need to determine before paying that an assignment had actually been made and that that assignment was valid. In response, it was noted that the Working Group had approved paragraph 2 on the understanding that that matter was not a problem in practice and thus did not need to be addressed in the draft Convention (see A/CN.9/456, para. 192, and A/CN.9/466, paras. 128 and 131). It was also stated that a person with sufficient knowledge about a transaction to notify the debtor would in most cases be a genuine assignee. In addition, it was observed that placing on the debtor the risk of the invalidity of an assignment was appropriate and in line with currently existing national law.

20. As to paragraph 6, the concern was expressed that it could undermine practices involving partial assignments. In order to address that concern, the suggestion was made that paragraph 6 should be deleted. That suggestion was objected to. It was stated that paragraph 6 did not invalidate partial assignments. It merely provided that, unless the debtor agreed to notification of a partial assignment, the assignee would have to obtain payment through other means (for example, by structuring the financing transaction along the lines of draft article 26, para. 2). It was also observed that, if paragraph 6 were to be deleted, the issue of additional cost to the debtor arising as a result of the need to pay several assignees would need to be addressed by giving the debtor the right to seek compensation. In that context, it was recalled that the Working Group had considered that alternative and decided not to adopt it. Paragraph 6 was adopted instead in order to protect the debtor in a sufficient but flexible way, without creating liability and without prescribing in a regulatory manner what the assignor, the assignee or the debtor should do (see A/CN.9/491, para. 19).

21. As to paragraph 7, a number of concerns were expressed. One concern was that paragraph 7 did not adequately cover situations in which subsequent assignments were combined with duplicate assignments (where, for example, A assigned to B and B assigned to D, while A assigned also to C and C assigned to E). It was widely felt, however, that paragraph 7, in combination with paragraphs 4 and 5, was sufficient. Another concern was that paragraph 7 failed to address the question whether the payment obligation was suspended or the debtor was in breach and subject to paying interest, if payment became due while the debtor would wait to receive the adequate proof requested. In response, it was recalled that the Working Group had decided not to address that matter explicitly in the draft Convention, since stating explicitly that the payment obligation was suspended might encourage abusive practices and, in any case, interest-related matters did not lend them-

selves to unification (see A/CN.9/466, paras. 126-128 and A/CN.9/456, para. 189). It was also observed that if payment became due before the debtor received the information requested and had time to act on it and the debtor had no way to safely discharge its obligation, it was implicit in paragraph 7 that the payment obligation would be suspended. In addition, it was pointed out that paragraph 7 was based on the assumption that in such a case, under paragraph 8, the debtor could discharge its obligation in different ways (e.g. by way of payment into court or a deposit fund). It was agreed that that matter could usefully be clarified in the commentary on the draft Convention.

22. Yet another concern was that paragraph 7 failed to protect the debtor in situations where the debtor would misjudge the proof provided by the assignee. While that concern was met with some sympathy, it was agreed that that problem could be resolved only by requiring that notification be given by the assignor or by the assignee with the consent of the assignor. It was stated that that would be a radical and unwelcome change in the draft Convention, since the right of the assignee to notify the debtor independently of the assignor was one of the essential features of the draft Convention. After discussion, the Commission approved the substance of article 19 unchanged and referred it to the drafting group.

Article 20. Defences and rights of set-off of the debtor

23. The text of draft article 20 as considered by the Commission was as follows:

“1. In a claim by the assignee against the debtor for payment of the assigned receivables, the debtor may raise against the assignee all defences and rights of set-off arising from the original contract, or any other contract that was part of the same transaction, of which the debtor could avail itself if such claim were made by the assignor.

“2. The debtor may raise against the assignee any other right of set-off, provided that it was available to the debtor at the time notification of the assignment was received.

“3. Notwithstanding paragraphs 1 and 2 of this article, defences and rights of set-off that the debtor may raise pursuant to article 11 against the assignor for breach of agreements limiting in any way the assignor’s right to assign its receivables are not available to the debtor against the assignee.”

24. It was noted that, in some jurisdictions, if the assignment was effective, the debtor could lose any right of set-off. In order to avoid that result, it was agreed that the words “as if the assignment had never been made” should be inserted at the end of paragraph 1.

25. The suggestion was made that the substance of draft article 30 should be included in draft article 20 to ensure that it would not be subject to an opt-out by States. In support, it was stated that it was essential for financiers to know what their rights and the countervailing rights of debtors were or, at least, to which law to look to determine what those rights were. That suggestion was objected to. It

was observed that the rule in draft article 30 should remain subject to an opt-out, since it did not belong in a substantive law text. It was also stated that including in draft article 20 a rule along the lines of draft article 30 would unduly complicate draft article 20, since the public policy and mandatory law exceptions of draft articles 32 and 33 would also need to be reproduced in draft article 20.

26. The view was expressed that paragraph 2 should be aligned with draft article 19, paragraph 6, leaving the effectiveness of a notification of a partial assignment for all relevant purposes to the discretion of the debtor. Recalling the decision of the Working Group on that matter (see A/CN.9/486, para. 19), the Commission felt that such an approach would unnecessarily undermine existing practices. It was stated that the rule in draft article 19, paragraph 6, was justified by the need to protect the debtor from additional cost, a need that did not arise in draft article 20, paragraph 2.

27. The suggestion was also made that in paragraph 3 reference should be made to draft article 12, which reproduced the rule contained in draft article 11, paragraph 1. Subject to that change and the change referred to in paragraph 24 above, the Commission approved the substance of draft article 20 and referred it to the drafting group.

Article 21. *Agreement not to raise defences or rights of set-off*

28. The text of draft article 21 as considered by the Commission was as follows:

“1. Without prejudice to the law governing the protection of the debtor in transactions made for personal, family or household purposes in the State in which the debtor is located, the debtor may agree with the assignor in a writing signed by the debtor not to raise against the assignee the defences and rights of set-off that it could raise pursuant to article 20. Such an agreement precludes the debtor from raising against the assignee those defences and rights of set-off.

“2. The debtor may not exclude:

“(a) Defences arising from fraudulent acts on the part of the assignee; or

“(b) Defences based on the debtor’s incapacity.

“3. Such an agreement may be modified only by an agreement in a writing signed by the debtor. The effect of such a modification as against the assignee is determined by article 22, paragraph 2.”

29. The Commission approved the substance of draft article 21 unchanged and referred it to the drafting group (for a change decided later in the discussion, see para. 186).

Article 22. *Modification of the original contract*

30. The text of draft article 22 as considered by the Commission was as follows:

“1. An agreement concluded before notification of the assignment between the assignor and the debtor that affects the assignee’s rights is effective as against the assignee and the assignee acquires corresponding rights.

“2. After notification of the assignment, an agreement between the assignor and the debtor that affects the assignee’s rights is ineffective as against the assignee unless:

“(a) The assignee consents to it; or

“(b) The receivable is not fully earned by performance and either the modification is provided for in the original contract or, in the context of the original contract, a reasonable assignee would consent to the modification.

“3. Paragraphs 1 and 2 of this article do not affect any right of the assignor or the assignee for breach of an agreement between them.”

31. The Commission approved the substance of draft article 22 unchanged and referred it to the drafting group.

Article 23. *Recovery of payments*

32. The text of draft article 23 as considered by the Commission was as follows:

“Without prejudice to the law governing the protection of the debtor in transactions made for personal, family or household purposes in the State in which the debtor is located, failure of the assignor to perform the original contract does not entitle the debtor to recover from the assignee a sum paid by the debtor to the assignor or the assignee.”

33. The Commission approved the substance of draft article 23 unchanged and referred it to the drafting group (for a change decided later in the discussion, see para. 186).

Section III. Other parties

Article 24. *Law applicable to competing rights*

34. The text of draft article 24 as considered by the Commission was as follows:

“1. With the exception of matters that are settled elsewhere in this Convention and subject to articles 25 and 26:

“(a) With respect to the right of a competing claimant, the law of the State in which the assignor is located governs:

“(i) The characteristics and priority of the right of an assignee in the assigned receivable; and

“(ii) The characteristics and priority of the right of the assignee in proceeds that are receivables whose assignment is governed by this Convention[;”

“(b) With respect to the right of a competing claimant, the characteristics and priority of the right of the assignee in proceeds described below are governed by:

- “(i) In the case of money or negotiable instruments not held in a bank account or through a securities intermediary, the law of the State in which such money or instruments are located;
- “(ii) In the case of investment securities held through a securities intermediary, the law of the State in which the securities intermediary is located;
- “(iii) In the case of bank deposits, the law of the State in which the bank is located[; and
- “(iv) In the case of receivables whose assignment is governed by this Convention, the law of the State in which the assignor is located];

“[(c) The existence and characteristics of the right of a competing claimant in proceeds described in paragraph 1 (b) of this article are governed by the law indicated in that paragraph].”

“2. For the purposes of this article and article 31, the characteristics of a right are:

- “(a) Whether it is a personal or property right; and
- “(b) Whether or not it is security for indebtedness or other obligation.”

35. It was noted that subparagraphs (b) and (c) of paragraph 1 raised both a problem of substance and a problem of procedure. The problem of substance arose as a result of the lack of a universally acceptable solution as to the law applicable to priority issues with respect to deposit accounts. It also related to the difficulty to reach consensus as to the location of a bank (or an account). The problem of procedure related to the need to ensure that draft article 24 would be consistent with the approach taken in the draft Convention on the law applicable to dispositions of securities currently being prepared by the Hague Conference on Private International Law. In that regard, it was noted that the place of the relevant intermediary approach (PRIMA) appeared to emerge from the Hague Conference as a generally acceptable solution but that it would be very difficult for the Commission to reach agreement on a text that would be consistent with the text of the Hague Conference which had not yet been finalized. It was also stated that, no matter how important subparagraphs (b) and (c) might be, their finalization would take time and could significantly delay the adoption of the draft Convention by the Commission. It was, therefore, observed that financiers would need to rely on draft article 26 in order to ensure priority with respect to proceeds. As to the priority rule with respect to proceeds in the form of negotiable instruments, it was agreed that, while agreement could be reached on a rule along the lines of paragraph 1 (b) (i), in the absence of a rule as to the law applicable to priority issues with respect to deposit accounts and securities, paragraph 1 (b) (i) would not be sufficient in addressing the most typical proceeds of receivables. After discussion, it was agreed that subparagraphs (b) and (c) of paragraph 1 should be deleted.

36. As to paragraph 1 (a) (ii), differing views were expressed. One view was that it could be deleted since, in any case, it would not cover the most typical proceeds of receivables, namely, deposit accounts, negotiable instruments and securities. Another view was that paragraph 1 (a) (ii) remained useful and should be retained. After discussion, the Commission agreed that paragraph 1 (a) (ii) could be removed from draft article 24 on the understanding that its placement in draft article 26 would be considered at a later stage (see para. 45).

37. With respect to paragraph 2, the concern was expressed that it might inappropriately refer matters unrelated to priority to the law of the assignor’s location. In order to address that concern, the suggestion was made that paragraph 2 should be deleted. That suggestion was objected to on the ground that the matters addressed in paragraph 2 could arise in the context of and be very relevant to a priority conflict. In order to make that point sufficiently clear, the suggestion was made that the thrust of paragraph 2 should be recast in the context of article 5, subparagraph (g) (definition of “priority”). There was sufficient support for that suggestion on the understanding that it would make it abundantly clear that the matters addressed in paragraph 2 would be referred to the law of the assignor’s location only to the extent they were relevant for the purpose of determining priority. After discussion, subject to the deletion of paragraphs 1 (a) (ii), (b) and (c) and 2, the consideration of the inclusion of paragraph 1 (a) (ii) in draft article 26 and the inclusion of the thrust of paragraph 2 in draft article 5, subparagraph (g), the Commission approved the substance of draft article 24 and referred it and draft article 5, subparagraph (g), to the drafting group (for changes to draft article 5, subparagraph (g), decided later, see paras. 149 and 162).

Article 25. Public policy and preferential rights

38. The text of draft article 25 as considered by the Commission was as follows:

- “1. The application of a provision of the law of the State in which the assignor is located may be refused by a court or other competent authority only if that provision is manifestly contrary to the public policy of the forum State.
- “2. In an insolvency proceeding commenced in a State other than the State in which the assignor is located, any preferential right that arises, by operation of law, under the law of the forum State and is given priority status over the rights of an assignee in insolvency proceedings under the law of that State may be given priority notwithstanding article 24. A State may deposit at any time a declaration identifying any such preferential right.”

39. The concern was expressed that the word “manifestly” in paragraph 1 introduced an inappropriate limitation to the ability of a court or other competent authority to refuse the application of a provision of the applicable law that was contrary to the public policy of the forum State. In order to address that concern, the suggestion was made that that word should be deleted. That suggestion was objected to. It

was widely felt that the word “manifestly” was necessary to ensure that public policy exceptions would be interpreted restrictively and paragraph 1 would be invoked only in exceptional circumstances concerning matters of fundamental importance for the forum State. It was also noted that the notion “manifestly contrary” was typically used in modern international texts, such as the UNCITRAL Model Law on Cross-Border Insolvency (see article 6).

40. The suggestion was also made that paragraph 1 should make it clear that the application of a provision of the applicable law and not the provision itself needed to be manifestly contrary to the public policy of the forum State. Furthermore, the suggestion was made that paragraph 2 should state explicitly what was implied, namely, that, with the exception of the rules referred to in paragraph 2, the mandatory law rules of the forum or another State that were applicable irrespective of the law otherwise applicable could not displace the priority rules of the law of the assignor’s location (see A/CN.9/489/Add.1, para. 40). Subject to those changes, the Commission approved the substance of draft article 25 and referred it to the drafting group.

Article 26. *Special proceeds rules*

41. The text of draft article 26 as considered by the Commission was as follows:

“1. If proceeds are received by the assignee, the assignee is entitled to retain those proceeds to the extent that the assignee’s right in the assigned receivable had priority over the right of a competing claimant in the assigned receivable.

“2. If proceeds are received by the assignor, the right of the assignee in those proceeds has priority over the right of a competing claimant in those proceeds to the same extent as the assignee’s right had priority over the right in the assigned receivable of those claimants if:

“(a) The assignor has received the proceeds under instructions from the assignee to hold the proceeds for the benefit of the assignee; and

“(b) The proceeds are held by the assignor for the benefit of the assignee separately and are reasonably identifiable from the assets of the assignor, such as in the case of a separate deposit account containing only cash receipts from receivables assigned to the assignee.”

42. The concern was expressed that draft article 26 would unduly interfere with currently existing national law that treated payment in cash differently from payment through other means and was not familiar with the notion of proceeds or tracing of assets. It was stated that, under such law, payments made to the assignor would be part of the assignor’s assets and the assignee could not assert a property right in such payments. In order to address that concern, the suggestion was made that draft article 26 should be made subject to a reservation. That suggestion was objected to. It was widely felt that draft article 26 introduced a special rule applicable only where parties chose to structure their transactions in a certain way so as to take advantage of the protection afforded by draft article 26. It was

stated that such a rule, which was not unlike special national legislation, could benefit parties to securitization or confidential invoice discounting transactions, which were common practice all over the world and on the basis of which parties were able to obtain more credit and at a more affordable cost. It was also observed that drafting a rule so as to treat cash differently from other proceeds presupposed that a clear distinction could be drawn between cash and, for example, cash in deposit or securities accounts and negotiable instruments or securities, which was not easy in today’s economy.

43. It was noted that, in the case of a conflict of priority between a securities intermediary with a right in securities as original collateral and an assignee under the draft Convention with a right in securities as proceeds, different results could be reached depending on whether draft article 26 or the place of the relevant intermediary approach (PRIMA) applied. It was also noted that the same problem could arise in the case of a priority conflict between a depository institution with a security right in or a right of set-off against a deposit account as original collateral and an assignee asserting a right in the deposit account as proceeds; and in the case of a transferee of a deposit or securities account as original collateral and an assignee with a right in such account as proceeds of an assigned receivable. In order to address that problem, it was suggested that language along the following lines should be added in draft article 26 as paragraph 3:

“Nothing in paragraph 2 of this article affects the priority of a right, not derived from the receivable, of a person holding a right created by agreement or of a person holding a right of set-off.”

44. That suggestion received sufficient support. As an alternative, language along the following lines was proposed:

“Nothing in paragraph 2 affects the priority as against the assignee, under law outside this Convention, of a right, not derived from the receivable, of (i) a person holding a consensual security right in the proceeds, (ii) a consensual transferee of the proceeds for value, or (iii) a person holding a right of set-off against the proceeds.”

45. In response to a question as to the difference between the two proposals, it was stated that, while the underlying policy of both proposals was the same, the second proposal was more precise. As a matter of drafting, the suggestion was also made that in paragraph 2 (b) indicative reference should be made to securities and securities accounts. Subject to that change in paragraph 2 (b) and to including in draft article 26 a new paragraph along the lines of the proposals mentioned above, the Commission approved the substance of draft article 26 and referred it to the drafting group (the Commission, however, did not consider the question of including language along the lines of draft article 24, para. 1 (a) (ii), in draft article 26).

Article 27. *Subordination*

46. The text of draft article 27 as considered by the Commission was as follows:

“An assignee entitled to priority may at any time subordinate its priority unilaterally or by agreement in favour of any existing or future assignees.”

47. The Commission approved the substance of draft article 27 unchanged and referred it to the drafting group.

IV. AUTONOMOUS CONFLICT-OF-LAWS RULES

Article 28. *Application of chapter V*

48. The text of draft article 28 as considered by the Commission was as follows:

“The provisions of this chapter apply to matters that are:

“(a) Within the scope of this Convention as provided in article 1, paragraph 4; and

“(b) Otherwise within the scope of this Convention but not settled elsewhere in it.”

49. The Commission approved the substance of draft article 28 unchanged and referred it to the drafting group.

Article 29. *Law applicable to the mutual rights and obligations of the assignor and the assignee*

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

“1. The mutual rights and obligations of the assignor and the assignee arising from their agreement are governed by the law chosen by them.

“2. In the absence of a choice of law by the assignor and the assignee, their mutual rights and obligations arising from their agreement are governed by the law of the State with which the contract of assignment is most closely connected.”

51. The Commission approved the substance of draft article 29 unchanged and referred it to the drafting group. The Commission took note of a proposal to include in chapter V a provision on form and deferred its discussion until it had considered draft article 8 (see paras. 163 and 164).

Article 30. *Law applicable to the rights and obligations of the assignee and the debtor*

52. The text of draft article 30 as considered by the Commission was as follows:

“The law governing the original contract determines the effectiveness of contractual limitations on assignment as between the assignee and the debtor, the relationship between the assignee and the debtor, the conditions under which the assignment can be invoked against the debtor and any question whether the debtor’s obligations have been discharged.”

53. The Commission approved the substance of draft article 30 unchanged and referred it to the drafting group.

Article 31. *Law applicable to competing rights of other parties*

54. The text of draft article 31 as considered by the Commission was as follows:

“1. With the exception of matters that are settled elsewhere in this Convention and subject to articles 25 and 26:

“(a) With respect to the right of a competing claimant, the law of the State in which the assignor is located governs:

“(i) The characteristics and priority of the right of an assignee in the assigned receivable; and

“(ii) The characteristics and priority of the right of the assignee in proceeds that are receivables whose assignment is governed by this Convention[;

“(b) With respect to the right of a competing claimant, the characteristics and priority of the right of the assignee in proceeds described below are governed by:

“(i) In the case of money or negotiable instruments not held in a bank account or through a securities intermediary, the law of the State in which such money or instruments are located;

“(ii) In the case of investment securities held through a securities intermediary, the law of the State in which the securities intermediary is located;

“(iii) In the case of bank deposits, the law of the State in which the bank is located[; and

“(iv) In the case of receivables whose assignment is governed by this Convention, the law of the State in which the assignor is located[;

“[(c) The existence and characteristics of the right of a competing claimant in proceeds described in paragraph 1 (b) of this article are governed by the law indicated in that paragraph]].

“2. In an insolvency proceeding commenced in a State other than the State in which the assignor is located, any preferential right that arises, by operation of law, under the law of the forum State and is given priority status over the rights of an assignee in insolvency proceedings under the law of that State may be given priority notwithstanding paragraph 1 of this article.”

55. It was agreed that paragraph 1 should be aligned with draft article 24. It was also agreed that the opening words of draft article 24, “with the exception of ... 26,” could be deleted on the understanding that draft article 28 was sufficient to deal with the hierarchy between draft article 31 and other provisions of the draft Convention outside chapter V and that the reference to draft article 25 was sufficiently covered by draft article 31, paragraph 2, and draft articles 32 and 33. In particular, as to the hierarchy between draft articles 24-26 and 31, it was widely felt that, if the

assignor was not located in a Contracting State, draft articles 24-26 could not apply (see draft article 28, subpara. (a)), while, if the assignor was located in a Contracting State, draft article 31 would not apply, since the matter covered therein would be settled in draft articles 24-26 (see draft article 28, subpara. (b)). It was also agreed that paragraph 2 could be retained in its current formulation, since the matter addressed in the wording added to its equivalent draft article 25 (see para. 40) was sufficiently covered in draft article 32 (see, however, para. 196). Subject to the changes mentioned above, the Commission approved the substance of draft article 31 and referred it to the drafting group.

Article 32. Mandatory rules

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

“1. Nothing in articles 29 and 30 restricts the application of the rules of the law of the forum State in a situation where they are mandatory, irrespective of the law otherwise applicable.

“2. Nothing in articles 29 and 30 restricts the application of the mandatory rules of the law of another State with which the matters settled in those articles have a close connection if and in so far as, under the law of that other State, those rules must be applied irrespective of the law otherwise applicable.”

57. The Commission approved the substance of draft article 32 unchanged and referred it to the drafting group.

Article 33. Public policy

58. The text of draft article 33 as considered by the Commission was as follows:

“With regard to matters settled in this chapter, the application of a provision of the law specified in this chapter may be refused by a court or other competent authority only if that provision is manifestly contrary to the public policy of the forum State.”

59. Subject to the same changes made to draft article 25, paragraph 1 (see para. 40), the Commission approved the substance of draft article 33 and referred it to the drafting group.

Chapter VI. Final provisions

Article 34. Depositary

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

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

61. The Commission approved the substance of draft article 34 unchanged and referred it to the drafting group.

Article 35. Signature, ratification, acceptance, approval, accession

62. The text of draft article 35 as considered by the Commission was as follows:

“1. This Convention is open for signature by all States at the Headquarters of the United Nations in New York, until [...].

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

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

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

63. The Commission approved the substance of draft article 35 unchanged and referred it to the drafting group.

Article 36. Application to territorial units

64. The text of draft article 36 as considered by the Commission was as follows:

“1. If a State has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at any time, declare that this Convention is to extend to all its territorial units or only one or more of them, and may at any time substitute another declaration for its earlier declaration.

“2. Such declarations are to state expressly the territorial units to which this Convention extends.

“3. If, by virtue of a declaration under this article, this Convention does not extend to all territorial units of a State and the assignor or the debtor is located in a territorial unit to which this Convention does not extend, this location is considered not to be in a Contracting State.

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

65. A number of concerns were expressed with respect to draft article 36. One concern was that paragraph 1 might introduce some uncertainty in that it allowed States to make a declaration “at any time”. In order to address that concern, it was suggested that paragraph 1 be revised to provide that declarations should be made at the time of signature, ratification, acceptance, approval or accession. It was widely felt, however, that the flexibility provided to States in paragraph 1 as to the time a declaration could be made was common practice in international conventions (including, for example, the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (General Assembly resolution 50/48, annex)) and did not raise any problems.

66. Another concern was that the term “territorial unit” might not fully encompass what was reflected by the French term “collectivité territoriale” or by the term “jurisdiction”. It was generally agreed, however, that the term “territorial unit” was sufficiently broad for that purpose, a matter that could be usefully clarified in the commentary on the draft Convention. It was stated in particular that the words in paragraph 1 qualifying the term “territorial unit” by reference to a different “system of law” were sufficiently general to ensure that different territorially defined jurisdictions would be covered. It was also observed that federal state clauses along the lines of draft article 36 were normally included in international conventions and the application of such clauses had not raised any problems. Yet another concern was that paragraph 3 might create uncertainty as to the application of the draft Convention and should be deleted. That suggestion was objected to. It was stated that, without a rule along the lines of paragraph 3, federal States that had no right to bind territorial units would not be able to adopt international conventions. After discussion, the Commission approved the substance of draft article 36 unchanged and referred it to the drafting group (for a later addition to draft article 36, see para. 187).

Article 37. *Applicable law in territorial units*

67. The text of draft article 37 as considered by the Commission was as follows:

“[If a State has two or more territorial units whose law may govern a matter referred to in chapters IV and V of this Convention, a reference in those chapters to the law of a State in which a person or property is located means the law applicable in the territorial unit in which the person or property is located, including rules that render applicable the law of another territorial unit of that State. Such a State may specify by declaration at any time how it will implement this article.]”

68. The suggestion was made that language along the following lines should be substituted for draft article 37:

“If a State has two or more territorial units, the location of a person within that State shall be the territorial unit in which the central administration of the person is exercised or, if the person has no place of business, its habitual residence, unless that State specifies by declaration other rules for determining the location of a person within that State.”

69. The Commission took note of the proposed text and, in order to give delegates the opportunity to study it, decided to defer discussion to a later point in time (see paras. 187 and 188).

Article 38. *Conflicts with other international agreements*

70. The text of draft article 38 as considered by the Commission was as follows:

“1. This Convention does not prevail over any international agreement that has already been or may be entered

into and that contains provisions concerning the matters governed by this Convention, provided that the assignor is located at the time of the conclusion of the contract of assignment in a State party to such agreement or, with respect to the provisions of this Convention that deal with the rights and obligations of the debtor, at the time of the conclusion of the original contract, the debtor is located in a State party to such agreement or the law governing the original contract is the law of a State party to such agreement.

“2. Notwithstanding paragraph 1 of this article, this Convention prevails over the Unidroit Convention on International Factoring (“the Ottawa Convention”). If, at the time of the conclusion of the original contract, the debtor is located in a State party to the Ottawa Convention or the law governing the original contract is the law of a State party to the Ottawa Convention and that State is not a party to this Convention, nothing in this Convention precludes the application of the Ottawa Convention with respect to the rights and obligations of the debtor.”

71. The concern was expressed that, in referring to “matters” governed by two international agreements, paragraph 1 might not be sufficiently clear. In order to address that concern, the suggestion was made that the words “concerning the matters” should be replaced with the words “specifically governing transactions otherwise”. It was stated that the suggested wording would ensure that the draft Unidroit Convention on International Interests in Mobile Equipment (“the draft Unidroit Convention”) would prevail only where it was specifically applicable to a transaction. Some concern was expressed as to the impact of that change on the draft Unidroit Convention. However, the Commission approved that change on the understanding that the matter might need to be revisited in the context of later discussions on the relationship between the draft Convention and the draft Unidroit Convention (see paras. 190-194).

72. The concern was also expressed that the second sentence of paragraph 2 might not achieve its purpose of ensuring that, if the draft Convention did not apply to the rights and obligations of a debtor, it would not preclude the application of the Ottawa Convention with respect to the rights and obligations of that debtor. In order to address that concern, the suggestion was made that that sentence should be replaced by language along the following lines:

“To the extent that this Convention does not apply to the rights and obligations of a debtor, it does not preclude the application of the Ottawa Convention with respect to the rights and obligations of that debtor.”

There was sufficient support for that suggestion.

73. In the discussion, the suggestion was made that the commentary should state that various regulations and directives of regional organizations should be treated as international agreements for the purpose of draft article 38. That suggestion was objected to. It was stated that such an approach would risk undermining the effectiveness of the international legislative process in general and the draft Convention in particular. It was also observed that, for that reason, obligations between members to various regional

organizations should not interfere with obligations undertaken in multilateral legislative texts. In addition, it was pointed out that the purpose of the commentary was not to address a matter that, in any case, would have to be left to the courts. Furthermore, it was said that, in view of the large number of regional regulations or directives, reviewing all those texts would be an impossible task.

74. Subject to the changes referred to above (see paras. 71 and 72) and to its further deliberations on the relationship between the draft Convention and the draft Unidroit Convention (see paras. 190-194), the Commission approved the substance of draft article 38 and referred it to the drafting group.

Article 39. Declaration on application of chapter V

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

“A State may declare at any time that it will not be bound by chapter V.”

76. The Commission approved the substance of draft article 39 unchanged and referred it to the drafting group.

Article 40. Limitations relating to Governments and other public entities

77. The text of draft article 40 as considered by the Commission was as follows:

“A State may declare at any time that it will not be bound or the extent to which it will not be bound by articles 11 and 12 if the debtor or any person granting a personal or property right securing payment of the assigned receivable is located in that State at the time of the conclusion of the original contract and is a Government, central or local, any subdivision thereof, or an entity constituted for a public purpose. If a State has made such a declaration, articles 11 and 12 do not affect the rights and obligations of that debtor or person. A State may list in a declaration the types of entity that are the subject of a declaration.”

78. The Commission approved the substance of draft article 40 unchanged and referred it to the drafting group.

Article 41. Other exclusions

79. The text of draft article 41 as considered by the Commission was as follows:

“[1. A State may declare at any time that it will not apply this Convention to types of assignment or to the assignment of categories of receivables listed in a declaration. In such a case, this Convention does not apply to such types of assignment or to the assignment of such categories of receivables if the assignor is located at the time of the conclusion of the contract of assignment in such a State or, with respect to the provisions of this Convention that deal with the rights and obligations of

the debtor, at the time of the conclusion of the original contract, the debtor is located in such a State or the law governing the original contract is the law of such a State.

“2. After a declaration under paragraph 1 of this article takes effect:

“(a) This Convention does not apply to such types of assignment or to the assignment of such categories of receivables if the assignor is located at the time of the conclusion of the contract of assignment in such a State; and

“(b) The provisions of this Convention that affect the rights and obligations of the debtor do not apply if, at the time of the conclusion of the original contract, the debtor is located in such a State or the law governing the receivable is the law of such a State.]”

80. It was noted that both draft article 41, which set forth the effect of a declaration, and draft article 4, paragraph 4, which permitted a State to make such a declaration, appeared within square brackets, since the Working Group had not been able to reach agreement on those provisions.

81. Views that had been expressed at the last session of the Working Group both in favour and against the retention of draft article 41 were reiterated (see A/CN.9/486, paras. 115-118). On the one hand, it was argued that draft article 41 should be retained to provide the necessary flexibility for States to adjust the scope of the draft Convention to their needs by excluding present practices other than those excluded in draft article 4 and future practices for which the draft Convention might not be suitable and which could not be predicted at the present time. It was underscored in particular that, even if draft article 4 were to cover fully all present practices that should be excluded, draft article 41 would still be needed so as to provide flexibility with respect to future practices. The example of de-materialized securities was given to emphasize the need for such flexibility with respect to new and rapidly developing practices. It was stated that such an approach would increase the acceptability of the draft Convention to States. It was also observed that the declaration mechanism was sufficiently transparent and would not create problems in practice. The Commission was urged, however, to try to simplify draft article 41. The view was also expressed that, while flexibility was welcome, it should be reflected in the draft Convention in a balanced way. In order to achieve that result, it was suggested that the draft Convention should allow States to utilize the declaration mechanism not only to exclude but also to include further practices. In response, it was stated that that suggestion could also be considered on the understanding that it would relate to practices for which the draft Convention would be suitable. Non-contractual receivables were mentioned as an example of receivables for the assignment of which the draft Convention would not be suitable.

82. On the other hand, it was argued that an approach based on exclusions by declaration would risk undermining the certainty and uniformity achieved by the draft Convention. It was pointed out that, if States were allowed to exclude any practice they wished, the scope of the draft

Convention could differ from State to State, and parties would have to identify and interpret the relevant declarations, which might not always be easy. It was also observed that the revision mechanism provided in draft article 47 was sufficient to meet the needs of future practices. In addition, it was stated that, in view of the fact that such declarations would exclude the application of the draft Convention, they would constitute reservations subject to reciprocity, a result that could complicate the application of the draft Convention. Furthermore, it was pointed out that the advantage of creating an international uniform regime was the necessary counterweight for States that would have to change their own law to adopt the draft Convention. If that advantage was lost or minimized, those States might be reluctant to adopt the draft Convention. Moreover, it was emphasized that an open-ended authorization for exclusions could inadvertently result in States excluding assignments of trade receivables or assignments of receivables arising from contracts that contained an anti-assignment clause. It was pointed out that the possibility for such exclusions would create uncertainty, since financiers of trade receivables would virtually have to look over their shoulders for declarations by States. Such a result, it was said, could significantly reduce the usefulness of the draft Convention. In order to avoid such a deleterious result, it was suggested that, at least, draft article 41 should make it clear that practices relating to the assignment of trade receivables could not be excluded by declaration.

83. The Commission generally recognized that draft article 41 might need to describe or list the practices that could be excluded by declaration. It was also widely felt that the content of such a list could not be determined before finalization of draft article 4. The Commission, therefore, decided to defer further discussion on draft article 41 until it had completed its consideration of draft article 4 (see paras. 141-146). A note of caution was struck, however, that discussion should not be reopened with respect to draft article 4, since the Commission had approved that provision at its thirty-third session.

Article 42. *Application of the annex*

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

“1. A State may at any time declare that it will be bound by:

“(a) The priority rules set forth in section I of the annex and will participate in the international registration system established pursuant to section II of the annex;

“(b) The priority rules set forth in section I of the annex and will effectuate such rules by use of a registration system that fulfils the purposes of such rules, in which case, for the purposes of section I of the annex, registration pursuant to such a system has the same effect as registration pursuant to section II of the annex;

“(c) The priority rules set forth in section III of the annex;

“(d) The priority rules set forth in section IV of the annex; or

“(e) The priority rules set forth in articles 7 and 8 of the annex.

“2. For the purposes of article 24:

“(a) The law of a State that has made a declaration pursuant to paragraph 1 (a) or (b) of this article is the set of rules set forth in section I of the annex;

“(b) The law of a State that has made a declaration pursuant to paragraph 1 (c) of this article is the set of rules set forth in section III of the annex;

“(c) The law of a State that has made a declaration pursuant to paragraph 1 (d) of this article is the set of rules set forth in section IV of the annex; and

“(d) The law of a State that has made a declaration pursuant to paragraph 1 (e) of this article is the set of rules set forth in articles 7 and 8 of the annex.

“3. A State that has made a declaration pursuant to paragraph 1 of this article may establish rules pursuant to which assignments made before the declaration takes effect become subject to those rules within a reasonable time.

“4. A State that has not made a declaration pursuant to paragraph 1 of this article may, in accordance with priority rules in force in that State, utilize the registration system established pursuant to section II of the annex.

“5. At the time a State makes a declaration pursuant to paragraph 1 of this article or thereafter, it may declare that it will not apply the priority rules chosen under paragraph 1 of this article to certain types of assignment or to the assignment of certain categories of receivables.”

85. A number of suggestions were made. One suggestion was that, in order to clarify the relationship between paragraphs 2 and 5, language along the following lines should be added at the end of subparagraphs (a)-(d) of paragraph 2: “as effected by any declaration made pursuant to paragraph 5 of this article”. Another suggestion was that States should be allowed to adopt the provisions of the annex with modifications to be specified in a declaration. Language along the following lines was proposed for addition at the end of paragraph 5: “or that it will apply those priority provisions with modifications specified in that declaration”. Subject to those changes, the Commission approved the substance of draft article 42 and referred it to the drafting group.

Article 43. *Effect of declaration*

86. The text of draft article 43 as considered by the Commission was as follows:

“1. Declarations made under article 36, paragraph 1, and articles 37 or 39 to 42 at the time of signature are subject to confirmation upon ratification, acceptance or approval.

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

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

“4. A State that makes a declaration under article 36, paragraph 1, and articles 37 or 39 to 42 may withdraw it at any time by a formal notification in writing addressed to the depositary. Such withdrawal takes effect on the first day of the month following the expiration of six months after the date of the receipt of the notification by the depositary.

“5. In the case of a declaration under article 36, paragraph 1, and articles 37 or 39 to 42 that takes effect after the entry into force of this Convention in respect of the State concerned or in the case of a withdrawal of any such declaration, the effect of which in either case is to cause a rule in this Convention, including any annex, to become applicable:

“(a) Except as provided in paragraph 5 (b) of this article, that rule is applicable only to assignments for which the contract of assignment is concluded on or after the date when the declaration or withdrawal takes effect in respect of the Contracting State referred to in article 1, paragraph 1 (a);

“(b) A rule that deals with the rights and obligations of the debtor applies only in respect of original contracts concluded on or after the date when the declaration or withdrawal takes effect in respect of the Contracting State referred to in article 1, paragraph 3.

“6. In the case of a declaration under article 36, paragraph 1, and articles 37 or 39 to 42 that takes effect after the entry into force of this Convention in respect of the State concerned or in the case of a withdrawal of any such declaration, the effect of which in either case is to cause a rule in this Convention, including any annex, to become inapplicable:

“(a) Except as provided in paragraph 6 (b) of this article, that rule is inapplicable to assignments for which the contract of assignment is concluded on or after the date when the declaration or withdrawal takes effect in respect of the Contracting State referred to in article 1, paragraph 1 (a);

“(b) A rule that deals with the rights and obligations of the debtor is inapplicable in respect of original contracts concluded on or after the date when the declaration or withdrawal takes effect in respect of the Contracting State referred to in article 1, paragraph 3.

“7. If a rule rendered applicable or inapplicable as a result of a declaration or withdrawal referred to in paragraphs 5 or 6 of this article is relevant to the determination of priority with respect to a receivable for which the contract of assignment is concluded before such declaration or withdrawal takes effect or with respect to its proceeds, the right of the assignee has priority over the right of a competing claimant to the extent that, under the law that would determine priority before such declaration or

withdrawal takes effect, the right of the assignee would have priority.”

87. The Commission approved the substance of draft article 43 unchanged and referred it to the drafting group.

Article 44. *Reservations*

88. The text of draft article 44 as considered by the Commission was as follows:

“No reservations are permitted except those expressly authorized in this Convention.”

89. It was suggested that the commentary should clarify the application of draft article 44 by reference to two possible drafting changes (i.e. adding the words “or declarations” after the word “reservations” or deleting the words after the word “permitted”). The Commission approved the substance of draft article 44 unchanged and referred it to the drafting group.

Article 45. *Entry into force*

90. The text of draft article 45 as considered by the Commission was as follows:

“1. This Convention enters into force on the first day of the month following the expiration of six months from the date of deposit of the fifth instrument of ratification, acceptance, approval or accession with the depositary.

“2. For each State that becomes a Contracting State to this Convention after the date of deposit of the fifth instrument of ratification, acceptance, approval or accession, this Convention enters into force on the first day of the month following the expiration of six months after the date of deposit of the appropriate instrument on behalf of that State.

“3. This Convention applies only to assignments if the contract of assignment is concluded on or after the date when this Convention enters into force in respect of the Contracting State referred to in article 1, paragraph 1 (a), provided that the provisions of this Convention that deal with the rights and obligations of the debtor apply only to assignments of receivables arising from original contracts concluded on or after the date when this Convention enters into force in respect of the Contracting State referred to in article 1, paragraph 3.

“4. If a receivable is assigned pursuant to a contract of assignment concluded before the date when this Convention enters into force in respect of the Contracting State referred to in article 1, paragraph 1 (a), the right of the assignee has priority over the right of a competing claimant with respect to the receivable and its proceeds to the extent that, under the law that would determine priority in the absence of this Convention, the right of the assignee would have priority.”

91. Subject to the deletion of the word “proceeds” in paragraph 4, which was the result of the deletion of the

proceeds rules in draft article 24 (see para. 37), the Commission approved the substance of draft article 45 and referred it to the drafting group.

Article 46. Denunciation

92. The text of draft article 46 as considered by the Commission was as follows:

“1. A Contracting State may denounce this Convention at any time by written notification addressed to the depositary.

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

“3. This Convention remains applicable to assignments if the contract of assignment is concluded before the date when the denunciation takes effect in respect of the Contracting State referred to in article 1, paragraph 1 (*a*), provided that the provisions of this Convention that deal with the rights and obligations of the debtor remain applicable only to assignments of receivables arising from original contracts concluded before the date when the denunciation takes effect in respect of the Contracting State referred to in article 1, paragraph 3.

“4. If a receivable is assigned pursuant to a contract of assignment concluded before the date when the denunciation takes effect in respect of the Contracting State referred to in article 1, paragraph 1 (*a*), the right of the assignee has priority over the right of a competing claimant with respect to the receivable and its proceeds to the extent that, under the law that would determine priority under this Convention, the right of the assignee would have priority.”

93. Subject to the deletion of the term “proceeds” in paragraph 4, which was the result of the deletion of the proceeds rules in draft article 24 (see para. 37), the Commission approved the substance of draft article 46 and referred it to the drafting group.

Article 47. Revision and amendment

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

“1. At the request of not less than one third of the Contracting States to this Convention, the depositary shall convene a conference of the Contracting States for revising or amending it.

“2. Any instrument of ratification, acceptance, approval or accession deposited after the entry into force of an amendment to this Convention is deemed to apply to the Convention as amended.”

95. In view of the suggestion that the revision mechanism provided in draft article 47 might be used in adjusting the draft Convention to meet the needs of future practices (see para. 82), the Commission postponed discussion of draft article 47 until it had completed its discussion on draft article 4, paragraph 4, and draft article 41 (see para. 146).

ANNEX TO THE DRAFT CONVENTION

Section I. Priority rules based on registration

Article 1. Priority among several assignees

96. The text of draft article 1 of the annex as considered by the Commission was as follows:

“As between assignees of the same receivable from the same assignor, the priority of the right of an assignee in the assigned receivable and its proceeds is determined by the order in which data about the assignment are registered under section II of this annex, regardless of the time of transfer of the receivable. If no such data are registered, priority is determined by the order of the conclusion of the respective contracts of assignment.”

97. Subject to the deletion of the reference to proceeds (see para. 37), the Commission approved the substance of draft article 1 of the annex and referred it to the drafting group.

Article 2. Priority between the assignee and the insolvency administrator or creditors of the assignor

98. The text of draft article 2 of the annex as considered by the Commission was as follows:

“The right of an assignee in an assigned receivable and its proceeds has priority over the right of an insolvency administrator and creditors who obtain a right in the assigned receivable or its proceeds by attachment, judicial act or similar act of a competent authority that gives rise to such right, if the receivable was assigned, and data about the assignment were registered under section II of this annex, before the commencement of such insolvency proceeding, attachment, judicial act or similar act.”

99. Subject to the deletion of the reference to proceeds (see para. 37), the Commission approved the substance of draft article 2 of the annex and referred it to the drafting group.

Section II. Registration

Article 3. Establishment of a registration system

100. The text of draft article 2 of the annex as considered by the Commission was as follows:

“A registration system will be established for the registration of data about assignments, even if the relevant assignment or receivable is not international, pursuant to

the regulations to be promulgated by the registrar and the supervising authority. Regulations promulgated by the registrar and the supervising authority under this annex shall be consistent with this annex. The regulations will prescribe in detail the manner in which the registration system will operate, as well as the procedure for resolving disputes relating to that operation.”

101. The concern was expressed that draft article 3 of the annex gave significant responsibilities to the supervising authority and the registrar without specifying the method of their appointment. In order to address that concern, a number of suggestions were made. One suggestion was that draft article 3 of the annex should be reformulated to deal with the matter in more general terms. That suggestion did not receive sufficient support. Another suggestion was that the method of designating the supervising authority and the registrar should be expressly settled in the draft Convention. Language along the following lines was proposed (see A/CN.9/491, para. 26):

“At the request of not less than one third of the [Contracting] [Signatory] States to this Convention, the depositary shall convene a conference of the [Contracting] [Signatory] States for designating the supervising authority and the first registrar, and for preparing the first regulations and for revising or amending them.”

102. There was sufficient support in the Commission for that proposal. It was agreed that both Contracting and Signatory States should be allowed to request and participate in a conference. After discussion, the Commission approved the substance of draft article 3 of the annex, as well as of the proposed text mentioned above (deleting the brackets), and referred both provisions to the drafting group.

Article 4. Registration

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

“1. Any person may register data with regard to an assignment at the registry in accordance with this annex and the regulations. As provided in the regulations, the data registered shall be the identification of the assignor and the assignee and a brief description of the assigned receivables.

“2. A single registration may cover one or more assignments by the assignor to the assignee of one or more existing or future receivables, irrespective of whether the receivables exist at the time of registration.

“3. A registration may be made in advance of the assignment to which it relates. The regulations will establish the procedure for the cancellation of a registration in the event that the assignment is not made.

“4. Registration or its amendment is effective from the time when the data set forth in paragraph 1 of this article are available to searchers. The registering party may specify, from options set forth in the regulations, a period of effectiveness for the registration. In the absence of such a specification, a registration is effective for a period of five years.

“5. Regulations will specify the manner in which registration may be renewed, amended or cancelled and regulate such other matters as are necessary for the operation of the registration system.

“6. Any defect, irregularity, omission or error with regard to the identification of the assignor that would result in data registered not being found upon a search based on a proper identification of the assignor renders the registration ineffective.”

104. The Commission approved the substance of draft article 4 of the annex unchanged and referred it to the drafting group.

Article 5. Registry searches

105. The text of draft article 5 of the annex as considered by the Commission was as follows:

“1. Any person may search the records of the registry according to identification of the assignor, as set forth in the regulations, and obtain a search result in writing.

“2. A search result in writing that purports to be issued by the registry is admissible as evidence and is, in the absence of evidence to the contrary, proof of the registration of the data to which the search relates, including the date and hour of registration.”

106. The Commission approved the substance of draft article 5 of the annex unchanged and referred it to the drafting group.

Section III. Priority rules based on the time of the contract of assignment

Article 6. Priority among several assignees

107. The text of draft article 6 of the annex as considered by the Commission was as follows:

“As between assignees of the same receivable from the same assignor, the priority of the right of an assignee in the assigned receivable and its proceeds is determined by the order of the conclusion of the contract of assignment.”

108. Subject to the deletion of the reference to proceeds (see para. 37), the Commission approved the substance of draft article 6 of the annex and referred it to the drafting group.

Article 7. Priority between the assignee and the insolvency administrator or creditors of the assignor

109. The text of draft article 7 of the annex as considered by the Commission was as follows:

“The right of an assignee in an assigned receivable and its proceeds has priority over the right of an insolvency administrator and creditors who obtain a right in

the assigned receivable or its proceeds by attachment, judicial act or similar act of a competent authority that gives rise to such right, if the receivable was assigned before the commencement of such insolvency proceeding, attachment, judicial act or similar act.”

110. Subject to the deletion of the reference to proceeds (see para. 37), the Commission approved the substance of draft article 7 of the annex and referred it to the drafting group.

Additional provision in section III

111. In order to address the issue of proof of the time of conclusion of the contract of assignment, wording along the following lines was proposed:

“The time of conclusion of a contract of assignment in respect of articles 6 and 7 may be proved by any means.”

There was broad support in the Commission for the proposed text. After discussion, the Commission approved the substance of the proposal and referred it to the drafting group.

Section IV. Priority rules based on the time of notification of assignment

Article 8. Priority among several assignees

112. The text of draft article 8 of the annex as considered by the Commission was as follows:

“As between assignees of the same receivable from the same assignor, the priority of the right of an assignee in the assigned receivable and its proceeds is determined by the order in which notification of the assignment is effected.”

113. The concern was expressed that a priority system based on notification might not be as efficient as it should be for it to be recommended to States. In response, it was pointed out that such a system existed and was functioning well in many countries. It was also stated that the purpose of the annex was not to rate different priority systems but to present them in a balanced and comprehensive way.

114. In order to better reflect the relevant rule, it was suggested that draft article 8 of the annex should be supplemented by language along the following lines:

“However, an assignee with knowledge of a prior assignment at the time of its assignment may not obtain priority over the prior assignment.”

It was also suggested that, for the same reason, reference should be made to the time notification of the assignment was received by the debtor rather than to the time when notification of the assignment was effected. Subject to those modifications and to the deletion of the reference to proceeds (see para. 37), the Commission approved the substance of draft article 8 of the annex and referred it to the drafting group.

Article 9. Priority between the assignee and the insolvency administrator or creditors of the assignor

115. The text of draft article 9 of the annex as considered by the Commission was as follows:

“The right of an assignee in an assigned receivable and its proceeds has priority over the right of an insolvency administrator and creditors who obtain a right in the assigned receivable or its proceeds by attachment, judicial act or similar act of a competent authority that gives rise to such right, if the receivable was assigned and notification was effected before the commencement of such insolvency proceeding, attachment, judicial act or similar act.”

116. Subject to the deletion of the reference to proceeds (see para. 37), the Commission approved the substance of draft article 9 of the annex and referred it to the drafting group.

Title and preamble

117. The text of the title and the preamble of the draft Convention as considered by the Commission was as follows:

“Draft Convention on Assignment of Receivables in International Trade

“Preamble

“The Contracting States,

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

“Considering that problems created by uncertainties as to the content and the choice of legal regime applicable to the assignment of receivables constitute an obstacle to international trade,

“Desiring to establish principles and to adopt rules relating to the assignment of receivables that would create certainty and transparency and promote the modernization of the law relating to assignments of receivables, while protecting existing assignment practices and facilitating the development of new practices,

“Desiring also to ensure adequate protection of the interests of debtors in assignments of receivables,

“Being of the opinion that the adoption of uniform rules governing the assignment of receivables would promote the availability of capital and credit at more affordable rates and thus facilitate the development of international trade,

“Have agreed as follows:”

118. The Commission agreed to include the definite article “the” before the word “assignment” in the title of the draft Convention. Subject to that change, the Commission approved the substance of the title and the preamble of the draft Convention and referred them to the drafting group.

Chapter I. Scope of application

Article 1. *Scope of application*

119. The text of draft article 1 as considered by the Commission was as follows:

“1. This Convention applies to:

“(a) Assignments of international receivables and to international assignments of receivables as defined in this chapter, if, at the time of the conclusion of the contract of assignment, the assignor is located in a Contracting State; and

“(b) Subsequent assignments, provided that any prior assignment is governed by this Convention.

“2. This Convention applies to subsequent assignments that satisfy the criteria set forth in paragraph 1 (a) of this article, even if it did not apply to any prior assignment of the same receivable.

“3. This Convention does not affect the rights and obligations of the debtor unless, at the time of the conclusion of the original contract, the debtor is located in a Contracting State or the law governing the original contract is the law of a Contracting State.

“4. The provisions of chapter V apply to assignments of international receivables and to international assignments of receivables as defined in this chapter independently of paragraphs 1 and 2 of this article. However, those provisions do not apply if a State makes a declaration under article 39.

“5. The provisions of the annex to this Convention apply as provided in article 42.”

120. The Commission approved the substance of draft article 1 unchanged and referred it to the drafting group (for a change decided later, see para. 196).

Article 2. *Assignment of receivables*

121. The text of draft article 2 as considered by the Commission was as follows:

“For the purposes of this Convention:

“(a) ‘Assignment’ means the transfer by agreement from one person (‘assignor’) to another person (‘assignee’) of all or part of or an undivided interest in the assignor’s contractual right to payment of a monetary sum (‘receivable’) from a third person (‘debtor’). The creation of rights in receivables as security for indebtedness or other obligation is deemed to be a transfer;

“(b) In the case of an assignment by the initial or any other assignee (‘subsequent assignment’), the person who makes that assignment is the assignor and the person to whom that assignment is made is the assignee.”

122. The Commission approved the substance of draft article 2 unchanged and referred it to the drafting group.

Article 3. *Internationality*

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

“A receivable is international if, at the time of the conclusion of the original contract, the assignor and the debtor are located in different States. An assignment is international if, at the time of the conclusion of the contract of assignment, the assignor and the assignee are located in different States.”

124. The Commission approved the substance of draft article 3 unchanged and referred it to the drafting group.

Article 4. *Exclusions*

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

“1. This Convention does not apply to assignments made:

“(a) To an individual for his or her personal, family or household purposes;

“(b) By the delivery of a negotiable instrument, with an endorsement, if necessary;

“(c) As part of the sale or change in the ownership or legal status of the business out of which the assigned receivables arose.

“2. This Convention does not apply to assignments of receivables arising under or from:

“(a) Transactions on a regulated exchange;

“(b) Financial contracts governed by netting agreements, except a receivable owed on the termination of all outstanding transactions;

“(c) Bank deposits;

“(d) Inter-bank payment systems, inter-bank payment agreements or investment securities settlement systems;

“(e) A letter of credit or independent guarantee;

“(f) The sale, loan or holding of or agreement to repurchase investment securities.

“3. This Convention does not:

“(a) Affect whether a property right in real estate confers a right in a receivable related to that real estate or determine the priority of such a right in the receivable with respect to the competing right of an assignee of the receivable; or

“(b) Make lawful the acquisition of property rights in real estate not permitted under the law of the State where the real estate is located.

“[4. This Convention does not apply to assignments listed in a declaration made under article 41 by the State in which the assignor is located, or with respect to the provisions of this Convention that deal with the rights and obligations of the debtor, by the State in which the debtor is located or the State whose law is the law governing the original contract.]”

Paragraph 1

126. It was noted that the Working Group had referred to the Commission the question whether transfers of negotiable instruments by delivery without a necessary endorsement or by a book entry should be excluded or be made subject to a priority rule other than that in draft article 24. In order to address that question, it was suggested that paragraph 1 (*b*) be replaced with wording along the following lines: “This Convention does not affect the rights and obligations of any person under negotiable instrument law” (see A/CN.9/491, paras. 27 and 28).

127. Support was expressed for that suggestion. It was stated that it appropriately focused on the transfer of an instrument by negotiation rather than on the type of the instrument. It was also observed that it was consistent with the policy of paragraph 1 (*b*), as approved by the Commission at its thirty-third session, to preserve the rights and obligations of parties obtaining a right by negotiation, without excluding the assignment of the underlying contractual receivable, if such assignment was permitted under law applicable outside the draft Convention (see A/CN.9/491, para. 28, and A/CN.9/489, para. 45).

128. However, a number of concerns were expressed. One concern was that the meaning of the term “negotiable instrument law” was not clear. In order to address that concern, the suggestion was made that reference should be made to “the law governing negotiable instruments”. It was also suggested that the commentary could explain that the term “negotiable instrument” encompassed bills of exchange, promissory notes and cheques. Another concern was that the words “does not affect”, the exact meaning of which was not sufficiently clear, appeared to change the effect of paragraph 1 (*b*). In response, it was noted that the words were used in a number of provisions of the draft Convention (e.g. draft article 4, para. 3 (*a*)) and were intended to ensure that, while a particular type of assignment was covered, rights of certain parties (e.g. priority rights) under law applicable outside the draft Convention would not be affected.

129. Yet another concern was that the proposed wording did not cover the rights and obligations of a person acquiring rights in an instrument by mere delivery. In order to address that concern, the suggestion was made that paragraph 1 (*b*) should be replaced by wording along the following lines: “This Convention does not affect the rights of an assignee in possession of an instrument under the law of the State in which the instrument was situated.” While interest was expressed in the proposed text, a number of concerns were also expressed. One concern was that it inappropriately expanded the scope of paragraph 1 (*b*) to cover instruments that were transferred by means other than negotiation. Another concern was that, like the text proposed above (see para. 126), the newly proposed text changed the effect of paragraph 1 (*b*) in that it did not exclude the transfer of an instrument by negotiation. Another concern was that use of the term “assignee in possession of an instrument” might be confusing, since it was not meant to refer to an assignee as defined in draft article 2, paragraph 1.

130. The Commission expressed its willingness to replace paragraph 1 (*b*) with a text along the lines of the text mentioned in paragraph 126 above. However, it was reiterated that that text would not address the rights of a person in possession of an instrument under law other than negotiable instrument law (e.g. pledge law); the rights of a person in an instrument that was not technically a negotiable instrument but was transferred by delivery; and the rights of a person in an electronic instrument transferable by book entry or control. In response, it was stated that there should be no exception for instruments other than negotiable instruments and, in effect, priority disputes between an assignee and a pledgee or another person in possession of an instrument should be referred to the law of the assignor’s location. Otherwise, it was said, in view of the difficulty in drawing a clear distinction between negotiable and other instruments, the proposed exception could even encompass trade receivables. In an effort to bridge the gap between the differing views as to whether the exception in paragraph 1 (*b*) should encompass instruments transferable in a way similar to negotiation, the suggestion was made that wording along the following lines could be added to the text proposed in paragraph 126 above: “The same rule applies to transfers made in the same manner as negotiation”. It was stated that that text would cover the pledge or delivery of a non-negotiable instrument, as well as the transfer of an electronic instrument. While some support was expressed for that text, it was stated that it created an exception in cases where no exception should be made.

131. After discussion, the Commission reiterated its support for the text referred to in paragraph 126 above and expressed its willingness to explore the possibility for an amendment along the lines of the text proposed in paragraph 129 above. Discussion focused on a revised text that was as follows:

“Nothing in this Convention affects:

“(a) The rights of a person in possession of a negotiable [or similarly transferable] instrument under the laws of the State in which the instrument is situated; and

“(b) The obligations of a party to a negotiable [or similarly transferable] instrument.”

132. It was stated that the effect of that provision would be to preserve the rights (e.g. priority rights) of an issuer or the holder of an instrument under the law of the State in which the instrument was located. While some support was expressed for that proposal, a number of concerns were also expressed. One concern was that the words “or similarly transferable” could inadvertently create an exception for instruments for which no such an exception should be established (e.g. documents evidencing financial leases). Another concern was that the reference to “possession” could cover even rights not derived from the instrument. In order to address those concerns, a number of suggestions were made, including the suggestions to refer to “instruments transferable by mere delivery or by delivery and endorsement” or to “instruments transferable by negotiation”.

133. However, those suggestions too were objected to. It was widely felt that the text mentioned in paragraph 126 above would be preferable, slightly revised to read along the following lines: “This Convention does not affect the

rights and obligations of a person under the law governing negotiable instruments". It was stated that "law governing negotiable instruments" was broader than "negotiable instrument law" and would include the law of pledge of negotiable instruments. Subject to the deletion of paragraph 1 (b) and the introduction of a new paragraph in draft article 4 along the lines of the text just mentioned, the Commission approved paragraph 1 and referred it to the drafting group.

Paragraph 2

134. It was stated that subparagraphs (a) and (b) appropriately excluded, inter alia, foreign exchange transactions. However, the concern was expressed that they might not be sufficient to exclude all foreign exchange transactions since such transactions could take place outside a regulated exchange or without being governed by a netting agreement. In order to address that concern, the suggestion was made that foreign exchange transactions should be specifically excluded from the scope of the draft Convention. That suggestion received broad support.

135. As to subparagraph (d), a number of concerns were expressed. One concern was that the reference to "investment securities" was too limiting, with the result that priority issues with respect to some types of securities might not be subject to PRIMA, in favour of which consensus was emerging, as the text being prepared by the Hague Conference on Private International Law indicated. It was stated that such a result could disrupt security markets and create an overlap with the text being prepared by the Hague Conference. In order to address that concern, experts from the Hague Conference suggested that the focus of the exclusion should be on the indirect holding pattern. In the same vein, it was suggested that the exclusion should be expanded to refer to "securities or other financial assets or instruments" to the extent held with an intermediary. There was sufficient support in the Commission for that suggestion. Support was also voiced in the Commission for the suggestion to supplement the reference to "settlement systems" by adding in subparagraph (d) a reference to "clearance systems".

136. It was also agreed that a reference to "securities and other financial assets or instruments held with an intermediary" should be added in subparagraph (f) as well. Furthermore, it was agreed that transfers of security rights in securities should also be excluded in subparagraph (f). Subject to those changes (see paras. 134-136), the Commission approved paragraph 2 and referred it to the drafting group.

Paragraph 3

137. With respect to subparagraph (a), a number of concerns were expressed. One concern was that subparagraph (a) did not resolve a question that raised great problems in some jurisdictions, namely, whether rental payments constituted personal rather than real property. In order to address that concern, it was suggested that subparagraph (a) be replaced with language along the following lines: "The Convention does not apply to the assignment of a

receivable related to land that is situated in a State in which a property right in land confers a right to such a receivable." That suggestion was objected to. It was stated that, in view of the fact that in most jurisdictions a right in real property conferred a right in its "fruits", the result of that suggestion would be to exclude all land-related receivables, which would be a significant change in the policy underlying paragraph 3. In response, it was observed that the suggestion was not intended to change the policy of paragraph 3, which was to avoid undermining real estate markets. It was recognized, however, that the problem identified arose only in some jurisdictions and that those jurisdictions could make use of the declaration mechanism for an exclusion, which should be preserved.

138. Another concern was that, in its current formulation, paragraph 3 might not be sufficiently clear and even raise questions of interpretation. In order to avoid that result, the suggestion was made that it be replaced with language along the following lines: "Where an assignment of a receivable operates so as to confer an interest in land on an assignee, nothing in this Convention shall displace or override the application to that interest of the national law of the State in which the land is located." That suggestion too was objected to. It was stated that the element that triggered the application of subparagraph (a) was reversed. It was also observed that it was not clear which law would apply to a priority conflict between an assignee and the holder of an interest in real property extending to the receivables arising from the sale or lease of the real property. As a matter of drafting, it was suggested that the term "real estate" be replaced with the term "real property" or "land", on the understanding that both the soil and any building thereon should be covered. It was also suggested that in subparagraph (b) reference should be made to legal effectiveness rather than to lawfulness.

139. In a final effort to clarify the meaning of paragraph 3, while addressing the concerns expressed with regard to its proposed reformulation, language along the following lines was proposed:

"Nothing in this Convention:

"(a) Affects the application of the law of a State in which land is situated either:

"(i) To an interest in that land to the extent that under that law the assignment of a receivable confers such an interest; or

"(ii) To determine the priority of a right in a receivable to the extent that under that law an interest in the land confers such a right; or

"(b) Makes lawful the acquisition of an interest in land not permitted under the law of the State in which the land is situated."

140. Broad support was expressed in the Commission for that proposal. It was stated that the proposed text was in line with the policy of paragraph 3 to avoid excluding the assignment of land-related receivables from the scope of the draft Convention, while preserving certain rights. Under subparagraph (a), priority with respect to rents or mortgages would be subject to the law of the State in which the real property was located, while under subparagraph (b) the draft Convention would not override statutory prohibi-

tions on the acquisition of interests in real property. After discussion, the Commission approved the proposed text, which was to replace current paragraph 3, and referred it to the drafting group. It was also agreed that the term “land” or “real property” could be used on the understanding that it included both the soil and any buildings on it, a matter that could be usefully clarified in the commentary.

Paragraph 4 and draft article 41

141. Recalling its earlier discussion of draft article 41 (see paras. 79-83), the Commission focused on practices that might need to be specifically excluded by declaration. In that connection, several practices were mentioned, including practices relating to capital markets, settlement systems between entities other than financial institutions, land-related receivables and receivables in the form of electronic instruments. While the arguments mentioned above (see paras. 81 and 82) in favour of and against draft article 4, paragraph 4, and draft article 41 were reiterated, it was felt that those provisions could be retained if they provided for specific and limited exclusions.

142. Language along the following lines was proposed to replace draft article 41:

“A State may declare at any time that it will not apply this Convention to the following types of assignments:

“(a) Assignments of receivables arising in transactions in securities or capital markets, in which case this Convention does not apply to assignments of such receivables if the assignor is located in such State;

“(b) Assignments of receivables arising from payment or clearance and settlement systems, in which case this Convention does not apply to assignments of such receivables if the rights of participants in such systems are governed by the law of such State; and

“(c) Assignments of receivables arising from the use or occupancy of buildings or land situated in that State, in which case this Convention does not apply to assignments of such receivables if the land or buildings are situated in such State; and

“(d) Assignments of receivables evidenced by a writing that is transferred by book entry, control of electronic records, [or delivery], in which case this Convention does not apply to assignments of such receivables if (i) the debtor is located in such State, in the case of a receivable transferred by book entry, (ii) the person by whom control is maintained is located in such State, in the case of a receivable transferred by control of an electronic record, [or (iii) the writing is situated in such State, in the case of a writing transferred by delivery].”

143. It was stated that, further to the Commission’s decision to revise paragraph 3 (see para. 140), subparagraph (c), of the proposed wording would no longer be necessary. The Commission expressed its appreciation for the effort to prepare that proposal. However, a number of concerns were expressed. One concern was that the exclusions were formulated in such a broad way that that could inadvertently result in excluding the core subject of the draft Convention, namely the assignment of trade receivables. It was

stated that such a result would risk reducing the impact of the draft Convention and virtually turning it into a model law with a scope that could differ from State to State. It was also observed that, in particular, subparagraph (d) could have the unintended effect of excluding factoring of trade receivables evidenced by electronic records. It was also observed that the reference in subparagraph (a) to “capital markets” could have the same effect, since the term would cover all public markets in which capital was raised (including securitization of trade receivables). Another concern was that the proposed text could be misunderstood as a recommendation to exclude all practices listed, a result that could undermine the effectiveness of the draft Convention. Yet another concern was that the proposed text inappropriately limited the ability of States to exclude further practices and was not balanced in the sense that it did not permit States to also include further practices within the scope of the draft Convention. In response, it was stated that the prevailing view in the discussion was for specific exclusions and that the same specificity rule should apply to any possible inclusions that could be considered if a proposal was made.

144. In view of the difficulties identified with respect to the proposed text, the suggestion was made that draft article 41 should be deleted on the understanding that the revision mechanism foreseen in draft article 47 was sufficient to face the challenge posed by future developments. However, it was stated that, if retained, paragraph 1 should be revised to refer to “specific” exclusions “clearly described” in a declaration and a new paragraph 3 should be included to ensure that assignments of trade receivables could not be the subject of such a declaration. Support was expressed for that proposal. Another proposal to make the declaration subject to prior consultation with all signatory and contracting States was not supported, since it was felt that it would unduly restrict the ability of a State to make a declaration. It was agreed, however, that the commentary could refer to the possibility for consultation with States or the secretariat. At the same time, a number of objections were raised to the proposed reformulation of draft article 41. One objection was that the proposed text failed to take into account that, if a State did not wish to apply the draft Convention to trade receivables, it would simply not adopt it. Another objection was that the proposed text failed to address concerns expressed with regard to certain practices relating to trade receivables that might need to be excluded in the future (e.g. receivables in electronic records). In order to address that point, language along the following lines was proposed as a new paragraph 4 in draft article 41:

“Following consultations with all signatories and contracting States, a State may declare at any time that this Convention will not affect the rights of a transferee of receivables evidenced by writing whose rights are derived from the transfer to the transferee of the writing by book entry, control of electronic records or delivery and whose rights under the law of the State in which the writing is located or the book entry or control is maintained are superior to those of a person who is not a transferee of the writing by book entry, control of electronic records or delivery. The declaration shall describe the nature of the writing and the types of assignment or

categories of receivables evidenced by the writing and the circumstances in which the rights of the transferee will not be affected by this Convention.”

145. While the Commission expressed its appreciation for the proposal, it was widely felt that it failed to address the main concern expressed with regard to the previous proposal (see paras. 142 and 143), namely, that it was overly broad. It was also stated that the newly proposed text added to the level of complexity of the provision and raised new concerns. One concern was that, under the proposed text, it would not be enough for a party to look at the law of the State of the assignor’s location to determine if a declaration had been made. Parties would be exposed to the risk of a declaration made by a State in which an instrument, about the existence of which parties might not even be aware, was located. Another concern was that it would not be clear whether a declaration would be binding on all States or only on the State in which a dispute arose, provided that it had made a declaration and the instrument at issue was located in that State. In response, it was stated that missing the opportunity to deal with transfers by book entry or control of electronic records and by delivery of paper instruments would be regrettable. It was also observed that practice would cope with custodians in the assignor’s State and with other steps, but those steps would add to the cost of certain financing transactions.

146. After discussion, subject to the changes referred to at the beginning of paragraph 144 above, the Commission approved the substance of draft article 41 and referred it and paragraph 4 of draft article 4 to the drafting group. Recalling its decision to defer discussion on draft article 47 until it had considered draft article 4, paragraph 4, and draft article 41 (see para. 95), the Commission approved the substance of draft article 47 unchanged and referred it to the drafting group (for the discussion of a new paragraph in draft article 4 to deal with consumer protection issues, see paras. 185 and 186).

Article 5. Definitions and rules of interpretation

147. The text of draft article 5 as considered by the Commission was as follows:

“For the purposes of this Convention:

“(a) ‘Original contract’ means the contract between the assignor and the debtor from which the assigned receivable arises;

“(b) ‘Existing receivable’ means a receivable that arises upon or before the conclusion of the contract of assignment and “future receivable” means a receivable that arises after the conclusion of the contract of assignment;

“(c) ‘Writing’ means any form of information that is accessible so as to be usable for subsequent reference. Where this Convention requires a writing to be signed, that requirement is met if, by generally accepted means or a procedure agreed to by the person whose signature is required, the writing identifies that person and indicates that person’s approval of the information contained in the writing;

“(d) ‘Notification of the assignment’ means a communication in writing that reasonably identifies the assigned receivables and the assignee;

“(e) ‘Insolvency administrator’ means a person or body, including one appointed on an interim basis, authorized in an insolvency proceeding to administer the reorganization or liquidation of the assignor’s assets or affairs;

“(f) ‘Insolvency proceeding’ means a collective judicial or administrative proceeding, including an interim proceeding, in which the assets and affairs of the assignor are subject to control or supervision by a court or other competent authority for the purpose of reorganization or liquidation;

“(g) ‘Priority’ means the right of a party in preference to another party;

“(h) ‘Location’ means a person is located in the State in which it has its place of business. If the assignor or the assignee has a place of business in more than one State, the place of business is that place where the central administration of the assignor or the assignee is exercised. If the debtor has a place of business in more than one State, the place of business is that which has the closest relationship to the original contract. If a person does not have a place of business, reference is to be made to the habitual residence of that person;

“(i) ‘Law’ means the law in force in a State other than its rules of private international law;

“(j) ‘Proceeds’ means whatever is received in respect of an assigned receivable, whether in total or partial payment or other satisfaction of the receivable. The term includes whatever is received in respect of proceeds. The term does not include returned goods;

“(k) ‘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 any transaction referred to above entered into in financial markets and any combination of the transactions mentioned above;

“(l) ‘Netting agreement’ means an agreement 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 (l) (ii) of this article under two or more netting agreements;

“(m) ‘Competing claimant’ means:

“(i) Another assignee of the same receivable from the same assignor, including a person who, by operation of law, claims a right in the assigned receivable as a result of its right

in other property of the assignor, even if that receivable is not an international receivable and the assignment to that assignee is not an international assignment;

- “(ii) A creditor of the assignor; or
- “(iii) The insolvency administrator.”

Subparagraph (g) (“Priority”)

148. Recalling its earlier discussion of the definition of “priority” (see para. 37), the Commission considered a new version of subparagraph (g) that read as follows:

“(g) ‘Priority’ means the right of a person in preference to the right of a competing claimant and, to the extent relevant for such purpose, includes the determination whether the right is a property right or not and whether it is a security right for indebtedness or other obligation or not.”

149. It was noted that a new paragraph had been added to draft article 26 to ensure that the draft Convention did not affect the priority of rights of persons other than those included in the definition of “competing claimant”. It was, therefore, suggested that, for that provision to operate, reference should be made in subparagraph (g) to “a competing claimant *or other person*” (for a change to draft article 5, subpara. (h), decided later, see para. 162).

Subparagraph (h) (“Location”)

150. It was agreed that the definition of “location” in subparagraph (h) would operate well in the vast majority of cases. The view was expressed, however, that it might not be appropriate for banks and other financial institutions, at least to the extent that it would refer priority issues with respect to the dealings of a branch of a foreign bank in one State to the law of the central administration of the bank in another State. It was stated in particular that that result was problematic in the case of financing transactions in which central banks provided financing to branches of foreign banks taking receivables of those branches as security, as well as in transactions in which commercial banks bought loans from branches of foreign banks. In order to address that problem, it was suggested that branch offices of banks and possibly of other financial institutions should be treated as independent legal entities. While the concern was raised that such a rule would reduce the certainty achieved by subparagraph (h) and might negatively affect practices beyond those that it was intended to address, the Commission expressed its willingness to attempt to develop a rule to address the specific problem identified above. Language along the following lines was proposed for addition at the end of subparagraph (h): “If the assignor or the assignee is engaged in the business of banking by making loans and accepting deposits, a branch of that assignee or assignor is a separate person.”

151. Support was expressed for that proposal. It was recalled that article 1, paragraph 3, of the UNCITRAL Model Law on International Credit Transfers contained a similar rule. It was stated that, if branches were treated as separate legal entities, priority issues with respect to their dealings

would be subject to the law with the closest connection to the assignment transaction. It was also pointed out that such a rule would be appropriate since it would result in referring priority issues to the State in which the branch of a bank was deemed to be located for regulatory and taxation purposes.

152. In order to improve the rule proposed, a number of proposals were made. One proposal was that the proposed rule should be expanded to apply to other financial institutions or even to other commercial entities operating through a branch-based structure. That proposal was objected to on the ground that it could inappropriately expand the scope of the proposed rule and undermine the certainty achieved by subparagraph (h). Another proposal was that the new rule should apply solely to cases where the banking activity had been authorized. That proposal too was objected to on the ground that merely referring to the authorization to trigger the effect of the proposed rule would inadvertently result in its application to situations where no actual banking activity took place. It was also pointed out that it was not clear whether the authorization would refer to the head office or to the branch (a matter that was said not to be clear even with respect to the actual banking activity). Yet another proposal was to avoid any reference to “making loans and accepting deposits”, because some banks might not be authorized to engage in both activities. While there was support for that proposal, the concern was expressed that it might result in the rule applying to entities that were not banks. Yet another proposal was to limit the application of that rule to priority issues. There was no support for that proposal. Yet another proposal was that the reference to the “assignee” should be deleted, since the assignee’s location was relevant neither for the applicability of the draft Convention nor for the purposes of priority. That proposal too was objected to on the ground that the location of the assignee was relevant for the internationality of a transaction and thus for the application of the draft Convention.

153. Beyond the concerns expressed with regard to the formulation of the proposed rule, a number of fundamental objections were raised. It was stated that the central administration rule contained in subparagraph (h) was appropriate in the vast majority of cases and should not be compromised by exceptions. In addition, it was pointed out that priority issues should be referred not to the law of the State where the branch of a bank was regulated or taxed but to that of the State in which the bank would be wound up, namely, the place of its central administration. Furthermore, it was observed that treating branches of banks as separate entities would create an artificial distinction that could cause confusion in practice. In particular in jurisdictions where registration was required in the place of central administration, such a rule could cause uncertainty as to how to obtain priority or even create a double registration requirement. It was also stated that such a rule could inadvertently apply to entities beyond those envisaged since there was no uniform understanding as to what a “bank” was. In that connection, it was observed that the definition of “bank” in the UNCITRAL Model Law on International Credit Transfers could not be used since it was structured around the subject of the Model Law, namely, payment orders.

Subparagraph (k) ("Financial contract")

154. The suggestion was made that collateral and credit support arrangements were part of financial contracts and should thus also be excluded. It was stated that such arrangements were documented under the same industry standard master agreements governing financial contracts. It was also observed that exclusion of collateral and credit support arrangements from the draft Convention would lead to further certainty and predictability with respect to set-off and netting provisions of the standard market arrangements pursuant to which those important risk-management arrangements operated. It was noted, however, that, at its thirty-third session, the Commission had agreed that collateral and credit support arrangements should be deleted from the definition of "financial contracts" that was before it. The reasons given by the Commission were that such arrangements did not fit into a definition of "financial contract" and, more importantly, that such an approach could inadvertently result in excluding an assignment of receivables to secure a bank loan.⁵ The Commission confirmed that decision. It was widely felt that such exclusion could expand the scope of the excluded practices excessively. It was stated that it would be particularly inappropriate to exclude the assignment of receivables that secured rights arising under both financial and non-financial contracts.

Subparagraph (l) ("Netting")

155. The suggestion was made that it should be made clear that the definition of netting covered both bilateral and multilateral netting. Language along the following lines was proposed for insertion after the word "agreement": "between two or more parties". There was broad support in the Commission for that suggestion.

156. Subject to the changes referred to above (see paras. 149 and 154), the Commission approved the substance of draft article 5 and referred it to the drafting group.

Article 6. Party autonomy

157. The text of draft article 6 as considered by the Commission was as follows:

"Subject to article 21, the assignor, the assignee and the debtor may derogate from or vary by agreement provisions of this Convention relating to their respective rights and obligations. Such an agreement does not affect the rights of any person who is not a party to the agreement."

158. The Commission approved the substance of draft article 6 unchanged and referred it to the drafting group.

Article 7. Principles of interpretation

159. The text of draft article 7 as considered by the Commission was as follows:

⁵Ibid., paras. 50 and 74.

"1. In the interpretation of this Convention, regard is to be had to its object and purpose as set forth in the preamble, to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.

"2. Questions concerning matters governed by this Convention that are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law."

160. The Commission approved the substance of draft article 7 unchanged and referred it to the drafting group.

Chapter III. Effects of assignment**Article 8. Form of assignment**

161. The text of draft article 8 as considered by the Commission was as follows:

"An assignment is valid as to form if it meets the form requirements, if any form requirements exist, of either the law of the State in which the assignor is located or any other law applicable by virtue of the rules of private international law."

162. The concern was expressed that draft article 8 might inadvertently refer matters related to priority (e.g. notification as a condition for obtaining priority) to a law other than the law of the assignor's location. In order to address that concern, a number of suggestions were made. One suggestion was to replace article 10 with a provision that would require no form for the assignment as between the assignor and the assignee and as against the debtor. That suggestion was objected to on the ground that it would validate assignments that were currently invalid under law applicable outside the draft Convention. Another suggestion was to refer in draft article 8 only to the law of the assignor's location. That suggestion too was objected to on the ground that it might run counter to generally acceptable private international law doctrine as to the law applicable to the form of the contract of assignment. Yet another suggestion was to revise the definition of priority so as to include steps to be taken for the purpose of obtaining priority (see A/CN.9/491, para. 18). That suggestion received broad support. It was widely felt that to the extent any form requirements needed to be satisfied for a person to obtain priority they should be referred to the law governing priority under draft article 24, namely, the law of the assignor's location. Subject to revising the definition of "priority" in draft article 5, subparagraph (g), to cover that matter, the Commission decided to delete draft article 8 (for the earlier discussion of draft article 5, subpara. (g), see paras. 37 and 149).

New provision on form in chapter V

163. The Commission recalled its earlier decision to consider, in the context of its discussion of draft article 8, the question of including a new provision on form in chapter V (see para. 51). The Commission considered the matter on

the basis of a provision along the lines of article 11 of the Convention on the Law Applicable to Contracts for the International Sale of Goods (1986) that read as follows:

“1. A contract of assignment concluded between persons who are in the same State is formally valid if it satisfies the requirements either of the law which governs it or of the State in which it is concluded.

“2. A contract of assignment concluded between persons who are in different States is formally valid if it satisfies the requirements either of the law which governs it or of the law of one of those States.”

164. After discussion, the Commission approved the substance of the proposed text unchanged and referred it to the drafting group.

**Article 9. Effectiveness of assignments,
bulk assignments, assignments of future receivables
and partial assignments**

165. The text of draft article 9 as considered by the Commission was as follows:

“1. An assignment of one or more existing or future receivables and parts of or undivided interests in receivables is effective as between the assignor and the assignee, as well as against the debtor, whether the receivables are described:

“(a) Individually as receivables to which the assignment relates; or

“(b) In any other manner, provided that they can, at the time of the assignment or, in the case of future receivables, at the time of the conclusion of the original contract, be identified as receivables to which the assignment relates.

“2. Unless otherwise agreed, an assignment of one or more future receivables is effective without a new act of transfer being required to assign each receivable.

“3. Except as provided in paragraph 1 of this article and in articles 11 and 12, paragraphs 2 and 3, this Convention does not affect any limitations on assignments arising from law.

“4. An assignment of a receivable is not ineffective against, and the right of an assignee may not be denied priority with respect to the right of, a competing claimant, solely because law other than this Convention does not generally recognize an assignment described in paragraph 1 of this article.”

166. It was noted that, in its current formulation, paragraph 1 might inadvertently result in the validation of an assignment of any future receivable, including pensions and wages, even if the assignment of such receivables was prohibited by law. In order to avoid that result, which would be inconsistent with paragraph 3, the suggestion was made that paragraph 1 should be revised along the following lines: “An assignment of one or more existing or future receivables and parts of or undivided interest in receivables

is not ineffective ...”. There was broad support for that suggestion on the understanding that, subject to that change, all the elements of paragraph 1 would be included in the new version of paragraph 1.

167. The concern was expressed that the term “undivided interest” was not sufficiently clear. It was stated that, depending on how that notion was understood in the different legal systems, the assignee could claim from the debtor the whole or a percentage of the amount of the receivable. It was also observed that it was not clear in the draft Convention how a conflict between assignees of undivided interests would be resolved. It was also stated that a distinction should be drawn in draft article 12 also between the assignment of a receivable and an assignment of an undivided interest in a receivable, since in the latter case the assignee might not have the right to claim rights securing payment of the assigned undivided interest. In order to address that concern, the suggestion was made that the notion “undivided interest” should be defined in the draft Convention. That suggestion did not attract sufficient support. It was widely felt that it was sufficiently clear that, in the case of an assignment of an undivided interest in a receivable, each assignee could claim from the debtor and that payment to any of the assignees of an undivided interest would discharge the debtor.

168. Subject to the change referred to above (see para. 166), the Commission approved the substance of draft article 9 and referred it to the drafting group.

Article 10. Time of assignment

169. The text of draft article 10 as considered by the Commission was as follows:

“Without prejudice to the right of a competing claimant, an existing receivable is transferred and a future receivable is deemed to be transferred at the time of the conclusion of the contract of assignment, unless the assignor and the assignee have specified a later time.”

170. It was noted that the opening words of draft article 10 deprived it of any meaning (i.e. determining the time of assignment for priority purposes). On that understanding, the Commission agreed to delete draft article 10.

Article 11. Contractual limitations on assignments

171. The text of draft article 11 as considered by the Commission was as follows:

“1. An assignment of a receivable is effective notwithstanding any agreement between the initial or any subsequent assignor and the debtor or any subsequent assignee limiting in any way the assignor’s right to assign its receivables.

“2. Nothing in this article affects any obligation or liability of the assignor for breach of such an agreement, but the other party to such agreement may not avoid the original contract or the assignment contract on the sole

ground of that breach. A person who is not party to such an agreement is not liable on the sole ground that it had knowledge of the agreement.

“3. This article applies only to assignments of receivables:

“(a) Arising from an original contract for the supply or lease of [goods,] construction or services other than financial services or for the sale or lease of real estate;

“(b) Arising from an original contract for the sale, lease or licence of industrial or other intellectual property or other information;

“(c) Representing the payment obligation for a credit card transaction; or

“(d) Owed to the assignor upon net settlement of payments due pursuant to a netting agreement involving more than two parties.”

172. It was recalled that the policy underlying paragraph 3 was to ensure that the assignment of financial service receivables not excluded from the scope of the draft Convention as a whole would be excluded from the scope of draft article 11. In order to reflect that policy more clearly, several suggestions were made, including the suggestions to reformulate paragraph 3 along the following lines: “Article 11 does not apply to assignments of receivables arising from financial service contracts”; or “Article 11 does not apply to assignments of receivables arising from loan agreements or insurance policies”; or “Article 11 does not apply to the assignment of a single, existing receivable”. There was no support in the Commission for those suggestions.

173. The concern was expressed that the term “goods”, which appeared within square brackets in paragraph 3 (a), was too narrow and could result in excluding intangible assets. It was also stated that paragraph 3 (b) might not be sufficiently broad to cover all intangible assets and in particular customer lists, trade names and commercial secrets. In order to address that concern, it was suggested that, at the end of paragraph 3 (b), language along the following lines should be added: “or other intangible assets”. That suggestion was objected to on the ground that it could inadvertently result in including within article 11 the assignment of receivables such as insurance or loan receivables. It was widely felt, however, that assets, such as customer lists, trade names and proprietary information, were covered in paragraph 3 (b). Subject to the removal of the brackets around the word “goods”, the Commission approved draft article 11 and referred it to the drafting group.

Article 12. *Transfer of security rights*

174. The text of draft article 12 as considered by the Commission was as follows:

“1. A personal or property right securing payment of the assigned receivable is transferred to the assignee without a new act of transfer. If such a right, under the law governing it, is transferable only with a new act of

transfer, the assignor is obliged to transfer such right and any proceeds to the assignee.

“2. A right securing payment of the assigned receivable is transferred under paragraph 1 of this article notwithstanding any agreement between the assignor and the debtor or other person granting that right, limiting in any way the assignor’s right to assign the receivable or the right securing payment of the assigned receivable.

“3. Nothing in this article affects any obligation or liability of the assignor for breach of any agreement under paragraph 2 of this article, but the other party to that agreement may not avoid the original contract or the assignment contract on the sole ground of that breach. A person who is not a party to such an agreement is not liable on the sole ground that it had knowledge of the agreement.

“4. Paragraphs 2 and 3 of this article apply only to assignments of receivable:

“(a) Arising from an original contract for the supply or lease of [goods,] construction or services other than financial services or for the sale or lease of real estate;

“(b) Arising from an original contract for the sale, lease or licence of industrial or other intellectual property or other information;

“(c) Representing the payment obligation for a credit card transaction; or

“(d) Owed to the assignor upon net settlement of payments due pursuant to a netting agreement involving more than two parties.

“5. The transfer of a possessory property right under paragraph 1 of this article does not affect any obligations of the assignor to the debtor or the person granting the property right with respect to the property transferred existing under the law governing that property right.

“6. Paragraph 1 of this article does not affect any requirement under rules of law other than this Convention relating to the form or registration of the transfer of any rights securing payment of the assigned receivable.”

175. The concern was expressed that paragraph 1 could affect special types of mortgages that were not transferable under the law governing them. It was stated that draft article 9, paragraph 3, might not be sufficient to preserve such statutory limitations since it referred to statutory limitations on transfers of receivables not of rights securing receivables. In order to address that concern, it was suggested that, at the end of paragraph 1, language along the following lines should be added: “if such right is transferable under the law governing it”. There was no support for that suggestion (see, however, new draft article 4, para. 3, in paras. 139 and 140). Subject to the removal of the brackets around the word “goods” in paragraph 4 (a), the Commission approved the substance of draft article 12 and referred it to the drafting group.

Chapter IV. Rights, obligations and defences

Section I. Assignor and assignee

Article 13. *Rights and obligations of the assignor and the assignee*

176. The text of draft article 13 as considered by the Commission was as follows:

“1. The mutual rights and obligations of the assignor and the assignee arising from their agreement are determined by the terms and conditions set forth in that agreement, including any rules or general conditions referred to therein.

“2. The assignor and the assignee are bound by any usage to which they have agreed and, unless otherwise agreed, by any practices they have established between themselves.

“3. In an international assignment, the assignor and the assignee are considered, unless otherwise agreed, to have implicitly made applicable to the assignment a usage that in international trade is widely known to, and regularly observed by, parties to the particular type of assignment or the assignment of the particular category of receivables.”

177. The Commission approved the substance of draft article 13 unchanged and referred it to the drafting group.

Article 14. *Representations of the assignor*

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

“1. Unless otherwise agreed between the assignor and the assignee, the assignor represents at the time of the conclusion of the contract of assignment that:

“(a) The assignor has the right to assign the receivable;

“(b) The assignor has not previously assigned the receivable to another assignee; and

“(c) The debtor does not and will not have any defences or rights of set-off.

“2. Unless otherwise agreed between the assignor and the assignee, the assignor does not represent that the debtor has, or will have, the ability to pay.”

179. The Commission approved the substance of draft article 14 unchanged and referred it to the drafting group.

Article 15. *Right to notify the debtor*

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

“1. Unless otherwise agreed between the assignor and the assignee, the assignor or the assignee or both may send the debtor notification of the assignment and

payment instructions, but after notification has been sent only the assignee may send such an instruction.

“2. Notification of the assignment or payment instructions sent in breach of any agreement referred to in paragraph 1 of this article are not ineffective for the purposes of article 19 by reason of such breach. However, nothing in this article affects any obligation or liability of the party in breach of such an agreement for any damages arising as a result of the breach.”

181. The Commission approved the substance of draft article 15 unchanged and referred it to the drafting group.

Article 16. *Right to payment*

182. The text of draft article 16 as considered by the Commission was as follows:

“1. As between the assignor and the assignee, unless otherwise agreed and whether or not notification of the assignment has been sent:

“(a) If payment in respect of the assigned receivable is made to the assignee, the assignee is entitled to retain the proceeds and goods returned in respect of the assigned receivable;

“(b) If payment in respect of the assigned receivable is made to the assignor, the assignee is entitled to payment of the proceeds and also to goods returned to the assignor in respect of the assigned receivable; and

“(c) If payment in respect of the assigned receivable is made to another person over whom the assignee has priority, the assignee is entitled to payment of the proceeds and also to goods returned to such person in respect of the assigned receivable.

“2. The assignee may not retain more than the value of its right in the receivable.”

183. The Commission approved the substance of draft article 16 unchanged and referred it to the drafting group.

Section II. Debtor

Article 17. *Principle of debtor protection*

184. The text of draft article 17 as considered by the Commission was as follows:

“1. Except as otherwise provided in this Convention, an assignment does not, without the consent of the debtor, affect the rights and obligations of the debtor, including the payment terms contained in the original contract.

“2. A payment instruction may change the person, address or account to which the debtor is required to make payment, but may not:

“(a) Change the currency of payment specified in the original contract; or

“(b) Change the State specified in the original contract in which payment is to be made to a State other than that in which the debtor is located.”

185. The Commission considered several proposals for a new paragraph in draft article 17 to deal with the protection of consumers, including language along the following lines: “This Convention does not override law governing the protection of parties in transactions made for personal, family or household purposes” (see A/CN.9/491, para. 40); or “This Convention does not authorize a debtor who is a consumer to enter into or modify an original contract than as authorized by the law of the location of the debtor”; or “Nothing in this Convention affects the rights and obligations of the assignor and the debtor under the [special] laws governing the protection of [parties to] [persons in] transactions made for personal, family or household purposes”.

186. While some doubt was expressed as to whether such a rule was necessary, the Commission agreed that the principle that the draft Convention was not intended to affect rights and obligations arising under consumer protection law should be reflected in the draft Convention. It was also widely felt that the matter went beyond debtor protection and should be addressed in draft articles 4 or 6. As a matter of drafting, the suggestion was made that reference could be made to the habitual residence of a consumer. It was noted, however, that draft article 5, subparagraph (h), might be sufficient in that respect. On the understanding that the matter of consumer protection would be addressed in draft article 4, the Commission approved the substance of draft article 17 and referred it to the drafting group. The Commission also decided that the reference in draft articles 21 and 23 to consumer protection would no longer be necessary and could be deleted.

Article 37. *Applicable law in territorial units*

187. Recalling its decision to defer discussion of draft article 37 to a later point in time (see para. 69), the Commission resumed its discussion on the basis of a new proposal that was as follows:

*“Article 36
“Application to territorial units*

“... ”

“3 bis. If, by virtue of a declaration under this article, this Convention does not extend to all territorial units of a State and the law governing the original contract is the law in force in a territorial unit to which this Convention does not extend, the law governing the original contract is considered not to be the law of a Contracting State.

*“Article 37
“Location in a territorial unit*

“If a person is located in a State that has two or more territorial units, that person is located in the territorial unit in which it has its place of business. If the assignor or the assignee has a place of business in more than one territorial unit, the place of business is that place where the central administration of the assignor or the assignee is exercised. If the debtor has a place of business in more than one territorial unit, the place of business is that which has the closest relationship to the original contract. If a person does not have a place of business,

reference is to be made to the habitual residence of that person. A State with two or more territorial units may specify by declaration at any time other rules for determining the location of a person within that State.

*“Article 37 bis
“Applicable law in territorial units*

“Any reference in this Convention to the law of a State means, in the case of a State that has two or more territorial units, the law in force in the territorial unit. Such a State may specify by declaration at any time other rules for determining the applicable law, including rules that render applicable the law of another territorial unit of that State.”

188. It was stated that the proposed provisions were necessary to ensure transparency and consistency in the application of the draft Convention in the case of a State with two or more territorial units. It was explained that the proposed paragraph 3 bis of draft article 36, which tracked the language of paragraph 3, was intended to deal with the application of the draft Convention in the case of a declaration under draft article 36. New draft article 37, which tracked the definition of location in draft article 5, subparagraph (h), and the language of draft article 37, was aimed at addressing location of a person in a State with two or more territorial units. New draft article 37 bis was designed to address the meaning of law in the case of a State with two or more territorial units.

189. While support was expressed in favour of the proposed provisions, a number of questions were raised. One question was whether the reference to territorial units was sufficient to indicate that units with different systems of law were involved. In response, it was stated that no reference should be added to different systems of law, since the proposed provisions needed to be applied to territorial systems with the same system of law. It was noted, however, that while the reference to territorial units with different systems of law in draft article 36, paragraph 1, would cover also the proposed provisions, the reference to different systems of law should be understood in a broad way and cover uniform law enacted in several territorial units as a distinct body of law by a legislative or other authority in each territorial unit. Another question was whether a State could specify that a branch of an entity, such as a bank, in a territorial unit should be treated as a separate entity. In response, it was observed that, under the rule in the last sentence of new draft article 37, a State had the right to specify in a declaration the rules it wished to apply with respect to location of persons in its territorial units. After discussion, the Commission approved draft articles 36, paragraph 3 bis, and draft articles 37 and 37 bis and referred them to the drafting group.

Article 38. *Conflicts with other international agreements*

190. Recalling its decision to approve draft article 38 on the understanding that the relationship between the draft Convention and the draft Unidroit Convention might need to be revisited (see para. 74), the Commission considered

several proposals for an amendment of draft article 38 to deal with the matter. One proposal read as follows:

“Variant A

“This Convention does not apply to the assignment of receivables taken as security in financing mobile equipment to the extent that these assignments are governed by an international convention [on international interests].

“Variant B

“This Convention does not apply to the assignment of receivables that become associated rights in connection with the financing of categories of mobile equipment, such as aircraft equipment, railway rolling stock and space property, encompassed by an international convention [on international interests].”

191. While some support was expressed for that proposal, discussion focused on another proposal, which read as follows:

“1. This Convention does not apply to assignments of receivables taken as security in the financing of mobile equipment, but only where such receivables are within the scope of the Unidroit Convention on International Interests in Mobile Equipment.

“2. This Convention supersedes the Unidroit Convention on International Factoring (the “Ottawa Convention”) except, as relates to the rights and obligations of the debtor, where the debtor is located in a State party to the Ottawa Convention that is not a party to this Convention.”

192. In support of the proposed text, it was stated that the matter should not be left to the classical rules on conflicts between international agreements. It was also said that the common objective of both texts to increase access to lower-cost credit could best be served by a clear and innovative solution, such as the one proposed, and such solution could enhance the certainty and predictability required in practice. In addition, it was observed that paragraph 1 of the proposed text introduced the appropriate rule, in particular with respect to financing transactions relating to aircraft in which receivables were inextricably linked with the aircraft. In addition, it was pointed out that, in view of the fact that the Unidroit text relating to aircraft covered both payment and other performance rights, an approach other than the one proposed would result in subjecting aircraft-related receivables to a legal regime other than the regime governing other aircraft-related performance rights. Moreover, it was pointed out that, in view of the fact that traditionally rights in aircraft were filed with a national aviation authority, the law of the place of registration was more appropriate to govern priority issues than the law of the assignor’s location. It was also said that an exception of aircraft-related receivables along the lines of paragraph 1 of the proposed text would have the beneficial effect of avoiding any tension that might affect the ratification process of either convention.

193. While some support was expressed for that proposal, it was widely felt that draft article 38, as amended by the Commission (see para. 74), was sufficient. It was stated

that the approach proposed was excessive and could create legal gaps, since the draft Convention would not apply even if the draft Unidroit Convention did not apply to a particular transaction and even if the latter had not entered into force. It was also observed that the proposed exception could seriously undermine the usefulness of the draft Convention since it was open-ended. In addition, it was said that nothing precluded the drafters of the draft Unidroit Convention from providing that it superseded the draft Convention, a possibility alluded to by the International Civil Aviation Organization in its official comments (see A/CN.9/490, p. 10). Moreover, it was observed that it was very difficult to refer in draft article 38 to a convention that had not yet been concluded.

194. The suggestion was also made that, further to the amendment of draft article 38, agreed upon by the Commission at its current session, the proviso in paragraph 1 of draft article 38 was not necessary and could be deleted. There was wide support for that proposal. However, to reflect the decision of the Commission that another convention should prevail only if it specifically governed a transaction that would otherwise be governed by the draft Convention, it was agreed that the words “contains provisions specifically governing” should be replaced with words along the lines “specifically governs”. Subject to those changes, the Commission reiterated its approval of draft article 38 and referred it to the drafting group.

C. Report of the drafting group

195. The Commission requested a drafting group established by the secretariat to review the draft Convention and the annex to the draft Convention, with a view to ensuring consistency between the various language versions. At the close of its deliberations on the draft Convention, the Commission considered the report of the drafting group and adopted the draft Convention and the annex to the draft Convention as a whole. The Commission also requested the secretariat to prepare a revised version of the commentary on the draft Convention.

196. It was agreed that, in draft article 1, paragraph 4, reference should be made to paragraphs 1-3 of draft article 1. It was also agreed that, in the Chinese version of draft article 24, after paragraph 2 (a), the word “and” should be added. In addition, it was agreed that draft article 25, paragraph 2, should be reproduced in draft article 31 in order to avoid any uncertainty as to whether it was covered by draft article 32. Furthermore, it was agreed that, in draft article 35 (new draft article 34), a reference should be added within square brackets to the time during which the draft Convention should be opened for signature (i.e. two years after the date of adoption of the draft Convention by the General Assembly).

197. Moreover, it was agreed that in the French version of draft article 38, paragraph 1, the word “régie” should be replaced with the word “couverte”. It was also agreed that, for reasons of consistency, draft article 8 of the annex to the draft Convention should refer to “the time of conclusion of the contract of assignment”.

D. Procedure for the adoption of the draft Convention

198. After completing its work on the draft Convention, the Commission considered the procedures to be followed for the adoption of the text as a United Nations convention. The Commission supported a proposal to recommend that the General Assembly adopt the draft Convention in its current form and open it for signature by States. It was widely felt that the draft Convention had received sufficient consideration, had reached the level of maturity for it to be generally acceptable to States and formed a balanced text that the Assembly could conclude without reconsidering its provisions. It was also generally felt that the draft Convention could significantly facilitate receivables financing and thus increase the availability of credit at a more affordable cost, which would enhance international trade and benefit producers, wholesalers, retailers and consumers of goods and services.

199. A suggestion was also made that the recommendation to the General Assembly could also make some reference to a diplomatic conference on the condition that, until consideration of the draft Convention by the Sixth Committee of the Assembly, a State would offer to host a diplomatic conference and would be able to host it early in 2002. However, it was agreed that the recommendation to the Assembly should be clear and unequivocal in order to avoid inadvertently casting any doubt as to the maturity and the acceptability of the text. It was stated that no State was precluded from making an offer to host a diplomatic conference and that the matter would be duly considered by the Sixth Committee.

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

200. At its 722nd meeting, on 2 July 2001, the Commission adopted by consensus the following decision and recommendation to the General Assembly:

"The United Nations Commission on International Trade Law,

"Recalling that at its twenty-eighth session, in 1995, it decided to prepare uniform legislation on assignment in receivables financing and entrusted the Working Group on International Contract Practices with the preparation of a draft,

"Noting that the Working Group devoted nine sessions, held from 1995 to 2000, to the preparation of the draft convention on the assignment of receivables in international trade,

"Having considered the draft Convention at its thirty-third session, in 2000, and at its thirty-fourth session, in 2001,

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

"Also drawing attention to the fact that the text of the draft convention was circulated for comments once before the thirty-third session of the Commission and a second time in its revised version before the thirty-fourth session of the Commission to all Governments and international organizations invited to attend the meetings of the Commission and the Working Group as observers and that such comments were before the Commission at its thirty-third and thirty-fourth sessions,"⁶

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

"1. Submits to the General Assembly the draft convention on the assignment of receivables in international trade, as set forth in annex I to the report of the United Nations Commission on International Trade Law on its thirty-fourth session;⁷

"2. Recommends that the General Assembly consider the draft convention with a view to concluding at its fifty-sixth session, on the basis of the draft convention approved by the Commission, a United Nations convention on the assignment of receivables in international trade."

III. DRAFT UNCITRAL MODEL LAW ON ELECTRONIC SIGNATURES AND DRAFT GUIDE TO ENACTMENT

A. Introduction

201. Pursuant to decisions taken by the Commission at its twenty-ninth session, in 1996,⁸ and thirtieth session, in 1997,⁹ the Working Group on Electronic Commerce devoted its thirty-first to thirty-seventh sessions to the preparation of the draft UNCITRAL Model Law on Electronic Signatures (hereinafter referred to also as "the draft Model Law" or "the new Model Law"). Reports of those sessions are found in documents A/CN.9/437, 446, 454, 457, 465, 467 and 483. At its thirty-seventh session, held at Vienna in September 2000, the Working Group adopted the substance of the draft Model Law, the text of which was annexed to the report of that session (A/CN.9/483). It was noted that the draft Model Law would be submitted to the Commission for review and adoption at the current session (A/CN.9/483, para. 23).

202. The text of the draft Model Law as approved by the Working Group was circulated to all Governments and to interested international organizations for comment. At the current session, the Commission had before it the comments received from Governments and international organizations (A/CN.9/492 and Add.1-3).

⁶See documents A/CN.9/472 and Add.1-5 and A/CN.9/490 and Add.1-5.

⁷*Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 17 (A/56/17).*

⁸*Official Records of the General Assembly, Fifty-first Session, Supplement No. 17 (A/51/17), paras. 223 and 224.*

⁹*Ibid., Fifty-second Session, Supplement No. 17 (A/52/17), paras. 249-251.*

203. In preparing the Model Law, the Working Group noted that it would be useful to provide in a commentary additional information concerning the Model Law. Following the approach taken in the preparation of the UNCITRAL Model Law on Electronic Commerce, there was general support for a suggestion that the new Model Law should be accompanied by a guide to assist States in enacting and applying that Model Law. The guide, much of which could be drawn from the travaux préparatoires of the Model Law, would also be helpful to other users of the Model Law. At its thirty-eighth session, held in New York in March 2001, the Working Group reviewed the draft Guide to Enactment of the UNCITRAL Model Law on Electronic Signatures, based on a revised draft prepared by the secretariat (A/CN.9/WG.IV/WP.88). The deliberations and decisions of the Working Group with respect to the draft Guide are reflected in the report of that session (A/CN.9/484). The secretariat was requested to prepare a revised version of the Guide, based on those deliberations and decisions. At the current session, the Commission had before it the revised text of the draft Guide (A/CN.9/493, hereinafter referred to as “the draft Guide” or “the Guide”).

B. Consideration of comments from Governments and international organizations

204. At the outset of the discussion, the Commission considered the comments received from Governments and international organizations (A/CN.9/492 and Add.1-3).

Article 2

Subparagraph (b)

205. A proposal was made (see A/CN.9/492/Add.1) to amend draft article 2, subparagraph (b), to read:

“‘Certificate’ means a data message or other record confirming:

- “(i) In a case where a private and a public cryptographic key are used respectively to create and verify an electronic signature, the link between the signatory and the public cryptographic key; and
- “(ii) In any case, the link between the signatory and the signature creation data.”

206. It was stated that the intention behind the proposed amendment was not to promote public keys as a preferred technological method but merely to align the text of the draft Model Law with improvements made to the draft Guide at the thirty-eighth session of the Working Group. The amendment, in line with the draft Guide (A/CN.9/493, annex, para. 97), was described as being necessary to clarify that, where a dual-key “digital signature” and a related certificate were being used, an important function of the certificate was to certify that it was the “public key” that belonged to the signatory (see A/CN.9/492/Add.1).

207. In response to the proposal, concern was expressed that the express reference to “cryptographic key” would introduce a technology-specific element to the definition of “certificate”, which would not be consistent with the para-

mount principle of technological neutrality underlying the draft Model Law. It was pointed out that the text as currently drafted dealt sufficiently with public-key cryptography. After discussion, the Commission agreed to retain the substance of draft article 2, subparagraph (b), unchanged.

Article 5

208. A proposal was made (see A/CN.9/492/Add.2) to amend draft article 5 by deleting the words “unless that agreement would not be valid or effective under applicable law”. As possible alternatives to such deletion, it was also suggested that the words “applicable law” could be replaced with the words “mandatory principles of public policy” or “mandatory provisions of applicable law”. The amendment of draft article 5 according to one of those alternatives was presented as necessary in order to reduce confusion in the application and interpretation of article 5 by national courts, as well as to clarify that any limitation on party autonomy was intended to result only from mandatory rules. It was also stated that referring in the draft Model Law to limitations to party autonomy was superfluous, since in most legal systems mandatory rules of public policy or ordre public would override party autonomy in all cases, whether or not they were mentioned in the text. In addition, it was stated that draft article 5 as currently drafted could create the mistaken impression that the draft Model Law was intended to limit party autonomy more than was absolutely necessary.

209. Although some support was expressed in favour of the various alternative proposals, the widely prevailing view was that the text of draft article 5 should be retained as currently drafted. It was widely felt that, while both restatements of the well-known principle of party autonomy in commercial relationships and of the traditional limitations to that principle might be regarded as equally superfluous, the text served a useful purpose in clarifying the regime of party autonomy in the context of the draft Model Law. It was generally agreed that altering the balance currently reflected in draft article 5 might result in the draft Model Law unduly interfering with the determination by domestic law as to the mandatory or non-mandatory nature of statutory provisions.

Article 7

210. A proposal was made (see A/CN.9/492) to amend draft article 7, paragraph 1, to read:

“Any person, organ or authority, whether public or private, specified by the enacting State as competent may determine which electronic signatures satisfy the provisions of article 6, without prejudice to the possibility for the parties to agree on the use of any method for creating an electronic signature.”

211. It was stated that the intention behind the proposed amendment was to ensure that draft article 7 did not limit the freedom given to parties by draft article 3, as combined with draft article 5, to assign legal validity to particular

methods of creating electronic signatures that could be different from those determined by a relevant person, organ or authority under draft article 7, paragraph 1 (see A/CN.9/492). Notwithstanding general support for the principle underlying the proposed amendment, namely, that parties should retain autonomy in respect of determining the facts for reliability of an electronic signature, it was widely felt that the matter was adequately addressed in draft article 6, paragraph 1, which referred to “any relevant agreement”. In that respect, attention was drawn to paragraphs 127 and 133 of the draft Guide, which appeared to indicate clearly that draft article 7 respected the principle of party autonomy. Recognizing that draft article 7 did not impinge upon the principle of party autonomy, the Commission decided to retain the substance of draft article 7 as currently drafted and referred it to the drafting group.

Article 8

Paragraph 1 (a)

212. A proposal was made (see A/CN.9/492/Add.2) to amend draft article 8, paragraph 1 (a), by inserting the words “in accordance with accepted commercial practices” before the words “reasonable care”. In support of the proposal, it was stated that draft article 8 (and draft articles 9-11) should be subject to a general limitation that the criteria and rules therein should be applied as was reasonable under the circumstances of the type of transaction and the nature of the parties. It was also stated that the imposition of strict obligations would be inappropriate if applied to a wide variety of transactions that had developed in electronic commerce. It was further stated that a reference to “accepted commercial practices” might assist the signatories in determining what might constitute “reasonable care” in a given situation, for example where a signatory was faced with the overall obligation to maintain the confidentiality of a cryptographic key under draft article 8 but that key was stored as part of the software (possibly the Internet browser) loaded on the signatory’s computer. In such a situation, the signatory (who would not necessarily know where and how the key was stored) might need to receive guidance as to the nature of the signature data and the proper rules of conduct to be observed to avoid improper use of the cryptographic key. A concern was expressed that, in the absence of any such guidance, prospective users might be discouraged from using electronic signature techniques, a result that would run counter to the objectives of the draft Model Law. With a view to accommodating that concern, it was suggested that language might be inserted in the text of draft article 8 along the following lines: “in determining reasonable care, regard may be had to a relevant commercial practice, if any”. A related suggestion was the insertion of the words “in determining reasonable care, regard is to be had to well-established and widely recognized international practices, if any”.

213. There was general agreement in the Commission as to the importance of providing guidance, education and protection to prospective users of electronic signature techniques in general and prospective signatories in particular. However, the proposed amendment to draft article 8, paragraph 1 (a), was strongly opposed on the grounds that a

reference to “accepted”, “habitual” or “relevant” commercial practices might result in increased confusion for users, since there currently existed no established commercial practice with respect to electronic signatures. It was pointed out that adding a reference to commercial practices would not increase the level of protection afforded to the prospective user of electronic signature techniques. Such a reference would rather place a heavier burden on the signatory, who might end up being faced with the obligation to prove compliance with non-existing or unknown practices in addition to the initial obligation to prove that it had exercised “reasonable care” in protecting its signature creation data. It was generally agreed that the standard of reasonable care set forth in the current text of draft article 8, paragraph 1 (a), together with the general reference to the observance of good faith under draft article 4, provided a well-understood concept, which offered sufficient guidance to users and to courts to facilitate the emergence of trust in the use of electronic signature techniques. At the same time, the standard of reasonable care was sufficiently broad and flexible to include a reference to relevant practices, if any.

214. After discussion, the Commission decided to maintain the substance of draft article 8, paragraph 1 (a), unchanged. It was agreed that the Guide to Enactment should reflect that, when interpreting the notion of “reasonable care”, relevant practices, if any, might need to be taken into account. “Reasonable care” under the draft Model Law should also be interpreted with due regard being given to its international origin, as indicated in draft article 4.

Paragraph 1 (b)

215. A proposal was made (see A/CN.9/492/Add.2) to amend the opening words of draft article 8, paragraph 1 (b), to read “without undue delay, use reasonable efforts to initiate any procedures made available to the signatory to notify relying parties if:”.

216. Wide support was expressed in support of the proposal to replace the strict obligation to notify set forth in draft article 8, paragraph 1 (b), by a more flexible requirement to use “reasonable efforts” to notify any person who might be expected to rely on the electronic signature in cases where the electronic signature appeared to have been compromised. In view of the fact that it might be impossible for the signatory to track down every person that might rely on the electronic signature, it was generally felt that, where the electronic signature appeared to have been compromised, it would be excessively burdensome to charge the signatory with the obligation to achieve the result of actually notifying every person that might conceivably rely on the signature. It was also agreed that it would be more appropriate to express the rule in the form of an obligation for the signatory to use all reasonable means at its disposal to notify the relying parties. In the context of that discussion, it was pointed out that paragraph 139 of the Guide should make it clear that the notion of “reasonable efforts” or “reasonable diligence” should be interpreted in the light of the general principle of good faith expressed in draft article 4, paragraph 1.

217. As to the proposed addition of a reference to “procedures made available to the signatory to notify relying parties”, it was pointed out that, in many practical instances, procedures would be placed at the disposal of signatories by certification service providers to be followed in cases where it appeared that the electronic signature had been compromised. Such procedures could generally not be varied by the signatory. It was stated that, in practice, such procedures were increasingly provided by relying parties. It was explained that it was essential to provide the signatory with a “safe harbour” provision to the effect of enabling a signatory to demonstrate that it had been sufficiently diligent in attempting to notify potentially relying parties if the signatory had followed such procedures. While support was expressed in favour of the reasoning underlying the proposal, it was generally felt that the words “reasonable efforts to initiate any procedures” were too vague and might be read as diluting the obligation of the signatory to undertake a good faith attempt to notify relying parties.

218. After discussion, the Commission decided that the opening words of article 8, paragraph 1 (*b*), should read along the lines of “without undue delay, use reasonable efforts to notify, such as by using means made available by the certification service provider pursuant to article 9, to any person that may reasonably be expected by the signatory to rely on or to provide services in support of the electronic signature if: ...”. After review by the drafting group, the Commission agreed that the text should read as follows: “Without undue delay, utilize means made available by the certification service provider pursuant to article 9, or otherwise use reasonable efforts, to notify any person that may reasonably be expected by the signatory to rely on or to provide services in support of the electronic signature if: ...”.

Paragraph 2

219. A proposal was made (see A/CN.9/492/Add.2) to amend draft article 8, paragraph 2, to read “A signatory shall bear the legal consequences of its failure to satisfy the requirements of paragraph 1”. Among the reasons given in support of that proposal, it was stated that the text of draft article 8, paragraph 2 (and of draft article 9, paragraph 2), might lend itself to the mistaken interpretation that a purpose of the Model Law was to establish a rule of strict liability binding on both the signatory and the certification service provider. It was pointed out that determining such strict liability rules for certain parties would be an exceptional position to take within an instrument geared to the harmonization of certain rules of commercial law, with a need to balance the obligations of all the parties involved, and to facilitating the use of electronic commerce. A concern was expressed that, unless the proposed amendment was made, the Model Law could result in inhibiting the development of electronic commerce, in particular in countries that had not yet implemented legislation in that area. The aim of the proposal was thus to revise draft article 8, paragraph 2, to reflect the language used in draft article 11 with respect to the conduct of the relying party.

220. While it was generally agreed that the Model Law was not intended to create grounds for imposing a strict

liability regime on either the signatory or the certification service provider, doubts were expressed as to whether the proposed language would sufficiently reflect the distinction to be made between the situation of the signatory and the certification service provider, on the one hand (both of whom should be faced with obligations regarding their conduct in the context of the electronic signature process), and the relying party, on the other (for whom the Model Law might appropriately establish rules of conduct but who should not be faced with the same level of obligations as the other two parties). With a view to maintaining in the Model Law a distinction in the treatment of the relying party as opposed to the other two parties, it was suggested that the text of draft article 8, paragraph 2, should read as follows: “A signatory shall be exposed to liability or to any other applicable legal consequence for its failure to satisfy the requirements of paragraph 1.” A similar adjustment was suggested for draft article 9, paragraph 2. It was explained that the proposed language would eliminate the risk of any mistaken interpretation that the Model Law was intended to interfere with the legal consequences that might flow from the law applicable outside the Model Law. At the same time, the proposed language would appropriately draw attention to the fact that the legal consequences of failure to comply with the requirements of paragraph 1 would not necessarily involve only liability. Other legal consequences might include, for example, the faulty party being stopped from denying the binding effect of the electronic signature.

221. While support was expressed in favour of the latter proposal, the prevailing view was that the entire issue of the legal consequences to be drawn from the failure to comply with the requirements of paragraph 1, as well as the issue of a possible distinction between the legal position of the signatory and the certification service provider, on the one hand, and the legal position of the relying party, on the other hand, should be left to the law applicable outside the Model Law. After discussion, the Commission decided that the substance of paragraph 2 should read along the lines of “A signatory shall bear the legal consequences of its failure to satisfy the requirements of paragraph 1”. The matter was referred to the drafting group.

Proposed new paragraph

222. A proposal was made (see A/CN.9/492) to add a paragraph to draft article 8 along the following lines:

“It shall provide to the certification service provider for any party relying on the certificate reasonably accessible means to ascertain, where relevant, from the certificate referred to in article 9 or otherwise, any limitation on its responsibility.”

It was explained that the aim of the proposed language was to make it clear that the signatory should inform the relying parties (through the certification service provider) of any limitation on the maximum value of the transactions for which the signatory’s electronic signature might be used. While general support was expressed in favour of the explanation underlying the proposal, it was generally felt that the proposed wording was unclear and probably unnecessary, in view of the fact that the certification service provider, under draft article 9, paragraph 1 (*d*) (ii) and (iv),

was under an obligation to provide accessible means by which a relying party might ascertain “any limitation on the purpose or value for which the signature creation data or the certificate may be used” and “any limitation on the scope or extent of liability stipulated by the certification service provider”. While an alternative proposal to add the words “or by the signatory” at the end of draft article 9, paragraph 1 (*d*) (iv), received some support, the prevailing view was that the issue was sufficiently taken care of by draft article 9, paragraph 1 (*d*) (ii), as currently drafted. As to draft article 8, it was agreed that no change in the substance of the provision was necessary, since it would be in the interest of the signatory to inform the relying parties about any limitation that might affect the maximum value of the transactions for which the signatory’s electronic signature might be used. Creating an additional obligation of the signatory in that respect would thus be superfluous.

Draft article 9

Paragraph 1 (*d*) (iv)

223. A proposal was made (see A/CN.9/492) to amend the end of the sentence in draft article 9, paragraph 1 (*d*) (iv), to read “any limitation on the scope or extent of its liability stipulated by it”. It was generally agreed that the proposal was merely of a drafting nature and, on that basis, the issue was referred by the Commission to the drafting group.

Paragraph 1 (*f*)

224. A proposal was made (based upon a proposal set forth in A/CN.9/492/Add.2) to amend draft article 9, paragraph 1 (*f*), by changing the substance of the provision from an obligation upon the certification service provider to “utilize trustworthy systems, procedures and human resources in performing its services” to an obligation on the certification service provider to disclose the systems, procedures and human resources it used in performing its services. It was stated that the effect of the proposed language would be simply to enable the relying party to determine whether the systems, procedures and human resources used by the certification service provider were trustworthy or not. The view was expressed that it was necessary to narrow the obligation of the certification service provider, which was too broad and might be inappropriate if applied to a wide range of electronic commerce functions. It was stated that the standard of trustworthiness set forth in the article was too high for many electronic signatures and services, for example, the many businesses that provided certification services in the course of their business, such as services provided by an employer to its employees. The proposal was to delete existing paragraph 1 (*f*) and add, as a new item (vii) to draft article 9, paragraph 1 (*d*), words along the lines of “the systems, procedures and human resources utilized in performing its services”.

225. Although some support was expressed in favour of the proposal, provided that the connection to article 10 was retained, the prevailing view was that the proposal was not acceptable. Concern was expressed that, by removing the

obligation upon the certification service provider to utilize trustworthy systems and imposing a new obligation upon the relying party to satisfy itself that the systems, procedures and human resources used by the certification service provider were in fact trustworthy, the proposal would alter the balance of duties and obligations between the parties, a balance that had already been discussed and established by the Working Group. A further concern was that the proposal appeared to dilute the importance of article 10, which was viewed as an important provision of the draft Model Law.

226. As a compromise, a further proposal was made to maintain the provision as article 9, paragraph 1 (*f*), but to amend the drafting to read “utilize systems, procedures and human resources that are suitably trustworthy for the purposes for which the certificate was intended to be used”. Although that proposal received some support, the prevailing view was that it was not acceptable. A principal ground of objection was that the intention of article 9 was to ensure that, where an electronic signature that might be used for legal effect was supported by a certification service provider, the certification service provider should meet certain standards and satisfy certain obligations, including using trustworthy systems, procedures and human resources. In referring to the possible use of the certificate, the compromise proposal removed the general obligation for the certification service provider to use trustworthy systems, procedures and human resources and, in doing so, moved the focus away from the standards that should be met in order to support the electronic signature process properly.

227. After discussion, the Commission decided to retain the substance of draft article 9, paragraph 1 (*f*), unchanged.

Paragraph 2

228. A proposal was made (based upon a proposal set forth in A/CN.9/492/Add.2) that draft article 9, paragraph 2, should be amended to be made consistent with changes already agreed to with respect to draft article 8, paragraph 2, and that a chapeau should be added to draft article 9, paragraph 2, to recognize the limitations to liability set forth in draft article 9, paragraph 1 (*d*) (ii) and (iv). The following words were proposed for paragraph 2: “Subject to any limitations ascertainable under paragraph 1 (*d*), the certification service provider shall bear the legal consequences of its failure to comply with paragraph 1.”

229. The basis of the proposal to add a chapeau to article 9, paragraph 2, was the concern that had been expressed as to whether, under the language of the draft article, it was clear that the limitations referred to in paragraph 1 (*d*) (ii) and (iv) would operate to modify liability pursuant to draft article 9, paragraph 2.

230. In respect of the first issue, the widely prevailing view was that draft article 9, paragraph 2, should adopt the same formulation that had been agreed in respect of draft article 8, paragraph 2, that is, that the certification service provider should bear the legal consequences of its failure to comply with the requirements of paragraph 1. As to the

proposal to add a chapeau to draft article 9, paragraph 2, it was widely agreed that the proposed words were not necessary. It was stated that, since the limitations set forth in paragraph 1 (d) (ii) and (iv) would be implemented into the national law of any State adopting the Model Law, they would therefore be a part of the legal regime that determined the consequences of the failure of the certification service provider to satisfy paragraph 1. On that basis and on the basis of the general formulation of the agreed amendment to draft article 9, paragraph 2, it was felt that the limitations referred to in paragraph 1 (d) were sufficiently taken into account and the additional words were therefore unnecessary. It was proposed that, to facilitate understanding of those provisions of the Model Law, the Guide to Enactment should clearly state that the intention of paragraph 2 of articles 8 and 9 was for the legal consequences of the failure to comply with the obligations set forth in those articles to be determined by applicable national law. The Commission decided to adopt that part of the proposal that would align the language of draft article 9, paragraph 2, with draft article 8, paragraph 2, and referred it to the drafting group (for the discussion regarding article 8, paragraph 2, see above, paras. 219-221).

Draft article 10

231. A proposal was made (see A/CN.9/492/Add.2) to amend the opening words of draft article 10 to read:

“For the purposes of article 9, paragraph 1 (f), in determining whether, or to what extent, any systems, procedures and human resources utilized by a certification service provider are trustworthy, regard may be had to the following factors, if and to the extent generally applied in commercial practice for the level of service provided, and if relied on by a relying party”.

The reason stated for the proposal was that the standards currently set forth in draft article 10 considerably exceeded actual practices for services generally provided today.

232. While some support was expressed in favour of the proposal, the widely prevailing view was that the purpose of draft article 10 was not to impose an exhaustive list of strict standards to be satisfied by certification service providers in all circumstances but merely to set forth a list of illustrative factors that could be taken into account in assessing whether the certification service provider had utilized “trustworthy systems, procedures and human resources in performing its services”. It was generally felt that the illustrative and non-mandatory nature of draft article 10 was sufficiently reflected by the words “regard may be had to the following factors”. After discussion, the Commission decided to retain the opening words of draft article 10 as currently drafted and referred it to the drafting group.

Subparagraph (f)

233. A proposal was made (see A/CN.9/492) to amend draft article 10, subparagraph (f), to read “the existence of a declaration by the State, an accreditation body or an

independent auditing body regarding compliance with or existence of the foregoing”.

234. It was stated by its proponents that the proposed amendment was appropriate, in particular in the case of developing countries, which might have fewer resources for the establishment of accreditation bodies such as certification service providers, so as to allow such a function to be performed by an independent auditing body. Strong opposition was expressed to the proposed deletion of the reference to situations where a declaration regarding compliance with the factors listed in draft article 10 would be made by the certification provider itself, for example by way of a certification practice statement. It was pointed out that in many countries such declarations by the certification service providers themselves were essential in the development of electronic commerce practice. No objection was made to the possible addition of a reference to situations where a declaration under draft article 10, subparagraph (f), would be made by independent auditing bodies. After discussion, however, it was generally felt that such an addition was unnecessary in view of the fact that the possible intervention of an independent auditing body was sufficiently covered by the reference to “an accreditation body” in the current text of draft article 10, subparagraph (f), and by the mention of “any other relevant factor” under draft article 10, subparagraph (g). The Commission decided to retain the substance of draft article 10, subparagraph (f), as currently drafted and referred it to the drafting group.

Draft article 11

235. A proposal made (see A/CN.9/492/Add.2) to amend draft article 11 so as to provide, in accordance with commercial and transactional practices where applicable, that relying parties should assume a greater responsibility for ascertaining the reliability of a signature than was reflected in the current text, was withdrawn. That withdrawal was made in recognition that amendments made to the draft text had adequately evened out the relative position of the parties.

Subparagraph (b)

236. A proposal was made (see A/CN.9/492) to amend draft article 11, subparagraph (b), by replacing the words “where an electronic signature is supported by” with the words “where a signature is based on”. Opposition to that amendment was voiced on the basis that it could narrow down the scope of draft article 11, subparagraph (b). After discussion, the Commission decided to retain the substance of draft article 11, subparagraph (b), as currently drafted and referred it to the drafting group.

Draft article 12

237. Clarification was sought as to what the Commission understood the expression used in article 12 of “substantially equivalent level of reliability” to mean. Referring to paragraph 152 of the draft Guide, the Commission agreed that the text sought to take account of the variations in levels of reliability found within and outside national

borders. It was accepted that it was not the level of security being evaluated but rather the security or administrative requirements that could be set up differently and the use of the expression sought, following the functional approach, to establish comparability on those issues. It was considered that an explanation along those lines, as set out in paragraph 5 of the draft Guide, could usefully be referred to in the section of the Guide dealing with article 12.

C. Consideration of the remainder of the draft articles

238. Having completed its consideration of the proposals that were raised by delegations on the basis of the comments submitted by Governments and interested international organizations with respect to the text of the draft Model Law (A/CN.9/492 and Add.1-3), the Commission proceeded with a systematic review of the draft articles.

Title

239. The title of the draft model law as considered by the Commission was as follows: "UNCITRAL Model Law On Electronic Signatures (2001)".

240. The Commission approved the substance of the title of the draft Model Law and referred it to the drafting group.

Article 1. Sphere of application

241. The text of draft article 1 as considered by the Commission was as follows:

"This Law applies where electronic signatures are used in the context* of commercial** activities. It does not override any rule of law intended for the protection of consumers."

242. The Commission approved the substance of draft article 1 and referred it to the drafting group.

*The Commission suggests the following text for States that might wish to extend the applicability of this Law:

"This Law applies where electronic signatures are used, except in the following situations: [...]"

**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.

Article 2. Definitions

243. The text of draft article 2 as considered by the Commission was as follows:

"For the purposes of this Law:

"(a) 'Electronic signature' means data in electronic form in, affixed to, or logically associated with, a data message, which may be used to identify the signatory in relation to the data message and indicate the signatory's approval of the information contained in the data message;

"(b) 'Certificate' means a data message or other record confirming the link between a signatory and signature creation data;

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

"(d) 'Signatory' means a person that holds signature creation data and acts either on its own behalf or on behalf of the person it represents;

"(e) 'Certification service provider' means a person that issues certificates and may provide other services related to electronic signatures;

"(f) 'Relying party' means a person that may act on the basis of a certificate or an electronic signature."

Subparagraph (a) ("Electronic signature")

244. A suggestion was made that the words "may be used" in subparagraph (a) should be replaced with words such as "is technically capable". That suggestion was opposed on the basis that such language was not appropriate for use in a legislative text and also on the basis that the proposed amendment was less flexible than the text as currently drafted and that it could introduce a rigid requirement into the definition of electronic signature. Despite rejecting that proposed amendment, the Commission agreed that the issue could be referred to in the Guide to Enactment.

245. A broader concern was raised that the aspect of the definition of electronic signature in paragraph 2 (a), which referred to the signatory's approval of the information contained in the data message, was problematic and that it was not imperative for a signature to indicate the approval of a message. It was suggested that the word "may" should be included before the word "indicate" to clarify that the signatory's approval of the contents of the data message was to have no higher status than the element of the definition stating that the electronic signatory may identify the signatory. The Commission rejected any amendment to the text on the basis that the definition had been extensively debated and that the text had been crafted so as to dovetail with the text of the UNCITRAL Model Law on Electronic Commerce, which listed the functions of an electronic signature. It was noted that the matter could be further clarified in the draft Guide. In response to a question raised, the Commission noted that the consent of a signatory to the information contained in the data message should be gauged at the time when the signature was affixed to the

document rather than at the time when the signature was created.

246. After discussion, the proposal to amend the definition was withdrawn.

Subparagraph (d) ("Signatory")

247. As a matter of drafting, it was suggested that the texts should be aligned in the different languages with respect to the use of the expression "acts on its own behalf or on behalf of the person it represents". The matter was referred to the drafting group for its consideration.

248. In reply to a question that was raised as to the substance of the definition, it was recalled that, as indicated in the draft Guide, the notion of "signatory" could not be severed from the person or entity that actually generated the electronic signature, since a number of specific obligations of the signatory under the Model Law were logically linked to actual control over the signature creation data. However, in order to cover situations where the signatory would be acting in representation of another person, the phrase "or on behalf of the person it represents" had been retained in the definition of "signatory". The extent to which, in addition to the person actually applying an electronic signature, a person would be bound by an electronic signature generated "on its behalf", for example, by one of its employees, was a matter to be settled in accordance with the law governing, as appropriate, the legal relationship between the signatory and the person on whose behalf the electronic signature was generated, on the one hand, and the relying party, on the other (A/CN.9/493, para. 103).

Subparagraph (e) ("Certification service provider")

249. A concern was raised that it was not clear if the definition of "certification service provider" was consistent with draft article 8, paragraph 1 (b), which referred to "any person ... expected ... to provide services in support of electronic signatures" and with draft article 12, paragraph 1 (b), which referred to the "issuer". In response, it was generally agreed that both provisions could be understood, where appropriate, as referring to the certification service provider. As to whether the text of draft article 8, paragraph 1 (b), would need to be aligned more closely with the wording of the definition of "certification service provider" in draft article 2, subparagraph (e), the matter was referred to the drafting group.

Subparagraph (f) ("Relying party")

250. A concern was raised that it was not clear whether a person falling within the definition of "certification service provider" could also be covered by the definition of "relying party". In response, attention was drawn to paragraphs 139 and 150 of the draft Guide, which made it clear that, in certain circumstances, the notion of "relying party" might cover not only a third party but also the signatory or a certification service provider.

251. After discussion, the Commission approved the substance of draft article 2 and referred it to the drafting group.

Article 3. Equal treatment of signature technologies

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

"Nothing in this Law, except article 5, shall be applied so as to exclude, restrict or deprive of legal effect any method of creating an electronic signature that satisfies the requirements referred to in article 6 (1) or otherwise meets the requirements of applicable law."

253. The Commission approved the substance of draft article 3 and referred it to the drafting group.

Article 4. Interpretation

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

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

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

255. The Commission approved the substance of draft article 4 and referred it to the drafting group.

Article 5. Variation by agreement

256. The text of draft article 5 as considered by the Commission was as follows:

"The provisions of this Law may be derogated from or their effect may be varied by agreement, unless that agreement would not be valid or effective under applicable law."

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

Article 6. Compliance with a requirement for a signature

258. The text of draft article 6 as considered by the Commission was as follows:

"(1) Where the law requires a signature of a person, that requirement is met in relation to a data message if an electronic signature is used which is as reliable as was appropriate for the purpose for which the data message was generated or communicated, in the light of all the circumstances, including any relevant agreement.

"(2) Paragraph (1) applies whether the requirement referred to therein is in the form of an obligation or whether the law simply provides consequences for the absence of a signature.

"(3) An electronic signature is considered to be reliable for the purpose of satisfying the requirement referred to in paragraph (1) if:

“(a) The signature creation data are, within the context in which they are used, linked to the signatory and to no other person;

“(b) The signature creation data were, at the time of signing, under the control of the signatory and of no other person;

“(c) Any alteration to the electronic signature, made after the time of signing, is detectable; and

“(d) Where a purpose of the legal requirement for a signature is to provide assurance as to the integrity of the information to which it relates, any alteration made to that information after the time of signing is detectable.

“(4) Paragraph (3) does not limit the ability of any person:

“(a) To establish in any other way, for the purpose of satisfying the requirement referred to in paragraph (1), the reliability of an electronic signature; or

“(b) To adduce evidence of the non-reliability of an electronic signature.

“(5) The provisions of this article do not apply to the following: [...]”

259. The Commission approved the substance of draft article 6 and referred it to the drafting group.

Article 7. Satisfaction of article 6

260. The text of draft article 7 as considered by the Commission was as follows:

“(1) [Any person, organ or authority, whether public or private, specified by the enacting State as competent] may determine which electronic signatures satisfy the provisions of article 6.

“(2) Any determination made under paragraph (1) shall be consistent with recognized international standards.

“(3) Nothing in this article affects the operation of the rules of private international law.”

261. The Commission approved the substance of draft article 7 and referred it to the drafting group.

Article 8. Conduct of the signatory

262. The text of draft article 8 as considered by the Commission was as follows:

“(1) Where signature creation data can be used to create a signature that has legal effect, each signatory shall:

“(a) Exercise reasonable care to avoid unauthorized use of its signature creation data;

“(b) Without undue delay, notify any person that may reasonably be expected by the signatory to rely on or to provide services in support of the electronic signature if:

“(i) The signatory knows that the signature creation data have been compromised; or

“(ii) The circumstances known to the signatory give rise to a substantial risk that the signature creation data may have been compromised;

“(c) Where a certificate is used to support the electronic signature, exercise reasonable care to ensure the accuracy and completeness of all material representations made by the signatory which are relevant to the certificate throughout its life-cycle, or which are to be included in the certificate.

“(2) A signatory shall be liable for its failure to satisfy the requirements of paragraph (1).”

263. Subject to its earlier deliberations with respect to draft article 8 (see above, paras. 212-222), the Commission approved the substance of the draft article and referred it to the drafting group.

Article 9. Conduct of the certification service provider

264. The text of draft article 9 as considered by the Commission was as follows:

“(1) Where a certification service provider provides services to support an electronic signature that may be used for legal effect as a signature, that certification service provider shall:

“(a) Act in accordance with representations made by it with respect to its policies and practices;

“(b) Exercise reasonable care to ensure the accuracy and completeness of all material representations made by it that are relevant to the certificate throughout its life-cycle, or which are included in the certificate;

“(c) Provide reasonably accessible means which enable a relying party to ascertain from the certificate:

“(i) The identity of the certification service provider;

“(ii) That the signatory that is identified in the certificate had control of the signature creation data at the time when the certificate was issued;

“(iii) That signature creation data were valid at or before the time when the certificate was issued;

“(d) Provide reasonably accessible means which enable a relying party to ascertain, where relevant, from the certificate or otherwise:

“(i) The method used to identify the signatory;

“(ii) Any limitation on the purpose or value for which the signature creation data or the certificate may be used;

“(iii) That the signature creation data are valid and have not been compromised;

“(iv) Any limitation on the scope or extent of liability stipulated by the certification service provider;

“(v) Whether means exist for the signatory to give notice pursuant to article 8 (1) (b);

“(vi) Whether a timely revocation service is offered;

“(e) Where services under subparagraph (d) (v) are offered, provide a means for a signatory to give notice pursuant to article 8 (1) (b) and, where services under subparagraph (d) (vi) are offered, ensure the availability of a timely revocation service;

“(f) Utilize trustworthy systems, procedures and human resources in performing its services.

“(2) A certification service provider shall be liable for its failure to satisfy the requirements of paragraph (1).”

265. Subject to its earlier deliberations with respect to draft article 9 (see above, paras. 223-230), the Commission approved the substance of the draft article and referred it to the drafting group.

Article 10. Trustworthiness

266. The text of draft article 10 as considered by the Commission was as follows:

“For the purposes of article 9 (1) (f), in determining whether, or to what extent, any systems, procedures and human resources utilized by a certification service provider are trustworthy, regard may be had to the following factors:

“(a) Financial and human resources, including existence of assets;

“(b) Quality of hardware and software systems;

“(c) Procedures for processing of certificates and applications for certificates and retention of records;

“(d) Availability of information to signatories identified in certificates and to potential relying parties;

“(e) Regularity and extent of audit by an independent body;

“(f) The existence of a declaration by the State, an accreditation body or the certification service provider regarding compliance with or existence of the foregoing; or

“(g) Any other relevant factor.”

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

Article 11. Conduct of the relying party

268. The text of draft article 11 as considered by the Commission was as follows:

“A relying party shall bear the legal consequences of its failure to:

“(a) Take reasonable steps to verify the reliability of an electronic signature; or

“(b) Where an electronic signature is supported by a certificate, take reasonable steps to:

“(i) Verify the validity, suspension or revocation of the certificate; and

“(ii) Observe any limitation with respect to the certificate.”

269. The Commission approved the substance of draft article 11, noting a suggestion that the title of the article should be aligned in all languages. The matter was referred to the drafting group.

Article 12. Recognition of foreign certificates and electronic signatures

270. The text of draft article 12 as considered by the Commission was as follows:

“(1) In determining whether, or to what extent, a certificate or an electronic signature is legally effective, no regard shall be had to:

“(a) The geographic location where the certificate is issued or the electronic signature created or used; or

“(b) The geographic location of the place of business of the issuer or signatory.

“(2) A certificate issued outside [*the enacting State*] shall have the same legal effect in [*the enacting State*] as a certificate issued in [*the enacting State*] if it offers a substantially equivalent level of reliability.

“(3) An electronic signature created or used outside [*the enacting State*] shall have the same legal effect in [*the enacting State*] as an electronic signature created or used in [*the enacting State*] if it offers a substantially equivalent level of reliability.

“(4) In determining whether a certificate or an electronic signature offers a substantially equivalent level of reliability for the purposes of paragraph (2) or (3), regard shall be had to recognized international standards and to any other relevant factors.

“(5) Where, notwithstanding paragraphs (2), (3) and (4), parties agree, as between themselves, to the use of certain types of electronic signatures or certificates, that agreement shall be recognized as sufficient for the purposes of cross-border recognition, unless that agreement would not be valid or effective under applicable law.”

271. A proposal was made to delete the word “types” from article 12, paragraph 5, so that it would refer to “certain electronic signatures or certificates”. That proposal was opposed on the basis that the Working Group had after extensive discussion specifically chosen to include this word and its removal could in fact narrow the scope of the paragraph.

272. Another proposal was made to delete article 12, paragraph 3. While some support was expressed, the Commission, after discussion, did not adopt that proposal.

273. After discussion, the Commission approved the substance of draft article 12 and referred it to the drafting group.

D. Consideration of the draft Guide to Enactment of the UNCITRAL Model Law on Electronic Signatures

274. Having completed its deliberations with respect to the text of the draft Model Law, the Commission proceeded with a review of the draft Guide to Enactment prepared by the secretariat (A/CN.9/493).

Paragraphs 135 and 159

275. A proposal was made (see A/CN.9/492/Add.2) to amend paragraphs 135 and 159 to reflect changes made to paragraph 69 as a result of the thirty-eighth session of the Working Group to limit the risk that insufficient attention might be given to industry-led voluntary standards processes.

276. The following text was proposed as a substitute for the second sentence of paragraph 135:

“The word ‘standards’ should be interpreted in a broad sense, which would include voluntary industry practices and trade usages, which may assure the flexibility upon which commercial practice relies, promote open standards with a view to facilitating interoperability, and support the objective of cross-border recognition (as described in article 12). Example texts include those emanating from such international organizations as the International Chamber of Commerce, the regional accreditation bodies operating under the aegis of the International Organization for Standardization (see A/CN.9/484, para. 66), the World Wide Web Consortium (W3C), as well as the work of UNCITRAL itself (including this Model Law and the UNCITRAL Model Law on Electronic Commerce).”

While some support was expressed in favour of the proposed amendment, it was generally felt that the existing text expressed adequate recognition of the role of voluntary standards. After discussion, it was agreed that inserting the words “voluntary standards (as described in para. 69 above)” after the words “industry practices and trade usages” in the second sentence of paragraph 135 would constitute an appropriate reference to such voluntary standards.

277. In the context of that discussion, another proposal was made that paragraph 135 should make reference to the European Electronic Signature Standardization Initiative (EESSI) as an example of a regional standardization initiative that should be taken into account when examining the standards applicable in the field of electronic signatures. While support was expressed for that proposal, it was pointed out that other such initiatives existed within other regional international organizations and that the Guide should not single out any such regional initiative. After discussion, it was agreed that paragraph 135 should refer in general terms to “regional standardization initiatives”.

278. As to paragraph 159, a proposal was made to replace the current text by the following:

“The notion of ‘recognized international standard’ should be interpreted broadly to cover voluntary

international technical and commercial standards (i.e. market-driven standards) and standards and norms adopted by governmental or intergovernmental bodies (ibid., para. 49). ‘Recognized international standard’ may be statements of accepted technical, legal or commercial practices, whether developed by the public or private sector (or both), of a normative or interpretative nature, which are generally accepted as applicable internationally. Such standards may be in the form of requirements, recommendations, guidelines, codes of conduct, or statements of either best practices or norms (ibid., paras. 101-104). Voluntary international technical and commercial standards may form the basis of product specifications of engineering and design criteria and of consensus for research and development of future products. To assure the flexibility upon which such commercial practice relies, to promote open standards with a view to facilitating interoperability and to support the objective of cross-border recognition (as described in article 12), States may wish to give due regard to the relationship between any specifications incorporated in or authorized by national regulations, and the voluntary technical standards process (see A/CN.9/484, para. 46).”

For the same reasons expressed in the context of the above discussion of paragraph 135 (see above, para. 43), it was agreed that inserting a reference to “voluntary standards (as described in para. 69 above)” at the end of the first sentence of paragraph 159 would constitute a sufficient reference to the practice of developing voluntary standards.

Paragraph 54

279. In addition to the mention currently found in paragraph 54 that “the issuing certification service provider’s digital signature on the certificate can be verified by using the public key of the certification service provider listed in another certificate by another certification service provider”, it was proposed that the following should be added after the second sentence of paragraph 54:

“Among other possible ways of verifying the digital signature of the certification service provider, that digital signature can also be recorded in a certificate issued by that certification service provider itself, and sometimes referred to as a ‘root certificate’.”

Along the same lines, it was proposed that the end of the last sentence should read as follows: “to publish the public key of the certification service provider (see A/CN.9/484, para. 41) or certain data pertaining to the root certificate (such as a ‘digital fingerprint’) in an official bulletin”. While support was expressed in favour of the proposal, objections were made, based on the view that, in certain countries, there existed strong objections to implementations of root certificates in the commercial sphere, for reasons linked to the costs associated with the establishment of the structures necessary for such implementations and to a perception that such implementations might result in an overly regulated regime. Accordingly, it was proposed that those objections should also be mentioned in paragraph 54. After discussion, the Commission agreed that those various proposals should be reflected in paragraph 54.

Paragraph 62

280. With respect to subparagraph (3), it was proposed that the words “unique to both the signed message and a given private key” should be replaced with the words “unique to the signed message”. The Commission adopted that proposal.

Paragraph 93

281. A proposal was made to replace the words “the identification of the signatory and the intent to sign” with wording based on the language used in paragraph 29 to describe the basic functions of a signature, namely, “to identify a person; and to associate that person with the content of a document”. The Commission adopted that proposal.

Paragraph 153

282. A proposal was made to quote more extensively in paragraph 153 from the text of paragraph 31 of the report of the Working Group on the work of its thirty-seventh session (A/CN.9/483). In particular, it was pointed out that the indication that “the purpose of paragraph 2 was not to place foreign suppliers of certification services in a better position than domestic ones” should be reflected in the Guide. That proposal was adopted by the Commission.

283. Subject to any amendment that might be necessary to reflect the deliberations and decisions of the Commission at its current session with respect to both the text of the Model Law and the draft Guide itself and subject to any editorial changes that might be necessary to ensure consistency in terminology, the Commission found that the text of the draft Guide adequately implemented the Commission’s intent to assist States in enacting and applying the Model Law and to provide guidance to other users of the Model Law. The secretariat was requested to prepare the definitive version of the Guide and to publish it together with the text of the Model Law.

E. Adoption of the Model Law

284. The Commission, after consideration of the text of the draft Model Law as revised by the drafting group and the draft Guide to Enactment prepared by the secretariat (A/CN.9/493), adopted the following decision at its 727th meeting, on 5 July 2001:

“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 particularly those of developing countries, in the extensive development of international trade,

“Noting that an increasing number of transactions in international trade are carried out by means of communication commonly referred to as “electronic

commerce”, which involve the use of alternatives to paper-based forms of communication, storage and authentication of information,

“Recalling the recommendation on the legal value of computer records adopted by the Commission at its eighteenth session, in 1985, and paragraph 5 (b) of General Assembly resolution 40/71 of 11 December 1985, in which the Assembly called upon Governments and international organizations to take action, where appropriate, in conformity with the recommendation of the Commission so as to ensure legal security in the context of the widest possible use of automated data processing in international trade,

“Recalling also the UNCITRAL Model Law on Electronic Commerce adopted by the Commission at its twenty-ninth session, in 1996, and complemented by an additional article 5 bis adopted by the Commission at its thirty-first session, in 1998,

“Convinced that the UNCITRAL Model Law on Electronic Commerce is of significant assistance to States in enabling or facilitating the use of electronic commerce through the enhancement of their legislation governing the use of alternatives to paper-based forms of communication and storage of information and through the formulation of such legislation where none currently exists,

“Mindful of the great utility of new technologies used for personal identification in electronic commerce and commonly referred to as ‘electronic signatures’,

“Desirous of building on the fundamental principles underlying article 7 of the UNCITRAL Model Law on Electronic Commerce with respect to the fulfilment of the signature function in an electronic environment,

“Convinced that legal certainty in electronic commerce will be enhanced by the harmonization of certain rules on the legal recognition of electronic signatures on a technologically neutral basis,

“Believing that the UNCITRAL Model Law on Electronic Signatures will significantly assist States in enhancing their legislation governing the use of modern authentication techniques and in formulating such legislation where none currently exists,

“Being of the opinion that the establishment of model legislation to facilitate the use of electronic signatures in a manner acceptable to States with different legal, social and economic systems could contribute to the development of harmonious international economic relations,

“1. Adopts the UNCITRAL Model Law on Electronic Signatures as it appears in annex II to the report of the United Nations Commission on International Trade Law on its thirty-fourth session,⁷ together with the Guide to Enactment of the Model Law;

“2. Requests the Secretary-General to transmit the text of the UNCITRAL Model Law on Electronic Signatures, together with the Guide to Enactment of the Model Law, to Governments and other interested bodies;

“3. *Recommends* that all States give favourable consideration to the newly adopted UNCITRAL Model Law on Electronic Signatures, together with the UNCITRAL Model Law on Electronic Commerce adopted in 1996 and complemented in 1998, when they enact or revise their laws, in view of the need for uniformity of the law applicable to alternatives to paper-based forms of communication, storage and authentication of information.”

IV. POSSIBLE FUTURE WORK ON ELECTRONIC COMMERCE

285. At the thirty-second session of the Commission, in 1999, various suggestions were made with respect to future work in the field of electronic commerce after completion of the Model Law on Electronic Signatures. It was recalled that, at the close of the thirty-second session of the Working Group, it had been proposed that the Working Group might wish to give preliminary consideration to undertaking the preparation of an international convention based on relevant provisions of the UNCITRAL Model Law on Electronic Commerce and of the draft model law on electronic signatures (A/CN.9/446, para. 212). The Commission was informed that interest had been expressed in a number of countries in the preparation of such an instrument.¹⁰

286. The attention of the Commission was drawn to a recommendation adopted on 15 March 1999 by the Centre for the Facilitation of Procedures and Practices for Administration, Commerce and Transport (CEFACT) of the Economic Commission for Europe (ECE).¹¹ That text recommended that UNCITRAL consider the actions necessary to ensure that references to “writing”, “signature” and “document” in conventions and agreements relating to international trade allowed for electronic equivalents. Support was expressed for the preparation of an omnibus protocol to amend multilateral treaty regimes to facilitate the increased use of electronic commerce.

287. Other items suggested for future work included: electronic transactional and contract law; electronic transfer of rights in tangible goods; electronic transfer of intangible rights; rights in electronic data and software (possibly in cooperation with the World Intellectual Property Organization (WIPO)); standard terms for electronic contracting (possibly in cooperation with the International Chamber of Commerce (ICC) and the Internet Law and Policy Forum); applicable law and jurisdiction (possibly in cooperation with the Hague Conference on Private International Law); and online dispute settlement systems.¹²

288. At its thirty-third session, in 2000, the Commission held a preliminary exchange of views regarding future

work in the field of electronic commerce. The Commission focused its attention on three of the topics mentioned above. The first dealt with electronic contracting considered from the perspective of the United Nations Convention on Contracts for the International Sale of Goods (hereinafter referred to as “the United Nations Sales Convention” or “the Convention”). The second topic was online dispute settlement. The third topic was de-materialization of documents of title, in particular in the transport industry.

289. The Commission welcomed the proposal to consider further the possibility of undertaking future work on those topics. While no decision as to the scope of future work could be made until further discussion had taken place in the Working Group, the Commission generally agreed that, upon completing its current task, namely, the preparation of the draft Model Law on Electronic Signatures, the Working Group would be expected to examine, at its first meeting in 2001, some or all of the above-mentioned topics, as well as any additional topic, with a view to making more specific proposals for future work by the Commission. It was agreed that work to be carried out by the Working Group could involve consideration of several topics in parallel as well as preliminary discussion of the contents of possible uniform rules on certain aspects of the above-mentioned topics.¹³

290. The Working Group considered those proposals at its thirty-eighth session, in 2001, on the basis of a set of notes dealing with a possible convention to remove obstacles to electronic commerce in existing international conventions (A/CN.9/WG.IV/WP.89); de-materialization of documents of title (A/CN.9/WG.IV/WP.90); and electronic contracting (A/CN.9/WG.IV/WP.91).

291. The Working Group concluded its deliberations on future work by recommending to the Commission that work towards the preparation of an international instrument dealing with certain issues in electronic contracting be started on a priority basis. At the same time, it was agreed to recommend to the Commission that the secretariat be entrusted with the preparation of the necessary studies concerning three other topics considered by the Working Group, namely: (a) a comprehensive survey of possible legal barriers to the development of electronic commerce in international instruments, including, but not limited to, those instruments already mentioned in the CEFACT survey; (b) a further study of the issues related to transfer of rights, in particular rights in tangible goods, by electronic means and mechanisms for publicizing and keeping a record of acts of transfer or the creation of security interests in such goods; and (c) a study discussing the UNCITRAL Model Law on International Commercial Arbitration, as well as the UNCITRAL Arbitration Rules, to assess their appropriateness for meeting the specific needs of online arbitration (A/CN.9/484, paras. 94-127).

292. There was wide support for the recommendations made by the Working Group, which were found to constitute a sound basis for future work by the Commission. The

¹⁰*Ibid.*, *Fifty-third Session, Supplement No. 17 (A/53/17)*, para. 209.

¹¹The text of the recommendation to UNCITRAL is contained in document TRADE/CEFACT/1999/CRP.7. Its adoption by CEFACT is mentioned in the report of CEFACT on the work of its fiftieth session (TRADE/CEFACT/1999/19, para. 60).

¹²*Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 17 (A/54/17)*, paras. 315-318.

¹³*Ibid.*, *Fifty-fifth Session, Supplement No. 17 (A/55/17)*, paras. 384-388.

views varied, however, as regards the relative priority to be assigned to the topics. One line of thought was that a project aimed at removing obstacles to electronic commerce in existing instruments should have priority over the other topics, in particular over the preparation of a new international instrument dealing with electronic contracting. It was said that references to “writing”, “signature”, “document” and other similar provisions in existing uniform law conventions and trade agreements already created legal obstacles and generated uncertainty in international transactions conducted by electronic means. Efforts to remove those obstacles should not be delayed or neglected by attaching higher priority to issues of electronic contracting.

293. The prevailing view, however, was in favour of the order of priority that had been recommended by the Working Group (see para. 291). It was pointed out, in that connection, that the preparation of an international instrument dealing with issues of electronic contracting and the consideration of appropriate ways for removing obstacles to electronic commerce in existing uniform law conventions and trade agreements were not mutually exclusive. The Commission was reminded of the common understanding reached at its thirty-third session that work to be carried out by the Working Group could involve consideration of several topics in parallel as well as preliminary discussion of the contents of possible uniform rules on certain aspects of the above-mentioned topics.¹⁴

294. There were also differing views regarding the scope of future work on electronic contracting, as well as the appropriate moment to begin such work. Pursuant to one view, the work should be limited to contracts for the sale of tangible goods. The opposite view, which prevailed in the course of the Commission’s deliberations, was that the Working Group on Electronic Commerce should be given a broad mandate to deal with issues of electronic contracting, without narrowing the scope of the work from the outset. It was understood, however, that consumer transactions and contracts granting limited use of intellectual property rights would not be dealt with by the Working Group. The Commission took note of one of several preliminary working assumptions made by the Working Group that the form of the instrument to be prepared could be that of a stand-alone convention (although it was not possible for a final decision to be taken as to form). The future instrument should deal broadly with the issues of contract formation in electronic commerce (A/CN.9/484, para. 124), without creating any negative interference with the well-established regime of the United Nations Convention on Contracts for the International Sale of Goods (A/CN.9/484, para. 95), and without unduly interfering with the law of contract formation in general. In that connection, it was stated that the focus of the work should be restricted to international transactions. Broad support was given to the idea expressed in the context of the thirty-eighth session of the Working Group that, to the extent possible, the treatment of Internet-based sales transactions should not differ from the treatment given to sales transactions conducted by more traditional means (A/CN.9/484, para. 102).

295. As regards the timing of the work to be undertaken by the Working Group, there was support for commencing consideration of future work without delay during the third quarter of 2001. However, strong views were expressed that it would be preferable for the Working Group to await until the first quarter of 2002, so as to afford States sufficient time to hold internal consultations. The Commission took note of that suggestion and decided to revert to the issue in the course of its deliberations on its overall work programme and the proposed schedule of meetings of its Working Groups (see para. 425).

V. INSOLVENCY LAW

296. The Commission, at its thirty-second session in 1999, had before it a proposal by Australia (A/CN.9/462/Add.1) on possible future work in the area of insolvency law. That proposal had recommended that, in view of its universal membership, its previous successful work on cross-border insolvency and its established working relations with international organizations that have expertise and interest in the law of insolvency, the Commission was an appropriate forum for the discussion of insolvency law issues. The proposal urged that the Commission consider entrusting a working group with the development of a model law on corporate insolvency to foster and encourage the adoption of effective national corporate insolvency regimes.

297. Recognition was expressed in the Commission for the importance to all countries of strong insolvency regimes. The view was expressed that the type of insolvency regime that a country had adopted had become a “front-line” factor in international credit ratings. Concern was expressed, however, about the difficulties associated with work on an international level on insolvency legislation, which involved sensitive and potentially diverging socio-political choices. In view of those difficulties, the fear was expressed that the work might not be brought to a successful conclusion. It was said that a universally acceptable model law was in all likelihood not feasible and that any work needed to take a flexible approach that would leave options and policy choices open to States. While the Commission heard expressions of support for such flexibility, it was generally agreed that the Commission could not take a final decision on committing itself to establishing a working group to develop model legislation or another text without further study of the work already being undertaken by other organizations and consideration of the relevant issues.

298. To facilitate that further study, the Commission decided to convene an exploratory session of a working group to prepare a feasibility proposal for consideration by the Commission at its thirty-third session. That session of the Working Group was held in Vienna from 6 to 17 December 1999.

299. At its thirty-third session, in 2000, the Commission noted the recommendation that the Working Group had made in its report (A/CN.9/469, para. 140) and gave the Working Group the mandate to prepare a comprehensive

¹⁴Ibid., para. 387.

statement of key objectives and core features for a strong insolvency, debtor-creditor regime, including consideration of out-of-court restructuring, and a legislative guide containing flexible approaches to the implementation of such objectives and features, including a discussion of the alternative approaches possible and the perceived benefits and detriments of such approaches.

300. It was agreed that, in carrying out its task, the Working Group should be mindful of the work under way or already completed by other organizations, including the World Bank, the International Monetary Fund, the Asian Development Bank, the International Federation of Insolvency Professionals (INSOL International) and Committee J of the Section on Business Law of the International Bar Association (IBA). In order to obtain the views and benefit from the expertise of those organizations, the secretariat, in cooperation with INSOL and IBA, organized the UNCITRAL/INSOL/IBA Global Insolvency Colloquium at Vienna, from 4 to 6 December 2000.

301. At its current session, the Commission had before it the report of the Colloquium (A/CN.9/495).

302. The Commission took note of the report with satisfaction and commended the work accomplished so far, in particular the holding of the Global Insolvency Colloquium and the efforts of coordination with the work carried out by other international organizations in the area of insolvency law. The Commission discussed the recommendations of the Colloquium, in particular with respect to the form that the future work might take and interpretation of the mandate given to the Working Group by the Commission at its thirty-third session.

303. In terms of the mandate given to the Working Group, the Commission was generally of the view that it should be interpreted broadly to enable the Working Group to develop a work product that could reflect the elements mentioned in the mandate for inclusion (see para. 299 above and A/CN.9/495, para. 13). As to the possible form of future work, it was reaffirmed that a model law on substantive features of an insolvency regime would be neither desirable nor feasible, given the complexity and variety of issues involved in insolvency law and the disparity of approaches taken within the various legal systems. The view was widely shared that the work should ensure as much flexibility as possible, while at the same time maximizing utility. Concern was expressed that while a legislative guide could provide the necessary flexibility, it might result in a product that was too general and too abstract to provide the required guidance. Accordingly, it was suggested that the Working Group should bear in mind the need to be as specific as possible in developing its work and in that connection it was suggested that model legislative provisions, even if only addressing some of the issues to be included in the guide, should be included as far as possible.

304. The view was widely expressed that the work should take the form of a legislative guide. It was pointed out that a product issued in that form might prove very useful not only for countries that did not have efficient and effective

insolvency regimes and needed to develop such a regime, but also for countries that had undertaken or were to undertake the process of modernizing and reviewing their national systems. The view was expressed that, in developing the guide, the Working Group should be mindful of the goal of furthering trade and promoting commerce, not just of the goal of harmonization of existing laws.

305. It was suggested that the three key areas for organizing the material to be included in the guide, as outlined in the report of the Colloquium (A/CN.9/495, paras. 30-33), provided an appropriate format for the essential elements and that work should proceed on that basis. As to the substantive contents of the guide, a number of suggestions were made, including that, in developing the legislative guide, the Working Group should bear in mind a number of key principles and objectives such as respecting issues of public policy; enhancing the coordination role of courts; establishing a special regime for public claims; recognizing the priority of reorganization over liquidation; preserving the operation of the business and employment; guaranteeing salaries; respecting the role of courts in controlling the insolvency representatives; providing for equal treatment of creditors and ensuring transparency of collective proceedings. It was observed that those principles should not be interpreted as limiting the mandate given to the Working Group, but might usefully be taken into account by the Working Group for purposes of guidance and to avoid the legislative guide being overly general. It was suggested that either banks and financial institutions should remain outside the scope of the work or that a special regime should be maintained for those entities.

306. Other suggestions that received some support included the need to take account of a number of issues that had proved to be problems in international insolvency, such as the difficulty of collecting and disseminating information on companies that were the subject of insolvency proceedings, providing access for foreign creditors to make claims, equal treatment of foreign creditors and the treatment of late claims, especially where they might be made by foreign creditors. A further issue noted was problems associated with the granting of credit and the fact that cases were often encountered where insufficient care in decisions to grant credit proved, though apparently remote, to be one of the causes of insolvency. It was recalled that the UNCITRAL Model Law on Cross-Border Insolvency already addressed a number of those problems. It was noted that while some of those issues might also be relevant in the context of the current project to develop a legislative guide, there was no intention that the current project should change or amend the Model Law in any way.

307. The Commission noted the importance of training of insolvency professionals and the judiciary to the efficient and orderly functioning of an insolvency regime and heard of the work being undertaken to further that important objective by other international organizations.

308. After discussion, the Commission confirmed that the mandate given to the Working Group at the thirty-third session of the Commission should be widely interpreted to ensure an appropriately flexible work product, which should take the form of a legislative guide.

VI. SETTLEMENT OF COMMERCIAL DISPUTES

309. At its thirty-second session, in 1999, the Commission had before it a note entitled "Possible future work in the area of international commercial arbitration" (A/CN.9/460).¹⁵ Welcoming the opportunity to discuss the desirability and feasibility of further development of the law of international commercial arbitration, the Commission generally considered that the time had come to assess the extensive and favourable experience with national enactments of the UNCITRAL Model Law on International Commercial Arbitration (1985), as well as the use of the UNCITRAL Arbitration Rules and the UNCITRAL Conciliation Rules, and to evaluate in the universal forum of the Commission the acceptability of ideas and proposals for improvement of arbitration laws, rules and practices.¹⁶

310. The Commission entrusted the work to one of its working groups, which it named the Working Group on Arbitration, and decided that the priority items for the Working Group should be conciliation,¹⁷ requirement of written form for the arbitration agreement,¹⁸ enforceability of interim measures of protection¹⁹ and possible enforceability of an award that had been set aside in the State of origin.²⁰

311. At its thirty-third session, in 2000, the Commission had before it the report of the Working Group on Arbitration on the work of its thirty-second session (A/CN.9/468). The Commission took note of the report with satisfaction and reaffirmed the mandate of the Working Group to decide on the time and manner of dealing with the topics identified for future work. Several statements were made to the effect that, in general, the Working Group, in deciding the priorities of the future items on its agenda, should pay particular attention to what was feasible and practical and to issues where court decisions left the legal situation uncertain or unsatisfactory. Topics that were mentioned in the Commission as potentially worthy of consideration, in addition to those which the Working Group might identify as such, were the meaning and effect of the more-favourable-right provision of article VII of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter referred to as "the New York Convention") (A/CN.9/468, para. 109 (k)); raising claims in arbitral proceedings for the purpose of set-off and the jurisdiction of the arbitral tribunal with respect to such claims (para. 107 (g));

freedom of parties to be represented in arbitral proceedings by persons of their choice (para. 108 (c)); residual discretionary power to grant enforcement of an award notwithstanding the existence of a ground for refusal listed in article V of the 1958 New York Convention (para. 109 (i)); and the power by the arbitral tribunal to award interest (para. 107 (j)). It was noted with approval that, with respect to "online" arbitrations (i.e. arbitrations in which significant parts or even all of arbitral proceedings were conducted by using electronic means of communication) (para. 113), the Working Group on Arbitration would cooperate with the Working Group on Electronic Commerce. With respect to the possible enforceability of awards that had been set aside in the State of origin (para. 107 (m)), the view was expressed that the issue was not expected to raise many problems and that the case law that gave rise to the issue should not be regarded as a trend.²¹

312. At its current session, the Commission took note with appreciation of the reports of the Working Group on the work of its thirty-third and thirty-fourth sessions (A/CN.9/485 and A/CN.9/487, respectively). The Commission commended the Working Group for the progress accomplished so far regarding the three main issues under discussion, namely, the requirement of the written form for the arbitration agreement, the issues of interim measures of protection and the preparation of a model law on conciliation.

313. With regard to the requirement of written form for the arbitration agreement, the Commission noted that the Working Group had considered the draft model legislative provision revising article 7, paragraph 2, of the UNCITRAL Model Law on International Commercial Arbitration (see A/CN.9/WG.II/WP.113, paras. 13 and 14) and a draft interpretative instrument regarding article II, paragraph 2, of the New York Convention (para. 16). Consistent with a view expressed in the context of the thirty-fourth session of the Working Group (A/CN.9/487, para. 30), concern was expressed as to whether a mere reference to arbitration terms and conditions or to a standard set of arbitration rules available in written form could satisfy the written form requirement. It was stated that such a reference should not be taken as satisfying the form requirement since the written text being referred to was not the actual agreement to arbitrate but rather a set of procedural rules for carrying out the arbitration (i.e. a text that would most often exist prior to the agreement and result from the action of persons that were not parties to the actual agreement to arbitrate). It was pointed out that, in most practical circumstances, it was the agreement of the parties to arbitrate that should be required to be made in a form that was apt to facilitate subsequent evidence of the intent of the parties. In response to that concern, it was generally felt that, while the Working Group should not lose sight of the importance of providing certainty as to the intent of the parties to arbitrate, it was also important to work towards facilitating a more flexible interpretation of the strict form requirement contained in the New York Convention, so as not to frustrate the expectations of the parties when they agreed to arbitrate. In that respect, the Commission took note of the possibility that the Working Group examine further the

¹⁵The note drew on ideas, suggestions and considerations expressed in different contexts, such as the New York Convention Day (*Enforcing Arbitration Awards under the New York Convention*, op. cit.); the Congress of the International Council for Commercial Arbitration, Paris, 3-6 May 1998 (*Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention*, International Council for Commercial Arbitration Congress Series No. 9, Kluwer Law International, 1999); and other international conferences and forums, such as the 1998 Freshfields lecture by Gerold Herrmann, "Does the world need additional uniform legislation on arbitration?" (*Arbitration International*, vol. 15, No. 3 (1999), p. 211).

¹⁶*Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 17 (A/54/17)*, para. 337.

¹⁷*Ibid.*, paras. 340-343.

¹⁸*Ibid.*, paras. 344-350.

¹⁹*Ibid.*, paras. 371-373.

²⁰*Ibid.*, paras. 374 and 375.

²¹*Ibid.*, *Fifty-fifth Session, Supplement No. 17 (A/55/17)*, para. 396.

meaning and effect of the more-favourable-right provision of article VII of the New York Convention.

314. With regard to the issues of interim measures of protection, the Commission noted that the Working Group had considered a draft text for a revision of article 17 of the UNCITRAL Model Law on International Commercial Arbitration and the text of paragraph 1 (a) (i) of a draft new article prepared by the secretariat for addition to that Model Law (A/CN.9/WG.II/WP.113, para. 18). The Working Group was requested to continue its work on the basis of revised draft provisions to be prepared by the secretariat.

315. With regard to conciliation, the Commission noted that the Working Group had considered articles 1 to 16 of the draft model legislative provisions (A/CN.9/WG.II/WP.113/Add.1). It was generally felt that work on those draft model legislative provisions could be expected to be completed by the Working Group at its next session. The Commission requested the Working Group to proceed with the examination of those provisions on a priority basis, with a view to the instrument being presented in the form of a draft model law for review and adoption by the Commission at its thirty-fifth session, in 2002.

VII. MONITORING THE IMPLEMENTATION OF THE 1958 NEW YORK CONVENTION

316. It was recalled that the Commission, at its twenty-eighth session, in 1995, had approved the project, undertaken jointly with Committee D of IBA, aimed at monitoring the legislative implementation of the New York Convention.²² It was stressed that the purpose of the project, as approved by the Commission, was limited to that aim and, in particular, that its purpose was not to monitor individual court decisions applying the Convention. In order to be able to prepare a report on the subject, the secretariat had sent to the States parties to the Convention a questionnaire relating to the legal regime in those States governing the recognition and enforcement of foreign awards.

317. It was noted that, as at the beginning of the current session of the Commission, the secretariat had received 59 replies to the questionnaire (of a current total of 125 States parties).

318. The Commission repeated its appeal to States parties to the Convention that had not yet replied to the questionnaire to do so as soon as possible or, to the extent necessary, to inform the secretariat about any new developments since their previous replies to the questionnaire. The secretariat was requested to prepare, for a future session of the Commission, a note presenting the findings based on the analysis of the information gathered.

²²Ibid., *Fiftieth Session, Supplement No. 17 (A/50/17)*, paras. 401-404, and *ibid.*, *Fifty-first Session, Supplement No. 17 (A/51/17)*, paras. 238-243.

VIII. POSSIBLE FUTURE WORK ON TRANSPORT LAW

319. When considering future work in the area of electronic commerce, following the adoption of the UNCITRAL Model Law on Electronic Commerce at its twenty-ninth session, in 1996,²³ the Commission considered a proposal to include in its work programme a review of current practices and laws in the area of the international carriage of goods by sea, with a view to establishing the need for uniform rules where no such rules existed and with a view to achieving greater uniformity of laws.²⁴

320. At that session, the Commission had been informed that existing national laws and international conventions had left significant gaps regarding issues such as the functioning of bills of lading and seaway bills, the relation of those transport documents to the rights and obligations between the seller and the buyer of the goods and the legal position of the entities that provided financing to a party to the contract of carriage. Some States had provisions on those issues, but the fact that those provisions were disparate and that many States lacked them constituted an obstacle to the free flow of goods and increased the cost of transactions. The growing use of electronic means of communication in the carriage of goods further aggravated the consequences of those fragmentary and disparate laws and also created the need for uniform provisions addressing the issues particular to the use of new technologies.²⁴

321. It was then suggested that the secretariat should be requested to solicit views and suggestions on those difficulties not only from Governments but in particular from the relevant intergovernmental and non-governmental organizations representing the various interests in the international carriage of goods by sea.²⁵ It was stated that an analysis of those views and suggestions would enable the secretariat to present, at a future session, a report that would allow the Commission to take an informed decision as to the desirable course of action.²⁵

322. Several reservations were expressed with regard to that suggestion.²⁶ One reservation was that the issues to be covered were numerous and complex, which would strain the limited resources of the secretariat. Priority should instead be given to other topics that were, or were about to be, put on the agenda of the Commission. Furthermore, it was said that the continued coexistence of different treaties governing the liability in the carriage of goods by sea and the slow process of adherence to the United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg Rules), made it unlikely that adding a new treaty to the existing ones would lead to greater harmony of laws. Indeed, there was some danger that the disharmony of laws would increase.²⁷

²³Ibid., *Fifty-first Session, Supplement No. 17 (A/51/17)*.

²⁴Ibid., para. 210.

²⁵Ibid., para. 211.

²⁶Ibid., paras. 211-214.

²⁷Ibid., para. 213.

323. In addition, it was said that any work that would include the reconsideration of the liability regime was likely to discourage States from adhering to the Hamburg Rules, which would be an unfortunate result. It was stressed that, if an investigation were to be carried out, it should not cover the liability regime. It was, however, stated in reply that the review of the liability regime was not the main objective of the suggested work; rather, what was necessary was to provide modern solutions to the issues that either were not adequately dealt with or were not dealt with at all in treaties.²⁷

324. Having regard to those differing views, the Commission did not include the consideration of the suggested issues on its agenda at that stage. Nevertheless, it decided that the secretariat should be the focal point for gathering information, ideas and opinions as to the problems that arose in practice and possible solutions to those problems. It was also agreed that such information-gathering should be broadly based and should include, in addition to Governments, the international organizations representing the commercial sectors involved in the carriage of goods by sea, such as the International Maritime Committee (CMI), ICC, the International Union of Marine Insurance (IUMI), the International Federation of Freight Forwarders Associations (FIATA), the International Chamber of Shipping (ICS) and the International Association of Ports and Harbors.²⁸

325. At its thirty-first session, in 1998, the Commission heard a statement on behalf of CMI to the effect that it welcomed the invitation to cooperate with the secretariat in soliciting views of the sectors involved in the international carriage of goods and in preparing an analysis of that information. It was stated that that analysis would allow the Commission to take an informed decision as to the desirable course of action.²⁹ Strong support was expressed at that session for the exploratory work being undertaken by CMI and the secretariat. The Commission expressed its appreciation to CMI for its willingness to embark on that important and far-reaching project, for which few or no precedents existed at the international level.³⁰

326. At the thirty-second session of the Commission, in 1999, it was reported on behalf of CMI that a CMI working group had been instructed to prepare a study on a broad range of issues in international transport law with the aim of identifying the areas where unification or harmonization was needed by the industries involved.³¹ In undertaking the study, it had been realized that the industries involved were extremely interested in pursuing the project and had offered their technical and legal knowledge to assist in that endeavour. Based on that favourable reaction and the preliminary findings of the CMI working group, it appeared that further harmonization in the field of transport law would greatly benefit international trade. The CMI working group had found a number of issues that had not been covered by the current unifying instruments. Some of those

issues were regulated by national laws that were not internationally harmonized. Evaluated in the context of electronic commerce, that lack of harmonization became even more significant. It was reported that the CMI working group had identified numerous interfaces between the different types of contracts involved in international trade and transport of goods (such as sales contracts, contracts of carriage, insurance contracts, letters of credit, freight forwarding contracts and a number of other ancillary contracts). The CMI working group intended to clarify the nature and function of those interfaces and to collect and analyse the rules currently governing them. That exercise would at a later stage include a re-evaluation of principles of liability to determine their compatibility with a broader area of rules on the carriage of goods.³¹

327. At that session, it was also reported that the CMI working group had sent a questionnaire to all CMI member organizations covering a large number of legal systems. The intention of CMI was, once the replies to the questionnaire had been received, to create an international subcommittee to analyse the data and find a basis for further work towards harmonizing the law in the area of international transport of goods. The Commission had been assured that CMI would provide it with assistance in preparing a universally acceptable harmonizing instrument.³²

328. Also at that session, the Commission expressed its appreciation to CMI for having acted upon its request for cooperation and requested the secretariat to continue to cooperate with CMI in gathering and analysing information. The Commission was looking forward to receiving a report at a future session presenting the results of the study with proposals for future work.³³

329. At its thirty-third session, in 2000, the Commission had had before it a report of the Secretary-General on possible future work in transport law (A/CN.9/476), which described the progress of the work carried out by CMI in cooperation with the secretariat. It had also heard an oral report on behalf of CMI. In cooperation with the secretariat, the CMI working group had launched an investigation based on a questionnaire covering different legal systems addressed to the CMI member organizations. It was also noted that, at the same time, a number of round-table meetings had been held in order to discuss features of the future work with international organizations representing various industries. Those meetings showed the continued support for and interest of the industry in the project.

330. It was reported that, pursuant to the receipt of replies to the questionnaire, CMI had created an international subcommittee with a view to analysing the information and finding a basis for further work towards harmonizing the law in the area of international transport of goods. It was also reported that the enthusiasm encountered so far in the industry and the provisional findings about the areas of law that needed further harmonization made it likely that the project would be eventually transformed into a universally acceptable harmonizing instrument.

²⁸Ibid., para. 215.

²⁹Ibid., *Fifty-third Session, Supplement No. 17 (A/53/17)*, para. 264.

³⁰Ibid., para. 266.

³¹Ibid., *Fifty-fourth Session, Supplement No. 17 (A/54/17)*, para. 413.

³²Ibid., para. 415.

³³Ibid., para. 418.

331. In the course of the discussions in the CMI subcommittee, it had been noted that although bills of lading were still used, especially where a negotiable document was required, the actual carriage of goods by sea sometimes represented only a relatively short leg of an international transport of goods. In the container trade, even a port-to-port bill of lading would involve receipt and delivery at some point not directly connected with the loading on to, or discharge from, the ocean vessel. Moreover, in most situations it was not possible to take delivery alongside the vessel. Furthermore, where different modes of transport were used, there were often gaps between mandatory regimes applying to the various transport modes involved. It had been proposed, therefore, that in developing an internationally harmonized regime covering the relationships between the parties to the contract of carriage for the full duration of the carrier's custody of the cargo, issues that arose in connection with activities that were integral to the carriage agreed to by the parties and that took place before loading and after discharge should also be considered, as well as issues that arose under shipments where more than one mode of transport was contemplated. It was noted that the emphasis of the work, as originally conceived, had been on the review of areas of law governing the transport of goods that had not previously been covered by international agreements. However, it had been increasingly felt that the current broad-based project should be extended to include an updated liability regime that would complement the terms of the proposed harmonizing instrument.

332. Several statements were made in the Commission to the effect that the time had come for active pursuit of harmonization in the area of the carriage of goods by sea, that increasing disharmony in the area of international carriage of goods was a source of concern and that it was necessary to provide a certain legal basis to modern contract and transport practices. It was also observed that the carriage of goods by sea was increasingly part of a warehouse-to-warehouse operation and that factor should be borne in mind in conceiving future solutions. Approval was expressed for a concept of work that would extend beyond liability issues and would deal with the contract of carriage so as to facilitate the export-import operation, which included the relationship between the seller and the buyer (and possible subsequent buyers) as well as the relationship between the parties to the commercial transaction and providers of financing. It was recognized that such a broad approach would involve some re-examination of the rules governing the liability for loss of or damage to goods.

333. In the context of the thirty-third session of the Commission, a transport law colloquium, organized jointly by the secretariat and CMI, was held in New York on 6 July 2000. The purpose of the colloquium was to gather ideas and expert opinions on problems that arose in the international carriage of goods, in particular the carriage of goods by sea, identifying issues in transport law on which the Commission might wish to consider undertaking future work and, to the extent possible, suggesting possible solutions. It allowed a broad range of interested organizations and representatives of both carrier and shipper industry bodies to provide their views on possible areas where transport law was in need of reform.

334. A majority of speakers acknowledged that existing national laws and international conventions left significant gaps regarding issues such as the functioning of a bill of lading and a seaway bill, the relationship of those transport documents to the rights and obligations between the seller and the buyer of the goods and the legal position of the entities that provide financing to a party to a contract of carriage. There was general consensus that, with the changes wrought by the development of multimodalism and the use of electronic commerce, the transport law regime was in need of reform to regulate all transport contracts, whether applying to one or more modes of transport and whether the contract was made electronically or in writing. Some issues raised for consideration in any reform process included formulating more exact definitions of the roles, responsibilities, duties and rights of all parties involved and clearer definitions of when delivery was assumed to occur; rules for dealing with cases where it was not clear at which leg of the carriage cargo had been lost or damaged; identifying the terms or liability regime that should apply as well as the financial limits of liability; and the inclusion of provisions designed to prevent the fraudulent use of bills of lading.

335. At that session, the Commission welcomed the fruitful cooperation between CMI and the secretariat. Several statements were made to the effect that it was necessary throughout the preparatory work to involve other interested organizations, including those representing the interests of cargo owners. The Commission requested the secretariat to continue to cooperate actively with CMI with a view to presenting, at the next session of the Commission, a report identifying issues in transport law on which the Commission might undertake future work.

336. It was noted with appreciation that a CMI International Subcommittee, in which all maritime law association members of CMI were invited to participate, had met four times during 2000 to consider the scope and possible substantive solutions for a future instrument on transport law (27 and 28 January, 6 and 7 April, 7 and 8 July and 12 and 13 October). A number of other non-governmental organizations participated as observers in those meetings, including FIATA, the Baltic and International Maritime Council (BIMCO), ICC, ICS, IUMI and the International Group of P&I Clubs. The tasks of the Subcommittee, as laid down by CMI in consultation with the secretariat, had been to consider in what areas of transport law that were not at present governed by international liability regimes greater international uniformity might be achieved; to prepare an outline of an instrument designed to bring about uniformity of transport law and then to draft provisions to be incorporated into the proposed instrument, including provisions relating to liability. In addition, the Subcommittee was to consider how the instrument might accommodate other forms of carriage associated with carriage by sea. The draft outline instrument and a paper on door-to-door issues were discussed at the major CMI international conference held in Singapore from 12 to 16 February 2001. It was reported that, pursuant to the discussion at the conference, the Subcommittee would continue its work with a view to identifying solutions that were likely to attract agreement among the industries involved in the international carriage of goods by sea.

337. At its thirty-fourth session, the Commission had before it a report of the Secretary-General (A/CN.9/497) that had been prepared pursuant to that request by the Commission.

338. The report that was before the Commission summarized the considerations and suggestions that had resulted so far from the discussions in the CMI International Subcommittee. The details of possible legislative solutions were not presented because they were currently being worked on by the Subcommittee. The purpose of the report was to enable the Commission to assess the thrust and scope of possible solutions and decide on how it wished to proceed. The issues described in the report that would have to be dealt with in the future instrument included the following: the scope of application of the instrument, period of responsibility of the carrier, obligations of the carrier, liability of the carrier, obligations of the shipper, transport documents, freight, delivery to the consignee, right of control of parties interested in the cargo during carriage, transfer of rights in goods, the party that had the right to bring an action against the carrier and time bar for actions against the carrier.

339. The report suggested that consultations that the secretariat had been conducting pursuant to the mandate it received from the Commission in 1996 indicated that work could usefully commence towards an international instrument, possibly having the nature of an international treaty, that would modernize the law of carriage, take into account the latest developments in technology, including electronic commerce, and eliminate legal difficulties in the international transport of goods by sea that were identified by the Commission. Considerations of possible legislative solutions by CMI were making good progress and it was expected that a preliminary text containing drafts of possible solutions for a future legislative instrument, with alternatives and comments, would be prepared by December 2001.

340. It was suggested that the Commission should commence consideration of the feasibility, scope and content of a future legislative instrument in 2002 by entrusting the work to a working group.

341. The Commission heard a report from a representative of CMI that the work of its Subcommittee had received broad support from its members. In consultations undertaken by CMI, the importance of that project had been acknowledged along with the necessity of ensuring that its objectives were compatible with electronic commerce and the need to clarify further the relationship between shipper, carrier and consignee even where such relationships were already covered by existing international regimes. The Commission expressed its gratitude to CMI for the intensive and productive consultations conducted so far.

342. The view was expressed that it was important to focus on issues that were not dealt with by existing international conventions. In particular, it was suggested that it was not necessary to develop new rules relating to issues such as the liability of the carrier already covered by international treaties, as it would be uncertain whether States would accept a new regime. Furthermore, it was suggested

that the regime to be developed should cover only port-to-port transport operations and that it should not extend to cover inland transport or attempt to deal with door-to-door transport operations. A contrary view expressed was that existing international conventions often dealt with issues in an inconsistent manner and that there were gaps between the existing texts and problems that arose because different States were parties to different instruments. A view was expressed that the Commission should not deal with door-to-door issues without undertaking a comprehensive analysis of existing national and international multimodal regimes. It was reported on behalf of UNCTAD that it had recently initiated studies on multimodal transport matters that showed that, even though the United Nations Convention on Multimodal Transport of Goods had not entered into force and was adhered to by a small number of States, it had influenced national laws and regional harmonization efforts on the subject.³⁴ It was stated that, whilst the work proposed to be done by UNCITRAL was of interest to UNCTAD, it was also of some concern in that it was considered that it would be inappropriate to extend the rules governing the carriage of goods by sea to inland transport.

343. An alternative view was that work should not be limited to issues that were not covered by existing international conventions and that the scope of work as outlined in the report on possible future work in transport law (A/CN.9/497) was appropriate, as it included liability issues and contemplated, subject to further more detailed studies, the possibility of dealing with issues that arose beyond the sea leg of a transport contract in the context of door-to-door operations. Wide support was expressed for such a broad mandate to be given to a working group.

344. It was reported that the secretariat of ECE, in cooperation with government experts and representatives of various industries involved in the international carriage of goods, was studying possibilities for reconciliation and harmonization of civil liability regimes governing multimodal transport. Hearings convened by ECE had shown that so far there existed no consensus on the action to be taken at the international level in that field. Experts representing mainly maritime interests as well as freight forwarders and insurers generally did not favour the preparation of an international mandatory legal regime on civil liability covering multimodal operations. However, experts representing road and rail transport industries, combined transport operators, transport customers and shippers felt that work towards harmonization of the existing liability regimes governing various modes of transport should be pursued urgently and that a single international civil liability regime governing multimodal transport operations was required. It was noted that ECE continued its exploratory work on multimodal transport and was ready to share its experience in the field with the Commission. A view was expressed, however, that the Commission should, at that stage, avoid multimodal issues, given the difficulty of merging practices in the four modes of transportation.

³⁴*Implementation of Multimodal Transport Rules*, report prepared by the UNCTAD secretariat, UNCTAD 15DTE/TLB/2, 25 June 2001.

345. After discussion, the Commission decided to establish a working group to consider issues as outlined in the report on possible future work (A/CN.9/497). It was expected that the secretariat would draft for the working group a preliminary working document containing drafts of possible solutions for a future legislative instrument, with alternatives and comments, which was under preparation by CMI. As to the scope of the work, the decision was that it should include issues of liability. The Commission also decided that the considerations in the working group should initially cover port-to-port transport operations; however, the working group would be free to study the desirability and feasibility of dealing also with door-to-door transport operations, or certain aspects of those operations, and, depending on the results of those studies, recommend to the Commission an appropriate extension of the working group's mandate. It was stated that solutions embraced in the United Nations Convention on the Liability of Transport Terminals in International Trade (Vienna, 1991) shall also be carefully taken into account. It was also agreed that the work would be carried out in close cooperation with interested intergovernmental organizations involved in work on transport law (such as UNCTAD, ECE and other regional commissions of the United Nations and the Organization of American States (OAS)), as well as international non-governmental organizations.

IX. POSSIBLE FUTURE WORK ON SECURITY INTERESTS

346. The Commission considered a note by the secretariat on the issue of security interests (A/CN.9/496). It was recalled that, at its thirty-third session in 2000, the Commission had considered a report on current activities in the field of security interests (A/CN.9/475). That report not only referred to the Commission's earlier interest and work on security interests, dating back to the late 1970s, and to the developments that had occurred in that area during the previous 25 years, but also contained suggestions as to areas for possible future work.

347. At the same session, it was agreed that security interests was an important subject and had been brought to the attention of the Commission at the right time, in particular in view of the close link of security interests with the work of the Commission on insolvency law. It was widely felt that modern secured credit laws could have a significant impact on the availability and the cost of credit and thus on international trade. It was also widely felt that modern secured credit laws could alleviate the inequalities in the access to lower-cost credit between parties in developed countries and parties in developing countries, and in the share such parties had in the benefits of international trade. A note of caution was struck, however, in that regard to the effect that such laws needed to strike an appropriate balance in the treatment of privileged, secured and unsecured creditors so as to become acceptable to States. Furthermore, it was stated that, in view of the divergent policies of States, a flexible approach aimed at the preparation of a set of principles with a guide, rather than a model law, would be advisable.³⁵

³⁵*Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 17 (A/55/17)*, para. 459.

348. Also at the same session, a number of suggestions were made as to the scope of the work. One suggestion was that a uniform law should be prepared to deal with security interests in investment property (e.g. stocks, bonds, swaps and derivatives). It was stated that such securities, which were held, as entries in a register, by an intermediary and, physically, by a depository institution, were important instruments on the basis of which vast amounts of credit were extended not only by commercial banks to their clients but also by central banks to commercial banks. It was also observed that, in view of the globalization of financial markets, a number of jurisdictions were normally involved whose laws were often incompatible with each other or even inadequate to address the relevant problems. As a result, a great deal of uncertainty existed as to whether investors owning securities and financiers extending credit and taking a pledge in the securities had a right in rem and were protected, in particular, in the case of the insolvency of an intermediary. It was also pointed out that a great deal of uncertainty arose even as to the law applicable to security interests in investment property held by an intermediary and that the fact that the Hague Conference on Private International Law planned to address that matter indicated both its importance and its urgency. In that regard, it was observed that work by UNCITRAL could be perfectly compatible with and could usefully supplement any work undertaken by the Hague Conference, in particular in view of the inherent limitations of private international law rules in matters of mandatory law and public policy.³⁶

349. Also at that session, the Commission had requested the secretariat to prepare a study that would discuss in detail the relevant problems in the field of secured credit law and the possible solutions for consideration by the Commission at its thirty-fourth session, in 2001, and decision as to possible future work.

350. With reference to the study, a statement was made on behalf of the secretariat of the International Institute for the Unification of Private Law (Unidroit) in which it was noted that, having spent resources on research and drafting model provisions on secured transactions law, the Unidroit secretariat was sensitive to the importance of that area of the law. It was further stated that since the Unidroit secretariat had done work in the area defined in the study as "security interests over investment securities", and in view of the need to make all possible efforts to avoid duplication of work, it appeared advisable for the Commission to avoid undertaking work on that topic. The hope was expressed that the omission of reporting on other ongoing developments in the same field of law would be corrected in future documentation. In particular, reference was made to the draft Unidroit Convention on International Interests in Mobile Equipment, which dealt with many of the same issues and which was expected to be completed in November 2001, as well as a model national law on secured transactions, also expected to be completed in November 2001 by OAS.

351. After expressing its appreciation for the study prepared by the secretariat, the Commission commenced its

³⁶*Ibid.*, para. 462.

discussion. Diverging views were expressed as to the advisability of work on security interests being undertaken by the Commission. However the prevailing view was that such work should be undertaken in view of the beneficial economic impact of a modern secured credit law. It was stated that experience had shown that deficiencies in that area could have major negative impacts on a country's economic and financial system. It was also stated that an effective and predictable legal framework had both short- and long-term macroeconomic benefits. In the short term, namely, when countries faced crises in their financial sector, an effective and predictable legal framework was necessary, in particular in terms of enforcement of financial claims, to assist the banks and other financial institutions in controlling the deterioration of their claims through quick enforcement mechanisms and to facilitate corporate restructuring by providing a vehicle that would create incentives for interim financing. In the longer term, a flexible and effective legal framework for security rights could serve as a useful tool to increase economic growth. Indeed, without access to affordable credit, economic growth, competitiveness and international trade could not be fostered, with enterprises being prevented from expanding to meet their full potential.

352. On the other hand, it was stated that the study showed that the topic of security interests was a very complex and complicated one to deal with. The concern was expressed that the study did not make clear what impact the result of any efforts in that area of the law would have on domestic law. It was observed that the study did not discuss how the work by UNCITRAL would be coordinated with other organizations dealing with related issues. It was, therefore, suggested to defer any decision on whether work should be undertaken in that field of law, as it was too early to be able to take an informed decision, in particular since the study did not examine all the relevant issues in depth.

353. Those concerns were not shared on various grounds. On the one hand, it was stated that the study did offer the basis for an informed decision to be taken during the current session. On the other, it was observed that not taking any action with respect to that area of the law would mean wasting an opportunity to help promote the extension of lower-cost credit. It was widely felt that several institutions had attested to the need for the creation of a legal regime relating to security interests. It was stated that a similar regime would benefit not only those countries which would like to participate in international commerce and did not have rules on secured transactions, but also those countries which had outdated regimes. By way of example, several countries were mentioned that had recently adopted new rules on security interests and in which the flow of low-cost credit had increased. It was, therefore, suggested that a working group should be established to deal with security interests. That proposal gained wide support.

354. Noting that there was wide support for the establishment of a working group, the Commission focused on the scope of the work to be undertaken by such a group. It was suggested that the working group should not deal with security interests over investment securities since that was an area in which Unidroit had an interest. The Commission agreed with that suggestion.

355. It was also suggested that the working group should not deal with security interests over intellectual property rights as there was less need for work in that area and that work in that area therefore should not have priority. It was also stated that, at that time, the intersection of intellectual property law, contract law and secured financing law had proved a difficult subject in other forums and currently consensus was lacking on the matter. It was stated that, if at a later stage it was decided that work be done in that area, any efforts regarding the development of a regime on security interests over intellectual property rights would have to be coordinated with other organizations, such as WIPO, which had particular experience with intellectual property law. There was sufficient support in the Commission for that suggestion too.

356. The suggestion was also made that the focus of the working group should be security interests in goods involved in a commercial activity. The need for an efficient regime regarding security interests in inventory of goods used in manufacturing or destined for sale was stressed in particular. That suggestion was objected to on the grounds that that focus would be too restricted. It was pointed out that the study also suggested a wider focus, as it focused in chapter IV on "security rights in general". In response, it was stated that chapter IV focused less on the objects that could serve as collateral than on the issues to be addressed when dealing with security rights over objects other than those warranting a special regime, such as intellectual property rights and investment securities. It was further stated that the focus on the aforementioned goods would allow a result to be achieved more quickly than if the focus were security rights in general. Furthermore, it was stated that the decision to restrict the focus of the working group to goods involved in a commercial activity, including inventory of goods used in manufacturing or destined for sale, would not exclude the possibility of extending the scope of that work at a later stage.

357. Various statements were made concerning the form of the work to be undertaken. It was felt that a model law might be too rigid and that the instrument to be developed should be very flexible. The important issue was to achieve the goals underlying the creation of a regime on security interests. It was stated that those goals could be achieved by resorting to various forms to meet the different needs. It was therefore suggested that the working group draft a set of core principles for an efficient legal regime governing secured transactions to be inserted into a legislative guide (containing flexible approaches to the implementation of such principles and a discussion of alternative approaches possible and of the benefits and detriments of such approaches). It was further suggested that the legislative guide should also contain, where feasible, model legislative provisions.

358. After discussion, the Commission decided to establish a working group with the mandate to develop an efficient legal regime for security rights in goods involved in a commercial activity, including inventory, to identify the issues to be addressed, such as the form of the instrument, the exact scope of the assets that can serve as collateral, the perfection of security, the degree of formalities to be complied with, the need for an efficient and well balanced

enforcement regime, the scope of the debt that may be secured, means of publicizing the existence of security rights, limitations, if any, on the creditors entitled to the security right, the effects of bankruptcy on the enforcement of security right and the certainty and predictability of the creditor's priority over competing interests.

359. The Commission, aware of the financial implications of holding a two- or three-day colloquium on security interests, emphasized the importance of that subject matter and the need to consult with practitioners and organizations having expertise in the area. It therefore recommended that a colloquium be held before the next session of the Working Group on Security Interests (see para. 425 (*f*)). It was anticipated that the costs of such a colloquium would be absorbed in the existing regular budget of the United Nations.

X. POSSIBLE FUTURE WORK ON PRIVATELY FINANCED INFRASTRUCTURE PROJECTS

360. It was recalled that, at its thirty-third session, the Commission adopted the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects, consisting of the legislative recommendations (A/CN.9/471/Add.9), with the amendments adopted by the Commission at that session and the notes to the legislative recommendations (A/CN.9/471/Add.1-8), which the secretariat was authorized to finalize in the light of the deliberations of the Commission.³⁷ It was noted that the Guide had since been published in all official languages.

361. It was also recalled that, at that session, the Commission also considered a proposal for future work in that area. It was suggested that, although the Legislative Guide would be a useful reference for domestic legislators in establishing a legal framework favourable to private investment in public infrastructure, it would nevertheless be desirable for the Commission to formulate more concrete guidance in the form of model legislative provisions or even in the form of a model law dealing with specific issues.³⁸

362. After consideration of that proposal, the Commission had decided that the question of the desirability and feasibility of preparing a model law or model legislative provisions on selected issues covered by the Legislative Guide should be considered by the Commission at its thirty-fourth session. In order to assist the Commission in making an informed decision on the matter, the secretariat was requested to organize a colloquium, in cooperation with other interested international organizations or international financial institutions, to disseminate knowledge about the Legislative Guide.³⁹

363. The Colloquium on Privately Financed Infrastructure: Legal Framework and Technical Assistance was organized with the co-sponsorship and organizational

assistance of the Public-Private Infrastructure Advisory Facility (PPIAF), a multi-donor technical assistance facility aimed at helping developing countries improve the quality of their infrastructure through private sector involvement. It was held in Vienna from 2 to 4 July 2001, during the second week of the thirty-fourth session of the Commission.

364. At its thirty-fourth session, the Commission took note with appreciation of the results of the Colloquium as summarized in a note by the secretariat (A/CN.9/488) and expressed its gratitude to the PPIAF for its financial and organizational support. The Commission also expressed its appreciation to the various international intergovernmental and non-governmental organizations represented and to the speakers at the Colloquium. Finally, the Commission agreed that the proceedings of the Colloquium should be published by the United Nations.

365. The Commission endorsed the recommendation made at the Colloquium that the secretariat, in coordination with other organizations, undertake joint initiatives to ensure widespread awareness of the Guide.

366. Various views were expressed as to the desirability and feasibility of further work by the Commission in the field of privately financed infrastructure projects.

367. There was wide support for the view that there was a significant demand for model legislation providing for more specific guidance, especially in developing countries and in countries with economies in transition. In that connection, it was suggested that the Legislative Guide should be implemented by way of drafting a set of core model provisions dealing with some of the substantive issues identified and dealt with in the Legislative Guide. It was pointed out that, while the Guide was in itself a valuable tool in assisting domestic legislators in the process of enacting or reviewing legislation in that field, the effectiveness of that process would be significantly increased if model legislative provisions were available. It was also noted that the prompt undertaking of such further work would take advantage of the vast and significant expertise gathered throughout the process that had led to the adoption of the Legislative Guide and would allow it to be easily and effectively achieved within a reasonable amount of time. Finally, it was observed that there was no inconsistency between undertaking such further work, on the one hand, and undertaking efforts to promote awareness and dissemination of the Legislative Guide, on the other.

368. A concern that appeared to be widely shared was that the excessive proximity between the time of the adoption of the Legislative Guide and the decision to undertake further work in the same field could adversely affect the considerable and valuable work that had led to the adoption of the Guide, ultimately reducing its impact. It was observed that the flexible approaches reflected in the Legislative Guide already provided sufficient guidance to legislators wishing to use it as a template while in the process of enacting or reviewing national laws. A further view was that no further significant guidance was to be expected from the drafting of a limited set of model legislative provisions, since the need to refer to the recommendations contained in the Guide would remain unaffected.

³⁷Ibid., paras. 195-368 and 372.

³⁸Ibid., para. 375.

³⁹Ibid., para. 379.

Accordingly, it was suggested that consideration of the issue of desirability of further work should be deferred to a later stage, in order to allow legislators to become more familiar with the existence and the contents of the Guide and to test its utility in practice. A further view was that such deferral might also prove useful since it would provide an opportunity for accurately identifying the issues to which harmonization efforts should actually be devoted.

369. After considering the different views that were expressed, the Commission agreed that a working group should be entrusted with the task of drafting core model legislative provisions in the field of privately financed infrastructure projects. As to the possible contents of such model provisions, a proposal was that the project should focus on the phase of the selection of the concessionaire. The Commission was of the view that, if further work in the field of privately financed infrastructure projects was to be accomplished within a reasonable time, it was essential to carve out a specific area from among the many issues dealt with in the Legislative Guide. Accordingly, it was agreed that the first session of such a working group should identify the specific issues on which model legislative provisions, possibly to become an addendum to the Legislative Guide, could be formulated.

XI. ENLARGEMENT OF THE MEMBERSHIP OF THE COMMISSION

370. The Commission noted that, in paragraph 13 of its resolution 55/151 of 12 December 2000, the General Assembly had requested the Secretary-General to submit to it at its fifty-sixth session a report on the implications of increasing the membership of the Commission and had invited Member States to submit their views. It was also noted that, pursuant to a note verbale of 25 January 2001, some 30 States had submitted comments. Furthermore, it was noted that, in order to give States an opportunity to express their views and possibly to formulate a recommendation to the General Assembly, the secretariat had prepared a note on the subject (A/CN.9/500). Taking note with appreciation of the background information contained in the note, the Commission noted that as far as servicing of conferences was concerned there was little impact of an increase in the membership to quantify. In particular, it was noted that no impact was foreseen in interpretation, translation of pre-session and post-session documentation and meetings servicing, since cost was fixed irrespective of the number of members of the Commission. It was also noted that, as far as reproduction of in-session documentation was concerned, the impact was not expected to be large enough to have any financial implications. Furthermore, it was noted that all the States that had submitted comments were in favour of the enlargement of the Commission.

371. It was generally agreed that the membership of the Commission should be enlarged. It was stated that such an enlargement of the Commission would ensure that the Commission remained representative of all legal traditions and economic systems, in particular in view of the substantial increase in the membership of the Organization. In addition, it was observed that an enlargement of the

Commission would assist the Commission in better implementing its mandate by drawing on a pool of experts from an increased number of countries and by enhancing the acceptability of its texts. It was also stated that such an enlargement would adequately reflect the increased importance of international trade law for economic development and the preservation of peace and stability. Moreover, it was said that such an enlargement of the Commission would foster participation of those States which could not justify the human and other resources necessary for the preparation and attendance of the meetings of the Commission and its working groups unless they were members. It was also stated that an enlargement would facilitate coordination with the work of other organizations active in the unification of private law to the extent that the overlap between the membership of the Commission and the membership of those organizations would be increased. It was also observed that an enlargement of the Commission would not affect its efficiency or its working methods or, in particular, the participation as observers of non-member States and international organizations, whether governmental or non-governmental, active in the field of international trade law or the principle of reaching decisions by consensus without a formal vote.

372. The concern was expressed, however, that actual participation might not increase substantially if the necessary steps were not taken to provide assistance to delegates of developing countries. In order to address that concern, the suggestion was made that efforts to increase the voluntary contributions to the Trust Fund set up to assist delegates of developing countries in participating in meetings of the Commission and its working groups should be stepped up. The Commission endorsed that suggestion.

373. The Commission next considered the size of the increase in its membership. Differing views were expressed, ranging from 48 to 72 member States. The view was also expressed that the exact number to be recommended to the General Assembly should be left to the secretariat to determine on the understanding that the Sixth Committee of the General Assembly would have to make a final decision. A common theme in all the views expressed was the need to make the Commission a more representative body of the membership of the Organization, without affecting its efficiency or its working methods. The prevailing view was in favour of increasing the membership to 72, in particular, since such an increase could result in maintaining the current proportions between regional groups.

374. However, the concern was expressed that such an increase might be excessive and, to the extent that not all members would be able to attend, might not lead to increased attendance. One delegation expressed the view that, in making a decision regarding the size of the increase in membership, the possible impact of such a decision on other organs of the United Nations should be taken into account. That delegation stated that doubling the number of member States might set a precedent that might be difficult to follow for other organs of the United Nations. The concern was also expressed that, with the change in its working methods decided by the Commission at the current session,

such an increase might inadvertently result in reducing the efficiency of the Commission. In response to those views and concerns, it was observed that at the current session 74 States were represented and that fact had not affected the efficiency of the Commission, as the adoption of two major texts indicated. It was also stated that efficiency would not necessarily be reduced merely because the membership would be doubled. It was also widely felt that, in order to avoid raising political concerns about proportions of representation of regional groups, the current proportions should be preserved. The Commission decided, therefore, to recommend to the General Assembly that the Commission's membership be doubled and that regional groups be given as many seats as they currently had. The Commission also decided to recommend to the Assembly that it elect the new members as soon as possible, determining the terms of office of the new members in such a way as to preserve the practice of renewing the Commission's membership every three years. Regional groups were encouraged to conduct consultations in advance of the fifty-sixth session of the General Assembly and to agree on candidates for the new seats. At the close of the discussion, one delegation recalled its reservations regarding the size of the increase (as recommended in para. 375) and stated that the issue needed to be discussed further in the context of the Sixth Committee.

375. At its 236th meeting on 11 July 2001, the Commission adopted the following recommendation to the General Assembly:

"The United Nations Commission on International Trade Law,

"Having considered a note by the secretariat,⁴⁰ prepared with a view to assisting the Commission in formulating a recommendation for the General Assembly on the possible increase of membership of the Commission,

"Recalling General Assembly resolution 2205 (XXI) of 17 December 1966, by which the Assembly established the Commission and its mandate of furthering the progressive harmonization and unification of the law of international trade and pursuant to which the Commission is to bear in mind the interests of all peoples, and particularly those of developing countries, in the extensive development of international trade,

"Being satisfied with the practice of inviting States not members of the Commission and relevant intergovernmental and international non-governmental organizations to participate as observers in sessions of the Commission and its working groups and to take part in the formulation of texts by the Commission, as well as with the practice of reaching decisions by consensus without a formal vote,

"Considering that the primary consequence of membership in the Commission may be to encourage States to be represented at meetings of the Commission and its working groups, that representatives of States members of the Commission may be more likely to be drawn from

among persons of eminence in the field of the law of international trade as called for by the General Assembly in its resolution 2205 (XXI), and that membership in the Commission may stimulate interest in the work of the Commission and better justify the dedication of human and other resources to preparation for and attendance at meetings,

"Observing that the considerable number of States that have participated as observers and made valuable contributions to the work of the Commission indicates that there exists an interest in active participation in the Commission beyond the current thirty-six States that are members of the Commission,

"Stressing the importance of the work of the Commission for developing countries and countries with economies in transition, and being concerned about the inconsistent and less than optimal incidence of expert representation from developing countries at sessions of the Commission and its working groups during recent years, owing in part to inadequate resources to finance the travel of such experts,

"Reaffirming the importance of 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,

"Appealing to Governments, relevant bodies of the United Nations system, organizations, institutions and individuals to consider taking measures to increase their voluntary contributions to the Trust Fund in order to ensure full participation by States members of the Commission in the sessions of the Commission and its working groups,

"Being informed that the impact of an increase in membership of the Commission on the secretariat services required to facilitate the work of the Commission would not be material enough to quantify and that therefore the increase would have no financial implications,

"Recommends that the General Assembly approve an increase of the membership of the Commission from the current thirty-six States to seventy-two and, maintaining the current proportion between the regional groups, approve the following distribution of the additional seats: eighteen from the Group of African States, fourteen from the Group of Asian States, ten from the Group of Eastern European States, twelve from the Group of Latin American and Caribbean States and eighteen from the Group of Western European and Other States, and elect the new members as soon as possible."

XII. WORKING METHODS OF THE COMMISSION

376. In connection with its deliberations on the implications of increasing its membership (see paras. 370-375), the Commission decided to review its current working methods with a view to exploring ways to make the best possible use of the resources available to it. The Commission agreed to use as a basis for its deliberations a note that had been prepared by the secretariat to that effect (A/CN.9/499).

⁴⁰A/CN.9/500.

377. That note contained an overview of topics currently under consideration by the Commission and topics that had been proposed for future work by the Commission. The note also contained a summary review of the current working methods of the Commission and its working groups and suggestions for their review. In the note it was pointed out that, with a total entitlement of only six working group sessions every year, an increase in the number of projects handled by the Commission would mean that normally only one annual session of a working group could be devoted to each project. Given the overall limitation on the conference time to which each subsidiary body of the General Assembly was entitled, it was unlikely that more meeting time could be allocated to the Commission.

378. Against that background the Commission considered the following proposals for review of its working methods: (a) increasing the number of working groups to a total of six, each of which would hold two annual sessions of one week only; or (b) entrusting each working group with two different topics during their sessions (i.e. one per week) or arranging for two working groups to share the same two-week meeting period, one session being held in the first week and the other during the second week (i.e. two sessions back-to-back).

379. The Commission welcomed the proposals for reviewing its working methods. Such a review was considered necessary in view of the increasing workload of the Commission and the possibility of enlargement of its membership. However, several delegations also expressed the concern that member States might find it increasingly difficult to devote resources to participating in the Commission's work in six different projects at the same time. The concern was expressed that the Commission's work might suffer because working groups would have less time available for deliberations, with the consequence that results might be achieved later. It was further said that servicing six different working groups placed an additional burden on the secretariat of the Commission and that progress in the Commission's work might suffer unless the resources available to its secretariat were significantly increased. The Commission was, therefore, urged to establish clearly the relative priority of each of its projects and to allow for them to be carried out at a varying pace.

380. As to the two basic options under consideration, the Commission expressed its preference for entrusting each working group with two different topics during their sessions (i.e. one per week) or arranging for two working groups to share the same two-week meeting period, one session being held in the first week and the other during the second week (i.e. two sessions back-to-back). The Commission did not favour the option of all six topics being dealt with separately, by holding two one-week sessions per year for each topic, since that would result in additional travel costs both for delegations and the secretariat, the latter as a result of the alternating pattern of meetings of the Commission and its working groups.

381. In order to make the best possible use of conference facilities available to the working groups, the Commission agreed that working groups could hold substantive deliberations during the first eight half-day meetings (for

example, from Monday to Thursday), with a draft report on the entire period being prepared by the secretariat for adoption at the tenth and last meeting of a working group (on Friday afternoon). The Commission acknowledged that, under that option, no extensive report could be prepared on deliberations held during the ninth meeting (Friday morning). Some delegations were of the view that the last substantive discussion could be left unreported on, or that the working groups could adopt the remaining portions of the report at the beginning of its next session, as was the practice in some organizations, or it might be published later by the secretariat as its own account of the proceedings. However, the prevailing view within the Commission was that it was important for the working groups to adopt the entire report at the same session. For that purpose, the Commission agreed that the main conclusions reached by a working group at its ninth meeting should be summarily read out for the record by the Chairman at the tenth meeting and subsequently incorporated into the report.

382. The Commission expressed its understanding that the new arrangements should be used in a flexible manner and that, depending on its relative priority, a working group could devote an entire two-week session to the consideration of only one topic, while other topics could be combined for consideration by a working group within a two-week period of meeting. In that context, every effort should be made to choose germane topics for successive consideration by a working group. With a view to making optimal use of conference time, the Commission invited delegations to resort to informal consultations prior to actual meetings, thus reserving conference time only for those issues which required extensive deliberation, both formal and informal, in the context of Commission and working group meetings.

383. The Commission was hopeful that the new working methods could address the increase in the Commission's work programme without lowering the high standards of professional care that had distinguished the work of the Commission and contributed so much to its high reputation. The Commission decided to review the practical application of the new working methods at a future session.

XIII. CASE LAW ON UNCITRAL TEXTS

384. The Commission noted with appreciation the ongoing work under the system that had been established for the collection and dissemination of case law on UNCITRAL texts (CLOUT). In that regard, it was pointed out that, up to the current session of the Commission, 34 issues of CLOUT had been published, dealing with 393 cases. It was noted that CLOUT was a most important means of promoting the uniform interpretation and application of UNCITRAL texts by enabling interested persons, such as judges, arbitrators, lawyers or parties to commercial transactions, to take into account decisions and awards of other jurisdictions when rendering their own judgements or opinions or adjusting their actions to the prevailing interpretation of those texts.

385. The Commission expressed appreciation to the national correspondents for their work in the collection of

relevant decisions and arbitral awards and their preparation of case abstracts. It also expressed its appreciation to the secretariat for compiling, editing, issuing and distributing the abstracts.

XIV. DIGEST OF UNITED NATIONS SALES CONVENTION CASE LAW: INTERPRETATION OF TEXTS

386. The Commission had before it a note by the secretariat containing a proposal as to how to further implement the mandate to the Commission to promote the progressive harmonization and unification of the law of international trade, namely, by developing ways and means of ensuring the uniform interpretation and application of international conventions and uniform laws in that field (A/CN.9/498). It was recalled that, when the General Assembly gave the Commission its mandate, the Commission was instructed to implement it, *inter alia*, by promoting ways and means of ensuring a uniform interpretation and application of international conventions and uniform laws in the field of the law of international trade and by collecting and disseminating information on national legislation and modern developments, including case law, in the field of international trade.⁴¹

387. It was further recalled that, when the Commission decided in 1988 to establish the CLOUT system, it had also considered the desirability of establishing an editorial board, which, amongst other things, could undertake a comparative analysis of the collected decisions and report to the Commission on the state of application of the legal texts. Those reports could evidence the existence of uniformity or divergence in the interpretation of individual provisions of the legal texts, as well as gaps in the texts that might come to light in actual court practice. The Commission decided, however, not to establish the board at that time, but to reconsider the proposal in the light of experience gathered in the collection of decisions and the dissemination of information under the CLOUT system.⁴²

388. The document prepared by the secretariat for the discussion during the 34th session of the Commission submitted that it would be appropriate for the Commission to reconsider the question of how it should contribute to the uniform interpretation of the texts resulting from its work. Such reconsideration was considered to be timely, as evidenced by the fact that, since the establishment of the CLOUT system, 393 cases had been reported, including more than 250 on the United Nations Convention on Contracts for the International Sale of Goods. In the light of the fact that divergences in the interpretation of the Convention had been noted, it had been repeatedly suggested by users of that material that appropriate advice and guidance would be useful to foster a more uniform interpretation of the Convention. The preparation of an analytical digest of court and arbitration cases, identifying trends in interpretation, would be one way of providing such advice and guid-

ance. In preparing the digest one possible way might be simply to note diverging case law for information purposes; alternatively, guidance as to the interpretation of the Convention might be provided, based in particular on the legislative history of the provision and the reasons underlying it (A/CN.9/498, para. 3).

389. The document submitted to the current session of the Commission summarized case law on articles 6 and 78 of the Convention and was intended to offer to the Commission an example of how court and arbitral decisions might be presented with a view to fostering uniform interpretation. In that paper it was suggested that the Commission should consider whether the secretariat, in consultation with experts from the different regions, should prepare a complete digest of cases reported on the various articles of the Convention. If so, the Commission might wish to consider whether the approach taken in preparing the sample digest in the document under review, including the style of presentation and the level of detail, was appropriate (A/CN.9/498, para. 4).

390. In the note by the secretariat it was suggested that the reasons for which the Commission might wish to take steps to foster uniform interpretation of the Convention on Contracts for the International Sale of Goods applied similarly to the UNCITRAL Model Law on International Commercial Arbitration (1985). With respect to the Model Law, some 135 cases had been reported, with some unsettled or divergent trends noted. Against that background, it was suggested that the Commission might request the secretariat to analyse the cases interpreting uniform provisions of the Model Law and to submit a digest of those cases to the Commission at a future session or to its Working Group on Arbitration so as to enable the Commission to decide whether any action, similar to that suggested above with respect of the Convention on Contracts for the International Sale of Goods, should be taken (A/CN.9/498, para. 5).

391. The Commission took note with appreciation of the document in general and, in particular, of the examples given as to how court and arbitral decisions might be presented with a view to fostering uniform interpretation. The Commission commended the secretariat for its innovative approach towards the implementation of the mandate the Commission had received from the General Assembly to promote and ensure a uniform interpretation and application of international conventions. A widely shared view was that, given the amount of information gathered, the decision taken in 1988 should be reconsidered and that the document constituted a good starting point for discussion in that respect. It was suggested that the secretariat should also explore whether other initiatives could be undertaken to assist the Commission in carrying out its mandate.

392. As to the contents of the document, it was suggested that the project should not only consider case law, but also existing legal writing. In respect of the drafting procedure of the digest, it was suggested that the secretariat should avail itself of the network of national correspondents, as they were persons knowledgeable about CLOUT and its context. It was further suggested that the digest should not only have the goal of evidencing divergences in the case law of different countries or giving guidance as to the in-

⁴¹General Assembly resolution 2205 (XXI), part II, para. 8 (d) and (e); UNCITRAL Yearbook, Vol. I: 1968-1970, part one, II.E.

⁴²*Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 17 (A/55/17)*, paras. 107-109.

terpretation of uniform legal texts, but also to identify gaps in those texts. It would then be the task for the Commission to decide on how to deal with such gaps. It was further suggested that the project should be an ongoing one, in that it should be updated continually, as new cases emerged.

393. In response, some concerns were expressed. It was stated that it was not clear to whom the digest would be addressed, as the natural addressees of any UNCITRAL text were States. States, however, might not need a digest such as the one under consideration. As far as practitioners and judiciaries were concerned, it was felt that they did not need such a digest, as much literature existed that aimed at helping to understand the Convention on Contracts for the International Sale of Goods. In respect of the contents, it was suggested that the digest could be merely a compilation of differences in the interpretation of the Convention rather than a guide. In support of that view it was stated that if the digest to be drafted were to function as a guide, it would necessarily have to indicate preference for some views over others. It was felt that such an expression of preference might be read as a criticism of decisions taken by national courts, which was felt to be an inappropriate result.

394. With a view to alleviating some of the above-mentioned concerns, it was stated, for instance, that although it was true that much literature existed on the Convention on Contracts for the International Sale of Goods in some countries, there were countries where no such literature was available. It was also stated that any work done by UNCITRAL would have the advantage not only of being translated into the six official languages of the United Nations (and thus have a very wide reach), but also of taking a more international view than most existing commentaries and papers, which were drafted from a national point of view.

395. As it was observed that any decision taken by the Commission with respect to the digest would be subject to reconsideration at any future session, it was felt that the secretariat should be given the mandate to continue to draft that digest. It was again pointed out that, in line with the sample provisions presented in the note by the secretariat (A/CN.9/498), the digest should not criticize domestic case law. After discussion, the Commission requested the secretariat to draft a digest on the entire Convention on Contracts for the International Sale of Goods. In doing so, the secretariat should avail itself of the help of the network of national correspondents and avoid criticism of the decisions of national courts.

XV. TRAINING AND TECHNICAL ASSISTANCE

396. The Commission had before it a note by the secretariat (A/CN.9/494) setting forth the activities undertaken since its thirty-third session and indicating the direction of future activities being planned, in particular in view of the increase in the requests received by the secretariat. It was noted that training and technical assistance activities were typically carried out through seminars and briefing mis-

sions, which were designed to explain the salient features of UNCITRAL texts and the benefits to be derived from their adoption by States.

397. It was reported that, since the previous session, the following seminars and briefing missions had been organized in 2000: Havana (22-26 May); Tashkent (16-19 October); Seoul (6-9 November); Beijing (13-16 November); Cairo (20-23 November). In addition to the participation of members of the secretariat in a number of meetings convened by other organizations, it was also reported that a symposium had been held in cooperation with the Organization for the Unification of Business Law in Africa (OHADA) in Bologna, Italy (2 and 3 April 2001). The secretariat of the Commission reported that a number of requests had had to be turned down for lack of sufficient resources and that for the remainder of 2001 only some of the requests made by countries in Africa, Asia, Latin America and Eastern Europe could be met.

398. The Commission expressed its appreciation to the secretariat for the activities undertaken since its previous session and emphasized the importance of the training and technical assistance programme for promoting awareness and the wider adoption of the legal texts it had produced. Training and technical assistance were particularly useful for developing countries lacking expertise in the areas of trade and commercial law covered by the work of UNCITRAL and the training and technical assistance activities of the secretariat could play an important role in the economic integration efforts being undertaken by many countries.

399. The Commission noted the various forms of technical assistance that might be provided to States preparing legislation based on UNCITRAL texts, such as review of preparatory drafts of legislation from the point of view of UNCITRAL texts, preparation of regulations implementing such legislation and comments on reports of law reform commissions, as well as briefings for legislators, judges, arbitrators, procurement officials and other users of UNCITRAL texts as embodied in national legislation. The upsurge in commercial law reform represented a crucial opportunity for the Commission to further significantly the objectives of substantial coordination and acceleration of the process of harmonization and unification of international trade law, as envisaged by the General Assembly in its resolution 2205 (XXI) of 17 December 1966.

400. The Commission took note with appreciation of the contributions made by Canada, Cyprus, Finland, France, Greece, Mexico and Switzerland towards the seminar programme. It also expressed its appreciation to Austria, Cambodia, Cyprus, Kenya and Singapore for their contributions to the trust fund for granting travel assistance to developing countries that are members of UNCITRAL since the trust fund was established. The Commission furthermore expressed its appreciation to those other States and organizations which had contributed to its programme of training and assistance by providing funds or staff or by hosting seminars.

401. Stressing the importance of extrabudgetary funding for carrying out training and technical assistance activities,

the Commission appealed once again to all States, international organizations and other interested entities to consider making contributions to the UNCITRAL trust funds so as to enable the secretariat of the Commission to meet the increasing demands in developing countries and newly independent States for training and assistance and to enable delegates from developing countries to attend UNCITRAL meetings. It was also suggested that the secretariat should make efforts to actively seek contributions from donor countries and organizations, for instance by formulating concrete proposals for projects to support its training and technical assistance activities. It was noted that the Trust Fund for Symposia could not be used to finance technical assistance to Governments, which was regretted in view of the increasing need and demands on the secretariat for such assistance. It was therefore suggested, and the Commission agreed, that the terms of reference of the UNCITRAL Trust Fund for Symposia should be amended so as to make it possible to use resources from the Trust Fund to finance technical assistance activities undertaken by the secretariat.

402. In view of the limited resources available to the secretariat, whether from budgetary or extrabudgetary resources, strong concern was expressed that the Commission could not fully implement its mandate with regard to training and technical assistance. Concern was also expressed that, without effective cooperation and coordination between the secretariat and development assistance agencies providing or financing technical assistance, international assistance might lead to the adoption of national laws that did not represent internationally agreed standards, including UNCITRAL conventions and model laws.

403. In order to ensure the effective implementation of its training and assistance programme and the timely publication and dissemination of its work, the Commission decided to recommend that the General Assembly consider requesting the Secretary-General to increase substantially both the human and the financial resources available to its secretariat.

XVI. STATUS AND PROMOTION OF UNCITRAL TEXTS

404. On the basis of a note by the secretariat (A/CN.9/501), the Commission considered the status of the conventions and model laws emanating from its work, as well as the status of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958). The Commission noted with pleasure the new action of States and jurisdictions subsequent to 7 July 2000 (date of the conclusion of the thirty-third session of the Commission) regarding the following instruments:

(a) Convention on the Limitation Period in the International Sale of Goods, concluded at New York on 14 June 1974, as amended by the Protocol of 11 April 1980. Number of States parties: 17;

(b) [Unamended] Convention on the Limitation Period in the International Sale of Goods (New York, 1974). New action by Yugoslavia; number of States parties: 24;

(c) United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg Rules). New actions by

Jordan and St. Vincent and the Grenadines; number of States parties: 28;

(d) United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980). New actions by Iceland, St. Vincent and the Grenadines and Yugoslavia; number of States parties: 59;

(e) United Nations Convention on International Bills of Exchange and International Promissory Notes (New York, 1988). The Convention has two States parties; it requires eight additional adherences for entry into force;

(f) United Nations Convention on the Liability of Operators of Transport Terminals in International Trade (Vienna, 1991). The Convention has two States parties; it requires three additional adherences for entry into force;

(g) United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (New York, 1995). The Convention has five States parties;

(h) Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958). New actions by Albania, Honduras, St. Vincent and the Grenadines and Yugoslavia; number of States parties: 126;

(i) UNCITRAL Model Law on International Commercial Arbitration, 1985. New jurisdictions that have enacted legislation based on the Model Law: Belarus, Greece, Madagascar and Republic of Korea;

(j) UNCITRAL Model Law on International Credit Transfers, 1992;

(k) UNCITRAL Model Law on Procurement of Goods, Construction and Services, 1994;

(l) UNCITRAL Model Law on Electronic Commerce, 1996. New jurisdictions that have enacted legislation based on the Model Law: Ireland, Philippines, Slovenia and States of Jersey (Crown Dependency of the United Kingdom of Great Britain and Northern Ireland);

(m) UNCITRAL Model Law on Cross-Border Insolvency, 1997. New jurisdiction that has enacted legislation based on the Model Law: South Africa.

405. Appreciation was expressed for those legislative actions on the texts of the Commission. A request was directed to States that had enacted or were about to enact a model law prepared by the Commission, or were considering legislative action regarding a convention resulting from the work of the Commission, to inform the secretariat of the Commission thereof. Such information would be useful to other States in their consideration of similar legislative action.

406. Representatives and observers of a number of States reported that official action was being considered with a view to adherence to various conventions and to the adoption of legislation based on various model laws prepared by UNCITRAL, in particular the UNCITRAL Model Law on Cross-Border Insolvency.

407. It was noted that, despite the universal relevance and usefulness of those texts, a number of States had not yet enacted any of them. An appeal was directed to the representatives and observers who had been participating in the meetings of the Commission and its working groups to contribute, to the extent that they in their discretion deemed

appropriate, to facilitating consideration by legislative organs in their countries of texts of the Commission.

XVII. GENERAL ASSEMBLY RESOLUTION ON THE WORK OF THE COMMISSION

408. The Commission took note with appreciation of General Assembly resolution 55/151 of 12 December 2000 on the report of the Commission on the work of its thirty-third session. In particular, the Commission noted with appreciation that, in paragraph 2 of the resolution, the Assembly had commended the Commission for the completion and adoption of the Legislative Guide on Privately Financed Infrastructure Projects, as well as for the important progress made in its work on receivables financing.

409. The Commission also noted with appreciation that, in paragraph 3 of resolution 55/151, the General Assembly had appealed to Governments that had not yet done so to reply to the questionnaire circulated by the secretariat in relation to the legal regime governing the recognition and enforcement of foreign arbitral awards.

410. The Commission further noted with appreciation that, in paragraph 5 of resolution 55/151, the Assembly had reaffirmed the mandate of the Commission, as the core legal body within the United Nations system in the field of international trade law, to coordinate legal activities in that field, and in that connection had called upon all bodies of the United Nations system and invited other international organizations to bear in mind the mandate of the Commission and the need to avoid duplication of effort and to promote efficiency, consistency and coherence in the unification and harmonization of international trade law, and had recommended that the Commission, through its secretariat, continue to maintain close cooperation with the other international organs and organizations, including regional organizations, active in the field of international trade law.

411. The Commission noted with appreciation the decision of the General Assembly, in paragraph 6 of resolution 55/151, to reaffirm the importance, in particular for developing countries, of the work of the Commission concerned with training and technical assistance in the field of international trade law, such as assistance in the preparation of national legislation based on legal texts of the Commission, and that, in paragraph 7, the Assembly had expressed the desirability for increased efforts by the Commission, in sponsoring seminars and symposia, to provide such training and assistance.

412. The Commission also noted with appreciation that, in paragraph 7 (b) of the resolution, the Assembly had appealed to Governments, the relevant bodies of the United Nations system, organizations, institutions and individuals to make voluntary contributions to the UNCITRAL Trust Fund for Symposia and, where appropriate, to the financing of special projects. Furthermore, it was noted that, in paragraph 8, the Assembly had appealed to the United Nations Development Programme and other bodies responsible for development assistance, such as the International Bank for Reconstruction and Development and the European Bank

for Reconstruction and Development, as well as to Governments in their bilateral aid programmes, to support the training and technical assistance programme of the Commission and to cooperate and coordinate their activities with those of the Commission (the Trust Fund was established pursuant to resolution 48/32 of 9 December 1993).

413. It was also appreciated that the General Assembly, in paragraph 9 of the resolution, had appealed to Governments, the relevant bodies of the United Nations system, organizations, institutions and individuals, in order to ensure full participation by all Member States in the sessions of the Commission and its working groups, to make voluntary contributions to the trust fund for travel assistance to developing countries that are members of the Commission, at their request and in consultation with the Secretary-General (for a recommendation by the Commission that the Assembly adjust the terms of reference of the trust fund so that resources in the fund might be used for technical assistance projects, see para. 401).

414. The Commission further noted with appreciation the decision of the General Assembly, in paragraph 10 of resolution 55/151, to continue, in the competent Main Committee during the fifty-fifth session of the Assembly, its consideration of granting travel assistance to the least developed countries that were members of the Commission, at their request and in consultation with the Secretary-General.

415. The Commission welcomed the request by the General Assembly, in paragraph 11 of the resolution, to the Secretary-General to strengthen the secretariat of the Commission within the bounds of the resources available so as to ensure and enhance the effective implementation of the programme of the Commission. In that connection, the Commission noted with appreciation initial steps taken in the direction of implementation of the request of the Assembly. However, the Commission noted that its secretariat had still fewer Professional staff than it had had when the Commission was established. It therefore recommended to the Assembly that, in view of the substantial increase in the workload of the Commission and its secretariat and also in view of the importance of trade law unification for economic development and therefore for peace and stability, it request the Secretary-General to intensify and expedite efforts to strengthen the secretariat of the Commission within the bounds of the resources available to the Organization.

416. The Commission also noted with appreciation that the General Assembly, in paragraph 12, had stressed the importance of bringing into effect the conventions emanating from the work of the Commission and that to that end it had urged States that had not yet done so to consider signing, ratifying or acceding to those conventions.

417. The Commission also noted that, in paragraph 13, the General Assembly had requested the Secretary-General to submit to it at its fifty-sixth session a report on the implications of increasing the membership of the Commission, and had invited Member States to submit their views on that issue.

XVIII. COORDINATION AND COOPERATION

A. Asian-African Legal Consultative Organization

418. On behalf of the Asian-African Legal Consultative Organization (AALCO, formerly AALCC), it was stated that, in view of the importance AALCO attached to the Commission's work, at its fortieth annual session, it had considered the report of the Commission on the work of its thirty-third session and had expressed its appreciation for the progress achieved by the Commission. AALCO welcomed the completion of the Legislative Guide on Privately Financed Infrastructure Projects. AALCO had taken note with interest and appreciation of the substantive work accomplished towards the finalization of a draft Convention on Assignment of Receivables in International Trade, which had the potential of increasing the availability of credit at more affordable rates. Furthermore, AALCO supported the Commission's work towards a Model Law on Electronic Signatures, in particular in view of the general acceptance with which the UNCITRAL Model Law on Electronic Commerce had been received. AALCO's interest in the work of the Commission on arbitration had been enhanced by the success of the regional arbitration centres in Cairo, Kuala Lumpur and Lagos. It was announced that a fourth arbitration centre in Tehran would become operational in the near future. Moreover, a number of members of AALCO had expressed an interest in the increase of the membership of the Commission.

B. Permanent Court of Arbitration

419. On behalf of the Permanent Court of Arbitration at The Hague, it was stated that the Court continued to follow with great interest the Commission's work and had expanded its related activities. The Court had recently prepared new arbitration and conciliation rules for use by States, intergovernmental organizations and private parties, as well as Rules for the Settlement of Disputes Relating to Natural Resources and the Environment, adopted on 19 June 2001. Those rules were based on the UNCITRAL Arbitration and Conciliation Rules. Other new activities included international law seminars on topics such as air and space law, settlement of investment disputes and protection of the environment and mass claims settlement tribunals. Those activities were supplemented by a publication programme, which included seminar papers, in cooperation with Kluwer Law International, arbitration CD-ROMs and, in cooperation with the International Council for Commercial Arbitration (ICCA), the ICCA Yearbook Commercial Arbitration. In that connection, appreciation was expressed for the work of the secretariat of the Commission in making UNCITRAL texts available in CD-ROM format. The Court and ICCA, in cooperation with the UNCITRAL secretariat, continued analysing answers to the questionnaire sent to States in the context of the UNCITRAL/IBA project on the legislative implementation of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. It was announced that a first paper would be ready in the near future.

C. Southeast European Cooperative Initiative

420. On behalf of the Southeast European Cooperative Initiative (SECI), it was stated that SECI had been established in 1996 on the basis of the Points of Common E.U.-U.S. understanding to develop a viable economic strategy for the region. SECI focused on cross-border projects in the area of infrastructure development, trade and transport issues, security, energy, environment and private sector development. SECI had also done work, in particular, on border crossing facilitation, transport infrastructure, interconnection of natural gas networks and development of interconnection of electric power systems, cleaning of rivers and lakes, combating cross-border crime, investment promotion and commercial arbitration and mediation. Furthermore, SECI projects were carried out by experts from participating and supporting States with technical support from ECE and other institutions, took into account in its activities texts elaborated by UNCITRAL and that it hoped to benefit from its technical assistance programme.

XIX. OTHER BUSINESS

A. Bibliography

421. The Commission noted with appreciation the bibliography of recent writings related to the work of the Commission (A/CN.9/502). The Commission stressed the importance for the bibliography to be as complete as possible and, for that reason, requested Governments, academic institutions, other relevant organizations and individual authors to send copies of such publications to the secretariat.

B. Willem C. Vis International Commercial Arbitration Moot

422. It was noted that the Institute of International Commercial Law at Pace University School of Law, New York, had organized the eighth Willem C. Vis International Commercial Arbitration Moot at Vienna from 5 to 12 April 2001. In addition, it was noted that legal issues dealt with by the teams of students participating in the Moot had been based on the United Nations Convention on Contracts for the International Sale of Goods, the UNCITRAL Model Law on International Commercial Arbitration and the Arbitration Rules of the International Chamber of Commerce. Moreover, it was noted that, in the 2001 Moot, some 94 teams had participated from law schools in some 31 countries, involving about 550 students and about 240 arbitrators. It was also noted that the ninth Moot was to be held at Vienna from 22 to 28 March 2002.

423. The Commission expressed its appreciation to the Institute of International Commercial Law at Pace University School of Law for organizing the Moot and to the secretariat for sponsoring it. It was widely felt that the Moot, with its broad international participation, was an excellent method of disseminating information about uniform law texts and teaching international trade law.

XX. DATE AND PLACE OF FUTURE MEETINGS

A. Thirty-fifth session of the Commission

424. It was decided that the Commission would hold its thirty-fifth session in New York from 10 to 28 June 2002.

B. Sessions of working groups

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

(a) Working Group I, scheduled to work on issues of privately financed infrastructure projects, is to hold its fourth session at Vienna for one week, from 24 to 28 September 2001;

(b) Working Group II, currently working on arbitration, is to hold its thirty-fifth session at Vienna for two weeks, from 19 to 30 November 2001, and its thirty-sixth session in New York for one week, from 4 to 8 March 2002, immediately before the thirty-ninth session of Working Group IV on electronic commerce (see subpara. (d) below);

(c) Working Group III, scheduled to work on issues of transport law, is to hold its ninth session in New York for two weeks, from 15 to 26 April 2002;

(d) Working Group IV, currently working on electronic commerce, is to hold its thirty-ninth session in New York for one week, from 11 to 15 March 2002, immediately after the thirty-sixth session of Working Group II on arbitration (see subpara. (b) above);

(e) Working Group V, currently working on insolvency, is to hold its twenty-fourth session in New York for two weeks, from 23 July to 3 August 2001, its twenty-fifth session at Vienna for two weeks, from 3 to 14 December 2001 and its twenty-sixth session in New York for one week, from 13 to 17 May 2002, immediately before the first session of Working Group VI on security interests (see subpara. (f) below);

(f) Working Group VI, scheduled to work on issues of security interests, is to hold its first session in New York for one week, from 20 to 24 May 2002, immediately after the twenty-sixth session of Working Group V on insolvency (see subpara. (e) above).

Annexes

Annexes I and II and a list of documents before the Commission at its thirty-fourth session are reproduced in part three of this *Yearbook*.

**B. United Nations Conference on Trade and Development (UNCTAD):
extract from the report of the Trade and Development Board
(forty-eighth session)
(TD/B/48/18 (Vol. I))**

I.D.4 Progressive development of the law of international trade: thirty-fourth annual report of the United Nations Commission on International Trade Law (agenda item 6(b))

2. At its 925th plenary meeting, on 4 October 2001, the Board took note of the report of UNCITRAL on its thirty-fourth session (A/56/17).

**C. General Assembly: report of the United Nations Commission
on International Trade Law on the work of its thirty-fourth session:
report of the Sixth Committee (A/56/588)**

I. INTRODUCTION

1. At its 3rd plenary meeting, on 19 September 2001, the General Assembly, on the recommendation of the General Committee, decided to include in the agenda of its fifty-sixth session the item entitled "Report of the United Nations Commission on International Trade Law on the work of its thirty-fourth session" and to allocate it to the Sixth Committee.

2. The Sixth Committee considered the item at its 2nd to 4th and 24th, 27th and 28th meetings, on 8 and 9 October and 9, 19 and 21 November 2001. The views of the representatives who spoke during the Committee's

consideration of the item are reflected in the relevant summary records (A/C.6/56/SR.2-4, 24, 27 and 28).

3. For its consideration of the item, the Committee had before it the following documents:

(a) Report of the United Nations Commission on International Trade Law on the work of its thirty-fourth session;¹

(b) Report of the Secretary-General on the increase in the membership of the United Nations Commission on International Trade Law (A/56/315).

¹Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 17 and corrigendum (A/56/17 and Corr.3).

4. At the 2nd meeting, on 8 October, the Chairman of the United Nations Commission on International Trade Law at its thirty-fourth session introduced the report of the Commission on the work of that session (see A/C.6/56/SR.2).

5. At the 4th meeting, on 9 October, the Chairman of the Commission made a concluding statement (see A/C.6/56/SR.4).

II. CONSIDERATION OF PROPOSALS

A. Draft resolution A/C.6/56/L.8

6. At the 24th meeting, on 9 November, the representative of Austria, on behalf of *Algeria, Angola, Argentina, Armenia, Australia, Austria, Azerbaijan, Belarus, Belgium, Belize, Bosnia and Herzegovina, Botswana, Brazil, Bulgaria, Burkina Faso, Canada, Chile, China, Colombia, Croatia, Cyprus, the Czech Republic, Denmark, the Dominican Republic, Ecuador, Estonia, Ethiopia, Fiji, Finland, France, Georgia, Germany, Greece, Grenada, Guatemala, Guinea, Guinea-Bissau, Haiti, Hungary, India, Ireland, Israel, Italy, Jamaica, Japan, Kenya, Lebanon, Lesotho, Liechtenstein, Lithuania, Luxembourg, Madagascar, Malaysia, Malta, Mexico, Monaco, Morocco, Nepal, the Netherlands, New Zealand, Nicaragua, Nigeria, Norway, Pakistan, Paraguay, Peru, the Philippines, Poland, Portugal, the Republic of Korea, Romania, the Russian Federation, Saint Vincent and the Grenadines, San Marino, Senegal, Sierra Leone, Singapore, Slovakia, Slovenia, South Africa, Spain, the Sudan, Swaziland, Sweden, Thailand, the former Yugoslav Republic of Macedonia, Turkey, Uganda, Ukraine, the United Kingdom of Great Britain and Northern Ireland, Uruguay, Venezuela and Yugoslavia*, introduced a draft resolution entitled "Report of the United Nations Commission on International Trade Law on the work of its thirty-fourth session" (A/C.6/56/L.8).

7. At its 27th meeting, on 19 November, the Committee adopted draft resolution A/C.6/56/L.8 without a vote (see para. 15, draft resolution I).

B. Draft resolution A/C.6/56/L.11

8. At the 24th meeting, on 9 November, the Chairman of the Committee introduced a draft resolution entitled "Model Law on Electronic Signatures of the United Nations Commission on International Trade Law" (A/C.6/56/L.11).

9. At its 27th meeting, on 19 November, the Committee adopted draft resolution A/C.6/56/L.11 without a vote (see para. 15, draft resolution II).

C. Draft resolution A/C.6/56/L.12 and Corr.1

10. At the 24th meeting, on 9 November, the Chairman of the Committee introduced a draft resolution entitled "United Nations Convention on the Assignment of Receivables in International Trade" (A/C.6/56/L.12 and Corr.1).

11. At its 27th meeting, on 19 November, the Committee adopted draft resolution A/C.6/56/L.12 and Corr.1 without a vote (see para. 15, draft resolution III).

D. Draft resolution A/C.6/56/L.10 and draft decision A/C.6/56/L.26

12. At the 24th meeting, on 9 November, the Chairman introduced a draft resolution entitled "Enlargement of the membership of the United Nations Commission on International Trade Law" (A/C.6/56/L.10), which read:

"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 3108 (XXVIII) of 12 December 1973, by which it increased the membership of the Commission from twenty-nine to thirty-six States,

"Taking note of the recommendation of the Commission that its membership should be increased maintaining the current proportion between the regional groups,

"Convinced that wider participation of States in the work of the United Nations Commission on International Trade Law would further the progress of the work of the Commission,

"Having considered comments by States, as well as a report by the Secretary-General, on the implications of increasing the membership of the Commission, submitted pursuant to paragraph 13 of General Assembly resolution 55/151 of 12 December 2000,

"Being satisfied with the practice of the Commission to invite States not members of the Commission and relevant intergovernmental and international non-governmental organizations to participate as observers in sessions of the Commission and its working groups and to take part in the formulation of texts by the Commission, as well as with the practice of reaching decisions by consensus without a formal vote,

"Considering that the increase in the membership of the Commission may stimulate interest in the work of the Commission and better justify the dedication of human and other resources to preparation for and attendance at its meetings,

"Observing that the considerable number of States that have participated as observers and made valuable contributions to the work of the Commission indicates that there exists an interest in active participation in the Commission beyond the current thirty-six Member States,

"Reaffirming the importance of 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,

"1. Notes that the impact of an increase of the membership of the United Nations Commission on International Trade Law on the secretariat services required to properly facilitate the work of the Commission would not be material enough to quantify, and that therefore the increase would have no financial implications;

“2. *Decides* to increase the membership of the United Nations Commission on International Trade Law from thirty-six to sixty States;

“3. *Decides also* that the twenty-four additional members of the Commission shall be elected by the General Assembly during its fifty-seventh session in accordance with the following rules:

“(a) The General Assembly shall observe the following distribution of seats:

- “(i) Six from African States;
- “(ii) Five from Asian States;
- “(iii) Three from Eastern European States;
- “(iv) Four from Latin American and Caribbean States;
- “(v) Six from Western European and other States;

“(b) Of the twenty-four additional members, the terms of eleven members shall expire on the last day prior to the opening of the thirty-seventh session of the Commission, in 2004, while the term of thirteen members shall expire on the last day prior to the opening of the fortieth session of the Commission, in 2007; the President of the General Assembly shall, by drawing lots, select these members as follows:

- “(i) For a term up to the last day prior to the thirty-seventh session of the Commission, in 2004:
 - “a. Three from those elected from African States and three from those elected from Western European and other States;
 - “b. Two from those elected from Asian States and two from those elected from Latin American and Caribbean States;
 - “c. One from those elected from Eastern European States;
- “(ii) For a term up to the last day prior to the fortieth session of the Commission, in 2007:
 - “a. Three from those elected from African States, three from those elected from Asian States and three from those elected from Western European and other States;

“b. Two from those elected from Eastern European States and two from those elected from Latin American and Caribbean States;

“(c) The twenty-four additional members shall take office on 1 January 2003;

“(d) The provisions of section II, paragraphs 4 and 5, of General Assembly resolution 2205 (XXI) shall also apply to the additional members;

“4. *Appeals* to Governments, the relevant bodies of the United Nations system, organizations, institutions and individuals, in order to ensure full participation by all Member States in the sessions of the Commission and its working groups, to make voluntary contributions to the Trust Fund established to provide travel assistance to developing countries that are members of the Commission, at their request and in consultation with the Secretary-General;

“5. *Requests* the Commission at its fortieth session to evaluate the effects of the present enlargement and to examine and report to the General Assembly on the implications of enlarging the membership of the Commission to 72 States.”

13. At the 28th meeting, on 21 November, the Chairman of the Committee, on the basis of informal consultations held on the draft resolution, withdrew draft resolution A/C.6/56/L.10, and introduced a draft decision entitled “Enlargement of the membership of the United Nations Commission on International Trade Law” (A/C.6/56/L.26).

14. At the same meeting, the Committee adopted draft decision A/C.6/56/L.26 without a vote (see para. 16).

III. RECOMMENDATIONS OF THE SIXTH COMMITTEE

15. The Sixth Committee recommends to the General Assembly the adoption of the following draft resolutions: [The texts are not reproduced in this section. The draft resolutions were adopted with editorial changes, as General Assembly resolutions 56/79, 56/80 and 56/81 (see section D below).]

D. General Assembly resolutions 56/79, 56/80 and 56/81 of 12 December 2001

RESOLUTIONS ADOPTED BY THE GENERAL ASSEMBLY

[on the report of the Sixth Committee (A/56/588 and Corr.1)]

56/79. *Report of the United Nations Commission on International Trade Law on the work of its thirty-fourth 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 conviction that the progressive harmonization and unification of international trade law, in reducing or removing legal obstacles to the flow of international trade, especially those affecting the developing countries, would contribute significantly to universal economic cooperation among all States on a basis of equality, equity and common interest and to the elimination of

discrimination in international trade and, thereby, to the well-being of all peoples,

Emphasizing the need for higher priority to be given to the work of the Commission in view of the increasing value of the modernization of international trade law for global economic development and thus for the maintenance of friendly relations among States,

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

Having considered the report of the Commission on the work of its thirty-fourth session,¹

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

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

1. *Takes note with appreciation* of the report of the United Nations Commission on International Trade Law on the work of its thirty-fourth session;¹

2. *Takes note with satisfaction* of the completion and adoption by the Commission of the draft Convention on the Assignment of Receivables in International Trade² and of the United Nations Commission on International Trade Law Model Law on Electronic Signatures;³

3. *Takes note* of the progress made in the work of the Commission on arbitration and insolvency law and of its decision to commence work on electronic contracting, privately financed infrastructure projects, security interests and transport law, and expresses its appreciation to the Commission for its decision to adjust its working methods in order to accommodate its increased workload without endangering the high quality of its work;

4. *Expresses its appreciation* to the secretariat of the Commission for the publication and distribution of the *Legislative Guide on Privately Financed Infrastructure Projects*,⁴ calls upon the secretariat to ensure, in a joint effort with intergovernmental organizations such as the regional commissions of the United Nations, the United Nations Development Programme, the United Nations Industrial Development Organization, organizations of the World Bank Group and regional development banks, wide dissemination of the *Legislative Guide*, and invites States to give favourable consideration to its provisions when revising or adopting legislation in that area;

¹Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 17 and corrigenda (A/56/17 and Corr.1 and 3).

²Ibid., annex I.

³Ibid., annex II.

⁴United Nations publication, Sales No. E.01.V.4.

5. *Appeals* to Governments that have not yet done so to reply to the questionnaire circulated by the secretariat in relation to the legal regime governing the recognition and enforcement of foreign arbitral awards and, in particular, to the legislative implementation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on 10 June 1958;⁵

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

7. *Reaffirms* the mandate of the Commission, as the core legal body within the United Nations system in the field of international trade law, to coordinate legal activities in this field and, in this connection:

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

(b) Recommends that the Commission, through its secretariat, continue to maintain close cooperation with the other international organs and organizations, including regional organizations, active in the field of international trade law;

8. *Also reaffirms* the importance, in particular for developing countries, of the work of the Commission concerned with training and technical assistance in the field of international trade law, such as assistance in the preparation of national legislation based on legal texts of the Commission;

9. *Expresses the desirability* of increased efforts by the Commission, in sponsoring seminars and symposia, to provide such training and technical assistance, and in this connection:

(a) Expresses its appreciation to the Commission for organizing seminars and briefing missions in Belarus, Burkina Faso, China, Colombia, Croatia, Cuba, the Dominican Republic, Egypt, Kenya, Lithuania, Peru, the Republic of Korea, Tunisia, Ukraine and Uzbekistan;

(b) Expresses its appreciation to the Governments whose contributions enabled the seminars and briefing missions to take place, and appeals to Governments, the relevant bodies of the United Nations system, organizations, institutions and individuals to make voluntary contributions to the United Nations Commission on International Trade Law Trust Fund for Symposia and, where appropriate, to the financing of special projects, and otherwise to assist the secretariat of the Commission in financing and organizing seminars and symposia, in particular in developing countries, and in the award of fellowships to candidates from developing countries to enable them to participate in such seminars and symposia;

10. *Appeals* to the United Nations Development Programme and other bodies responsible for development assistance, such as the International Bank for Reconstruction and Development and the European Bank for Reconstruction and Development, as well as to Governments in their

⁵United Nations, *Treaty Series*, vol. 330, No. 4739.

bilateral aid programmes, to support the training and technical assistance programme of the Commission and to cooperate and coordinate their activities with those of the Commission;

11. *Appeals* to Governments, the relevant bodies of the United Nations system, organizations, institutions and individuals, in order to ensure full participation by all Member States in the sessions of the Commission and its working groups, to make voluntary contributions to the trust fund established to provide travel assistance to developing countries that are members of the Commission, at their request and in consultation with the Secretary-General;

12. *Decides*, in order to ensure full participation by all Member States in the sessions of the Commission and its working groups, to continue, in the competent Main Committee during the fifty-sixth 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. *Reiterates*, in view of the increased work programme of the Commission, its request to the Secretary-General to strengthen the secretariat of the Commission within the bounds of the resources available in the Organization so as to ensure and enhance the effective implementation of the programme of the Commission;

14. *Requests* the Secretary-General to adjust the terms of reference of the United Nations Commission on International Trade Law Trust Fund for Symposia so as to make it possible for the resources in the Trust Fund to be used also for the financing of training and technical assistance activities undertaken by the secretariat;

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

*85th plenary meeting
12 December 2001*

56/80. *Model Law on Electronic Signatures 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, particularly those of developing countries, in the extensive development of international trade,

Noting that an increasing number of transactions in international trade are carried out by means of communication commonly referred to as electronic commerce, which involves the use of alternatives to paper-based forms of communication, storage and authentication of information,

Recalling the recommendation on the legal value of computer records adopted by the Commission at its eighteenth session, in 1985, and paragraph 5 (b) of General Assembly resolution 40/71 of 11 December 1985, in which the Assembly called upon Governments and international organizations to take action, where appropriate, in conformity with the recommendation of the Commission,¹ so as to ensure legal security in the context of the widest possible use of automated data processing in international trade,

Recalling also that the Model Law on Electronic Commerce was adopted by the Commission at its twenty-ninth session, in 1996,² and complemented by an additional article, 5 bis, adopted by the Commission at its thirty-first session, in 1998,³ and recalling paragraph 2 of General Assembly resolution 51/162 of 16 December 1996, in which the Assembly recommended that all States should give favourable consideration to the Model Law when enacting or revising their laws, in view of the need for uniformity of the law applicable to alternatives to paper-based methods of communication and storage of information,

Convinced that the Model Law on Electronic Commerce is of significant assistance to States in enabling or facilitating the use of electronic commerce, as demonstrated by the enactment of the Model Law in a number of countries and its universal recognition as an essential reference in the field of electronic commerce legislation,

Mindful of the great utility of new technologies used for personal identification in electronic commerce and commonly referred to as electronic signatures,

Desiring to build on the fundamental principles underlying article 7 of the Model Law on Electronic Commerce⁴ with respect to the fulfilment of the signature function in an electronic environment, with a view to promoting reliance on electronic signatures for producing legal effect where such electronic signatures are functionally equivalent to handwritten signatures,

Convinced that legal certainty in electronic commerce will be enhanced by the harmonization of certain rules on the legal recognition of electronic signatures on a technologically neutral basis and by the establishment of a method to assess in a technologically neutral manner the practical reliability and the commercial adequacy of electronic signature techniques,

Believing that the Model Law on Electronic Signatures will constitute a useful addition to the Model Law on Electronic Commerce and significantly assist States in enhancing their legislation governing the use of modern authentication techniques and in formulating such legislation where none currently exists,

Being of the opinion that the establishment of model legislation to facilitate the use of electronic signatures in a manner acceptable to States with different legal, social and economic systems could contribute to the development of harmonious international economic relations,

¹See *Official Records of the General Assembly, Fortieth Session, Supplement No. 17 (A/40/17)*, chap. VI, sect. B.

²*Ibid.*, *Fifty-first Session, Supplement No. 17 (A/51/17)*, chap. III, sect. F, para. 209.

³*Ibid.*, *Fifty-third Session, Supplement No. 17 (A/53/17)*, chap. III, sect. B.

⁴Resolution 51/162, annex.

1. *Expresses its appreciation* to the United Nations Commission on International Trade Law for completing and adopting the Model Law on Electronic Signatures contained in the annex to the present resolution, and for preparing the Guide to Enactment of the Model Law;

2. *Recommends* that all States give favourable consideration to the Model Law on Electronic Signatures, together with the Model Law on Electronic Commerce adopted in 1996 and complemented in 1998, when they enact or revise their laws, in view of the need for uniformity of the law applicable to alternatives to paper-based forms of communication, storage and authentication of information;

3. *Recommends also* that all efforts be made to ensure that the Model Law on Electronic Commerce and the Model Law on Electronic Signatures, together with their respective Guides to Enactment, become generally known and available.

*85th plenary meeting
12 December 2001*

ANNEX

MODEL LAW ON ELECTRONIC SIGNATURES OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

[The annex is reproduced in part three II, of this *Yearbook*.]

56/81. *United Nations Convention on the Assignment of Receivables in International Trade*

The General Assembly,

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

Considering that problems created by uncertainties as to the content and the choice of the legal regime applicable to the assignment of receivables constitute an obstacle to international trade,

Convinced that the adoption of a convention on the assignment of receivables in international trade will enhance transparency, contribute to overcoming the problems of uncertainties in this field and promote the availability of capital and credit at more affordable rates, while protecting existing assignment practices and facilitating the development of new practices, as well as ensuring adequate protection of the interests of debtors in assignments of receivables,

Recalling that, at its twenty-eighth session in 1995, the Commission decided to prepare uniform legislation on assignment in receivables financing and entrusted the

Working Group on International Contract Practices with the preparation of a draft,¹

Noting that the Working Group on International Contract Practices devoted nine sessions, from 1995 to 2000, to the preparation of the draft Convention on the Assignment of Receivables in International Trade, and that the Commission considered the draft Convention at its thirty-third session in 2000² and at its thirty-fourth session in 2001,³

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

Noting with satisfaction that the text of the draft Convention was circulated for comments once before the thirty-third session of the Commission and a second time in its revised version before the thirty-fourth session of the Commission to all Governments and international organizations invited to attend the meetings of the Commission and the Working Group as observers, and that the comments received were before the Commission at its thirty-third⁴ and thirty-fourth sessions,

Taking note with satisfaction of the decision of the Commission at its thirty-fourth session to submit the draft Convention to the General Assembly for its consideration,⁵

Taking note of the draft Convention adopted by the Commission,⁶

1. *Expresses its appreciation* to the United Nations Commission on International Trade Law for preparing the draft Convention on the Assignment of Receivables in International Trade;⁶

2. *Adopts and opens for signature or accession* the United Nations Convention on the Assignment of Receivables in International Trade, contained in the annex to the present resolution;

3. *Calls upon* all Governments to consider becoming party to the Convention.

*85th plenary meeting
12 December 2001*

ANNEX

UNITED NATIONS CONVENTION ON THE ASSIGNMENT OF RECEIVABLES IN INTERNATIONAL TRADE

[The annex is reproduced in part three I, of this *Yearbook*.]

¹See *Official Records of the General Assembly, Fiftieth Session, Supplement No. 17 (A/50/17)*, para. 381.

²*Ibid.*, *Fifty-fifth Session, Supplement No. 17, (A/55/17)*, chap III.

³*Ibid.*, *Fifty-sixth Session, Supplement No. 17 and corrigendum, (A/56/17 and Corr.3)*, chap III.

⁴See A/CN.9/472 and Add.1-5.

⁵*Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 17 and corrigendum (A/56/17 and Corr.3)*, para. 200.

⁶*Ibid.*, annex I.

Part Two

**STUDIES AND REPORTS ON
SPECIFIC SUBJECTS**

I. ASSIGNMENT IN RECEIVABLES FINANCING

A. Report of the Working Group on International Contract Practices on the work of its twenty-third session

(Vienna, 11-22 December 2000) (A/CN.9/486) [Original: English]

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INTRODUCTION

1. At the present session, the Working Group on International Contract Practices continued its work on the preparation of a draft convention on assignment of receivables in international trade pursuant to a decision taken by the Commission at its thirty-third session held in New York from 12 June to 7 July 2000.¹

2. At its previous session, which was held at Vienna from 11 to 22 October 1999, the Working Group had completed its work and submitted the draft convention to the Commission (A/CN.9/466, para. 19). However, due to the lack of sufficient time, the Commission considered and adopted only draft articles 1 to 17 of the draft convention with the exception of the bracketed language in those provisions²

and referred the draft convention back to the Working Group entrusting the Working Group with the task of: reviewing draft articles 18 to 44 of the draft convention and draft articles 1 to 7 of the annex to the draft convention, as well as text that remained in square brackets in draft articles 1 to 17 of the draft convention; ensuring the coherence and consistency in the text of the draft convention as a whole in the light of the modifications made by the Commission to draft articles 1 to 17 of the draft convention; bringing to the attention of the Commission any new policy issues that may be identified by the Working Group in draft articles 1 to 17, as well as making recommendations for the resolution of those issues by the Commission; and making only those changes in the draft convention that would meet with substantial support.³

3. The Commission requested the Working Group to proceed with its work expeditiously so as to finalize the draft

¹*Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 17 (A/55/17)*, paras. 186-192.

²*Ibid.*, para. 180.

³*Ibid.*, para. 187.

convention and submit it for final adoption by the Commission at its thirty-fourth session in 2001.⁴ The Commission also requested the secretariat to prepare and distribute a revised version of the commentary on the draft convention after the Working Group had completed its work. Furthermore, the Commission requested the secretariat to distribute for comments the text of the draft convention after the completion of the work of the Working Group to all States and international organizations, including non-governmental organizations that were normally invited to attend meetings of the Commission and its working groups as observers, and to prepare and distribute an analytical compilation of those comments.⁵

4. The Working Group, which was composed of all States members of the Commission, held the present session at Vienna from 11 to 22 December 2000. The session was attended by representatives of the following States members of the Working Group: Argentina, Australia, Austria, Cameroon, China, Colombia, Egypt, France, Germany, Honduras, Hungary, Iran (Islamic Republic of), Italy, Japan, Kenya, Mexico, Nigeria, Romania, Russian Federation, Spain, Sudan, Thailand, United Kingdom of Great Britain and Northern Ireland and United States of America.

5. The session was attended by observers from the following States: Bolivia, Canada, Czech Republic, Ecuador, Indonesia, Iraq, Lebanon, Malaysia, Peru, Republic of Korea, Saudi Arabia, Slovakia, Sweden, Switzerland and Turkey.

6. The session was attended by observers from the following international organizations: Asian-African Legal Consultative Committee (AALCC), Common Market for Eastern and Southern Africa (COMESA), Association of the Bar of the City of New York (ABCNY), Commercial Finance Association (CFA), European Federation of National Factoring Associations (EUROPAFACTORING), European Central Bank (ECB), Factors Chain International (FCI), Fédération bancaire de l'Union européenne and Federacion Latinoamericana de Bancos (FELABAN).

7. The Working Group elected the following officers:

Chairman: Mr. David MORÁN BOVIO (Spain)

Rapporteur: Mr. Hossein GHAZIZADEH
(Islamic Republic of Iran)

8. The Working Group had before it the following documents: the provisional agenda (A/CN.9/WG.V/WP.51), the draft convention on assignment of receivables in international trade, as adopted by the Working Group in October 1999 (A/CN.9/466, annex I); draft articles 1 to 17 of the draft convention, as adopted by the Commission in July 2000 (A/55/17, annex I); and an analytical commentary on the draft convention prepared by the secretariat (A/CN.9/470). The Working Group also had before it comments on the draft convention made by Governments and international organizations (A/CN.9/472 and Addenda 1 to 5).

⁴Ibid., para. 188.

⁵Ibid., para. 191.

9. The Working Group adopted the following agenda:
 1. Election of officers.
 2. Adoption of the agenda.
 3. Preparation of draft convention on assignment of receivables in international trade.
 4. Other business.
 5. Adoption of the report.

I. DELIBERATIONS AND DECISIONS

10. The Working Group considered draft article 1, paragraph 4, draft article 4, paragraph 4 and draft articles 18 to 44 of the draft convention, as well as draft articles 1 to 7 of the annex.

11. The deliberations and conclusions of the Working Group are set forth below in chapters III to V. With the exception of draft article 4, paragraph 4 and draft article 39 that were retained in square brackets and referred to the Commission, the Working Group adopted draft article 1, paragraph 4, and draft articles 18 to 38 and 40 to 44 of the draft convention, as well as draft articles 1 to 7 of the annex. Having completed its work, the Working Group decided to submit the draft convention to the Commission for adoption at its thirty-fourth session, to be held at Vienna from 25 June to 13 July 2001.

II. DRAFT CONVENTION ON ASSIGNMENT OF RECEIVABLES IN INTERNATIONAL TRADE

...

Section II. Debtor

...

Article 18. Notification of the debtor

12. Draft article 18 as considered by the Working Group was as follows:

“1. A notification of the assignment and a payment instruction are effective when received by the debtor, if they are in a language that is reasonably expected to inform the debtor about their contents. It shall be sufficient if a notification of the assignment or a payment instruction is in the language of the original contract.

“2. A notification of the assignment or a payment instruction may relate to receivables arising after notification.

“3. Notification of a subsequent assignment constitutes notification of any prior assignment.”

Paragraph 1

13. In response to a question as to the relationship between a notification and a payment instruction, it was noted that, as a result of draft article 5, subparagraph (d), and draft articles 15 and 18, to be effective, a notification did not need to contain a payment instruction, but a payment instruction could only be given in a notification or subsequent to a notification by the assignee (see also para. 24).

Paragraph 3

14. A number of concerns were expressed with respect to paragraph 3. One concern was that, if not all assignments in a chain of assignments were notified to the debtor, it would be very difficult for the debtor to determine which was the last of such subsequent assignments in order to obtain a valid discharge under draft article 19, paragraph 4. Another concern was that in the case of a combination of duplicate assignments with subsequent assignments, it would be even more difficult for the debtor to determine whether to pay in accordance with the first notification received before payment (draft article 19, para. 2) or in accordance with the notification of the last subsequent assignment (draft article 19, para. 4).

15. In order to address those concerns, a number of proposals were made. One proposal was that paragraph 3 should be revised to read as follows:

“Notification of a subsequent assignment constitutes notification of any prior assignment, to the extent that the notification contains reasonable identification of any assignor of such prior assignment.”

16. That proposal was objected to on the ground that it would inadvertently result in unnecessarily complicating notification of subsequent assignments by introducing an additional requirement for such notification to be effective and by referring to vague terms, such as “reasonable identification of any prior assignor” (for the discussion of a related proposal with respect to draft article 19, para. 5, see paras. 25-29). It was also observed that draft article 19, paragraphs 2 and 4 sufficiently addressed situations in which notifications of duplicate assignments were combined with notifications of subsequent assignments. Another proposal was that paragraph 3 should be revised to refer only to one prior assignment. In support of that proposal, it was stated that such an approach would be sufficient to address situations involving international factoring arrangements which were the main focus of paragraph 3. There was not sufficient support for that proposal.

17. Yet another concern was that, in its current formulation, paragraph 3 failed to make it sufficiently clear that the assignor of a prior assignment could give notification with respect to a subsequent assignment to which that assignor was not a party. It was stated that that situation was normal practice in international factoring transactions, in which the exporter (assignor) would give, with the invoice, direct notification to the importer (debtor) of the subsequent assignment from the factor in the exporter’s country (first assignee) to the factor in the importer’s country (second assignee). In order to address that concern, the proposal

was made that at the end of paragraph 3 wording along the following lines should be added: “even if the notification of the subsequent assignment is given by the assignor under the prior assignment”. The Working Group agreed that such an amendment was not necessary and could raise questions of interpretation in the context of other provisions of the draft convention dealing with notification, in which the proposed wording would not be added. It was also agreed that the commentary should reflect the understanding that neither the definition of notification in draft article 5 (d) nor draft article 15, dealing with notification in the relationship between the assignor and the assignee, nor draft article 18 precluded the assignor in a prior assignment from giving effective notification to the debtor about a subsequent assignment.

Notification of assignments of parts of or undivided interests in receivables

18. Recalling that the Commission did not have the time to consider the legal position of the debtor in the case of one or more notifications with respect to an assignment of a part of or an undivided interest in one or more receivables,⁶ the Working Group noted that the matter could be addressed in draft article 18. Support was expressed in favour of a provision under which, at the discretion of the debtor, a notification would be treated as ineffective for the purposes of draft article 19 (debtor’s discharge by payment) if the related payment instruction instructed the debtor to pay to a designated payee less than the amount due under the original contract.

19. It was stated that such an approach would result in protecting the debtor in a sufficient but flexible way, without prescribing in a regulatory manner what the assignor, the debtor or the assignee ought to do and without creating liability. It was also observed that such an approach would ensure that all possible combinations would be covered of single or multiple assignments of parts of or undivided interests in receivables, whether they involved lump-sum or periodic payments. Furthermore, it was said that such an approach would not affect the effectiveness of a notification of a partial assignment for any purpose other than the discharge of the debtor (e.g. for freezing the rights of set-off that arose from contracts unrelated to the original contract and became available to the debtor after notification). The concern was expressed, however, that if such a distinction were to be drawn, the debtor might not be able to avoid double payment by raising a right of set-off. It was, therefore, suggested that the debtor should be able to ignore a notification of a partial assignment for all purposes. It was observed that that result was already implicit in draft article 17, which provided that the draft convention did not affect the rights and obligations of the debtor without the consent of the debtor “except as provided in this Convention”. That suggestion was objected to, since it would inadvertently result in disrupting useful practices. It was also stated that draft articles 9 and 18 respectively validated partial assignments and notifications of partial assignments, and that draft article 17 did nothing to invalidate such

⁶Ibid., para. 173.

assignments or notifications. On that understanding, the Working Group decided that only the issue of the debtor's discharge in the case of a partial assignment needed to be addressed and that draft article 19, dealing with the debtor's discharge, was the appropriate place in the text of the draft convention in which that matter should be addressed.

20. After discussion, the Working Group adopted the substance of draft article 18 unchanged and referred it to the drafting group. The preparation of a provision along the lines described in paragraph 19 above, to be included in draft article 19, was also left to the drafting group.

Article 19. *Debtor's discharge by payment*

21. The text of draft article 19 as considered by the Working Group was as follows:

"1. Until the debtor receives notification of the assignment, the debtor is entitled to be discharged by paying in accordance with the original contract. After the debtor receives notification of the assignment, subject to paragraphs 2 to 6 of this article, the debtor is discharged only by paying the assignee or, if otherwise instructed in the notification of the assignment or subsequently by the assignee in a writing received by the debtor, in accordance with such instructions.

"2. If the debtor receives notification of more than one assignment of the same receivable made by the same assignor, the debtor is discharged by paying in accordance with the first notification received.

"3. If the debtor receives more than one payment instruction relating to a single assignment of the same receivable by the same assignor, the debtor is discharged by paying in accordance with the last payment instruction received from the assignee before payment.

"4. If the debtor receives notification of one or more subsequent assignments, the debtor is discharged by paying in accordance with the notification of the last of such subsequent assignments.

"5. If the debtor receives notification of the assignment from the assignee, the debtor is entitled to request the assignee to provide within a reasonable period of time adequate proof that the assignment has been made and, unless the assignee does so, the debtor is discharged by paying the assignor. Adequate proof includes, but is not limited to, any writing emanating from the assignor and indicating that the assignment has taken place.

"6. This article does not affect any other ground on which payment by the debtor to the person entitled to payment, to a competent judicial or other authority, or to a public deposit fund discharges the debtor."

Discharge by way of a good faith payment to a "purported assignee"

22. In order to ensure that the debtor could rely on a prima facie legitimate notification, it was noted that draft article 19 should provide that the debtor was discharged if it paid in good faith a purported assignee. The Working Group agreed that that matter occurred very rarely in

practice and did not need to be addressed in the draft convention. It was also agreed that a rule granting the debtor a valid discharge in the case of a purported assignment would go against the law in many legal systems, which did not allow the good faith acquisition of property rights in receivables.

Paragraph 1

23. It was noted that the right of the debtor to discharge its obligation before notification by paying the assignee, rather than the assignor, might disrupt practices in which it was expected that the debtor would continue paying the assignor even after receiving notification (e.g. securitization). The Working Group agreed that no change should be made to paragraph 1, since such a situation would arise very rarely in practice, in particular since the debtor paying the assignee before notification would run the risk of having to pay twice.

24. The view was expressed that the second sentence of paragraph 1 should make it sufficiently clear that a change in the way in which the debtor could discharge its obligation would be triggered by a payment instruction and not by a mere notification. In response, it was observed that paragraph 1 appropriately focused on notification, since in most cases notification would be accompanied by a payment instruction and those practices in which a notification was given without a payment instruction deserved to be recognized. The view was also expressed that the assignee should not be allowed to give notification in the case of the assignor's insolvency since in that way the assignee could obtain an undue preference over other creditors. It was pointed out, however, that a notification in itself could not give an assignee a preference, since that matter was left to the law governing priority. It was also added that, if, under that law, priority was based on the time of notification, an assignee could not obtain priority over the creditors of the assignor or the insolvency administrator, unless notification took place before the commencement of an insolvency proceeding and provided that it did not constitute a fraudulent or preferential transfer.

Paragraph 5 bis

25. In order to address the concerns expressed in paragraph 14 above, the proposal was made that a new paragraph 5 bis should be introduced in draft article 19 to read as follows:

"If the debtor receives notification of a subsequent assignment from the assignee, the debtor is entitled to request the assignee to provide within a reasonable period of time adequate proof that the subsequent assignment and any prior assignment have been made, and the debtor is discharged by paying the last assignee of a subsequent assignment with respect to which adequate proof is provided. Adequate proof includes, but is not limited to, any writing emanating from the assignor and indicating that the assignment has taken place."

26. Support was expressed in favour of that proposal. It was stated that it was sufficient to protect the debtor in the case of doubt as to how the debtor should discharge its

obligation if it received multiple notifications relating to subsequent assignments. As a matter of drafting, it was suggested that the same result could be obtained by combining paragraph 5 with the proposed paragraph 5 bis. It was stated that a new paragraph 5 could grant the debtor the right to request adequate proof of a single assignment or of all assignments in a chain of assignments. It was also said that such a new paragraph 5 could provide that, unless such adequate proof were provided to the debtor within a reasonable period of time, the debtor could be discharged, in the case of a single assignment, in accordance with paragraph 1 and, in the case of a chain of assignments, in accordance with paragraph 4. In addition, it was observed that, under the proposed combination of paragraph 5 and the proposed paragraph 5 bis, in the case of an assignment from A to B, from B to C and from C to D, if only B gave notification, the debtor would be discharged by paying B; and if D gave notification but not B or C, the debtor would be discharged by paying in accordance with the original contract.

27. While support was expressed in favour of that proposal, some doubt was expressed as to whether it was necessary to revise paragraph 5 at all. It was stated that paragraph 5 was already sufficiently flexible for a court to construe it so as to obtain the appropriate results. It was also observed that there might be some inconsistency between such a new paragraph 5 and article 18, paragraph 3, under which notification of a subsequent assignment constituted notification of all prior assignments. In response, it was stated that paragraph 5 in its current formulation did not fully address the question whether the debtor could request adequate proof of the chain of assignments as a whole or the way in which the debtor could discharge its obligation in the absence of such adequate proof. In addition, it was stated that draft article 18, paragraph 3 was intended to deal with the effectiveness of notification in the case of a chain of assignments, while draft article 19, paragraph 5 was aimed at ensuring that the debtor could request adequate proof and know how to discharge its obligation in the absence of such proof.

28. In order to address those matters, the proposal was made that paragraph 5 should be revised to read along the following lines:

“If the debtor receives notification of the assignment from the assignee, the debtor is entitled to request the assignee to provide within a reasonable period of time adequate proof that the assignment and all preceding assignments have been made and, unless the assignee does so, the debtor is discharged by paying in accordance with this article as if the notification from the assignee had not been received. Adequate proof of an assignment includes but is not limited to any writing emanating from the assignor and indicating that the assignment has taken place.”

29. It was generally agreed that the proposed text addressed in the best possible way the concerns expressed (see para. 14). Subject to that change, the Working Group adopted the substance of draft article 19 and referred it to the drafting group.

Article 20. *Defences and rights of set-off of the debtor*

30. The text of draft article 20 as considered by the Working Group was as follows:

“1. In a claim by the assignee against the debtor for payment of the assigned receivables, the debtor may raise against the assignee all defences or rights of set-off arising from the original contract, or any other contract that was part of the same transaction, of which the debtor could avail itself if such claim were made by the assignor.

“2. The debtor may raise against the assignee any other right of set-off, provided that it was available to the debtor at the time notification of the assignment was received.

“3. Notwithstanding paragraphs 1 and 2 of this article, defences and rights of set-off that the debtor may raise pursuant to article 11 against the assignor for breach of agreements limiting in any way the assignor’s right to assign its receivables are not available to the debtor against the assignee.”

31. The concern was expressed that leaving the meaning of the term “available” in paragraph 2 to law applicable outside the draft convention without specifying that law would create uncertainty as to whether a right of set-off needed to be actual and ascertained, mature or quantified at the time of notification. It was observed that what was at stake was not only the principle that an assignment should not prejudice the debtor’s legal position but also the principle that, after notification, the debtor should not be able to take away the rights of the assignee. In order to address that concern, the proposal was made that the question of when a right of set-off should be considered as being “available” to the debtor should be referred to the law governing the receivable. That proposal was objected to. It was stated that a provision similar to paragraph 2 had been included in the *Unidroit Convention on International Factoring* (Ottawa, 1988; “the Ottawa Convention”) without causing any problems. It was also observed that, while the law governing the receivable could be designated as the law applicable to rights of set-off arising from the original contract and related contracts, such an approach would not be appropriate with respect to other rights of set-off such as, for example, rights arising from unrelated contracts, torts or court judgements. In addition, it was pointed out that specifying the law governing set-off might not produce the desirable certainty since in many jurisdictions set-off was treated as a procedural matter and was as such subject to the law of the forum. Moreover, it was said that draft article 29 might be sufficient to refer rights of set-off arising from the original contract and related contracts to the law governing the original contract.

32. After discussion, the Working Group adopted the substance of draft article 20 unchanged and referred it to the drafting group.

Article 21. *Agreement not to raise defences or rights of set-off*

33. The text of draft article 21 as considered by the Working Group was as follows:

“1. Without prejudice to the law governing the protection of the debtor in transactions made for personal, family or household purposes in the State in which the debtor is located, the debtor may agree with the assignor in a writing signed by the debtor not to raise against the assignee the defences and rights of set-off that it could raise pursuant to article 20. Such an agreement precludes the debtor from raising against the assignee those defences and rights of set-off.

“2. The debtor may not exclude:

(a) defences arising from fraudulent acts on the part of the assignee;

(b) defences based on the debtor’s incapacity.

“3. Such an agreement may be modified only by an agreement in a writing signed by the debtor. The effect of such a modification as against the assignee is determined by article 22, paragraph 2.”

34. The Working Group adopted the substance of draft article 21 unchanged and referred it to the drafting group.

Article 22. *Modification of the original contract*

35. The text of draft article 22 as considered by the Working Group was as follows:

“1. An agreement concluded before notification of the assignment between the assignor and the debtor that affects the assignee’s rights is effective as against the assignee and the assignee acquires corresponding rights.

“2. After notification of the assignment, an agreement between the assignor and the debtor that affects the assignee’s rights is ineffective as against the assignee unless:

(a) the assignee consents to it; or

(b) the receivable is not fully earned by performance and either modification is provided for in the original contract or, in the context of the original contract, a reasonable assignee would consent to the modification.

“3. Paragraphs 1 and 2 of this article do not affect any right of the assignor or the assignee for breach of an agreement between them.

36. The view was expressed that paragraph 2 might be appropriate for project finance but not for factoring transactions in which, after notification, a modification of the original contract was not binding on the assignee. It was stated that, if such a modification were to be binding on the assignee, the assignee should be, at least, given notice of that modification. In response, it was observed that that matter would typically be addressed in the contract between the assignor and the assignee. In addition, it was pointed out that paragraph 2 was, in any case, based on the assumption that the assignee would be given notice of the modification, even though that matter was in practice left to the discretion of the assignor. After discussion, the Working Group adopted the substance of draft article 22 unchanged and referred it to the drafting group.

Article 23. *Recovery of payments*

37. The text of draft article 23 as considered by the Working Group was as follows:

“Without prejudice to the law governing the protection of the debtor in transactions made for personal, family or household purposes in the State in which the debtor is located and the debtor’s rights under article 20, failure of the assignor to perform the original contract does not entitle the debtor to recover from the assignee a sum paid by the debtor to the assignor or the assignee.”

38. The Working Group agreed that the reference to “the debtor’s rights under article 20” was unclear and should be deleted. It was widely felt that draft article 23, referring to affirmative recovery, and draft article 20, referring only to defences and rights of set-off, did not overlap. Subject to that change, the Working Group adopted the substance of draft article 23 and referred it to the drafting group.

Section III. Other parties

Article 24. *Law applicable to competing rights of other parties*

39. The text of draft article 24 as considered by the Working Group was as follows:

“With the exception of matters which are settled elsewhere in this Convention, and subject to articles 25 and 26, the law of the State in which the assignor is located governs:

“(a) the extent of the right of an assignee in the assigned receivable and the priority of the right of the assignee with respect to competing rights in the assigned receivable of:

- (i) another assignee of the same receivable from the same assignor, even if that receivable is not an international receivable and the assignment to that assignee is not an international assignment;
- (ii) a creditor of the assignor; and
- (iii) the insolvency administrator;

“(b) the existence and extent of the right of the persons listed in paragraph 1 (a) (i) to (iii) in proceeds of the assigned receivable, and the priority of the right of the assignee in those proceeds with respect to competing rights of such persons; and

“(c) whether, by operation of law, a creditor has a right in the assigned receivable as a result of its right in other property of the assignor, and the extent of any such right in the assigned receivable.”

Chapeau

40. The Working Group agreed that a reference to draft article 27 was not necessary in the opening words of the chapeau. It was widely felt that, unlike draft articles 25 and 26, draft article 27 was not intended to override the law applicable under draft article 24 but to validate subordination agreements. It was also widely felt that subordination agreements covered in draft article 27 were sufficiently

covered by the words “with the exception of matters which are settled elsewhere in this Convention”. After discussion, the Working Group adopted the substance of the chapeau unchanged and referred it to the drafting group.

Subparagraph (a)

41. A number of concerns were expressed with respect to the chapeau of subparagraph (a). One concern was that the law of the assignor’s location could not effectively cover all priority conflicts with respect to the assigned receivable. The example was given of an assignment of receivables, which under the law of the assignor’s location needed to be registered to be effective, while under the law of the assignee’s location it would be effective, even in the absence of registration, but only as between the assignor and the assignee, and under the law of the debtor’s location it would be effective only if it did not involve future receivables. It was stated that, in such a case, the law of the assignor’s location could not displace local law in particular in the case of insolvency of the assignor or the debtor. It was also observed that, in jurisdictions in which formalities were required for the creation of a security right (e.g. notarization, notification or registration) and in which no distinction was drawn between existence, extent and priority of the assignee’s right, all those matters would be referred to the law of the country in which the formalities took place. In response, it was stated that it was exactly cases such as the one described that the draft convention was intended to address. Any limitation as to the assignability of future receivables would be set aside by the draft convention. In addition, referring priority conflicts in the case described to the law of the assignor’s location would be particularly appropriate since that law required registration and third parties would normally expect the assignor’s law to apply. Moreover, the assignor’s law was appropriate since it would be the law governing the main insolvency proceeding with respect to the assignor. If the insolvency proceeding was opened in another jurisdiction (e.g. the country where the debtor was located), the assignor’s law would govern priority with the exception of a rule which would be manifestly contrary to the public policy of the debtor’s country and subject to non-consensual, preferential rights of that country.

42. Another concern was that the reference to “the extent” of the assignee’s right in the assigned receivable expanded excessively, or at least introduced uncertainty as to, the scope of draft article 24. It was stated that the “extent” of an assignee’s right was an ambiguous term. It was also observed that, if the “extent” of the assignee’s right was relevant to priority (i.e. dealt with the personal (ad personam) or the property (in rem) nature of the assignee’s right or with the question whether full title or only a security right was involved), it was covered by the reference to priority, while, if it was irrelevant to priority, it went beyond the scope of the draft convention. In addition, it was said that referring the full property or security right nature of the assignee’s right to the law of the assignor’s location might not achieve the desired certainty, since, for example, an outright transfer under the law in one jurisdiction might be characterized as a security right in another jurisdiction. Furthermore, it was observed that it might not be appropriate to refer to “the extent” or “the nature” of an assignment

as a pure outright transfer or a security device, since in many jurisdictions a clear distinction was drawn between the assignment and the underlying transaction (or the purpose for which the assignment was made) which the draft convention should not interfere with. In order to address that concern, it was suggested that the reference to the “extent of the right of the assignee in the assigned receivable” should be deleted.

43. That suggestion was objected to. While it was agreed that the formulation of the chapeau of subparagraph (a) could be improved, the view was expressed that failing to cover the in rem or ad personam nature of the assignee’s right and the question whether it was a security or a full property right would significantly reduce the value of the draft convention as a whole. It was explained that, in the absence of certainty as to how to obtain an in rem right, an assignee could have no assurance that it would receive payment in the case of the assignor’s insolvency. It was also explained that uncertainty as to the law applicable to the nature of the assignee’s right as a full property or a security right would continue to impair transactions such as securitization, in which the effectiveness of the outright transfer involved was essential. In addition, it was stated that referring those matters to the assignor’s law was particularly useful in the case of the assignor’s insolvency, since that law was likely to be in most cases the law governing the assignor’s insolvency.

44. Another concern was that the chapeau of subparagraph (a) might not be sufficient to cover the question of the existence of the right of the assignee in the assigned receivable. It was stated that, while the draft convention covered a number of issues relating to the existence of the assignee’s right in the assigned receivable, it might not cover them all and in particular it might not cover the existence of such right as a precondition to priority which should be referred to the law of the assignor’s location. The example was given of notification as a precondition of both the existence and the priority of the assignee’s right in the assigned receivable. In order to address that concern, the suggestion was made to include in the chapeau of subparagraph (a) a reference to the “existence of the assignee’s right in the assigned receivable”.

45. That suggestion was also objected to. It was stated that the existence of the assignee’s right in the assigned receivable was fully covered in chapter III of the draft convention and, in particular, in draft articles 8 and 9 that covered the formal and substantive validity of an assignment of even a single existing receivable. It was also observed that referring that matter to the assignor’s law would undermine the certainty achieved in particular by draft article 9. With respect to the example mentioned above, it was pointed out that, as a matter of formal validity, notification would be subject to the law of the assignor’s location or any other law applicable, while, as a matter of substantive validity, the requirement for a notification would be set aside by draft article 9 (i.e. the assignment would be effective and the assignee’s right would “exist” even in the absence of notification) and, as a matter of priority, notification would be subject to the law of the assignor’s location.

46. In view of the lack of consensus with respect to the question of how to deal with the existence and the extent of the assignee's right in the assigned receivable, it was recalled that, as mandated by the Commission (see para. 2), no change should be approved by the Working Group, unless it received substantial support. In response, it was stated that such a rule could not apply to the reference to "the extent" of the assignee's right in receivables (subparagraph (a)) or to "the existence and extent" of the rights of third parties in proceeds (subparagraph (b)), since references to those terms had been added by the drafting group at the previous session of the Working Group without a specific mandate and without sufficient discussion by the Working Group (A/CN.9/466, paras. 45-49). However, it was stated that, at that session, the Working Group had considered the report of the drafting group and had approved it without any objection. After discussion, the Working Group agreed that the matter should be decided on the basis of substantive and not procedural considerations. It was also agreed that the Working Group should do its best to resolve as many problems as possible and to avoid referring them to the Commission, in particular, since the Commission might not have sufficient time to resolve them.

47. After discussion, it was agreed that no reference should be made in subparagraph (a) to the existence of the assignee's right in the assigned receivable. It was also agreed that subparagraph (a) should be revised to reflect more clearly that "the extent" of the assignee's right referred to the nature of that right as a personal or a property right and as a full-title or security right and that that matter should be covered only with respect to a priority conflict. As to the manner in which that idea could be better expressed in subparagraph (a), various suggestions were made, including the suggestion to refer to "the nature and priority" or to "the priority, including the nature" of the assignee's right, and the suggestion to define "priority" as including "the nature" of the assignee's right in the assigned receivable. All those suggestions were intended to ensure that draft article 24 would not include a free-standing rule as to the extent or the nature of the assignee's right in the assigned receivable for all purposes, but that that rule would be limited to the context of a priority conflict. The suggestion was also made that subparagraph (c) should be merged with subparagraph (a) (ii). There was broad support for that suggestion (see, however, para. 147). Subject to that change and to the necessary changes to ensure that the *in rem* or *ad personam* and the full property or security right nature of the assignee's right in the assigned receivable in the context of a priority conflict would be covered, the Working Group adopted the substance of subparagraph (a) and referred it to the drafting group.

Conflicts of priority in subsequent assignments

48. In response to a question, it was stated that no conflict of priority could arise as between the assignees in a chain of subsequent assignments. It was also observed that such a conflict could arise between any assignee and the creditors or the insolvency administrator of the assignor from whom that assignee obtained the receivables. In such a case, it was pointed out, draft article 24 would provide the appropriate solution by referring such a priority conflict to the law of the location of the assignor from whom the assignee in question had obtained the receivables directly.

Subparagraph (b)

49. A number of concerns were expressed with regard to subparagraph (b). One concern was that the first part of the subparagraph went beyond the scope of the draft convention in that it did not deal with priority in proceeds but with the existence and the extent of the rights of third parties in proceeds of receivables (and in proceeds of proceeds). It was stated that, to the extent that proceeds would include tangible assets, the existence and the extent of rights of third parties in such assets should be referred to the law of the country in which the assets were located in order to avoid frustrating the normal expectations of parties that provided financing to the assignor relying on the law of the location of those assets. In order to address that concern, the suggestion was made that the first part of subparagraph (b) should be deleted.

50. That suggestion was objected to. It was stated that uncertainty as to the law applicable to the existence and extent of the rights of competing parties in proceeds would significantly reduce the value of, and the certainty achieved by, draft article 24. However, it was generally recognized that the matter of the existence and extent of rights of competing parties in proceeds was a distinct issue from the issue of priority and would need to be addressed differently and in a separate provision. On that understanding, the Working Group decided that the first part of subparagraph (b) should be deleted (for the continuation of the discussion on that matter, see paras. 55-61).

51. Another concern was that subparagraph (b) was incomplete in that it covered the priority of the right of the assignee in proceeds with respect to competing rights of third parties without covering the existence and extent of the right of the assignee. It was agreed that the extent and the priority of the right of the assignee in proceeds with respect to competing rights of third parties should be covered and that, to that extent, subparagraph (b) should be aligned with subparagraph (a) which dealt with the extent and the priority of the assignee's right in the assigned receivable with respect to competing rights of third parties. However, it was stated that the existence of the assignee's right in proceeds, as a precondition to priority, was already covered in draft article 16 and should not be referred to the law of the assignor's location. It was also pointed out that any reference to the existence of the assignee's right in proceeds in subparagraph (b) would inadvertently result in creating uncertainty as to whether that matter was covered in draft article 16.

52. Yet another concern was that referring the priority of the assignee's right in proceeds with respect to competing rights of third parties to the law of the assignor's location would be inappropriate if the proceeds took the form of assets other than receivables. It was stated that with respect to priority in proceeds other than receivables the law of the country in which those proceeds were located would be more appropriate in that it could correspond to the normal expectations of creditors of the assignor lending in reliance on those assets as security. In order to address that concern, it was suggested that the rule in the second part of subparagraph (b) should be limited to proceeds that were receivables. There was broad support for that suggestion. The

issue of priority between the right of an assignee and those of third parties in proceeds other than receivables was left to be addressed in a separate provision together with the existence and the extent of the right of such third parties in such proceeds (see para. 50).

53. After discussion, the Working Group agreed that the existence of the assignee's right in proceeds was sufficiently covered in draft article 16 (while the existence of the assignee's right in the assigned receivable was covered in draft articles 8 and 9; see paras. 45 and 49). Subject to the deletion of the rule contained in the first part of subparagraph (a), on the understanding that it would be dealt with differently and in a separate provision (see paras. 55-61), to adding a reference to the extent or the nature of the assignee's right in proceeds with respect to competing rights of third parties and to limiting the rule in subparagraph (b) to proceeds that were receivables, the Working Group adopted the substance of subparagraph (b) and referred it to the drafting group.

Subparagraph (c)

54. Recalling its decision that subparagraph (c) should be merged with subparagraph (a) (ii) (see para. 47), the Working Group adopted the substance of subparagraph (c) and referred it to the drafting group (see, however, para. 147).

New proposed text

55. The Working Group continued its discussion on draft article 24 on the basis of a proposal that read as follows:

"1. With the exception of matters that are settled elsewhere in this Convention and subject to articles 25 and 26:

"(a) With respect to the rights of a competing claimant, the law of the State in which the assignor is located governs:

- (i) the characteristics and priority of the right of an assignee in the assigned receivable; and
- (ii) the characteristics and priority of the right of the assignee in proceeds that are receivables whose assignment is governed by this Convention; and

"(b) The existence and characteristics of the right of a competing claimant in proceeds described below and, with respect to the rights of such a competing claimant, the characteristics and priority of the right of the assignee in such proceeds are governed by:

- (i) in the case of money or negotiable instruments not held in a bank account or through a securities intermediary, the law of the State in which such money or instruments are located;
- (ii) in the case of investment securities held through a securities intermediary, the law of the State in which the securities intermediary is located;
- (iii) in the case of bank deposits, the law of the State in which the bank is located."

56. It was stated that the thrust of the proposal, which had been submitted to facilitate discussion and was subject to further refinement, was to provide a pointer to the law applicable to the most usual types of proceeds in the typical cases where a short-term receivable was assigned and/or the assignee did not receive payment (as, for example, in security transfers or in non-notification practices). It was also observed that the proposal was not intended to interfere with the characterization of rights in proceeds as personal or property rights since that matter was left to the applicable law. In addition, it was pointed out that the solutions offered were widely adopted and in particular the solution offered with respect to the law applicable to investment securities was being considered by the Hague Conference on Private International Law and the European Union. In that respect, the view was expressed that the formulation of the rule would have to be aligned with the rule that would emerge from those organizations. A note of caution was struck, however, since the focus of those organizations was not on the law applicable to investment securities as proceeds of receivables.

57. While interest was expressed in the proposal, a number of concerns were expressed. One concern was that, in dealing only with some types of asset, the proposed text might inadvertently result in creating special regimes, the application of which might not necessarily enhance certainty. In that connection, the Working Group was urged to consider carefully the relationship between the proposed text and the special proceeds rules contained in draft article 26. In order to address that concern, it was suggested that priority conflicts with respect to proceeds in general should be referred to the law of their location (*lex situs*). While there was no objection in principle, a note of caution was struck that it might not be feasible to agree on a *lex situs* rule that would be generally applicable. It was stated that the proposal dealt with the most likely proceeds of receivable and would cover the vast majority of cases. Therefore, it was observed, an effort should be made to address the law applicable to priority issues with respect to those assets as a matter of priority, without shying away from preparing a special rule on the sole ground that the preparation of a generally applicable rule might not be feasible. In that connection, some doubt was expressed as to the appropriateness of reintroducing into the draft convention as proceeds assets that had been excluded as receivables. It was stated that any work on investment securities in particular would need to be coordinated with the work under way at the Hague Conference. The Working Group noted that an expert group meeting might be held with the participation of experts on private international law, in particular from the Hague Conference, in order to consider that matter, as well as the treatment of security interests issues from a private international law point of view, which was one of the subjects to be considered in a study being prepared by the secretariat. Another concern was that the proposed text might impact on domestic law notions with respect to proceeds and characterization of rights in proceeds. In response, it was stated that the proposal was not intended to address the personal or property nature of rights in proceeds but rather left that matter to domestic law. It was also stated that in adopting a *lex situs* approach, the proponents of the proposal were mindful of the need to adequately

protect the rights of parties extending credit to the assignor in reliance on those assets.

58. Yet another concern was that the *lex situs* might not be appropriate in all cases where bank deposits were involved. It was stated that, in some countries, priority issues with respect to proceeds from deposit accounts were subject to the law of the assignor's location. In response, it was argued that referring those issues to the law of the location of the bank was appropriate for a number of reasons, including addressing regulatory, money-laundering and State-guarantee issues. It was agreed, however, that, in view of the divergent views expressed, States would need time to consult in advance of the next Commission session on the appropriate applicable law policy.

59. In the discussion, a number of issues were identified on which further refinement would be needed. One issue was that of location. It was stated that it would need to be clarified whether, in the case of banks, the location of the head-office or of a branch office also was meant. Another issue was the exact meaning of the terms "investment securities" and "intermediary". Yet another issue was whether "proceeds" meant the immediate proceeds of the receivables or also proceeds of proceeds. Yet another issue was the distinction drawn between negotiable instruments held and not held in a bank account or through a securities intermediary.

60. As to the first part of paragraph 1 (b), it was suggested that it should be deleted or be reflected only in the report of the Working Group, since a number of concerns had been expressed in that regard (see para. 42) and the text had not been presented in a separate rule as had been agreed upon (see para. 50). While it was admitted that the matter had not been sufficiently discussed in that context, that suggestion was objected to since deleting the text might inadvertently result in losing sight of the problem dealt with in that provision. After discussion, it was agreed that the text could be preserved in draft article 24 on the understanding that it would appear in a separate paragraph and within separate square brackets.

61. After discussion, it was agreed that the proposal was valuable and should be retained in the text of draft article 24. It was also agreed that, in view of the concerns expressed about whether the draft convention should include private international law rules dealing with priority issues with respect to types of asset that were not receivables and about which the appropriate applicable law should be, and the issues identified for further refinement, the proposed text should be retained within square brackets. In addition, it was agreed that the first part of paragraph 1 (b) in the proposed text, which dealt with a separate issue, should be reflected in a separate paragraph and within separate square brackets. Furthermore, it was agreed that, in order to provide an alternative presentation of the matters covered in paragraph 1 whereby paragraph 1 (a) would deal with priority in respect of receivables and paragraph 1 (b) would deal with priority in proceeds, paragraph 1 (a) (ii) should be moved to paragraph 1 (b) and be placed within separate square brackets, pending determination by the Commission of the placement of that provision.

Special priority rules

62. The view was expressed that special priority rules should be devised with respect to receivables owed under insurance policies and negotiable instruments transferred by delivery without a necessary endorsement. It was stated that the assignment of insurance receivables had not been excluded from the scope of the draft convention, while draft article 4, paragraph 1 (b) was not sufficient to exclude such transfers of negotiable instruments. It was also observed that priority conflicts with respect to insurance receivables were typically referred to the law of the insurer's location, while priority with respect to negotiable instruments was referred to the law of their location. After discussion, the Working Group agreed that the rule in draft article 24 was sufficient with respect to insurance receivables. As to transfers of negotiable instruments by mere delivery without a necessary endorsement, the Working Group noted that the intent of draft article 4, paragraph 1 (b) was to exclude transfers of negotiable instruments, whether made by mere delivery or by delivery and endorsement.⁷ In view of the ambiguity, however, of draft article 4, paragraph 1 (b), the Working Group decided that the matter should be brought to the attention of the Commission for further clarification.

63. In the discussion, the view was expressed that transfers of negotiable instruments by a book entry into a depository's accounts should also be excluded. It was stated that draft article 4, paragraph 1 (b) was not sufficient to ensure that result, since no delivery occurred in such transfers. It was also observed that draft article 4, paragraph 2 (b) or (f) might be equally insufficient to exclude such transfers, since they could involve negotiable instruments that would not fall under the category of "investment securities". In addition, it was pointed out that the exclusion of such transfers was necessary, since those instruments might call for special treatment as regards the law applicable to priority conflicts. Taking note of the matter, the Working Group decided to discuss it in the context of draft article 4.⁸

Article 25. Public policy and preferential rights

64. The text of draft article 25 as considered by the Working Group was as follows:

"1. The application of a provision of the law of the State in which the assignor is located may be refused by a court or other competent authority only if that provision is manifestly contrary to the public policy of the forum State.

"2. In an insolvency proceeding commenced in a State other than the State in which the assignor is located, any preferential right which arises under the law of the forum State and is given priority status over the rights of an assignee in insolvency proceedings under the law of that State has such priority notwithstanding article 24. A State may deposit at any time a declaration identifying those preferential rights."

⁷Ibid., para. 29.

⁸As the Working Group did not have the time to consider draft article 4, the matter was left to the Commission.

65. The concern was expressed that paragraph 2 was formulated in an overly broad way and might inadvertently result in giving priority even to consensual rights and even in cases in which the forum might not wish to apply its own rules and to give priority to preferential rights existing under its own law since no fundamental policy issue might be involved in a particular case. In order to address that concern, the suggestion was made that reference should be made to preferential rights arising by operation of law and to the discretion of the forum to determine whether to apply its own rules. Subject to that change, the Working Group adopted the substance of draft article 25 and referred it to the drafting group.

Article 26. *Special proceeds rules*

66. The text of draft article 26 as considered by the Working Group was as follows:

“1. If proceeds of the assigned receivable are received by the assignee, the assignee is entitled to retain those proceeds to the extent that the assignee’s right in the assigned receivable had priority over competing rights in the assigned receivable of the persons described in subparagraph (a) (i) to (iii) of article 24.

“2. If proceeds of the assigned receivable are received by the assignor, the right of the assignee in those proceeds has priority over competing rights in those proceeds of the persons described in subparagraph (a) (i) to (iii) of article 24 to the same extent as the assignee’s right had priority over the right in the assigned receivable of those persons if:

“(a) the assignor has received the proceeds under instructions from the assignee to hold the proceeds for the benefit of the assignee; and

“(b) the proceeds are held by the assignor for the benefit of the assignee separately and are reasonably identifiable from the assets of the assignor, such as in the case of a separate deposit account containing only cash receipts from receivables assigned to the assignee.”

67. The Working Group noted that paragraph 1 might inadvertently result in granting an assignee priority with respect to proceeds of proceeds even if another person had priority with respect to proceeds of the assigned receivable under the law of the assignor’s location. Recalling its decision to limit the application of the law of the assignor’s location to proceeds that were receivables (see para. 53), the Working Group agreed that that result was appropriate. In line with its decision with respect to draft article 24 (see para. 53), the Working Group decided that reference should be made in draft article 26 to “proceeds” in general and not to “proceeds of the assigned receivable” only. Subject to that change, the Working Group adopted the substance of draft article 26 and referred it to the drafting group.

Article 27. *Subordination*

68. The text of draft article 27 as considered by the Working Group was as follows:

“An assignee entitled to priority may at any time subordinate unilaterally or by agreement its priority in favour of any existing or future assignees.”

69. The Working Group adopted the substance of draft article 27 unchanged and referred it to the drafting group.

Chapter V. Conflict of laws

Scope or purpose of chapter V (article 1, para. 4)

70. Before entering into a discussion of the provisions of chapter V, the Working Group considered the general usefulness of chapter V and its scope as reflected in draft article 1, paragraph 4, which appeared within square brackets pending final determination of the scope or the purpose of chapter V. It was generally agreed that chapter V was useful for States that did not have any rules on the law applicable to assignment-related issues or did not have adequate rules on all such issues. It was also agreed that, to the extent that the law applicable to priority issues was far from clear even in States with sufficiently developed private international law rules, chapter V usefully resolved that matter for the benefit of all States. It was further agreed that, as a matter of policy, if, in the absence of a substantive law solution to a commercial law problem, no solution was offered at all, the unification of the law of international trade, which was at the heart of UNCITRAL’s mandate, could not be sufficiently advanced. Furthermore, it was widely felt that the possibility for an opting-out by States sufficiently addressed the concern of some States that such an approach might not be appropriate as a matter of policy or might lead to conflicts with existing conventions, such as the European Union Convention on the Law Applicable to Contractual Obligations (Rome, 1980; “the Rome Convention”). The suggestion that was made in that connection to make chapter V subject to an opt-in did not attract sufficient support. It was felt that an opt-in by States would inadvertently result in giving the wrong impression that chapter V was not an integral and necessary part of the draft convention.

71. As to the scope of chapter V, it was noted that, under draft article 1, paragraph 4, chapter V could apply to transactions falling fully within the scope of the draft convention as a whole (i.e. to international assignments of receivables or to assignments of international receivables, provided that the relevant party was located in a Contracting State and the relevant transaction was not excluded) or to transactions falling outside the scope of the provisions of the draft convention outside chapter V (in view of the fact that, unlike those provisions, chapter V could apply, irrespective of whether any party was located in a Contracting State). It was also noted that with respect to transactions that were fully within the scope of the draft convention chapter V would usefully supplement the rest of the draft convention, filling any gaps left, while, with respect to transactions that were outside the scope of the provisions of the draft convention outside chapter V, chapter V would provide a second layer of unification, a mini-convention like chapter VI of the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (New York, 1995; “the Guarantee and Standby Convention”).

72. Strong support was expressed for draft article 1, paragraph 4. It was widely felt that there was no reason to

require for the application of chapter V a territorial connection between an assignment and a Contracting State. A suggestion, however, to further extend the scope of chapter V by making its application independent of the definition of internationality in draft article 3 did not attract sufficient support. As to the placement of the rule contained in draft article 1, paragraph 4, it was agreed that it should be retained in draft article 1, since it contained an exception to the rule on territorial connection contained in article 1, paragraphs 1 and 3.

73. In order to ensure that, in cases in which both chapter V and the rest of the draft convention would be applicable, States would apply first the rest of the draft convention and then chapter V, it was suggested that a rule dealing with the hierarchy between chapter V and the rest of the draft convention should be inserted at the beginning of chapter V. It was also suggested that, for the sake of clarity as to the scope of chapter V, that provision should refer back to draft article 1, paragraph 4. There was broad support for both suggestions.

74. Another suggestion to address the hierarchy between chapter V and the private international law rules of the forum did not attract sufficient support. It was widely felt that, to the extent that the forum was a Contracting State and chapter V covered an issue, chapter V would displace the equivalent private international law rules of the forum, while, to the extent that the forum was not in a Contracting State or chapter V did not address a matter, chapter V would be supplemented by the private international law rules of the forum. It was also agreed that that matter could be clarified in the commentary and in any case did not need to be addressed in draft article 7, paragraph 2. It was further agreed that the commentary should also clarify that the possibility of applying general principles or the law applicable by virtue of the private international rules of the forum extended only to the substantive law provisions of the draft convention.⁹

75. Subject to the deletion of the square brackets, the Working Group adopted the substance of draft article 1, paragraph 4 and referred it to the drafting group. The preparation and the inclusion of a new provision on the hierarchy between chapter V and the rest of the draft convention along the lines described in paragraph 73 above was also referred to the drafting group.

Form of assignment

76. The suggestion was made that a new provision should be included in chapter V to address the law applicable to the formal validity of the assignment and the contract of assignment. The matter was referred to an ad hoc group that undertook to present a proposal (see para. 174).

Article 28. Law applicable to the rights and obligations of the assignor and the assignee

77. The text of draft article 28 as considered by the Working Group was as follows:

“1. [With the exception of matters which are settled in this Convention,] the rights and obligations of the assignor and the assignee under the contract of assignment are governed by the law expressly chosen by the assignor and the assignee.

“2. In the absence of a choice of law by the assignor and the assignee, their rights and obligations under the contract of assignment are governed by the law of the State with which the contract of assignment is most closely connected. In the absence of proof to the contrary, the contract of assignment is presumed to be most closely connected with the State in which the assignor has its place of business. If the assignor has more than one place of business, reference is to be made to the place of business most closely connected to the contract. If the assignor does not have a place of business, reference is to be made to the habitual residence of the assignor.

“3. If the contract of assignment is connected with one State only, the fact that the assignor and the assignee have chosen the law of another State does not prejudice the application of the law of the State with which the assignment is connected to the extent that law cannot be derogated from by contract.”

78. It was noted that the requirement for an express choice of law in paragraph 1 and the rebuttable presumption in paragraph 2 might run against generally acceptable private international law rules and be unnecessarily rigid. It was also noted that, after the decision of the Working Group to limit the application of chapter V to assignments with an international element under draft article 3 (see paras. 72 and 75), the vast majority of cases in which chapter V could apply would involve an international element. In view of that fact, it was agreed, paragraph 3 would not be necessary.

79. After discussion, the Working Group agreed that the word “expressly” in paragraph 1 and the second sentence of paragraph 2 should be deleted. The Working Group also agreed that paragraph 3 should be deleted on the understanding that the commentary would refer to the very limited cases in which the draft convention might apply to purely domestic transactions (i.e. to subsequent assignments in a chain of assignments in which a prior assignment was governed by the draft convention). Subject to those changes, the Working Group adopted the substance of draft article 28 and referred it to the drafting group.

Article 29. Law applicable to the rights and obligations of the assignee and the debtor

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

“[With the exception of matters which are settled in this Convention,] the law governing the receivable to which the assignment relates determines the enforceability of contractual limitations on assignment, the relationship between the assignee and the debtor, the conditions under which the assignment can be invoked against the debtor and any question whether the debtor’s obligations have been discharged.”

⁹A/55/17, para. 124.

81. It was noted that, in view of the limitation of the scope of application of the draft convention to assignments of contractual receivables, the law governing the receivable could be only the law of the original contract. It was, therefore, suggested that draft article 29 should refer directly to the law of the original contract. In addition, it was suggested that, in order to ensure consistency and avoid raising questions of interpretation, the word “effectiveness” should be substituted for the word “enforceability”. Moreover, it was suggested that the effectiveness of contractual limitations should be qualified by reference to the relationship between the assignee and the debtor. It was further suggested that the commentary could usefully clarify that rights of set-off arising from the original contract or related contracts were subject to the law of the original contract. It was stated, however, that the commentary should clarify that the existence, but not necessarily the exercise, of a contractual right of set-off was subject to the law governing the contract. The Working Group adopted all those suggestions.

82. In the discussion, the suggestion was also made that draft article 29 should cover not only contractual but also statutory limitations. That suggestion was objected to. It was stated that statutory limitations were intended to protect the rights of the assignor or the debtor, appeared in various forms, were the result of *lois de police* the application of which was territorially limited and were, in any case, sufficiently covered in draft article 31.

83. Furthermore, the suggestion was made that the rule contained in draft article 29 should be repeated in the context of draft article 20. It was stated that such an approach could ensure that the benefits to be derived from the application of draft article 29 would not be lost if a State opted out of chapter V. It was also stated that such an approach would be in line with the approach followed with respect to issues of priority. The Working Group received that suggestion with mixed feelings. On the one hand, the concern was expressed that including yet another private international law provision in the substantive law part of the draft convention might raise questions of legislative policy and make the draft convention less acceptable to States. On the other hand, the suggestion was received with interest and support, since it was consistent with the overall aims of the draft convention. It was stated, however, that that suggestion raised a very important matter and, therefore, needed to be carefully considered in consultation with representatives of the industry. It was also pointed out that matters to be considered included whether the contents of draft article 29 should be repeated in draft article 20 or whether a State should be given additional options as to chapter V (i.e. to opt out of chapter V with the exception of provisions such as draft article 29). It was also stated that, if draft article 29 were to be repeated in draft article 20, there might be a need to include also in that provision a reference to mandatory law and public policy. After discussion, the Working Group decided that the matter should be referred to the Commission (see also para. 111).

84. Subject to the changes referred to in paragraph 81 above, the Working Group adopted the substance of draft article 29 and referred it to the drafting group.

Article 30. *Law applicable to competing rights of other parties*

85. The text of draft article 30 as considered by the Working Group was as follows:

“1. The law of the State in which the assignor is located governs:

“(a) the extent of the right of an assignee in the assigned receivable and the priority of the right of the assignee with respect to competing rights in the assigned receivable of:

- (i) another assignee of the same receivable from the same assignor, even if that receivable is not an international receivable and the assignment to that assignee is not an international assignment;
- (ii) a creditor of the assignor; and
- (iii) the insolvency administrator;

“(b) the existence and extent of the right of the persons listed in paragraph 1 (a) (i) to (iii) in proceeds of the assigned receivable, and the priority of the right of the assignee in those proceeds with respect to competing rights of such persons; and

“(c) whether, by operation of law, a creditor has a right in the assigned receivable as a result of its right in other property of the assignor, and the extent of any such right in the assigned receivable.

“2. The application of a provision of the law of the State in which the assignor is located may be refused by a court or other competent authority only if that provision is manifestly contrary to the public policy of the forum State.

“3. In an insolvency proceeding commenced in a State other than the State in which the assignor is located, any preferential right which arises under the law of the forum State and is given priority status over the rights of an assignee in insolvency proceedings under the law of that State has such priority notwithstanding paragraph 1 of this article. A State may deposit at any time a declaration identifying those preferential rights.”

86. It was noted that draft article 30 repeated the rules contained in draft articles 24 and 25, since chapter V could apply to transactions outside the scope of chapters I through IV of the draft convention (i.e. irrespective of whether the relevant party was located in a Contracting State; see draft article 1, para. 4). It was also noted that paragraph 1 should be aligned with draft article 24 as revised, while paragraph 2 might not be necessary as it repeated the rule contained in draft article 32. It was suggested that the last sentence of paragraph 3 should be deleted, since chapter V applied irrespective of whether the relevant party was located in a Contracting State that could make a declaration. Subject to those changes, the Working Group adopted the substance of draft article 30 and referred it to the drafting group.

Article 31. *Mandatory rules*

87. The text of draft article 31 as considered by the Working Group was as follows:

“1. Nothing in articles 28 and 29 restricts the application of the rules of the law of the forum State in a situation where they are mandatory irrespective of the law otherwise applicable.

“2. Nothing in articles 28 and 29 restricts the application of the mandatory rules of the law of another State with which the matters settled in those articles have a close connection if and in so far as, under the law of that other State, those rules must be applied irrespective of the law otherwise applicable.”

88. It was noted that, following generally acceptable principles of private international law, draft article 31 permitted the forum to set aside rules of the applicable law and apply its own mandatory rules or those of another State. It was also noted that setting aside the priority provisions of the applicable law was not allowed on the understanding that those provisions would be of a mandatory nature themselves and that setting them aside could result in uncertainty that would have a negative impact on the cost or the availability of credit. It was also noted that draft article 30, paragraph 3 contained a specific rule that was sufficient in that respect. After discussion, the Working Group adopted the substance of draft article 31 unchanged and referred it to the drafting group.

Article 32. *Public policy*

89. The text of draft article 32 as considered by the Working Group was as follows:

“With regard to matters settled in this chapter, the application of a provision of the law specified in this chapter may be refused by a court or other competent authority only if that provision is manifestly contrary to the public policy of the forum State.”

90. It was noted that draft article 32 was a rule that was typically found in private international law texts and that its main difference with draft article 31 was that its application could result in setting aside rules of the applicable law but not in the application of rules of the forum State. After discussion, the Working Group adopted the substance of draft article 32 unchanged and referred it to the drafting group.

Chapter VI. *Final provisions*

Article 33. *Depositary*

91. The text of draft article 33 as considered by the Working Group was as follows:

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

92. The Working Group adopted the substance of draft article 33 unchanged and referred it to the drafting group.

Article 34. *Signature, ratification, acceptance, approval, accession*

93. The text of draft article 34 as considered by the Working Group was as follows:

“1. This Convention is open for signature by all States at the Headquarters of the United Nations, New York, until

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

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

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

94. In connection with paragraph 1, it was agreed that, given the complexity of the matters dealt with in the draft convention, the period during which, once concluded, it should be open for signature by States should be two years. On that understanding, the Working Group adopted the substance of draft article 34 unchanged and referred it to the drafting group.

Article 35. *Application to territorial units*

95. The text of draft article 35 as considered by the Working Group was as follows:

“1. If a State has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at any time, declare that this Convention is to extend to all its territorial units or only one or more of them, and may at any time substitute another declaration for its earlier declaration.

“2. These declarations are to state expressly the territorial units to which the Convention extends.

“3. If, by virtue of a declaration under this article, this Convention does not extend to all territorial units of a State and the assignor or the debtor is located in a territorial unit to which the Convention does not extend, this location is considered not to be in a Contracting State.

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

96. It was noted that draft article 35 was intended to ensure that a federal State would be able to adopt the draft convention, even if it did not wish to or could not, under internal law, have it apply to all territorial units. The Working Group adopted draft article 35 unchanged and referred it to the drafting group. It was also agreed that a new provision should be included in the draft convention to deal with applicable law issues in the case of a federal State. Language along the following lines was proposed:

“If a State has two or more territorial units whose law may govern a matter referred to in chapters IV and V of this Convention, a reference in those chapters to the law of a State in which a person or property is located means

the law applicable in the territorial unit in which the person or property is located, including rules that render applicable the law of another territorial unit of that State. Such a State may specify by declaration at any time how it will implement this article.”

97. It was agreed that the proposed provision should be included in the draft convention right after draft article 35 within square brackets for further consideration by the Commission.

Article 36. Conflicts with other international agreements

98. The text of draft article 36 as considered by the Working Group was as follows:

“This Convention does not prevail over any international agreement which has already been or may be entered into and which contains provisions concerning the matters governed by this Convention[, provided that the assignor is located in a State party to such agreement or, with respect to the provisions of this Convention which deal with the rights and obligations of the debtor, the debtor is located in a State party to such agreement].”

99. Broad support was expressed in favour of the principle contained in draft article 36. Subject to further review of existing international agreements, it was widely felt that draft article 36 reflected normal practice in giving precedence to other conventions that dealt with matters governed by the draft convention. It was agreed that draft article 36 should also include a reference to the application of the debtor-related provisions of the draft convention by virtue of private international law rules. The suggestion was also made that reference should be made to the time when the assignor or the debtor should be located in a State party to an international convention. There was sufficient support for that suggestion. Subject to those changes, the Working Group adopted draft article 36 and referred it to the drafting group.

100. The Working Group next considered potential conflicts with the Ottawa Convention, the Inter-American Convention on the Law Applicable to International Contracts (Mexico City, 1994; “the Mexico City Convention”), the Rome Convention, the Unidroit draft Convention on International Interests in Mobile Equipment (“the mobile equipment convention”), the Guarantee and Standby Convention, the European Union Insolvency Regulation and regulations in general.

Ottawa Convention

101. It was widely felt that, in the case where both the draft convention and the Ottawa Convention applied to a particular transaction, the draft convention should prevail. It was stated that the scope of application of the draft convention was broader than the scope of the Ottawa Convention. It was also observed that the draft convention addressed issues that were left unaddressed in the Ottawa Convention. Language along the following lines was proposed: “Notwithstanding paragraph 1 of this article, this Convention prevails over the Ottawa Convention.”

102. The suggestion was made, however, that the draft convention should not affect the application of the Ottawa Convention to cases in which the debtor was located in a State that was party to the Ottawa Convention but not to the draft convention. It was stated that, in such a case, the rights of the assignee as against the debtor that might exist under the Ottawa Convention should be preserved. Language along the following lines was proposed: “Subject to ...[the rule in paragraph 101 above], nothing in this Convention precludes the application of the Ottawa Convention to the extent that it is applicable.” Subject to those changes, the Working Group adopted the substance of the proposed wording and referred it to the drafting group.

Mexico City and Rome Conventions

103. While it was noted that there were no conflicts between the draft convention and the Mexico City Convention, it was stated that the matter was currently being considered among States parties to that Convention. It was also noted that, after the changes made to draft article 28 (see para. 79), the potential for conflicts with the Rome Convention had been reduced. On the assumption that article 12 of the Rome Convention addressed priority issues (a matter that was far from being clear), it was stated that a conflict could arise with draft articles 24 and 30 of the draft convention. In order to eliminate the possibility for a conflict with draft article 24, the suggestion was made that draft article 24 should be moved to chapter V (which was subject to an opt-out) or be made subject to reservation. It was stated that the matter could be left to the Commission. That suggestion was strongly objected to. It was stated that casting any doubt as to the applicability of draft article 24 would significantly reduce the value of the draft convention, since draft article 24 was one of the most important provisions of the draft convention. It was also observed that draft article 36 was sufficient in dealing with any conflict with article 12 of the Rome Convention to the extent that such conflict would be resolved in favour of the Rome Convention. After discussion, the Working Group agreed that there was no need for an additional provision dealing with conflicts with the Rome Convention.

Unidroit draft Convention on International Interests in Mobile Equipment

104. Differing views were expressed with respect to conflicts between the draft convention and the mobile equipment convention. One view was that the assignment of receivables arising from the sale or lease of certain types of high-value mobile equipment, such as aircraft, should be excluded. It was stated that such receivables formed an integral part of equipment-financing practices and should be subject to a separate regime. It was also observed that such an approach would not affect practices, such as factoring, in view of the limited scope of the mobile equipment convention. In addition, it was stated that the matter could effectively be resolved by States at a diplomatic conference scheduled to take place in May 2001 for the adoption of the mobile equipment convention. Moreover, in view of the possibility that the assignment-related provisions of the mobile equipment convention might be aligned with the provisions of the draft convention, the potential for

conflict would be significantly reduced. Furthermore, it was said that, taking into account the decisions to be made by States at the diplomatic conference, the Commission could decide how to address the matter.

105. Another view was that the assignment of receivables arising from the sale or lease of mobile equipment should not be excluded from the scope of the draft convention. It was stated that an exclusionary approach would be inappropriate in view of the fact that, in several jurisdictions, receivables financing practices could involve the assignment of receivables to be covered by the mobile equipment convention. It was also observed that an exclusionary approach would inadvertently result in creating a gap until the mobile equipment convention was concluded and entered into force. Furthermore, it was pointed out that an exclusion was not necessary since, under draft article 36, any conflict would be resolved in favour of the mobile equipment convention. After discussion, the Working Group agreed that the matter did not need to be addressed by way of an outright exclusion or by way of a special provision dealing with conflicts. It was also agreed that draft article 36 was sufficient in that its application would result in giving precedence to the mobile equipment convention. The Working Group reached that decision on the understanding that the Commission might have to reconsider the matter in view of the decisions to be taken at the diplomatic conference scheduled to take place for the adoption of the mobile equipment convention.

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

106. The Working Group noted that, after the decision made by the Commission to exclude the application of independent guarantees and stand-by letters of credit,¹⁰ there was no potential for conflicts between the Guarantee and Standby Convention and the draft convention.

European Union Insolvency Regulation

107. It was noted that no conflicts arose with the European Union Insolvency Regulation, since: the notion of central administration was identical with the centre of main interests used in that Regulation; that Regulation did not affect rights in rem in a main insolvency proceeding; and, while that Regulation might affect rights in rem in a secondary insolvency proceeding (articles 2 (g), 4 and 28), article 25 would be sufficient to preserve, for example, super-priority rights and, in any case, the draft convention would not affect special insolvency rights.

Regulations

108. It was agreed that no reference needed to be made in draft article 36 to regulations of regional organizations. It was stated that, if there was a conflict between the draft convention and any regulations, the regulations would prevail in any case either because that would be the result of national law or because States members of the relevant regional organization would not adopt the draft convention in the first place.

Article 37. Application of chapter V

109. The text of draft article 37 as considered by the Working Group was as follows:

“A State may declare at any time that it will not be bound by chapter V.”

110. Noting that draft article 37 made it possible for a State to make a declaration even before it had become a Contracting State by ratification, acceptance, approval or accession, the Working Group agreed that reference should be made to “a State” rather than to “a Contracting State”.

111. In order to give States the option to exclude the application of chapter V in whole or in part, it was proposed that the words “or any part thereof” should be added after the words “chapter V”. While some support was expressed for the proposal, objections thereto were voiced on the ground that such an option would reduce legal certainty and predictability in the application of the draft convention, since different jurisdictions might retain different provisions of chapter V. Recalling its decision, however, to leave to the Commission the question whether draft article 29 should be repeated in draft article 20 so that it would not be subject to an opt-out by States (see para. 83), the Working Group also left the proposed amendment to draft article 37 to the Commission.

Article 38. Limitations relating to Governments and other public entities

112. The text of draft article 38 as considered by the Working Group was as follows:

“A State may declare at any time that it will not be bound by articles 11 and 12 if the debtor or any person granting a personal or property right securing payment of the assigned receivable is located in that State at the time of the conclusion of the original contract and is a Government, central or local, any subdivision thereof, or any public entity. If a State has made such a declaration, articles 11 and 12 do not affect the rights and obligations of that debtor or person.”

113. It was noted that draft article 38 was addressed to States that did not limit the assignability of sovereign receivables by statute, since statutory limitations were not affected by the draft convention (draft article 9, para. 3). It was stated that that limitation should be borne in mind in order not to overstate the import of draft article 38.

114. While support was expressed for the overall policy reflected in draft article 38, a number of suggestions were made as to the way in which that policy could be better implemented. One suggestion was that the wording of draft article 38 should be refined so as to give States the possibility of limiting the scope of the reservation to certain categories of public entities, rather than making it an across-the-board reservation. It was stated that States would be well advised to exercise restraint in making reservations under draft article 38, since such reservations might impair or reduce the ability of governmental entities to obtain access to credit at more favourable terms. Another suggestion was that reference should be made to an entity

¹⁰Ibid., para. 65.

constituted for a public purpose. It was observed that such an approach would ensure that States would have sufficient flexibility in excluding public entities, including commercial entities publicly owned or serving a public purpose. It was also pointed out that such an approach would avoid the use of the term “public entity” the meaning of which was not sufficiently clear and was likely to differ from State to State. Another suggestion was that States should be allowed to list in the same or a different declaration the types of entity to which they wished the declaration to apply. It was generally felt that that proposal would lead to enhanced transparency and predictability in the application of the draft convention. All those suggestions received sufficient support. Subject to those changes, the Working Group adopted the substance of draft article 38 and referred it to the drafting group.

Article 39. *Other exclusions*

115. The text of draft article 39 as considered by the Working Group was as follows:

“[A State may declare at any time that it will not apply the Convention to specific practices listed in a declaration. In such a case, the Convention does not apply to such practices if the assignor is located in such a State or, with respect to the provisions of this Convention which deal with the rights and obligations of the debtor, the debtor is located in such a State.]”

116. The Working Group heard expressions of both strong objection to and strong support for draft article 39. In favour of retaining draft article 39 it was argued that it would make the draft convention more acceptable to States. In that connection, it was stated that the provision would allow States that were not fully satisfied with the current exclusions to exclude further practices (e.g. foreign exchange transactions to the extent they were not already excluded or practices relating to consumer receivables unless language were included in the draft convention to ensure that consumer-protection legislation would not be interfered with).¹¹ It was also observed that the provision would make the draft convention a breathing and living text that could be easily adjusted to future developments that could not be foreseen at the present stage. In favour of deleting draft article 39, it was stated that the draft convention already contained an extensive list of exclusions and that the need to ensure certainty and uniformity in its application might be seriously jeopardized if States were allowed to make additional exclusions unilaterally. The Working Group took note of the differing views and decided to retain the provision within square brackets.

117. Without prejudice to a future decision on the matter, the Working Group proceeded to consider proposals as to the formulation of draft article 39. It was agreed that, in order to align the language in draft article 39 with the wording of draft article 4, paragraph 4, wording along the lines of “types of assignments” and “assignments of types of receivables” should be used instead of the expression “specific practices”. Furthermore, with a view to

circumscribing more clearly the effects of a declaration under draft article 39, it was proposed to substitute the second sentence of draft article 39 with a new second paragraph along the following lines:

“If a State makes a declaration under paragraph (1) of this article:

“(a) The Convention does not apply to such practices if the assignor is located at the time of the conclusion of the contract of assignment in such a State; and

“(b) The provisions of the Convention that affect the rights and obligations of the debtor do not apply if, at the time of the conclusion of the original contract, the debtor is located in such a State or the law governing the receivable is the law of such a State.”

118. Support was expressed for the proposed text. It was also agreed that it should refer to the time after the declaration took effect. Subject to the changes referred to in paragraph 117, the Working Group decided to retain draft article 39 within square brackets and referred it to the drafting group.

Article 40. *Application of the annex*

119. The text of draft article 40 as considered by the Working Group was as follows:

“1. A Contracting State may at any time declare that [it will be bound either by sections I and/or II or by section III of the annex to this Convention.] [it:

“(a) will be bound by the priority rules based on registration set out in section I of the annex and will participate in the international registration system established pursuant to section II of the annex;

“(b) will be bound by the priority rules based on registration set out in section I of the annex and will effectuate such rules by use of a registration system that fulfils the purposes of such rules [as set forth in regulations promulgated pursuant to section II of the annex], in which case, for the purposes of section I of the annex, registration pursuant to such a system shall have the same effect as registration pursuant to section II of the annex; or

“(c) will be bound by the priority rules based on the time of the contract of assignment set out in section III of the annex.

“2. For the purposes of article 24, the law of a Contracting State that has made a declaration pursuant to paragraph 1 (a) or 1 (b) of this article is the set of rules set forth in section I of the annex, and the law of a Contracting State that has made a declaration pursuant to paragraph 1 (c) of this article is the set of rules set forth in section III of the annex. The Contracting State may establish rules pursuant to which assignments made before the declaration takes effect shall, within a reasonable time, become subject to those rules.

“3. A Contracting State that has not made a declaration pursuant to paragraph 1 of this article may, pursuant to its domestic priority rules, utilize the registration system established pursuant to section II of the annex.]”

¹¹Ibid., paras. 170-172.

120. Noting that draft article 40 dealt with the application of the annex and in view of the doubt expressed as to whether the annex should be retained, the Working Group agreed to defer the discussion of draft article 40 until it had considered the annex (see para. 169).

Article 41. *Effect of declaration*

121. The text of draft article 41 as considered by the Working Group was as follows:

“1. Declarations made under article 35, paragraph 1 and articles 37 to 40 at the time of signature are subject to confirmation upon ratification, acceptance or approval.

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

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

“4. Any State which makes a declaration under article 35, paragraph 1 and articles 37 to 40 may withdraw it at any time by a formal notification in writing addressed to the depositary. Such withdrawal takes effect on the first day of the month following the expiration of six months after the date of the receipt of the notification of the depositary.

“[5. A declaration or its withdrawal does not affect the rights of parties arising from assignments made before the date on which the declaration or its withdrawal takes effect.]”

122. It was noted that paragraphs 1 to 4 reflected standard provisions usually included in international conventions. In response to a question, it was noted that a declaration made at the time of signature needed to be confirmed at the time of ratification, acceptance or approval, since before that time the declaration was not binding.

123. The substance of those paragraphs was adopted by the Working Group unchanged and referred to the drafting group. As to paragraph 5, on the understanding that the provision addressed similar issues as those addressed in draft article 43, paragraph 3 and draft article 44, paragraph 3 but was more complex than those provisions, the Working Group deferred discussion until it had completed its consideration of those provisions (see para. 134).

Article 42. *Reservations*

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

“No reservations are permitted except those expressly authorized in this Convention.”

125. It was noted that, in accordance with standard treaty law practice, draft article 42 was aimed at ensuring that no reservations other than those provided in draft articles 37 to 39 would be made by Contracting States.

126. The suggestion was made that the wording “except those expressly authorized in this Convention” could be deleted or draft article 42 should be recast to refer to declarations. In support of that suggestion, doubt was expressed as to whether the draft convention provided for any reservations. It was also observed that equating declarations with reservations might inadvertently result in the application of reservation-related provisions of treaty law, including provisions on reciprocity. Doubt was expressed as to the appropriateness of those suggestions. After discussion, the Working Group agreed that the issue could not be resolved without prior consultation and left the matter to the Commission.

Article 43. *Entry into force*

127. The text of draft article 43 as considered by the Working Group was as follows:

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

“2. For each State which becomes a Contracting State to this Convention after the date of the deposit of the fifth instrument of ratification, acceptance, approval or accession, this Convention enters into force on the first day of the month following the expiration of six months after the date of the deposit of the appropriate instrument on behalf of that State.

“[3. This Convention applies only to assignments made on or after the date when the Convention enters into force in respect of the Contracting State referred to in article 1, paragraph 1.]”

128. It was stated that paragraph 3, which appeared within square brackets, should refer to which party would need to be located in the State making a declaration, to the relevant time when the relevant party should be located in a Contracting State and to priorities between assignments made before and after the entry into force of the draft convention. Language along the following lines was proposed:

“This Convention applies only to assignments for which the contract of assignment is concluded on or after the date when this Convention enters into force in respect of the Contracting State referred to in article 1, subparagraph 1 (a), provided that the provisions of this Convention that deal with the rights and obligations of the debtor apply only to original contracts concluded on or after the date when the Convention enters into force with respect to the Contracting State referred to in article 1, paragraph 3.”

129. General support was expressed in favour of the policy underlying the proposal. As a matter of drafting, it was suggested that reference should be made to assign-

ments since the draft convention could not apply to original contracts. Support was expressed for that suggestion on the understanding that it should not affect debtors in original contracts concluded before the draft convention entered into force.

130. It was recalled that draft article 24, subparagraph (a) (i) addressed priority conflicts between convention and non-convention assignees in the case where a domestic assignment of domestic receivables was involved. In that connection, the view was expressed that draft article 43 should also address priority conflicts with respect to an assignment made before the draft convention entered into force and an assignment made after the draft convention entered into force. As a matter of policy, it was suggested that priority should be given to the assignment made before the draft convention entered into force. In support, it was pointed out that the rights of parties relying on receivables assigned before the draft convention entered into force should not be frustrated. It was also said that the rights of those parties should be preferred since such parties could not predict that the draft convention would enter into force, while parties to an assignment made after the draft convention entered into force could expect that the receivables might have been assigned before the draft convention entered into force. Language along the following lines was proposed:

“If there is one assignment before the entry into force and another after entry into force of this Convention, the earlier assignee has priority over the later assignee, if, under the law that would determine priority in the absence of this Convention, the earlier assignee had priority.”

131. Subject to the changes mentioned in paragraphs 128 and 130 above, the Working Group adopted the substance of draft article 43, decided that the brackets around paragraph 3 should be deleted and referred the draft article to the drafting group.

Article 44. *Denunciation*

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

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

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

“[3. The Convention remains applicable to assignments made before the date on which the denunciation takes effect.]”

133. The suggestion was made that paragraph 3, which appeared within square brackets, should be aligned with draft article 43, paragraph 3, as revised (see paras. 128 and 130) in order to address the questions of which party

needed to be located in the State making a declaration and at what time, and the question of priority as between an assignment made before denunciation took effect and an assignment made after denunciation took effect. Subject to that change, the Working Group adopted the substance of draft article 44, decided that the brackets around paragraph 3 should be deleted and referred the draft article to the drafting group.

Draft article 41, paragraph 5

134. Recalling its decision to defer discussion of draft article 41, paragraph 5 until it had considered draft article 43, paragraph 3 and draft article 44, paragraph 3 (see para. 123), the Working Group resumed its discussion on draft article 41, paragraph 5 and decided that it should be aligned with draft article 43, paragraphs 3 and draft article 44, paragraph 3 (see paras. 128, 130 and 133). Subject to that change, the Working Group adopted the substance of draft article 41, paragraph 5, decided that the square brackets around that provision should be deleted and referred it to the drafting group.

Article X. *Revision and amendment*

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

“1. At the request of not less than one third of the Contracting States to this Convention, the depositary shall convene a conference of the Contracting States for revising or amending it.

“2. Any instrument of ratification, acceptance, approval or accession deposited after the entry into force of an amendment to this Convention is deemed to apply to the Convention as amended.”

136. Noting that draft article X was a standard provision found in other UNCITRAL texts (see, e.g. article 32 of the United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg Rules)), the Working Group adopted the substance of draft article X unchanged and referred it to the drafting group.

III. ANNEX TO THE DRAFT CONVENTION

General remarks

137. It was noted that, in view of the possibility that the law of the assignor's location might not have any or, at least, modern priority rules, the annex set forth two sets of alternative priority rules for States to choose from. It was also noted that, while the rules set forth in the annex were intended to serve as a model for national legislation, they were not designed to form a complete model law and that, therefore, States would need to prepare additional provisions.

138. The concern was expressed that the annex could not achieve its objectives and might even do harm. It was stated that, in order to provide useful guidance, the annex

should contain a more detailed set of rules. It was also observed that, in providing so many alternatives, the annex could be confusing to States. In order to address that concern, the suggestion was made that the annex should be deleted or referred to the Commission with the question on whether it should be retained, in particular in view of the possible future work of the Commission in the field of secured credit law. Both suggestions were strongly objected to. It was widely felt that, in setting forth two alternative priority systems for States to choose from, the annex provided useful guidance to States that wished to modernize their priority systems. In particular, the reference to a registration-based priority system was said to have an educational and practical value that should be preserved for the draft convention to be really useful to States.

139. In that connection, the suggestion was made that, in order to enhance the educational value of the draft convention and to avoid sending conflicting signals, the reference in the annex to the priority system based on the time of the contract of assignment should be deleted. That suggestion was strongly objected to. It was widely felt that, in view of the lack of agreement in the Working Group as to which was the most appropriate priority system, the annex should reflect all the alternatives in a balanced way. In that connection, it was observed, however, that in leaving aside the priority system based on the time of notification of the debtor, the annex was not fully consistent with that policy. It was, therefore, suggested that reference should be made in the annex to that priority system as well. There was sufficient support for that suggestion. After discussion, the Working Group decided that the annex should be retained and revised to include a reference to the priority system based on the time of notification of the debtor as well.

140. The Working Group next considered the scope of the provisions of the annex. It was stated that, under draft article 40, the provisions of the annex chosen by the State of the assignor's location would apply as the law of the assignor's location in accordance with draft article 24. As a result, it was observed, the provisions of the annex should apply with respect to priority conflicts covered by draft article 24. In particular, it was explained that the terms "assignor", "assignee", "creditors of the assignor", "insolvency administrator", "assignment" and "receivable", as used in the annex, should be understood as having the meaning given to them in the draft convention. It was also explained that the priority rules in the annex should cover the characteristics of the right of an assignee and conflicts of priority in receivables and proceeds to the extent those matters were covered in draft article 24. After discussion, the Working Group agreed that the priority provisions of the annex should be aligned with draft article 24.

141. In order to further enhance the acceptability of the registration-based priority provisions of the annex, the Working Group agreed that States opting into those provisions of the annex by way of a declaration made in accordance with draft article 40 could list in the declaration types of conflicts they did not wish to subject to a registration-based priority regime (e.g. conflicts between assignees and the assignor's suppliers). The matter was referred to the drafting group subject to further consideration of draft article 40.

142. Noting the interplay between draft article 40, which dealt with the options offered to States with respect to the annex, and the provisions of the annex, the Working Group proceeded to consider those provisions, on the understanding that it might need to revisit them once it had finalized draft article 40.¹²

Section I. Priority rules based on registration

Article 1. Priority among several assignees

143. The text of draft article 1 of the annex as considered by the Working Group was as follows:

"As between assignees of the same receivable from the same assignor, priority is determined by the order in which data about the assignment are registered under section II of this annex, regardless of the time of transfer of the receivable. If no such data are registered, priority is determined on the basis of the time of the assignment."

144. A question was raised as to the usefulness of the rule contained in the second sentence of draft article 1 of the annex. In response, it was stated that registration was non-mandatory and conferred priority only to the extent that a right was validly created. As a result, if parties had chosen not to register and a conflict had arisen with respect to the rights of those parties, the rule contained in the second sentence of draft article 1 of the annex would be necessary to address that conflict. It was also observed that that result could not be obtained in the absence of that rule, in particular since a State opting into section I could not opt into section III as well which contained a time-of-assignment priority rule.

145. The suggestion was made that in the second sentence of draft article 1 of the annex reference should be made to the time of "the contract of assignment" rather than to "the assignment". There was support for that suggestion, since a priority rule referring to the time of the actual transfer would be difficult to apply in the case of bulk assignments of future receivables. Subject to that change and the changes referred to in paragraph 140 above, the Working Group adopted the substance of draft article 1 of the annex and referred it to the drafting group.

Article 2. Priority between the assignee and the insolvency administrator or creditors of the assignor

146. The text of draft article 2 of the annex as considered by the Working Group was as follows:

"[Subject to article 25 of this Convention,] an assignee has priority over an insolvency administrator and creditors of the assignor, including creditors attaching the assigned receivables, if the receivables were assigned, and data about the assignment were registered under section II of this annex, before the commencement of the insolvency proceeding or attachment."

¹²However, the Working Group did not revisit the provisions of the annex.

147. On the understanding that draft article 2 of the annex would apply by way of draft article 24 of the draft convention, which was subject to draft articles 25 and 26, it was agreed that the bracketed language could be deleted. It was also agreed that, in order to sufficiently address conflicts involving attaching creditors outside an insolvency proceeding, draft article 2 of the annex should refer to "attachment or other judicial act or event". Furthermore, it was agreed that creditors of the assignor with a right in a tangible asset that extended by operation of law in the receivables flowing from the sale or lease of that asset should be considered as assignees and not as creditors of the assignor. As a result, conflicts involving such parties should be subject to draft article 1 rather than to draft article 2 of the annex. Recalling its decision to treat such parties as creditors of the assignor in the context of draft article 24 (see paras. 47 and 54), the Working Group decided that draft article 24 should be revised to reflect the understanding of the Working Group that such parties should be treated as assignees.

148. In response to a question, it was confirmed that priority conflicts between domestic and foreign assignees of domestic receivables would be addressed by draft article 2 of the annex, since draft article 24 referred it to the law of the assignor's location and, after a State had opted into section I of the annex, draft article 2 would be the relevant rule of the law of the assignor's location. It was also confirmed that, in view of the fact that conflicts with a domestic assignee of a domestic receivable were covered by draft article 2, such assignees should be able to register in order to obtain priority.

149. Subject to the changes referred to in paragraph 147 above, the Working Group adopted draft article 2 of the annex and referred it to the drafting group.

Section II. Registration

Article 3. Establishment of a registration system

150. The text of draft article 3 of the annex as considered by the Working Group was as follows:

"A registration system will be established for the registration of data about assignments under this Convention and the regulations to be promulgated by the registrar and the supervising authority. The regulations will prescribe in detail the manner in which the registration system will operate, as well as the procedure for resolving disputes relating to that operation."

151. Recalling its earlier discussion of the question whether a domestic assignee of domestic receivables should be able to register and obtain priority (see para. 148), the Working Group agreed that language along the following lines should be substituted for the words "under this Convention and": "..., even if the assignment is not an international assignment and the receivable is not an international receivable, pursuant to".

152. It was noted that, while significant responsibility was left to the supervising authority and the registrar, the draft convention did not include any provisions as to the manner in which they might be appointed. Differing views were expressed as to whether the draft convention should identify the registrar and the supervising authority or include a mechanism for their selection. One view was that, at the present stage, it would be very difficult to identify the registrar or the supervising authority. It was also observed that locking in a particular procedure for the selection of the registrar and the supervising authority or establishing a high threshold as to that procedure would be inappropriate, since such an approach could inadvertently result in delaying the initiation of the registration process.

153. Another view was that it was necessary for the draft convention to establish a mechanism for the registration rules of the annex to come into force. It was stated that, in the absence of such a mechanism in the draft convention, the annex might never come to apply. It was suggested that the link between the draft convention and the registration system could be established by way of a provision along the lines of article X that would allow Contracting States to appoint a supervising authority and a registrar. Noting the different views, the Working Group deferred a final decision on draft article 3 of the annex to a later time so as to allow time for consultations (see para. 174).

Article 4. Registration

154. The text of draft article 4 of the annex as considered by the Working Group was as follows:

"1. Any person authorized by the regulations may register data with regard to an assignment at the registry in accordance with this Convention and the registration regulations. The data registered shall be identification of the assignor and the assignee, as provided in the regulations, and a brief description of the assigned receivables.

"2. A single registration may cover:

"(a) The assignment by the assignor to the assignee of more than one receivable;

"(b) An assignment not yet made;

"(c) The assignment of receivables not existing at the time of registration.

"3. Registration, or its amendment, is effective from the time that the data referred to in paragraph 1 are available to searchers. The registering party may specify, from options provided in the regulations, a period of effectiveness for the registration. In the absence of such a specification, a registration is effective for a period of five years. Regulations will specify the manner in which registration may be renewed, amended or discharged and, consistent with the annex, such other matters are necessary for the operation of the registration system.

"4. Any defect, irregularity, omission or error with regard to the identification of the assignor that would result in data registered not being found upon a search based on the identification of the assignor renders the registration ineffective."

Paragraph 1

155. The suggestion was made that the words “authorized by the regulations” should be deleted. It was stated that those words were redundant, since reference was made in the same provision to the fact that the registration was to be made “in accordance with ... the registration regulations”. There was sufficient support for that suggestion. The suggestion was also made that paragraph 1 should clarify that the description of the receivable did not need to be specific. The view was expressed, however, that the regulations could confirm the sufficiency of a non-specific description of the receivables. There was no objection to that view as long as it was understood that the regulations should deal with operational issues and not add any additional substantive requirements, such as specificity, for a registration to be effective. In response to a question, it was stated that, if the registry had the capability of identifying the assignor and the assignee by number, in particular in order to avoid language problems, it should be allowed to do so. Subject to the change referred to above, the Working Group adopted the substance of paragraph 1 and referred it to the drafting group.

Paragraph 2

156. In order to ensure that subparagraph (a) properly implemented the policy that a single registration would be sufficient, it was suggested that it should be supplemented by a reference to one or more assignments of present or future receivables. There was broad support for that suggestion.

157. The concern was expressed that subparagraph (a) might be going too far in allowing the registration even if an assignment was not made. In order to address that concern, the suggestion was made that subparagraph (a) should be deleted or its scope should be limited. That suggestion was objected to. It was stated that, for the assignee to be able to release funds, there was a need to ensure that registration could be effected as soon as possible (“pre-registration”). It was also observed that the concern expressed could be addressed if a reference were included in a separate provision as to the possibility for pre-registration and as to the way in which such pre-registration could be discharged if the assignment did not take place. Language along the following lines was proposed: “A registration may be made in advance of the assignment. Regulations will establish the procedure for discharge of a registration in the event that no assignment is actually made”. Support was expressed for that suggestion. Subject to that change and the change referred to in paragraph 156 above, the Working Group adopted the substance of paragraph 2 and referred it to the drafting group.

Paragraph 3

158. Doubt was expressed as to the efficiency of a system in which registration became effective only as of the time data became available to searchers. It was stated that delays in processing applications would be to the detriment of

registering parties. In response, it was stated that the system envisaged would be fully or partly electronic and that, as a result, registrations would be processed in a timely fashion. The suggestion was also made that the manner in which registrations could be “entered” into the record should also be left to regulations. No objection was voiced to that suggestion as long as it was understood that the regulations could not create additional hurdles for a registration to be effective. It was agreed that that result could be achieved if the words “consistent with this annex” were added at the beginning of the last sentence of paragraph 3, in particular if that sentence were to be reflected in a separate paragraph. Subject to that change, the Working Group adopted the substance of paragraph 3 and referred it to the drafting group.

Paragraph 4

159. It was suggested that the second reference to “identification” should be to “proper identification”. It was stated that, only upon proper identification of the assignor by a searcher, could it be determined whether an error had occurred as to the identification of the assignor. There was sufficient support for that suggestion. Subject to that change, the Working Group adopted the substance of paragraph 4 and referred it to the drafting group.

Article 5. Registry searches

160. The text of draft article 5 of the annex as considered by the Working Group was as follows:

“1. Any person may search the records of the registry according to identification of the assignor, as provided in the regulations, and obtain a search result in writing.

“2. A search result in writing that purports to be issued from the registry is admissible as evidence and is, in the absence of evidence to the contrary, proof of the data to which the search relates, including:

“(a) the date and time of registration; and

“(b) the order of registration.”

161. It was agreed that paragraph 2 (b) could be deleted, since the date and time was sufficient to determine the order of registration. The view was expressed that registration might not be that useful if it only provided proof of the date and time (hour) of registration. In response, it was observed that, unlike title registries, notice-filing registries such as the one envisaged in the annex served to put interested parties on notice that a right might exist and allow them to obtain additional information. It was also pointed out that, in various jurisdictions with a notice-filing system, parties with a legitimate interest had the right to obtain a copy of the assignment document from the assignor, a point that might usefully be made in the commentary. Subject to the deletion of paragraph 2 (b), the Working Group adopted draft article 5 of the annex and referred it to the drafting group.

Section III. Priority rules based on the time of the contract of assignment

Article 6. *Priority among several assignees*

162. The text of draft article 6 of the annex as considered by the Working Group was as follows:

“As between assignees of the same receivable from the same assignor, the right to the receivable is acquired by the assignee whose contract of assignment is of the earliest date.”

163. Support was expressed in favour of the rule contained in draft article 6 of the annex. However, doubt was expressed as to whether draft article 6 set a real priority rule since it provided that the first assignee “acquired” the receivables, assuming that any later assignee of the same receivables obtained no right and, therefore, no conflict of priority arose. The Working Group noted that a specific proposal as to the reformulation of draft article 6 of the annex would be submitted well in advance of the next Commission session and referred draft article 6 of the annex to the Commission. It was agreed, however, that draft article 6 of the annex should be aligned with draft article 24 of the draft convention.

Article 7. *Priority between the assignee and the insolvency administrator or creditors of the assignor*

164. The text of draft article 7 of the annex as considered by the Working Group was as follows:

“[Subject to article 25 of this Convention,] an assignee has priority over an insolvency administrator and creditors of the assignor, including creditors attaching the assigned receivables, if the receivables were assigned before the commencement of the insolvency proceeding or attachment.”

165. Recalling its decision to delete the words “subject to article 25 of this Convention” from draft article 2 of the annex (see para. 147), the Working Group agreed that those words could also be deleted from draft article 7 of the annex. The Working Group also agreed that draft article 7 of the annex should be aligned with draft article 24 of the draft convention. The Working Group noted that a specific proposal as to the reformulation of draft article 7 of the annex would be submitted well in advance of the Commission session and referred draft article 7 to the Commission.

Additional priority rules

166. Recalling its decision to reflect in the annex all the possible alternative priority rules for States to choose from (see para. 139), the Working Group decided that a new section IV should be added to the annex to reflect a system in which priority would be determined on the basis of the time of notification of the debtor. The discussion focused on a proposal that read as follows:

“Section IV. Priority rules based on the time of notification of the contract of assignment

“Article 8. *Priority among several assignees*

“As between assignees of the same receivable from the same assignor, the priority of the right of an assignee in the assigned receivable is determined by the order in which effective notice in writing of each contract of assignment is given to the debtor.

“Article 9. *Priority between the assignee and the insolvency administrator or creditors of the assignor*

“An assignee has priority over an insolvency administrator and creditors of the assignor, including creditors attaching the assigned receivables, if the receivables were assigned before the commencement of the insolvency proceeding or attachment or other judicial act or event.”

167. It was stated that the proposal was intended to introduce a set of optional priority rules based on the time of the notification of the debtor. As to draft article 8, it was explained that the reference to “effective notification” meant effectiveness under the law of the debtor’s location. However, it was noted that notification was one of the matters addressed in the draft convention and was not referred to the rules in the annex as the law of the assignor’s location applicable under draft article 24. It was also noted that certainty as to the rights of the assignee as against the debtor would be achieved under the draft convention, since for the debtor-related provisions to apply the debtor needed to be in a Contracting State or the law governing the original contract had to be the law of a Contracting State.

168. While support was expressed for the proposed text, the concern was expressed that draft article 9 was not a pure time-of-notification rule. In view of the fact that the priority conflict addressed in draft article 9 was addressed differently in countries following a debtor-notification priority system, it was agreed that draft article 40 should make it possible for States to opt into draft articles 7 and 8. After discussion, the Working Group decided that the proposed text should be included in the annex for the continuation of the discussion and referred the matter to the drafting group.

Article 40. *Application of the annex*

169. Recalling its decision to defer discussion of draft article 40 until it had considered the annex (see para. 120), the Working Group resumed its discussion of draft article 40. It was agreed that the second variant should be retained outside square brackets. It was also agreed that the bracketed language in paragraph 1 (b) should be deleted and that, in order to allow a signatory State to make a declaration, reference should be made to a “State” rather than to a “Contracting State”. Furthermore, it was agreed that draft article 40 should allow a State to exclude certain types of assignments or the assignment of certain types of receivables from the priority provisions of the annex that State chose to opt into. Subject to those changes and the change referred to in paragraph 168 above, the Working Group adopted draft article 40 and referred it to the drafting group.

IV. REPORT OF THE DRAFTING GROUP

170. The Working Group requested a drafting group established by the secretariat to review draft article 1, paragraphs 4 and 5, draft article 4, paragraph 4, and draft articles 18 to 44 of the draft convention, as well as draft articles 1 to 7 of the annex to the draft convention, with a view to reflecting the deliberations of the Working Group at the present session and to ensuring consistency between the various language versions.

171. At the close of its deliberations, the Working Group considered the report of the drafting group and, with the exception of the bracketed language, adopted draft article 1, paragraphs 4 and 5, draft article 4, paragraph 4, and draft articles 18 to 46 of the draft convention and draft articles 1 to 9 of the annex to the draft convention, as revised by the drafting group. The consolidated text of the draft convention, as adopted by the Working Group, is reproduced in the annex to the present report.

172. With regard to draft article 18, it was agreed that reference should be made to “notification or payment instruction” in order to avoid giving the impression that a notification had to include a payment instruction. As to draft article 19, paragraph 6, the view was expressed that the current text might result in impairing the effectiveness of partial assignments, as it left to the debtor the choice of paying either in accordance with the notification or in accordance with the original contract. It was recalled that the Working Group had decided that payment in the case of a partial assignment should be left to the discretion of the debtor. Accordingly, it was agreed that draft article 19, paragraph 6 adequately reflected the policy decision of the Working Group (see paras. 18-20). The view was expressed that the second sentence of draft article 19, paragraph 6 was redundant, since it merely restated the rule set forth in the first sentence of that paragraph. In response, it was noted that retention of that second sentence was necessary, since the first part of the provision did not make it clear to what extent the debtor paying in accordance with the notification would be discharged. With respect to draft article 19, paragraph 7, it was agreed that it should be revised to refer to proof of “the assignment from the initial assignor to the initial assignee including any intermediate assignment”.

173. Concerning draft article 20, it was agreed that the word “or” in paragraph 1 should be replaced by the word “and”. With respect to draft article 21, it was proposed to delete the words “in the State in which the debtor is located” and to insert the word “applicable” before the word “law”. It was stated that that change would ensure debtor protection, whatever the law applicable was. That proposal was objected to on the ground that it would result in a substantive change as to the policy underlying the provision. With respect to draft article 24, paragraph 2 (b), it was agreed that, in order to avoid the implication that only security assignments were meant, it should be revised to read: “whether or not”. As to draft article 24, paragraph 3 (b), it was agreed that, following a decision of the Working Group that such parties should be treated as assignees (see para. 147), it was agreed that it should be moved to paragraph 3 (a). While some concern was expressed with

regard to the title of chapter V (“Other” conflict of laws rules), the Working Group agreed that the title clearly reflected the fact that the draft convention contained conflict-of-laws rules outside chapter V and, in order to better reflect that fact, decided that the word “autonomous” should be substituted for the word “other”. It was agreed that the reference to creditors of the assignor that had a right in other property, contained in draft article 5 (m) (ii), should be moved to draft article 5 (m) (i) and that the word “person” should be substituted for the word “creditor”. It was also agreed that in draft article 37, paragraph 2 the sentence starting with the word “provided” should be deleted and that paragraph 3 should be merged with paragraph 2.

V. FUTURE WORK

174. Further to consultations, an ad hoc group suggested that a new provision on form should be introduced in chapter V. It was stated that the Commission might wish to ensure that the proposed provision would be in line with draft article 8. It was also suggested that the Commission might wish to introduce a provision in the annex that would allow for the registry to be established as quickly as possible, providing for designation of a supervising authority, for an interim registrar and for interim regulations. It was also pointed out that the process to achieve that result should be an inclusive one, possibly convening a group of interested States at the request of one third of the signatory States. In addition, it was said that it would be useful to provide for future amendments and review of the registration system by a group of Contracting States to be convened at the request of one third of Contracting and signatory States. The Working Group noted an invitation addressed to all interested delegations to participate in consultations on that matter so that an adequate text would be presented well in advance of the next Commission session. Moreover, it was stated that the Commission might wish to consider additional practices with the question of whether they should be excluded from the scope of the draft convention. It was agreed that any such suggestion should be submitted well in advance of the Commission session for delegations to have sufficient time to consult and be prepared to decide on that matter in a timely manner at the next Commission session.

175. Having completed its work, the Working Group adopted the draft convention as a whole, with the exception of the bracketed language, and submitted it to the Commission for final review and adoption at its next session, to be held at Vienna from 25 June to 13 July 2001. It was noted that the text of the draft convention, as adopted by the Working Group, would be distributed to all States and interested international organizations for comments, and that the secretariat would prepare an analytical compilation of those comments for distribution in advance of the Commission session. It was also noted that the secretariat would prepare and distribute a revised version of the commentary to the draft convention. It was expected that the compilation of comments and the commentary would assist delegates at the Commission session in their deliberations and allow the Commission to finalize and adopt the draft convention.

ANNEX I

DRAFT CONVENTION ON ASSIGNMENT OF RECEIVABLES IN
INTERNATIONAL TRADE

Preamble

The Contracting States,

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

Considering that problems created by uncertainties as to the content and the choice of legal regime applicable to the assignment of receivables constitute an obstacle to international trade,

Desiring to establish principles and to adopt rules relating to the assignment of receivables that would create certainty and transparency and promote the modernization of the law relating to assignments of receivables, while protecting existing assignment practices and facilitating the development of new practices,

Desiring also to ensure adequate protection of the interests of debtors in assignments of receivables,

Being of the opinion that the adoption of uniform rules governing the assignment of receivables would promote the availability of capital and credit at more affordable rates and thus facilitate the development of international trade,

Have agreed as follows:

CHAPTER I. SCOPE OF APPLICATION

Article 1. *Scope of application*

1. This Convention applies to:

(a) Assignments of international receivables and to international assignments of receivables as defined in this chapter, if, at the time of the conclusion of the contract of assignment, the assignor is located in a Contracting State; and

(b) Subsequent assignments, provided that any prior assignment is governed by this Convention.

2. This Convention applies to subsequent assignments that satisfy the criteria set forth in paragraph 1 (a) of this article, even if it did not apply to any prior assignment of the same receivable.

3. This Convention does not affect the rights and obligations of the debtor unless, at the time of the conclusion of the original contract, the debtor is located in a Contracting State or the law governing the original contract is the law of a Contracting State.

4. The provisions of chapter V apply to assignments of international receivables and to international assignments of receivables as defined in this chapter independently of paragraphs 1 and 2 of this article. However, those provisions do not apply if a State makes a declaration under article 39.

5. The provisions of the annex to this Convention apply as provided in article 42.

Article 2. *Assignment of receivables*

For the purposes of this Convention:

(a) "Assignment" means the transfer by agreement from one person ("assignor") to another person ("assignee") of all or part of or an undivided interest in the assignor's contractual right to payment of a monetary sum ("receivable") from a third person ("the debtor"). The creation of rights in receivables as security for indebtedness or other obligation is deemed to be a transfer;

(b) In the case of an assignment by the initial or any other assignee ("subsequent assignment"), the person who makes that assignment is the assignor and the person to whom that assignment is made is the assignee.

Article 3. *Internationality*

A receivable is international if, at the time of the conclusion of the original contract, the assignor and the debtor are located in different States. An assignment is international if, at the time of the conclusion of the contract of assignment, the assignor and the assignee are located in different States.

Article 4. *Exclusions*

1. This Convention does not apply to assignments:

(a) Made to an individual for his or her personal, family or household purposes;

(b) Made by the delivery of a negotiable instrument, with an endorsement, if necessary;

(c) Made as part of the sale or change in the ownership or legal status of the business out of which the assigned receivables arose.

2. This Convention does not apply to assignments of receivables arising under or from:

(a) Transactions on a regulated exchange;

(b) Financial contracts governed by netting agreements, except a receivable owed on the termination of all outstanding transactions;

(c) Bank deposits;

(d) Inter-bank payment systems, inter-bank payment agreements or investment securities settlement systems;

(e) A letter of credit or independent guarantee;

(f) The sale, loan or holding of or agreement to repurchase investment securities.

3. This Convention does not:

(a) Affect whether a property right in real estate confers a right in a receivable related to that real estate or determine the priority of such a right in the receivable with respect to the competing right of an assignee of the receivable; or

(b) Make lawful the acquisition of property rights in real estate not permitted under the law of the State where the real estate is located.

[4. This Convention does not apply to assignments listed in a declaration made under article 41 by the State in which the

assignor is located, or with respect to the provisions of this Convention that deal with the rights and obligations of the debtor, by the State in which the debtor is located or the State whose law is the law governing the original contract.]

CHAPTER II. GENERAL PROVISIONS

Article 5. *Definitions and rules of interpretation*

For the purposes of this Convention:

(a) “Original contract” means the contract between the assignor and the debtor from which the assigned receivable arises;

(b) “Existing receivable” means a receivable that arises upon or before the conclusion of the contract of assignment and “future receivable” means a receivable that arises after the conclusion of the contract of assignment;

(c) “Writing” means any form of information that is accessible so as to be usable for subsequent reference. Where this Convention requires a writing to be signed, that requirement is met if, by generally accepted means or a procedure agreed to by the person whose signature is required, the writing identifies that person and indicates that person’s approval of the information contained in the writing;

(d) “Notification of the assignment” means a communication in writing that reasonably identifies the assigned receivables and the assignee;

(e) “Insolvency administrator” means a person or body, including one appointed on an interim basis, authorized in an insolvency proceeding to administer the reorganization or liquidation of the assignor’s assets or affairs;

(f) “Insolvency proceeding” means a collective judicial or administrative proceeding, including an interim proceeding, in which the assets and affairs of the assignor are subject to control or supervision by a court or other competent authority for the purpose of reorganization or liquidation;

(g) “Priority” means the right of a party in preference to another party;

(h) A person is located in the State in which it has its place of business. If the assignor or the assignee has a place of business in more than one State, the place of business is that place where the central administration of the assignor or the assignee is exercised. If the debtor has a place of business in more than one State, the place of business is that which has the closest relationship to the original contract. If a person does not have a place of business, reference is to be made to the habitual residence of that person;

(i) “Law” means the law in force in a State other than its rules of private international law;

(j) “Proceeds” means whatever is received in respect of an assigned receivable, whether in total or partial payment or other satisfaction of the receivable. The term includes whatever is received in respect of proceeds. The term does not include returned goods;

(k) “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 any transaction referred to above entered into in financial markets and any combination of the transactions mentioned above;

(l) “Netting agreement” means an agreement 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 (l) (ii) of this article under two or more netting agreements;

(m) “Competing claimant” means:

- (i) Another assignee of the same receivable from the same assignor, including a person who, by operation of law, claims a right in the assigned receivable as a result of its right in other property of the assignor, even if that receivable is not an international receivable and the assignment to that assignee is not an international assignment;

- (ii) A creditor of the assignor; or

- (iii) The insolvency administrator.

Article 6. *Party autonomy*

Subject to article 21, the assignor, the assignee and the debtor may derogate from or vary by agreement provisions of this Convention relating to their respective rights and obligations. Such an agreement does not affect the rights of any person who is not a party to the agreement.

Article 7. *Principles of interpretation*

1. In the interpretation of this Convention, regard is to be had to its object and purpose as set forth in the preamble, to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.

2. Questions concerning matters governed by this Convention that are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

CHAPTER III. EFFECTS OF ASSIGNMENT

Article 8. *Form of assignment*

An assignment is valid as to form if it meets the form requirements, if any form requirements exist, of either the law of the State in which the assignor is located or any other law applicable by virtue of the rules of private international law.

Article 9. *Effectiveness of assignments, bulk assignments, assignments of future receivables and partial assignments*

1. An assignment of one or more existing or future receivables and parts of or undivided interests in receivables is effective as between the assignor and the assignee, as well as against the debtor, whether the receivables are described:

- (a) Individually as receivables to which the assignment relates; or

- (b) In any other manner, provided that they can, at the time of the assignment or, in the case of future receivables, at the time of the conclusion of the original contract, be identified as receivables to which the assignment relates.

2. Unless otherwise agreed, an assignment of one or more future receivables is effective without a new act of transfer being required to assign each receivable.

3. Except as provided in paragraph 1 of this article and in articles 11 and 12, paragraphs 2 and 3, this Convention does not affect any limitations on assignments arising from law.

4. An assignment of a receivable is not ineffective against, and the right of an assignee may not be denied priority with respect to the right of, a competing claimant, solely because law other than this Convention does not generally recognize an assignment described in paragraph 1 of this article.

Article 10. *Time of assignment*

Without prejudice to the right of a competing claimant, an existing receivable is transferred and a future receivable is deemed to be transferred at the time of the conclusion of the contract of assignment, unless the assignor and the assignee have specified a later time.

Article 11. *Contractual limitations on assignments*

1. An assignment of a receivable is effective notwithstanding any agreement between the initial or any subsequent assignor and the debtor or any subsequent assignee limiting in any way the assignor's right to assign its receivables.

2. Nothing in this article affects any obligation or liability of the assignor for breach of such an agreement, but the other party to such agreement may not avoid the original contract or the assignment contract on the sole ground of that breach. A person who is not party to such an agreement is not liable on the sole ground that it had knowledge of the agreement.

3. This article applies only to assignments of receivables:

(a) Arising from an original contract for the supply or lease of [goods,] construction or services other than financial services or for the sale or lease of real estate;

(b) Arising from an original contract for the sale, lease or licence of industrial or other intellectual property or other information;

(c) Representing the payment obligation for a credit card transaction; or

(d) Owed to the assignor upon net settlement of payments due pursuant to a netting agreement involving more than two parties.

Article 12. *Transfer of security rights*

1. A personal or property right securing payment of the assigned receivable is transferred to the assignee without a new act of transfer. If such a right, under the law governing it, is transferable only with a new act of transfer, the assignor is obliged to transfer such right and any proceeds to the assignee.

2. A right securing payment of the assigned receivable is transferred under paragraph 1 of this article notwithstanding any agreement between the assignor and the debtor or other person granting that right, limiting in any way the assignor's right to assign the receivable or the right securing payment of the assigned receivable.

3. Nothing in this article affects any obligation or liability of the assignor for breach of any agreement under paragraph 2 of this article, but the other party to that agreement may not avoid the original contract or the assignment contract on the sole ground of that breach. A person who is not a party to such an agreement is not liable on the sole ground that it had knowledge of the agreement.

4. Paragraphs 2 and 3 of this article apply only to assignments of receivables:

(a) Arising from an original contract for the supply or lease of [goods,] construction or services other than financial services or for the sale or lease of real estate;

(b) Arising from an original contract for the sale, lease or licence of industrial or other intellectual property or other information;

(c) Representing the payment obligation for a credit card transaction; or

(d) Owed to the assignor upon net settlement of payments due pursuant to a netting agreement involving more than two parties.

5. The transfer of a possessory property right under paragraph 1 of this article does not affect any obligations of the assignor to the debtor or the person granting the property right with respect to the property transferred existing under the law governing that property right.

6. Paragraph 1 of this article does not affect any requirement under rules of law other than this Convention relating to the form or registration of the transfer of any rights securing payment of the assigned receivable.

CHAPTER IV. RIGHTS, OBLIGATIONS AND DEFENCES

Section I. *Assignor and assignee*

Article 13. *Rights and obligations of the assignor and the assignee*

1. The mutual rights and obligations of the assignor and the assignee arising from their agreement are determined by the terms and conditions set forth in that agreement, including any rules or general conditions referred to therein.

2. The assignor and the assignee are bound by any usage to which they have agreed and, unless otherwise agreed, by any practices they have established between themselves.

3. In an international assignment, the assignor and the assignee are considered, unless otherwise agreed, to have implicitly made applicable to the assignment a usage that in international trade is widely known to, and regularly observed by, parties to the particular type of assignment or the assignment of the particular category of receivables.

Article 14. *Representations of the assignor*

1. Unless otherwise agreed between the assignor and the assignee, the assignor represents at the time of the conclusion of the contract of assignment that:

(a) The assignor has the right to assign the receivable;

(b) The assignor has not previously assigned the receivable to another assignee; and

(c) The debtor does not and will not have any defences or rights of set-off.

2. Unless otherwise agreed between the assignor and the assignee, the assignor does not represent that the debtor has, or will have, the ability to pay.

Article 15. *Right to notify the debtor*

1. Unless otherwise agreed between the assignor and the assignee, the assignor or the assignee or both may send the debtor notification of the assignment and payment instructions, but after notification has been sent only the assignee may send such an instruction.

2. Notification of the assignment or payment instructions sent in breach of any agreement referred to in paragraph 1 of this article are not ineffective for the purposes of article 19 by reason of such breach. However, nothing in this article affects any obligation or liability of the party in breach of such an agreement for any damages arising as a result of the breach.

Article 16. *Right to payment*

1. As between the assignor and the assignee, unless otherwise agreed and whether or not notification of the assignment has been sent:

(a) If payment in respect of the assigned receivable is made to the assignee, the assignee is entitled to retain the proceeds and goods returned in respect of the assigned receivable;

(b) If payment in respect of the assigned receivable is made to the assignor, the assignee is entitled to payment of the proceeds and also to goods returned to the assignor in respect of the assigned receivable; and

(c) If payment in respect of the assigned receivable is made to another person over whom the assignee has priority, the assignee is entitled to payment of the proceeds and also to goods returned to such person in respect of the assigned receivable.

2. The assignee may not retain more than the value of its right in the receivable.

Section II. Debtor

Article 17. Principle of debtor protection

1. Except as otherwise provided in this Convention, an assignment does not, without the consent of the debtor, affect the rights and obligations of the debtor, including the payment terms contained in the original contract.

2. A payment instruction may change the person, address or account to which the debtor is required to make payment, but may not:

(a) Change the currency of payment specified in the original contract; or

(b) Change the State specified in the original contract in which payment is to be made to a State other than that in which the debtor is located.

Article 18. Notification of the debtor

1. Notification of the assignment or a payment instruction is effective when received by the debtor if it is in a language that is reasonably expected to inform the debtor about its contents. It is sufficient if notification of the assignment or a payment instruction is in the language of the original contract.

2. Notification of the assignment or a payment instruction may relate to receivables arising after notification.

3. Notification of a subsequent assignment constitutes notification of all prior assignments.

Article 19. Debtor's discharge by payment

1. Until the debtor receives notification of the assignment, the debtor is entitled to be discharged by paying in accordance with the original contract.

2. After the debtor receives notification of the assignment, subject to paragraphs 3 to 8 of this article, the debtor is discharged only by paying the assignee or, if otherwise instructed in the notification of the assignment or subsequently by the assignee in a writing received by the debtor, in accordance with such payment instruction.

3. If the debtor receives more than one payment instruction relating to a single assignment of the same receivable by the same assignor, the debtor is discharged by paying in accordance with the last payment instruction received from the assignee before payment.

4. If the debtor receives notification of more than one assignment of the same receivable made by the same assignor, the debtor is discharged by paying in accordance with the first notification received.

5. If the debtor receives notification of one or more subsequent assignments, the debtor is discharged by paying in accordance with the notification of the last of such subsequent assignments.

6. If the debtor receives notification of the assignment of a part of or an undivided interest in one or more receivables, the debtor is discharged by paying in accordance with the notification or in accordance with this article as if the debtor had not received the notification. If the debtor pays in accordance with the notification, the debtor is discharged only to the extent of the part or undivided interest paid.

7. If the debtor receives notification of the assignment from the assignee, the debtor is entitled to request the assignee to provide within a reasonable period of time adequate proof that the assignment from the initial assignor to the initial assignee and any intermediate assignment have been made and, unless the assignee does so, the debtor is discharged by paying in accordance with this article as if the notification from the assignee had not been received. Adequate proof of an assignment includes but is not limited to any writing emanating from the assignor and indicating that the assignment has taken place.

8. This article does not affect any other ground on which payment by the debtor to the person entitled to payment, to a competent judicial or other authority, or to a public deposit fund discharges the debtor.

Article 20. Defences and rights of set-off of the debtor

1. In a claim by the assignee against the debtor for payment of the assigned receivables, the debtor may raise against the assignee all defences and rights of set-off arising from the original contract, or any other contract that was part of the same transaction, of which the debtor could avail itself if such claim were made by the assignor.

2. The debtor may raise against the assignee any other right of set-off, provided that it was available to the debtor at the time notification of the assignment was received.

3. Notwithstanding paragraphs 1 and 2 of this article, defences and rights of set-off that the debtor may raise pursuant to article 11 against the assignor for breach of agreements limiting in any way the assignor's right to assign its receivables are not available to the debtor against the assignee.

Article 21. Agreement not to raise defences or rights of set-off

1. Without prejudice to the law governing the protection of the debtor in transactions made for personal, family or household purposes in the State in which the debtor is located, the debtor may agree with the assignor in a writing signed by the debtor not to raise against the assignee the defences and rights of set-off that it could raise pursuant to article 20. Such an agreement precludes the debtor from raising against the assignee those defences and rights of set-off.

2. The debtor may not exclude:

(a) Defences arising from fraudulent acts on the part of the assignee; or

(b) Defences based on the debtor's incapacity.

3. Such an agreement may be modified only by an agreement in a writing signed by the debtor. The effect of such a modification as against the assignee is determined by article 22, paragraph 2.

Article 22. Modification of the original contract

1. An agreement concluded before notification of the assignment between the assignor and the debtor that affects the assignee's rights is effective as against the assignee and the assignee acquires corresponding rights.

2. After notification of the assignment, an agreement between the assignor and the debtor that affects the assignee's rights is ineffective as against the assignee unless:

(a) The assignee consents to it; or

(b) The receivable is not fully earned by performance and either the modification is provided for in the original contract or, in the context of the original contract, a reasonable assignee would consent to the modification.

3. Paragraphs 1 and 2 of this article do not affect any right of the assignor or the assignee for breach of an agreement between them.

Article 23. *Recovery of payments*

Without prejudice to the law governing the protection of the debtor in transactions made for personal, family or household purposes in the State in which the debtor is located, failure of the assignor to perform the original contract does not entitle the debtor to recover from the assignee a sum paid by the debtor to the assignor or the assignee.

Section III. *Other parties*

Article 24. *Law applicable to competing rights*

1. With the exception of matters that are settled elsewhere in this Convention and subject to articles 25 and 26:

(a) With respect to the right of a competing claimant, the law of the State in which the assignor is located governs:

- (i) The characteristics and priority of the right of an assignee in the assigned receivable; and
- (ii) The characteristics and priority of the right of the assignee in proceeds that are receivables whose assignment is governed by this Convention[;]

(b) With respect to the right of a competing claimant, the characteristics and priority of the right of the assignee in proceeds described below are governed by:

- (i) In the case of money or negotiable instruments not held in a bank account or through a securities intermediary, the law of the State in which such money or instruments are located;
- (ii) In the case of investment securities held through a securities intermediary, the law of the State in which the securities intermediary is located;
- (iii) In the case of bank deposits, the law of the State in which the bank is located[; and
- (iv) In the case of receivables whose assignment is governed by this Convention, the law of the State in which the assignor is located].

[(c) The existence and characteristics of the right of a competing claimant in proceeds described in paragraph 1 (b) of this article are governed by the law indicated in that paragraph]].

2. For the purposes of this article and article 31, the characteristics of a right are:

- (a) Whether it is a personal or property right; and
- (b) Whether or not it is security for indebtedness or other obligation.

Article 25. *Public policy and preferential rights*

1. The application of a provision of the law of the State in which the assignor is located may be refused by a court or other competent authority only if that provision is manifestly contrary to the public policy of the forum State.

2. In an insolvency proceeding commenced in a State other than the State in which the assignor is located, any preferential right that arises, by operation of law, under the law of the forum State and is given priority status over the rights of an assignee in insolvency proceedings under the law of that State may be given priority notwithstanding article 24. A State may deposit at any time a declaration identifying any such preferential right.

Article 26. *Special proceeds rules*

1. If proceeds are received by the assignee, the assignee is entitled to retain those proceeds to the extent that the assignee's right in the assigned receivable had priority over the right of a competing claimant in the assigned receivable.

2. If proceeds are received by the assignor, the right of the assignee in those proceeds has priority over the right of a competing claimant in those proceeds to the same extent as the assignee's right had priority over the right in the assigned receivable of those claimants if:

(a) The assignor has received the proceeds under instructions from the assignee to hold the proceeds for the benefit of the assignee; and

(b) The proceeds are held by the assignor for the benefit of the assignee separately and are reasonably identifiable from the assets of the assignor, such as in the case of a separate deposit account containing only cash receipts from receivables assigned to the assignee.

Article 27. *Subordination*

An assignee entitled to priority may at any time subordinate its priority unilaterally or by agreement in favour of any existing or future assignees.

CHAPTER V. AUTONOMOUS CONFLICT-OF-LAWS RULES

Article 28. *Application of chapter V*

The provisions of this chapter apply to matters that are:

- (a) Within the scope of this Convention as provided in article 1, paragraph 4; and
- (b) Otherwise within the scope of this Convention but not settled elsewhere in it.

Article 29. *Law applicable to the mutual rights and obligations of the assignor and the assignee*

1. The mutual rights and obligations of the assignor and the assignee arising from their agreement are governed by the law chosen by them.

2. In the absence of a choice of law by the assignor and the assignee, their mutual rights and obligations arising from their agreement are governed by the law of the State with which the contract of assignment is most closely connected.

Article 30. *Law applicable to the rights and obligations of the assignee and the debtor*

The law governing the original contract determines the effectiveness of contractual limitations on assignment as between the assignee and the debtor, the relationship between the assignee and the debtor, the conditions under which the assignment can be invoked against the debtor and any question whether the debtor's obligations have been discharged.

Article 31. *Law applicable to competing rights of other parties*

1. With the exception of matters that are settled elsewhere in this Convention and subject to articles 25 and 26:

(a) With respect to the right of a competing claimant, the law of the State in which the assignor is located governs:

- (i) The characteristics and priority of the right of an assignee in the assigned receivable; and

- (ii) The characteristics and priority of the right of the assignee in proceeds that are receivables whose assignment is governed by this Convention[;
- (b) With respect to the right of a competing claimant, the characteristics and priority of the right of the assignee in proceeds described below are governed by:
 - (i) In the case of money or negotiable instruments not held in a bank account or through a securities intermediary, the law of the State in which such money or instruments are located;
 - (ii) In the case of investment securities held through a securities intermediary, the law of the State in which the securities intermediary is located;
 - (iii) In the case of bank deposits, the law of the State in which the bank is located[; and
 - (iv) In the case of receivables whose assignment is governed by this Convention, the law of the State in which the assignor is located].

[(c) The existence and characteristics of the right of a competing claimant in proceeds described in paragraph 1 (b) of this article are governed by the law indicated in that paragraph]].

2. In an insolvency proceeding commenced in a State other than the State in which the assignor is located, any preferential right that arises, by operation of law, under the law of the forum State and is given priority status over the rights of an assignee in insolvency proceedings under the law of that State may be given priority notwithstanding paragraph 1 of this article.

Article 32. *Mandatory rules*

1. Nothing in articles 29 and 30 restricts the application of the rules of the law of the forum State in a situation where they are mandatory, irrespective of the law otherwise applicable.
2. Nothing in articles 29 and 30 restricts the application of the mandatory rules of the law of another State with which the matters settled in those articles have a close connection if and in so far as, under the law of that other State, those rules must be applied irrespective of the law otherwise applicable.

Article 33. *Public policy*

With regard to matters settled in this chapter, the application of a provision of the law specified in this chapter may be refused by a court or other competent authority only if that provision is manifestly contrary to the public policy of the forum State.

CHAPTER VI. FINAL PROVISIONS

Article 34. *Depositary*

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

Article 35. *Signature, ratification, acceptance, approval, accession*

1. This Convention is open for signature by all States at the Headquarters of the United Nations in New York, until [...].
2. This Convention is subject to ratification, acceptance or approval by the signatory States.
3. This Convention is open to accession by all States that are not signatory States as from the date it is open for signature.
4. Instruments of ratification, acceptance, approval and accession are to be deposited with the Secretary-General of the United Nations.

Article 36. *Application to territorial units*

1. If a State has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at any time, declare that this Convention is to extend to all its territorial units or only one or more of them, and may at any time substitute another declaration for its earlier declaration.
2. Such declarations are to state expressly the territorial units to which this Convention extends.
3. If, by virtue of a declaration under this article, this Convention does not extend to all territorial units of a State and the assignor or the debtor is located in a territorial unit to which this Convention does not extend, this location is considered not to be in a Contracting State.
4. If a State makes no declaration under paragraph 1 of this article, the Convention is to extend to all territorial units of that State.

[Article 37. *Applicable law in territorial units*

If a State has two or more territorial units whose law may govern a matter referred to in chapters IV and V of this Convention, a reference in those chapters to the law of a State in which a person or property is located means the law applicable in the territorial unit in which the person or property is located, including rules that render applicable the law of another territorial unit of that State. Such a State may specify by declaration at any time how it will implement this article.]

Article 38. *Conflicts with other international agreements*

1. This Convention does not prevail over any international agreement that has already been or may be entered into and that contains provisions concerning the matters governed by this Convention, provided that the assignor is located at the time of the conclusion of the contract of assignment in a State party to such agreement or, with respect to the provisions of this Convention that deal with the rights and obligations of the debtor, at the time of the conclusion of the original contract, the debtor is located in a State party to such agreement or the law governing the original contract is the law of a State party to such agreement.
2. Notwithstanding paragraph 1 of this article, this Convention prevails over the Unidroit Convention on International Factoring ("the Ottawa Convention"). If, at the time of the conclusion of the original contract, the debtor is located in a State party to the Ottawa Convention or the law governing the original contract is the law of a State party to the Ottawa Convention and that State is not a party to this Convention, nothing in this Convention precludes the application of the Ottawa Convention with respect to the rights and obligations of the debtor.

Article 39. *Declaration on application of chapter V*

A State may declare at any time that it will not be bound by chapter V.

Article 40. *Limitations relating to Governments and other public entities*

A State may declare at any time that it will not be bound or the extent to which it will not be bound by articles 11 and 12 if the debtor or any person granting a personal or property right securing payment of the assigned receivable is located in that State at the time of the conclusion of the original contract and is a Government, central or local, any subdivision thereof, or an entity

constituted for a public purpose. If a State has made such a declaration, articles 11 and 12 do not affect the rights and obligations of that debtor or person. A State may list in a declaration the types of entity that are the subject of a declaration.

[Article 41. *Other exclusions*

1. A State may declare at any time that it will not apply this Convention to types of assignment or to the assignment of categories of receivables listed in a declaration. In such a case, this Convention does not apply to such types of assignment or to the assignment of such categories of receivables if the assignor is located at the time of the conclusion of the contract of assignment in such a State or, with respect to the provisions of this Convention that deal with the rights and obligations of the debtor, at the time of the conclusion of the original contract, the debtor is located in such a State or the law governing the original contract is the law of such a State.

2. After a declaration under paragraph 1 of this article takes effect:

(a) This Convention does not apply to such types of assignment or to the assignment of such categories of receivables if the assignor is located at the time of the conclusion of the contract of assignment in such a State; and

(b) The provisions of this Convention that affect the rights and obligations of the debtor do not apply if, at the time of the conclusion of the original contract, the debtor is located in such a State or the law governing the receivable is the law of such a State.]

Article 42. *Application of the annex*

1. A State may at any time declare that it will be bound by:

(a) The priority rules set forth in section I of the annex and will participate in the international registration system established pursuant to section II of the annex;

(b) The priority rules set forth in section I of the annex and will effectuate such rules by use of a registration system that fulfils the purposes of such rules, in which case, for the purposes of section I of the annex, registration pursuant to such a system has the same effect as registration pursuant to section II of the annex;

(c) The priority rules set forth in section III of the annex;

(d) The priority rules set forth in section IV of the annex; or

(e) The priority rules set forth in articles 7 and 8 of the annex.

2. For the purposes of article 24:

(a) The law of a State that has made a declaration pursuant to paragraph 1 (a) or (b) of this article is the set of rules set forth in section I of the annex;

(b) The law of a State that has made a declaration pursuant to paragraph 1 (c) of this article is the set of rules set forth in section III of the annex;

(c) The law of a State that has made a declaration pursuant to paragraph 1 (d) of this article is the set of rules set forth in section IV of the annex; and

(d) The law of a State that has made a declaration pursuant to paragraph 1 (e) of this article is the set of rules set forth in articles 7 and 8 of the annex.

3. A State that has made a declaration pursuant to paragraph 1 of this article may establish rules pursuant to which assignments made before the declaration takes effect become subject to those rules within a reasonable time.

4. A State that has not made a declaration pursuant to paragraph 1 of this article may, in accordance with priority rules in force in that State, utilize the registration system established pursuant to section II of the annex.

5. At the time a State makes a declaration pursuant to paragraph 1 of this article or thereafter, it may declare that it will not apply the priority rules chosen under paragraph 1 of this article to certain types of assignment or to the assignment of certain categories of receivables.

Article 43. *Effect of declaration*

1. Declarations made under article 36, paragraph 1, and articles 37 or 39 to 42 at the time of signature are subject to confirmation upon ratification, acceptance or approval.

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

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

4. A State that makes a declaration under article 36, paragraph 1, and articles 37 or 39 to 42 may withdraw it at any time by a formal notification in writing addressed to the depositary. Such withdrawal takes effect on the first day of the month following the expiration of six months after the date of the receipt of the notification by the depositary.

5. In the case of a declaration under article 36, paragraph 1, and articles 37 or 39 to 42 that takes effect after the entry into force of this Convention in respect of the State concerned or in the case of a withdrawal of any such declaration, the effect of which in either case is to cause a rule in this Convention, including any annex, to become applicable:

(a) Except as provided in paragraph 5 (b) of this article, that rule is applicable only to assignments for which the contract of assignment is concluded on or after the date when the declaration or withdrawal takes effect in respect of the Contracting State referred to in article 1, paragraph 1 (a);

(b) A rule that deals with the rights and obligations of the debtor applies only in respect of original contracts concluded on or after the date when the declaration or withdrawal takes effect in respect of the Contracting State referred to in article 1, paragraph 3.

6. In the case of a declaration under article 36, paragraph 1, and articles 37 or 39 to 42 that takes effect after the entry into force of this Convention in respect of the State concerned or in the case of a withdrawal of any such declaration, the effect of which in either case is to cause a rule in this Convention, including any annex, to become inapplicable:

(a) Except as provided in paragraph 6 (b) of this article, that rule is inapplicable to assignments for which the contract of assignment is concluded on or after the date when the declaration or withdrawal takes effect in respect of the Contracting State referred to in article 1, paragraph 1 (a);

(b) A rule that deals with the rights and obligations of the debtor is inapplicable in respect of original contracts concluded on or after the date when the declaration or withdrawal takes effect in respect of the Contracting State referred to in article 1, paragraph 3.

7. If a rule rendered applicable or inapplicable as a result of a declaration or withdrawal referred to in paragraphs 5 or 6 of this article is relevant to the determination of priority with respect to a receivable for which the contract of assignment is concluded

before such declaration or withdrawal takes effect or with respect to its proceeds, the right of the assignee has priority over the right of a competing claimant to the extent that, under the law that would determine priority before such declaration or withdrawal takes effect, the right of the assignee would have priority.

Article 44. *Reservations*

No reservations are permitted except those expressly authorized in this Convention.

Article 45. *Entry into force*

1. This Convention enters into force on the first day of the month following the expiration of six months from the date of deposit of the fifth instrument of ratification, acceptance, approval or accession with the depositary.

2. For each State that becomes a Contracting State to this Convention after the date of deposit of the fifth instrument of ratification, acceptance, approval or accession, this Convention enters into force on the first day of the month following the expiration of six months after the date of deposit of the appropriate instrument on behalf of that State.

3. This Convention applies only to assignments if the contract of assignment is concluded on or after the date when this Convention enters into force in respect of the Contracting State referred to in article 1, paragraph 1 (a), provided that the provisions of this Convention that deal with the rights and obligations of the debtor apply only to assignments of receivables arising from original contracts concluded on or after the date when this Convention enters into force in respect of the Contracting State referred to in article 1, paragraph 3.

4. If a receivable is assigned pursuant to a contract of assignment concluded before the date when this Convention enters into force in respect of the Contracting State referred to in article 1, paragraph 1 (a), the right of the assignee has priority over the right of a competing claimant with respect to the receivable and its proceeds to the extent that, under the law that would determine priority in the absence of this Convention, the right of the assignee would have priority.

Article 46. *Denunciation*

1. A Contracting State may denounce this Convention at any time by written notification addressed to the depositary.

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

3. This Convention remains applicable to assignments if the contract of assignment is concluded before the date when the denunciation takes effect in respect of the Contracting State referred to in article 1, paragraph 1 (a), provided that the provisions of this Convention that deal with the rights and obligations of the debtor remain applicable only to assignments of receivables arising from original contracts concluded before the date when the denunciation takes effect in respect of the Contracting State referred to in article 1, paragraph 3.

4. If a receivable is assigned pursuant to a contract of assignment concluded before the date when the denunciation takes effect in respect of the Contracting State referred to in article 1, paragraph 1 (a), the right of the assignee has priority over the right of a competing claimant with respect to the receivable and its proceeds to the extent that, under the law that would determine priority under this Convention, the right of the assignee would have priority.

Article 47. *Revision and amendment*

1. At the request of not less than one third of the Contracting States to this Convention, the depositary shall convene a conference of the Contracting States for revising or amending it.

2. Any instrument of ratification, acceptance, approval or accession deposited after the entry into force of an amendment to this Convention is deemed to apply to the Convention as amended.

ANNEX TO THE DRAFT CONVENTION

Section I. *Priority rules based on registration*

Article 1. *Priority among several assignees*

As between assignees of the same receivable from the same assignor, the priority of the right of an assignee in the assigned receivable and its proceeds is determined by the order in which data about the assignment are registered under section II of this annex, regardless of the time of transfer of the receivable. If no such data are registered, priority is determined by the order of the conclusion of the respective contracts of assignment.

Article 2. *Priority between the assignee and the insolvency administrator or creditors of the assignor*

The right of an assignee in an assigned receivable and its proceeds has priority over the right of an insolvency administrator and creditors who obtain a right in the assigned receivable or its proceeds by attachment, judicial act or similar act of a competent authority that gives rise to such right, if the receivable was assigned, and data about the assignment were registered under section II of this annex, before the commencement of such insolvency proceeding, attachment, judicial act or similar act.

Section II. *Registration*

Article 3. *Establishment of a registration system*

A registration system will be established for the registration of data about assignments, even if the relevant assignment or receivable is not international, pursuant to the regulations to be promulgated by the registrar and the supervising authority. Regulations promulgated by the registrar and the supervising authority under this annex shall be consistent with this annex. The regulations will prescribe in detail the manner in which the registration system will operate, as well as the procedure for resolving disputes relating to that operation.

Article 4. *Registration*

1. Any person may register data with regard to an assignment at the registry in accordance with this annex and the regulations. As provided in the regulations, the data registered shall be the identification of the assignor and the assignee and a brief description of the assigned receivables.

2. A single registration may cover one or more assignments by the assignor to the assignee of one or more existing or future receivables, irrespective of whether the receivables exist at the time of registration.

3. A registration may be made in advance of the assignment to which it relates. The regulations will establish the procedure for the cancellation of a registration in the event that the assignment is not made.

4. Registration or its amendment is effective from the time when the data set forth in paragraph 1 of this article are available to searchers. The registering party may specify, from options set forth in the regulations, a period of effectiveness for the registration. In the absence of such a specification, a registration is effective for a period of five years.

5. Regulations will specify the manner in which registration may be renewed, amended or cancelled and regulate such other matters as are necessary for the operation of the registration system.

6. Any defect, irregularity, omission or error with regard to the identification of the assignor that would result in data registered not being found upon a search based on a proper identification of the assignor renders the registration ineffective.

Article 5. *Registry searches*

1. Any person may search the records of the registry according to identification of the assignor, as set forth in the regulations, and obtain a search result in writing.

2. A search result in writing that purports to be issued by the registry is admissible as evidence and is, in the absence of evidence to the contrary, proof of the registration of the data to which the search relates, including the date and hour of registration.

Section III. *Priority rules based on the time of the contract of assignment*

Article 6. *Priority among several assignees*

As between assignees of the same receivable from the same assignor, the priority of the right of an assignee in the assigned receivable and its proceeds is determined by the order of the conclusion of the contract of assignment.

Article 7. *Priority between the assignee and the insolvency administrator or creditors of the assignor*

The right of an assignee in an assigned receivable and its proceeds has priority over the right of an insolvency administrator and creditors who obtain a right in the assigned receivable or its proceeds by attachment, judicial act or similar act of a competent authority that gives rise to such right, if the receivable was assigned before the commencement of such insolvency proceeding, attachment, judicial act or similar act.

Section IV. *Priority rules based on the time of notification of assignment*

Article 8. *Priority among several assignees*

As between assignees of the same receivable from the same assignor, the priority of the right of an assignee in the assigned receivable and its proceeds is determined by the order in which notification of the assignment is effected.

Article 9. *Priority between the assignee and the insolvency administrator or creditors of the assignor*

The right of an assignee in an assigned receivable and its proceeds has priority over the right of an insolvency administrator and creditors who obtain a right in the assigned receivable or its proceeds by attachment, judicial act or similar act of a competent authority that gives rise to such right, if the receivable was assigned and notification was effected before the commencement of such insolvency proceeding, attachment, judicial act or similar act.

ANNEX II

RENUMBERING OF ARTICLES OF THE DRAFT CONVENTION

<i>Current article number</i> ¹³	<i>Former article number</i> ¹⁴
1	1
2	2
3	3
4	4
5	5
6	6
7	7
8	8
9	9
10	10
11	11
12	12
13	13
14	14
15	15
16	16
17	17
18	18
19	19
20	20
21	21
22	22
23	23
24	24
25	25
26	26
27	27
28	New
29	28
30	29
31	30
32	31
33	32
34	33
35	34
36	35
37	New
38	36
39	37
40	38
41	39
42	40
43	41
44	42
45	43
46	44
47	New
<i>Annex to the draft convention</i>	
1	1
2	2
3	3
4	4
5	5
6	6
7	7
8	New
9	New

¹³Annex I to the present document.

¹⁴Draft articles 1 through 17 are taken from document A/55/17, annex I. Draft articles 18 to 44 of the draft convention and draft articles 1 to 7 of the annex are taken from document A/CN.9/466, annex I.

**B. Analytical commentary on the draft Convention on Assignment
of Receivables in International Trade: note by the secretariat
(A/CN.9/489 and Add.1) [Original: English]**

A/CN.9/489

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INTRODUCTION

1. The United Nations Commission on International Trade Law (UNCITRAL), at its twenty-eighth session, in 1995, decided to entrust the Working Group on International Contract Practices with the task of preparing a uniform law on assignment in receivables financing.¹ The Commission, at that session, had before it a report of the Secretary-General entitled: "Assignment in receivables financing: discussion and preliminary draft of uniform rules" (A/CN.9/412). It was agreed that the report, setting forth the concerns and the purposes underlying the project and the possible contents of the uniform law, would provide a useful basis for the deliberations of the Working Group.²

2. The Working Group commenced its work at its twenty-fourth session, in November 1995, by considering the report of the Secretary-General.³ At its twenty-fifth to thirty-first sessions, the Working Group considered revised draft articles prepared by the secretariat,⁴ and, at its twenty-ninth to thirty-first sessions, it adopted a draft Convention.⁵ At its thirty-first session, the Working Group had before it a preliminary commentary on the draft Convention prepared by the secretariat.⁶ At that session, the Working Group agreed that the secretariat should revise and submit the commentary to the Commission at its thirty-third session, to be held in New York from 12 June to 7 July 2000.⁷ At that session, the Commission adopted articles 1 through 17 of the draft Convention and referred articles 18 through 44 of the draft Convention as well as articles 1 to 7 of the annex to the Working Group. The Commission requested the Working Group to proceed with its work expeditiously so that the draft Convention could be submitted to the Commission at its thirty-fourth session, to be held at Vienna from 25 June to 13 July 2001.⁸ The Commission also requested the secretariat to prepare and submit to the Commission at its thirty-fourth session a revised version of the commentary.⁹ The Working Group met at Vienna from 11 to 22 December 2000 and adopted articles 18 to 47 of the draft Convention and 1 to 9 of the annex to the draft Convention.¹⁰

¹Official Records of the General Assembly, Fiftieth Session, Supplement No. 17 (A/50/17), paras. 374-381.

²Ibid., para. 379. At its twenty-sixth and twenty-seventh sessions, the Commission had considered two other reports of the Secretary-General (A/CN.9/378/Add.3 and A/CN.9/397). For the Commission's discussion of those reports, see *ibid.*, Forty-eighth Session, Supplement No. 17 (A/48/17), paras. 297-301, and Forty-ninth Session, Supplement No. 17 (A/49/17), paras. 208-214, respectively.

³The report of the Working Group is contained in document A/CN.9/420.

⁴The draft articles prepared by the secretariat are contained in documents A/CN.9/WG.II/WP.87, A/CN.9/WG.II/WP.89, A/CN.9/WG.II/WP.93, A/CN.9/WG.II/WP.96, A/CN.9/WG.II/WP.98, A/CN.9/WG.II/WP.102 and A/CN.9/WG.II/WP.104. The reports of the Working Group are contained in documents A/CN.9/420, A/CN.9/432, A/CN.9/434, A/CN.9/445, A/CN.9/447, A/CN.9/455, A/CN.9/456 and A/CN.9/466.

⁵A/CN.9/455, para. 17; A/CN.9/456, para. 18; and A/CN.9/466, para. 19.

⁶A/CN.9/WG.II/WP.105 and A/CN.9/WG.II/WP.106.

⁷A/CN.9/466, para. 215.

⁸Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 17 A/55/17, paras. 186-188.

⁹Ibid., paras. 190 and 191. The commentary that was before the Commission at its thirty-third session appears in document A/CN.9/470.

¹⁰A/CN.9/486.

3. The present note has been prepared pursuant to the request of the Commission. It is intended to provide a summary of the reasons for the adoption of a provision and its main objectives, along with explanations and interpretations of particular terms, without, however, giving a complete account of the travaux préparatoires or of all proposals and provisions that were not retained. For the benefit of those seeking fuller information on the history of a given provision, the commentary lists the references to the relevant portions of the reports of the sessions of the Working Group and the Commission.¹¹ The present note covers articles 1 through 17 of the draft Convention and is based on the consolidated text of the draft Convention as adopted by the Working Group at its last session, held at Vienna from 11 to 22 December 2000. The commentary on the remaining articles of the draft Convention will be issued in a subsequent document.

I. ANALYTICAL COMMENTARY

A. Title and preamble

Draft Convention on Assignment of Receivables in International Trade*Preamble*

The Contracting States,

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

Considering that problems created by uncertainties as to the content and the choice of legal regime applicable to the assignment of receivables constitute an obstacle to international trade,

Desiring to establish principles and to adopt rules relating to the assignment of receivables that would create certainty and transparency and promote the modernization of the law relating to assignments of receivables, while protecting existing assignment practices and facilitating the development of new practices,

Desiring also to ensure adequate protection of the interests of debtors in assignments of receivables,

Being of the opinion that the adoption of uniform rules governing the assignment of receivables would promote the availability of capital and credit at more affordable rates and thus facilitate the development of international trade,

Have agreed as follows:

References

A/CN.9/420, paras. 14-18; A/CN.9/434, paras. 14-16; A/CN.9/455, paras. 157-159; A/CN.9/445, paras. 120-124; A/CN.9/456, paras. 19-21 and 60-65; and A/55/17, paras. 181-183.

¹¹In order to avoid confusion, no special reference is made to previous article numbers, which, in the course of the preparation of the draft Convention, were altered several times. However, any earlier number will be apparent from the relevant discussion in the reports of the Working Group. Annex II to A/CN.9/486 contains an index to the final renumbering of articles.

*Commentary**Title*

4. The draft Convention is intended to apply to a wide variety of assignment-related practices (for a brief description of the practices, see paras. 7-13; for a definition of the terms “assignment”, “receivable”, “assignor”, “assignee” and “debtor”, see article 2). The focus of the draft Convention is on financing practices. However, the title of the draft Convention contains no reference to financing. The reason is the need to avoid giving the impression that the scope of the draft Convention is limited to purely financing transactions and excludes important service transactions (e.g. assignments in international factoring transactions in which protection against debtor default, book-keeping or collection services are provided).

5. The reference to international trade is intended to reflect the overall objective of the draft Convention to facilitate the movement of goods and services across borders and appropriately clarify that the draft Convention applies to assignments with an international and commercial element. However, it is not intended to limit the scope of the draft Convention, for example, only to assignments of receivables generated in international trade, excluding assignments of domestic receivables, or only to international assignments of domestic receivables, excluding domestic assignments of international receivables. In addition, the reference to international trade should not be interpreted as suggesting that the draft Convention may in no case affect domestic assignments of domestic receivables. Such assignments are affected by article 24, under which a conflict between a domestic and a foreign assignee of domestic receivables is referred to the law of the assignor’s location (on this matter, see also paras. 21 and 22). They are also affected by article 1, paragraph 1 (b) under which the draft Convention may apply to a domestic assignment of a domestic receivable in a chain of assignments if a prior subsequent assignment falls within the ambit of the draft Convention. Furthermore, the reference to international trade is not intended to exclude assignments of consumer receivables (on this matter, see paras. 36, 103 and 132).

Preamble

6. The preamble is intended to serve as a statement of the general principles on which the draft Convention is based and which, under article 8, may be used in filling the gaps left in the draft Convention. These principles include: the facilitation of both commercial and consumer credit at more affordable rates, which is in the interest of all parties involved, assignors, assignees and debtors; the principle of debtor protection, according to which the debtor’s legal position is not affected unless expressly stated otherwise in the draft Convention; the promotion of the movement of goods and services across borders; the enhancement of certainty and predictability as to the rights of parties involved in assignment-related transactions; the modernization and harmonization of domestic and international laws on assignment, both at the substantive and the private international law level; the facilitation of new practices and the avoidance of interference with current practices; and the avoidance of interference with competition.

Transactions covered

7. In view of the broad definition of the term “receivable” in article 2 (a) (“contractual right to payment of a monetary sum”), the draft Convention applies to a wide array of transactions. In particular, the draft Convention covers the assignment of trade receivables (arising from the supply of goods, construction or services between businesses), consumer receivables (arising from consumer transactions) and sovereign receivables (arising from transactions with a governmental authority or a public entity). With a view to clarifying the context of application of the draft Convention, those practices are described briefly in the following paragraphs. The list of practices covered by the draft Convention cannot be exhaustive, in particular in view of the rapid development of new practices.

8. First of all, included are traditional financing techniques relating to trade receivables, such as asset-based financing, factoring and forfaiting. Revolving credit facilities and purchase-money financing are the most common types of asset-based financing. Under a revolving loan facility, a lender makes loans from time to time at the request of its borrower. Such loans are secured by a security interest in all of the borrower’s existing and future receivables or inventory (i.e. a revolving pool of goods that are bought, stored and sold on a regular basis) or both. They are generally used by the borrower to finance its ongoing working capital needs. The amount of loans available under this type of loan facility is based upon a specified percentage of the value of the collateral. This percentage (generally known as the “advance rate”) is determined by the lender based upon the lender’s estimate of the amount it would realize on the collateral if it were to look to it as a source for repayment of the loan. Typically, the advance rate ranges from 70 per cent to 90 per cent with respect to collateral consisting of receivables and 40 per cent to 60 per cent with respect to collateral consisting of inventory. The revolving loan structure is, from an economic standpoint, highly efficient and generally considered to be beneficial to the borrower, since it is aimed at matching borrowings to the borrower’s “cash conversion cycle” (i.e. acquiring inventory, selling inventory, creating receivables, receiving payments on the receivables and acquiring more inventory to begin the cycle again).

9. The term “purchase-money financing” refers to a financing arrangement under which a seller of goods or other property extends credit to its purchaser to enable the purchaser to acquire the property, or a creditor makes a credit or loan to the purchaser to enable the purchaser to acquire the property. In both cases, the seller or creditor will receive a security interest in the property to secure the credit or loan and in the resulting receivables. A common type of purchase-money financing is known as “floor-planning”. Under a floor-planning facility, a creditor makes loans to finance the acquisition of a debtor’s stock of inventory. This type of facility is often provided to debtors that are dealers in items, such as automobiles, trucks or other vehicles, computers and large consumer appliances. The creditors in these arrangements are often finance entities affiliated with the manufacturers. They normally take a security interest in the inventory and in any receivables resulting from the sale of inventory. Another common type of

purchase-money financing is known as “purchase order financing”. Under this type of facility, the creditor typically provides funds to finance the fulfillment by the debtor of specific purchase orders, which often includes the purchase by the debtor of the inventory required to complete the orders. The loan will be secured by the purchase orders, the purchased inventory and the resulting receivables. Among its other benefits to debtors, purchase-money financing serves a pro-competitive purpose in that it enables a debtor to choose different creditors to finance different components of the debtor’s business in the most efficient and cost-effective way.

10. Factoring, in its most common form, is the outright sale of a large number of receivables (with or without recourse to the assignor in the case of debtor default). Forfeiting, in its basic form, is the outright sale of single, large-value receivables, whether they incorporated in a negotiable instrument or not, without recourse. In these types of transactions, assignors assign to financiers their rights in receivables arising from the sale of the assignors’ goods or services. The assignment in such transactions is normally an outright transfer but may also, for various reasons (e.g. stamp duty), be for security purposes. The purchase price is adjusted depending on the risk and the time involved in the collection of the underlying receivable. Beyond their traditional forms, those transactions appear in a number of variants tailored to meet the various needs of parties to international trade transactions. For example, in invoice discounting, there is an outright sale of a large number of receivables without debtor notification but with full recourse against the assignor in the case of debtor default. In maturity factoring, there is full administration of the sales ledger, collection from debtors and protection against bad debts, but without any financing. In international factoring, receivables are assigned to a factor in the assignor’s country (“export factor”) and then from the export factor to another factor in the debtor’s country (“import factor”). The second assignment is made for collection purposes and the factors do not have recourse against the assignor in the case of debtor default (non-recourse factoring). All those transactions are covered in the draft Convention regardless of their form.

11. The draft Convention also covers innovative financing techniques, such as securitization and project financing on the basis of the future income flow of a project. In a securitization transaction, an assignor, creating receivables through its own efforts (“originator”), assigns, usually by way of an outright transfer, these receivables to an entity (“special purpose vehicle” or “SPV”). The SPV is fully owned by the assignor and specially created for the purpose of buying the receivables and paying their price with the money received from investors to whom the SPV sells the receivables or securities backed by the receivables. The segregation of the receivables from the originator’s other assets allows the price paid by investors (or the money lent) to be linked to the financial strength of the receivables assigned and not to the creditworthiness of the assignor. It also insulates the receivables from the risk of the insolvency of the originator. Accordingly, the originator may be able to obtain more credit than would be warranted on the basis of its own credit rating. In addition, by gaining access to international securities markets, the originator may be

able to obtain credit at a cost that would be lower than the average cost of commercial bank-based credit.

12. In large-scale, revenue-generating infrastructure projects, sponsors raise the initial capital costs by borrowing against the future revenue stream of the project. Thus, hydroelectric dams are financed on the security of the future income flow from electricity fees, telephone systems are paid for by the future revenues from telecommunications charges and highways are constructed with funds raised through the assignment of future toll-road receipts. Given the draft Convention’s applicability to future receivables, these types of project finance may be reduced to transfers, usually for purposes of security, of the future receivables to be generated by the project being financed. In this context, it should be emphasized that the draft Convention’s exclusion of assignments made for personal, family or household purposes (see article 4, para. 1 (a)) will not act to exclude the assignment of consumer receivables.

13. Many other forms of transactions will be covered, including the refinancing of loans for the improvement of the capital-obligations ratio or for portfolio diversification purposes, loan syndication and participation and the assignment of an insurance company’s contingent obligation to pay upon loss. Also covered are practices relating to the assignment of real estate or aircraft receivables and of receivables arising from certain financial transactions (e.g. receivables owed on the termination of all outstanding financial contracts governed by netting agreements; see article 4, para. 2 (b) and para. 47).

B. CHAPTER I SCOPE OF APPLICATION

Commentary

Structure of chapter I

14. In chapter I, scope-related issues are dealt with in different provisions for the sake of clarity and simplicity in the text. Article 1 defines the substantive scope in general terms, as well as the territorial scope of application of the draft Convention. Articles 2 and 3 define the substantive scope in more detailed terms (definitions of assignment, receivable and internationality of an assignment or a receivable). Article 4 deals with excluded transactions. Article 5 (definitions and rules of interpretation) appears in chapter II of the draft Convention since the terms defined therein do not raise mainly scope-related issues.

Article 1. *Scope of application*

1. This Convention applies to:

(a) Assignments of international receivables and to international assignments of receivables as defined in this chapter, if, at the time of the conclusion of the contract of assignment, the assignor is located in a Contracting State; and

(b) Subsequent assignments, provided that any prior assignment is governed by this Convention.

2. This Convention applies to subsequent assignments that satisfy the criteria set forth in paragraph 1 (a) of this article, even if it did not apply to any prior assignment of the same receivable.

3. This Convention does not affect the rights and obligations of the debtor unless, at the time of the conclusion of the original contract, the debtor is located in a Contracting State or the law governing the original contract is the law of a Contracting State.

4. The provisions of chapter V apply to assignments of international receivables and to international assignments of receivables as defined in this chapter independently of paragraphs 1 and 2 of this article. However, those provisions do not apply if a State makes a declaration under article 39.

5. The provisions of the annex to this Convention apply as provided in article 42.

References

A/CN.9/420, paras. 19-32; A/CN.9/432, paras. 13-38; A/CN.9/434, paras. 17-41; A/CN.9/445, paras. 45-48 and 125-145; A/CN.9/447, paras. 143-146; A/CN.9/455, paras. 41-46 and 160-173; A/CN.9/456, paras. 22-37; A/CN.9/466, paras. 145-149; A/55/17, paras. 13-17; and A/CN.9/486, paras. 70-75.

Commentary

Substantive and territorial scope of application

15. Under article 1, the draft Convention applies to assignments of receivables (for a definition of the terms “assignment”, “subsequent assignment”, “receivable”, “assignor”, “assignee” and “debtor”, see article 2). There are two conditions for the draft Convention to apply. There needs to be an element of internationality (for an exception, see article 1, para. 1 (b)) and an element of a territorial connection between certain parties and a Contracting State (for an exception, see article 1, para. 4). The element of internationality may relate to the assignment or to the receivable. Accordingly, the draft Convention applies to assignments of international receivables, whether or not the assignments are international or domestic, and to international assignments of receivables, even if the receivables are domestic (for comments on internationality, see paras. 38-41). The element of territorial connection may relate to the assignor only or to the assignor and the debtor as well. For the application of the provisions of the draft Convention other than the debtor-related provisions (e.g. chapter IV, section II), only the assignor needs to be located in a Contracting State. For the application of the draft Convention as a whole, the debtor too needs to be located in a Contracting State (or the law governing the receivable needs to be the law of a Contracting State; for a discussion of the term “location”, see paras. 67-69).

16. This approach is based on the assumption that the main disputes that the draft Convention would be called upon to resolve would be addressed if the assignor (and, only for the application of the debtor-related provisions, the debtor too) is located in a Contracting State. This approach

also takes into account that application of the provisions of the draft Convention other than those dealing with the rights and obligations of the debtor would not affect the debtor and, therefore, the debtor’s location (or the law governing the original contract) should not matter for their application. It also takes into account that enforcement would normally be sought in the place of the assignor’s or the debtor’s location and there is thus no need to make reference to the assignee’s location.

17. The territorial scope of application of the draft Convention is sufficiently broad and there is no need to extend it to cases in which no party may be located in a Contracting State but the law of a Contracting State is applicable by virtue of private international law rules. In addition, relying on private international law rules for the application of the draft Convention might introduce uncertainty. Private international law on assignment is not uniform and, in any case, parties would not know at the time of the conclusion of a transaction where a dispute might arise and, as a result, which private international law rules might apply. However, if the forum is located in a non-Contracting State, the courts are not bound by the draft Convention. Therefore, the courts of a non-Contracting State may not be precluded from applying, at least, the substantive law provisions of the draft Convention as part of the law designated by their private international law rules (if *renvoi* is prohibited under the law of the forum, the private international law rules of the draft Convention would not be applicable in such a case; for the meaning of *renvoi*, see para. 70).

18. Under article 1, paragraph 3, the debtor-related provisions of the draft Convention may apply to situations in which the debtor is not located in a Contracting State but the law of a Contracting State governs the contract from which the assigned receivable arises (“the original contract”; see article 5 (a)). In this context, a different approach to the territorial scope of application of the draft Convention is followed, since both the laws referred to would be known to the debtor. In line with article 1, paragraph 1, article 1, paragraph 3 provides that the debtor needs to be located in a Contracting State or the original contract needs to be governed by the law of a Contracting State at the time of the conclusion of the original contract. This approach is followed so as to ensure predictability of the application of the draft Convention with respect to the debtor (the same approach is followed in article 40). However, as a result of this approach, in the case of future receivables assigned domestically, parties may not be able to determine (at least, before the future receivables arise) whether the draft Convention would apply to the rights and obligations of the debtor (for a related problem with regard to future receivables assigned domestically, see paras. 40 and 41).

Subsequent assignments

19. The draft Convention is designed to apply also to subsequent assignments. Such assignments may be made, for example, in the context of international factoring, securitization and refinancing transactions. The only condition for the application of the draft Convention is that a prior assignment is governed by the draft Convention. Accordingly, even a domestic assignment of domestic re-

ceivables may be brought into the ambit of the draft Convention if it is subsequent to an international assignment. The reason for such an approach is that, unless all assignments in a chain of assignments are made subject to one and the same legal regime, it would be very difficult to address assignment-related issues in a consistent manner (*continuatio juris*).

20. The draft Convention is also intended to apply to subsequent assignments that in themselves fall under article 1, paragraph 1 (*a*), whether or not any prior assignment is governed by the draft Convention. As a result, the draft Convention may apply only to some of the assignments in a chain of assignments. This approach is a departure from the principle of *continuatio juris*. However, it is followed so as to ensure that parties to assignments in securitization transactions, in which the first assignment is a domestic one and relates to domestic receivables, are not deprived of the benefits that may be derived from the application of the draft Convention. This approach is based on the assumption that it would not unduly interfere with domestic practices (on this matter, see paras. 21 and 22).

Relationship with national law

21. As a result of the fact that the draft Convention covers international assignments of domestic receivables or even domestic assignments of domestic receivables made in the context of subsequent assignments, business parties in domestic transactions could benefit from increased access to international financial markets and thus to potentially lower-cost credit. The interests of assignors protected, for example, by national law prohibitions of assignments of future receivables or of global assignments, would not be unduly interfered with (see para. 94). The draft Convention does not preclude the assignor from offering its receivables to different lenders for credit (e.g. to a supplier of materials on credit and to a financing institution for working capital) in that it does not give priority to one lender over the other. The interests of debtors, protected by national legislation, would not be unduly interfered with either. The draft Convention requires that the debtor be located in a Contracting State (or that the law governing the original contract is the law of a Contracting State) and limits the effects of an assignment on the debtor to those specified in articles 19 to 23.

22. The interests of domestic assignees would not be unduly interfered with either, because the draft Convention does not give priority to a foreign over a domestic assignee. It merely specifies which national law would govern priority (see articles 24 and 5 (*m*)). In addition, a conflict between a domestic and a foreign assignee of domestic receivables is not covered by the draft Convention, unless the assignor is located in a Contracting State (see article 1, para. 1 (*a*)). That State, by definition in a domestic assignment of a domestic receivable, would be the State in which both the domestic debtor and the domestic assignee would be located (see article 3). However, in the case of a conflict between an assignment by a branch office and a duplicate assignment of the same receivables by the head office, different laws may apply. This may occur if the branch or the head office is located in a non-Contracting State in which the conflict is referred to the law of the branch office's

location, while under the draft Convention reference would be made to the law of the head office's location (see article 5 (*h*)).

Scope of chapter V

23. Under article 1, paragraph 4, chapter V applies to assignments with an international element as defined in article 3, whether or not there is a territorial connection between an assignment and a Contracting State. The scope of application of chapter V is limited to international transactions as defined in article 3. In order to reduce any conflicts with other conventions, dealing with private international law issues of assignment,¹² article 1, paragraph 4 allows States to opt out of chapter V. On the other hand, the scope of chapter V is extended beyond the scope of the other provisions of the draft Convention, since chapter V applies irrespective of any territorial connection with a Contracting State. As a result, chapter V may perform a double function. It may supplement the other provisions of the draft Convention or provide a second layer of harmonization, a so called mini-convention along the lines of chapter VI of the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (New York, 1995).

Application of the annex

24. Article 24 of the draft Convention refers priority issues to the law of the assignor's location (as to the meaning of "location", see article 5 (*h*)). In recognition of the fact that some States may need to modernize or adjust their priority rules, article 1, paragraph 5 allows States to opt into one of the substantive law priority rules set forth in the annex. Article 42 clarifies the effect of a declaration made under article 1, paragraph 5.

Article 2. *Assignment of receivables*

For the purposes of this Convention:

- (a) "Assignment" means the transfer by agreement from one person ("assignor") to another person ("assignee") of all or part of, or an undivided interest in, the assignor's contractual right to payment of a monetary sum ("receivable") from a third person ("debtor"). The creation of rights in receivables as security for indebtedness or other obligation is deemed to be a transfer;
- (b) In the case of an assignment by the initial or any other assignee ("subsequent assignment"), the person who makes that assignment is the assignor and the person to whom that assignment is made is the assignee.

References

A/CN.9/420, paras. 33-44; A/CN.9/432, paras. 39-69 and 257; A/CN.9/434, paras. 62-77; A/CN.9/445, paras. 146-153; A/CN.9/456, paras. 38-43; A/CN.9/466, paras. 87-91; and A/55/17, paras. 18-24.

¹²For example, the European Union Convention on the Law Applicable to Contractual Obligations, Rome, 1980 ("the Rome Convention") and the Inter-American Convention on the Law Applicable to International Contracts, Mexico City, 1994 ("the Mexico City Convention").

Commentary

Assignment and contract of assignment or financing contract

25. Like most legal systems, the draft Convention recognizes the distinction between the assignment itself as a transfer of property and the contract of assignment as a transaction creating personal obligations (in other words, between the assignment and its *causa*, that is, a sale, security agreement, gift or payment). However, the draft Convention does not deal with the relationship between the assignment and the contract of assignment. In particular, the draft Convention does not address the question whether the effectiveness of an assignment depends on the validity of the contract, which is treated differently from one legal system to another. In addition, the draft Convention does not refer to the purpose of an assignment, that is whether an assignment is made for purely financing purposes or for bookkeeping, collection, protection against debtor default, risk-management, portfolio diversification or other purposes. A reference to the “financing” purpose of a transaction could create a special regime on assignments for financing purposes, even though one is not needed. Such a reference could also result in unnecessarily excluding from the scope of the draft Convention important transactions in which services but no financing may be provided. Furthermore, the “commercial” purpose of the transaction could create uncertainty, since a uniform definition of the term in a convention is neither feasible nor desirable.

Contractual issues

26. The draft Convention does not address contractual issues other than those dealt with in articles 13 to 16 and 29. For example, whether “value, credit or services” (i.e. consideration) is given or promised at the time of the assignment or at an earlier time is not mentioned in article 2 or elsewhere in the draft Convention, since it is a matter for the contract of assignment or the financing contract. As a result, the draft Convention would apply to both assignments for value and to gratuitous assignments.

“Transfer by agreement”

27. With the intention of bringing within the ambit of the draft Convention, in addition to assignments, other practices involving the transfer of property rights in receivables, such as contractual subrogation or pledge, article 2 defines “assignment” as a transfer. This approach takes into account the fact that significant receivables financing transactions, such as factoring, take place, in some legal systems, by way of a contractual subrogation or pledge. Rather than creating a new type of assignment, the draft Convention is aimed at providing uniform rules on assignment and assignment-related practices with an international element. Although covered in theory by currently existing national law, such practices cannot be sufficiently developed in view of the inherent limitations on the application of national law in an international context posed by mandatory rules and public policy considerations of the forum. The reference to transfers “by agreement” is intended to exclude transfers by operation of law (e.g. statutory subrogation) and unilateral assignments (i.e. where there is no agreement of the assignee, whether explicit or implicit).

28. Both outright transfers, including those made for security purposes, and assignments by way of security are covered. In order to avoid any ambiguity as to that matter, article 2 (a) covers it explicitly and creates the legal fiction that, for the purposes of the draft Convention, the creation of security rights in receivables is deemed to be a transfer. However, the draft Convention does not define outright assignments and assignments by way of security. In view of the wide divergences existing among legal systems as to the classification of assignments, this matter is left to other law applicable outside the draft Convention. In fact, an assignment by way of security could possess attributes of an outright transfer, while an outright transfer might be used as a security device.

National form and opting-in

29. There is no condition for the application of the draft Convention other than the conditions described in chapter I. In particular, there is no requirement for the assignment to be in a certain form for the draft Convention to apply. In fact, article 8 refers form to law applicable outside the draft Convention. In addition, there is no need for the parties to the assignment to indicate in any way their will to submit their assignment to the draft Convention. If parties located in a Contracting State opt into the draft Convention anyway, in line with article 6, their agreement should not affect the rights of the debtor and other third parties. If parties are located in a non-Contracting State, the law applicable to the choice of law by the parties would determine its effects.

“From one person to another person”

30. Both the assignor and the assignee can be legal entities or individuals, whether merchants or consumers. In particular, the assignment between individuals is covered, unless the assignee is a consumer and the assignment is made for his or her own consumer purposes (article 4, para. 1 (a)). As a result, the assignment of credit card receivables or of loans secured by real estate in securitization transactions or of toll-road receipts in project financing arrangements falls within the ambit of the draft Convention. In view of the Commission’s understanding that the singular includes the plural and vice versa, an assignment made by many persons (e.g. joint owners of receivables) or to many persons (e.g. a syndicate of financiers) is also covered (so is the assignment of more than one receivable). In the determination, however, of the territorial scope of application or internationality, each assignment is to be considered as a separate assignment and to meet the conditions of chapter I for the draft Convention to apply (as to cases involving multiple debtors, see para. 37). In an assignment to an agent acting on behalf of several persons, whether there is one assignee or more depends on the exact authority of the agent, which is a matter left to law applicable outside the draft Convention. If the agent acts as a mere intermediary, accepting and forwarding correspondence to the persons it represents for instructions, and then forwarding the instructions, an assignment to several persons, on whose behalf the assignee is acting, may be involved. If the agent has the authority to make decisions on behalf of the persons represented, an assignment to one person may be involved.

“Contractual right to payment of a monetary sum”

31. The draft Convention applies to the assignment of receivables arising from any type of contract, in the broadest sense of the term, whether the contract exists at the time of the assignment or not. What is a “contractual” right is a matter of interpretation in accordance with the law governing that right. However, contractual receivables covered include receivables arising under contracts for the supply of goods, construction or services. The assignment of such receivables is covered whether the relevant original contracts are commercial or consumer transactions. For example, toll road receipts are contractual receivables, since the person using the toll road accepts implicitly the offer made implicitly by the public or private entity operating the toll road. The assignment of receivables in the form of royalties arising from the licensing of intellectual property is also covered. So is the assignment of damages for breach of contract and of interest (if it was owed under the original contract) or of dividends (arising from shares, whether they were declared at, or arose after, the time of the assignment). However, the assignment of receivables from derivatives, letters of credit or deposit accounts is excluded (see article 4). On the other hand, the transfer of receivables arising by operation of law, such as tort receivables, receivables arising in the context of unjust enrichment, tax receivables or receivables determined in court judgements or arbitral awards, are excluded, unless they are incorporated in a settlement agreement.

32. In principle, the right of the seller (assignor) to any returned goods (e.g. because they are defective) is not a receivable. It is, however, treated as a receivable in the relationship between the assignor and the assignee if it takes the place of the assigned receivable (see articles 5 (j) and 16). Furthermore, non-monetary rights convertible into a monetary sum are receivables the assignment of which is covered. If the conversion is foreseen in the original contract, this result is implicit in article 2. If such a conversion is not foreseen in the original contract, it is in line with the decision to cover the assignment of non-monetary rights converted into damages for breach of contract.

Non-monetary performance rights

33. The assignment of other, non-monetary, contractual rights (e.g. the right to performance, the right to declare the contract avoided) is not covered. To the extent that assignees would rely not on the receivables but on such non-monetary performance rights, the assignment of such rights either does not form part of significant transactions or may be prohibited where the right to performance is a personal right. The assignment of contracts, which involves an assignment of contractual rights and a delegation of obligations, is not covered either. While such transactions may form part of financial arrangements, the financier would normally rely mainly on the receivables. As to the delegation of obligations, it is not covered because it raises issues going far beyond the desirable scope of the draft Convention.

Parts or undivided interests in receivables

34. Important practices covered by the draft Convention involve the assignment of parts or undivided interests in

receivables (e.g. securitization, loan syndication and participation). The effectiveness of partial assignments is not recognized in all legal systems. Article 9, therefore, validates such assignments. In addition, in order to avoid any uncertainty as to whether the draft Convention as a whole applies to them article 2 contains an explicit reference to such assignments. This result is particularly useful with respect to the application of the debtor-protection provisions to cases where the receivable may be partially assigned to several assignees (as to the debtor’s discharge in the case of a notification of a partial assignment, see article 19, para. 6).

Personal rights (statutory assignability)

35. The draft Convention treats the question of the assignment of personal rights (e.g. wages, pensions or insurance policies) and of rights the assignment of which is prohibited by law (e.g. sovereign receivables) as one of effectiveness not of scope. Accordingly, article 2 does not exclude the assignment of personal rights (involved, for example, in significant financing practices, such as the financing of temporary employment services). If such assignments are not prohibited under national law, the draft Convention recognizes their effectiveness. If, however, such assignments are prohibited under national law, the draft Convention does not affect that prohibition (see article 9, para. 3).

“[Owed by] a third person” (merchant, consumer, State or other public entity)

36. Apart from the assignor and the assignee, the debtor too could be a legal entity or an individual, a merchant or a consumer, a governmental authority or a financial institution. Unlike the Unidroit Convention on International Factoring (“the Ottawa Convention”), the draft Convention does not exclude commercial practices involving the assignment of contractual receivables owed by consumers, unless the assignment is to a consumer for his or her consumer purposes (see article 4, para. 1 (a)). Assignments of consumer receivables form part of significant practices, such as securitization of credit card receivables, the facilitation of which has the potential to increase access to lower-cost credit by manufacturers, retailers and consumers and, as a result, could facilitate international trade in consumer goods. However, while covering the assignment of consumer receivables, the draft Convention is not intended to override consumer-protection law (see paras. 103 and 132).

37. The assignment of receivables owed by a Government or a public entity is also covered, unless their assignment is prohibited by law (see article 9, para. 3). However, the State in which the sovereign debtor is located may enter a reservation as to the rule of article 11 according to which assignments are effective notwithstanding a contractual limitation on assignment (see article 40). Receivables owed by debtors in financial contracts, such as loans, deposit accounts, swaps and derivatives, are not covered by the draft Convention (see article 4 and paras. 47-54). Furthermore, the assignment of one or more than one receivable, whether in whole or in part, owed jointly (i.e. fully) and severally (i.e. independently) by multiple debtors is also covered, provided that the original contract is governed by

the law of a Contracting State. Otherwise, in cases where one or more, but not all, debtors are located in a Contracting State, each transaction should be viewed as an independent transaction so as to ensure predictability with regard to the debtor's legal position.

Article 3. *Internationality*

A receivable is international if, at the time of the conclusion of the original contract, the assignor and the debtor are located in different States. An assignment is international if, at the time of the conclusion of the contract of assignment, the assignor and the assignee are located in different States.

References

A/CN.9/420, paras. 26-29; A/CN.9/432, paras. 19-25; A/CN.9/445, paras. 154-167; A/CN.9/456, paras. 44, 45, 227 and 228; A/CN.9/466, paras. 92 and 93; and A/55/17, paras. 25-26.

Commentary

38. With a view to achieving certainty in the application of the draft Convention, article 3, following the example of other texts prepared by the Commission or other organizations, defines internationality by reference to the location of the parties (as to the meaning of "location", see article 5 (*h*)). In the case of more than one assignor, assignee or debtor internationality is to be determined for each of those parties separately (see paras. 30 and 37). As a result of article 3, once a receivable is international, its assignment is covered by the draft Convention, whether the receivable is assigned to a domestic or to a foreign assignee. On the other hand, even if a receivable is domestic, its assignment may come within the ambit of the draft Convention if it is international or it is part of a chain of assignments that includes an earlier international assignment (see paras. 19 and 20).

39. The international character of an assignment is determined at the time it is made, while internationality of a receivable is determined at the time of the conclusion of the original contract ("at the time it arises"). A change in the location of the parties after the relevant time does not make an international assignment or receivable domestic and vice versa. Determining the internationality of a receivable at the time it arises is justified by the need for a potential assignor or a debtor to know at the time of the conclusion of the original contract which law might apply to a potential assignment. Such knowledge is important for the determination of the availability of the cost of credit to the assignor and, consequently, to the debtor.

40. As a result, however, in the case of a domestic bulk assignment of domestic and international future receivables, the parties may not be able to determine at the time of the assignment whether the draft Convention will apply to the portion of the assignment that relates to international receivables. This means that, depending on whether the draft Convention applies, implied representations as between the assignor and the assignee, as well as the legal position of the debtor may be different. However, the ap-

plicable priority rules would not be different, since the draft Convention would cover in any case all possible conflicts of priority, including conflicts with a domestic assignee of domestic receivables.

41. Parties to a domestic bulk assignment of domestic and international future receivables, will, therefore, need to structure their transactions in a certain way to avoid this problem (e.g. by avoiding the assignment of both domestic and international future receivables in one transaction). Where parties are not able to do so, they will be exposed to the possibility that one law may apply to domestic receivables while another law, the draft Convention, would apply to international receivables. This problem, however, is not created by the draft Convention; it exists already outside the draft Convention in cases where domestic and international receivables are assigned. In addition, the draft Convention makes it easier for parties to address this problem at least, to the extent that parties to a domestic assignment will be faced with only two laws (i.e. the law of the country, in which the assignor and the assignee are located, and the draft Convention).

Article 4. *Exclusions*

1. This Convention does not apply to assignments made:

- (a) To an individual for his or her personal, family or household purposes;
- (b) By the delivery of a negotiable instrument, with an endorsement, if necessary;
- (c) As part of the sale, or change in the ownership or the legal status, of the business out of which the assigned receivables arose.

2. This Convention does not apply to assignments of receivables arising under or from:

- (a) Transactions on a regulated exchange;
- (b) Financial contracts governed by netting agreements, except a receivable owed on the termination of all outstanding transactions;
- (c) Bank deposits;
- (d) Inter-bank payment systems, inter-bank payment agreements or investment securities settlement systems;
- (e) A letter of credit or independent guarantee;
- (f) The sale, loan or holding of, or agreement to repurchase, investment securities.

3. This Convention does not:

- (a) Affect whether a property right in real estate confers a right in a receivable related to that real estate or determine the priority of such a right in the receivable with respect to the competing right of an assignee of the receivable;
- (b) Make lawful the acquisition of property rights in real estate not permitted under the law of the State where the real estate is situated.

[4. This Convention does not apply to assignments listed in a declaration made under article 41 by the State in which the assignor is located, or with respect to the

provisions of this Convention that deal with the rights and obligations of the debtor, by the State in which the debtor is located or the State whose law is the law governing the original contract.]

References

A/CN.9/432, paras. 18, 47-52, 106 and 234-238; A/CN.9/434, paras. 42-61; A/CN.9/445, paras. 168-179; A/CN.9/456, paras. 46-52; A/CN.9/466, paras. 54-77, 78-86 and 192-195; and A/55/17, paras. 27-109 and 152.

Commentary

42. In view of the broad scope of application of the draft Convention, article 4 is intended to exclude certain practices that are either distinct from assignment-related practices or are already sufficiently regulated.

Assignments for consumer purposes

43. Paragraph 1 (a) excludes from the scope of the draft Convention assignments of trade or consumer receivables from a business entity or a consumer to a consumer but only if they are made for the assignee's personal, family or household purposes. Such assignments are of no practical significance. Accordingly, assignments of receivables arising from consumer transactions are not excluded, unless such assignments are made to a consumer for his or her consumer purposes.

Assignments of negotiable instruments

44. In order to avoid any interference with the rights of persons derived from negotiable instrument law (i.e. the holder of the instrument and the debtor under the instrument), paragraph 1 (b) excludes transfers of negotiable instruments (i.e. bills of exchange, promissory notes, cheques and bearer documents). The main reason for this approach is that negotiable instrument law is a distinct body of law that treats certain key issues in a way other than the way in which they are addressed in the draft Convention. For example, under negotiable instrument law, if the debtor pays a transferee of the instrument who is not the rightful holder, the debtor is still liable to the holder. Similarly, a person who takes the instrument for value and without knowledge of any hidden defences against the transferor is not subject to those defences.

45. In view of the policy underlying paragraph 1 (b), the focus is on the negotiation of an instrument (i.e. delivery with an endorsement if such endorsement is necessary). As a result, transfers of instruments to the order of the holder by delivery and endorsement and transfers of bearer documents by delivery are excluded. However, transfers of instruments to the order by mere delivery without a necessary endorsement are not excluded. In addition, if a receivable exists both under the contract and in the form of a negotiable instrument, the assignment of the receivable is not excluded. Receivables arising under a contract are often incorporated into a negotiable instrument for the sole purpose of obtaining payment by way of summary proceedings in court, if necessary.

Assignments of receivables in corporate buyouts

46. Paragraph 1 (c) excludes assignments made in the context of the sale of a business as a going concern, if they are made from the seller to the buyer. Such assignments are excluded since they are normally regulated differently by national laws dealing with corporate buyouts. However, assignments made to an institution financing the sale (or between two or more entities for the purpose of debt restructuring or refinancing) are not excluded.

Assignments of "financial" receivables

47. Paragraph 2 excludes a number of practices for which the draft Convention (e.g. the provisions on representations, contractual limitations on assignment, set-off and priority) would not be well suited. Unlike the practices in article 11, paragraph 3 and article 12, paragraph 3 with respect to which the application of articles 11 and 12 only is excluded, practices are excluded in article 4, paragraph 2 from the scope of the draft Convention as a whole. The difference in the approach lies in the fact that the draft Convention would never apply to practices listed in article 4, paragraph 2, while the application of the draft Convention with respect to practices listed in article 11, paragraph 3 and article 12, paragraph 3 would depend on the existence of an anti-assignment agreement and on the effect given to such an agreement by the law governing it.

48. The criterion for the exclusion in subparagraph (a) is not the type of the asset being traded but the method of settlement used. In addition, not every regulated trading is excluded but trading under the auspices of a regulated exchange (e.g. stock exchange, securities and commodities exchange, foreign currency and precious metal exchange). As a result, the trading of securities, commodities, foreign currency or precious metals outside a regulated exchange (and outside netting arrangements excluded in subparagraph (b)) is not excluded (e.g. the factoring of proceeds from the sale of gold or other precious metals).

49. Subparagraph (b) excludes "financial contracts" governed by netting agreements (for comments on the relevant definitions, see paras. 72-75). In such financial transactions, it is inherent that any party may be debtor or creditor and, by definition, payments net against each other. As a result, if one payment is pulled out by way of an assignment, the credit risk situation on the basis of which a party entered into the transaction may change. A change in the risk exposure of a party could unravel the whole transaction or have a negative impact on the cost of credit, a result which would run counter to the overall objective of the draft Convention. In view of the importance of such transactions for international financial markets and their volume, such a situation may create a systemic risk that may affect the financial system as a whole.

50. Practices governed by netting arrangements between two commercial enterprises other than financing institutions ("industrial netting") are not excluded. There is nothing in the draft Convention that would interfere with such practices. In addition, their exclusion could inadvertently result in excluding significant commercial transactions on the mere ground that the assignor had a netting arrange-

ment with the debtor. The assignment of a receivable payable upon termination (“close-out”) of a netting arrangement is not excluded either, since, in the case of such an assignment, there is no risk of upsetting the mutuality of obligations (see also article 11, para. 3 (*d*) and article 12, para. 4 (*d*)).

51. In subparagraph (*c*), receivables arising from deposit accounts are excluded. The reason is that certain provisions of the draft Convention (e.g. articles 5 (*h*), 11, 12, 19, 20 and 24) may upset the normal relationship between a financing institution and an account holder, and interfere with the extension of credit on the security of a pledge of the account.

52. The underlying reason for the exclusion in subparagraph (*d*) is the need to avoid interfering with the regulation of inter-bank payment systems (more than two parties) or agreements (two parties) and securities settlement systems (that normally involve more than two parties but may, in some countries, involve only two parties). Such systems are excluded in subparagraph (*d*) (and not in subparagraph (*b*)), since they operate within or outside netting agreements.

53. Assignments of receivables arising under a letter of credit or an independent guarantee are also excluded (see subparagraph (*e*)). Such assignments give rise to special considerations and are regulated by special legislative and non-legislative texts, including the United Nations Convention on Independent Guarantees and Standby Letters of Credit, the Uniform Customs and Practice for Documentary Credits (UCP500), the Uniform Rules for Demand Guarantees (URDG) and the Uniform Rules on Standby Practices (ISP98).

54. Subparagraph (*f*) is intended to address transactions with respect to investment securities that take place outside a regulated exchange (see subparagraph (*a*)) or a netting agreement (subparagraph (*b*)). The direct (by the owner) or indirect (by an intermediary) holding of paper or dematerialized securities is excluded, since it may generate receivables, such as the balance in a securities account or dividends from securities. Subparagraph (*f*) is also intended to exclude transactions made by physical delivery or by an entry into the books of an intermediary holding paper or dematerialized securities.

Assignments of real estate receivables

55. The main purpose of paragraph 3 is to ensure that the draft Convention does not disrupt national real estate markets. Subparagraph (*a*) is aimed at ensuring that the draft Convention would not apply to a conflict of priority between the holder of a right in real estate and the assignee of receivables arising from the sale or lease of, or secured by, real estate. Such a conflict may arise if a right in real estate is extended to receivables related to the real estate. For example, it is normal for a financier of a real estate acquisition or of a construction or an improvement of buildings to obtain a mortgage that gives the financier a right in future income derived from the real estate or from the buildings. The priority of the rights of such a financier is normally subject to the law of the country in which the

real estate is located. However, if the right of the financier in the receivables is not derived from the right in real estate, the assignment of the receivables is not excluded. Otherwise, the mere existence of a mortgage could inadvertently result in excluding from the scope of the draft Convention significant receivables financing practices that are currently regulated appropriately by national assignment of receivables law.

56. Subparagraph (*b*) is intended to ensure that the draft Convention does not affect any statutory prohibitions existing with respect to the acquisition of rights in real estate by an assignee of receivables related to the real estate. As a result, if payment of the assigned receivable is secured by a mortgage, despite article 12, the assignee would not obtain that mortgage if that mortgage was not transferable by law. Furthermore, subparagraph (*b*) is intended to supplement the protection afforded to holders of rights in real estate receivables in article 9, paragraph 3 (statutory prohibitions), article 12, paragraph 5 (form requirements) and article 25, paragraph 1 (public policy).

Exclusions by declaration

57. In the interest of enhancing the acceptability of the draft Convention, paragraph 4, which appears within square brackets since it has not yet been adopted, gives States the option to exclude further practices, whether existing or future.

C. CHAPTER II GENERAL PROVISIONS

Article 5. *Definitions and rules of interpretation*

For the purposes of this Convention:

(a) “Original contract” means the contract between the assignor and the debtor from which the assigned receivable arises;

(b) “Existing receivable” means a receivable that arises upon or before the conclusion of the contract of assignment and “future receivable” means a receivable that arises after the conclusion of the contract of assignment;

(c) “Writing” means any form of information that is accessible so as to be usable for subsequent reference. Where this Convention requires a writing to be signed, that requirement is met if, by generally accepted means or a procedure agreed to by the person whose signature is required, the writing identifies that person and indicates that person’s approval of the information contained in the writing;

(d) “Notification of the assignment” means a communication in writing that reasonably identifies the assigned receivables and the assignee;

(e) “Insolvency administrator” means a person or body, including one appointed on an interim basis, authorized in an insolvency proceeding to administer the reorganization or liquidation of the assignor’s assets or affairs;

(f) “Insolvency proceeding” means a collective judicial or administrative proceeding, including an interim proceeding, in which the assets and affairs of the assignor are subject to control or supervision by a court or other competent authority for the purpose of reorganization or liquidation;

(g) “Priority” means the right of a party in preference to another party;

(h) A person is located in the State in which it has its place of business. If the assignor or the assignee has a place of business in more than one State, the place of business is that place where the central administration of the assignor or the assignee is exercised. If the debtor has a place of business in more than one State, the place of business is that which has the closest relationship to the original contract. If a person does not have a place of business, reference is to be made to the habitual residence of that person;

(i) “Law” means the law in force in a State other than its rules of private international law;

(j) “Proceeds” means whatever is received in respect of an assigned receivable, whether in total or partial payment or other satisfaction of the receivable. The term includes whatever is received in respect of proceeds. The term does not include returned goods;

(k) “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 any transaction referred to above entered into in financial markets and any combination of the transactions mentioned above;

(l) “Netting agreement” means an agreement 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 (l) (ii) of this article under two or more netting agreements;

(m) “Competing claimant” means:

- (i) Another assignee of the same receivable from the same assignor, including a person who, by operation of law, claims a right in the assigned receivable as a result of its right in other property of the assignor, even if that receivable is not an international receivable and the assignment to that assignee is not an international assignment;
- (ii) A creditor of the assignor; or
- (iii) The insolvency administrator.

References

A/CN.9/420, paras. 52-60; A/CN.9/432, paras. 70-72 and 94-105; A/CN.9/434, paras. 78-85, 109-114, 167 and 244; A/CN.9/445, paras. 180-190; A/CN.9/456, paras. 53-78; A/CN.9/466, paras. 25-31, 46-49 and 94-100; A/55/17, paras. 110-118 and 184; and A/CN.9/486, paras. 47, 54, 147 and 173.

Commentary

Original contract

58. The original contract, which is used as a point of reference in articles 5 (h), 17, 18, paragraph 1, article 19, paragraph 1, article 20, paragraph 1, article 22, paragraph 2 (b) and article 23, is the source of the assigned receivable. With the exception of those provisions that expressly state otherwise (e.g. articles 9-12 and 17-23), the draft Convention is not intended to affect the rights and obligations of the parties under the original contract.

Existing and future receivable

59. The terms “existing” and “future” receivable are referred to in articles 9 and 10 (it is understood that the singular includes the plural and vice versa). The distinction between an existing and a future receivable is based on the time of the conclusion of the original contract. A receivable arising under a contract, which has been concluded before or at the time of assignment, is considered to be an existing receivable, even though it does not become due until a future date or is dependent upon counter-performance or some other future event. The definition covers the entire range of future receivables. It covers, in particular, conditional receivables (that might arise subject to a future event) and purely hypothetical receivables (that might arise from a future activity of the assignor; for a limitation introduced in article 9, see para. 83). While it is generally assumed that “conclusion of the contract” refers to the time when the parties reach a legally binding agreement and does not presuppose the performance of the contract, the exact meaning of this term is left to law applicable outside the draft Convention.

Writing

60. The term is referred to in articles 5 (d), 19, paragraphs 2 and 7, article 21, paragraphs 1 and 3, article 43, paragraphs 2 and 4, article 46, paragraph 1 of the draft Convention and in article 5, paragraph 1 of the annex. Its definition includes other than paper-based means of communications that can perform the same functions as a paper communication (e.g. provide tangible evidence, serve as a warning to the parties with regard to the consequences or provide a legible communication, authentication and sufficient assurances as to its integrity). It is inspired by articles 6 and 7 of the UNCITRAL Model Law on Electronic Commerce and reflects the two distinct notions of “writing” and “signature” (for the meaning of the terms “accessible”, “usable” and “subsequent reference”, see the Guide to Enactment of the Model Law, para. 50).

61. It is assumed that the need for higher assurances as to the authenticity of communications should be assessed differently depending on the context in which the communication is made. Accordingly, the draft Convention requires a writing for the notification of the assignment (see article 5 (d)) and a writing signed by the debtor for the waiver of the debtor's defences (see article 21, para. 1). Writing is also required for declarations by States and for certain registration-related acts (see article 43, paras. 2 and 4 of the draft Convention and article 5, para. 1 of the annex).

Notification of the assignment

62. The term is used in articles 15, 16, 18, 19, 20, paragraph 2 and article 22. A notification meets the requirements of the draft Convention if it is in writing and reasonably identifies the assigned receivables and the assignee (and it is in a language that is reasonably expected to inform the debtor, see article 18, para. 1). If a notification does not meet those requirements, it is not effective under the draft Convention. However, the question whether such a notification is effective under law applicable outside the draft Convention is subject to that law (as to the discharge of the debtor by payment to the person entitled to payment even under law applicable outside the draft Convention, see article 19, para. 8).

63. What is a reasonable description in each particular case is a matter to be determined in view of the circumstances. In general, it would not be necessary to state whether an outright assignment or an assignment by way of security is involved or to specifically identify the debtor or the amount. A general identification along the lines "all my receivables from my car business to X" or "all my receivables as against my clients in countries A, B and C to Y" would be reasonable. However, in the case of a partial assignment, the amount assigned may need to be specified in the notification (on partial assignments, see paras. 34 and 89; see also article 19, para. 6).

64. While the notification must reasonably identify the assignee for it to be an effective notification under the draft Convention, it does not need to identify the payee (i.e. the person to whom or for whose account or the address to which the debtor is to pay). Accordingly, a notification containing no payment instruction is effective under the draft Convention (see article 15, para. 1, article 18 para. 1 and article 19, para. 2; see also para. 124 and comments on article 19, para. 2).

Insolvency administrator and insolvency proceeding

65. The term "insolvency administrator" is used in articles 24 of the draft Convention and articles 2, 7 and 9 of the annex. The term "insolvency proceeding" is used in article 25 of the draft Convention and articles 2, 7 and 9 of the annex. Their definitions have been inspired by the definitions of "foreign proceeding" and "foreign administrator" contained in article 2 (a) and (d) of the UNCITRAL Model Law on Cross-Border Insolvency. They are also consistent with article 1, paragraph 1 and article 2 (a) and (b) of the European Union Regulation on Insolvency Proceedings. By referring to the purpose of a proceeding or to the function of a person, rather than using technical expressions that

may have different meanings in different legal systems, the definitions are sufficiently broad to encompass a wide range of insolvency proceedings, including interim proceedings. This approach is intended to ensure that a Contracting State would not need to recognize a proceeding that is not an insolvency proceeding under the law of that State. It is also intended to ensure that a Contracting State would not deny recognition to a proceeding that is an insolvency proceeding under the law of that State.

Priority

66. The term "priority" is used in articles 16, 24, 25, paragraph 2, articles 26, 27, 31 and 43, paragraph 7, article 45, paragraph 4 and article 46, paragraph 4 of the draft Convention, as well as in articles 1, 2 and 6 to 9 of the annex. Priority under the draft Convention means that a party may satisfy its claim in preference to other claimants. No reference is made to payment, since the receivable may be satisfied by payment or in some other way (e.g. return of goods). Priority does not mean validity. It presupposes an assignment that is valid as between the assignor and the assignee (for the reasons why use of the term "effective" is preferred in article 9, see para. 85). Whether a claimant has a proprietary (in rem) rather than a personal (ad personam) right and whether an assignment is an outright assignment or an assignment by way of security are matters treated as being distinct from priority ("the characteristics of a right"; see article 24). Like priority, though, they are left, to the law of the assignor's location. Priority is a matter distinct from the discharge of the debtor as well. Under article 19, the debtor is discharged, even if payment is made to an assignee who does not have priority. Whether that assignee will retain the proceeds of payment is a matter of priority in proceeds to be resolved among the various claimants in accordance with the law governing priority (see article 24).

Location

67. This term is referred to in several provisions of the draft Convention (i.e. article 1, paras. 1 (a) and 3, articles 3 and 4, para. 4, article 17, para. 2, article 21, para. 1, articles 23 to 25, 31, 36, para. 3 and articles 38, 40 and 41). The two main issues, however, in which the term "location" is referred to, are the scope of application and questions of priority. The definition is intended to strike a balance between flexibility and certainty. The place of business is a well-known term, widely used in UNCITRAL and other international legislative texts, and on which abundant case law exists. It is used to denote a place in which the professional activities of a person or an entity are conducted. For the purpose of the application of the law of a State, several places of business in one and the same State are considered to be one place of business. In order to ensure a sufficient degree of predictability of the application of the draft Convention with regard to the debtor, in the case of multiple places of business of the debtor, reference is made to the place with the closest connection to the original contract. If the assignor (or the assignee) has more than one place of business, "place of business" means the place of central administration. This rule is designed to ensure that priority issues are referred to a single jurisdiction and one in which any main insolvency proceeding is most likely to be opened.

68. Place of central administration is akin to the centre of main interests (a term used in the UNCITRAL Model Law on Cross-Border Insolvency), chief executive office or principal place of business. All those terms are understood as denoting the centre of management and control, the real business centre, from which in fact, not as a matter of form, the important activities of an entity are controlled and ultimate decisions at the highest level are actually made. In this regard, the place where most assets are located or books and records are kept is irrelevant. To the extent that the day-to-day management of the affairs and operations of an entity is conducted from a place other than the place of central administration, the place of central administration remains decisive. However, unlike the UNCITRAL Model Law, in which a rebuttable presumption is established that the centre of main interests is the place of registration (article 16, para. 3), the draft Convention does not introduce such a “safe harbour” rule. Unlike the UNCITRAL Model Law whose main focus is on insolvency, the draft Convention focuses mainly on the advance planning in the financing of a solvent debtor and for that planning to be facilitated it is absolutely necessary to define location by reference to a single and easily determinable jurisdiction.

69. In most cases, the place of central administration would be easy to determine and would point to a single jurisdiction. In the exceptional situations in which that may not be the case, the parties would be left in no worse situation than they are to begin with and would need to ensure that their interest is effective and enforceable in each jurisdiction in which the assignor might possibly be located.

Law

70. The term “law” appears in the preamble and in article 1, paragraph 2, article 7, paragraph 2, articles 8 and 12, paragraphs 1, 5 and 6, and articles 21, 23 to 25, 28 to 32, 36 and 42, paragraph 2. The definition of “law” is intended to ensure that reference is made to the substantive law and not to the private international law rules of the applicable law. If “law” included the private international law rules of the applicable law, any matter could be referred to a law other than the substantive law applicable by virtue of the private international law rules of the forum (“renvoi”). Traditionally, private international law conventions exclude any form of renvoi. If the designation of the applicable law were to include the private international law rules of the law applicable, an element of uncertainty would be reintroduced. For example, the private international law rules of the assignor’s jurisdiction could point to the law of a State which is not party to the draft Convention and which has a rule referring priority issues to the law governing the receivable. The result would be that the parties would lose all the benefits of certainty and predictability that article 24 is designed to provide.

Proceeds

71. The term “proceeds” appears in article 12, paragraph 1, article 16, paragraph 1, and articles 24 and 26. Its definition is intended to cover both proceeds of receivables and proceeds of proceeds (e.g. if the receivable is paid by way of a cheque, the cheque is “proceeds of the receivable” and

cash received by the payee of the cheque is “proceeds of proceeds”). It is also intended to cover, proceeds in cash (“payment”) and proceeds in kind (“other satisfaction”), whether received in total or partial satisfaction of the assigned receivable. In particular, it is intended to cover goods received in total or partial discharge of the assigned receivable but not returned goods (e.g. because they were defective and the sales contract was cancelled or because the sales contract allowed the buyer to return the goods after a trial period). However, as between the assignor and the assignee, the assignee has a right in returned goods (see article 16, para. 1).

Financial contract

72. The definition is used in article 4, paragraph 2 (b). It refers to derivative contracts (e.g. swaps or repurchase agreements) that share the common characteristic of creating payment obligations determined by the price of an underlying transaction. Such contracts are called derivative because they are derived from ordinary commercial contracts and settlement is not by actual performance of the commercial (sale or deposit) contract but by the payment of a difference derived from an actual asset and an actual price. Derivatives are usually transacted within a master netting agreement (e.g. the Master Netting Agreement prepared by the International Swaps and Derivatives Association (ISDA)).

73. In a traditional interest-rate swap, a creditworthy entity borrowing money at a fixed interest rate exchanges that interest with a variable interest rate at which a less secure entity borrows a similar sum. As a result, a less creditworthy entity, for a fee, in effect borrows money at a fixed rate. No payment of capital occurs between the parties to the swap (that comes from the underlying loan transactions). Between such parties, only interest payments take place. In practice, the interest payments are offset against each other and only a net payment is made by the party with the larger payment due. This residual payment is a contractual right to a monetary sum, the assignment of which is not excluded from the scope of the draft Convention.

74. With the exception of interest-rate swaps, most derivative contracts relate to the difference between the agreed future price of an asset on a future date and the actual market price on that date. For example, in repurchase agreements one party sells a (usually fixed-interest) investment security (e.g. stocks or bonds) to another and simultaneously agrees to repurchase the investment security at a future date at an agreed price. That price includes allowance for the interest on the cash consideration and the accrued interest on the investment security. The payments are contingent upon the delivery or return of the investment security.

75. In “forward” transactions, parties agree to buy or sell an asset (e.g. foreign currency) for delivery on a specified future date at a specified price. In a “spot” transaction, the delivery date is a certain number of business days, usually two, after the contract date. In a “futures” contract, one party agrees to deliver to the other party on a specified future date (“the maturity date”) a specified asset (e.g. a

commodity, currency, a debt, equity security or basket of securities, a bank deposit or any other category of property) at a price agreed at the time of the contract and payable on the maturity date. Futures are usually performed by the payment of the difference between the price agreed upon at the time of the contract and the market price on the maturity date, and not by physical delivery and payment in full on that date. In options, the buyer has the right (but not the obligation) to acquire (“call option”) or to sell (“put option”) an asset in the future at a price fixed when the option contract is entered into.

Netting agreement

76. Netting arrangements are common practice in inter-bank payment and securities settlement systems, derivative and foreign currency transactions. They are implemented on the basis of standard contracts and legislation prepared by the relevant industry (e.g. the Master Netting Agreement prepared by the International Swaps and Derivatives Association (“ISDA”) and the ISDA Model Netting Act, adopted so far by 21 States). Such arrangements involve the net settlement of payments due in the same currency and on the same date. They also involve set off (i.e. the discharge of reciprocal claims to the extent of the smaller claim) and netting (at its simplest, the ability to set off reciprocal claims in the case of the insolvency of a counterparty).

Competing claimant

77. The term competing claimant appears in article 9, paragraph 4, articles 10, 24, 26, 31, 43, paragraph 7, article 45, paragraph 4, and article 46, paragraph 4. The definition is intended to ensure that all potential priority conflicts are covered, including conflicts between a domestic and a foreign assignee of domestic receivables, between an assignee and a creditor with an interest in other property extended to the receivables flowing from that property and between an assignee in an assignment made before and an assignee in an assignment made after the draft Convention enters into force. A creditor with an interest in goods, which is extended to receivables by agreement or by law, is treated as an assignee. As a result, a conflict with such a creditor would be subject to a type of a rule such as articles 1, 6 or 8 of the annex.

Article 6. *Party autonomy*

Subject to article 21, the assignor, the assignee and the debtor may derogate from or vary by agreement provisions of this Convention relating to their respective rights and obligations. Such an agreement does not affect the rights of any person who is not a party to the agreement.

References

A/CN.9/432, paras. 33-38; A/CN.9/434, paras. 35-41; A/CN.9/445, paras. 191-194; A/CN.9/456, paras. 79 and 80; and A/55/17, paras. 119-121.

Commentary

78. Article 6, which is modelled on article 6 of the United Nations Convention on Contracts for the International Sale of Goods, Vienna, 1980 (“the United Nations Sales Convention”), provides broad recognition of the principle of party autonomy. Unlike article 6 of the United Nations Sales Convention, however, article 6 does not allow parties to vary or derogate from provisions that affect the legal position of third parties, or to exclude the draft Convention as a whole. The reason for this different approach is that, unlike the United Nations Sales Convention, the draft Convention deals mainly with the proprietary effects of an assignment and may, therefore, have an impact on the legal position of third parties. Allowing parties to an agreement to affect the rights and obligations of third parties would not only go beyond any acceptable notion of party autonomy but would also introduce an undesirable degree of uncertainty and could thus frustrate the main objectives of the draft Convention. Article 6 is intended to apply to agreements between the assignor and the assignee, between the assignor and the debtor or between the assignee and the debtor as long as they vary or derogate from provisions of the draft Convention and not of law applicable outside the draft Convention. The reference to article 21 introduces a further limitation, namely that the assignor and the debtor may not agree to waive the defences mentioned in article 21, paragraph 2 (however, waiver of defences agreed upon between the assignee and the debtor are not covered by article 21).

Article 7. *Principles of interpretation*

1. In the interpretation of this Convention, regard is to be had to its object and purpose as set forth in the preamble, to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.
2. Questions concerning matters governed by this Convention that are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

References

A/CN.9/432, paras. 76-81; A/CN.9/434, paras. 100 and 101; A/CN.9/445, paras. 199 and 200; A/CN.9/456, paras. 82-85; A/55/17, paras. 122-124; and A/CN.9/486, para. 74.

Commentary

79. Article 7, inspired by article 7 of the United Nations Sales Convention, deals with the interpretation of and the filling of gaps in the draft Convention. With regard to the interpretation of the draft Convention, article 7, paragraph 1 refers to four principles, namely, the object and purpose of the draft Convention set forth in the preamble, the inter-

national character of the text, uniformity and good faith in international trade. With the exception of the reference to the preamble which is aimed at facilitating the process of interpretation and filling gaps in the draft Convention, these principles are common to most UNCITRAL texts and should be read in the same way as similar language in those texts. The reference to the international character or source of the text is intended to assist a court in avoiding an interpretation of the draft Convention on the basis of notions of national law. The need to preserve uniformity can be served only if courts or arbitral tribunals apply the draft Convention on its merits and have regard to decisions of courts or tribunals in other countries. The Case Law on UNCITRAL Texts (CLOUT), a system of reporting case law on UNCITRAL texts, has been established by the Commission exactly with the need to preserve uniformity in mind. CLOUT is available in paper form in the six official languages of the United Nations and through the UNCITRAL home page on the World Wide Web (<http://www.uncitral.org>) in English, French and Spanish (depending on the resources available, the other language versions will also be made available in the future).

80. The reference to good faith relates only to the interpretation of the draft Convention. If the principle of good faith is applied to the conduct of the parties, caution should be exercised. This principle may appropriately be applied to the contractual relationship between the assignor and the assignee or between the assignor and the debtor. However, if applied to the relationship between the assignee and the debtor or the assignee and any other claimant, it could undermine the certainty of the draft Convention. For example, according to the principle of good faith prevailing in the forum State, the debtor, who might have paid the assignee after notification, may have to pay again if the debtor knew (but had no notification) of a previous assignment. Similarly, application of the principle of good faith to the assignee-third party relationship might inadvertently result in the assignee with priority under the registration provisions of the law of the assignor's location losing priority if it knew or ought to have known of another person's rights acquired before registration (although there was no information registered about those rights).

81. As to gap-filling, a distinction is drawn between matters that fall within the scope of the draft Convention but are not expressly settled in it and matters outside the scope of the draft Convention. The latter are left to the law applicable outside the draft Convention by virtue of the private international law rules of the forum (or, if the forum is in a Contracting State, of the draft Convention). Gaps with regard to matters within the scope of the draft Convention but not expressly settled are to be filled through an application of the general principles on which the draft Convention is based.¹³ Such principles are to be derived from the preamble or specific provisions of the draft Convention (e.g. the principle of facilitation of increased access to lower-cost credit and the principle of debtor protection). If there is no principle that can be applied to a particular

¹³A number of matters that are not governed by the draft Convention but are left to law applicable outside the draft Convention by virtue of private international law rules are identified in the comments to various articles (see, for example, paras. 21 and 22, 24 and 25, 42-54, 66, 82 and 83, 85, 105 and 111).

issue, the gap is to be filled in accordance with the law applicable by virtue of private international law rules. Gaps in the private international law provisions of the draft Convention are to be filled in accordance with the private international law principles underlying the draft Convention. In the absence of such principles, such gaps should be filled in accordance with the private international law rules of the forum.

D. CHAPTER III EFFECTS OF ASSIGNMENT

Commentary

General comments

82. Chapter III settles issues of formal and material validity of an assignment under the draft Convention (for the use of the term "effectiveness", see para. 85). Formal validity is addressed by way of a private international law rule. Material validity is addressed by way of substantive law rules. However, not all matters of material validity are addressed. Matters that are not addressed and are left to law outside the draft Convention include statutory limitations on assignment, other than those dealt with in articles 9, 11 and 12, and issues relating to priority between an assignee and a competing claimant, as well as to capacity and authority.

Article 8. *Form of assignment*

An assignment is valid as to form if it meets the form requirements, if any form requirements exist, of either the law of the State in which the assignor is located or any other law applicable by virtue of the rules of private international law.

References

A/CN.9/420, paras. 75-79; A/CN.9/432, paras. 82-86; A/CN.9/434, paras. 102-106; A/CN.9/445, paras. 204-210; A/CN.9/456, paras. 86-92; A/CN.9/466, paras. 101-103; A/55/17, paras. 125-129 and A/CN.9/486, paras. 76 and 174.

Commentary

83. The main objective of article 8 is to provide assignees the certainty that, if they meet the form requirements of a single jurisdiction, their assignments (including the contract of assignment) would be valid as to form. In order to achieve this objective, article 8 refers form to the law of the assignor's location (i.e. a single, easily determinable jurisdiction even in the case of bulk assignments or assignments of future receivables). However, article 8 does not introduce a single applicable law so as to avoid interfering with current theories as to the law applicable to the form of the contract of assignment. Whether there is any form requirement or what form means exactly (i.e. writing, notification of the debtor, registration, notarial act or payment of a stamp duty) is left to law applicable outside the draft Convention.

Article 9. *Effectiveness of assignments, bulk assignments, assignments of future receivables and partial assignments*

1. An assignment of one or more existing or future receivables and parts of or undivided interests in receivables is effective as between the assignor and the assignee, as well as against the debtor, whether the receivables are described:

(a) Individually as receivables to which the assignment relates; or

(b) In any other manner, provided that they can, at the time of the assignment or, in the case of future receivables, at the time of the conclusion of the original contract, be identified as receivables to which the assignment relates.

2. Unless otherwise agreed, an assignment of one or more future receivables is effective without a new act of transfer being required to assign each receivable.

3. Except as provided in paragraph 1 of this article and in articles 11 and 12, paragraphs 2 and 3, this Convention does not affect any limitations on assignments arising from law.

4. An assignment of a receivable is not ineffective against, and the right of an assignee may not be denied priority with respect to the right of, a competing claimant, solely because law other than this Convention does not generally recognize an assignment described in paragraph 1 of this article.

References

A/CN.9/420, paras. 45-60; A/CN.9/432, paras. 93-112 and 254-258; A/CN.9/434, paras. 122 and 124-127; A/CN.9/445, paras. 211-214; A/CN.9/456, paras. 93-97; and A/55/17, paras. 130-135.

Commentary

84. Assignments of future receivables, bulk assignments and assignments of parts of or undivided interests in receivables are at the heart of significant financing practices (e.g. asset-based financing, factoring, securitization, project financing, loan syndication and participation). Yet their effectiveness as a matter of property law is not recognized in all legal systems. Article 9 is intended to validate such assignments. For reasons of consistency, article 9 validates also the assignment of a single existing receivable.

Effectiveness

85. The term “effective” is intended to reflect the proprietary effects of an assignment, the transfer of property rights in receivables. It was preferred since the term “valid” could not have that effect and, in any case, is not universally understood in the same way. The exact meaning of such effectiveness depends on whether an outright assignment or an assignment by way of security is involved. This matter is left to law applicable outside the draft Convention (see articles 5 (m) and 24, para. 2 (b)). In any case, if an assignment is effective, the assignee may claim and, if the

debtor does not raise the absence of notification as a defence and pays, retain payment. Whether the debtor is discharged is a matter for article 19. Whether the person who received payment may retain it is a matter for article 24, since article 9 limits the effect of the assignment to the relationship between the assignor and the assignee and to the relationship between the assignee and the debtor. The reason for this approach is that effectiveness as against third parties touches upon issues of priority and the draft Convention treats such issues as distinct issues, subjecting them to the law of the assignor’s location (see article 24). This means, for example, that article 9 would not validate the first assignment in time while invalidating any further assignment of the same receivables by the same assignor. It also means that application of article 9 would not result in the assignee prevailing over an insolvency administrator on the sole ground that the assignment took place before the effective date of the insolvency proceeding, even though the receivables arose or were earned after commencement of the insolvency proceeding.

86. In order to reflect this interplay between effectiveness (as a condition for priority) and priority, article 9, paragraph 1 states explicitly that it deals with effectiveness “as between the assignor and the assignee, as well as against the debtor”. However, this approach may inadvertently result in leaving the effectiveness of the assignments referred to in paragraph 1 altogether to the law applicable to priority. For that reason, article 9, paragraph 4 provides that an assignment, which is effective under article 9, paragraph 1, may not be invalidated or denied priority merely because law outside the draft Convention does not recognize it as a matter of general commercial law. For the same reason, article 24 states that it does not deal with matters dealt with elsewhere in the draft Convention.

“Existing or future receivables”

87. The terms are defined in article 5 (b) by reference to the time of the conclusion of the original contract. All future receivables are to be covered, including conditional receivables and purely hypothetical receivables (see para. 59). With a view to protecting the interests of the assignor, paragraph 1 introduces an element of specificity (receivables have to be identifiable at the time they arise).

“One or more”

88. While the focus of the draft Convention is on the bulk assignment of a large volume of low-value receivables (e.g. factoring of trade receivables or securitization of consumer receivables), the assignment of single, large-value receivables (e.g. loan syndication and participation) is also covered. The rule is that, as a matter of substantive validity (formal validity is left to the law applicable under article 8), an agreement between the assignor and the assignee, as defined in article 2, is sufficient for the transfer of property rights in receivables.

“Parts of or undivided interests in receivables”

89. Monetary claims can always be divided and assigned in part. Such partial assignments are not rare in practice and there is no reason to invalidate them as long as the legiti-

mate interests of the debtor are protected (see article 19, para. 6). Assignments of undivided interests are involved in significant transactions. For example, in securitization, a special purpose vehicle ("SPV") may assign to investors undivided interests in the receivables purchased from their originator as security for the SPV's obligations to investors. In loan syndication and participation, the leading lender may assign undivided interests in the loan to a number of other lenders.

"Described"

90. The term "described" is intended to establish a standard lower than the standard that would be established by the term "specified". Under this standard, a generic description of the receivable, without any specification of the identity of the debtor or the amount of the receivable, would be sufficient to encompass even future receivables (e.g. "all my receivables from my car business").

"Individually"/"in any other manner"

91. These words are intended to ensure that an assignment of existing and future receivables is effective, whether the receivables are described one by one or in any other manner that is sufficient to relate the receivables to the assignment.

Time of identification of receivables

92. Existing receivables are to be identified as receivables relating to the assignment at the time of the assignment. Future receivables should be identifiable at the time they arise (which is, by definition, after the time of the assignment). As a result of article 7, which enshrines party autonomy, the assignor and the assignee may agree on the time when future receivables should be identifiable to the assignment, as long as they do not affect the rights of the debtor and other third parties.

Master agreements

93. With a view to expediting the lending process and reducing transaction costs, paragraph 2, in effect, provides that a master agreement is sufficient to transfer rights in a pool of future receivables. If a new document were to be required each time a new receivable arose, the costs of administering a lending programme would increase considerably and the time needed to obtain properly executed documents and to review those documents would slow down the lending process to the detriment of the assignor. Under paragraph 2, a master agreement is sufficient to transfer a pool of future receivables, while, under article 10, a future receivable is deemed to be transferred at the time of the conclusion of the contract of assignment.

Statutory assignability

94. In validating the assignments to which it refers, article 9, paragraph 1 may set aside statutory prohibitions existing in national law with respect to such assignments. While setting aside such statutory limitations, the draft Convention is not intended to interfere with national policies (see para. 21). Such policies are aimed at protecting the assignor from

alienating its future property and potentially depriving itself of means of subsistence (as, for example, in the case of limitations to the assignment of wage claims or retirement annuities). They are often articulated by means of a requirement for specificity, which may not be possible in the case of an assignment of future receivables or a bulk assignment. With a view to establishing a balance between the need to validate assignments and the need to protect assignors, article 9, paragraph 1 requires that the receivables be identifiable when they arise (i.e. when the original contract is concluded) as receivables to which the assignment relates. The draft Convention avoids any other limitation to the assignor's right to transfer future receivables, since it does not give priority to one creditor over another, but leaves matters of priority to national law. National policies reflected in statutory prohibitions may also be aimed at protecting the debtor (as, for example, in the case of limitations to the assignment of sovereign or consumer receivables). The draft Convention does not interfere with such national policies either. It establishes a sufficiently high standard of debtor protection (e.g. in the case of partial assignments, the debtor may treat a notification as ineffective; see article 19, para. 6) and requires that the debtor be located in a Contracting State (see article 1, para. 3).

95. The draft Convention does not affect any statutory limitations other than those referred to in article 9, paragraph 1 (e.g. statutory limitations as to consumer receivables, sovereign receivables, wages or pensions). This result is implicit in article 11. In addition, it is explicitly addressed in article 9, paragraph 3 so as to avoid creating any ambiguity as to whether the matter is governed by the draft Convention but not explicitly settled or not governed at all (for the difference, see article 7, para. 2).

Article 10. *Time of assignment*

Without prejudice to the right of a competing claimant, an existing receivable is transferred and a future receivable is deemed to be transferred at the time of the conclusion of the contract of assignment, unless the assignor and the assignee have specified a later time.

References

A/CN.9/420, paras. 51 and 57; A/CN.9/432, paras. 109-112 and 254-258; A/CN.9/434, paras. 107, 108 and 115-121; A/CN.9/445, paras. 221-226; A/CN.9/456, paras. 76-78 and 98-103; and A/55/17, paras. 136-138.

Commentary

96. The rule under article 10 is that an assignment is effective, as between the assignor and the assignee, as well as against the debtor, at the time when the contract of assignment is concluded. However, article 10 is not intended to prejudice the rights of third parties and operate as a priority rule, since priority issues are left to the law of the assignor's jurisdiction. In particular, article 10 is not intended to interfere with domestic insolvency law, for

example, with respect to receivables arising, becoming due or being earned after the commencement of the insolvency proceeding.

97. While this approach is obvious with regard to receivables existing at the time they are assigned, a legal fiction is created with regard to future receivables (i.e. receivables arising from contracts not in existence at the time of the assignment). In practice, the assignee would acquire rights in future receivables only if they are in fact created, but, in legal terms, the time of transfer would go back to the time of the conclusion of the contract of assignment.

98. Article 10 also recognizes and, at the same time, limits the right of the assignor and the assignee to specify the time as of which the assignment is effective. Parties may agree as to the time of a transfer but that time may not be earlier than the time of the conclusion of the contract of assignment. This approach is in line with the principle of party autonomy enshrined in article 6, since an agreement setting an earlier time of assignment could affect the order of priority between several claimants. However, neither article 6 nor article 10 precludes the parties from agreeing to antedate the coming into force of their mutual contractual obligations.

Article 11. *Contractual limitations on assignments*

1. An assignment of a receivable is effective notwithstanding any agreement between the initial or any subsequent assignor and the debtor or any subsequent assignee limiting in any way the assignor's right to assign its receivables.

2. Nothing in this article affects any obligation or liability of the assignor for breach of such an agreement, but the other party to such agreement may not avoid the original contract or the assignment contract on the sole ground of that breach. A person who is not party to such an agreement is not liable on the sole ground that it had knowledge of the agreement.

3. This article applies only to assignments of receivables:

(a) Arising from an original contract for the supply or lease of [goods,] construction or services other than financial services or for the sale or lease of real estate;

(b) Arising from an original contract for the sale, lease or licence of industrial or other intellectual property or other information;

(c) Representing the payment obligation for a credit card transaction; or

(d) Owed to the assignor upon net settlement of payments due pursuant to a netting agreement involving more than two parties.

References

A/CN.9/420, paras. 61-68; A/CN.9/432, paras. 113-126; A/CN.9/434, paras. 128-137; A/CN.9/445, paras. 49-51 and 227-231; A/CN.9/447, paras. 148-152; A/CN.9/455, paras. 47-51; A/CN.9/456, paras. 104-116; A/CN.9/466, paras. 104-106; and A/55/17, paras. 139-151.

Commentary

The rule

99. Under article 11, which is inspired by article 6 of the Ottawa Convention, both the contractual limitation on assignment and the assignment are effective. The question whether there is any liability for breach of contract is left to law applicable outside the draft Convention. However, if there is any such liability, under article 11, paragraph 2, the debtor is not entitled to terminate the original contract on the sole ground that the assignor violated a contractual limitation. Furthermore, any liability of the assignor is not extended to the assignee and cannot be based solely on the assignee's knowledge of the contractual limitation (there needs to be, for example, also malicious interference with advantageous contractual relations for tortious liability to be established). Other rights that the debtor may have under law applicable outside the draft Convention such as, for example, the right to compensatory damages are not affected either. This approach is consistent with the overall objectives of the draft Convention, since the risk of the contract being avoided or the assignee being held liable for breach of a contractual limitation on assignment by the assignor could in itself have a negative impact on the cost of credit. It is also consistent with the principle that the assignment is effective even if it is made in violation of an anti-assignment clause (see article 11, para. 1 and article 20, para. 3). In addition, this approach is consistent with the principle that a modification of the original contract (which includes also contract termination), is not allowed after notification of the debtor without the consent of the assignee (see article 22, para. 2).

100. Article 11 is based on the assumption that the assignee should not have to examine the documentation of each receivable, since this process would be costly in a bulk assignment and impossible in an assignment of future receivables. This approach is consistent with the market economy principles and the principle against restraints on alienation of property. It also takes into account that an economy in which receivables are freely transferable yields substantial benefits to debtors. The cost savings achieved for creditors through the free transferability of their receivables can be passed along to debtors in the form of lower costs for goods and services or lower cost for credit. On balance, it is more beneficial for everyone to facilitate the assignment of receivables and to reduce transaction costs rather than to ensure that the debtor would not have to pay a person other than the original creditor. In addition, the overall objectives of the draft Convention could not be achieved without some adjustments in national legislation that would be aimed at accommodating modern commercial practices.

Substantive and territorial scope

101. Article 11 applies to contractual limitations, whether contained in the original contract or other agreement between the assignor and the debtor or in the initial or any subsequent assignment contract. It is also intended to apply to any contractual clauses limiting the assignment of receivables (e.g. by making it subject to the debtor's consent) and not only to clauses prohibiting assignment. It does not

apply to statutory limitations to assignment or to limitations relating to the assignment of rights other than receivables (e.g. confidentiality clauses). As a result, if an assignment is made in violation of a statutory limitation or a confidentiality clause, article 11 does not apply to validate such an assignment or limit any liability existing under law applicable outside the draft Convention.

102. Paragraph 3 is intended to limit the scope of application of article 11 to assignments of trade receivables. However, it is formulated in such a broad way so as to encompass a wide variety of receivables, including consumer receivables and sovereign receivables. Included are receivables arising from the sale or lease of goods and real estate, from the sale or licence of intangible property, such as intellectual, industrial or other property or information, and from the supply of construction or services. In order to avoid bringing back into the scope of the draft Convention financial receivables excluded in article 4, paragraph 3 explicitly provides that it does not apply to receivables arising from financial services. Subparagraphs (c) and (d) make it clear, however, that article 11 is to apply to the assignment of certain financial-service receivables. In subparagraph (d), reference is made only to multilateral netting arrangements so as to avoid excluding the application of article 11 in the case of assignments of trade receivables just because the assignor and the debtor had a netting arrangement.

103. Article 11 applies to assignments of receivables owed by consumer debtors. It is not intended, however, to override consumer-protection legislation (although, in practice, with few exceptions, consumers do not have the bargaining power to include such limitations in their contracts; for consumer receivables and consumer protection, see paras. 36 and 132). In any case, consumers would either not even be notified of any assignment or would be notified and asked to continue paying to the same bank account or post office box. In such a case, a debtor concerned about losing rights of set-off that may arise from contracts unrelated to the original contract could discontinue its relationship with the assignee.

104. Article 11 would also apply to assignments of receivables owed by sovereign debtors. However, under article 11, the State in which the sovereign debtor is located may make a reservation as to the application of article 11. Whether an assignment is effective as against a sovereign debtor in such a case would be left to law applicable outside the draft Convention. The effectiveness of contractual limitations in assignments other than those mentioned in paragraph 3 is left to law outside the draft Convention. If that law gives effect to contractual limitations, the assignment would be invalid and the draft Convention would not apply. If that law gives no effect to such contractual limitations, the assignment could be valid and the draft Convention could apply.

Article 12. *Transfer of security rights*

1. A personal or property right securing payment of the assigned receivable is transferred to the assignee without a new act of transfer. If such a right, under the law governing it, is transferable only with a new act of

transfer, the assignor is obliged to transfer such right and any proceeds to the assignee.

2. A right securing payment of the assigned receivable is transferred under paragraph 1 of this article notwithstanding any agreement between the assignor and the debtor or other person granting that right, limiting in any way the assignor's right to assign the receivable or the right securing payment of the assigned receivable.

3. Nothing in this article affects any obligation or liability of the assignor for breach of any agreement under paragraph 2 of this article, but the other party to that agreement may not avoid the original contract or the assignment contract on the sole ground of that breach. A person who is not a party to such an agreement is not liable on the sole ground that it had knowledge of the agreement.

4. Paragraphs 2 and 3 of this article apply only to assignments of receivables:

(a) Arising from an original contract for the supply or lease of [goods,] construction or services other than financial services or for the sale or lease of real estate;

(b) Arising from an original contract for the sale, lease or licence of industrial or other intellectual property or other information;

(c) Representing the payment obligation for a credit card transaction; or

(d) Owed to the assignor upon net settlement of payments due pursuant to a netting agreement involving more than two parties.

5. The transfer of a possessory property right under paragraph 1 of this article does not affect any obligations of the assignor to the debtor or the person granting the property right with respect to the property transferred existing under the law governing that property right.

6. Paragraph 1 of this article does not affect any requirement under rules of law other than this Convention relating to the form or registration of the transfer of any rights securing payment of the assigned receivable.

References

A/CN.9/420, paras. 69-74; A/CN.9/432, paras. 127-130; A/CN.9/445, paras. 232-235; A/CN.9/434, paras. 138-147; A/CN.9/456, paras. 117-126; and A/55/17, paras. 153-154.

Commentary

Accessory and independent rights

105. Paragraph 1 reflects the generally accepted principle that accessory security rights (e.g. a suretyship, pledge or mortgage) are transferred automatically with the principal obligation, while independent security rights (e.g. an independent guarantee or a standby letter of credit) are transferable only with a new act of transfer. A general expression (i.e. "right securing payment") is used in order to ensure that rights that may not be security rights, for example, rights arising from independent guarantees and standby letters of credit, would be covered. The question of the accessory or independent character of the right and the

substantive or procedural requirements to be met for the creation of such a right are left to the law governing that right. In view of the wide range of rights covered by article 12 and the divergences existing among the various legal systems in this regard, article 12 does not attempt to specify the law applicable to such rights.

106. Paragraph 1 also creates an obligation for the assignor to transfer to the assignee any independent right securing payment of the assigned receivables as well as the proceeds of such a right. As a result, if an independent right and its proceeds are assignable (by law or by agreement), the assignee will be able to obtain them. If such rights are not assignable or not assigned for any reason, the assignee will have a personal claim against the assignor. Under article 6, the assignor and the assignee may agree that a right is not transferred to the assignee. Such an agreement may reflect the lack of willingness on the part of the assignee to accept the responsibility and the cost involved in the maintenance and safekeeping of collateral (e.g. taxation and insurance costs in the case of immovable property or storage and insurance costs in the case of equipment).

Contractual limitations

107. Paragraph 2 is intended to ensure that any limitation agreed upon between the assignor and the debtor or other person granting a security right does not invalidate the assignment of such a right. Under paragraph 3, any liability that the assignor may have for breach of contract, under law applicable outside the draft Convention, is not affected but is not extended to the assignee (this approach is consistent with the approach taken in article 11). Paragraph 4 introduces in article 12 the scope limitations of article 11, paragraph 3. The underlying policy is that, with regard to limitations on assignment, security rights should be treated in the same way as receivables, since often the value relied upon by the assignee lies in the security right and not in the receivable itself. However, a limitation included in a contract with a sovereign third-party guarantor located in a State that has made a declaration under article 40 would render the assignment ineffective but only as against the sovereign third-party guarantor.

Possessory rights

108. According to paragraph 5, if the transfer of a security right involves the transfer of possession of the collateral and such transfer causes loss or prejudice to the debtor or the person granting the right, any liability that may exist under law applicable outside the draft Convention is not affected. Paragraph 5 envisages, for example, a transfer of pledged shares that might empower a foreign assignee to exercise the rights of a shareholder to the detriment of the debtor or any other person who might have pledged the shares.

Form requirements

109. Paragraph 6 makes clear that, like the form of an assignment of receivables, the form of transfer of a security right is left to law applicable outside the draft Convention. Accordingly, a notarized document and registration may be necessary for the effective transfer of a mortgage, while delivery of possession or registration may be required for the transfer of a pledge.

E. CHAPTER IV RIGHTS, OBLIGATIONS AND DEFENCES

1. Section I Assignor and assignee

Commentary

Purpose of section I

110. Unlike the other provisions of the draft Convention that deal mainly with the proprietary aspects of assignment (and with the exception of article 29), the provisions contained in this section deal with contractual issues. The usefulness of these provisions lies in the fact that they recognize party autonomy, a principle enshrined in a general way in article 6, and provide default rules applicable in the absence of an agreement between the assignor and the assignee. Such default provisions offer important benefits. They reduce transaction costs by eliminating the need for parties to replicate in their contract standard terms and conditions, in particular with respect to risk allocation. They also reduce dispute resolution costs by providing a clear-cut rule for both the courts and the parties in the event the parties have not addressed a particular issue. Furthermore, they perform a useful educational function by offering a checklist of matters for parties to address at the time of the initial contract negotiations. Most significantly, they enhance uniformity and certainty by reducing the need for courts to look to national solutions offered by the law applicable to the contract. However, the role of the law applicable to the contract is not wholly eliminated in section I of chapter IV. The effect of mistake, fraud or illegality on the validity of the contract is left to the law governing the contract, as are remedies available for breach of contract (in so far as they are not subject to the law of the forum as procedural matters).

Article 13. *Rights and obligations of the assignor and the assignee*

1. The mutual rights and obligations of the assignor and the assignee arising from their agreement are determined by the terms and conditions set forth in that agreement, including any rules or general conditions referred to therein.
2. The assignor and the assignee are bound by any usage to which they have agreed and, unless otherwise agreed, by any practices they have established between themselves.
3. In an international assignment, the assignor and the assignee are considered, unless otherwise agreed, to have implicitly made applicable to the assignment a usage that in international trade is widely known to, and regularly observed by, parties to the particular type of assignment or the assignment of the particular category of receivables.

References

A/CN.9/432, paras. 131-144; A/CN.9/434, paras. 148-151; CN.9/447, paras. 17-24; ACN.9/456, paras. 127 and 128; and A/55/17, paras. 158-161 and 184.

Commentary

111. The primary purpose of article 13 is to restate in more specific terms than article 6 the principle of party autonomy. The assignor and the assignee are free to structure their mutual rights and obligations so as to meet their particular needs. They are also free to incorporate into their agreement any rules or conditions by referring to them, rather than reproducing them in their agreement. The conditions, under which the parties may exercise their freedom, and the relevant legal consequences are left to the law governing their agreement.

112. In line with article 9 of the United Nations Sales Convention, article 13 also states in paragraphs 2 and 3 a principle that is recognized in all legal systems, namely, that trade usages agreed upon and practices established by parties in their dealings are binding. Paragraph 2 draws a clear distinction between trade usages existing beyond any agreement of the parties and practices established by certain parties in their dealings. Because of their nature, trade usages are binding if they are specifically agreed upon, while trade practices are binding unless specifically otherwise agreed since they presuppose, at least, an implicit agreement. Trade usages and practices may produce rights and obligations for the assignor and the assignee. However, they cannot bind third parties, such as the debtor or creditors of the assignor. They cannot bind subsequent assignors or assignees either (however, representations that are flowing from trade usages and are given to the initial assignee may benefit subsequent assignees; see para. 116). All those parties would not necessarily be aware of usages agreed upon by, and practices established between, the initial assignor and the initial assignee.

113. Paragraph 3 defines the scope of the matters covered by an international usage. Under paragraph 3, international usages bind only the parties to international assignments. Such a limitation is not necessary in article 9 of the United Nations Sales Convention since this Convention applies only to international transactions. It is, however, necessary in article 13 in view of the fact that the draft Convention may apply to domestic assignments of international receivables. In addition, under paragraph 3, as under article 9, paragraph 2 of the United Nations Sales Convention, usages are applicable only to the particular type of assignment or to the assignment of the particular type of receivables. This means that an international factoring usage would apply to an assignment in an international factoring but not to an assignment in a securitization transaction. However, unlike article 9, paragraph 2 of the United Nations Sales Convention, paragraph 3 does not refer to the subjective, actual or constructive knowledge of the parties but only to the objective requirements that the usages must be widely known and regularly observed. While such a reference to the subjective knowledge of the parties might be useful in a two-party relationship, it could cause uncertainty in an assignment relationship.

Article 14. *Representations of the assignor*

1. Unless otherwise agreed between the assignor and the assignee, the assignor represents at the time of the conclusion of the contract of assignment that:

(a) The assignor has the right to assign the receivable;

(b) The assignor has not previously assigned the receivable to another assignee; and

(c) The debtor does not and will not have any defences or rights of set-off.

2. Unless otherwise agreed between the assignor and the assignee, the assignor does not represent that the debtor has, or will have, the ability to pay.

References

A/CN.9/420, paras. 80-88; A/CN.9/432, paras. 145-158; A/CN.9/434, paras. 152-161; A/CN.9/447, paras. 25-40; A/CN.9/456, paras. 129 and 130; and A/55/17, paras. 162 and 163.

Commentary

Party autonomy/default rules

114. Representations made by the assignor are intended to clarify the risk allocation between the assignor and the assignee. Because of their purpose, representations constitute a significant factor in the assignee's determination of the amount of credit to be made available to the assignor and the cost of credit. For the same reason, representations are highly negotiated and explicitly settled between the assignor and the assignee. Recognizing this reality, article 14 embodies the principle of party autonomy with regard to representations of the assignor. Such representations may stem from the financing contract, the contract of assignment (if it is a separate contract) or any other contract between the assignor and the assignee. In accordance with article 13, paragraphs 2 and 3, they may also stem from trade usages and practices. Article 14 allows parties to modify the representations, whether explicitly or implicitly.

115. In addition to recognizing the principle of party autonomy, article 14 is intended to set forth a default rule allocating risks between the assignor and the assignee in the absence of an agreement of the parties as to this matter. In the allocation of risks, the overall aim of article 14 is to establish a balance between the need for fairness and the need to facilitate increased access to lower-cost credit. Article 14 is consistent with normal practice in which the assignor guarantees the existence of the assigned receivable but not the solvency of the debtor. If the parties have not agreed on representations, in the absence of a rule along the lines of article 14, the risk of non-payment would be higher. This situation could defeat a transaction (if the risk is too high) or, at least, reduce the amount of credit offered and raise the cost of credit. Furthermore, to the extent that the assignee has to bear a certain risk, the assignor's goods or services would be more expensive or even inaccessible to the debtor.

Representations as to the "existence" or assignability of a receivable

116. Under paragraph 1, the assignor represents that it has the right to assign the receivable, that it has not assigned it

already and that the debtor does and will not have any defences. In view of the need for the assignee to be able to estimate the risk involved in a transaction before extending credit, paragraph 1 provides that representations have to be made, and take effect, at the time of the conclusion of the contract of assignment. With respect to future receivables, representations are deemed to be made at the time of the assignment and take effect as of that time if they actually arise. Such representations are considered as being given not only to the immediate assignee but also to any subsequent assignee. As a result, any subsequent assignee may turn against the assignor for breach of representations. If representations were considered as being undertaken only as against the immediate assignee, any subsequent assignee would have recourse only against its immediate assignor, a process that would increase the risk and thus the cost of transactions involving subsequent assignments.

117. The assignor is in violation of the representation as to its right to assign, introduced in subparagraph (a), if it does not have the capacity or the authority to act, or if there is any statutory limitation on assignment. This result is justified by the fact that the assignor is in a better position to know whether it has the right to assign. However, the assignor is not liable towards the assignee for breach of representations if the original contract between the assignor and the debtor contains a limitation on assignment. Subparagraph (a) contains no explicit reference to that rule, since it is implicit in article 11, under which the assignment is effective even if it is in breach of an agreement limiting assignment (see also article 20, para. 3). The representation, contained in subparagraph (b), that the assignor has not already assigned the receivable is aimed at holding the assignor accountable to the assignee if, as a result of a previous assignment by the assignor, the assignee does not have priority. This result may occur if the assignee has no objective way of determining whether a previous assignment has occurred. Subparagraph (b), however, does not require the assignor to represent that it will not assign the receivables to another assignee after the first assignment. Such a representation would run counter to modern financing practice in which the right of the assignor to offer to different lenders parts of or an undivided interest in the same receivables as security for obtaining credit is essential.

118. Subparagraph (c) places on the assignor the risk of hidden defences or rights of set-off of the debtor that may defeat in whole or in part the assignee's claim. This provision is premised on the assumption that, by performing its contract with the debtor properly, the assignor will be able to preclude such defences from arising. In particular in the context of sales contracts with service and maintenance elements, such an approach would result in a greater degree of accountability of the assignor for performing properly its contract with the debtor. The provision is also based on the assumption that, in any case, the assignor will be in a better position to know whether the contract will be properly performed, even if the assignor is just the seller of goods manufactured by a third person. However, there is no need for the assignor to have actual knowledge of any defences. Furthermore, subparagraph (c) is premised on the assumption that placing on the assignor the risk of hidden defences

normally has a beneficial impact on the cost of credit. Subparagraph (c) has a wide scope, encompassing defences and rights of set-off whether they have a contractual or non-contractual source and whether they relate to existing or to future receivables. It also covers rights of set-off, whether they arise from the original or any related contract or from contracts unrelated to the original contract, with the exception of rights of set-off from unrelated contracts that become available after notification (see article 20, para. 2). With regard to representations relating to the absence of defences against future receivables assigned in bulk by way of security, the representation contained in subparagraph (c) properly reflects current practice. According to such practice, assignors normally receive credit only in the amount of those receivables that are not likely to be subject to defences, while they have to take back the receivables that were not paid by the debtor ("recourse financing").

Representations as to the solvency of the debtor

119. Paragraph 2 reflects the generally accepted principle that the assignor does not guarantee the solvency of the debtor. As a result, the risk of debtor default is on the assignee, a fact that the assignee takes into account in determining whether to extend credit and on what conditions. Recognizing the right of the parties to financing transactions to agree on a different risk allocation, paragraph 2 allows the assignor and the assignee to agree otherwise. Such an agreement may be implicit or explicit. The question of what constitutes an implicit agreement is left to the applicable contract interpretation rules.

Breach of representations

120. The draft Convention contains no specific rules on breach of representations since matters relating to the underlying contract are beyond the scope of the draft Convention.

Article 15. Right to notify the debtor

1. Unless otherwise agreed between the assignor and the assignee, the assignor or the assignee or both may send the debtor notification of the assignment and payment instructions, but after notification has been sent only the assignee may send such an instruction.

2. Notification of the assignment or payment instructions sent in breach of any agreement referred to in paragraph 1 of this article are not ineffective for the purposes of article 19 by reason of such breach. However, nothing in this article affects any obligation or liability of the party in breach of such an agreement for any damages arising as a result of the breach.

References

A/CN.9/420, paras. 89-94 and 119-122; A/CN.9/432, paras. 159-164 and 175; A/CN.9/434, paras. 162-165; A/CN.9/447, paras. 41-47; A/CN.9/456, paras. 131-144 and 193; A/CN.9/466, paras. 116 and 117; and A/55/17, paras. 164 and 165.

Commentary

Independent right of the assignee to notify the debtor and to request payment

121. The main objective of article 15 is to recognize the right of the assignee to notify the debtor and to request payment, even without the cooperation or the authorization of the assignor. It is not intended to define notification (see article 5 (d)) or to address the conditions for a notification to be effective as against the debtor (see article 18) or the legal consequences of notification (see articles 19, 20 and 22). Granting the assignee an autonomous right to notify the debtor is considered important, in particular since the assignor might be unwilling or, in the case of insolvency, unable to cooperate with the assignee. Allowing the assignee to notify the debtor independently of the assignor would not give an undue preference to the assignee in the case of insolvency of the assignor. That matter is left to the law governing priority. If, under that law, priority is based on the time of notification, an assignee cannot obtain priority over the creditors of the assignor or the insolvency administrator. In such a case, priority is obtained only if notification takes place before the commencement of an insolvency proceeding and on the condition that the assignment does not constitute a fraudulent or preferential transfer.

122. Article 15 is in particular intended to recognize practices in which it is normal for the assignor to send a bill to the debtor requesting payment and notifying the debtor about the assignment (e.g. factoring). At the same time, article 15 does not ignore non-notification practices (see para. 123). The protection of the debtor against the risk of being notified and being asked to pay by a potentially unknown person is a distinct matter, which is addressed by allowing the debtor in the case of notification by the assignee to request adequate proof (see article 19, para. 7).

Notification as a right, not an obligation

123. With a view to accommodating non-notification practices, notification is formulated in paragraph 1 as a right and not as an obligation. In such practices, in order to avoid any inconvenience to the debtor that might result in an interruption to the normal flow of payments, no notification at all is given (e.g. undisclosed invoice discounting or securitization). If the debtor is notified, so as not to accumulate rights of set-off from unrelated contracts (see article 20, para. 2), the debtor is instructed to continue paying the assignor, unless a default-like situation arises in which different payment instructions are given normally.

Notification and payment instruction

124. In line with the approach followed in article 5 (d) (which defines notification without any reference to a payment instruction), paragraph 1 draws a clear distinction between a notification and a payment instruction. This approach is intended to recognize the difference, both in purpose and in time, between a notification and a payment instruction. It is also intended to validate practices in which notification is given without any payment instructions (e.g. to cut off the debtor's rights of set-off arising from contracts unrelated to the original contract). Under paragraph 1, be-

fore notification, a payment instruction may be sent either by the assignor or by the assignee and, after notification, only by the assignee. Unlike article 19, paragraph 1, refers to the time notification is "sent" (not "received") because neither the assignor nor the assignee has a way to assess the time of receipt. In any case, that time is not important for the determination of who has the right to give a payment instruction as between the assignor and the assignee.

Agreements as to notification

125. While paragraph 1 grants the assignee an autonomous right to notify the debtor and to request payment, it also recognizes the right of the assignor and the assignee to negotiate and agree on the matter of notification of the debtor so as to meet their particular needs. For example, the assignor and the assignee may agree that no notification would be given to the debtor as long as the flow of payments is not interrupted. In order to ensure that there is no need for a specific agreement, the opening words of paragraph 1 are formulated in a negative way ("unless otherwise agreed").

126. The purpose of the rule introduced in paragraph 2 is that, if notification or a payment instruction is given in violation of such an agreement and the debtor pays, the debtor is discharged. The underlying rationale is that the debtor should be able to discharge its obligation as directed and should not concern itself with the private arrangements between the assignor and the assignee. Whether the person violating such an agreement is liable for breach of contract under law applicable outside the draft Convention is a separate matter and should not affect the discharge of the debtor, who is not a party to that agreement. A notification given in violation of an agreement between the assignor and the assignee, however, does not cut off any rights of set-off of the debtor from contracts unrelated to the original contract (see article 20). Such a notification does not trigger a change in the way the assignor and the debtor may amend the original contract (see article 22) or create a basis for the determination of priority under the law applicable to priority issues either (see articles 24-26). The reason for this approach is that the assignee who wrongfully notified the debtor should not be given an undue advantage. The double negative formulation in paragraph 2 ("is not ineffective") is intended to ensure that the mere violation of an agreement neither invalidates the notification for the purpose of debtor discharge, nor interferes with contract law as to the conditions required for such an agreement to be effective.

Article 16. *Right to payment*

1. As between the assignor and the assignee, unless otherwise agreed and whether or not notification of the assignment has been sent:

(a) If payment in respect of the assigned receivable is made to the assignee, the assignee is entitled to retain the proceeds and goods returned in respect of the assigned receivable;

(b) If payment in respect of the assigned receivable is made to the assignor, the assignee is entitled to payment of the proceeds and also to goods returned to the assignor in respect of the assigned receivable; and

(c) If payment in respect of the assigned receivable is made to another person over whom the assignee has priority, the assignee is entitled to payment of the proceeds and also to goods returned to such person in respect of the assigned receivable.

2. The assignee may not retain more than the value of its right in the receivable.

References

A/CN.9/447, paras. 48-68; A/CN.9/456, paras. 145-159; A/CN.9/466, paras. 118-123; and A/55/17, paras. 166 and 167.

Commentary

Objective and scope

127. Article 16 is intended to state explicitly what is already implicit in articles 2 and 9, namely, that, as between the assignor and the assignee, the assignee has a proprietary right in the assigned receivable and in any proceeds arising from the receivables. As the scope of article 16 is limited to the relationship between the assignor and the assignee, it is subject to the general principle of party autonomy embodied in article 6 and is intended to operate as a default rule. It is not intended to affect the debtor's legal position or issues of priority.

Rights in proceeds and returned goods

128. As between the assignor and the assignee, the assignee's right extends to proceeds (which, under article 5 (j), includes whatever is received in respect of a receivable and its proceeds). It also extends to goods returned as defective or after the expiry of a trial period. Unlike in a priority contest under article 24, where the assignee's right in proceeds does not extend to returned goods, in this context, there is no reason to limit the ability of the assignor and the assignee to agree that the assignee could claim any returned goods. This result is also justified by the fact that, even in the absence of an agreement, a default rule allowing the assignee to claim any returned goods could reduce the risks of non-collection from the debtor and thus have a positive impact on the cost of credit. Paragraph 1 covers situations in which payment has been made to the assignee, the assignor or another person. In the last case, the assignee's right is, under paragraph 1 (c), subject to priority.

129. Paragraph 2 reflects normal practice in assignments by way of security. In such assignments, the assignee 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 assignor any balance remaining after payment of the assignee's claim. Paragraph 2 does not repeat the reference to a contrary agreement of the parties, since it is included in the chapeau of paragraph 1 and the assignee's right in the assigned receivable flows from the assignment contract and is, under article 13, subject to party autonomy anyway.

Notification of the debtor

130. The assignee's right in proceeds is independent of any notification of the assignment (the nature of such a

right is left to the law of the assignor's location; see article 24, para. 1 (a) (ii), (b) and (c)). The reason for this approach is the need to ensure that, if payment is made to the assignee even before notification, the assignee may retain the proceeds of payment. This approach is also justified by the need to ensure that, if payment is made to the assignor after notification, the assignee would have a choice between claiming payment from the assignor, under article 16, paragraph 1 (b), or from the debtor, under article 19, paragraph 2. This result is appropriate. The debtor, who pays the assignor after notification, takes the risk of having to pay twice and of not being able to recover from the assignor if the assignor becomes insolvent (in practice, the assignee would not claim a second payment from the debtor, unless the assignor had become insolvent).

2. Section II Debtor

Article 17. Principle of debtor protection

1. Except as otherwise provided in this Convention, an assignment does not, without the consent of the debtor, affect the rights and obligations of the debtor, including the payment terms contained in the original contract.

2. A payment instruction may change the person, address or account to which the debtor is required to make payment, but may not:

(a) Change the currency of payment specified in the original contract; or

(b) Change the State specified in the original contract in which payment is to be made to a State other than that in which the debtor is located.

References

A/CN.9/420, para. 101; A/CN.9/432, paras. 33-38, 89 and 90, 206 and 244; A/CN.9/434, paras. 86-95; A/CN.9/445, paras. 195-198; A/CN.9/456, paras. 21, 81 and 168-176; and A/55/17, paras. 168-173.

Commentary

Principle of debtor protection

131. The principle of debtor protection is one of the main general principles of the draft Convention. It is referred to in a general manner in the preamble and in article 17. Furthermore, it is reflected in a number of provisions of the draft Convention (e.g. article 1, para. 3, articles 6, 19-23, 29 and 40). The thrust of the rule set forth in paragraph 1 is that there are no implied effects of the draft Convention on the legal position of the debtor (any doubt as to whether an assignment changes the debtor's legal position should be resolved in favour of the debtor). The draft Convention is, in particular, not designed to change the payment terms stipulated in the original contract (e.g. the amount owed, whether for principal or interest; the date payment is due; and any conditions precedent to the debtor's obligation to pay). The draft Convention is not intended to change the defences or rights of set-off that the debtor may raise under

the original contract or to increase expenses in connection with payment either. Such changes may, however, be effected with the consent of the debtor (see, however, para. 132).

Consumer protection

132. A particular principle flowing from article 17 is that the draft Convention is not intended to have an adverse effect on the rights of consumer debtors and, in particular, to override consumer-protection legislation, which normally reflects public policy or mandatory law considerations. This principle is also reflected in a number of provisions of the draft Convention, as, for example, in article 21, paragraph 1 and article 23 (see also paras. 36 and 103).

Country and currency risk

133. Whatever change is effected in the debtor's legal position as a result of an assignment under the draft Convention, under paragraph 2, a payment instruction, whether given with the notification or subsequently, may not change the currency of payment. It may not change the country of payment either, unless the change is beneficial to the debtor and results in payment being allowed in the country in which the debtor is located. Such a change of the country of payment is often allowed in factoring transactions so as to facilitate payment by debtors. Paragraph 2 refers to the currency or the country of payment "specified" in the original contract. Such specification may be explicit or implicit.

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Note by the secretariat

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INTRODUCTION

1. The commentary on articles 1 to 17 of the draft Convention is contained in document A/CN.9/489. The present note contains the commentary on the remaining provisions of the draft Convention and the annex to the draft Convention, as they appear in document A/CN.9/486, annex I.¹

I. ANALYTICAL COMMENTARY

A. CHAPTER IV RIGHTS, OBLIGATIONS AND DEFENCES

1. Section II Debtor

Article 18. *Notification of the debtor*

1. Notification of the assignment or a payment instruction is effective when received by the debtor if it is in a

language that is reasonably expected to inform the debtor about its contents. It is sufficient if notification of the assignment or a payment instruction is in the language of the original contract.

2. Notification of the assignment or a payment instruction may relate to receivables arising after notification.

3. Notification of a subsequent assignment constitutes notification of all prior assignments.

References

A/CN.9/420, paras. 124 and 125; A/CN.9/432, paras. 176 and 177 and 187; A/CN.9/434, paras. 172-175; A/CN.9/447, paras. 45-47, 158 and 159; A/CN.9/455, paras. 59-66; A/CN.9/456, paras. 177-180; and A/CN.9/486, paras. 12-20.

¹The previous version of the commentary on the entire draft Convention is contained in document A/CN.9/470.

Commentary

Time of effectiveness of notification: the receipt rule

2. The primary purpose of article 18 is to state the “receipt rule” with regard to the time of effectiveness of a notification, that is, that both a notification and a payment instruction become effective when received by the debtor. When exactly a debtor is deemed to receive a notification is a matter left to law applicable outside the draft Convention. Article 18, paragraph 1, also adds a requirement to those provided in article 5 (d) for a notification to be effective under the draft Convention, namely that a notification has to be in a language “that is reasonably expected to inform the debtor”. In referring to expectations, paragraph 1 introduces a subjective criterion which is, however, limited by the reference to the reasonableness of such expectations. To provide guidance to parties, paragraph 1 introduces a “safe harbour” rule, according to which the language of the original contract meets the required standard of a language reasonably expected to inform the debtor (for the relationship between a notification and a payment instruction, see A/CN.9/489, para. 124).

Notification with respect to receivables not existing at the time of notification

3. Unlike article 8, paragraph 1 (c), of the Unidroit Convention on International Factoring (Ottawa, 1988; “the Ottawa Convention”) and in line with normal practice in receivables financing, paragraph 2 allows a notification to be given with respect to receivables not existing at the time of notification. Such a notification simplifies and reduces the cost of notification in that it ensures that notification does not have to be given each time a receivable arises. It also ensures that, once a receivable arises, the debtor cannot accumulate rights of set-off from unrelated contracts with the assignor or modify the original contract without the consent of the assignee. More importantly, paragraph 2 sets aside any limitations existing under law applicable outside the draft Convention with respect to notification relating to receivables not existing at the time of notification. As this matter is governed in article 18, it is not referred to the law of the assignor’s location (see opening words of article 24 and para. 35).

Notification in subsequent assignments

4. Paragraph 3, which is inspired by article 11, paragraph 2, of the Ottawa Convention, validates normal practice in particular in international factoring transactions. In view of the fact that the debtor is normally notified only of the second assignment from the export factor to the import factor, it is essential to ensure that notification of the second assignment covers the first assignment from the assignor to the import factor as well. In the absence of notification with respect to the first assignment, that assignment might be rendered ineffective as against the debtor, a situation that might affect the effectiveness of the second assignment as well. In order to address subsequent assignments in general, paragraph 3 provides that a notification covers any prior, and not only the immediately preceding, assignment (with regard to the issue of the discharge of the

debtor in the case of several notifications relating to subsequent assignments, see para. 12). Paragraph 3 does not require the notifying party to identify prior assignments. However, in the case of doubt, the debtor may request that information (see article 19, para. 7, and para. 13). In addition, nothing in paragraph 3 (or in articles 5 (d) or 15) precludes the assignor in a prior assignment from notifying the debtor about a subsequent assignment to which that assignor is not a party.

Article 19. *Debtor’s discharge by payment*

1. Until the debtor receives notification of the assignment, the debtor is entitled to be discharged by paying in accordance with the original contract.

2. After the debtor receives notification of the assignment, subject to paragraphs 3 to 8 of this article, the debtor is discharged only by paying the assignee or, if otherwise instructed in the notification of the assignment or subsequently by the assignee in a writing received by the debtor, in accordance with such payment instruction.

3. If the debtor receives more than one payment instruction relating to a single assignment of the same receivable by the same assignor, the debtor is discharged by paying in accordance with the last payment instruction received from the assignee before payment.

4. If the debtor receives notification of more than one assignment of the same receivable made by the same assignor, the debtor is discharged by paying in accordance with the first notification received.

5. If the debtor receives notification of one or more subsequent assignments, the debtor is discharged by paying in accordance with the notification of the last of such subsequent assignments.

6. If the debtor receives notification of the assignment of a part of or an undivided interest in one or more receivables, the debtor is discharged by paying in accordance with the notification or in accordance with this article as if the debtor had not received the notification. If the debtor pays in accordance with the notification, the debtor is discharged only to the extent of the part or undivided interest paid.

7. If the debtor receives notification of the assignment from the assignee, the debtor is entitled to request the assignee to provide within a reasonable period of time adequate proof that the assignment from the initial assignor to the initial assignee and any intermediate assignment have been made and, unless the assignee does so, the debtor is discharged by paying in accordance with this article as if the notification from the assignee had not been received. Adequate proof of an assignment includes but is not limited to any writing emanating from the assignor and indicating that the assignment has taken place.

8. This article does not affect any other ground on which payment by the debtor to the person entitled to payment, to a competent judicial or other authority, or to a public deposit fund discharges the debtor.

References

A/CN.9/420, paras. 98-117, 127-131, 169-173 and 179; A/CN.9/432, paras. 165-174 and 178-204; A/CN.9/434, paras. 176-191; A/CN.9/447, paras. 69-93 and 153-157; A/CN.9/455, paras. 52-58; A/CN.9/456, paras. 181-193; A/CN.9/466, paras. 124-132; and A/CN.9/486, paras. 21-29.

Commentary

5. The main goal of article 19 is to provide certainty as to the debtor's discharge and to thus facilitate payment of the debt. It is not intended to deal with the discharge of the debtor in general or with the payment obligation as such, since that obligation is subject to the original contract and to the law governing that contract. It is not intended to address issues of priority either. The debtor may be discharged in accordance with article 19 even if the payee does not have priority (see para. 9 below). It is up to the person with priority to claim the proceeds of payment by the debtor.

Debtor's discharge by payment before and after notification

6. Under paragraph 1, until the time of receipt of a notification, the debtor is entitled to discharge by paying in accordance with the original contract. In view of the fact that the assignment is effective as of the time of the conclusion of the contract of assignment, the debtor, having knowledge of the assignment, may choose to discharge its debt by paying the assignee even before notification. However, in such a case the debtor takes the risk of having to pay twice, if it is later proved that there was no assignment at all or, at least, no effective assignment. In order to avoid undermining practices in which the debtor is normally expected to continue paying the assignor even after notification there is no explicit reference to the possibility of the debtor being able to pay before notification either the assignor or the assignee. The reference to payment "in accordance with the original contract", rather than to payment to the assignor, is intended to preserve any payment agreement between the assignor and the debtor (e.g. payment to a bank account or address, or payment to a third person).

7. After notification, the debtor may discharge its obligation only by paying the assignee or as instructed by the assignee. Reflecting normal practice, paragraph 1 recognizes payment instruction as a notion distinct from notification. While in some practices (e.g. factoring) payment instructions are given together with notification, in other practices (e.g. undisclosed invoice discounting or securitization), notification may be given without any payment instructions. The purpose of such a notification is normally to freeze the debtor's rights of set-off. To avoid leaving any uncertainty, paragraph 2 repeats what is already stated in article 15, paragraph 1, namely, that such instructions may be given, up to notification, by the assignor and, subsequently, only by the assignee. Paragraph 2 is also intended to clarify that a payment instruction should be in writing.

Knowledge of an assignment

8. Knowledge of an assignment is not to be treated as having the effect of a notification and does not trigger a change in the way in which the debtor has to discharge its obligation. While making business practice conform to good faith standards is an important goal, this should not be at the expense of certainty. Certainty as to the discharge of the debtor would be reduced if it were to be subject to subjective and unclear circumstances, such as knowledge on the part of the debtor (issues such as what constitutes knowledge and who has to establish it would need to be addressed). In addition, knowledge should not trigger a change in the way the debtor is to discharge its obligation, since, in certain cases, it is normal business practice for the debtor to continue paying the assignor even though the debtor knows (or is even notified) of the assignment (see para. 6). Article 19 does not deal with the issue of payment to a person, the assignment to whom was null and void (e.g. for fraud or duress or lack of capacity to act) or whether knowledge of such nullity should be taken into account in the debtor's discharge. As this problem arises only in exceptional situations, it is left to law applicable outside the draft Convention.

Debtor's discharge and priority

9. Unlike article 8, paragraph 1, of the Ottawa Convention, article 19 does not require the debtor to pay the person with a superior right (priority) so as to obtain a valid discharge. In line with the principle of debtor protection, article 19 draws a clear distinction between the debtor's discharge and priority among competing claimants. Thus, payment under article 19 discharges the debtor, even if the person receiving payment does not have priority. It would be unfair and inconsistent with the policy of debtor protection to require the debtor to determine who among several claimants has priority and to have the debtor pay a second time if, in the first instance, it has paid the wrong person. The debtor would most likely have a cause of action against that person, but the debtor's rights may be frustrated if that person becomes insolvent. The risk of insolvency of the person who received payment should be on the various claimants of the receivables and not on the debtor. Such claimants normally have ways to ensure that they have priority and that the debtor is notified accordingly.

Change or correction of payment instructions

10. Paragraph 3 is intended to ensure that the assignee may change or correct its payment instructions. A new instruction is effective if given by the assignee, since the first instruction constitutes notification and after notification only the assignee may give a payment instruction (see article 15, para. 1 and article 19, para. 2). In order to protect the debtor against the risk of having to pay twice, paragraph 3 allows the debtor to disregard a payment instruction received by the debtor after payment.

Multiple notifications

11. Paragraphs 4 and 5 are intended to provide simple and clear discharge rules in the case of several notifications.

Paragraph 4 deals with situations in which the debtor receives several notifications relating to more than one assignment of the same receivables by the same assignor (“duplicate assignments”). Such situations do not necessarily involve fraud. They may, for example, involve several assignments (including outright assignments) for security purposes of receivables for credit not exceeding the value of the receivables. In such assignments, the main issue is who will obtain payment first (i.e. who has priority), a matter dealt with in article 24.

12. Paragraph 5 deals with situations in which several notifications are given with respect to one or more subsequent assignments. Such situations are rare in practice, since normally only the last in a chain of assignees notifies the debtor and requests payment. In any case, in order to avoid any uncertainty as to how the debtor may discharge its debt, paragraph 5 provides that the debtor has to follow the instructions contained in the notification of the last assignment in a chain of assignments. For that rule to apply, the notifications received by the debtor have to be readily identifiable as notifications relating to subsequent assignments. Otherwise, the rule contained in paragraph 4 would apply and the debtor would be discharged by payment in accordance with the first notification received. In any case, under paragraph 7, the debtor, if in doubt, can request adequate proof from the assignees notifying. In the case of several notifications relating to both duplicate and subsequent assignments, paragraphs 4 and 5 will provide a solution. In line with the principle of debtor protection, in the case of several notifications relating to partial assignments, paragraph 6 allows the debtor to discharge by paying the several creditors or to treat the notification as ineffective and to discharge in accordance with article 19.

Right of the debtor to request additional information

13. Under article 15, notification may be given not only by the assignor but also by the assignee independently of the assignor. As a result, the debtor may receive notification of the assignment from a possibly unknown person and may be in doubt as to whether that person is a legitimate claimant, payment to whom would discharge the debtor. In addition, under article 18, paragraph 3, notification of a subsequent assignment constitutes notification of any prior assignment even if such assignment is not identified in the notification. In order to protect the debtor from uncertainty as to how to discharge its debt in such cases, paragraph 7 gives the debtor a right to request the assignee to provide within a reasonable period of time adequate proof of the initial assignment and, if it is not an initial but a subsequent assignment, of any preceding assignment. The debtor may, but does not have to, request adequate proof. If the debtor had to request adequate proof in all cases, payment would be delayed or assignees foreseeing that the debtor would request such proof would provide it in the notification, a result that could raise the cost of notification. The determination of what constitutes “adequate” proof and a “reasonable” period of time is a matter of interpretation for the courts or arbitral tribunals taking into account the particular circumstances. The flexibility introduced with these terms was thought to be necessary since no rule could suit all possible cases. However, in order to avoid any uncertainty

that might ensue as a result, paragraph 7 includes a “safe harbour” rule. According to that rule, a written confirmation from the assignor constitutes adequate proof.

14. Notification does not trigger the obligation to pay, which remains payable at the time and according to the terms of the original contract and the law applicable thereto. This means that the debtor does not have to pay upon notification and does not owe interest for late payment while it awaits the adequate proof requested. If the receivable becomes payable in accordance with the original contract within that period, the debtor may still be able to discharge its obligation, for example, by paying to a public deposit fund (see article 19, para. 8). If such alternative method of payment is not available, the payment obligation should be suspended until the debtor receives adequate proof and has a reasonable time to assess and act on it. Otherwise, the protection afforded to the debtor by paragraph 7 would be meaningless.

Debtor’s discharge under other law

15. Paragraph 8 is intended to ensure that article 19 does not exclude other ways of discharge of the debtor’s obligation by payment to the right person that may exist under national law applicable outside the draft Convention (e.g. payment in accordance with a notification not conforming with the requirements of articles 6 (f), 15 or 18).

Article 20. Defences and rights of set-off of the debtor

1. In a claim by the assignee against the debtor for payment of the assigned receivables, the debtor may raise against the assignee all defences and rights of set-off arising from the original contract, or any other contract that was part of the same transaction, of which the debtor could avail itself if such claim were made by the assignor.

2. The debtor may raise against the assignee any other right of set-off, provided that it was available to the debtor at the time notification of the assignment was received.

3. Notwithstanding paragraphs 1 and 2 of this article, defences and rights of set-off that the debtor may raise pursuant to article 11 against the assignor for breach of agreements limiting in any way the assignor’s right to assign its receivables are not available to the debtor against the assignee.

References

A/CN.9/420, paras. 66-68 and 132-135; A/CN.9/432, paras. 205-209; A/CN.9/434, paras. 194-197; A/CN.9/447, paras. 94-102; A/CN.9/456, paras. 194-199; A/CN.9/466, paras. 133-136; and A/CN.9/486, paras. 30-32.

Commentary

16. With the exception of defences and rights of set-off referred to in paragraphs 2 and 3, the debtor has against the assignee all the defences and rights of set-off that the debtor could raise against the assignor. What those de-

fences and rights of set-off are a matter not addressed in the draft Convention but left to other law. However, as the assignee is not a party to the original contract, the assignee incurs no positive contractual liability for non-performance by the assignor. In such a case, the debtor can raise the non-performance to defeat the assignee's claim, but needs to make a separate claim against the assignor to obtain, for example, compensation for any loss suffered as a result of the assignor's non-performance (see para. 29).

17. Under paragraph 1, there is no limitation as to defences or rights of set-off that arise from the original contract or from a closely connected contract (e.g. a maintenance or other service agreement). Such defences and rights of set-off (transaction set-off) may be raised even if they become available to the debtor after notification is received. According to paragraph 2, any other rights of set-off (independent set-off) may be raised against the assignee only if they are available to the debtor at the time notification is received. Such rights include rights arising from a separate contract between the assignor and the debtor, a rule of law (e.g. a tort rule) or a judicial or other decision. The reason for this approach is that the rights of a diligent assignee should not be made subject to rights of set-off arising at any time from separate dealings between the assignor and the debtor or other events of which the assignee could not reasonably be expected to be aware. Uncertainty as to the debtor's defences and rights of set-off would also make it difficult for the assignee to price the credit offered to the assignor. Furthermore, a contrary approach could have the unintended effect of allowing the assignor and the debtor to manipulate the amount owed. If the fact that the debtor cannot accumulate rights of set-off constitutes an unacceptable hardship for the debtor, the debtor can avoid entering into new dealings with the assignor. Rights of set-off arising from a separate contractual or other relationship between the debtor and the assignee are not affected by this rule and may be raised at any time. The exact meaning of the term "available" (e.g. whether the right of set-off has to be actual and ascertained, mature or quantified at the time notification is received by the debtor) is also left to other law.

18. Paragraph 3 is intended to ensure that the debtor may not raise against the assignee by way of defence or set-off the breach of a contractual limitation on assignment by the assignor. The debtor may have a cause of action against the assignor, if, under law applicable outside the draft Convention, the assignment constitutes a breach of contract that results in a loss to the debtor. However, the mere existence of a contractual limitation is not a violation of the representation contained in article 14, paragraph 1 (a) (see A/CN.9/489, para. 117). Otherwise, the rule holding the assignee harmless for breach of contract by the assignor (see article 11, para. 2) could be deprived of any meaning.

Article 21. *Agreement not to raise defences or rights of set-off*

1. Without prejudice to the law governing the protection of the debtor in transactions made for personal, family or household purposes in the State in which the debtor is located, the debtor may agree with the assignor in a writing

signed by the debtor not to raise against the assignee the defences and rights of set-off that it could raise pursuant to article 20. Such an agreement precludes the debtor from raising against the assignee those defences and rights of set-off.

2. The debtor may not exclude:

(a) Defences arising from fraudulent acts on the part of the assignee; or

(b) Defences based on the debtor's incapacity.

3. Such an agreement may be modified only by an agreement in a writing signed by the debtor. The effect of such a modification as against the assignee is determined by article 22, paragraph 2.

References

A/CN.9/420, paras. 136-144; A/CN.9/432, paras. 218-238; A/CN.9/434, paras. 205-212; A/CN.9/447, paras. 103-121; A/CN.9/456, paras. 200-204; A/CN.9/466, paras. 137-140; and A/CN.9/486, paras. 33 and 34.

Commentary

19. In return for better credit terms, assignors normally guarantee as against assignees the absence of defences and rights of set-off by the debtor (see article 14, para. 1 (c)). For the same reason, debtors often waive their defences and rights of set-off. With a view to facilitating this practice, article 21 validates such waivers of defences and rights of set-off. In order to avoid uncertainty as to the legal consequences of a waiver, paragraph 1 states what may appear to be obvious in some legal systems, namely, that a waiver agreed upon between the assignor and the debtor may benefit the assignee. In recognition of the fact that in practice a waiver may be agreed upon at different points of time, paragraph 1 does not make specific reference to the point of time at which a waiver may be agreed upon. Paragraph 1 does not require either that the defences be known to the debtor or be explicitly stated in the agreement by which the defences are waived. Such a requirement could introduce an element of uncertainty, since the assignee would need to establish in each particular case what the debtor knew or ought to have known. Whether the acceptance of an assignment by the debtor should be construed as a waiver or as a confirmation of a waiver and whether a waiver of defences is to be construed as a consent or confirmation of the debtor's consent to the assignment are matters left to other law.

20. Paragraph 1 is limited to waivers agreed upon by the assignor and the debtor. As a result, the limitations contained in paragraph 2 do not apply to waivers agreed upon by the debtor and the assignee and the debtor's ability to negotiate with the assignee in order to obtain a benefit is not limited. At the same time, article 19 does not empower the debtor to negotiate waivers with assignees, if, under other law applicable, the debtor does not have such a power. In order to protect debtors from undue pressure by creditors to waive their defences, paragraphs 1 and 2 introduce reasonable limitations. Such limitations refer to the form in which such waivers can be made, to certain types of debtors and to certain types of defences.

21. Under paragraph 1, a waiver cannot be a unilateral act or an oral agreement. It has to take the form of a written agreement and one that is signed by the debtor (for the distinct notions of “writing” and “signature”, see A/CN.9/489, paras. 60 and 61). This requirement is intended to ensure that both parties, and in particular the debtor, are well informed about the fact of the waiver and its consequences. It is also intended to facilitate evidence. In addition, a waiver cannot override the consumer-protection law prevailing in the country in which the debtor is located (for consumer receivables and consumer protection, see A/CN.9/489, paras. 36, 103 and 132). In cases where both articles 21 and 30 apply (i.e. the assignor is located in a Contracting State and that State has not opted out of chapter V), article 21 substitutes a specific applicable law reference to the debtor’s location for the general rule set forth in article 30. In order to avoid terminological and other differences existing among the various legal systems with respect to the meaning of the notion “consumer”, paragraph 1 uses generally accepted terminology from article 2 of the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980; “the Sales Convention”).

22. Under paragraph 2, a waiver cannot relate to defences arising from fraudulent acts committed by the assignee alone or by the assignee in collusion with the assignor. Such a result would run counter to basic good faith standards. Paragraph 2 does not refer to defences relating to fraud committed only by the assignor. If the debtor could not waive such defences, the assignee would have to conduct an investigation in this regard. Such a result could create uncertainty and have a negative impact on the cost of credit.

23. In line with paragraph 1, paragraph 3 requires a written agreement signed by the debtor for the modification of a waiver. Parties need to be warned of the legal consequences of such a modification. Furthermore, those circumstances should be easily proved, if necessary. With a view to ensuring that a modification does not affect the rights of the assignee, paragraph 3 subjects it to the actual or constructive consent of the assignee (see article 22, para. 2, and para. 27 below).

Article 22. *Modification of the original contract*

1. An agreement concluded before notification of the assignment between the assignor and the debtor that affects the assignee’s rights is effective as against the assignee and the assignee acquires corresponding rights.

2. After notification of the assignment, an agreement between the assignor and the debtor that affects the assignee’s rights is ineffective as against the assignee unless:

(a) The assignee consents to it; or

(b) The receivable is not fully earned by performance and either the modification is provided for in the original contract or, in the context of the original contract, a reasonable assignee would consent to the modification.

3. Paragraphs 1 and 2 of this article do not affect any right of the assignor or the assignee for breach of an agreement between them.

References

A/CN.9/420, para. 109; A/CN.9/432, paras. 210-217; A/CN.9/434, paras. 198-204; A/CN.9/447, paras. 122-135; A/CN.9/456, paras. 205 and 206; A/CN.9/466, paras. 141 and 142; and A/CN.9/486, paras. 35 and 36.

Commentary

24. Contracts normally deal with their modification. Article 22 does not interfere with such contractual clauses. It does, however, deal with the third-party effects of such contract modifications, namely with the question whether the debtor has as against the assignee the right to modify the original contract and whether the assignee acquires rights as against the debtor under the modified original contract.

25. Before notification, the assignor and the debtor may freely modify their contract. They do not need to obtain the consent of the assignee, even though the assignor may have undertaken in the assignment contract to abstain from any contract modifications without the consent of the assignee or, under law applicable outside the draft Convention, the assignor may be under the good faith obligation to inform the assignee about a contract modification. The breach of such an undertaking may give rise to liability of the assignor as against the assignee (see para. 28). It does not, however, invalidate an agreement modifying the original contract, since such an approach would inappropriately affect the rights of the debtor. After notification, a modification of the original contract becomes effective as against the assignee subject only to the actual or constructive consent of the assignee. The underlying rationale is that, after notification, the assignee becomes a party to a triangular relationship and any change in that relationship that affects the assignee’s rights should not bind the assignee against its will.

26. Paragraph 1 requires an agreement between the assignor and the debtor, which is concluded before notification of the assignment and affects the assignee’s rights. If the agreement does not affect the rights of the assignee, paragraph 1 does not apply. If the agreement is concluded after notification, paragraph 2 applies. Notification takes effect when received by the debtor. After that time, the debtor may discharge its obligation only in accordance with the assignee’s payment instructions (see article 19, para. 2).

27. Paragraph 2 is formulated in a negative way, since the rule is that, after notification, a modification is ineffective as against the assignee, unless an additional requirement is met. “Ineffective” means that the assignee may claim the original receivable and the debtor is not fully discharged by paying less than the value of the original receivable. Paragraph 2 requires actual or constructive consent of the assignee. Actual consent is required if the receivable has been fully earned by performance and the assignee has thus the reasonable expectation that it will receive payment of the original receivable. When an invoice is issued, a receivable should be considered as having been fully earned, even if the relevant contract has been performed partially. As a result, a partially performed contract may be modified only

with the actual consent of the assignee. Constructive consent exists if the original contract allows modifications or a reasonable assignee would have given its consent. Such consent is sufficient if the receivable is not fully earned and the modification is foreseen in the original contract or a reasonable assignee would have consented to such a modification. In requiring actual or constructive consent, article 22 is intended to establish an appropriate balance between certainty and flexibility. If a receivable is fully earned, its modification affects the reasonable expectations of the assignee and has thus to be subject to the actual consent of the assignee. If, on the other hand, a receivable is not fully earned, there is no need to overburden the parties with requirements that may affect the efficient operation of a contract. In particular, in long-term contracts, such as project financing or debt-restructuring arrangements, a requirement that the assignor would have to obtain the assignee's consent to every little contract modification could slow down the operations while creating an unwelcome burden for the assignee. This problem would normally not arise, since in practice parties tend to resolve such issues through an agreement as to which types of modifications require the assignee's consent. In the absence of such an agreement or in the case of breach of such an agreement by the assignor, paragraph 2 would provide an adequate degree of protection to the debtor.

28. Paragraph 3 is intended to preserve any right the assignee may have under other law as against the assignor if a modification of the original contract violates an agreement between the assignor and the assignee. This means that, if, under article 22, a modification is effective as against the assignee without its consent, the debtor is discharged by paying in accordance with the contract as modified. The assignee, however, retains any remedies it might have against the assignor under the applicable law, if the modification is in breach of an agreement between the assignor and the assignee (e.g. the assignee may claim the balance of the original receivable and compensation for any additional damage suffered).

Article 23. *Recovery of payments*

Without prejudice to the law governing the protection of the debtor in transactions made for personal, family or household purposes in the State in which the debtor is located, failure of the assignor to perform the original contract does not entitle the debtor to recover from the assignee a sum paid by the debtor to the assignor or the assignee.

References

A/CN.9/420, paras. 145-148; A/CN.9/432, paras. 239-244; A/CN.9/434, paras. 94 and 213-215; A/CN.9/447, paras. 136-139; A/CN.9/456, paras. 207 and 208; A/CN.9/466, paras. 143 and 144; and A/CN.9/486, paras. 37 and 38.

Commentary

29. The main purpose of article 23 is to protect the assignee from a claim by the debtor for the recovery of payments

made before performance of the original contract by the assignor. If the assignor does not perform, the debtor may refuse to pay the assignee (see article 20). If, however, the debtor pays the assignee before obtaining performance by the assignor, the debtor may not recover from the assignee the sums paid but is left with any remedies available under the applicable law against the assignor. There is one exception to this rule. If the debtor is a consumer, any right of the debtor to declare the original contract avoided or to recover from the assignee any payments made is not affected (for consumer receivables and consumer protection, see A/CN.9/489, paras. 36, 103, 132; see also para. 21 above). In particular, article 23 does not introduce the exceptions provided in article 10 of the Ottawa Convention in the case of unjust enrichment or bad faith on the part of the assignee. Such exceptions that operate as a guarantee by the assignee that the assignor will perform the original contract may be appropriate in the specific factoring situations addressed in the Ottawa Convention. However, they were considered to be inappropriate in the context of the wide range of financing or service transactions covered by the draft Convention.

2. Section III Other parties

Article 24. *Law applicable to competing rights*

1. With the exception of matters that are settled elsewhere in this Convention and subject to articles 25 and 26:

(a) With respect to the right of a competing claimant, the law of the State in which the assignor is located governs:

- (i) The characteristics and priority of the right of an assignee in the assigned receivable; and
- (ii) The characteristics and priority of the right of the assignee in proceeds that are receivables whose assignment is governed by this Convention;²

(b) With respect to the right of a competing claimant, the characteristics and priority of the right of the assignee in proceeds described below are governed by:

- (i) In the case of money or negotiable instruments not held in a bank account or through a securities intermediary, the law of the State in which such money or instruments are located;
- (ii) In the case of investment securities held through a securities intermediary, the law of the State in which the securities intermediary is located;
- (iii) In the case of bank deposits, the law of the State in which the bank is located; and
- (iv) In the case of receivables whose assignment is governed by this Convention, the law of the State in which the assignor is located].

[(c) The existence and characteristics of the right of a competing claimant in proceeds described in paragraph

²Pending final determination by the Commission of whether the bracketed language (i.e. paragraph 1 (b) and (c)) will be retained, the commentary does not cover that language.

1 (b) of this article are governed by the law indicated in that paragraph]].

2. For the purposes of this article and article 31, the characteristics of a right are:

- (a) Whether it is a personal or property right; and
- (b) Whether or not it is security for indebtedness or other obligation.

References

A/CN.9/420, paras. 149-164; A/CN.9/432, paras. 245-260; A/CN.9/434, paras. 238-258; A/CN.9/445, paras. 18-29 and 30-40; A/CN.9/455, paras. 18-34; A/CN.9/456, paras. 209-213; A/CN.9/466, paras. 20-24 and 32-35; and A/CN.9/486, paras. 39-63.

Commentary

Law applicable

30. Traditionally, priority issues have been submitted to the law of the location (lex situs) of the receivable. Departing from that approach, article 24 subjects priority issues to the law of the assignor's location. The traditional rule is no longer regarded as a workable or efficient rule and, in any case, there is no universal agreement on where a receivable is located. In the increasingly common case of a global assignment of present and future receivables, application of the law of the situs of the receivable fails to yield a single governing law. It also exposes prospective assignees to the burden of having to determine the notional situs of each receivable separately. Application of the law governing the receivable or of the law chosen by the parties produces similar results. Different priority rules would govern priority with regard to the various receivables in a pool of receivables. In the case of future receivables, the parties would not be able to determine with any certainty the law applicable to priority, a factor that might defeat a transaction or, at least, raise the cost of credit. Application of the law chosen by the assignor and the assignee in particular could allow the assignor, acting in collusion with a claimant in order to obtain a special benefit, to determine the priority among several claimants. Such a result would run counter to the principle of party autonomy as limited in article 6. In addition, the law chosen by the parties would be completely unworkable in the case of several assignments of the same receivables either by the same or by different assignors, since different laws could apply to the same priority conflicts.

31. While article 24 departs from the traditional approach in order to accommodate the most common practices that involve bulk assignments of all present and future receivables, it makes no exception for assignments of single, existing receivables. Introducing a different priority rule with regard to the assignment of such receivables would detract from the certainty achieved in article 24. If the rule were to focus on the value of the assigned receivable, it would create other problems. First, it would be difficult to clearly define "high-value" receivables. Moreover, in a bulk assignment containing both "high-value" and "low-value" receivables, priority would be subject to different laws. Such

a situation could inadvertently result in facilitating the manipulation of the applicable priority rule by the parties.

32. In the case of more than one place of business, location is defined by reference to the place of central administration of the assignor (see article 5 (h)). Accordingly, application of the law of the assignor's location will result in the application of the law of a single jurisdiction and one that can be easily determined at the time of the assignment. It will thus eliminate the difficulties mentioned above. In particular, the location of the assignor as a connecting factor presents the advantage that it provides a single point of reference; it can be ascertained at the time of even a bulk assignment of future receivables; it would be suitable even for legal systems in which registration is practised; and it would result in the application of the law of the jurisdiction in which any main insolvency proceeding with regard to the assignor would be most likely to commence. This last aspect of the application of the law of the assignor's location is essential, since it appropriately addresses the issue of the relationship between the draft Convention and the applicable insolvency law.

33. With respect to insolvency, the thrust of article 24 is to ensure that, in most cases, the law governing priority under article 24 and the law governing the insolvency of the assignor are the laws of one and the same jurisdiction (the assignor's main jurisdiction; see, for example, articles 2 (b) and 16, para. 3, of the UNCITRAL Model Law on Cross-Border Insolvency). In such a situation, any conflict between the draft Convention and the applicable insolvency law would be resolved by the rules of law of that jurisdiction. If an insolvency proceeding is commenced in a State other than the State of the assignor's main jurisdiction, article 25 applies. In such a case, a priority rule could be set aside if it is manifestly contrary to the public policy of the forum; and the priority of special preferential rights would not be affected.

Limitations

34. Article 25 introduces two limitations to the law applicable under article 24 (see paras. 38-40). Beyond those limitations, there are other limitations. As a private international law provision, article 24 does not settle priority conflicts. It merely refers them to the law of the assignor's location. If that law has adequate rules, certainty would be enhanced. If that law does not have adequate rules, certainty would not be obtained. For that reason, different substantive law priority rules are offered in the annex for States to choose from (as to the options available to States and their effects, see article 42). Another limitation to article 24 is that, for it to apply, the assignor has to be located in a Contracting State at the time of the conclusion of the contract of assignment. In most cases, this limitation would cause no problems. However, if the assignor, after making an assignment, relocates and makes another assignment in another country, under article 24, there would be two laws of the assignor's location. This matter was deliberately not addressed, since it was thought that it would arise only in very exceptional situations. Yet another limitation is that, for article 24 to apply, the forum has to be in a Contracting State. To the extent that the forum cannot be predicted at the time of an assignment (see para. 39), certainty may not be obtainable.

Scope

35. The opening words of article 24 are intended to ensure that article 24 would apply only to matters that are not settled by way of a substantive law rule of the draft Convention. For example, the general effectiveness of an assignment of future receivables is addressed in article 9. Accordingly, an assignment is effective as between the assignor and the assignee, and as against the debtor, even in the absence of a notification or registration (if, under national law, notification or registration is a condition of material validity). Issues of formal validity are addressed in article 8 and issues of material validity other than those addressed in articles 9 to 12 are left to law applicable outside the draft Convention. The words “subject to articles 25 and 26” are intended to ensure that, in the case of conflict, articles 25 and 26 would prevail. For example, matters in article 24 are referred to the law of the assignor’s location unless a rule of that law is manifestly contrary to the public policy of the forum and subject to certain super-priority rights to which priority is given under the law of the forum.

36. The chapeau of subparagraph (a) is aimed at ensuring that the characteristics of a right are referred to the law of the assignor’s location only in the case of a priority conflict. The term “characteristics” is defined in paragraph 2, while the term “priority” is defined in article 5 (g). The term “competing claimant” is defined in article 5 (m) so as to ensure that all possible priority conflicts are referred to the law of the assignor’s location. Conflicts between assignees of the same receivables from the same assignor are covered. Also covered are conflicts between a Convention and a non-Convention assignee (e.g. between a foreign and a domestic assignee of domestic receivables). Equally covered are conflicts between an assignee and a creditor of the assignor or the administrator in the insolvency of the assignor. Also covered are conflicts, in the case of subsequent assignments, between any assignee and the assignor’s creditors or the administrator in the insolvency of the assignor (no conflict of priority can arise as between assignees in a chain of assignments). However, a conflict between an assignee in a Contracting State and an assignee in a non-Contracting State is not covered (as to conflicts arising between parties to assignments made before and after a declaration takes effect, or the draft Convention enters into force or is denounced, see article 43, para. 7, article 45, para. 4, and article 46, para. 4 respectively).

37. Issues arising in the case of insolvency of the assignee are beyond the scope of the draft Convention and are not addressed, unless the assignee makes a subsequent assignment and becomes an assignor. The draft Convention is not intended to address issues arising in the context of the debtor’s insolvency either. It is assumed that normally the assignee would have in the receivables the same rights that the assignor would have in the case of insolvency of the debtor.

Article 25. Public policy and preferential rights

1. The application of a provision of the law of the State in which the assignor is located may be refused by a court or other competent authority only if that provision is manifestly contrary to the public policy of the forum State.

2. In an insolvency proceeding commenced in a State other than the State in which the assignor is located, any preferential right that arises, by operation of law, under the law of the forum State and is given priority status over the rights of an assignee in insolvency proceedings under the law of that State may be given priority notwithstanding article 24. A State may deposit at any time a declaration identifying any such preferential right.

References

A/CN.9/434, paras. 216-237; A/CN.9/445, paras. 41-44; A/CN.9/455, paras. 35-40; A/CN.9/456, paras. 214-222; A/CN.9/466, paras. 36-41 and A/CN.9/486, paras. 64 and 65.

*Commentary**Public policy*

38. A priority dispute will typically arise in the State of the assignor’s location. In such a case, if that State is a Contracting State, the substantive law priority rule of the forum will be the law applicable pursuant to article 24. However, a priority dispute may also arise in a State other than the State of the assignor’s location (e.g. a State where the assignor has assets or the State of the debtor’s location). In such a case, a conflict may arise between a priority rule of the law of the State of the assignor’s location and a priority rule of the forum. In principle, this conflict should be resolved in favour of the priority rule of the law applicable. Otherwise, the certainty achieved by any applicable law rule would be severely undermined or even negated. In the case of article 24, such a result could have a negative impact on the availability and the cost of credit on the basis of receivables. However, in private international law texts exceptions are typically introduced to preserve the public policy and certain mandatory law rules of the forum. The main purpose of article 25 is to introduce and, at the same time, to limit such exceptions.

39. Under paragraph 1, a court or other competent authority in the forum may refuse to apply a provision of the law of the State in which the assignor is located if that provision is manifestly contrary to the public policy of the forum. The public policy exception is qualified by the notion “manifestly contrary” (used also in article 33; see para. 53). This notion is used in international texts (see, for example, article 6 of the UNCITRAL Model Law on Cross-Border Insolvency) as a qualification of public policy. The purpose of such a qualification is to emphasize that public policy exceptions should be interpreted restrictively and paragraph 1 should be invoked only in exceptional circumstances concerning matters of fundamental importance for the forum (see Guide to Enactment of the Model Law, para. 89). Public policy in this sense, as it is used in an international context, normally permits rejection of the offensive provision of the otherwise applicable foreign law (e.g. a provision of law of the relevant foreign State, which gives overriding priority to the tax claims of the government of that State). It is not intended to result in the application of a rule of the law of the forum. It should be noted that it is the application of a relevant provision of the

applicable law to a particular case, and not the applicable law in general, that needs to be manifestly contrary to the public policy of the forum.

Mandatory law

40. Article 25 does not contain a general exception as to the mandatory rules of the forum, since it is not intended to permit the substitution of the priority rules of the forum or another State for the priority rules of the applicable law (this approach is explicit in article 32, see para 52). Such an approach could seriously undermine the certainty achieved by article 24, since most priority rules of the forum or an another State would normally be mandatory law rules. However, in order to make the draft Convention more acceptable to States, paragraph 2 introduces a limited exception. In an insolvency proceeding opened in a State other than the State of the assignor's location, the forum may apply its own priority rule and give priority to super-priority rights that arise by operation of law of the forum, provided that they would have priority over the rights of an assignee under the law of the forum. The exception is stated in permissive terms ("may") to signal that the forum court should take a restrained approach, preserving forum preferential rights only if the policy underlying the preference is clearly engaged on the particular facts. Moreover, the exception in paragraph (2) applies only in the context of insolvency proceedings under the law of the forum. Non-consensual preferential rights that operate under forum law outside of the formal insolvency context are not preserved. Furthermore, paragraph 2 permits (but does not oblige) a State to list in a declaration the categories of non-consensual super-priority rights that will prevail under the substantive law of that State over the rights of an assignee pursuant to paragraph 2. This possibility for declarations is intended to enhance certainty by providing a simple disclosure mechanism for assignees to know which super-priority rights would prevail over their rights without having to investigate the substantive law of the relevant Contracting State.

Special insolvency rights

41. Article 25 makes no reference to special rights of creditors of the assignor or of the insolvency administrator that may prevail over the rights of an assignee under law governing insolvency. The reason is that priority established under the draft Convention is not intended to interfere with such special rights. Such special rights include, but are not limited to, any right of creditors of the assignor or the insolvency administrator to initiate an action to avoid or otherwise render ineffective an assignment as a fraudulent or preferential transfer. They also include any right of the insolvency administrator to initiate an action to avoid or otherwise render ineffective, an assignment of receivables that have not arisen at the time of the commencement of the insolvency proceeding; to encumber the assigned receivables with the expenses of the insolvency administrator in performing the original contract; or to encumber the assigned receivables with the expenses of the insolvency administrator in maintaining, preserving or enforcing the receivables at the request and for the benefit of the assignee. If the assigned receivables constitute security for indebtedness or other obligations, the special rights protected include any rights existing under insolvency rules or procedures governing the insolvency of the assignor that

permit the insolvency administrator to encumber the assigned receivables; provide for a stay of the right of individual assignees or creditors of the assignor to collect the receivables during the insolvency proceeding; permit the substitution of the assigned receivables for new receivables of at least equal value; or provide for the right of the insolvency administrator to borrow using the assigned receivables as security to the extent that their value exceeds the obligations secured.

Article 26. *Special proceeds rules*

1. If proceeds are received by the assignee, the assignee is entitled to retain those proceeds to the extent that the assignee's right in the assigned receivable had priority over the right of a competing claimant in the assigned receivable.

2. If proceeds are received by the assignor, the right of the assignee in those proceeds has priority over the right of a competing claimant in those proceeds to the same extent as the assignee's right had priority over the right in the assigned receivable of that claimant if:

(a) The assignor has received the proceeds under instructions from the assignee to hold the proceeds for the benefit of the assignee; and

(b) The proceeds are held by the assignor for the benefit of the assignee separately and are reasonably identifiable from the assets of the assignor, such as in the case of a separate deposit account containing only cash receipts from receivables assigned to the assignee.

References

A/CN.9/447, paras. 63-68; A/CN.9/456, paras. 160-167; A/CN.9/466, paras. 42-53; and A/CN.9/486, paras. 66 and 67.

Commentary

42. The purpose of article 26 is to facilitate practices in which payment of the receivable is made to the assignee or to the assignor as an agent of the assignee (e.g. undisclosed invoice discounting and securitization). At the same time, by indicating a way in which assignees may obtain priority with respect to proceeds, article 26 may well facilitate other practices to the extent that they may be structured to meet the criteria of article 26. Paragraph 1 gives priority to an assignee with respect to the proceeds, if the assignee has received payment of and has priority with respect to the assigned receivable. The implicit limitation is that the assignee may not retain more than the value of its receivable. Paragraph 2 gives priority to an assignee with respect to proceeds, if the assignee has priority with respect to the assigned receivable and if the assignor receives payment on behalf of the assignee and those proceeds are reasonably identifiable from the assignor's assets.

Article 27. *Subordination*

An assignee entitled to priority may at any time subordinate its priority unilaterally or by agreement in favour of any existing or future assignees.

References

A/CN.9/445, para. 29; A/CN.9/455, para. 31; A/CN.9/456, para. 210; and A/CN.9/486, paras. 68 and 69.

Commentary

43. Article 27 is intended to recognize the interest of the parties involved in a conflict in negotiating and relinquishing priority in favour of a subordinate claimant where commercial considerations so warrant. In order to afford maximum flexibility and to reflect prevailing business practices, article 27 makes it clear that a valid subordination need not take the form of a direct subordination agreement between the assignee with priority and the beneficiary of the subordination agreement. It can also be effected unilaterally, for instance, by means of an undertaking of the first ranking assignee to the assignor, empowering the assignor to make a second assignment ranking first in priority. The term “unilaterally” is further intended to clarify that the beneficiary of the subordination (the second assignee) need not offer anything in exchange for the priority granted by the unilateral subordination. In referring to “agreement” in general, article 27 is intended to validate a subordination clause in the contract of assignment or in a separate agreement. Furthermore, article 27 clarifies that an effective subordination need not specifically identify the intended beneficiary or beneficiaries (“any existing or future assignees”) and can instead employ generic language. Such unilateral subordination may take place in an assignment between entities in the same corporate group or may be a service offered by a lender to a borrower for commercial considerations.

B. CHAPTER V. AUTONOMOUS CONFLICT-OF-LAWS RULES

Article 28. *Application of chapter V*

The provisions of this chapter apply to matters that are:

- (a) Within the scope of this Convention as provided in article 1, paragraph 4; and
- (b) Otherwise within the scope of this Convention but not settled elsewhere in it.

References

A/CN.9/420, paras. 185-187; A/CN.9/445, paras. 52-55; A/CN.9/455, paras. 67-73; A/CN.9/466, paras. 145-149; and A/CN.9/486, paras. 70-75.

Commentary

44. Article 28 deals with the scope and the purpose of chapter V. Under subparagraph (a), chapter V may apply even if the assignor (or, with respect to the application of article 30, the debtor) is not located in a Contracting State. In such a case, chapter V would introduce a second layer of unification, since it would apply to transactions falling

outside the scope of the provisions of the draft Convention other than those in chapter V. Under subparagraph (b), chapter V would apply in the same way as, and supplement, the provisions of the draft Convention other than those in chapter V.

Article 29. *Law applicable to the mutual rights and obligations of the assignor and the assignee*

1. The mutual rights and obligations of the assignor and the assignee arising from their agreement are governed by the law chosen by them.
2. In the absence of a choice of law by the assignor and the assignee, their mutual rights and obligations arising from their agreement are governed by the law of the State with which the contract of assignment is most closely connected.

References

A/CN.9/420, paras. 188-196; A/CN.9/445, paras. 52-74; A/CN.9/455, paras. 67-119; A/CN.9/466, paras. 150-153; and A/CN.9/486, paras. 77-79.

Commentary

45. Article 29 reflects the principle of party autonomy with respect to the law applicable to the contract of assignment, which is widely recognized but not universally accepted. In view of the fact that paragraph 1 does not require an explicit choice, even an implicit choice of law would be sufficient. Under paragraph 1, the law chosen by the parties governs the purely contractual aspects of the contract of assignment. Such contractual aspects include the conclusion and the substantive validity of the contract of assignment, the interpretation of its terms, the assignee’s obligation to pay the price or to render the promised credit, the existence and effect of representations as to the validity and enforceability of the receivable. With respect to assignments falling within the ambit of the provisions of the draft Convention other than those in chapter V, paragraph 1 is not intended to cover the substantive validity aspects addressed in the draft Convention (or other such aspects, such as capacity or authority to act). In the case of such assignments, paragraph 1 does not cover either the proprietary aspects of assignment addressed in the draft Convention (for this reason, reference is made to “the agreement” to assign as opposed to “the assignment” itself; for this distinction, see A/CN.9/489, para. 25). If the contract of assignment is just a clause in the financing contract, paragraph 1 does not cover the financing contract either, unless the parties agree otherwise.

46. Paragraph 2 is intended to deal with the exceptional situations in which the parties have not agreed (explicitly or implicitly) on the law applicable to the contract of assignment or in which the parties have agreed but their agreement is later found to be invalid. It refers to the closest-connection test, which may typically result in the application of the law of the assignor’s location or of the law of the assignee’s location.

Article 30. *Law applicable to the rights and obligations of the assignee and the debtor*

The law governing the original contract determines the effectiveness of contractual limitations on assignment as between the assignee and the debtor, the relationship between the assignee and the debtor, the conditions under which the assignment can be invoked against the debtor and any question whether the debtor's obligations have been discharged.

References

A/CN.9/420, paras. 197-200; A/CN.9/445, paras. 65-69; A/CN.9/455, paras. 92-104 and 117; A/CN.9/466, paras. 154-158; and A/CN.9/486, paras. 80-84.

Commentary

47. In line with the principle of debtor protection, article 30 refers issues arising in the context of the relationship between the assignee and the debtor to the law governing the receivable, which, in the case of contractual receivables, is the law governing the original contract from which they arise. Reference is made to the law of the original contract, since, unlike article 12, paragraph 2 of the Convention on the Law Applicable to Contractual Obligations (Rome, 1980; "the Rome Convention") on which article 30 was modelled and which may apply to non-contractual rights, article 30 covers only contractual receivables (see article 2). No reference is made to how the law applicable to the original contract should be determined. Such elaborate rules are not necessary in a chapter that is intended to establish certain general principles, without addressing all assignment-related private international law issues. In any case, it would be inappropriate to attempt to determine the law governing the wide variety of contracts that might be at the origin of a receivable (e.g. contracts of sale, insurance contracts or contracts relating to financial markets operations).

48. Article 30 also applies to transaction set-off (i.e. a cross-claim arising out of the original contract or a closely related contract), since a transaction set-off would fall under the "relationship between the assignee and the debtor". Independent set-off (i.e. claims arising from sources that are unrelated to the original contract), however, is not covered. Such claims may arise from a variety of sources (e.g. a separate contract between the assignor and the debtor, a rule of law or a judicial or arbitral decision). Their availability and the conditions governing availability (e.g. liquidity, same currency and maturity) are left to other law, which is not specified in the draft Convention.

49. Article 30 also covers contractual, but not statutory, assignability as an issue relating to payment by and discharge of the debtor. This means that, if the provisions of the draft Convention outside chapter V do not apply with regard to the debtor, the effects of a breach of a contractual limitation on the relationship between the assignee and the debtor are left to the law governing the original contract. If those provisions apply, the assignment made in breach of a contractual limitation is effective as against the debtor (see article 11, para. 1) and the debtor will not have a defence as against the assignee (see article 20, para. 3).

Article 31. *Law applicable to competing rights*

1. With the exception of matters that are settled elsewhere in this Convention and subject to articles 25 and 26:

(a) With respect to the right of a competing claimant, the law of the State in which the assignor is located governs:

- (i) The characteristics and priority of the right of an assignee in the assigned receivable; and
- (ii) The characteristics and priority of the right of the assignee in proceeds that are receivables whose assignment is governed by this Convention[;]

(b) With respect to the right of a competing claimant, the characteristics and priority of the right of the assignee in proceeds described below are governed by:

- (i) In the case of money or negotiable instruments not held in a bank account or through a securities intermediary, the law of the State in which such money or instruments are located;
- (ii) In the case of investment securities held through a securities intermediary, the law of the State in which the securities intermediary is located;
- (iii) In the case of bank deposits, the law of the State in which the bank is located[; and
- (iv) In the case of receivables whose assignment is governed by this Convention, the law of the State in which the assignor is located].

[(c) The existence and characteristics of the right of a competing claimant in proceeds described in paragraph 1 (b) of this article are governed by the law indicated in that paragraph]].

2. In an insolvency proceeding commenced in a State other than the State in which the assignor is located, any preferential right that arises, by operation of law, under the law of the forum State and is given priority status over the rights of an assignee in insolvency proceedings under the law of that State may be given priority notwithstanding paragraph 1 of this article.

References

A/CN.9/445, paras. 70-74; A/CN.9/455, paras. 105-110; A/CN.9/466, paras. 159 and 160; and A/CN.9/486, paras. 85 and 86.

Commentary

50. While article 31 reproduces the rules in articles 24 and 25, it has a different scope in that it may apply irrespective of whether the assignor is located in a Contracting State (see article 1, para. 4, and article 28 (a)).

Article 32. *Mandatory rules*

1. Nothing in articles 29 and 30 restricts the application of the rules of the law of the forum State in a situation where they are mandatory, irrespective of the law otherwise applicable.

2. Nothing in articles 29 and 30 restricts the application of the mandatory rules of the law of another State with which the matters settled in those articles have a close connection if and in so far as, under the law of that other State, those rules must be applied irrespective of the law otherwise applicable.

References

A/CN.9/455, paras. 111-117; A/CN.9/466, paras. 161 and 162; and A/CN.9/486, paras. 87 and 88.

Commentary

51. Paragraph 1 is intended to reflect a generally accepted principle in private international law according to which mandatory law rules of the forum may be applied irrespective of the law otherwise applicable (see article 7, para. 2, of the Rome Convention and article 11 of the Inter-American Convention on the Law Applicable to International Contracts (Mexico City, 1994; “the Mexico City Convention”). Mandatory law in this context refers to law of fundamental importance, such as consumer protection law or criminal law (*loi de police*) and not merely to law that cannot be derogated from by agreement. Paragraph 2 introduces a different rule, namely, that a court in a Contracting State may apply not its own law or the law applicable under articles 29 and 30 but the law of a third country to which the matters settled in those provisions have a close connection (see article 7, para. 1, of the Rome Convention).

52. The scope of article 32 is limited to cases involving the law applicable to the contract of assignment and to the relationship between the assignee and the debtor. This means that the law applicable to priority issues may not be set aside as contrary to mandatory law rules of the forum or another State. In this respect, article 31, paragraph 2, under which a priority rule of the law applicable may be set aside for the purpose of protecting, for example, a relative right of the forum State for taxes, was considered to be sufficient. Such a limitation of the mandatory-law exception was thought to be justified on the grounds that priority rules are of a mandatory nature and setting them aside in favour of the mandatory rules of the forum or another State would inadvertently result in creating uncertainty as to the law applicable to priority and thus have a negative impact on the availability and the cost of credit.

Article 33. *Public policy*

With regard to matters settled in this chapter, the application of a provision of the law specified in this chapter may be refused by a court or other competent authority only if that provision is manifestly contrary to the public policy of the forum State.

References

A/CN.9/455, paras. 118 and 119; A/CN.9/466, paras. 163 and 164; and A/CN.9/486, paras. 89 and 90.

Commentary

53. Article 33 reflects a standard provision in private international law texts (see, for example, article 16 of the Rome Convention and article 18 of the Mexico City Convention). The purpose of this provision is to make it possible for States to set aside a rule of the applicable law that, as applied in a specific case, is “manifestly contrary” to the international public policy of the forum State (on the meaning of the notion “manifestly contrary”, see para. 40).

C. CHAPTER VI FINAL PROVISIONS

Article 34. *Depositary*

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

References

A/CN.9/455, paras. 124 and 125; and A/CN.9/486, paras. 91 and 92.

Commentary

54. The Treaty Section of the Office of Legal Affairs of the United Nations, located at United Nations Headquarters in New York, performs the depositary functions of the Secretary-General. Treaties, related declarations deposited with the depositary, as well as lists of Contracting States, are accessible through the home page of the Treaty Section on the World Wide Web (<http://www.un.org/depositary>). Treaties based on texts developed by the Commission are accessible through the UNCITRAL website, along with a wide range of relevant information, including status of texts (<http://www.uncitral.org>). Printed texts may be obtained from the Treaty Section and the International Trade Law Branch, as well as from a variety of other sources, including United Nations depositary libraries.

Article 35. *Signature, ratification, acceptance, approval, accession*

1. This Convention is open for signature by all States at the Headquarters of the United Nations in New York, until [...].
2. This Convention is subject to ratification, acceptance or approval by the signatory States.
3. This Convention is open to accession by all States that are not signatory States as from the date it is open for signature.
4. Instruments of ratification, acceptance, approval and accession are to be deposited with the Secretary-General of the United Nations.

References

A/CN.9/455, paras. 141 and 142; and A/CN.9/486, paras. 93 and 94.

Commentary

55. Article 35 is a standard treaty provision. The period during which the Convention would be opened for signature by States remains to be determined.

Article 36. *Application to territorial units*

1. If a State has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at any time, declare that this Convention is to extend to all its territorial units or only one or more of them, and may at any time substitute another declaration for its earlier declaration.

2. Such declarations are to state expressly the territorial units to which this Convention extends.

3. If, by virtue of a declaration under this article, this Convention does not extend to all territorial units of a State and the assignor or the debtor is located in a territorial unit to which this Convention does not extend, this location is considered not to be in a Contracting State.

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

References

A/CN.9/455, paras. 143 and 144; and A/CN.9/486, paras. 95 and 96.

Commentary

56. Article 36 is intended to ensure that a federal State may adopt the draft Convention, even if, for any reason, it does not wish to or cannot, under internal law, have it apply to all its territorial units. Such a right is particularly important for States with more than one legal system. The declaration may be made at any time, including before or after ratification, approval or accession (reference is made to a "State" and not to a "Contracting State", since a declaration may be made by a signatory State). The effect of a declaration under article 36 is that a party located in a territorial unit, to which the draft Convention is not to be applied by virtue of the declaration, is not considered to be located in a Contracting State (para. 3). If that party is the assignor, the draft Convention would not apply at all (with the exception of chapter V where the forum is in a Contracting State that has not opted out of chapter V). If that party is the debtor, the provisions of the draft Convention dealing with the rights and obligations of the debtor would not apply (unless the law governing the original contract is the law of a Contracting State or a territorial unit to which the draft Convention is to apply). The rule in article 5 (h) as to multiple places of business applies if "the assignor or the assignee has places in more than one State". For the purpose of article 36, it should be applied by analogy to cases in which there are multiple places of business in different entities of a federal State.

[Article 37. *Applicable law in territorial units*

If a State has two or more territorial units whose law may govern a matter referred to in chapters IV and V of this Convention, a reference in those chapters to the law of a State in which a person or property is located means the law applicable in the territorial unit in which the person or property is located, including rules that render applicable the law of another territorial unit of that State. Such a State may specify by declaration at any time how it will implement this article.]

References

A/CN.9/486, paras. 96 and 97.

Commentary

57. Article 37, which appears in square brackets pending final determination by the Commission of whether it should be retained, is intended to deal with applicable law issues in the case of a federal State (the commentary will be written once the article is finalized).

Article 38. *Conflicts with other international agreements*

1. This Convention does not prevail over any international agreement that has already been or may be entered into and that contains provisions concerning the matters governed by this Convention, provided that the assignor is located at the time of the conclusion of the contract of assignment in a State party to such agreement or, with respect to the provisions of this Convention that deal with the rights and obligations of the debtor, at the time of the conclusion of the original contract, the debtor is located in a State party to such agreement or the law governing the original contract is the law of a State party to such agreement.

2. Notwithstanding paragraph 1 of this article, this Convention prevails over the Unidroit Convention on International Factoring ("the Ottawa Convention"). If, at the time of the conclusion of the original contract, the debtor is located in a State party to the Ottawa Convention or the law governing the original contract is the law of a State party to the Ottawa Convention and that State is not a party to this Convention, nothing in this Convention precludes the application of the Ottawa Convention with respect to the rights and obligations of the debtor.

References

A/CN.9/445, paras. 52-55, 75 and 76 and 201-203; A/CN.9/455, paras. 67-73 and 126-129; A/CN.9/456, paras. 232-239; A/CN.9/466, paras. 192-195; and A/CN.9/486, paras. 98-108.

Commentary

58. Reflecting generally acceptable principles as to conflicts among international legislative texts (see, e.g. article 30 of the Vienna Convention on the Law of Treaties, 1969 (“the Vienna Convention”); and article 90 of the United Nations Sales Convention), paragraph 1 gives precedence to other texts that contain provisions that deal with matters covered by the draft Convention. Paragraph 2 takes a different approach with regard to the Ottawa Convention. The main reason for this approach is that the draft Convention is more comprehensive both in the scope and in the issues covered. The second sentence of paragraph 2 is intended to ensure that the application of the Ottawa Convention is not affected if a factoring contract is within the territorial scope of application of the Ottawa Convention but not of the draft Convention.

59. In view of the fact that the draft Convention contains private international law provisions, conflicts may arise with private international law texts, such as the Rome Convention and the Mexico City Convention. However, there are no conflicts with the Mexico City Convention, which addresses the law applicable to contracts in general (not assignment in particular) in a way that is consistent with article 29 of the draft Convention. Any conflicts between article 12 of the Rome Convention and articles 29 and 30 of the draft Convention are minimal, since those articles are almost identical with article 12 of the Rome Convention. Furthermore, normally, no conflicts should arise between article 12 of the Rome Convention and article 31 of the draft Convention, since, according to the prevailing view, article 12 of the Rome Convention does not address this matter. However, in the literature and in case law, the view has been expressed that article 12 of the Rome Convention addresses issues of priority, either in paragraph 1 (the law chosen by the parties) or in paragraph 2 (the law governing the receivable). The Commission has taken a different approach (the law of the assignor’s location). In order to avoid any conflict with the Rome Convention, article 39 provides that a State may opt out of chapter V. As a result, if all States parties to the Rome Convention opt out of chapter V, no conflict would arise. However, an opt-out of articles 24 to 26 is not allowed. Therefore, conflicts may arise between articles 24 to 26 of the draft Convention and article 12 of the Rome Convention. Article 21 of the Rome Convention would not provide an answer to the question of which text would prevail, since it provides that the Rome Convention “shall not prejudice the application of international conventions”. The matter would, therefore, be left to general principles of treaty law, under which the latest or the more specific text would prevail.

60. The European Council (EC) Regulation No. 1346/2000 of 29 May 2000 on insolvency proceedings would refer conflicts of priority between an assignee and an insolvency administrator to the law of the member State in which the insolvency proceeding is opened (see article 4). In the case of a main insolvency proceeding, that place is the place where the insolvent debtor (i.e. the assignor in the terminology of the draft Convention) has the centre of its main interests (see article 3, para. 1). If the assignor has just one

place of business, that place is going to be the centre of its main interests and, as a result, both the draft Convention and the Regulation would refer to the same law. If the assignor has more than one place of business, both the draft Convention and the Regulation would refer to the law of the assignor’s centre of main interests (as to the notion of central administration, see A/CN.9/489, para. 68).

61. In the case of a secondary insolvency proceeding, the Regulation would refer priority issues to the law of the member State in which the assignor has an establishment, i.e. non-transitory economic activities (see article 3, para. 2, and article 2 (*h*)), while the draft Convention would refer to the law of the assignor’s main interests. The draft Convention goes a long way in addressing that conflict (which concerns all States and not only member States of the European Union). A priority rule that is manifestly contrary to the law of the forum can be set aside and super-priority rights with priority under the law of the forum are not affected (see article 25). Equally unaffected remain any special insolvency rights, such as those described in article 4, paragraph 2, of the Regulation (see para. 41 above). The Regulation also reduces the potential for any conflict in providing that the opening of an insolvency proceeding in one State member of the European Union does not affect rights in rem, rights of set-off or rights arising from a retention of title clause with respect to assets located in another member State (see articles 5-7 and 2 (*g*)). In any case, if a conflict arises, it should be resolved in favour of the regulation by virtue of article 38, paragraph 1 (the scope of which may need to be expanded).

62. Conflicts may arise with the preliminary draft Convention on International Interests in Mobile Equipment, currently being prepared by a group of experts in the context of the International Civil Aviation Organization (ICAO), Unidroit and other organizations. This preliminary draft Convention is intended to apply to certain types of high-value mobile equipment. An assignment of the security interest in such equipment transfers also the principal, secured obligation. An assignee registering this assignment with the international equipment-specific register of the preliminary draft Convention would prevail over an assignee of the principal obligation. Such an assignee of the principal obligation (e.g. an assignee under the draft Convention) could not register or obtain priority. Under article 38, paragraph 1, any conflicts with the preliminary draft Convention would be resolved in favour of the application of the preliminary draft Convention. The same result would presumably be reached, even in the absence of article 38, since according to general principles of treaty law the later or more specific text would prevail.

Article 39. *Declaration on application of chapter V*

A State may declare at any time that it will not be bound by chapter V.

References

A/CN.9/455, paras. 72 and 148; A/CN.9/466, paras. 196 and 197; and A/CN.9/486, paras. 109-111.

Commentary

63. In order to make the draft Convention more acceptable to States that do not need chapter V (e.g. because they are parties to other private international law texts, such as the Rome Convention), article 39 allows States to opt out (see also article 1, para. 4). The possibility for an opt-out, rather than an opt-in, is intended to make clear that chapter V forms an integral part of the draft Convention.

Article 40. *Limitations relating to Governments and other public entities*

A State may declare at any time that it will not be bound or the extent to which it will not be bound by articles 11 and 12 if the debtor or any person granting a personal or property right securing payment of the assigned receivable is located in that State at the time of the conclusion of the original contract and is a Government, central or local, any subdivision thereof, or an entity constituted for a public purpose. If a State has made such a declaration, articles 11 and 12 do not affect the rights and obligations of that debtor or person. A State may list in a declaration the types of entity that are the subject of a declaration.

References

A/CN.9/432, para. 117; A/CN.9/455, para. 48; A/CN.9/456, paras. 115 and 116; A/CN.9/466, paras. 107-115; and A/CN.9/486, paras. 112-114.

Commentary

64. Receivables owed by a State or other public entity are often not assignable by law. The draft Convention does not affect such statutory limitations on assignment (see article 9, para. 3). However, in some States, such statutory limitations are not normal practice and therefore sovereign debtors often resort to contractual limitations on assignment. In order to make the draft Convention more acceptable to such States, article 40 allows them to ensure the effectiveness of such contractual limitations with respect to sovereign debtors by making a declaration. If a declaration is made by the State in which a sovereign debtor is located at the time of the conclusion of the original contract, articles 11 and 12 do not affect the rights of that sovereign debtor. This means that an assignment will be ineffective as against the sovereign debtor, while it remains effective as against the assignor and the assignor's creditors. This approach is based on the assumption that, once the sovereign debtor is protected, there is no reason to invalidate the assignment in general. Preserving the validity of the assignment as between the assignor and the assignee would allow the assignee to obtain priority by meeting the requirements of the law of the assignor's location. Unlike article 6 of the Ottawa Convention, which allows a reservation with regard to any debtor, article 40 allows a reservation only with respect to sovereign debtors. As to public entities, article 40 leaves a wide flexibility to States to determine the types of entities they wish to exclude from the application of articles 11 and 12.

[Article 41. Other exclusions]

1. A State may declare at any time that it will not apply this Convention to types of assignment or to the assignment of categories of receivables listed in a declaration. In such a case, this Convention does not apply to such types of assignment or to the assignment of such categories of receivables if the assignor is located at the time of the conclusion of the contract of assignment in such a State or, with respect to the provisions of this Convention that deal with the rights and obligations of the debtor, at the time of the conclusion of the original contract, the debtor is located in such a State or the law governing the original contract is the law of such a State.

2. After a declaration under paragraph 1 of this article takes effect:

(a) This Convention does not apply to such types of assignment or to the assignment of such categories of receivables if the assignor is located at the time of the conclusion of the contract of assignment in such a State; and

(b) The provisions of this Convention that affect the rights and obligations of the debtor do not apply if, at the time of the conclusion of the original contract, the debtor is located in such a State or the law governing the receivable is the law of such a State.]

References

A/CN.9/466, paras. 198-201.

Commentary

65. With a view to making the draft Convention more acceptable to States that might be concerned with its application to certain present or to future practices, article 41 provides the possibility for States to exclude further practices. Article 41 appears within square brackets pending final determination of whether it should be retained (the commentary will be written once article 41 is finalized).

Article 42. *Application of the annex*

1. A State may at any time declare that it will be bound by:

(a) The priority rules set forth in section I of the annex and will participate in the international registration system established pursuant to section II of the annex;

(b) The priority rules set forth in section I of the annex and will effectuate such rules by use of a registration system that fulfils the purposes of such rules, in which case, for the purposes of section I of the annex, registration pursuant to such a system has the same effect as registration pursuant to section II of the annex;

(c) The priority rules set forth in section III of the annex;

(d) The priority rules set forth in section IV of the annex; or

(e) The priority rules set forth in articles 7 and 8 of the annex.

2. For the purposes of article 24:

(a) The law of a State that has made a declaration pursuant to paragraph 1 (a) or (b) of this article is the set of rules set forth in section I of the annex;

(b) The law of a State that has made a declaration pursuant to paragraph 1 (c) of this article is the set of rules set forth in section III of the annex;

(c) The law of a State that has made a declaration pursuant to paragraph 1 (d) of this article is the set of rules set forth in section IV of the annex; and

(d) The law of a State that has made a declaration pursuant to paragraph 1 (e) of this article is the set of rules set forth in articles 7 and 8 of the annex.

3. A State that has made a declaration pursuant to paragraph 1 of this article may establish rules pursuant to which assignments made before the declaration takes effect become subject to those rules within a reasonable time.

4. A State that has not made a declaration pursuant to paragraph 1 of this article may, in accordance with priority rules in force in that State, utilize the registration system established pursuant to section II of the annex.

5. At the time a State makes a declaration pursuant to paragraph 1 of this article or thereafter, it may declare that it will not apply the priority rules chosen under paragraph 1 of this article to certain types of assignment or to the assignment of certain categories of receivables.

References

A/CN.9/455, paras. 122 and 130-132; A/CN.9/466, paras. 188-191, 202 and 203; and A/CN.9/486, paras. 119 and 120 and 169.

Commentary

66. Article 42 is intended to list the choices available to States with regard to the annex and the effects of any such choice made by way of a declaration (permitted under article 1, para. 5; see A/CN.9/489, para. 24). States have several alternative choices with regard to the annex. These choices are: to adopt the priority rules of section I and the registration system proposed in section II of the annex (para. 1 (a)); to adopt the priority rules of section I and a registration system other than that proposed in section II (para. 1 (b)); to adopt the priority rules of section III, section IV or in articles 7 and 8 of the annex; or to apply their own priority rules with the registration system of section II (para. 4). The difference between the choices in paragraph 1 and the choice in paragraph 4 is that, a State would not need to make a declaration to exercise the choice given in paragraph 4. Paragraph 2 sets forth the effect of a declaration, namely that the section of the annex to which the assignor's State has opted into is the law of the assignor's location at the time of the conclusion of the contract of assignment. Paragraph 3 deals with transitional application issues, while paragraph 4 permits States to subject different practices to different priority rules.

Article 43. *Effect of declaration*

1. Declarations made under article 36, paragraph 1, articles 37 or 39 to 42 at the time of signature are subject to confirmation upon ratification, acceptance or approval.

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

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

4. A State that makes a declaration under article 36, paragraph 1, and articles 37 or 39 to 42 may withdraw it at any time by a formal notification in writing addressed to the depositary. Such withdrawal takes effect on the first day of the month following the expiration of six months after the date of the receipt of the notification by the depositary.

5. In the case of a declaration under article 36, paragraph 1, articles 37 or 39 to 42 that takes effect after the entry into force of this Convention in respect of the State concerned or in the case of a withdrawal of any such declaration, the effect of which in either case is to cause a rule in this Convention, including any annex, to become applicable:

(a) Except as provided in paragraph 5 (b) of this article, that rule is applicable only to assignments for which the contract of assignment is concluded on or after the date when the declaration or withdrawal takes effect in respect of the Contracting State referred to in article 1, paragraph 1 (a);

(b) A rule that deals with the rights and obligations of the debtor applies only in respect of original contracts concluded on or after the date when the declaration or withdrawal takes effect in respect of the Contracting State referred to in article 1, paragraph 3.

6. In the case of a declaration under article 36, paragraph 1, articles 37 or 39 to 42 that takes effect after the entry into force of this Convention in respect of the State concerned or in the case of a withdrawal of any such declaration, the effect of which in either case is to cause a rule in this Convention, including any annex, to become inapplicable:

(a) Except as provided in paragraph 6 (b) of this article, that rule is inapplicable to assignments for which the contract of assignment is concluded on or after the date when the declaration or withdrawal takes effect in respect of the Contracting State referred to in article 1, paragraph 1 (a);

(b) A rule that deals with the rights and obligations of the debtor is inapplicable in respect of original contracts concluded on or after the date when the declaration or withdrawal takes effect in respect of the Contracting State referred to in article 1, paragraph 3.

7. If a rule rendered applicable or inapplicable as a result of a declaration or withdrawal referred to in

paragraph 5 or 6 of this article is relevant to the determination of priority with respect to a receivable for which the contract of assignment is concluded before such declaration or withdrawal takes effect or with respect to its proceeds, the right of the assignee has priority over the right of a competing claimant to the extent that, under the law that would determine priority before such declaration or withdrawal takes effect, the right of the assignee would have priority.

References

A/CN.9/445, paras. 79 and 80; A/CN.9/455, paras. 145 and 146; A/CN.9/466, para. 206; and A/CN.9/486, paras. 121-123 and 134.

Commentary

67. Paragraphs 1 to 4 reflect standard treaty law practice. Under paragraphs 1 and 2, declarations made at the time of signature must be confirmed at the time a State declares its consent to be bound; and declarations and confirmations must be in writing and formally notified to the depositary. Under paragraph 3, a declaration takes effect at the same time the Convention enters into force in respect of the State making the declaration. There is a six-month delay if the depositary is notified of the declaration after the entry into force. The six-month period starts at the time of receipt of the formal notification by the depositary and ends on the first day after the expiry of the six-month period. Under paragraph 4, withdrawals of declarations take effect on the first day after the expiry of six months after the receipt of the formal notification by the depositary. Paragraphs 5 through 7 deal with issues relating to the transitional application of the draft Convention.

Article 44. *Reservations*

No reservations are permitted except those expressly authorized in this Convention.

References

A/CN.9/455, paras. 147 and 148

Commentary

68. Article 44, which reflects standard treaty law practice, is intended to ensure that no reservation is made other than those expressly authorized in article 36, paragraph 1, and articles 39 to 41 and 42, paragraph 5, that exclude or modify the effect of certain provisions of the draft Convention.

Article 45. *Entry into force*

1. This Convention enters into force on the first day of the month following the expiration of six months from the date of deposit of the fifth instrument of ratification, acceptance, approval or accession with the depositary.
2. For each State that becomes a Contracting State to this Convention after the date of deposit of the fifth

instrument of ratification, acceptance, approval or accession, this Convention enters into force on the first day of the month following the expiration of six months after the date of deposit of the appropriate instrument on behalf of that State.

3. This Convention applies only to assignments if the contract of assignment is concluded on or after the date when this Convention enters into force in respect of the Contracting State referred to in article 1, paragraph 1 (a), provided that the provisions of this Convention that deal with the rights and obligations of the debtor apply only to assignments of receivables arising from original contracts concluded on or after the date when this Convention enters into force in respect of the Contracting State referred to in article 1, paragraph 3.

4. If a receivable is assigned pursuant to a contract of assignment concluded before the date when this Convention enters into force in respect of the Contracting State referred to in article 1, paragraph 1 (a), the right of the assignee has priority over the right of a competing claimant with respect to the receivable and its proceeds to the extent that, under the law that would determine priority in the absence of this Convention, the right of the assignee would have priority.

References

A/CN.9/455, paras. 149 and 150; A/CN.9/466, para. 206; and A/CN.9/486, paras. 127-131.

Commentary

69. Paragraphs 1 and 2 reflect standard treaty law practice. Paragraphs 3 and 4 are intended to ensure that rights acquired before the entry into force of the draft Convention are not affected by it.

Article 46. *Denunciation*

1. A Contracting State may denounce this Convention at any time by written notification addressed to the depositary.
2. The denunciation takes effect on the first day of the month following the expiration of one year after the notification is received by the depositary. Where a longer period is specified in the notification, the denunciation takes effect upon the expiration of such longer period after the notification is received by the depositary.
3. This Convention remains applicable to assignments if the contract of assignment is concluded before the date when the denunciation takes effect in respect of the Contracting State referred to in article 1, paragraph 1 (a), provided that the provisions of this Convention that deal with the rights and obligations of the debtor remain applicable only to assignments of receivables arising from original contracts concluded before the date when the denunciation takes effect in respect of the Contracting State referred to in article 1, paragraph 3.

4. If a receivable is assigned pursuant to a contract of assignment concluded before the date when the denunciation takes effect in respect of the Contracting State referred to in article 1, paragraph 1 (*a*), the right of the assignee has priority over the right of a competing claimant with respect to the receivable and its proceeds to the extent that, under the law that would determine priority under this Convention, the right of the assignee would have priority.

References

A/CN.9/455, paras. 151-155; A/CN.9/466, para. 206 and A/CN.9/486, paras. 132 and 133.

Commentary

70. Article 46 is intended to ensure that a Contracting State may denounce the draft Convention. With a view to ensuring certainty, paragraphs 3 and 4 provide that a denunciation does not affect rights acquired before it takes effect.

Article 47. *Revision and amendment*

1. At the request of not less than one third of the Contracting States to this Convention, the depositary shall convene a conference of the Contracting States for revising or amending it.

2. Any instrument of ratification, acceptance, approval or accession deposited after the entry into force of an amendment to this Convention is deemed to apply to the Convention as amended.

References

A/CN.9/466, paras. 207 and 208; and A/CN.9.486, paras. 135 and 136.

Commentary

71. Article 47 is a provision found in other UNCITRAL texts (e.g. article 32 of the United Nations Convention on the Carriage of Goods by Sea, 1978, (Hamburg Rules)).

D. ANNEX TO THE DRAFT CONVENTION

Purpose of the annex

References

A/CN.9/420, paras. 155-164; A/CN.9/434, paras. 239-258; A/CN.9/445, paras. 18-44 and 83-93; A/CN.9/455, paras. 18-32 and 120-123; and A/CN.9/486, paras. 137-142.

Commentary

72. Articles 24 to 26 refer priority issues to national law (the law of the assignor's location). However, national priority rules may not exist; they may be outdated or not fully adequate in addressing all relevant problems. For that reason, the annex to the draft Convention, which a State may opt into, contains alternative substantive law priority rules, based on the time of assignment, notification or registration. In order to determine whether their priority rules need revision, States may wish to compare them with the rules set forth in the annex.

73. The rules, set forth in the annex, are intended to serve as a model for national legislation. If a State chooses to enact them by declaration, the choices and effects will be as prescribed in article 42. If a State enacts them independently of the draft Convention, the limitations of article 42 would not apply. There is an additional level of flexibility. These rules do not necessarily form a complete model law. States, therefore, might need to supplement them with additional provisions. For example, if a registration-based system is chosen, some practices may need to be excluded from a registration-based priority regime and subjected to a different priority regime; and the registration rules would need to be supplemented by appropriate regulations. In general, a section of the annex applies only if article 24 applies (i.e. the conditions of the application of the Convention are met and the forum is in a Contracting State) and the assignor's State has made a declaration under article 42 (see also article 1, para. 5). The choices available to States and their effects are set forth in article 42 (see para. 65). As the annex will apply in such a case through articles 24 to 26, the scope and the meaning of the terms in those articles will determine also the scope and the meaning of the terms of the provisions of the section of the annex opted into by the assignor's State.

Section I. Priority rules based on registration

Article 1. *Priority among several assignees*

As between assignees of the same receivable from the same assignor, the priority of the right of an assignee in the assigned receivable and its proceeds is determined by the order in which data about the assignment are registered under section II of this annex, regardless of the time of transfer of the receivable. If no such data are registered, priority is determined by the order of the conclusion of the respective contracts of assignment.

References

A/CN.9/445, paras. 88-90; A/CN.9/466, paras. 167 and 168; and A/CN.9.486, paras. 143-145.

Commentary

74. The registration system envisaged in article 1 involves the voluntary entering of certain data about an assignment in the public record. The purpose of such registration is not to create or constitute evidence of property rights, but to

protect third parties by putting them on notice about assignments made and to provide a basis for settling conflicts of priority between competing claims. Because of its limited function and for it to be simple, quick and inexpensive, the registration envisaged in article 1 requires a very limited amount of data (specified in article 4 of the annex) to be placed on public record. If no assignee files the required data, the first-in-time assignee prevails.

75. The policy underlying article 1 (and sections I and II) is that giving potential financiers notice about assignments and determining priority in receivables on the basis of a public filing system will enhance certainty as to the rights of financiers. This, in turn, would have a beneficial impact on the availability and the cost of credit on the basis of receivables. The priority rules in section I may operate with an existing national registration system or with a system under section II. Terms used in article 24 and in the provisions of the annex have the same meaning. For example, a person with a right in a receivable derived from a right in another asset should be treated as an assignee (and not as a creditor of the assignor). Accordingly, a conflict between an assignee and such a person would be subject to article 1 and not to article 2 of the annex.

Article 2. Priority between the assignee and the insolvency administrator or creditors of the assignor

The right of an assignee in an assigned receivable and its proceeds has priority over the right of an insolvency administrator and creditors who obtain a right in the assigned receivable or its proceeds by attachment, judicial act or similar act of a competent authority that gives rise to such right, if the receivable was assigned, and data about the assignment were registered under section II of this annex, before the commencement of such insolvency proceeding, attachment, judicial act or similar act.

References

A/CN.9/466, paras. 169 and 170; and A/CN.9/486, paras. 146-149.

Commentary

76. Article 2 is intended to reflect the principle that, if registration takes place before the commencement of an insolvency proceeding with regard to the assets and affairs of the assignor or before attachment of the receivables in the hands of the assignor, the assignee has priority. In view of the fact that provisions of the annex would apply as a result of the application of article 24, no reference is included to article 25 or the other conditions or limitations of the application of article 24, since they are all implicit.

Section II. Registration

Article 3. Establishment of a registration system

A registration system will be established for the registration of data about assignments, even if the relevant

assignment or receivable is not international, pursuant to the regulations to be promulgated by the registrar and the supervising authority. Regulations promulgated by the registrar and the supervising authority under this annex shall be consistent with this annex. The regulations will prescribe in detail the manner in which the registration system will operate, as well as the procedure for resolving disputes relating to that operation.

References

A/CN.9/445, paras. 94-103; A/CN.9/466, paras. 171 and 172; and A/CN.9/486, paras. 150-153.

Commentary

77. The policy underlying article 3 is that, while the annex should include some basic provisions about registration, the mechanics of the registration process should be left to regulations to be prepared by the registrar and the supervising authority. In principle, the regulations do not need to be more detailed than is practically necessary and the registrar and the supervising authority should have sufficient flexibility in preparing the regulations. For those reasons, article 3 refers to the regulations prescribing "in detail" (but not "exactly") the operation of the registration system. The registrar (who may, presumably, be a private entity) and the supervising authority (which is intended to be an intergovernmental organization) will be entrusted with the task of promulgating the regulations, as well as ensuring the efficient operation of the system.

Article 4. Registration

1. Any person may register data with regard to an assignment at the registry in accordance with this annex and the regulations. As provided in the regulations, the data registered shall be the identification of the assignor and the assignee and a brief description of the assigned receivables.

2. A single registration may cover one or more assignments by the assignor to the assignee of one or more existing or future receivables, irrespective of whether the receivables exist at the time of registration.

3. A registration may be made in advance of the assignment to which it relates. The regulations will establish the procedure for the cancellation of a registration in the event that the assignment is not made.

4. Registration or its amendment is effective from the time when the data set forth in paragraph 1 of this article are available to searchers. The registering party may specify, from options set forth in the regulations, a period of effectiveness for the registration. In the absence of such a specification, a registration is effective for a period of five years.

5. Regulations will specify the manner in which registration may be renewed, amended or cancelled and regulate such other matters as are necessary for the operation of the registration system.

6. Any defect, irregularity, omission or error with regard to the identification of the assignor that would

result in data registered not being found upon a search based on a proper identification of the assignor renders the registration ineffective.

References

A/CN.9/445, paras. 104-117; A/CN.9/466, paras. 173-178; and A/CN.9/486, paras. 154-159.

Commentary

78. The purpose of article 4 is to establish the basic parameters for an efficient registration system. Those basic parameters include the public character of the registry, the type of data that need to be registered, the ways in which the registration-related needs of modern financing practices may be accommodated and the time of effectiveness of registration. The registry envisaged is a public registry. However, in order to avoid any abuses, limitations may need to be introduced as to who may register (e.g. only persons with a legitimate interest or with the authorization of the assignor) and the assignor may need to be given the right to demand deregistration. In referring to registration “in accordance with this annex and the regulations”, paragraph 1 leaves those issues to the regulations. The regulations (or other legislation) could also deal with abusive and fraudulent registration, although this matter should normally not pose a problem, since registration under article 4 does not create any substantive rights. In any case, the issue of any loss caused as a result of an unauthorized or fraudulent registration could be addressed by general tort, fraud or even criminal law rules. The data to be registered, under paragraph 1, include identification of the assignor and the assignee and a brief description of the assigned receivables. The type of identification required is left to the regulations. It is meant to include, however, identification by number. The words “brief description” are intended to include a generic description, such as “all my receivables from my car business” or “all my receivables from countries A, B and C”. The sufficiency of a non-specific description of the receivables is also left to the regulations.

79. Paragraphs 2 and 3 are key provisions in that they are intended to ensure the efficient operation of the registration system and to accommodate the needs of significant transactions. Under paragraph 2, a single notice could cover a large number of receivables, existing or future, arising from one or several contracts, as well as a changing body of receivables and a constantly changing amount of secured credit (revolving credit). Without these features, registration would be expensive, slow and inefficient. Any abuse, which could harm the assignor but could not create any substantive rights, is left to the regulations or other legislation. Under paragraph 3, registration may take place even before an assignment is made. For the assignee to be able to release funds, there is a need to ensure that registration can be effected as soon as possible. The regulations may prescribe the way in which this pre-registration may be effected.

80. Under paragraph 4, registration or its amendment is effective when searchers are able to obtain access to the

data registered. This means that, if the assignor becomes insolvent after registration but before the data become available to searchers, the risk of any events that may affect the interests of the registering party is placed on that party. Such a risk would be significantly reduced if there is no time gap between data being registered and becoming available to searchers, which is possible in the case of a fully computerized registration system. Paragraph 4 permits registering parties to choose the length of time of effectiveness from a range of options set out in the regulations. In the absence of a choice, the time of effectiveness is five years. Renewals, discharges and amendments, as well as any other matter necessary for the operation of the registry, are left to the regulations (para. 5). With a view to preserving registrations with minor errors, paragraph 6 invalidates a registration only if there is a defect, irregularity or omission in the identification of the assignor that would preclude searchers from finding the data registered. The underlying rationale is that if the error is made by the registering party, that party should suffer the consequences; and if the error is committed by the registrar, the registrar should be held liable (an issue that may be addressed in the regulations or general law). The words “would result” are intended to ensure that the registration would be ineffective, in the case of a significant error in the identification of the assignor, even if no one was actually misled.

Article 5. Registry searches

1. Any person may search the records of the registry according to identification of the assignor, as set forth in the regulations, and obtain a search result in writing.
2. A search result in writing that purports to be issued by the registry is admissible as evidence and is, in the absence of evidence to the contrary, proof of the registration of the data to which the search relates, including the date and hour of registration.

References

A/CN.9/445, paras. 118 and 119; A/CN.9/466, paras. 179 and 180; and A/CN.9/486, paras. 160 and 161.

Commentary

81. Article 5 is intended to enshrine the principle of public access to the registry for searching purposes as opposed to registration purposes. Only a publicly accessible registry could provide the transparency necessary with regard to the rights of third parties. Such public access to the registry does not infringe upon the level of confidentiality necessary in financing transactions, since only a limited amount of data would be available in the registry. Article 5 also provides for the admissibility and the general evidential value of a search record in a court or other tribunal. A search record is, in particular, evidence of the registration and its date and hour.³

³The commentary on articles 6 to 9 of the annex will be written once those articles are finalized pursuant to a proposal to be submitted by States (see A/CN.9/486, paras. 163, 165 and 168).

C. Draft Convention on Assignment of Receivables in International Trade: compilation of comments by Governments and international organizations

(A/CN.9/490 and Add.1-5) [Original: English]

A/CN.9/490

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INTRODUCTION

1. At its thirty-third session in 2000, the Commission adopted articles 1 through 17 of the draft Convention on Assignment in International Trade and referred articles 18 through 44 of the draft Convention, as well as the annex to the draft Convention, to the Working Group.¹ At that session, the Commission requested the secretariat to distribute for comments the draft Convention after the completion of the work of the Working Group.² The Working Group met at Vienna from 11 to 22 December 2000 and adopted articles 18 to 47 of the draft Convention and the annex.³

2. By note verbale of 7 February 2001, the Secretary-General forwarded to States and international organizations that are invited to attend the meetings of the Commission and its working groups as observers the consolidated text of the draft Convention which appears in an annex to the report of the last session of the Working Group, and requested them to submit their comments on the draft Convention. This note reproduces the first comments received by the Secretariat. Further comments will be issued as addenda to this note and in the order they are received.

I. COMPILATION OF COMMENTS

A. STATES

1. Czech Republic

[Original: English]

General comments

We refer to our previous comments published in A/CN.9/472. Czech Republic is still in the position that our national

law differs in some basic aspects from the draft Convention. Owing to the fact that international agreements must be in conformity with national legislation, if we were to adopt the draft Convention, it would be necessary for us to change our Civil or Commercial Code.

¹Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 17 (A/55/17), paras. 186-188.

²Ibid., para. 191.

³The report of the Working Group is in document A/CN.9/486.

The main divergences relate to articles 11 and 12 of the draft Convention. Under Czech law, it is not possible to assign a receivable contrary to an anti-assignment

agreement between the assignor and the debtor. In addition, we are concerned about articles 15 and 17, because under Czech law, the assignor is obliged to notify the debtor without undue delay. Another concern relates to article 21. Under our national law any waiver of future defences and rights of set-off is prohibited.

Specific comments

Article 4: We are in favour of excluding in paragraph 1 transfers of negotiable instruments made by book entry in a depositary's accounts without delivery or endorsement, as well as of transfers made by mere delivery without a necessary endorsement. As to paragraph 4, we prefer its retention so that States would have the right to exclude by declaration further types of assignment.

Article 17: We think that article 17 is sufficient and does not need to be revised to address consumer protection issues.

New provision on form in chapter V: We are not against a new private international law provision on form in chapter V. We propose that the form of assignment should be governed by the law of the State where the contract of assignment has been concluded.

Article 20: We support the proposal to include in article 20 wording along the lines of article 30 in order to

ensure that the rule in article 30 would not be subject to an opt-out by States.

Article 38: We consider that the current wording is sufficient to resolve potential conflicts of the draft Convention with other international agreements.

Article 44: For the sake of consistency with other provisions of the draft Convention that provide for reservations, we prefer "reservations" to "declarations".

Procedure for the final adoption of the draft Convention: We prefer that the draft Convention be submitted to the General Assembly for final adoption.

Conclusions: In conclusion, we have to state that, due to the above-mentioned divergences between our national law and the draft Convention, at this stage, the Czech Republic will not be able to adopt the Convention, since we would have to change our Civil or Commercial Code. However, an important modification of our Constitution is currently being discussed. This modification would change the dualistic system of relations between national and international law and would result in international agreements prevailing over national legislation. In view of this development and of our interest in facilitating international receivables financing practices, such as factoring and forfaiting, in our country, we consider that we will have the opportunity to adopt the Convention in the near future.

2. Peru

[Original: Spanish]

General comments

We note that the draft is a considerable improvement over the one we received and commented on last year.

Specific comments

Article 4: We agree that the assignment of receivables through the endorsement of a negotiable instrument (i.e. a bill of exchange, promissory note or cheque) should be excluded, since the act of assignment is legally distinct from the act of endorsement and has different consequences. Receivables capable of being assigned can be readily distinguished from receivables contained in negotiable instruments, since the latter are transferred by endorsement or by other means distinct from assignment.

Accordingly, transfers of negotiable instruments should be excluded, whether made by delivery and endorsement or by mere delivery (even in cases where endorsement may be necessary). We would think that transfers of dematerialized instruments transferred electronically by means of a book entry would not need to be excluded. However, we could accept their exclusion if consensus is formed in the Commission in favour of an exclusion.

With regard to paragraph 4, we believe that States should be allowed to exclude by declaration further types of assignment.

Article 11, para. 3 (a): We believe that the reference to goods should be retained.

Article 17: We agree with the current formulation of article 17. It does not need to be revised to address consumer-protection issues.

Article 20: In our opinion, it is unnecessary to include in article 20 a provision similar to the one in article 30. Article 30 is sufficient.

Article 24, para. 1 (b) and (c): We believe that paragraphs (b) and (c) of article 24 should be retained. We have no way of determining whether or not they are consistent with the work of the Hague Conference on Private International Law.

New provision on form in chapter V: In our opinion, it is not necessary to include in chapter V a new private international law provision on form. Generally applicable private international law rules are sufficient to address the matter. Under Peruvian law, for example, form is subject to

either the law of the place where the legal act or transaction is concluded or the documents are executed, or to the law governing the legal relationship arising from the legal act or transaction.

Article 38: We agree with the Working Group's comments contained in paragraph 105 of document A/CN.9/486.

Article 44: We agree with the provision in article 44 providing that no reservations are permitted except those ex-

pressly authorized. This rule gives consistency and coherence to the draft Convention.

Annex: The rules contained in articles 6 to 9 of the annex appear to be adequate.

Procedure for the final adoption of the draft Convention: For practical reasons, we would think that the draft Convention should be referred to the General Assembly for final adoption.

3. United States of America

[Original: English]

General comments

The United States looks forward to completing work on the draft Convention on Assignment of Receivables in International Trade at the upcoming Commission session. Completion of this work and prompt adoption by States of the text, together with appropriate consideration of optional priority rules in the annex, will make modern commercial financing more readily available in greater amounts and at more affordable rates in all regions and levels of development.

Specific comments

I. Articles bracketed by the Commission in June 2000 (articles 1-17)

Article 1, para. 4: We concur with the decision of the Working Group to remove the brackets from paragraph 4 (A/CN.9/486, para. 75).

Article 4, para. 4: We believe that this paragraph should be retained with the addition of language indicating when an assignor or debtor must be located in a Contracting State (see, for example, article 3). The paragraph provides the necessary flexibility to exclude future financing practices for which the Convention's rules may be inappropriate. To the extent that the Commission is able to identify existing practices that should be excluded, the Commission should expressly exclude those practices by reference in the appropriate preceding paragraphs of article 4. Failure to do so will encourage groups that engage in these practices to oppose adoption of the Convention.

Articles 11, para. 3 (a), and 12, para. 4 (a): We think that the word "goods" in these subparagraphs should be retained with the brackets removed. It is unnecessary to substitute a broader term that would cover both tangible and intangible property because the subparagraphs immediately following the cited subparagraphs refer to the types of intangible property important in financing practice.

II. Articles not yet considered by the Commission (articles 18-47, annex)

Articles 24 and 5 (g): After consultations, we reluctantly conclude that there will be insufficient time at the

upcoming Commission session to resolve the complex issues raised by subparagraphs (b) and (c) of paragraph 1. We therefore think that these bracketed subparagraphs should not be retained.

Article 24 addresses the "priority" of competing rights in a receivable; article 5(g) defines "priority". We think that article 24 would be clarified and simplified if the definition of "priority" were redrafted to clarify what issues are to be resolved when determining whether a person has a right in a receivable superior to the right of another claimant. These issues include whether the right is a property right, whether it is security for indebtedness or other obligations, and whether the right is prior to the right of another claimant. If the definition of "priority" is amended in this way, paragraph 2 of article 24 would no longer be necessary. With these thoughts in mind, the Commission might consider the following language in substitution of the definition now found in article 5 (g):

"(g) 'Priority' means the right of a person in preference to a competing claimant or other person. The term includes the determination of whether the right is a personal or property right and whether the right arises from an assignment as security for indebtedness or other obligations."

Article 26, para. 2: We believe that in the context of article 26 the reference to "competing claimant" is too broad. An assignee claiming the proceeds as proceeds of the assigned receivable should not necessarily have priority over an assignee that claims the proceeds as original collateral, a purchaser for value of the proceeds, or a person with a right of set-off against the proceeds. Whether the assignee has priority over these competitors should be left to other law. With these thoughts in mind, the Commission might consider the following language for a new paragraph 3:

"Nothing in paragraph 2 affects the priority as against the assignee, under law outside this Convention, of a right, not derived from the receivable, of (i) a person holding a consensual security right in the proceeds, (ii) a consensual transferee of the proceeds for value, or (iii) a person holding a right of set off against the proceeds."

The Convention should also clarify whether exclusions under article 4 of types of assignment or of categories of receivables are exclusions for all purposes, including priority in proceeds under article 26, or only for some purposes.

Article 26, para. 2 (b): In practice it is more and more difficult to distinguish between bank accounts and security accounts. We suggest, therefore, that the words “or securities account” be added after the words “deposit account” and that the following clause: “or investment securities purchased with such cash receipts” be added at the end of paragraph 2 (b).

Article 37: To ensure appropriate application of the Convention in some States we believe that this article must be retained with the brackets removed. The present text of the article will need to be modified so that a State comprised of two or more territorial units may apply its own choice-of-law rules to the extent that they operate only among the territorial units within that State. If the article is so modified, the definition of “law” in article 5 (i) should note that it is subject to article 37.

Article 38: The Commission will need to consider adding a paragraph to address the special concerns of the aircraft and the air transport industries for which the Convention’s rules may not be consistent with existing financing practices of these industries.

Article 41: We think that this article should be retained and the brackets removed. The paragraph provides the necessary flexibility to exclude future financing practices for which the Convention’s rules are inappropriate.

Article 42: We believe that a State should be authorized to modify or add to any of the model substantive provisions set out in sections I, III and IV in order to adapt their provisions to its national law or to financial practices. A paragraph should be added to article 42 to permit a State making a declaration under that article to indicate in its declaration any modifications or additions to sections I, III or IV it wishes to make.

III. Other issues

Article 4, para. 1 (b): The underlying policy of this subparagraph would be better expressed if the subparagraph stated that nothing in the Convention affected rights to the negotiable instruments or the rights and obligations of par-

ties arising under applicable laws governing negotiable instruments. If the present exclusion is retained, it should be made clear that negotiable instruments may nevertheless be proceeds covered by the Convention.

In any event, the Commission should clarify what instruments fall within “negotiable instruments”. We think that the term should be restricted to those instruments that have traditionally been subject to special legislation such as the 1988 United Nations Convention on International Bills of Exchange and International Promissory Notes: bills of exchange (drafts), promissory notes and cheques.

Article 4, para. 2: It should be made clear that although this paragraph excludes bank accounts and securities accounts these accounts may be proceeds covered by the Convention. We urge the Commission to exclude foreign exchange transactions not otherwise excluded by the netting or other agreed exclusions. The Convention’s rules are not necessary for that market and may disrupt existing practices.

Article 4, para. 2 (f): The exclusion in subparagraph (f) of paragraph 2 may not fully capture the policy decision taken to exclude dealings with financial assets, including negotiable instruments (however defined), held in an indirect holding system. Thus, this subparagraph might state expressly that any financial asset credited to a securities account should be treated the same way as an investment security credited to that account.

Article 5, subpara. (g): We recommend that the definition of subparagraph (g) of article 5 be redrafted to clarify what issues are to be resolved when determining whether a person has a superior right in a receivable to another claimant. Proposed language is set out in connection with the earlier comment on article 24.

Article 9, para. 4: We think that the policy embodied in this paragraph applies equally to questions of form covered by article 8. The paragraph should be amended to state this explicitly.

Article 10: The Commission should reexamine whether this article remains necessary.

B. INTERNATIONAL ORGANIZATIONS

1. European Bank for Reconstruction and Development

[Original: English]

General comments

The EBRD welcomes the recent developments on the draft Convention and hopes that consensus on the draft will be found at the thirty-fourth session of the Commission this summer. The importance of assignment of receivables for countries of Central and Eastern Europe and the Commonwealth of Independent States where the Bank operates cannot be overestimated. Foreign investors in particular need urgently greater certainty as to the rules applicable in this matter.

As a general background comment, we would like to note that the EBRD can only comment on the difficulties it foresees for some of the States that may want to sign and ratify the Convention. In our experience of legal reform in the region, there is a large gap between theory and practice existing in this region and what is viewed as appropriate in countries with developed economies. By imposing rules or concept that are too alien, one runs the risk of a complete rejection of the reform by a country. This does not mean that progress is impossible. Beyond a bare set of principles around which there must be a consensus (such as the

EBRD Core Principles of Secured Transactions), there must be room for compromise and for finding solutions more adapted to what a country can or wants to absorb, or finds appropriate at a given time.

Below are listed a number of comments on some of the draft Convention's articles. We understand that comments were sought only for the sections that were not adopted at the last session and on which the Working Group has been working in preparation for the next session. However, we feel that our comments may have wider impact than the actual article to which they actually refer.

Specific comments

Article 2: We are concerned that the article rejects the conceptual distinction between the transfer of receivable and the creation of rights in receivables as security for another obligation. To our knowledge, such conceptual distinction is made in most if not all of our countries of operations, with separate regimes applying to one and the other. It would be very difficult to harmonize the Convention with the existing system, especially as the Convention would apply only to international receivables or international assignments. We have also conceptual reservations on treating equally assignments by way of sale and assignment by way of security. As part of the EBRD Model Law and the subsequent assessment we made based on its principles (see www.ebrd.com/english/st.htm), we make very clear that a charge over movable assets (including tangible ones) is conceptually different from a fiduciary transfer of property or indeed a transfer of property with a retention of title clause. In this respect, we differ from the approach adopted under the US Uniform Commercial Code, article 9. There is evidence that countries of the region have felt more comfortable with keeping the two types of assignments separated.

Article 9, para. 4: The principle expressed in this paragraph is clear but it is unclear how that would work in practice, since the assignment should not only not be ineffective but should be effective and enforceable. For example, if a local law does not recognize as valid an assignment of receivables by way of security unless the receivable is clearly identified in the security agreement, and this law becomes applicable, the assignment of generally described receivables will presumably still be valid under the Convention. But we are not sure what would be the priority of the right of an assignee with respect to the right of a secured creditor who was given in security the enterprise,

including book orders, and may wish to enforce its security over the enterprise. Presumably, no rule would be available since under local law, the assignment would simply be invalid.

Article 11: It is felt that overriding contractual obligations on subsequent assignments between the parties is not satisfactory, especially when the prohibition was known by the subsequent assignee. Naturally, registration of the assignment would permit to solve the problem of notice and of knowledge on the part of third parties (see comments below).

Article 15: In view of the fact that one of the objectives of the Convention is to remove the formalities usually associated with the notification to the debtor, it would be preferable to be more specific as to the way notification is to be given to the debtor, especially "by all means", or simply in written form. In fact, in the age of electronic communication, it would certainly make sense to explore the ways such notification could be given safely as well as quickly and simply, at a low cost.

Article 20, para. 2: The remark made above applies to the rule contained in article 20, paragraph 2. In effect, as the right of set-off between the assignee's right and the debtor's rights against the assignor depends on the precise time where notification of the assignment is received, it is imperative that clear rules on the proof of the date are spelled out in the Convention. Otherwise, the risk would be that the local law applicable would not provide any satisfactory rule on this essential point.

Article 41: The article is very complex, perhaps unduly, and this is unfortunate as it can create uncertainties.

Annex: In general, we welcome these provisions as they give the message we are trying to convey to the countries of the region EBRD is responsible for, namely that extensive registration can simplify complex rules and provide certainty and simplicity for the priorities rules.

Article 4, para. 1 of the annex: We feel it is important to have at the time of registration evidence of both parties' consent to the assignment, either by their signature, or by other means. It would avoid the risk of fraud.

Article 5 of the annex: We do not find the period of five years necessary for the registry to operate properly and we would leave this aspect to the local regulations on registration.

2. European Central Bank

[Original: English]

General comments

The Legal Services of the European Central Bank (ECB) follow this initiative of the Commission closely and with great interest. In particular, we are hopeful that the provisions of the draft Convention will promote an effective and sound regulation of the assignment of receivables.

We have reviewed the report and the provisions of the draft Convention, as elaborated by the Working Group. We have noted in particular the exclusion from the scope of application of the draft Convention of assignments of receivables arising from financial contracts. Financial contracts are generally subject to master agreements governed by the laws of a particular jurisdiction. An assignment of

receivables arising from such contracts may interfere with, inter alia, the calculations and the pricing made by credit institutions. We, therefore express our appreciation for this exclusion as a result of which the central banking community will not be affected by the provisions of the draft Convention.

Specific comments

Articles 24 and 26: In our view, some guidance may be needed concerning the relationship between the draft Convention and the provisions of the proposal by the Hague Conference on Private International Law for a convention concerning the law applicable to dispositions of securities held through one or more intermediaries. This would seem particularly relevant to articles 24 to 26 of the draft Convention. It may, therefore, be advisable to consider and clarify the relationship between the two documents.

Furthermore, the conflict-of-laws provision of article 24, paragraph (1) (b) (ii), should promote the approach that

interests over securities are governed by the law of the location of the securities account of the relevant intermediary (PRIMA). The exact wording of this principle, however, may require further consideration and should take into account work, which is carried out in this respect in relation to the proposal of the Hague Conference and to the proposed directive of the Commission of the European Union on the use of collateral. In the end, this provision of the draft Convention should be fully consistent with, and in no case contradict, the text that will emerge from the Hague Conference.

Our understanding of article 24, paragraph 1 (c), leads us to the conclusion that this provision seems to go beyond the scope of the draft Convention. Article 24, paragraph 1 (b), appropriately addresses the characteristics and priority of the right of an assignee vis-à-vis a competing claimant. However, the existence and characteristics of the rights of a competing claimant may well be subject to a law other than the law of the assignor's location. This result would be normal and would not negatively affect the certainty provided for by the draft Convention.

3. Factors Chain International

[Original: English]

General comments

The purpose of Factors Chain International (FCI) with about one hundred and fifty members in fifty-one countries is to facilitate the provision of finance and services by its members for the movement of goods and services across international borders. It is therefore of particular interest to FCI that the finalized version of the Convention should achieve its objects of encouraging the availability of credit and its provision at reasonable cost for international commerce and trade.

In order to achieve that purpose it appears to us essential that as far as possible our members and others, who finance and give protection for movement of goods and services across international borders, should know with certainty to which law they should look for the purpose of ensuring that their operations are to be carried out with reasonable safety. We consider that, in order to promote such certainty, the following should be taken into consideration.

Specific comments

Article 24: For the provision of finance with reasonable confidence and at fair cost it is essential for the financier, who is relying on an assignment of receivables, to know exactly what his position will be in relation to other claimants in the insolvency of his assignor. Therefore, this article is one of the most important provisions (if not the most important provision) of the draft Convention. It seems to us

that article 24 should cover priority issues in relation not only to the receivables themselves but also to their proceeds.

If the financier is to look with confidence to a single law to determine whether his rights to the receivables will survive the insolvency of the assignee he must also be able similarly to know what his position will be as regards the proceeds. As it would be most rare for those proceeds to consist of anything other than money or instruments of payment (whether or not negotiable), it seems that for the purpose of achieving the purposes of the Convention reference only to bank deposits and such instruments is necessary. It does not seem to us necessary for the Convention to deal with other forms of proceeds.

Articles 20 and 30: To further the purposes of the Convention by making for certainty for the prospective financier, a choice of law rule as in article 30 is necessary. The financier must know before providing finance which law will govern the countervailing rights of the debtors. Only with this knowledge can he properly assess the risks. Article 30 would provide the financier with that certainty. However, article 30 is subject to an opt out which could cause the financier further uncertainty. Therefore, we consider that the same rule should be repeated in article 20.

It has been noted that concern has been expressed that such private international law provisions might make the Convention less acceptable to States. However, if such concerns are to take precedence over the objects of the Convention, then there might be a widely accepted convention that achieved none of its objects.

4. Secretariat of the Intergovernmental Organization for International Carriage by Rail

[Original: English]

The secretariat of the Intergovernmental Organization for International Carriage by Rail (OTIF) takes the opportunity to compliment the Commission and the Working Group on International Contract Practices on the excellent work accomplished with regard to the draft Convention on Assignment of Receivables in International Trade ("the UNCITRAL draft Convention").

At the first joint session of the Committee of Governmental Experts for the preparation of a draft Protocol on Matters specific to Railway Rolling Stock, held at Berne on 15 and 16 March 2001, the Governmental Experts discussed, inter alia, the relationship between the UNCITRAL draft Convention and the preliminary draft Protocol on Matters specific to Railway Rolling Stock ("the preliminary draft Rail Protocol"). The experts at the joint session felt unanimously that the assignment of receivables taken as

security in rail financing should better be dealt within the equipment specific instrument, that is, in the Unidroit draft Convention on International Interests in Mobile Equipment ("the Unidroit draft Convention"), as implemented by the preliminary draft Railway Protocol, rather than in the UNCITRAL draft Convention.

Under these circumstances, the OTIF secretariat strongly supports the Unidroit secretariat's comments on this subject and suggests that the Commission give favourable consideration to a solution along the lines proposed by the Unidroit secretariat, in other words that the UNCITRAL draft Convention shall not apply to an assignment of receivables arising from an agreement which creates or provides for an interest in Railway Rolling Stock as defined in the draft Railway Protocol to the Unidroit draft Convention.

5. Secretariat of the International Civil Aviation Organization

[Original: English]

The International Civil Aviation Organization (ICAO) in cooperation with Unidroit has prepared a draft Convention on International Interests in Mobile Equipment ("the draft Mobile Equipment Convention") and a draft Protocol thereto on Matters Specific to Aircraft Equipment ("the draft Aircraft Protocol"). Those texts have been approved by the competent bodies of both organizations and will be submitted for adoption to a diplomatic conference to be held under the joint auspices of ICAO and Unidroit in Cape Town, South Africa, from 29 October to 16 November 2001.

It has been strongly advocated by the parties so far involved in the intergovernmental consultations arranged by ICAO and Unidroit that the draft Convention on Assignment of Receivables in International Trade ("the draft Assignment Convention") should not apply to an assignment of receivables arising from an agreement which creates or provides for an international interest in, inter alia, aircraft objects as defined in the draft Aircraft Protocol.

It has been considered that this result can be achieved by way of:

(a) an outright exclusion of the assignment of such receivables from the scope of application of the draft

Assignment Convention; or (if the draft Assignment Convention fails to do so);

(b) the inclusion of a provision in the draft Mobile Equipment Convention stating that it shall supersede the draft Assignment Convention as it relates to the assignment of receivables that are rights associated with international interests in objects covered by the draft Mobile Equipment Convention.

In view of the fact that it is not certain which convention will be adopted first, a provision along the lines of the foregoing paragraph (b) has been included in the draft Mobile Equipment Convention (article 46) as a measure to prevent any conflicts between the two conventions from arising.

The parties involved in the intergovernmental consultations arranged by ICAO and Unidroit have considered that this matter should be addressed in a specific provision in either one of the draft conventions at issue, rather than be left to the provisions of article 30 (on the application of successive treaties relating to the same subject matter) of the Vienna Convention on the Law of Treaties concluded at Vienna on 23 May 1969.

6. Secretariat of the International Institute for the Unification of Private Law

[Original: English]

The secretariat of the International Institute for the Unification of Private Law (Unidroit) takes this opportunity to compliment the Commission and the Working Group on the excellent work accomplished at their last sessions. It notes, however, that neither of the principal proposals that

it submitted to the Commission at its thirty-third session (see A/CN.9/472/Add.1 and 4) have found their way into the text of the draft Convention. It will be recalled that on that occasion the Unidroit secretariat proposed, first, that due recognition be given in the preamble to the debt owed

by the draft Convention to the Unidroit Convention on International Factoring and, secondly, that the assignment of receivables that become associated rights in connection with the financing of those categories of aircraft equipment, railway rolling stock and space property encompassed by the draft Unidroit Convention on International Interests in Mobile Equipment (“the draft Unidroit Convention”) as implemented by the draft Protocol on Matters specific to Aircraft Equipment (“the draft Aircraft Protocol”), the preliminary draft Protocol on matters specific to Railway Rolling Stock (“the preliminary draft Rail Protocol”) and the preliminary draft Protocol on matters specific to Space Property (“the preliminary draft Space Property Protocol”) respectively should be excluded from the sphere of application of the draft Convention.

Relationship between the draft Convention and the Unidroit Convention on International Factoring

The Working Group has already indirectly acknowledged the debt the draft Convention owes to the Unidroit Convention on International Factoring (see A/CN.9/466, para. 193). The Unidroit secretariat would accordingly submit that an appropriate manner in which to recognize this fact would be through the introduction in the preamble to the draft Convention of a clause indicating that it has built on the achievements of the aforesaid Unidroit Convention. This would have the considerable merit of alerting States coming to the draft Convention for the first time of the relationship between the two instruments as well as clarifying the intention announced at the outset by the Working Group of safeguarding the application of the Unidroit Convention.

Relationship between the draft Convention and the draft Unidroit Convention and the draft Aircraft Protocol, the preliminary draft Rail Protocol and the preliminary draft Space Property Protocol

In their preparation of the draft Unidroit Convention and the various draft and preliminary draft Protocols thereto, the authors of these texts have at all times striven to avoid entering into conflict with the draft Convention. Evidence of this concern is to be seen in the delimitation of the draft Unidroit Convention by reference to interests in mobile equipment protected by registration against identified assets. It is to be noted that the decision was taken early on not to go for a debtor-based registration system and not to deal with perfection requirements and priority rules relevant to receivables financing detached from the underlying asset.

The different categories of mobile equipment contemplated by the draft Unidroit Convention are of a kind traditionally recognized as enjoying special status. Various aspects of the structure of the proposed new international regimen correspond to the specificity of the categories of equipment covered: first, each category of equipment covered by the draft Unidroit Convention will be the subject of a separate Protocol, to contain those rules necessary to adapt the general rules contained in the Convention to the special characteristics particular to the financing of each such category; secondly, for the registration of each cat-

egory of equipment and the establishment of priority ranking as between each such registration a separate International Registry will be created. The specificity of the assets covered by the proposed new international regimen is a key feature of the draft Unidroit Convention.

All three special working groups established under the authority of the President of Unidroit to monitor the application of the draft Unidroit Convention to aircraft equipment, railway rolling stock and space property and to act as a conduit for the expertise of each sector (each made up of representatives of manufacturers, users/operators and financiers as also the relevant international organizations), namely, the Aviation Working Group, the Rail Working Group and the Space Working Group respectively, have reiterated a clear desire to see the assignment of receivables taken as security in aircraft, rail and space financing dealt with in equipment-specific instruments, that is, the draft Unidroit Convention as implemented by the draft Aircraft Protocol, the preliminary draft Rail Protocol and the preliminary draft Space Property Protocol, rather than in the draft Convention. They have emphasized the strong interest of their constituencies in seeing distinct regimes that would reflect aviation, rail and space financing practices and structures.

The value of assets like aircraft equipment, railway rolling stock and space property lies in the income that may be realized from their sale or lease. It would undermine the concept underlying the draft Unidroit Convention if the debtor could assign receivables derived from such an asset under a system different from that applicable to the pledging or other encumbering of the asset. The indivisibility of the asset and the income that may be realized from its sale or lease is enshrined in articles 7 (1) and 9 of the draft Unidroit Convention, relating to rights on default, and article 12, relating to interim relief.

In the case of aircraft, rail and space financing structures there is an inextricable link between the aircraft equipment, railway rolling stock and space property, on the one hand, and the associated receivables, on the other. In the case of space financing structures, for instance, much of the value placed on a satellite is derived from the various rights associated with the operation of that satellite, in particular the associated receivables. Such rights are an essential element of the commercial value of a satellite and without such rights the satellite will have very little commercial value. It is therefore appropriate for security rights relating to both the asset and the associated receivables to be subject to a common regimen, in the interest of avoiding not only conflict of laws problems but also the resultant lack of commercial predictability and increases in transaction costs.

Against the alternative solution referred to in the report on the last session of the Working Group (see A/CN.9/486, para. 105 in fine), which would consist in allowing the draft Unidroit Convention and the various draft and preliminary draft Protocols thereto to supersede the draft Convention, a number of disadvantages are to be noted.

Many national legal systems currently contain assignment rules that are more in line with aircraft, rail and space financing practices than those proposed in the draft Con-

vention. It is submitted that there is no need to disrupt such national legal systems that work well for aircraft, rail and space financing unless the resulting changes are specifically designed with their specific financing requirements in mind. As the draft Unidroit Convention may be adopted after the draft Convention, unsatisfactory rules may be applicable to transactions entered into in the interim. That being the case, the finalization and ratification processes relating to the draft Convention may be complicated and even delayed by virtue of aviation-, rail- and space-related objections and the need for further national and international consultations.

The alternative approach raises rather than resolves potential problems associated with sphere and temporal applications of the two instruments. Commercial predictability will decrease, resulting in increased transaction costs. Such an approach would not address the potential conflict between the draft Convention and the Geneva Convention on the International Recognition of Rights in Aircraft. In this connection, it is worth noting that the draft Unidroit Convention/Aircraft Protocol contain detailed provisions dealing with the coordination between the last two texts and the Geneva Convention.

The draft Unidroit Convention and the draft Aircraft Protocol are due to be adopted at a diplomatic Conference to be held at Cape Town from 29 October to 16 November 2001 and the omens for their early entry into force could not be better. The preliminary draft Rail Protocol, having already been the subject of a first session of governmental experts, held at Berne on 15 and 16 March 2001, is already

well on the way to completion. In the meantime, the preliminary draft Space Property Protocol is down for discussion at the fortieth session of the Legal Subcommittee of the United Nations Committee on the Peaceful Uses of Outer Space, to be held at Vienna from 2 to 12 April 2001, with a view to ascertaining inter alia the interest of the United Nations in exercising the functions of Supervisory Authority in respect of the future International Registry for space property, and the Unidroit secretariat would anticipate being in a position to transmit it to Governments later in the year.

In these circumstances, the Unidroit secretariat, being of the view that particular urgency attaches to the finding of a satisfactory solution to the problem of the relationship between the draft Convention and the draft Unidroit Convention and the different draft/preliminary draft Protocols thereto, has the honour to propose that the Commission give favourable consideration to a solution along the lines of the one that it tabled during its last session, a decision regarding which the Commission however decided on that occasion to defer, in particular so as to "allow Governments to undertake the necessary consultations with the relevant industries" (see A/55/17, para. 96 in fine), namely the inclusion in the draft Convention of language along the following lines:

"This Convention shall not apply to an assignment of receivables arising from an agreement which creates or provides for an interest in aircraft objects, railway rolling stock or space property as defined in the relevant Protocol to the Unidroit Convention on International Interests in Mobile Equipment."

A/CN.9/490/Add.1

Compilation of comments by Governments

ADDENDUM

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INTRODUCTION

The first set of comments on the draft Convention on Assignment was issued in document A/CN.9/490.

This note reproduces the second set of comments received by the secretariat. Further comments will be issued as addenda to this note and in the order they are received.

I. COMPILATION OF COMMENTS

1. Colombia

[Original: Spanish]

Article 19, para 7: The words “reasonable period of time” may be understood by each party in a different way and as referring to varying time periods, which could lead to unnecessary controversies. We, therefore, suggest that, in the interest of clarity, a precise period of time should be stated.

Article 24: The new proposal on the law applicable to priority conflicts with respect to proceeds clears up some uncertainties. However, its formulation may imply that there are situations that are not covered. We, therefore, suggest that consideration be given to including a rule of general application. In this context, bearing in mind that negotiable securities are transferred by endorsement and not by way of an assignment, we must stress the importance of their exclusion from the scope of the Convention.

Regulatory powers of central banks: To the extent general economic circumstances make it necessary, central banks should be authorized to intervene in assignments under the Convention without this entailing a violation of the Convention. Central banks and States in general have the authority to control the inflow and outflow of capital. The importance of such powers for general economic policy in any State cannot be overstated

Under article 24, the law of the assignor’s location governs priority questions. It seems that it also covers capital controls. This may create a conflict with capital controls of the country from which the receivables originate. A central bank may refrain from selling foreign exchange in a particular economic situation and, in this case, it is important not only that the bank can retain this power but also that debtors are safeguarded against any effect that this measure may have on the terms in which the debt is established.

2. France

[Original: French]

Pending issues

Article 4, para. 1 (b): France has always supported the exclusion of transfers of receivables effected by the delivery (instruments payable to bearer) or endorsement (instruments payable to order) of negotiable instruments. Such receivables are subject to a very specific legal regime characterized, in particular, by the application of the principle that defences outside the instrument cannot be invoked against the new bearer. Moreover, the Geneva Conventions of 1930 (on bills of exchange and promissory notes) and 1931 (on cheques) give a legal status to these instruments, which would be difficult to combine with the Convention being prepared by the Commission. What justifies the exclusion is not the nature of the instrument representing the receivable (bill of exchange, promissory note, cheque, etc.), but the technique of transfer, namely endorsement or delivery.

However, some negotiable securities, such as negotiable certificates of indebtedness or bonds (in French, titres de créances négociables or “TCNs”) do not belong to the category of negotiable instruments. It would, therefore, be desirable to replace the reference to “effets de commerce” in the French version of article 4, paragraph 1 (b), with a reference to “instruments négociables”.

An increasing number of negotiable instruments are paperless and are transferred by way of an entry into an account. These forms of transfer are often recognized as having an abstract character similar to endorsement, and their exclusion from the scope of application of the Convention would seem to be justified in the interest of uniformity with the rules governing negotiable instruments. If there is agreement on such exclusions, they should be expressly provided for in the text of the Convention. It goes without saying that, if a receivable is transferred not by a negotiation technique (endorsement or delivery, as applicable) but in the form of an assignment, there is no reason to exclude the application of the Convention.

Article 4, para. 4, and article 41: Permitting States to exclude further practices by way of declaration would seriously jeopardize the unifying function of the Convention. However, if the question of the protection of consumer debtors cannot be satisfactorily regulated in article 17, it would seem essential to maintain the right of States to exclude by declaration the assignment of certain types of receivables (see comment on article 17 below). Furthermore, taking into account the remaining uncertainty as to on the application of certain provisions of the Convention to certain practices, it would seem desirable to retain the

right of declaration provided for in article 41, so as to enhance the acceptability of the Convention.

Reference to "goods" in article 11, para. 3 (a), and article 12, para. 4 (a): The choice of the French expression "biens meubles corporels" to translate the English term "goods" (see A/55/17, para. 185), so as to cover only tangible, and not intangible, movable property, inevitably means adopting an unduly restrictive approach as to the scope of articles 11 and 12. Such a solution would entail excluding assignments of receivables that result from operations relating to intangible property such as the goodwill, the trade name or other name of an enterprise, or the right to a lease and the like). It is hard to see what would justify special rules for receivables resulting from operations with intangible property, particularly as the treatment of receivables connected with financial transactions is already the subject of broad exclusions. Furthermore, this approach would run counter to the policy underlying articles 11 and 12, since assignees would need to examine documents to ensure that receivables are assignable. In order to avoid that result, the word "goods" should be understood as covering both tangible and intangible movable property.

Consumer protection issues: As indicated above and in the comments last year (A/CN.9/472), France would insist that article 17 should include a provision ensuring that consumers are not deprived of the protection afforded to them by the law of the State in which they are located. This comment is also valid for article 6, entitled "Party autonomy". A consumer-related problem may arise also in article 19, paragraphs 5 to 7. When the debtor is a consumer, the debtor should always be allowed to be discharged by paying the initial creditor.

Article 17, in particular, seems incompatible with domestic provisions of public policy which protect the consumer in the area of consumer credit and from which the assignee may not derogate even with the consent of the consumer. It is essential that article 17 makes it clear that the Convention does not allow a consumer debtor to vary or derogate from a contract if such variation or derogation is not permitted by the law applicable to consumer protection (see document A/55/17, paras. 171 and 172). If this proposal is not adopted, some States, including France, may have to simply exclude assignments of consumer receivables from the scope of the Convention, which would deprive it of much of its usefulness.

Article 24, para. 1 (b) and (c): The question of the right of an assignee in proceeds is one of the issues that gave rise to the longest and most complicated discussions in the Working Group. Briefly, the question is whether the assignee has a right in financial instruments or other assets given in payment of the assigned receivable and, if so, whether that right is a personal or a property right. In view of the wide differences among the various legal systems, the Working Group did not find it possible to agree on a substantive law rule with respect to proceeds. The notion of "proceeds" is foreign to many legal systems and introduces changes that may discourage States from adopting the Convention. In addition, it seems impossible to define it in a way that would remove any uncertainty as to the conse-

quences of the application of article 24, paragraph 1 (b) and (c). It would, therefore, be desirable to exclude the idea of "proceeds" from the Convention and to delete article 24, paragraph 1 (b) and (c).

New provision on form in chapter V: On the question of the law applicable to the formal validity of an assignment, article 8 differs from the Rome Convention on the Law Applicable to Contractual Obligations (see article 9) particularly in creating a rebuttable presumption in favour of the law of the location of the assignor as the law most closely connected with the contract of assignment, without requiring an explicit choice of applicable law. In view of the differences between the criteria adopted in the Rome Convention and in the UNCITRAL draft, any provision on this subject must be dealt with directly in chapter V, whose optional character would permit future signatory States to avoid a conflict of private international law rules that could impair the aim of foreseeability desired by the parties and by third parties.

The possible inclusion in article 20 of a provision along the lines of article 30: France has no objection to allowing States that so wish to adopt chapter V only in part. However, the proposal to include in article 20 a rule along the lines of article 30 causes France serious concerns. This proposal, which would mean introducing a provision of an optional nature into the body of the Convention, is not acceptable, because the suggested text would overlap (and might even conflict) with the provisions of the Rome Convention on the Law Applicable to Contractual Obligations.

Potential conflicts with other conventions: France notes with concern that the relationship between the Convention and the Convention and Protocols being prepared by Unidroit jointly with other organizations has not yet been settled. In view of the fundamental differences between the two texts, it is urgent to address their relationship so as to avoid conflicts. France favours a limited or partial exclusion of the application of the Convention where the Unidroit Convention actually applies. For the reasons explained before the Commission or the Working Group, France considers that it would not be desirable to exclude receivables relating to mobile equipment, in general, from the scope of the UNCITRAL text. However, paragraph 1 of article 38 concerning conflicts with other international agreements is not well adapted to the Unidroit Convention, because it declares that Convention to be applicable even when it is not. A more precise provision taking into account the foregoing should therefore be added to article 38.

The annex: Priority rules based on the time of the contract (section III of the annex) are viewed with favour in France. It would be useful to supplement articles 6 and 7 of the annex in order to regulate the question of proving the date of an assignment. Three complementary solutions could be considered. The date of the assignment may be proved by any method; if the date is disputed, it is the responsibility of the party claiming priority to prove it; if the assignor is subjected to an insolvency proceeding, the assignee must show that the proceeding was opened subsequently to the assignment under which the assignee claims a right. As to the mechanism for the establishment of the

registry and the appointment of the supervising authority and registrar, France is not ready to adopt the registration system and, therefore, sees no need to take a position on the technical modalities for such a registration system.

Procedure for the final adoption of the Convention: For practical reasons, preference should be given to adoption by the General Assembly.

Additional issues

Definition of location: Referring to its comments on the definition of “location” last year (A/CN.9/472), France stresses that those comments remain valid. Article 24, paragraph 1 (b) (iii), which opts for the law of the location of the bank in the case of bank deposits, continues to cause uncertainty. In the case of sectors organized by branch offices, it would not be appropriate to have the questions of priority relating to operations that an enterprise carries out through a branch in one country governed by the law of another country where the enterprise has its head office or central administration. This applies in particular to the banking sector in which the conditions under which bank branches are authorized to operate and the particular constraints that they face concerning both their mode of refinancing and their prudential rules, require their being placed under a regime linked to the law of their location. France considers, therefore, that it would be desirable to state that article 24 refers not to the law of the location of the head office (or central administration) but to the law of the location of the branch concerned.

Non-contractual receivables: Article 2 (a) leaves outside the scope of application of the Convention receivables of a non-contractual nature, such as rights to payment under requests for reimbursement of taxes, the assignment of which forms part of important financing practices at the present time. France has always considered, and pointed out in its comments last year, that a broader definition of the concept of “receivables” would make it possible to reduce differences in the interpretation of the expression “contractual rights” in different legal systems. For these reasons, it would be desirable to include this type of receivable in the scope of application of the Convention through the introduction of an optional system for States, in the form of a declaration. Such an approach would avoid the need to reconsider, at this stage in the negotiations, a number of provisions already drawn up to govern assignments of contractual receivables exclusively.

Article 1, para. 4: Article 1, paragraph 4 does not make clear which State has to make a declaration for the annex to apply. As a result, several parallel systems may coexist under the Convention for establishing priorities among competing assignees. For example, if a conflict arises before the courts of State A between an assignment with priority according to the law of State A (which has opted for the priority rules based on the time of registration, sections I and II of the annex) and another assignment with priority according to the law of State B (in which the assignor is located and which has opted for the priority rules based on the time of the contract of assignment, section III of the

annex), it is not clear which law would apply, that of State A (section I) or that of State B (section II).

It seems obvious that it should be the law of the location of the assignor that determines what system of priority is applicable in a Contracting State in conformity with article 1 (a), which governs the scope of the Convention’s application. However, the text of the Convention is not sufficiently clear about this. Article 42, concerning the application of the annex, confines itself to indicating that “a State may ... declare that it will be bound either by sections I and II or by section III of the annex to this Convention”. Paragraph 2 of article 42 stipulates that, for the purposes of article 24, the law of a contracting State that has made a declaration pursuant to the provisions mentioned earlier is the set of rules set forth in either section I of the annex or section III. Under article 1, paragraph 4, the annex applies in a Contracting State that has made a declaration under article 42. It is, therefore, proposed that article 1, paragraph 4, should be amended as follows: “The annex to this Convention applies to the assignments referred to in a declaration made under article 42 by the Contracting State in which the assignor is located.”

Relationship between the draft Convention and Regulation (EC) No. 1346/2000 of the Council of the European Union of 29 May 2000 on Insolvency Proceedings

At its last session, the Working Group noted that there is no conflict between the Convention and the Regulation of the European Union on Insolvency Proceedings (see A/CN.9/486, para. 107). However, this does not seem to be sufficient to establish compatibility between the draft Convention and the European Union Regulation. Article 24 of the Convention refers conflicts between an assignee and an insolvency administrator to the law of the location of the assignor. Articles 5 and 2 (g) of the European Union Regulation refer the matter to the law of the centre of the main interests of the debtor affected by the assignment. There is thus an incompatibility, or at least an apparent one, between the two instruments. It would be desirable for this point to be clarified.

It might also be desirable to make clear to what extent the Convention could affect the situation of holders of rights in a secondary insolvency proceeding rather than in a main insolvency proceeding, since the European Union Regulation, in principle, provides for the same effects for the two types of proceeding. It would also probably be clearer to state that the insolvency proceedings referred to in article 25 of the Convention are proceedings opened against the assignor, unless it is felt that article 5 of the Convention is sufficient.

Article 38, para. 2: Article 38, paragraph 2, still refers to the “time of the conclusion of the original contract”. This formulation may be unfortunate in that a contract for the assignment of receivables may be signed on one date while the actual assignment of receivables may take place later. This is often what happens in practice.

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INTRODUCTION

This note reproduces comments on the draft Convention on Assignment of Receivables in International Trade re-

ceived subsequently to the comments reproduced in documents A/CN.9/490 and A/CN.9/490/Add.1. Further comments will be issued, if possible, as addenda to this note and in the order they are received.

I. COMPILATION OF COMMENTS

1. Association of the Bar of the City of New York

[Original: English]

General comments

The Committee on Foreign and Comparative Law (Committee) of the Association of the Bar of the City of New York (Association) submits these comments in connection with the ongoing work of UNCITRAL regarding assignment of receivables. The Committee has followed closely UNCITRAL's work on this project, and a member of the Committee, has acted as an observer to the Working Group in International Contract Practices for the past several years as the Working Group has continued its efforts to refine the draft Convention on this subject.

The Committee commends the efforts of the Working Group and the Commission on this important project, and looks forward to a continued cooperation with the Commission as the draft Convention moves toward completion and adoption. The Committee is confident the Commission will achieve a Convention acceptable to all delegations that will be successfully adopted by many jurisdictions and will comprise a significant positive contribution to international commerce.

Specific comments

Title: The Committee believes that, within the parameters of its final negotiated scope, the Convention should be given the broadest possible interpretation and application. In this regard the Committee believes that the preferred title of the Convention would be the "Convention on Assignment of Receivables".

Article 4, para. 1: The Committee believes that the exclusion of the transfer of negotiable instruments in article 4, paragraph 1, of the Convention should also refer to transfers of negotiable instruments made by book entry in a depository's accounts (without delivery or endorsement) and should include transfers by mail delivery without a necessary endorsement. Appropriate language explicitly including such transfers within the scope of the exclusion

should be added to article 4, paragraph 1. The commercial law, both statutory and decisional, of many States governing negotiable instruments, including the assignment thereof, is well-developed. These legal regimes have evolved with commercial practice and contain attributes particularly suited to the unique characteristics of negotiable instruments. The Committee believes that including negotiable instruments within the scope of the Convention would be unnecessarily duplicative of these established legal regimes and perhaps also of other international conventions and projects. Further, the unique attributes of negotiable instruments require specialized rules and approaches that would unnecessarily be disrupted if the Convention were to apply.

Article 4, para. 2: The Committee similarly strongly believes that foreign exchange contracts and arrangements, to the extent not already excluded from the scope of the Convention, should be excluded. The Convention would not benefit this market and, given the wide variety of arrangements existing in this market, application of the Convention to this market would have the potential to cause great uncertainty to existing international banking and commercial transactions involving foreign exchange.

The Committee briefly considered whether claims by or against a decedent's estate or otherwise exercisable by means of a will or other testamentary document, which claims would otherwise qualify as "receivables" under the Convention, should fall within its scope. The question is, for example, whether, if a United States resident decides to transfer a claim against her father's estate to her nephew in France, the assignment should be subject to the Convention. Generally speaking, the laws governing estates are expected by participants to be those applicable to probate or intestate administration and under which wills are drafted or estate planning is developed. It would also seem that such receivables would not comprise a significant element of cross-border commerce. Although the Committee has not explored this issue in depth, our initial reaction is that such claims should be excluded from the Convention's scope.

Article 5 (h): In the case of branch offices of banks and other financial institutions that are not separately incorporated or organized from their “parent” institution but are located in a State other than the State of incorporation/organization of the “parent” the issue of branch location is important under the Convention. The Committee believes that branches should be considered located in the State in which they are physically present, notwithstanding the presence of the “parent’s” organization in another State. Branches of banks and other financial institutions located outside of their “home” jurisdictions generally are subject to regulation by the competent authorities of the State in which they are located. Although clarity from a choice-of-law perspective could be accomplished by deeming a branch to be located either in the State of its physical presence or the State of incorporation/organization of its “parent” the Committee believes the better approach would be to deem for purposes of the Convention a branch to be located in the State of its physical presence, both so that the Convention’s approach to a branch is consistent with the approach of the relevant regulatory authorities (i.e. authorities of the State of such physical presence) and also so that the Convention treats in the same way all banks and other financial institutions located in a particular State, regardless of whether such entities are branches or locally organized subsidiaries.

Consumer protection issues: The Committee believes that the Convention does not need to be explicit in stating that it does not empower a consumer debtor to vary or derogate from a contract with an assignor if such variation or derogation would not be permitted by applicable consumer protection laws. The provisions in the Convention do not lend themselves to such an interpretation and lenders would not accept the risks inherent in such a liberal reading of the text. Nevertheless, if the Commission believes that such a misinterpretation is possible, the Committee believes it is appropriate to address this issue in the commentary, rather than in the text, of the Convention. The Committee believes the foregoing approach is preferable to amendments to the text of the Convention. However, if the Commission believes that changes to the text are necessary, the Committee believes it would be appropriate to address this issue as proposed by the secretariat by adding text to article 4 and revising articles 21 and 23 (see A/CN.9/491, para. 40).

Article 24, para. 1 (b) and (c): Although we are cognizant of the issues raised by certain civil law jurisdictions regarding the separate treatment of receivables and the proceeds thereof under applicable law, the Committee believes it quite important that all proceeds of receivables should be included within the scope of the Convention. Stating it differently, if a receivable is covered by the Convention, any proceeds of such receivable also should be covered by and subject to the Convention. Further, the Committee believes that proceeds of covered receivables should fall within the scope of the Convention even if, by their nature, such proceeds would have been excluded from the Convention if they were simply receivables in their own right (and not proceeds of covered receivables). For example, if a group of trade receivables from a single obligor transferred to a financier were thereafter replaced by a promissory note from the obligor to such financier, such negotiable instrument would nevertheless be within the scope of the Convention.

To the extent the foregoing would raise issues not addressed by the Convention (for example, priority issues relating to negotiable instruments comprising proceeds), such issues could be left to be resolved under law and other treaties specifically applicable thereto. In accordance with the foregoing, the Committee believes that article 24 (b) and (c) are unnecessary and may be deleted from the Convention. As noted above, particular issues left unresolved by this approach (for example, the dispositions of securities held through indirect holding systems) can be left to be resolved by laws outside of the Convention. In this respect the Convention will not be entirely silent, if the Convention (through article 24, para. 1 (a)) would look to the law of the State where the assignor is located (which law itself could point to other laws or treaties for resolution of issues).

Articles 24 and 31: Concerns have been raised in the Committee that, although it would not be the best interpretation, articles 24 and 31, in directing that the law of the State in which the assignor is located shall govern certain aspects of the rights of a competing claimant, could be construed to overcome or undo a choice of law made by the assignor and the assignee otherwise applicable pursuant to article 29, paragraph 11 (or perhaps also overcome or undo the law applicable in the absence of such a choice of law pursuant to article 29, para. 2). The law applicable to the relationship between third party claimants and assignors, as determined pursuant to articles 24 and 31, should not have an impact on the law applicable to the relationship between assignors and assignees, as determined pursuant to article 29. Although we do not believe that the text of the Convention needs to be changed, the Committee believes it would be appropriate to add a clarifying statement in the commentary that articles 24 and 31 are not meant to and should not be construed so as to overcome the law applicable as between the assignor and assignee under article 29. We note that this concern may be affected by other potential modifications to article 24, but believe the concern will remain and that the suggested commentary will remain a useful addition.

New provision on form in chapter V: Regarding the question of whether to include in chapter V of the Convention a provision to address the law applicable to the formal validity of the assignment and to the contract of assignment itself, the Committee believes that the inclusion of provisions clarifying the law applicable to such matters would be appropriate. The Committee concurs with the suggestion of the secretariat (see A/CN.9/491, para. 21) to include language similar to that found in the Convention on Contracts for the International Sale of Goods.

Article 38: The Committee believes that it is inappropriate for it to comment on the prevalence of one international agreement over another, as that seems to be the province of States and not NGOs. We note, however, that as a practical matter, we would prefer to have this Convention prevail over the draft Convention on International Interests in Mobile Equipment and the relevant equipment-specific protocols being prepared by Unidroit, as this Convention appears to be less restrictive for both borrower and lender.

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INTRODUCTION

This note reproduces comments on the draft Convention on Assignment of Receivables in International Trade re-

ceived subsequently to the comments reproduced in documents A/CN.9/490, A/CN.9/490/Add.1 and A/CN.9/490/Add.2. Further comments will be issued, if possible, as addenda to this note and in the order they are received.

I. COMPILATION OF COMMENTS

1. Germany

[Original: English]

General comments

The Federal Republic of Germany welcomes the continuation of discussions on the draft Convention on Assignment of Receivables in International Trade. The Federal Republic would like to express its gratitude to all participants, and especially to the UNCITRAL secretariat, for the preliminary work carried out and for the positive spirit in which the discussions were conducted.

Specific comments

Relationship with other texts: At present, there are numerous projects in the international and European arenas designed to unify substantive and private international law in respect of the law on assignment of receivables and of secured credit law in general. By way of example, reference may be made here not only to the Unidroit Convention on International Interests in Mobile Equipment but also to the work of the Hague Conference concerning the draft Convention on the law applicable to dispositions of securities held through indirect holding systems. In addition to those texts, there is the European Council Directive on settlement finality in payment and securities settlement systems and also the prospective directive on the use of securities as collateral for credit.

The Federal Republic of Germany is concerned about the fact that the interrelationship of these various projects has not yet been clarified. The current projects differ in their approaches because in some cases they differentiate according to collateral and in others according to transferor or transferee. Here there is no failure to appreciate the fact that the UNCITRAL Convention has a more extensive scope of application. Furthermore, the Federal Republic of Germany sees an urgent need for consultation to avoid contradictions between the provisions concerned.

Articles 1 to 17: Articles 1 to 17 of the Convention have already been discussed by the Commission and have been accepted in principle. Discussions should not be resumed here unless there is a compelling reason for doing so.

There are, however, misgivings as to whether the definition in respect of the "location" of person to whom the Convention is intended to apply takes adequate account of the needs arising. According to article 5 (*h*) a person is located in the State in which it has its "place of business". If the assignor or the assignee have places of business in more than one State, the place of business is where the assignor or the assignee has its central administration. This provision overlooks the fact that, for instance, providers of financial services (banks) make assignments in many locations in various countries where there is no connection at all with the central administration and therefore with the law of the place of central administration. This problem is becoming increasingly relevant in the European Union where not only banks or insurers but also other large enterprises with a chief executive office in one member State conducting business through legally dependent structures in other member States of the European Union. The Federal Republic of Germany therefore considers it necessary for the present provision made in article 5 (*h*), third sentence, to be applied not only to the debtor but also in general terms to assignors and assignees.

Article 19: The delegation of the Federal Republic of Germany has repeatedly expressed its concern that article 19 might considerably decrease the level of debtor protection existing under national law. The Working Group did not share this concern. The Commission should therefore have a renewed discussion of the problems emanating from article 19, paragraphs 5 to 7.

Consumer protection: In the foregoing context, but not only confined to article 19, there should be also a discussion of the question whether and to what extent the rules of

domestic or of Community law relating to consumer protection take precedence over the provisions of the Convention.

Article 24: The Federal Republic of Germany is not convinced that the provisions concerning priorities in respect of proceeds are adequate. Article 24 paragraph 1 (b) is difficult to understand and will hardly help in practice. The problems become apparent if article 24 of the Convention is compared with article 4 of the Hague Conference draft Convention on the law applicable to dispositions of securities held through indirect holding systems. Here there is the risk of contradictory provisions and interpretations.

Against this backdrop, consideration must be given to whether a provision on rights to proceeds should be

included in the Convention. The Federal Republic of Germany sees no need for article 24 paragraph 1 (b).

Article 39: Contrary to the express proposals made by the German delegation, article 39 has been formulated as an opt-out rule and not as an opt-in rule for the application of chapter V. This may not represent a great difference. Nevertheless, this is significant for the Convention's acceptability to States that may not need chapter V.

Independently of this matter, it is suggested that in article 39 provision also be made for Contracting States to adopt only parts of chapter V. This change would seem to be important particularly in regard to the content of article 30, but also in regard to the content of articles 32 and 33.

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INTRODUCTION

This note reproduces comments on the draft Convention on Assignment of Receivables in International Trade received

subsequently to the comments reproduced in documents A/CN.9/490, A/CN.9/490/Add.1, A/CN.9/490/Add.2 and A/CN.9/490/Add.3. Further comments will be issued, if possible, as addenda to this note and in the order they are received.

I. COMPILATION OF COMMENTS

1. European Federation of Factoring Associations

[Original: English]

The European Federation of Factoring Associations (EUROPAFACTORING) compliments UNCITRAL for the work done and the results accomplished, expecting that the fruitful debate carried on so far will now reach a final positive result. In its comments on the latest draft, Factors Chain International (FCI) already pointed out the importance of certainty for the financier as to which law is applicable (see A/CN.9/490), and we certainly join FCI in stressing this point important not only to factors but to all financiers worldwide. We also express our appreciation to the secretariat for the thoughtful commentary on the draft Convention. Its well-founded explanations made it easier for all to understand the complexity of the problems dealt with in the draft Convention.

Specific comments

Article 8: Article 8, which is intended to give certainty to the assignee as to which rules are to be followed with re-

spect to form, is a "safe haven" rule (if form requirements of the place of location of the assignor are fulfilled, the assignment is as to "form"). However, form in article 8 may be too broad. Whether or not an assignment has to be notified to the debtor may be a matter of form covered in article 8, although it is already dealt with in the Convention (article 9), and no such notification is required under the Convention. Furthermore, if under the law of the assignor's location priority is determined on the basis of notification, the question arises whether such notification has to follow the rules of the Convention or of other law. The current version of article 8 leaves room for discussion on this issue. We would therefore suggest that the matter be clarified in either article 8 or in article 24.

Article 38, para. 2: We reiterate our support for the policy of article 38, paragraph 2. The draft Convention should take precedence over the Ottawa Convention, whenever both conventions are applicable, but should not preclude the application of the Ottawa Convention if the draft

Convention does not apply with regard to a particular debtor. The second sentence of article 38, paragraph 2 may not be sufficient to achieve the latter result. We therefore suggest that it be reformulated along the following lines:

“To the extent that this Convention does not apply to the rights and obligations of a debtor, it does not preclude the application of the Ottawa Convention with respect to that debtor”.

2. Financial Markets Lawyers Group

[Original: English]

The Financial Markets Lawyers Group welcomes this opportunity to provide further comments on the draft Convention. We applaud the continued efforts of the Commission to facilitate greater cross-border trade financing and, as we noted in comments last year (see A/CN.9/472/Add.1), we believe that adoption of the draft Convention will lead to greater harmonization of the rules currently governing cross-border transactions.

We appreciate the Commission's responsiveness to our previous concerns and we feel that the draft Convention addresses many of the issues that we raised about the impact of the draft Convention on the international over-the-counter (OTC) financial markets. We would, however, like to raise a few additional points that we believe would improve the draft Convention and contribute to the legal certainty and clarity under which these markets operate.

Article 5 (k) and (l): While we believe that the draft Convention's definitions of “financial contract” and “netting agreement” cover almost all of the agreements that should be excluded from the draft Convention, the following clarifications of the scope of these definitions would contribute to legal certainty for the transactional arrangements of participants in the OTC financial markets.

With respect to “financial contract,” as we noted in our comments last year supporting the comments of the European Banking Federation (EBF), we believe that the definition should include reference to the collateral and credit support arrangements used by counter-parties to manage their counter-party credit risk in connection with the other enumerated “financial contracts”. Typically, these collateral and credit support arrangements are documented under the same industry standard master agreements governing the trading of “financial contracts” and related netting provisions and operate pursuant to the set-off and netting provisions of these master agreements. Exclusion of such collateral and credit support arrangements from the draft Convention, would lead to further certainty and predictability with respect to the set-off and netting provisions of the standard market agreements pursuant to which these important risk management arrangements operate. Language along the following lines could be used in article 5 (k): “‘Financial Contract’ means any spot ... and any combination of the transactions mentioned above, *and any and all collateral and credit support related to any transaction mentioned above;*” (this language is based on the EBF proposal last year; see A/CN.9/472/Add.1).

With respect to “netting agreement”, we believe that it would be desirable to clarify that the draft Convention should not apply to receivables arising out of multilateral netting arrangements such as those used by payment and securities settlement systems. Allowing the assignment of these multilateral netting payments is likely to substantially undermine the fluid operations of such systems and impair the certainty and finality of settlements. As such, we suggest that the definition of “netting agreement” should clearly include netting arrangements between two or more parties. Language along the following lines could be used in article 5 (l): “Netting agreement” means an agreement *between two or more parties* that provides for one or more of the following:

- (i) The...or otherwise;
- (ii) Upon...and netting into a single payment by *or to the defaulting party*; or
- (iii) The set-off...netting agreements;”

In addition, as discussed in our comments last year, we understand that “netting agreements” include within its scope agreements that provide for the close-out of some but not all transactions in certain situations such as where it may be in contravention of relevant law to close-out certain transactions. The commentary may usefully clarify this matter.

Finally, regarding whether or not issues of priority with respect to certain types of assets, the assignment of which has been excluded from the draft Convention, should be addressed if those assets are proceeds of receivables which would be subject to the draft Convention, we support the last alternative described by the secretariat in document A/CN.9/491, para. 10. The commentary could elaborate on the PRIMA approach and cite its growing acceptance. This approach would have the advantage of avoiding potential language conflicts with any forthcoming text from the Hague Convention. We believe that PRIMA represents the consensus approach in this area and would minimize uncertainty in cross-border transactions.

We urge the Commission to include these changes so that the OTC financial market retains clarity and certainty with respect to the expectations of market participants. These changes will ensure that the legal basis under which parties transact in this market is not undermined and that the techniques for managing counter-party credit risk continue to allow counter-parties to appropriately manage their exposures. Again, we commend the Commission's efforts to develop a legal regime under which global trade financing can better flourish, and we acknowledge the care that has been taken thus far to supply the proper treatment of OTC financial market transactions.

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INTRODUCTION

This note reproduces comments on the draft Convention on Assignment of Receivables in International Trade re-

ceived subsequently to the comments reproduced in documents A/CN.9/490 and Addenda 1 to 4. Further comments will be issued, if possible, as addenda to this note and in the order they are received.

I. COMPILATION OF COMMENTS

1. Canada

[Original: English/French]

Canada submits the following comments on the draft UNCITRAL Convention on the Assignment of Receivables in International Trade. We would stress that the draft Convention is more likely to be accepted by a large number of States if its main provisions, in particular the priority rules, are simple and easy to understand and to apply. To that end, we would encourage the Commission to consider simplifying the language where possible in the course of its review of the text at the 34th session.

Negotiable instruments (article 4.1 (b)): The current wording of article 4.1 (b) does not fully reflect the policy that the draft Convention should not impair the rights of a person under the special laws applicable to negotiable instruments. On the other hand, this wording might have the unintended result of excluding receivables from the draft Convention merely because they would be evidenced by negotiable instruments, even in instances where there would be no interference with negotiable instrument law. Accordingly, article 4.1 (b) should be replaced by a provision better expressing its underlying policy, such as the following:

“Nothing in this Convention affects the rights of a person under the **[special]** laws applicable to negotiable instruments.”

We also believe that one should not attempt to define “negotiable instrument” or “securities” and that these matters should be left to national law. However, the provisions of the Convention referring to securities should use the term “securities” instead of “investment securities”.

In another vein, we do not see a need to deal specifically with transfers of negotiable instruments by entry in the books of a depository. Most of the time, negotiable instruments so indirectly held will be considered as “securities” under domestic laws. The exclusions of articles 4.2 (d) and 4.2 (f) would then apply. On the other hand, one should not

exclude transfers of negotiable instruments which are not securities on the sole ground that they are held by a depository, if the transfer does not constitute negotiation under domestic law.

Consumer protection: The policy approved by the Commission with respect to consumer protection issues would be better reflected by a general provision stating that:

“Nothing in this Convention affects the rights and obligations of the assignor and the debtor under the **[special]** laws governing the protection of **[parties to]** **[persons in]** transactions made for personal, family or household purposes.”

With this new language, the “without prejudice ...” proviso of articles 21.1 and 23 would be unnecessary and should be removed. Note that the language above refers to any applicable consumer protection law, and not only to consumer protection law in the State in which the debtor is located.

Time of the assignment (article 10): Previously, certain provisions of the draft Convention referred to the time of the assignment. These provisions were changed to make reference to the conclusion of the contract of assignment (e.g. article 3). We propose the deletion of article 10, which now serves no useful purpose and could create confusion.

Applicable law in territorial units (article 37): The proposed text for article 37 provides a useful clarification for federal States in which matters dealt with by the choice of laws rules of chapters IV and V are not governed by federal laws. However, we question the appropriateness of incorporating for all States the internal conflict rules of the relevant territorial unit. Instead of stating in the draft Convention a rule providing for internal renvoi, one might permit a Contracting State that wishes to adopt such a rule to make a declaration to that effect.

Law applicable to the formal validity of assignments (article 8 and possible new provision in chapter V): The Commission has been asked to consider the incorporation in chapter V of a provision along the lines of article 8 which addresses the law applicable to the form of an assignment. We have concerns with the scope of article 8 as currently formulated.

Article 8 refers the formal validity of an assignment to the law of the State in which the assignor is located, but also preserves the choice of law rules of the forum if those rules would refer formal validity to a different law. In our view, this approach creates a potential conflict with the policy underpinning the choice of law rule in article 24. In the interests of certainty and predictability, article 24 requires the exclusive application of the law of the assignor's location for issues relating to the priority of the assignee's interest. Yet certain requirements which might be characterized as relating to the "formal validity" of an assignment—e.g. notarial or writing or registration requirements—may also be characterized as relating to "priority"; for example, where such requirements constitute pre-conditions under the law of the assignor's location to the effectiveness of the assignment as a property right or to the right of an assignee to claim priority in the assigned receivable against competing claimants. This risk of overlap between articles 8 and 24 means that third parties, including prospective assignees, will be unable to predict whether an assignment which is formally invalid by the law of the assignor's location might still be held valid if the litigation happens to be heard in a State which refers formal validity to a different law with different formality rules.

Our concerns would be resolved if article 8 were limited to the determination of the law applicable to formal validity only insofar as this is relevant to the reciprocal rights and obligations of the assignor and assignee under their contract of assignment. The utility of such a limited choice of law rule is questionable, however, and it may be preferable to simply delete article 8.

Law applicable to the "characteristics and priority" of the right of an assignee in the assigned receivable; meaning of the "characteristics of a right"; definition of "priority" (article 24, para. 1 (a), and para. 2; article 5, para. (g) (and corresponding provisions in article 31): We are concerned that the provisions of the draft Convention designating the law applicable to the priority of the assignee's right in the assigned receivable are both opaque and incomplete. The meaning of the current reference to "the characteristics" of the assignee's right in paragraph 1 (a) of article 24 (and in article 31) is not self-evident. The attempted clarification in paragraph 2 is also unclear. We suggest stating simply that the "priority of the assignee's right" against competing claimants is governed by the law of the assignor's location. At the same time, we think that the priority-related issues governed by the law of the assignor's location should be more clearly delineated to explicitly include the following (where relevant to the determination of priority):

(1) the legal nature of the right of the assignee in the assigned receivable (including whether it is a personal or property right, and whether it is an absolute right or a security right);

(2) any steps necessary to render the assignee's right in the assigned receivable effective against competing claimants (perfection); and

(3) the ranking of any person's title or claim to the assigned receivable as against any competing title or claim.

Law applicable to "characteristics and priority" of assignee's and competing claimants' rights in certain categories of proceeds (article 24, paras. 1 (b) and (c) and corresponding provisions in article 31): We have concerns with the retention in the draft Convention of the choice of law rules in paragraphs 1 (b) and (c) of article 24, currently in square brackets (and the corresponding provisions in article 31). These rules designate the law applicable to the "characteristics and priority" of the rights of an assignee or a competing claimant in proceeds of a collected receivable which take the form of negotiable instruments, investment securities held through a securities intermediary, and bank deposits. We do not think it is feasible, in the limited time available to the Commission, to achieve agreement on appropriately refined and internationally acceptable choice of law rules in these areas. We fear that any attempt to do so may endanger the overall acceptability of the Convention. In this connection, we note that assignments of these categories of intangibles were excluded from the Convention (see article 4, paras. 1 (b), 2 (e) and (f)). It was thought that the development of a uniform international legal regime, including a uniform international choice of law regime for issues of priority, constituted a separate unification project in itself. This consideration applies equally to the designation of the law applicable to priority in the relevant categories of assets when they constitute proceeds of receivables since the choice of law rules would have to be identical to the rules applicable to the priority of a right in such assets acquired by an assignee under a direct assignment.

We would therefore prefer to replace the square-bracketed language in paragraph 1 (b) and (c) of article 24 (and the corresponding language in article 31) with a provision along the following lines: "The priority of an assignee's claim to proceeds is governed by the law applicable by virtue of the rules of private international law." Such a provision would confirm that the choice of law rule in article 24 (and article 31) of the draft Convention for priority in the assigned receivable does not necessarily apply to priority in the proceeds of collection of the receivable. At the same time, the way would be left open for reference to be made to future international law texts to supply the appropriate choice of law rule (see, for instance, the work currently underway in the Hague Conference on Private International Law on an international convention to determine the law applicable to the proprietary aspects of dealings in securities credited to a securities account with a securities intermediary).

Special proceeds priority rule (article 26, para. 2): Under article 26, paragraph 2, an assignee who has a first priority in the assigned receivable under the applicable law as designated by article 24 also has priority in any proceeds received by the assignor, provided that the proceeds are "held by the assignor for the benefit of the assignee separately and are reasonably identifiable from the assets of the assignor." The example is then given of "a separate deposit account containing only cash receipts from receivables assigned to the assignee."

We are concerned that the current formulation leaves it unclear whether the “reasonable identifiability” requirement is to be tested objectively or subjectively. Is it enough if the assignor keeps the proceeds segregated from the assignor’s other assets, as in the case of proceeds deposited in a separate bank or securities account, even if the assignor is the “apparent owner” of the proceeds in the eyes of third parties? Or must the proceeds be held by the assignor in such a way that a third party would be put on notice without further inquiry that they did not form part of the assignor’s patrimony (for example, proceeds deposited by the assignor in a bank account designated on its face as a “trust” account, or in a bank account held in the joint names of the assignor and assignee)?

We think that the wording needs to be clarified to confirm the intent. If it is decided that a “subjective” test

should be sufficient, then we have the further concern that the rule does not adequately protect third parties who take a direct interest in the proceeds (e.g. via an assignment of a securities account containing proceeds) in reliance on the assignor’s “apparent ownership”. This concern arises because the law applicable to the priority of the right of the assignee in the assigned receivable under the Convention (the law of the assignor’s location) may differ from the law applicable to the priority of competing claims in the relevant kind of proceeds. Yet a third party who takes an interest in an asset, e.g. a securities account, in ignorance of the fact that it constitutes proceeds of the collection of a receivable would normally assess its priority position according to the law governing priority in the particular category of asset, not according to the law applicable to priority in the assigned receivable.

**D. Draft Convention on Assignment of Receivables in International Trade:
comments on pending and other issues: note by the secretariat**

(A/CN.9/491 and Add.1) [Original: English]

A/CN.9/491

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INTRODUCTION

1. At its thirty-third session, the Commission adopted the title, the preamble and articles 1 to 17 of the draft Convention on Assignment of Receivables in International Trade.¹ The remaining articles of the draft Convention that were referred back to the Working Group on International Contract Practices were adopted by the Working Group at its last session (Vienna, 11 to 22 December 2000).²

2. As indicated by the bracketed language in the text of the draft Convention or by references below to the report of the Commission or of the Working Group, no final conclusion was reached on certain issues. In addition, certain other issues are raised by the secretariat with the question whether the relevant provisions are sufficient to meet their stated objectives. This note has been prepared in order to give delegates to the Commission advance notice of those issues and of alternative ways in which they could be addressed. It is hoped that such advance notice will assist the Commission in resolving those issues in a timely manner and finalizing the draft Convention within the limited time that will be available to the Commission.³

I. COMMENTS

A. Articles 18 to 47 and annex: issues referred to the Commission by the Working Group

1. Characteristics and priority of the assignee's right in proceeds (article 24, para. 1 (b))

General remarks

3. At its last session, the Working Group decided to retain article 24, paragraph 1 (b), within square brackets referring to the Commission the question whether it should be retained and, if so, in what form (see A/CN.9/486, para. 61). In determining whether to retain article 24, paragraph 1 (b), or not, the Commission may wish to take into account the relationship between article 24, paragraph 1 (b), and article 26, the real import of article 24, paragraph 1 (b), and its acceptability.

Relationship between article 24, para. 1 (b), and article 26

4. With the current structure of articles 24, paragraph 1 (b), and 26, their relationship is not very clear. While they both deal with proceeds, article 26 is a substantive law rule and article 24, paragraph 1 (b), is a private international law rule. Article 26 covers the specific situations in which payment is made to the assignee or to the assignor but the assignor holds the proceeds in a separate account on behalf

of the assignee. It would, therefore, seem that article 24, paragraph 1 (b), would cover situations in which payment is made to the assignor or to another person and proceeds of the assigned receivable are commingled with other assets of the assignor or that other person. If the Commission decides to retain article 24, paragraph 1 (b), it may wish to recast it in a new provision combining article 24, paragraph 1 (b), and article 26.

Limitations of article 24, para. 1 (b)

5. As mentioned, article 24, paragraph 1 (b), would apply in the case of proceeds that are commingled with other assets of the assignor. However, if proceeds are not identifiable as "whatever is received in respect of an assigned receivable" (see article 5 (j)), article 24, paragraph 1 (b), may not even come into play (unless the law applicable is familiar with the notion of proceeds and tracing of proceeds). The situation is different in article 26, which envisages clearly identifiable proceeds.

Acceptability of article 24, para. 1 (b)

6. The general question that the Commission may wish to address is whether priority issues relating to certain types of asset, the assignment of which has been excluded from the draft Convention, should be addressed if those types of asset are proceeds derived from receivables. The Commission may wish to consider addressing the question for each of those types of asset.

Securities

7. It would seem that there is sufficient momentum in favour of the place of the relevant intermediary approach ("PRIMA", which in essence refers to the location of the account) with respect to the law applicable to dispositions of securities. PRIMA is considered by the Hague Conference on Private International Law and by the Commission of the European Union. It is also already reflected in the law of some countries (e.g. article 29 of law no. 83-1 of 3 January 1983 in France, article 9, para. 2 of the European Union Directive on Settlement Finality and article 8-110 of the Uniform Commercial Code in the United States of America). Furthermore, it is currently under consideration in other countries (e.g. Australia, Canada, Japan, the Netherlands and the United Kingdom). However, the exact formulation of PRIMA is a matter that still remains to be considered. In particular, it is not clear yet to what extent the account holder and the relevant intermediary will be allowed to specify in their custody agreement the location of the account without the need for an objective connecting factor. Furthermore, it is not absolutely clear what the terms "location", "securities", "securities account" or "securities intermediary" mean exactly.⁴

¹Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 17 (A/55/17), paras. 180-183; UNCITRAL Yearbook, vol. XXXI: 2000.

²Ibid., para. 186. The consolidated text of the draft Convention appears as annex 1 to the report of the Working Group (A/CN.9/486).

³The draft Convention is to be discussed from 25-29 June and, if necessary, on 2 July 2001. The drafting group may have to work until 5 July and the adoption of the report of the drafting group may have to take place on 5 July, depending on the time needed for the Commission and the drafting group to complete their work.

⁴Both the draft that emerged from a meeting of the Hague Conference in January 2001 and the current proposal by the Commission of the European Union for a Directive allow parties to the custody agreement to specify the location of the account. However, there is one condition, namely that there is an objective connecting factor (i.e. the place specified is the place where the relevant intermediary has an office or branch and from which the intermediary reports to its account holders or for regulatory or accounting purposes). However, both drafts are in the form of working documents subject to further discussion.

8. This situation presents both a problem of substance and a problem of procedure for the Commission. The problem of substance relates to whether PRIMA should be adopted and, if so, in what form. The problem of procedure relates to whether the Commission could adopt PRIMA without coordinating with the work of the Hague Conference, since it is highly unlikely that a text will emerge from the Hague Conference by the time the Commission has to adopt the draft Convention. In addressing this matter, the Commission may wish to consider the possible alternatives.

9. One alternative would be for the draft Convention to include a free-standing PRIMA-based rule. The advantage of such a rule would be that it would provide sufficient certainty as to the law applicable under the draft Convention. The disadvantage of such an approach though would be that efforts to prepare such a rule would go far beyond this project and would risk producing a result that would be inconsistent with the text being prepared by the Hague Conference. Another alternative would be for the Commission to include a rule that would set the principle of PRIMA without going into any details for which reference would be made to other texts. The advantage of this approach would be that it would recognize PRIMA as a matter of principle. Its disadvantage though would be that it would not provide sufficient guidance. In addition, it could create problems of coordination, in particular if the rule of the draft Convention were to be read as a free-standing rule to be interpreted without reference to the text of the Hague Conference.

10. Yet another alternative would be to provide in the draft Convention that issues of priority would be governed by the law applicable under private international law rules applicable with respect to the relevant types of asset. The commentary could further elaborate on the PRIMA-based approach as the increasingly prevailing approach with respect to disposition of property rights in securities. The advantage of this approach would be that it would reflect a generally acceptable principle without prejudging what the applicable law might be. Its disadvantage, however, would be that such a provision would be unnecessary as stating the obvious, without providing any guidance as to the law applicable. Yet another alternative would be to address the matter only in the commentary. The commentary could refer to PRIMA as being the preferred approach to be reflected in the text of the Hague Conference. The advantage of this approach would be that, through the discussion of the matter in the commentary, the Commission would give as much guidance to States as can be given, without burdening the draft Convention with provisions that do not set clear rules. The Commission may, therefore, wish to delete article 24, paragraph 1 (b) (ii), and to address the matter in the commentary with a view to clarifying the advantages of PRIMA and referring to the Hague Conference text.

Deposit accounts

11. With respect to article 24, paragraph 1 (b) (iii), the Commission may wish to consider following an approach similar to the approach to be followed with respect to securities. It would appear that there are strong arguments in favour of the law of the country in which the depositary

institution is located (see A/CN.9/486, para. 58). The reference to the law of the bank's location could also be read as a reference to the location of the account (a PRIMA-like approach). However, a reference to the law of the bank's or the account's location would be inconsistent with the approach taken in jurisdictions that refer to the law of the assignor's location. Furthermore, an effort to define the location of the bank or the account may re-open the difficult questions the Commission had to address in defining "location" for the purposes of the draft Convention. The Commission may, therefore, wish to consider deleting article 24, paragraph 1 (b) (iii), and leaving the matter to the commentary, either with a clear recommendation as to the law applicable (if the Commission promptly reaches agreement on such a recommendation) or with an analysis of the alternatives (if the Commission does not reach such an agreement).

Negotiable instruments

12. The law applicable to priority in negotiable instruments may be less controversial than the law applicable to priority in securities or in deposit accounts. However, article 24, paragraph 1 (b) (i), raises an issue of overlap with article 24, paragraph 1 (b) (ii). Negotiable instruments may well include securities if they are evidenced by certificates transferable by delivery (with any necessary endorsement). In addition, priority with respect to securities held directly by their owner may need to be also referred to the law of their location (*lex rei sitae*), since it is the indirect holding pattern that justifies the replacement of the *lex rei sitae* by PRIMA. However, it is questionable whether a rule on priority in negotiable instruments only would be sufficiently useful without a rule on securities and deposit accounts. The Commission may, therefore, wish to consider deleting article 24, paragraph 1 (b) (i), and including the relevant analysis in the commentary with a view to providing guidance to States.

Relationship between article 26 and the Hague Conference text

13. In principle, it would appear that no conflict could arise between article 26 and the Hague Conference text, since article 26 is a substantive law provision, while the Hague Conference text is a private international law text. Under article 26, if the assignee has priority with respect to the receivable and the conditions of paragraphs 1 and 2 are met, the assignee has priority with respect to proceeds of the receivable as against a competing assignee of the receivable or of the proceeds (as original collateral), as against a creditor of the assignor (including a creditor with a right in proceeds as original collateral) and as against the administrator in the insolvency of the assignor. If the place of the relevant intermediary is a State party to both the draft Convention and the Hague Conference text (and the draft Convention applies because the assignor is located in a Contracting State), article 26 would be the law of the place of the relevant intermediary. There would be no conflict in this case between article 26 and PRIMA. If, however, the place of the relevant intermediary is not a State party to the draft Convention (and the draft Convention applies because the assignor is in a Contracting State), ar-

ticle 26 would be a law other than PRIMA (and, as a result, an intermediary may find that it does not have priority even though it did all it could in that regard under PRIMA).

14. It would, therefore, appear that different results would be reached depending on whether article 26 or PRIMA applies. However, even in this case the conflict is rather apparent than real. If the receivable is paid to the assignee (article 26, para. 1), there are no proceeds in which an intermediary may have a right as creditor of the assignor. If the receivable is paid to the assignor (article 26, para. 2) and is held in a segregated account, an intermediary would normally have no right in such an account since securities covered by netting agreements are not in such a segregated account. To enhance certainty with regard to an intermediary, the need for notice to an intermediary (or any depository institution) about the nature of the account may need to be further clarified in article 26, paragraph 2. A new subparagraph (*a bis*) could read along the following lines: “notice to that effect is given to a person holding a right created by agreement which is not derived from the receivable or a person with a right of set-off”. The commentary could explain that the right meant may be a security right or the right of a purchaser of the relevant property. In current subparagraph (*b*), after the word “deposit” the words “or securities” would need to be added to cover both deposit and securities accounts. The commentary could also explain that article 26 is not intended to and does not create any conflict with PRIMA.

15. Alternatively, the Commission may wish to ensure that the rights of a depository institution or a securities intermediary or an assignee of the bank or securities account as original collateral would not be affected by article 26, paragraph 2. Language along the following lines may be considered: “Nothing in paragraph 2 of this article affects the priority of a right, not derived from the receivable, of a person holding a right created by agreement or of a person holding a right of set-off”.

16. With such an approach, while article 26, paragraph 2, would apply in general, its real impact would be limited to conflicts between an assignee of the receivable claiming the account as proceeds and creditors of the assignor or the insolvency administrator. This result would be justified by the fact that such persons would normally not be extending credit to the assignor in reliance on the relevant bank or securities account. Article 27 would also apply to validate a subordination agreement between a depository institution or a securities intermediary and an assignee.

2. *Existence and characteristics of the right of a competing claimant in proceeds* (article 24, para. 1 (c))

17. The above-mentioned analysis with respect to article 24, paragraph 1 (*b*) would apply also to article 24, paragraph 1 (*c*). In attempting to provide certainty as to the law applicable to the existence and the characteristics of the rights of a competing claimant, this provision adds an additional level of complexity to the draft Convention. In

addition, it deals with issues that may go well beyond the scope of the draft Convention. Moreover, this provision may be inappropriate to the extent that matters, such as the existence of a right, may be subject to the law of the location of the relevant asset (*lex rei sitae*) or to the law governing insolvency (*lex concursus*). The Commission may, therefore, wish to delete article 24, paragraph 1 (*c*).

3. *Characteristics of a right* (article 24, para. 2)

18. The characteristics of a right are treated in article 24, paragraph 2 as issues distinct from priority. This approach runs counter to the policy of the Working Group to address that matter only in the context of a priority conflict. It also complicates article 24 unnecessarily. Ensuring that article 24, which is one of the most important provisions of the draft Convention, sets a clear and simple rule and may well facilitate its proper understanding and application. The Commission may, therefore, wish to combine the definitions of characteristics and priority, moving article 24, paragraph 2 to article 5, subparagraph (*g*). Such an approach may also clarify the meaning of the term priority. It could also assist in addressing form requirements for the assignment to be effective as against third parties (this approach is taken in article 5 of the Hague Conference text, of 19 January 2001; article 8 may not be appropriate in addressing form requirements for priority purposes; see paras. 33 and 34). Language along the following lines could be considered for a revised article 5, subparagraph (*g*): “Priority means the right of a person in preference to the right of a competing claimant and includes the determination whether the right is a property right or not, whether it is a security right for indebtedness or other obligation or not and any steps necessary to render a right effective against a competing claimant”.

19. If the Commission decides to follow such an approach, article 24 would read as follows:

“With the exception of matters that are settled elsewhere in this Convention and subject to articles 25 and 26, the law of the State in which the assignor is located governs:

“(a) The priority of the right of an assignee in the assigned receivable with respect to the right of a competing claimant; and

“(b) The priority of the right of the assignee in proceeds that are receivables whose assignment is governed by this Convention with respect to the right of a competing claimant.” (See, however, para. 42.)

4. *Relationship between the assignee and the debtor* (article 20)

20. The Working Group referred to the Commission the question whether the essence of article 30 should be included in article 20. The matter was briefly discussed by the Working Group further to a suggestion aimed at ensuring that the benefits of article 30 would not be lost if a State opted out of chapter V (see A/CN.9/486, para. 83). If that suggestion is acceptable to the Commission, language along the following lines may be considered for article 39:

“A State may declare at any time that it will not be bound by chapter V with the exception of articles 30, 32 and 33”. Thus, article 30 would continue to apply and its substance would continue to be subject to the principles of mandatory law and public policy (and these principles would continue to be inapplicable to provisions other than those in chapter V). If the Commission prefers to retain the possibility for an opt-out of chapter V as a whole (see A/CN.9/486, para. 111), language along the following lines could be considered: “A State may declare at any time that it will not be bound by chapter V as a whole or by articles 28, 29 and 31 only”. Such an approach could increase the flexibility of the draft Convention but could also reduce its unifying effect to the extent that chapter V may apply to differing degrees from State to State.

5. *Form (new provision in chapter V)*

21. The Working Group referred to the Commission the question whether a provision dealing with the law applicable to the form of the assignment and the contract of assignment should be included in chapter V (see A/CN.9/486, paras. 76 and 174). Such a new provision would provide certainty as to the law applicable to form in cases where article 8 does not apply because the assignor is not located in a Contracting State. If the form of the assignment as against third parties is left to the law of the assignor’s location (see paras. 18, 33 and 34) and the form of the assignment as between the assignor and the assignee and as against the debtor is addressed by way of a substantive law rule (see para. 34), all that would remain to be addressed in chapter V would be the law applicable to the form of the contract of assignment. That matter may be left to generally applicable private international law rules on the form of contracts. Alternatively, language along the lines of article 11 of the Convention on the Law Applicable for the International Sale of Goods could be considered:

“1. A contract of assignment concluded between persons who are in the same State is formally valid if it satisfies the requirements either of the law which governs it or of the State in which it was concluded.

“2. A contract of assignment concluded between persons who are in different States is formally valid if it satisfies the requirements either of the law which governs it or of the law of one of those States.”

6. *Applicable law in territorial units (article 37)*

22. The Commission may wish to consider article 37, which appears within square brackets, in the light of a proposal to be submitted by certain federal States (A/CN.9/486, para. 97).

7. *Reservations and declarations (article 44)*

23. At the last session of the Working Group, the view was expressed that equating reservations with declarations might inadvertently result in the application of reservation-related provisions of treaty law, including provisions on

reciprocity. This view was based on the assumption that the draft Convention did not authorize any reservations. On that basis, the suggestion was made that the wording “except those expressly authorized in this Convention” should be deleted or article 44 should be recast to refer to declarations (see A/CN.9/486, paras. 125 and 126).

24. To the extent that article 36, paragraph 1, and articles 39-41 and 42, paragraph 5, exclude or modify the effect of certain provisions of the draft Convention, they reflect, in principle, reservations. Guideline 1.1.8 “Reservations made under exclusionary clauses” adopted by the International Law Commission during its last session is clear in this respect.⁵ In addition, article 17, paragraph 1 of the 1969 and 1978 Vienna Conventions on the Law of Treaties creates a clear link between a provision allowing a State to opt out of a part of a convention and a reservation. If such declarations are made, not at the time of signature or expression by a State of its consent to be bound, they may be viewed either as reservations allowed to be made at any time or as partial denunciations.

25. The Commission may, therefore, wish to retain article 44, which is a standard provision in conventions emanating from the work of the Commission, unchanged. The commentary on article 44 could clarify that article 36, paragraph 1, and articles 39-41 and 42, paragraph 5, provide for reservations, at least if made at the time of signature or expression by a State of its consent to be bound, while article 37 provides for an interpretative declaration and article 42 has the character of an optional clause. Alternatively, article 44 could be revised along the following lines: “No reservations are permitted except those authorized in article 36, paragraph 1, and articles 39 to 41 and 42, paragraph 5” [to the extent they are made at the time of signature, ratification, approval or accession]. In order to avoid the technical question addressed in the bracketed language, the Commission may wish to consider formulating article 44 along the following lines: “No reservations are permitted”. The commentary could explain that this formulation is intended to avoid this technical question and that it is not intended to change the legal nature of reservations made possible by other provisions.

8. *Annex*

26. The Commission may wish to consider including in the annex a provision on the designation of the supervising authority, the registrar and the preparation of regulations (see A/CN.9/486, paras. 153 and 174). Language along the following lines may be considered: “At the request of not less than one third of the [Contracting] [Signatory] States to this Convention, the depositary shall convene a conference of the [Contracting] [Signatory] States for designating the supervising authority and the first registrar, and for preparing the first regulations and for revising or amending them”. The Commission may also wish to discuss articles 6 to 9 in the light of a proposal to be submitted to the Commission by States (see A/CN.9/486, paras. 163, 165 and 168).

⁵Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 10 (A/55/10), para. 663.

B. Articles 1 to 17: issues left pending by the Commission or referred by the Working Group to the Commission

1. Exclusions of transfers of negotiable instruments (article 4, para. 1 (b))

27. The Working Group referred to the Commission the question whether transfers of negotiable instruments by delivery without a necessary endorsement or by a book entry into a depository's accounts should be excluded (see A/CN.9/486, paras. 62 and 63). A related question that was also referred to the Commission was whether, if transfers by delivery without a necessary endorsement are not excluded, conflicts of priority relating to such transfers should be referred to the law of the location of the relevant negotiable instrument.

28. The Commission may wish to recall the policy of article 4, paragraph 1 (b) to preserve the rights and obligations of parties under negotiable instrument law, without excluding the assignment of the underlying contractual receivable (see A/55/17, para. 29; and A/CN.9/470, paras. 43 and 44). It would be consistent with that policy to also exclude transfers by delivery without a necessary endorsement or by a book entry if they are regulated in negotiable instrument law. This result could be achieved through language along the following lines: "This Convention does not affect the rights and obligations of any person under negotiable instrument law". This wording would also make it unnecessary to refer to the way an instrument is transferred. It would also result in avoiding excluding the assignment of a contractual receivable just because the receivable is incorporated into a negotiable instrument. Furthermore, it would result in excluding rights of persons under negotiable instrument law, irrespective of whether they are parties to the instrument or not (e.g. attaching creditors).

2. Exclusions by declaration (article 4, para. 4)

29. At the last session of the Working Group, both strong support and opposition was expressed with respect to the possibility for an exclusion of further, existing or future, practices by declaration by States. Particular emphasis was placed on the value of article 4, paragraph 4, in providing flexibility to deal with future practices that cannot be anticipated at the present stage. Existing practices mentioned for such treatment involve receivables from foreign exchange transactions, to the extent they are not already excluded in article 4, paragraph 2 (a) and (b), or receivables from consumer transactions, unless a general consumer-protection provision is included in the draft Convention (see A/CN.9/486, paras. 116 and 117; as to consumer protection, see paras. 38 to 40 below). The Commission may wish to consider excluding those practices directly instead of leaving them to States to exclude by declaration. Such an approach would ensure a higher degree of certainty and uniformity as to the scope of the draft Convention. If such an approach is followed, the potential impact of article 4, paragraph 4 would be limited to future practices. As a result, it may be easier for the Commission to decide whether to retain or delete this provision. If the Commission decides to retain article 4, paragraph 4, it may wish to consider

whether it would be consistent with the policy underlying that provision to also allow States to apply the draft Convention to practices to which it is not intended to apply ("opt-in" by declaration by States).

3. Exclusions of transfers of intangible property (article 11, para. 3 (a) and article 12, para. 4 (a))

30. The term "goods" was placed within square brackets, since the reference in the French text to "biens meubles corporels" raised the question whether it includes general intangible property (i.e. intellectual or industrial property or other information; see A/55/17, para. 185). It would seem that intangibles are covered in article 11, paragraph 3 (b) and article 12, paragraph 4 (b). Therefore, the Commission may wish to remove the square brackets around the term "goods" and have the matter clarified in the commentary.

C. Additional issues

31. Depending on the availability of time, the Commission may also wish to consider the following issues.

1. Exclusions of real estate receivables (article 4, para. 3)

32. The Commission may wish to consider whether article 4, paragraph 3 (a) could be replaced by language along the following lines to be added at the end of the proposed new provision with respect to negotiable instruments (see para. 28): "or under real estate law". In such a case, article 4, paragraph 3 (b) could be replaced by language along the following lines to be inserted at the end of article 9, paragraph 3: "including limitations governing the acquisition of property rights in real estate under the law of the State in which the real estate is located".

2. Effectiveness (articles 8 to 12)

Article 8

33. In providing that meeting the form requirements of the assignor's location is sufficient, article 8 provides guidance to assignees as to how to ensure that an assignment will be formally valid. However, if the law of the assignor's location requires, for example, notification for an assignment to be formally (not materially)⁶ valid, article 8 is not helpful. In such a case, article 8 would fail, for example, to remove obstacles with respect to the assignment of future receivables in which notification of the debtor is not possible, at least, until the receivable arises and the debtor's identity becomes known. In addition, to the extent that article 8 refers to laws other than the law of the assignor's location, it may be inconsistent with article 24 to the extent that form requirements may be characterized as matters relating to priority.

⁶If notification is a condition of material validity, article 9 would be sufficient to remove such obstacles.

34. The Commission may, therefore, wish to explore the possibility of including a substantive law rule on form as between the assignor and the assignee, and as against the debtor. A possible approach may be based on the understanding that no form is necessary as between the assignor and the assignee and as against the debtor. As to the assignor and the assignee, party autonomy should prevail. As against the debtor, no form is necessary, since the debtor is sufficiently protected by the requirement for a written notification. Language along the following lines may be considered: “As between the assignor and the assignee and as against the debtor, the assignment need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses.” Under such an approach, article 8 would address formal validity and article 9 material validity. Obstacles created to the assignment of future receivables would be removed in a consistent and sufficiently comprehensive way. To the extent they are necessary for priority purposes, form requirements could be left to the law of the assignor’s location (see para. 18).

Article 9

35. In referring to future receivables in general and despite article 9, paragraph 3, article 9, paragraph 1 may inadvertently result in validating an assignment of any future receivables, including consumer receivables or pensions and wages, even though such an assignment is prohibited by law. Therefore, the Commission may wish to reformulate article 9, paragraph 1 along the following lines: “An assignment of one or more existing or future receivables and parts of or undivided interest in receivables is not ineffective as between the assignor and the assignee or as against the debtor and a competing claimant on the sole ground that it relates to future receivables if, at the time of the conclusion of the original contract, they can be identified as receivables to which the assignment relates.”⁷ The reference to the effectiveness of an assignment between an assignee and a competing claimant is intended to cover the matter addressed in article 9, paragraph 4, which may be no longer necessary.

Article 10

36. The Commission may wish to reconsider whether article 10 should be retained. It would seem that the time of the assignment is important for determining priority and for determining whether an assignment could be set aside as a fraudulent or preferential transfer if made within a certain time period before the commencement of an insolvency proceeding (“the suspect period”). However, the opening words of article 10 take away that effect from article 10 and thus render it meaningless. The term “time of assignment” is used only in draft article 9, paragraph 1 (b), but reference could be made there, as in other provisions (e.g. article 1, para. 1 (a), articles 3 and 4, subparagraph (b), and articles 14, 38, 41 and 6 of the annex), directly to the time of the conclusion of the contract of assignment. As to the

⁷Article 5 of the Unidroit Convention on International Factoring is formulated along the same lines (“a provision in the factoring contract for the assignment of existing or future receivables shall not be rendered invalid by the fact that the contract does not specify them individually ...”).

issue whether parties are allowed to set the time of assignment without affecting the rights of third parties, article 10 is still not necessary, since this result is implicit in article 6. The Commission may, therefore, wish to consider deleting article 10.

Articles 11 and 12

37. The policy underlying article 11, paragraph 3, and article 12, paragraph 4, is to *limit* the application of articles 11 and 12 to assignments of *trade receivables* (see A/55/17, paras. 104-108). However, “trade receivable” is defined so broadly that the only import of article 11, paragraph 3 is to exclude from the scope of article 11 the assignment of financial service receivables. The Commission may wish to express that result directly along the following lines: “Article 11 does not apply to assignments of receivables arising from financial service contracts”. In order to avoid creating uncertainty, the Commission may also wish to define financial service contracts. However, it would appear that the exclusions of financial service practices in article 4 would be broad enough to, at least, cast some doubt about the value of article 11, paragraph 3. Perhaps, the only practices that are not excluded in article 4 and may need to be excluded in article 11 are those that relate to assignments of loans or of insurance receivables. It would be better to exclude the assignment of those types of receivables directly rather than by way of a vague reference to financial service contracts. Language along the following lines may be considered to replace the current wording of article 11, paragraph 3: “Article 11 does not apply to assignments of receivables arising from loan agreements or insurance policies [...]”. Alternatively, if general language is preferred language along the following lines could be considered: “Article 11 does not apply to the assignment of a single, existing receivable” (although this formulation may result in excluding additional practices, such as an assignment of a high-value receivable from an aircraft, real estate or construction contract).

3. Consumer protection issues

38. At its thirty-third session, the Commission decided not to include any language specific to consumer debtors in article 17 on the understanding that it may have to reconsider the matter. A suggestion to include a provision clarifying that the draft Convention would not permit a consumer debtor to vary or derogate from the original contract if that was not permitted under consumer-protection legislation was met with interest but was not adopted (see A/55/17, paras. 170-172).

39. At the last session of the Working Group, the view was expressed that, unless some reference to consumer-protection legislation were included in article 17, certain States might have to exclude practices relating to consumer receivables (see A/CN.9/486, para. 116). In order to avoid such a result, which could inadvertently reduce the value of the draft Convention, the Commission may wish to reconsider the matter. Reconsideration of the matter would not require a policy change. Reflecting the policy of the Com-

mission, the commentary specifically provides that the draft Convention is not intended to override consumer-protection legislation (see A/CN.9/470, para. 128 and A/55/17, para. 170).

40. With respect to the protection of consumers that are assignors, article 9, paragraph 3, may be sufficient in that it provides that the draft Convention does not affect statutory prohibitions. However, article 9, paragraph 3, may not be sufficient to the extent that article 9, paragraph 1, may be read as validating the assignment of future receivables even in the case of consumer receivables. Although the suggested reformulation of article 9, paragraph 1, may address the matter (see para. 35), it may be better to include in the draft Convention language covering consumer assignors as well. The focus may be on an element highlighted during the discussion by the Commission last year, namely on mandatory law provisions that cannot be varied or derogated from by agreement of the parties. With such an approach, it may be possible for the Commission to address the concern expressed, thereby reducing significantly the possibility for a reservation as to the application of the draft Convention to assignments of consumer receivables. At the same time, such an approach would not undermine the certainty sought by the draft Convention or change the policy approved by the Commission. Language along the following lines may be considered for article 4: "This Convention does not override law governing the protection of parties in transactions made for personal, family or household purposes." The commentary could explain that, with the exception of assignments excluded in article 4, paragraph 1 (a), the draft Convention applies to assignments of consumer receivables but is not intended to interfere with domestic internal mandatory consumer-protection legislation. If the Commission adopts the proposed text, the specific reference to consumer protection in article 21, paragraph 1, and article 23 would not be necessary.

4. Debtor's defences and rights of set-off (article 20, para. 1)

41. In some jurisdictions, if the assignment is effective, the debtor may lose any right of set-off. As article 20 does not grant to the debtor a right of set-off if, under law applicable outside the draft Convention, the debtor does not have such a right, the debtor may not have any right of set-off in such jurisdictions. In order to avoid that result, the words "as if the assignment had never been made" could be inserted at the end of article 20, paragraph 1.

5. Priority issues (article 24, para. 1 (a) (ii))

42. Article 24, paragraph 1 (a) (ii) envisages situations in which the debtor pays by assigning a receivable. In such situations, there would be two assignors (the assignor of the original receivable and the debtor/assignor of the receivable assigned in payment of the original receivable). The Commission may wish to consider the question of whose law should govern. The Commission may also wish to consider moving this provision to article 26 so as to concentrate all proceeds-related rules in one article.

D. Procedure for the final adoption of the draft Convention

43. At its forthcoming session, the Commission would need to consider the procedure for the final adoption of the draft Convention (see A/55/17, paras. 189 and 192). In determining whether to recommend final adoption of the draft Convention by the General Assembly or by a diplomatic conference to be convened by the General Assembly, the Commission may wish to take into account considerations that influenced the decision of the Commission on this matter in the past. Six conventions have been prepared on the basis of texts elaborated by the Commission. Four were adopted at a diplomatic conference and two were adopted by the General Assembly.

44. Considerations taken into account by the Commission in recommending adoption of a convention by a diplomatic conference include the following: technical texts should be adopted in special meetings of bodies of qualified experts; cost savings from referring a draft Convention to a working group of the Sixth Committee and the General Assembly may be apparent rather than real (see A/87/17, para. 19 and A/CN.9/SR.123; *UNCITRAL Yearbook*, vol. III:1972); financial implications and invitation by a State (see A/31/17, paras. 39-43; *UNCITRAL Yearbook*, vol. VII:1976); dispensing with the need for a conference would deprive many States, in particular developing States and States not represented in the Commission, of the opportunity to scrutinize the text and to influence the final content and form of the text; the Commission should conclude in the appropriate way work in which efforts and expenses over a long period of time had been invested (see A/32/17, paras. 20-32; *UNCITRAL Yearbook*, vol. VIII:1977); even a sound legal text could be further improved; and a conference would be the most desirable forum of negotiations between States, specialists and industry (see A/44/17, paras. 223 and 224; *UNCITRAL Yearbook*, vol. XVI:1985).

45. Considerations on the basis of which the Commission decided to refer a convention to the General Assembly include the following: the expense of a diplomatic conference may not be justified in the case of a text which is the culmination of work of a number of years, has been extensively discussed and has been refined sufficiently not to need any further substantive consideration (see A/42/17, para. 301 and A/50/17, para. 199; *UNCITRAL Yearbook*, vol. XVIII:1987 and vol. XXV:1995 respectively).

46. In view of the above considerations, the Commission may wish to recommend adoption of the draft Convention by the General Assembly if it is satisfied that the text has received sufficient consideration and has reached the level of maturity for it to be generally acceptable to States. In its deliberations, the Commission may wish to also take into account the possibility that a diplomatic conference may change the text of the draft Convention adopted by the Commission, but also the potential for a wider participation by States in a diplomatic conference and the potential impact of a diplomatic conference on the acceptability of the draft Convention.

E. Drafting matters

47. If agreement can be reached in a timely manner, the Commission may wish to refer the following matters to the drafting group.

48. Articles 2 (assignment) and 3 (internationality) are in chapter I (scope of application), while article 5 (definitions and rules of interpretation) is in chapter II (general provisions), since article 5 does not deal mainly or only with scope-related provisions. However, article 5 contains important scope-related provisions that may need to be highlighted right at the beginning of the draft Convention (e.g. the definition of “location”). It may, therefore, be more logical and useful for the reader to have all the definitions and interpretations in one provision which could be article 2 (the present articles 2 and 3 could be subparagraphs (a) and (b) of that new article 2). Chapters I and II would be merged into one chapter entitled scope of application and general provisions.

49. The word “made” at the beginning of subparagraphs (a), (b) and (c) of article 4, paragraph 1 should be deleted, since it appears in the chapeau of article 4, paragraph 1. Reference should be made throughout the draft Convention to securities in general, rather than to investment securities.

50. In order to make it absolutely clear that representations take effect at the time when the assignment takes effect, the Commission may wish to revise article 14, paragraph 1 along the following lines: “Unless ... the assignor represents [...] that *at the time of the conclusion of the contract of assignment: ...*” (the position of the words in italics is simply changed). In addition, in order to ensure that the assignor will be held responsible if the receivable has not been validly created, words along the following lines may be inserted at the beginning of paragraph 1 (c): “the receivable exists and ...”.

51. Usages and practices may bind the assignor and the assignee but not third parties (see article 13, para. 2 and A/CN.9/489, para. 107). Representations (that may stem even from trade and usages) are considered as being given not only to the initial but also to any subsequent assignee (see article 14, para. 1 and A/CN.9/489, para. 111). The Commission may wish to confirm that the commentary appropriately reflects its understanding.

52. For consistency with article 1, paragraph 3, the reference to the law governing the receivable in article 41, paragraph 2 (b) should be substituted by a reference to the law governing the original contract.

A/CN.9/491/Add.1

Draft Convention on Assignment of Receivables in International Trade: comments on pending and other issues: note by the secretariat

This note reproduces in the annex the cost estimate for a diplomatic conference in Vienna (see A/CN.9/491, paras. 43-46) prepared by Finance and Budget Section.

ANNEX

**Estimated cost of holding a Diplomatic Conference on Assignment of Receivables
Vienna, autumn 2002**

Conference servicing cost at Vienna

				<i>Number of pages</i>	<i>US dollars</i>
I. Translation service					
Pre-session translation				1,000	178,000
In-session translation				1,000	178,000
Post-session translation				250	44,500
Summary records translation				3,030	539,340
In-house summary records					155,700
Overtime, night differential, taxi, etc.					10,500
Sub-total: Translation service					1,106,040
	<i>Number of staff</i>	<i>Number of days</i>	<i>DSA days</i>		
II. Interpretation service					
Interpreters					
Staff interpreters	—	—	—		
Freelance interpreters (non-local)	20	20	400		
Freelance interpreters (non-local)	<u>20</u>	6	<u>120</u>		
	40		520		
DSA					83,720
Terminal expenses					4,320
Air fares					52,000
Interpreters' salaries					183,300
Interpretation support					
DSA					
Terminal expenses					
Air fares					
Sub-total: Interpretation service					323,340
III. Reproduction service					
Page impressions (2.34 million)					58,013
Sub-total: Reproduction service					58,013
IV. Substantive secretariat service					
From Vienna					
From New York	2	21	42		
DSA					6,762
Terminal expenses					216
Air fares @ US\$1,800					3,600
Sub-total: Substantive secretariat service					10,578
V. Conference service and logistical support					
Plenary					
Technicians	19			1,255	
Conference Officers	44			2,519	
Ushers	66			3,264	
Messengers	44			2,176	
Messengers for the secretariat	22			1,088	
Micro switchers	19			1,088	
Delegates' aides	19			1,088	
Wardrobe aids	19			940	
Registration clerks	3			172	
Documents Control clerks	19			1,088	
Documents Distribution clerks	44			2,519	
Bilingual secretaries	44			3,364	
Interpretation messengers	19			1,088	
Telephone operators	38			2,176	
Overtime				6,000	29,825
Drafting group					
Technicians	5			330	
Conference Officers	10			573	
Ushers	10			495	
Messengers	10			495	
Micro switchers	5			286	2,179
Sub-total: Conference service and logistical support					32,004
VI. UN Security and Safety Service					
Overtime: Security staff					28,204
VII. Transportation of supplies and materials					
VIII. Communications charge					
IT staff (1)	19			1,255	1,255
TOTAL					1,559,434

II. ELECTRONIC COMMERCE

A. Report of the Working Group on Electronic Commerce on the work of its thirty-seventh session (Vienna, 18-29 September 2000) (A/CN.9/483) [Original: English]

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INTRODUCTION

1. The Commission, at its twenty-ninth session (1996), decided to place the issues of digital signatures and certification authorities on its agenda. The Working Group on Electronic Commerce was requested to examine the desirability and feasibility of preparing uniform rules on those topics. It was agreed that the uniform rules to be prepared should deal with such issues as: the legal basis supporting certification processes, including emerging digital authentication and certification technology; the applicability of the certification process; the allocation of risk and liabilities of users, providers and third parties in the context of the use of certification techniques; the specific issues

of certification through the use of registries; and incorporation by reference.¹

2. At its thirtieth session (1997), the Commission had before it the report of the Working Group on the work of its thirty-first session (A/CN.9/437). The Working Group indicated to the Commission that it had reached consensus as to the importance of, and the need for, working towards harmonization of law in that area. While no firm decision as to the form and content of such work had been reached, the Working Group had come to the preliminary conclusion that it was feasible to undertake the preparation of

¹Official Records of the General Assembly, Fifty-first Session, Supplement No. 17 (A/51/17), paras. 223 and 224.

draft uniform rules at least on issues of digital signatures and certification authorities, and possibly on related matters. The Working Group recalled that, alongside digital signatures and certification authorities, future work in the area of electronic commerce might also need to address: issues of technical alternatives to public-key cryptography; general issues of functions performed by third-party service providers; and electronic contracting (A/CN.9/437, paras. 156 and 157). The Commission endorsed the conclusions reached by the Working Group and entrusted the Working Group with the preparation of draft uniform rules on the legal issues of digital signatures and certification authorities (also referred to in this report as “the draft uniform rules” or “the uniform rules”).

3. With respect to the exact scope and form of the uniform rules, the Commission generally agreed that no decision could be made at this early stage of the process. It was felt that, while the Working Group might appropriately focus its attention on the issues of digital signatures in view of the apparently predominant role played by public-key cryptography in the emerging electronic-commerce practice, the uniform rules should be consistent with the media-neutral approach taken in the UNCITRAL Model Law on Electronic Commerce (hereinafter referred to as “the Model Law”). Thus, the uniform rules should not discourage the use of other authentication techniques. Moreover, in dealing with public-key cryptography, the uniform rules might need to accommodate various levels of security and to recognize the various legal effects and levels of liability corresponding to the various types of services being provided in the context of digital signatures. With respect to certification authorities (a concept that was later replaced by that of “certification service provider” by the Working Group: see below, paras. 66 and 89), while the value of market-driven standards was recognized by the Commission, it was widely felt that the Working Group might appropriately envisage the establishment of a minimum set of standards to be met by certification authorities, particularly where cross-border certification was sought.²

4. The Working Group began the preparation of the uniform rules at its thirty-second session on the basis of a note prepared by the secretariat (A/CN.9/WG.IV/WP.73).

5. At its thirty-first session (1998), the Commission had before it the report of the Working Group on the work of its thirty-second session (A/CN.9/446). It was noted that the Working Group, throughout its thirty-first and thirty-second sessions, had experienced manifest difficulties in reaching a common understanding of the new legal issues that arose from the increased use of digital and other electronic signatures. It was also noted that a consensus was still to be found as to how those issues might be addressed in an internationally acceptable legal framework. However, it was generally felt by the Commission that the progress realized so far indicated that the draft uniform rules on electronic signatures were progressively being shaped into a workable structure.

6. The Commission reaffirmed the decision made at its thirtieth session as to the feasibility of preparing such

uniform rules and expressed its confidence that more progress could be accomplished by the Working Group at its thirty-third session on the basis of the revised draft prepared by the secretariat (A/CN.9/WG.IV/WP.76). In the context of that discussion, the Commission noted with satisfaction that the Working Group had become generally recognized as a particularly important international forum for the exchange of views regarding the legal issues of electronic commerce and for the preparation of solutions to those issues.³

7. The Working Group continued revision of the uniform rules at its thirty-third (1998) and thirty-fourth (1999) sessions on the basis of notes prepared by the secretariat (A/CN.9/WG.IV/WP.76, WP.79 and WP.80).

8. At its thirty-second session (1999), the Commission had before it the report of the Working Group on the work of those two sessions (A/CN.9/454 and 457). The Commission expressed its appreciation for the efforts accomplished by the Working Group in its preparation of draft uniform rules on electronic signatures. While it was generally agreed that significant progress had been made at those sessions in the understanding of the legal issues of electronic signatures, it was also felt that the Working Group had been faced with difficulties in building a consensus as to the legislative policy on which the uniform rules should be based.

9. A view was expressed that the approach currently taken by the Working Group did not sufficiently reflect the business need for flexibility in the use of electronic signatures and other authentication techniques. As currently envisaged by the Working Group, the uniform rules placed excessive emphasis on digital signature techniques and, within the sphere of digital signatures, on a specific application involving third-party certification. Accordingly, it was suggested that work on electronic signatures by the Working Group should either be limited to the legal issues of cross-border certification or be postponed altogether until market practices were better established. A related view expressed was that, for the purposes of international trade, most of the legal issues arising from the use of electronic signatures had already been solved in the UNCITRAL Model Law on Electronic Commerce. While regulation dealing with certain uses of electronic signatures might be needed outside the scope of commercial law, the Working Group should not become involved in any such regulatory activity.

10. The widely prevailing view was that the Working Group should pursue its task on the basis of its original mandate (see above, paras. 2 and 3). With respect to the need for uniform rules on electronic signatures, it was explained that, in many countries, guidance from UNCITRAL was expected by governmental and legislative authorities that were in the process of preparing legislation on electronic signature issues, including the establishment of public key infrastructures (also referred to in this report as “PKI”) or other projects on closely related matters (see A/CN.9/457, para. 16). As to the decision made by the Working Group to focus on PKI issues and PKI

²Ibid., *Fifty-second Session, Supplement No. 17 (A/52/17)*, paras. 249-251.

³Ibid., *Fifty-third Session, Supplement No. 17 (A/53/17)*, paras. 207-211.

terminology, it was recalled that the interplay of relationships between three distinct types of parties (i.e. key holders, certification authorities and relying parties) corresponded to one possible PKI model, but that other models were conceivable, e.g. where no independent certification authority was involved. One of the main benefits to be drawn from focusing on PKI issues was to facilitate the structuring of the uniform rules by reference to three functions (or roles) with respect to key pairs, namely, the key issuer (or subscriber) function, the certification function and the relying function. It was generally agreed that those three functions were common to all PKI models. It was also agreed that those three functions should be dealt with irrespective of whether they were in fact served by three separate entities or whether two of those functions were served by the same person (e.g. where the certification authority was also a relying party). In addition, it was widely felt that focusing on the functions typical of PKI and not on any specific model might make it easier to develop a fully media-neutral rule at a later stage (*ibid.*, para. 68).

11. After discussion, the Commission reaffirmed its earlier decisions as to the feasibility of preparing such uniform rules (see above, paras. 2 and 6) and expressed its confidence that more progress could be accomplished by the Working Group at its forthcoming sessions.⁴

12. The Working Group continued revision of the uniform rules at its thirty-fifth (September 1999) and thirty-sixth (February 2000) sessions on the basis of notes prepared by the secretariat (A/CN.9/WG.IV/WP.82 and WP.84). The reports of those two sessions are contained in documents A/CN.9/465 and 467.

13. At its thirty-third session (New York, 12 June-7 July 2000), the Commission noted that the Working Group, at its thirty-sixth session, had adopted the text of draft articles 1 and 3 to 11 of the uniform rules. The view was expressed that some issues remained to be clarified as a result of the deletion from the draft uniform rules of the notion of “enhanced electronic signature”. It was stated that, depending on the decision to be made by the Working Group with respect to draft articles 2 (Definitions) and 12 (Recognition of foreign certificates and foreign electronic signatures), the remainder of the draft provisions might need to be revisited to avoid creating a situation where the standard set forth by the uniform rules would apply equally to electronic signatures that ensured a high level of security and to low-value certificates that might be used in the context of electronic communications that were not intended to carry significant legal effect.

14. After discussion, the Commission expressed its appreciation for the efforts accomplished by the Working Group and the progress achieved in the preparation of the draft uniform rules. The Working Group was urged to complete its work with respect to the draft uniform rules at its thirty-seventh session, and to review the draft guide to enactment to be prepared by the secretariat.⁵

15. The Working Group on Electronic Commerce, which was composed of all the States members of the Commission, held its thirty-seventh session at Vienna from 18 to 29 September 2000. The session was attended by representatives of the following States members of the Working Group: Argentina, Australia, Austria, Brazil, Cameroon, China, Colombia, Egypt, France, Germany, Honduras, Hungary, India, Iran (Islamic Republic of), Italy, Japan, Mexico, Nigeria, Romania, Russian Federation, Singapore, Spain, Thailand, United Kingdom of Great Britain and Northern Ireland, and United States of America.

16. The session was attended by observers from the following States: Belgium, Canada, Costa Rica, Cuba, Czech Republic, Ecuador, Guatemala, Indonesia, Ireland, Jordan, Lebanon, Malaysia, Malta, Morocco, Netherlands, New Zealand, Peru, Poland, Portugal, Republic of Korea, Saudi Arabia, Slovakia, Sweden, Switzerland, Tunisia, Turkey, Ukraine, Uruguay and Yemen.

17. The session was also attended by observers from the following international organizations: (a) *United Nations system*: Economic Commission for Europe (UN/ECE), United Nations Conference on Trade and Development (UNCTAD), World Bank; (b) *Intergovernmental organizations*: African Development Bank (ADB), Commonwealth secretariat, European Commission, European Space Agency (ESA), Organisation for Economic Cooperation and Development (OECD); (c) *International organizations invited by the Commission*: Cairo Regional Centre for International Commercial Arbitration, European Law Students’ Association (ELSA), International Association of Ports and Harbors (IAPH), International Bar Association (IBA), International Chamber of Commerce (ICC) and Union internationale du notariat latin (UINL).

18. The Working Group elected the following officers:

Chairman: Mr. Jacques GAUTHIER
(Canada, elected in his personal capacity)

Rapporteur: Mr. Pinai NANAKORN (Thailand)

19. The Working Group had before it the following documents: provisional agenda (A/CN.9/WG.IV/WP.85); note by the secretariat containing draft uniform rules on electronic signatures (A/CN.9/WG.IV/WP.84); and two notes by the secretariat containing the draft guide to enactment of the uniform rules (A/CN.9/WG.IV/WP.86 and A/CN.9/WG.IV/WP.86/Add.1).

20. The Working Group adopted the following agenda:

1. Election of officers.
2. Adoption of the agenda.
3. Legal aspects of electronic commerce:
 - Draft uniform rules on electronic signatures
 - Draft guide to enactment of the uniform rules on electronic signatures
 - Possible future work in the field of electronic commerce
4. Other business.
5. Adoption of the report.

⁴*Ibid.*, Fifty-fourth Session, Supplement No. 17 (A/54/17), paras. 308-314.

⁵*Ibid.*, Fifty-fifth Session, Supplement No. 17 (A/55/17), paras. 380-389.

I. DELIBERATIONS AND DECISIONS

21. The Working Group discussed the issues of electronic signatures on the basis of the note prepared by the secretariat (A/CN.9/WG.IV/WP.84) and the draft articles adopted by the Working Group at its thirty-sixth session (A/CN.9/467, annex). The deliberations and conclusions of the Working Group with respect to those issues are reflected in section II below.

22. After discussing draft articles 2 and 12 (numbered 13 in document A/CN.9/WG.IV/WP.84), and considering consequential changes in other draft articles, the Working Group adopted the substance of the draft articles and referred them to a drafting group to ensure consistency between the provisions of the uniform rules. The Working Group subsequently reviewed and amended the provisions adopted by the drafting group. The final version of the draft provisions as adopted by the Working Group is contained in the annex to this report.

23. The Working Group discussed the draft guide to enactment of the uniform rules. The deliberations and conclusions of the Working Group in that respect are reflected in section III below. The secretariat was requested to prepare a revised version of the draft guide reflecting the decisions made by the Working Group, based on the various views, suggestions and concerns that had been expressed at the current session. Due to lack of time, the Working Group did not complete its deliberations regarding the draft guide to enactment. It was agreed that some time should be set aside by the Working Group at its thirty-eighth session for completion of that agenda item. It was noted that the draft uniform rules (now in the form of a draft UNCITRAL Model Law on Electronic Signatures), together with the draft guide to enactment, would be submitted to the Commission for review and adoption at its thirty-fourth session, to be held at Vienna from 25 June to 13 July 2001.

II. DRAFT ARTICLES ON ELECTRONIC SIGNATURES

A. General remarks

24. At the outset, the Working Group exchanged views on current developments in regulatory issues arising from electronic commerce, including adoption of the Model Law, electronic signatures and public key infrastructure (referred to here as "PKI") issues in the context of digital signatures. These reports, at the governmental level, confirmed that addressing electronic commerce legal issues was recognized as essential for the implementation of electronic commerce and the removal of barriers to trade. It was reported that a number of countries had introduced recently, or were about to introduce, legislation either adopting the Model Law or addressing related electronic commerce facilitation issues. A number of those legislative proposals also dealt with electronic (or in some cases, specifically digital) signature issues.

B. Consideration of draft articles

Article 12. *Recognition of foreign certificates and electronic signatures*

25. The text of draft article 12 (numbered 13 in document A/CN.9/WG.IV/WP.84) as considered by the Working Group was as follows:

"[(1) In determining whether, or the extent to which, a certificate [or an electronic signature] is legally effective, no regard shall be had to the place where the certificate [or the electronic signature] was issued, nor to the State in which the issuer had its place of business.]

"(2) Certificates issued by a foreign supplier of certification services are recognized as legally equivalent to certificates issued by suppliers of certification services operating under ... [the law of the enacting State] if the practices of the foreign suppliers of certification services provide a level of reliability at least equivalent to that required of suppliers of certification services under ... [the law of the enacting State]. [Such recognition may be made through a published determination of the State or through bilateral or multilateral agreement between or among the States concerned.]

"(3) Signatures complying with the laws of another State relating to electronic signatures are recognized as legally equivalent to signatures under ... [the law of the enacting State] if the laws of the other State require a level of reliability at least equivalent to that required for such signatures under ... [the law of the enacting State]. [Such recognition may be made by a published determination of the State or through bilateral or multilateral agreement with other States.]

"(4) In determining equivalence, regard shall be had, if appropriate, [to the factors in paragraph (2) of article 10] [to the following factors:

"(a) financial and human resources, including existence of assets within the jurisdiction;

"(b) trustworthiness of hardware and software systems;

"(c) procedures for processing of certificates and applications for certificates and retention of records;

"(d) availability of information to the [signers][subjects] identified in certificates and to potential relying parties;

"(e) regularity and extent of audit by an independent body;

"(f) the existence of a declaration by the State, an accreditation body or the certification authority regarding compliance with or existence of the foregoing;

"(g) susceptibility to the jurisdiction of courts of the enacting State; and

"(h) the degree of discrepancy between the law applicable to the conduct of the certification authority and the law of the enacting State].

"(5) Notwithstanding paragraphs (2) and (3), parties to commercial and other transactions may specify that a particular supplier of certification services, class of suppliers of certification services or class of certificates must be used in connection with messages or signatures submitted to them.

“(6) Where, notwithstanding paragraphs (2) and (3), parties agree, as between themselves, to the use of certain types of electronic signatures and certificates,[that agreement shall be recognized as sufficient for the purpose of cross-border recognition]. [In determining whether, or the extent to which, an electronic signature or certificate is legally effective, regard shall be had to any agreement between the parties to the transaction in which that signature or certificate is used.]”

Paragraph (1)

26. It was pointed out that, in connection with certificates, the qualification “foreign” clearly denoted a certificate issued by a certification authority operating outside the jurisdiction where the certificate was invoked. In contrast, the notion of a “foreign” signature, be it handwritten or in electronic form, was not equally clear since various criteria might be used to qualify a signature as “foreign” (such as the place where the signature was produced, the nationality of the parties, the place of operations of the certification authority). Therefore, the suggestion was made that the scope of paragraph (1) should be confined to the recognition of foreign certificates and that the words “or an electronic signature”, which currently appeared within square brackets, should be deleted. While some support was expressed to that suggestion, the prevailing view was that paragraph (1) should cover both certificates and signatures and the square brackets around the words “or an electronic signature” should be removed. It was pointed out, in that connection, that electronic signatures were not always accompanied by a certificate and that electronic signatures generated without an attached certificate should also benefit from the non-discrimination rule stated in paragraph (1).

27. The view was expressed that the phrase “no regard shall be had [...] to the place where the certificate or the electronic signature was issued” was excessively categorical for the purposes of paragraph (1). The provision, it was suggested, might be more clearly expressed by using instead words such as “[d]etermination of whether, or the extent to which, a certificate or an electronic signature is legally effective shall not depend on the place where the certificate or the electronic signature was issued [...]”. Another suggestion was to rephrase paragraph (1) along the following lines: “A certificate or an electronic signature shall not be denied effect only on the basis of the place it emanates from.” In response to those suggestions, it was stated that the wording currently used adequately reflected the purpose of paragraph (1), as it made it clear that the place of origin, in and of itself, should in no way be a factor determining whether and to what extent foreign certificates or electronic signatures were legally effective. After consideration of the different views expressed, the Working Group decided to retain the current text of paragraph (1), subject to removing all square brackets, and referred it to the drafting group.

Paragraph (2)

28. As a general comment, it was stated by a number of delegations that paragraph (1) already contained the fundamental principles to be followed in respect of the recogni-

tion of foreign certificates and electronic signatures, so that paragraph (2) and the remainder of draft article 13 were not necessary. Furthermore, it was said that paragraph (2) might have unintended discriminatory effects, since the references in italics to legal requirements in the enacting State appeared to link the recognition of foreign certificates or electronic signatures to the existence of a governmental licensing regime for certification authorities (the concept of “certification authority” was later replaced by that of “certification service provider” by the Working Group: see below, paras. 66 and 89). Therefore, it was proposed that paragraphs (2) through (6) should be replaced with the following provisions:

“(2) To the extent that a State does condition the recognition of a certificate [or an electronic signature], any condition should be satisfied through accreditation by a private sector voluntary accreditation mechanism.

“(3) Where, notwithstanding paragraph (2), parties agree, as between themselves, to the use of certain types of electronic signatures and certificates, that agreement shall be recognized as sufficient for the purpose of cross-border recognition.”

29. While some support was expressed in favour of the proposal, the prevailing view was that, although its wording might require some improvement, paragraph (2) contained important provisions, which needed to be retained in the text of the uniform rules. It was noted that the Working Group had acknowledged early on that domestic jurisdictions might use various approaches for dealing with certification functions, ranging from mandatory licensing regimes under governmental control to private sector voluntary accreditation schemes. It was not the intention of draft article 12 to impose or exclude any of such approaches but rather to set forth criteria for the recognition of foreign certificates and electronic signatures, which would be valid and pertinent regardless of the nature of the certification scheme obtaining in the jurisdiction from which the certificate or signature emanated. Nevertheless, the Working Group acknowledged that the phrase inviting the enacting State to indicate the law under which suppliers of certifications services operated might be given an undesirably narrow interpretation, and agreed that alternative wording, such as “in this State” or “in this jurisdiction” should be used instead.

30. Turning its attention to the current text of paragraph (2), the Working Group heard expressions of concern that the purpose of the provision was not entirely clear. Three interpretations, it was said, could be given to paragraph (2), namely: (a) that foreign suppliers of certification services should be given equal opportunity to have their services recognized through registration under the laws of the enacting State; (b) that certificates issued by foreign suppliers of certification services should, under the circumstances provided in paragraph (2) have the same legal effect as certificates issued by recognized certification authorities in the enacting State; or (c) that foreign suppliers of certification services should benefit from fast-track recognition in the enacting State if they met the requirements set forth in paragraph (2). If the first interpretation was correct, paragraph (2) was not needed, since it would merely restate the non-discrimination principle of paragraph (1). If the second

interpretation was correct, paragraph (2) might place a foreign supplier of certification services that was not subject to mandatory licensing in its country of origin in equal standing with licensed domestic certification authorities, thus resulting in undesirable reverse discrimination against suppliers of certification services that needed to obtain a licence in the enacting State. If the third interpretation was correct, it should be spelled out more clearly.

31. In response to those interpretations and concerns, it was pointed out that the purpose of paragraph (2) was not to place foreign suppliers of certification services in a better position than domestic ones, but to provide criteria for the cross-border recognition of certificates without which suppliers of certification services would face the unreasonable burden of having to obtain licences in multiple jurisdictions. For that purpose, paragraph (2) established a threshold for technical equivalence of foreign certificates based on testing their reliability against the reliability requirements established by the enacting State pursuant to the uniform rules. Whether, for the licensing of domestic suppliers of certification services, an enacting State chose to establish additional criteria above and beyond those set out in paragraph (3), or whether the country of origin imposed criteria higher than those, was a policy decision outside the scope of the uniform rules.

32. The view was expressed that the requirement that the level of reliability of the practices of foreign suppliers of certification services should be "at least" equivalent to that required in the enacting State was excessively restrictive and inappropriate in an international context. It was important to acknowledge that there might be significant variance between the requirements of individual jurisdictions. Therefore, it would be more appropriate to require that the level of reliability of the practices of suppliers of certification services should be "comparable", rather than "at least equivalent", to that of domestic ones. The Working Group considered at length the appropriate threshold for the recognition of foreign certificates. There was general sympathy for the concerns that had been expressed regarding the difficulty of establishing equivalence of certificates in an international context. It was felt, however, that the notion of a "comparable" level of reliability in the practices of suppliers of certification services did not afford the degree of legal certainty that might be needed to promote cross-border use of certificates. After consideration of various alternatives, the Working Group decided that paragraph (2) should refer to a level of reliability "substantially" equivalent to that obtaining in the enacting State. The Working Group noted, in that connection, that the requirement of equivalence, as used in paragraph (2), did not mean that the level of reliability of the foreign certificate should be exactly identical with that of domestic ones.

33. It was pointed out that paragraph (2) seemed to imply that there would be a single set of requirements for all types of certificates. In practice, however, suppliers of certification services issued certificates with various levels of reliability, according to the purposes for which the certificates were intended to be used by their customers. Depending on their respective level of reliability, not all certificates were worth producing legal effects, either domestically or abroad. Therefore, it was suggested that paragraph (2)

should be reformulated so as to reflect the idea that the equivalence to be established was as between certificates of the same type. The Working Group was mindful of the need to take into account the various levels of certificate and the type of recognition or legal effect each might deserve depending on their respective level of reliability. However, the prevailing view was that the proposed reformulation of paragraph (2) was problematic because of the difficulty of establishing the correspondence between certificates of different types issued by different suppliers of certification services in different jurisdictions. For that reason, the uniform rules had been drafted so as to contemplate a possible hierarchy of different types of certificate. Furthermore, it was said that the issue of different types of certificates was a matter for the practical application of the uniform rules and that appropriate reference in the draft guide to enactment might suffice. In practice, a court or arbitral tribunal called upon to decide on the legal effect of a foreign certificate would normally consider each certificate on its own merit and try to equate it with the closest corresponding level in the enacting State.

34. Another comment was that, although the essence of paragraph (2) was satisfactory, its purpose would be better served if paragraph (2) would clearly provide for the legal effectiveness, rather than the recognition, of foreign certificates issued in accordance with practices found to be substantially equivalent to those required in the enacting State. The notion of recognition, which was known in other areas of the law (for example in connection with recognition and enforcement of foreign arbitral awards), was said to imply that a special procedure might be required in each instance, before a foreign certificate could produce legal effects in the enacting State. If paragraph (2) was to have any practical significance beyond what was already contained in paragraph (1), the provision should be reformulated so as to affirm the legal effectiveness of foreign certificates and the conditions therefor.

35. While there was general support for recasting paragraph (2) to include the notion of legal effectiveness, the views differed as to whether the applicable standard should be dependent upon the reliability of the practices followed by the foreign supplier of certification services or whether such standard should be based on the level of reliability offered by the foreign certificate itself. The prevailing view that emerged in the course of the deliberations was that the standard to be used in paragraph (2) should be the level of reliability offered by the foreign certificate itself, when compared with the level of reliability offered by certificates issued by domestic suppliers of certification services. Focusing on the certificate, rather than the practices followed by the supplier of certification services, also made it easier to solve other problems raised by the current wording of paragraph (2). Indeed, the new wording of paragraph (2) made it more flexible and apt to take into account the various types of certificates and the varying level of reliability they provided, without having to refer in the text to different types of certificate.

36. The Working Group concluded its consideration of paragraph (2) by requesting the drafting group to reformulate the provision to the effect that a certificate issued by a foreign supplier of certification services should have the

same legal effect as a certificate issued by a domestic supplier of certification services when such certificate afforded a substantially equivalent level of reliability. It was understood that the use of the words “a certificate”, rather than “certificates”, made it clear that the reliability test was to be applied in respect of each certificate, rather than to categories of certificates, or to all certificates of a particular supplier of certification services.

Paragraph (3)

37. As a general comment, it was said that paragraph (3) appeared to contemplate criteria whereby the enacting State would validate electronic signatures produced abroad. If that was the case, paragraph (3) seemed to introduce, in respect of electronic signatures, a situation without precedent in the context of paper-based transactions. Indeed, the validity of handwritten signatures was determined, as appropriate, by the law governing the transaction in question or by the law governing questions related to the legal capacity of the signatory. To the extent that paragraph (3) set forth an independent parameter for establishing the legal effect of an electronic signature, the provision interfered with well-established rules of private international law. The Working Group, therefore, was urged to consider deleting the provision.

38. The Working Group was of the view, however, that paragraph (3) did not affect the functioning of the rules of private international law relevant to the validity of a signature, since it was concerned exclusively with standards for the cross-border recognition of the reliability of the method used to identify the signatory of any given electronic message. Nevertheless, it was generally felt that, for purposes of clarity, and with a view to aligning paragraphs (2) and (3), the references to the laws of States other than the enacting State should be deleted from paragraph (3).

39. In that connection, the view was expressed that a provision recognizing some legal effect in the enacting State to compliance with the laws of a foreign country was useful and, subject to clarifying the doubts that had been expressed earlier, the provision should be retained. It was said that what mattered for paragraph (3) was to establish a cross-border reliability test of the methods used for producing electronic signatures. The current formulation of paragraph (3) had the practical advantage of obviating the need for a reliability test in respect of specific signatures, when the enacting State was satisfied that the law of the jurisdiction from which the signature originated provided an adequate standard of reliability for electronic signatures. In response it was pointed out that the practical advantage that had been identified would still exist despite the deletion of the reference to the laws of the foreign State. In the context of that discussion, it was pointed out that electronic signatures were defined in draft article 2 as methods of identification and therefore the reliability test contemplated in paragraph (3) pertained to such method, rather than to the signature itself.

40. The view was expressed that, since both paragraphs (2) and (3) implemented the non-discrimination rule

stated in paragraph (1) they could be usefully combined in a single provision. The prevailing view, however, was that, paragraphs (2) and (3) had a function of their own, which was distinct from paragraph (1). Paragraph (1) was a rule of non-discrimination formulated in negative terms, whereas paragraphs (2) and (3) developed that general rule in more concrete terms by positively affirming that foreign certificates and electronic signatures should be given legal effect when substantially equivalent to domestic ones in terms of their reliability. While the logical link between the three paragraphs could be made clearer (for example, by adding words such as “consequently” at the end of paragraph (1) and re-arranging paragraphs (2) and (3) as its subparagraphs), the substance of those two paragraphs should be retained. Furthermore, as different factors might need to be taken into account for the cross border-recognition of certificates and electronic signatures, each provision should be kept separate.

41. After discussion, the Working Group decided that the text of paragraph (3) should be brought in line with the structure of paragraph (2) and redrafted along the lines of “Electronic signatures issued in a foreign State shall produce the same legal effects as electronic signatures issued in ... [the enacting State], provided that they offer a substantially equivalent level of reliability”. The matter was referred to the drafting group.

42. As to the words in square brackets at the end of both paragraphs (2) and (3), it was generally agreed that the reference to the legal techniques through which advance recognition of the reliability of foreign certificates and signatures might be made by an enacting State (i.e. a unilateral declaration or a treaty) should not be part of the uniform rules. Instead, it should be discussed in the draft guide to enactment.

Paragraph (4)

43. The Working Group held an extensive discussion on the relevance of the criteria set forth in paragraph (4) for the purpose of cross-border recognition of foreign certificates and signatures, and the need for retaining such a provision in view of the amendments that had been agreed to in paragraphs (2) and (3). In that connection, strong support was expressed both for deleting paragraph (4) as well as for retaining it, possibly in a modified form. The view was also reiterated that paragraphs (2) and (3) should be deleted.

44. In favour of deleting paragraph (4) it was stated that, to the extent that the criteria listed therein were not identical with those listed in the relevant parts of draft articles 6, 9 and 10, paragraph (4) was inconsistent with the view taken by the Working Group at its thirty-fifth session, in 1999, that criteria set forth with respect to signatures or certificates should apply equally to foreign and domestic signatures or certificates (A/CN.9/465, para. 35). If, in turn, paragraph (4) were merely to reproduce criteria set forth earlier in the uniform rules, the provision would in practice be superfluous. Moreover, the criteria set forth in paragraph (4) were not entirely relevant for certificates or electronic signatures, since they included criteria contained in draft articles 9 and 10 that had been specifically conceived

for the purpose of assessing the trustworthiness of suppliers of certification services. Another argument for the deletion of paragraph (4) was that the list was perceived as limiting party autonomy and impinging upon the freedom of judges and arbitrators to examine, in concrete cases, the reliability of certificates and signatures. Yet another reason for deleting paragraph (4) was that the listing of specific criteria for determining equivalence was inconsistent with the spirit of paragraphs (2) and (3), as newly amended by the Working Group. Indeed, paragraphs (2) and (3) envisaged a test of the substantial equivalence of foreign certificates and signatures, as compared to domestic ones. Such a test logically entailed a comparison of the respective standards of reliability obtaining in the jurisdictions concerned and not the referral to an independent set of criteria.

45. In favour of retaining paragraph (4) it was stated that although the list contained therein might not be entirely pertinent and might need to be revised, such a provision offered useful guidance for assessing the equivalence of certificates and signatures. Merely mentioning the relevant criteria in the draft guide to enactment, as had been suggested, would not achieve the intended result, since the draft guide was addressed to legislators and was not the type of document to which domestic courts would usually refer. A set of standards for assessing the equivalence of foreign certificates was needed, since that exercise was intrinsically different from the assessment of the trustworthiness of a supplier of certification services under draft articles 9 and 10. If the concern was that the criteria listed in paragraph (4) were not entirely pertinent to cross-border recognition of certificates and electronic signatures, reformulating the list would be a better solution than simply deleting it. For that purpose, the following alternative wording was proposed for paragraph (4):

“In determining whether a certificate offers a substantially equivalent level of reliability for the purpose of paragraph (2) regard shall be had to:

“1. the following aspects of the operational procedures of the foreign supplier of certification services:

“(a) the trustworthiness of hardware and software systems and the method of its utilization;

“(b) procedures for:

“(i) the making of applications for certificates;

“(ii) the processing of certificate applications;

“(iii) the processing of certificates;

“(iv) the procedures for a signatory to give notice that a signature device has been compromised;

“(v) the procedures utilized for the operation of a timely revocation service.

“(c) the regularity and extent of any audit by an independent third party;

“2. the existence of a declaration by a State or an accreditation body in respect of all or any of the matters listed in para. (1)(b) above;

“3. recognized international standards met by the foreign supplier of certification services;

“4. any other relevant factor.”

46. The Working Group considered with great interest the proposed new wording for paragraph (4), which was found to introduce elements of particular relevance for assessing the equivalence of certificates in a cross-border context, in particular the reference to recognized international standards. However, various questions were raised as to the meaning of the individual criteria listed and the possible overlap or discrepancies between the new criteria and those already mentioned in draft articles 6, 9 and 10. Also, concerns were voiced that the suggested approach, although having the advantage of being more analytical and focused than the list currently contained in paragraph (4), would render the provision overly complex, thus defeating the purpose of legal clarity. Based on those questions and concerns, the Working Group did not adopt the suggested new wording. As an alternative, it was suggested that essentially the same objective might be achieved by means of cross-references, in paragraph (4), to the appropriate provisions in the uniform rules where the relevant criteria were mentioned, possibly with the addition of other criteria particularly important for cross-border recognition, such as compliance with recognized international standards.

47. It was also pointed out that different criteria could apply to electronic signatures. A proposal for determining substantial equivalence of electronic signatures was made in the following terms:

“In determining whether an electronic signature offers a substantially equivalent level of reliability for the purpose of article 13(3), regard shall be had to:

“1. whether the means of creating the electronic signature is, within the context in which it is used, linked to the signatory and to no other person;

“2. whether the means of creating the electronic signature was, at the time of signing, under the control of the signatory and of no other person;

“3. whether any alteration to the electronic signature, or any alteration to the information to which the electronic signature relates, made after the time of signing is detectable;

“4. any recognized international standards applied in relation to the creation of the electronic signature;

“5. any other relevant factor.”

48. The Working Group paused to consider the proposed alternatives and examined various ways in which they might be formulated. In the course of its deliberations, however, the Working Group eventually came to the conclusion that an attempt to capture all relevant criteria in one single provision by means of cross-references to earlier portions of the uniform rules was likely to result in a formulation no less complex than the one the Working Group had just discarded.

49. After extensive discussion, and in an effort to bridge the gap between those who advocated eliminating paragraph (4) and those who maintained the importance of the provision, it was decided that paragraph (4) should be re-drafted to state that, in determining whether a foreign certificate or an electronic signature offered a substantially equivalent level of reliability for the purposes of paragraphs (2) and (3), regard should be had to recognized international standards and to any other relevant factors. In

that connection, it was proposed that the reference to recognized international standards should be replaced by a reference to “international technical and commercial standards” so as to make it clear that the deciding standards were market-driven standards, rather than standards and norms adopted by governmental or intergovernmental bodies. Although that proposal was met with some support, the prevailing view was that it would not be appropriate to exclude governmental standards from among the relevant standards, and that the current formulation was sufficiently broad so as to encompass technical and commercial standards developed by the private sector. It was decided that appropriate explanations should be included in the draft guide to enactment regarding the broad interpretation to be given to the notion of “recognized international standards”.

Paragraph (5)

50. The Working Group noted that paragraph (5) originated from an earlier provision (i.e. draft article 19(4) as contained in A/CN.9/WG.IV/WP.73), which recognized the right of government agencies to specify that a particular certification authority, class of certification authorities or class of certificates must be used in connection with messages or signatures submitted to those agencies. The scope of that provision had been subsequently broadened since the Working Group, when first considering the matter, at its thirty-second session, in 1998, had felt that all parties to commercial and other transactions, and not only government agencies, should be accorded the same right in connection with messages or signatures they received (A/CN.9/446, para. 207). Noting that it had not since then had the opportunity to examine the provision, the Working Group engaged in an exchange of views on the need for, and desirability of, retaining paragraph (5).

51. In support of keeping the provision, it was said that paragraph (5) reflected a common practice, in particular for transactions involving governmental agencies in some countries, which was aimed at facilitating and supporting standardization of technical requirements. A provision such as paragraph (5) was also important for controlling risks and the potential cost involved in having to test the reliability of unknown certification methods or the trustworthiness of suppliers of certification services that did not belong to a recognized class of certification authorities. Those costs and risks might be considerable for entities handling a large volume of day-to-day communications with multiple individuals or companies, as was typically the case of governments or financial institutions. Without the possibility of specifying a particular supplier of certification services, class of supplier or class of certificates that they wished to use in connection with messages or signatures submitted to them, those agencies might find themselves under an obligation to accept any class of supplier of certification services or certificate.

52. The prevailing view within the Working Group, however, was that, given the new structure of the draft article, paragraph (5) was not needed and should be deleted. If the purpose of paragraph (5), it was said, consisted in establishing a special prerogative for government agencies, the provision was unnecessary, since nothing in the uniform rules, which were essentially concerned with commercial

transactions, limited or impaired the ability of governments to establish special procedures to be followed in dealing with public administrations. As regards other transactions, however, the classes of suppliers of certification services or certificates to be used were a matter best left for the mutual agreement of the parties concerned. In any event, it would not be appropriate for the uniform rules to appear to be encouraging, or suggesting legislative endorsement of, practices resulting in the unilateral imposition by a private party of a particular certification authority, class of certification authorities or class of certificates. Such a power could lend itself to abuse in the form of discrimination against emerging competitors or industries or other forms of restrictive business practices. Even if paragraph (5) were to be reformulated to provide that the parties might “agree as between themselves”, as was suggested, on the use of a particular supplier of certification services, class of supplier or class of certificates, the provision would be redundant, since paragraph (6) already recognized the principle of party autonomy in respect of the choice of certain types of electronic signatures and certificates.

53. After discussion, the Working Group decided that paragraph (5) should be deleted.

Paragraph (6)

54. It was recalled that paragraph (6) was intended to reflect the decision made by the Working Group at its thirty-fifth session that the uniform rules should provide for the recognition of agreements between interested parties regarding the use of certain types of electronic signatures or certificates as sufficient grounds for cross-border recognition (as between those parties) of such agreed signatures or certificates (A/CN.9/465, para. 34). The Working Group based its deliberations on the first alternative wording proposed in paragraph (6) as follows: “Where, notwithstanding paragraphs (2) and (3), parties agree, as between themselves, to the use of certain types of electronic signatures and certificates, that agreement shall be recognized as sufficient for the purpose of cross-border recognition”.

55. The view was expressed that paragraph (6) merely restated, in the context of cross-border recognition of electronic signatures and certificates, the principle of party autonomy expressed in draft article 5. Under that interpretation, paragraph (6) was superfluous and potentially damaging since it might create doubts as to the generality of draft article 5. The prevailing view, however, was that paragraph (6) was necessary for the avoidance of doubt, since draft article 12 could be seen as a code relating to cross-border recognition, or could be regarded as a set of mandatory rules, not subject to contractual derogation (for continuation of the discussion with respect to the mandatory nature of the rules, see below, paras. 112 and 113). In addition, it was stated that specific wording was needed to give effect to contractual stipulations under which parties would agree, as between themselves, to recognize the use of certain electronic signatures or certificates (that might be regarded as foreign in some or all of the States where the parties might seek legal recognition of a given signature or certificate), without those signatures or certificates being subject to the substantial-equivalence test set forth in paragraphs (2), (3) and (4).

56. A concern was expressed that paragraph (6) might not make it sufficiently clear that, for the purpose of cross-border recognition, the agreement made between the parties should not affect the legal position of third parties. In response, it was generally felt that the words “as between themselves” appropriately reflected the fundamental principle of privity (also referred to as “the relative effect of contracts”), a principle that was readily applicable in most legal systems.

57. It was generally agreed that the recognition of specific agreements under paragraph (6) should be made subject to any mandatory law of the enacting State. A suggestion was to include the following wording, drawn from draft article 5: “unless that agreement would not be valid or effective under the law of the enacting State”. While general support was expressed in favour of the policy underlying that suggestion, a concern was raised that the reference to “the law of the enacting State” might be interpreted as interfering unduly with the rules of private international law. While it was explained that the law of the enacting State would inevitably come into play, even if it was only to refer to foreign law through the operation of a rule of conflict, the prevailing view was that, for the purpose of clarity, a reference to “applicable law” should be substituted for the current mention of “the law of the enacting State”. It was agreed that the text of draft article 5 should be modified accordingly.

58. After discussion, the Working Group decided that paragraph (6) should read along the following lines: “Where, notwithstanding paragraphs (2), (3) and (4), parties agree, as between themselves, to the use of certain types of electronic signatures or certificates, that agreement shall be recognized as sufficient for the purpose of cross-border recognition, unless that agreement would not be valid or effective under applicable law.” The provision was referred to the drafting group, which was also requested to align the text of article 5 with the corresponding wording in paragraph (6). It was generally agreed that appropriate explanations should be inserted in the draft guide to enactment as to the interpretation of the notion of “applicable law”.

Article 2. Definitions

59. The text of draft article 2 as considered by the Working Group was as follows:

“For the purposes of these Rules:

“(a) ‘Electronic signature’ means [data in electronic form in, affixed to, or logically associated with, a data message, and] [any method in relation to a data message] that may be used to identify the signature holder in relation to the data message and indicate the signature holder’s approval of the information contained in the data message;

“[(b) ‘Enhanced electronic signature’ means an electronic signature in respect of which it can be shown, through the use of a [security procedure] [method], that the signature:

“(i) is unique to the signature holder [for the purpose for][within the context in] which it is used;

“(ii) was created and affixed to the data message by the signature holder or using a means under the sole control of the signature holder [and not by any other person];

“[(iii) was created and is linked to the data message to which it relates in a manner which provides reliable assurance as to the integrity of the message’;

“(c) ‘Certificate’ means a data message or other record which is issued by an information certifier and which purports to ascertain the identity of a person or entity who holds a particular [key pair] [signature device];

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

“(e) ‘Signature holder’ [device holder] [key holder] [subscriber] [signature device holder] [signer] [signatory] means a person by whom, or on whose behalf, an enhanced electronic signature can be created and affixed to a data message;

“(f) ‘Information certifier’ means a person or entity which, in the course of its business, engages in [providing identification services] [certifying information] which [are][is] used to support the use of [enhanced] electronic signatures.”

Subparagraph (a) *(Definition of “electronic signature”)*

60. It was recalled that the Working Group, in the context of its discussion of draft article 6 at its previous session, had considered the definition of “electronic signature” and adopted the following wording: “Electronic signature means any method that is used to identify the signature holder in relation to the data message and indicate the signature holder’s approval of the information contained in the data message” (A/CN.9/467, paras. 54-58).

“method”

61. Having reviewed that wording, the Working Group was of the view that defining the electronic signature as a “method” was inappropriate, since it created confusion between the process of creating an electronic signature and the result of that process. It was decided that, for continuation of the discussion, the Working Group would instead consider the definition of “electronic signature” contained in document A/CN.9/WG.IV/WP.84 (see above, para. 1) and delete the reference to “method” from that definition.

“approval of the information”

62. Various concerns were expressed about the reference in the definition to the concept of “approval of the information contained in the data message”. One concern was that the definition might inappropriately confuse legal and technical concepts. It was suggested that the definition stated in draft article 2 should confine itself to describing the technical characteristics of an electronic signature, for example along the lines of technical definitions adopted by the International Organization for Standardization (ISO). The

legal aspects of electronic signatures should be dealt with only in the operative provisions of the uniform rules, e.g. in draft article 6. A related concern was that the definition might insufficiently reflect the possibility that electronic signatures might be used without any intent of expressing subjective approval of information. In response to those concerns, it was pointed out that defining an electronic signature as capable of indicating approval of information amounted primarily to establishing a technical prerequisite for the recognition of a given technology as an electronic signature. The legal consequences of applying that technology for signature purposes were dealt with under other draft provisions of the uniform rules. It was also pointed out that the definition did not disregard the fact that technologies commonly referred to as “electronic signatures” could be used for purposes other than creating a legally-significant signature. The definition simply illustrated the focus of the uniform rules on the use of electronic signatures as functional equivalents of handwritten signatures. A suggestion was made that the reference to “approval of information” might be replaced with more general wording to indicate that an electronic signature should be capable of “meeting the legal requirements for a signature”. The prevailing view, however, was that the substance of subparagraph (a) should be retained. It was agreed that the draft guide to enactment should make it clear that the notion of “electronic signature” was intended to cover all uses of a handwritten signature for legal effect, the identification of the signatory and the intent to sign being no more than the smallest common denominator to the various approaches to “signature” found in the various legal systems, as already discussed in the context of the preparation of the Model Law. The draft guide should also explain the distinction between the legal notion of “signature” and the technical notion of “electronic signature”, a term of art which covered practices that did not necessarily involve the production of legally significant signatures. The draft guide should bring the attention of users to the risk of confusion that might result from the use of the same technical tool for the production of a legally meaningful signature and for other authentication or identification functions.

63. As a matter of drafting, it was agreed that the term “signatory” should be used instead of “signature holder”. After discussion, the Working Group decided that subparagraph (a) should be drafted along the lines of “Electronic signature means data in electronic form in, affixed to, or logically associated with, a data message, and that may be used to identify the signatory in relation to the data message and indicate the signatory’s approval of the information contained in the data message”. The text was referred to the drafting group.

Subparagraph (b)
(Definition of “enhanced electronic signature”)

64. Consistent with the approach taken by the Working Group at its previous session, it was generally agreed that the current structure of the uniform rules did not make it necessary to use a notion of “enhanced electronic signature” together with the wider notion of “electronic signature”, which could receive a more flexible interpretation under draft article 6. The Working Group decided that subparagraph (b) should be deleted.

Subparagraph (c)
(Definition of “certificate”)

65. A question was raised as to whether a definition of “certificate” was needed, in view of the fact that the meaning of “certificate” as used in the context of certain types of electronic signatures differed little from the general meaning of a document by which a person would confirm certain facts. It was pointed out, however, that the general notion of “certificate” might not exist in all legal systems or indeed in all languages. As a consequence, defining that term in the context of the uniform rules was particularly useful.

“information certifier”

66. As a matter of drafting, it was generally agreed that the term “certification service provider (CSP)” was commonly used in practice and should be preferred to “information certifier”, “supplier of certification services” or “certification authority”.

“ascertain the identity”

67. Doubts were expressed as to whether the definition should be limited in scope to cover only those certificates known as “identity certificates”. In view of the earlier decision by the Working Group that the notion of “identity” should be interpreted broadly so as to cover both designation by name and designation through an attribute of the signatory, it was widely felt that there was no need to limit the scope of the uniform rules to uses of identity certificates. While a certificate could be described generally as authenticating certain information contained in, or logically associated with the certificate, the Working Group agreed that the main function of a certificate in the context of electronic signatures was to provide certainty regarding the existence of a link between a given signature creation device (for example, a private cryptographic key or a biometric indicator) and a signatory. Such linking of a person with a signature creation device was a prerequisite for the operation of draft article 9. As to how that function should be expressed in the definition, doubts were expressed regarding the verb “ascertain”. A drafting suggestion was to define “certificate” as “a statement establishing a link between a signatory and a signature creation device, which allows confirmation of certain facts relating to an electronic signature”. In response to that suggestion, a widely shared view was that the link between the signature creation device and the signatory was not “established” by the certificate, since it was created when the signature creation device was generated. The purpose of the certificate was merely to recognize, show or confirm the link in question. In the context of that discussion, it was agreed that the notion of “signature creation device” should also be defined in draft article 2 (for continuation of the discussion, see below, paras. 70-76).

68. Various drafting improvements were suggested for subparagraph (c). A number of those suggestions included mentioning in the definition of “certificate” that the signature creation device should be “reliable”. It was widely felt, in response, that the reliability of the signature creation device (which was dealt with in the substantive provisions of the uniform rules) should be distinguished from the

reliability of the link recognized in the certificate. After discussion, the Working Group decided that subparagraph (c) should read along the lines of "Certificate means a data message or other record confirming the link between a signatory and a signature creation device". The text was referred to the drafting group.

Subparagraph (d)
(*Definition of "data message"*)

69. It was noted that the definition of "data message" in the uniform rules merely restated the corresponding definition in the Model Law. The Working Group decided that, to ensure consistent interpretation of the two texts, those definitions should be strictly identical. Subparagraph (d) was adopted unchanged. With a view to reflecting technical and commercial developments in the practice of electronic commerce, it was widely felt that "web-based commerce" should be mentioned in the section of the draft guide to enactment corresponding to that definition.

Proposed additional subparagraph
(*Definition of "signature creation device"*)

70. In continuation of its earlier discussion of the definition of "certificate" (see above, para. 67), the Working Group considered a possible definition of the notion of "signature creation device".

"signature creation device" or
"signature creation data"

71. As to the nature of the object to be defined, there was general agreement that only one term was needed to designate, throughout the uniform rules, those secret keys, codes, or other elements that, in the process of creating an electronic signature, were used to provide a secure link between the resulting electronic signature and the person of the signatory. For example, in the context of digital signatures relying on asymmetric cryptography, the core operative element that could be described as "linked to the signatory and to no other person" was the cryptographic key pair. In the context of electronic signatures based on biometric devices, the essential element would be the biometric indicator, such as a fingerprint or retina-scan data. It was widely felt that, in any event, the definition should cover only those core elements that should be kept confidential to ensure the quality of the signature process, to the exclusion of any other element which, although it might contribute to the signature process, could be disclosed without jeopardizing the reliability of the resulting electronic signature. For example, in the case of digital signatures, while both the public and the private key were linked to the person of the signatory, only the private key needed to be covered by the definition, since only the private key should be kept confidential and it was of the essence of the public key to be made available to the public.

72. As to the name of the element to be defined, a widely shared view was that "signature creation device" would appropriately designate the core confidential element on which the signature-creation process was based. However, a concern was expressed that using the term "device" might

inadvertently suggest that the defined element should be in the form of hardware, or other physical device. While it was explained that the common usage would define the word "device" as something non-material, such as "an arrangement, scheme, project" or "something devised for bringing about some end or result", the prevailing view was that, in the context of new technologies, the term "device" would probably not be interpreted as connoting the appropriate level of abstraction. The fact that existing international standards might describe "device" as "hardware or software" was not found sufficient to alleviate the above-stated concern, since the desired definition should not encompass any element (e.g. those pieces of hardware or software involved in a "hash function") that might be used in the signature-creation process but would not need to be kept strictly confidential. Among the elements not to be covered by the definition, it was pointed out that the text being electronically signed, although it also played an important role in the signature-creation process, should obviously not be subject to the same confidentiality as the information identifying the signatory. As possible alternatives to "device", the words "code" and "value" were suggested. After discussion, the Working Group decided that, for lack of a better term, the term "signature creation data" should be used.

"signature creation and signature verification"

73. A question was raised as to whether, alongside a definition of "signature creation data", a definition of "signature verification data" was needed. While the Working Group acknowledged that, particularly in the context of asymmetric cryptography, the signature-creation data (i.e. the private key) was distinct from the signature-verification data (i.e. the public key), it was generally found that draft articles 8 to 10 referred only to those confidential data used for the creation of the electronic signature. Accordingly, it was decided that no definition of "signature-verification data" was needed.

Uniqueness

74. As to the contents of a possible definition of "signature creation data", the following text was proposed: "Signature creation data means data which is unique to the signatory in the context in which it is used, and which can be used to create an electronic signature". Doubts were expressed as to whether a reference to "uniqueness" could convey the required meaning. The Working Group recalled its deliberations at earlier sessions regarding the concept of "uniqueness". It was pointed out that, in the context of the uniform rules, "uniqueness" should be interpreted as a relative concept. While the private key was unique to the signer, it could be used to produce several electronic signatures; the electronic signature itself might be unique to both the signer and the authenticated message; a hash function and a message digest would also be unique to the message, and yet they would not need to be kept confidential. With a view to alleviating some of the difficulties linked to that notion of "uniqueness", the following wording was suggested, among various possible wordings that borrowed from draft article 6: "Signature creation data means data which can be used to create an electronic signature and, in that context, is linked to the signatory and to no other per-

son". In the discussion of that suggestion, a more general concern was expressed that dealing with the exclusive link between the signature creation data and the signatory was a function of draft article 6, which should not be made part of the definition of "signature creation data". A proposal was made for a minimalist definition along the lines of "signature creation data means data used for the creation of an electronic signature". At that stage, doubts were expressed as to the usefulness of including in the uniform rules a definition that merely stated the obvious.

75. General preference was expressed for not having the definition and relying on draft article 6 to express the idea that the signature creation data should be linked to the signatory and to no other person. While it was generally agreed that the notion of "signature creation data" should be used throughout the text as a self-explanatory notion, a question was raised as to whether the reference in draft article 6(3) to "the means of creating the electronic signature" should be replaced by a reference to "the signature creation data". It was widely felt that, in the context of a general description of the means that were used at the time and for the purpose of creating the electronic signature, elements of data, hardware or software other than the core secret data envisaged in draft articles 8 to 10 might also need to be under the exclusive control of the signatory (for continuation of the discussion, see below, para. 144).

76. After discussion, the Working Group decided that no definition of "signature creation device" or "signature creation data" was needed. In the text of the uniform rules, the term "signature device" should be replaced by the term "signature creation data". In draft article 6, the reference to "the means of creating an electronic signature" should be maintained. The draft guide to enactment should make it clear that in the uniform rules, "signature creation data" was intended to cover only the private cryptographic key (or other confidential data linked to the identity of the signatory) that was used to create an electronic signature. Should other data (such as the text to be authenticated) be used in the process of creating the electronic signature (through a hash function or otherwise), those data should not be covered by the obligations set forth in draft article 8, since keeping those data confidential was not essential to guarantee the reliability of the electronic signature process. The text was referred to the drafting group.

Subparagraph (e)
(Definition of "signatory")

77. In line with its earlier decision to use the word "signatory" (see above, para. 63), the Working Group decided to remove the square brackets around that word and to delete all alternative expressions contained in subparagraph (e).

78. Noting its earlier decision to delete the definition of "enhanced electronic signature" (see above, para. 64), the Working Group decided to delete the word "enhanced" in subparagraph (e). In that connection, it was pointed out that, as the uniform rules no longer distinguished between electronic signatures and enhanced electronic signatures, the duties and obligations of signatories, relying parties and certification service providers set forth in the uniform rules applied with respect to all classes and types of certificates

and electronic signatures. Those duties and obligations, it was said, might be appropriate in connection with high-value certificates or electronic signatures of the type previously referred to as "enhanced electronic signatures". However, those duties and obligations might be excessive with respect to low-value certificates or electronic signatures offering a lesser degree of security, whose issuers and users should not be expected to have to comply with all the requirements of articles 8 and 9. One suggestion to counter that problem was to restrict the definition of "signatory" by limiting it to persons by whom or on whose behalf "legally required signatures" could be created.

79. The Working Group was generally of the view that the degree of trustworthiness offered by a certificate should normally be commensurate with the purposes for which the certificate was used and that certificates or electronic signatures sometimes used in practice were not always intended to be legally relevant. The example was given of situations where an electronic signature would be used for authenticating a browser. However, the Working Group, did not accept the proposed amendment to subparagraph (e), since the prevailing view was that it would not be appropriate to limit the concept of "signatory", which was used throughout the uniform rules, by reference to the purpose for which an electronic signature was used.

"can be created"

80. The view was expressed that, in practice, a person could not become a signatory before he or she had actually used the signature creation data to produce an electronic signature. Since the reference, in the definition, to a person by whom an electronic signature "can be created" only denoted the possibility or ability to create a signature, it would be more appropriate to use words such as "is created" or any other phrase of equivalent meaning.

81. In response, it was pointed out that draft article 8 established specific obligations for the signatory in respect of the contents of certificates and the use or condition of signature creation data, which were not necessarily connected, with the act of creating an electronic signature. Obligations such as the obligations to exercise reasonable care to avoid unauthorized use of the signature creation data (draft article 8(1)(a)) or to notify the relying party if the signature creation data was known to have been compromised (draft article 8(2)(i)), for instance, were relevant both before and after the electronic signature was created.

"by whom or on whose behalf"

82. The Working Group considered several questions raised in connection with the use of the phrase "by whom or on whose behalf" in subparagraph (e) and the implications that the use of such phrase had for the definition of "signatory", as used in the uniform rules.

83. Pursuant to one view, that phrase was not adequate in the context of subparagraph (e), since the quality of "signatory" was inherently that of the person that actually created the electronic signature, irrespective of whether that person acted on its own account, or on behalf of someone else. Tracing a parallel to the use of handwritten signatures,

it was pointed out that a person that signed a contract as an agent for another person was still regarded as the signatory of the contract, even though the contract was to become binding on the person whom he or she was representing.

84. Another view was that, in the context of the uniform rules, the deciding factor for conferring the quality of signatory upon a person was the attribution of the signature to that person, even though the signature was in fact generated by an agent. In that sense, the use of the phrase “by whom or on whose behalf” in subparagraph (e) was correct and should be retained. Another view was that the phrase should read “or by whose authority”. Yet another view, which took an intermediate position between the other interpretations, was that, in the context of communications by electronic means, the notion of signatory might need to be defined in a manner that encompassed both the person that actually generated the electronic signature and the person to whom the signature was attributed.

85. The analogy to handwritten signatures, it was stated, was in principle acceptable, but might not always be suitable for taking advantage of the possibilities offered by modern technology. In a paper-based environment, for instance, legal entities could not strictly speaking be signatories of documents drawn up on their behalf, because only natural persons could produce authentic handwritten signatures. Electronic signatures, in turn, could be conceived so as to be attributable to companies, or other legal entities (including governmental and other public authorities), and there might be situations where the identity of the person who actually generated the signature, where human action was required, might not be relevant for the purposes for which the signature was created. Recent measures to improve and modernize domestic tax collection and administration systems in some jurisdictions were already taking advantage of that possibility by assigning signature creation data to legal entities, rather than to the individuals acting on their behalf. The definition of “signatory” in the uniform rules, it was said, should be flexible enough to acknowledge those practices.

86. The Working Group considered at length the various views that had been expressed. In the context of that discussion, the Working Group generally agreed that, consistent with the approach taken in the Model Law, any reference in the uniform rules to a “person” should be understood as covering all types of persons or entities, whether physical, corporate or other legal persons. The Working Group was sympathetic to the need for affording a sufficient degree of flexibility to the definition so as not to pose obstacles to the use of electronic signatures in the manner most suitable in a paperless environment. The Working Group was nevertheless of the view that the notion of signatory for the purposes of the uniform rules could not be severed from the person or entity that actually generated the electronic signature, since a number of specific obligations of the signatory under the uniform rules were logically linked to actual control over the signature creation data. However, in order to cover situations where the signatory would be acting in representation of another person, the phrase “or on whose behalf” or another equivalent phrase, should be retained in the definition of “signatory”.

87. It was the understanding of the Working Group that the extent to which a person would be bound by an electronic signature generated “on its behalf” was a matter to be settled in accordance with the law governing, as appropriate, the legal relationship between the signatory and the person on whose behalf the signature was generated, on the one hand, and the relying party, on the other hand. That matter, as well as other matters pertaining to the underlying transaction, including issues of agency and other questions as to who bore the ultimate liability for failure by the signatory to comply with its obligations under article 8 (whether the signatory or the person represented by the signatory) were outside the scope of the uniform rules.

88. Concluding its deliberations on this topic, the Working Group decided that “signatory” should be defined as a person that holds signature creation data and acts either on its own behalf or on behalf of the person it represents, and referred subparagraph (e) to the drafting group.

Subparagraph (f)
(*Definition of “certification services provider”*)

89. As a matter of drafting, the Working Group decided to use the expression “certification services provider” instead of “information certifier”, “supplier of certification services” or “certification authority” (see above, para. 66). Noting also its earlier decision to delete the definition of “enhanced electronic signature” (see above, para. 64), the Working Group decided to delete the word “enhanced” in subparagraph (f).

90. The suggestion was made that, since the main functions of certification service providers that were relevant for the uniform rules were set out in draft article 9, and since the notion of certification service provider was not used elsewhere in the uniform rules, the definition was not needed and might be deleted. In support of that suggestion, it was said that the only additional element of practical significance contained in subparagraph (f) was the qualification of a certification service provider as a person or entity that provided those services “in the course of its business”. However, no separate provision was required only for expressing that qualification, since the same result might be achieved, for instance, by inserting the phrase “in the course of its business” at an appropriate place in the chapeau of draft article 9.

91. The Working Group was sensitive to the aim of economy of language in drafting the uniform rules. Nevertheless, the Working Group decided that, since subparagraph (e) defined the notion of “signatory”, the definition of certification service provider should be retained in order to ensure symmetry in the definition of the various parties involved in the operation of electronic signature schemes under the uniform rules.

“in the course of its business”

92. The Working Group considered various questions that were raised in connection with the meaning of the words “in the course of its business”, which was found to contain some ambiguity.

93. There was general agreement within the Working Group that a person or entity whose main activity was the provision of certification services, in particular the issuance of certificates, carried out that activity “in the course of its business” and should, therefore, be covered by the definition of certification service provider under the uniform rules. However, that formulation was felt to create some difficulties. The word “business” might not be broad enough to cover the commercial activities of public authorities or non-profit organizations. In addition, the duties of certification service providers under draft article 9 resulted from the performance of a variety of functions, not all of which were in the nature of certification (such as, for example, managing and maintaining a list of revoked certificates). Furthermore, certain of those ancillary or complementary functions might not be carried out by the certification service provider itself. In practice, a number of such functions might be contracted out to other persons or entities whose main activity might not be the provision of certification services.

Certification service provider and subcontractors

94. The question was asked whether, in such cases, only the issuer of certificates would become a “certification service provider” for the purposes of the uniform rules, or whether all subcontractors and other persons or entities should come under the definition of subparagraph (f). The latter situation, it was said, might have undesirable consequences, since the provisions of article 9 were developed essentially for persons or entities whose main activity was the provision of certification services.

95. In considering that question, the Working Group took the view that the possibility of multiple parties performing functions relevant for the purposes of draft article 9 did not pose a problem for the definition of certification service provider. When other parties performed services in connection with certificates issued by a certification service provider, they did so either as independent certification service providers of their own right, or as subcontractors of a certification service provider. In the first case, those other parties would be automatically subject to the provisions of article 9. In the second case, they would be regarded as agents of the certification service providers, and the manner in which their duties and liability under draft article 9 was allocated was a matter to be dealt with in their contractual arrangements with the certification service provider. Neither of those cases would, in the view of the Working Group, affect the rights of the relying party under draft article 9.

Issuance of certificates on an habitual or an occasional basis

96. The Working Group focused its attention on other questions raised by the phrase “in the course of its business”. In favour of retaining that phrase in subparagraph (f), it was said that a certain element of regularity in the performance of certification services was needed, in order for a person or entity to be required to comply with article 9. Without that qualification in subparagraph (f) the definition of certification service provider would encompass even persons or entities who only occasionally or

incidentally provided certification services or issued certificates, as in some of the examples given.

97. The countervailing view was that, in practice, the likelihood that a person or entity might be in a position to provide certification services sporadically was not a significant one, in view of the cost entailed by equipping itself for that purpose. If excluding such occasional providers of certification services was the only purpose of the phrase “in the course of its business”, that phrase had little practical value, and could be deleted. Moreover, if the intention was to circumscribe the application of the uniform rules to the use of certificates and electronic signatures in particular situations, alternative wording should be used, since the phrase in question was not sufficiently clear for that purpose.

Issuance of certificates as a main or a secondary activity

98. Indeed, one possible interpretation of the phrase “in the course of its business” might be that the uniform rules applied only to those entities whose main activity was the provision of certification services. Another interpretation might be that a person or entity that issued certificates would still be regarded as a certification service provider, for the purposes of the uniform rules, even if its main activity was not the provision of certification services, as long as such person or entity issued the certificates “in the course of its business”. Examples brought to the attention of the Working Group included companies that issued certificates that their employees might use in dealing with social security and welfare bodies; health insurance companies that issued certificates to be used by their customers in dealings with third parties; or governmental organs that certified public keys used to verify digital signatures created by other governmental agencies. If the first interpretation of the words “in the course of its business” in subparagraph (f) was correct, none of those companies, insurers or governmental organs could be regarded as certification service providers, since the provision of certification services was not their main activity. If, in turn, the second interpretation was correct, those companies, insurers or governmental organs might well qualify as certification service providers, since the issuance of certificates occurred “in the course of their business”.

99. After an extensive debate on the matter, and having considered the various views that had been expressed, the Working Group decided that the phrase “in the course of its business” should be deleted. In reaching that decision, the Working Group noted that, pursuant to draft article 1, the uniform rules would apply to the use of electronic signatures in the context of commercial transactions. It was the understanding of the Working Group that, in view of that limitation in the scope of application of the uniform rules, entities that issued certificates for internal purposes and not for commercial purposes would not fall under the category “certification service providers” for the purposes of the uniform rules. That interpretation should be reflected clearly in the draft guide to enactment of the uniform rules.

100. In the deliberations, it was decided that the definition of “certification service provider” should emphasize

that, in all cases, the certification service provider as defined would have to provide certification services, possibly together with other services. The Working Group concluded its deliberations on the matter by deciding that the current definition of “information certifier” should be replaced with a definition along the following lines: “Certification service provider” means a person that issues certificates and may provide other services related to electronic signatures.” The provision was referred to the drafting group.

*Proposed definition of
“recognized international standards”*

101. The suggestion was made that the uniform rules should include a definition of “recognized international standards”, an expression which was used in connection with the recognition of foreign certificates and electronic signatures (see above, paras. 46-49). The following wording was proposed:

“Recognized international standards means statements of accepted technical, legal or commercial practices, whether developed by the public or private sector [or both], of a normative or interpretative nature which are generally accepted as applicable internationally. Without limiting its generality, such standards may be in the form of requirements, recommendations, guidelines, codes of conduct, or statements of either best practices or norms.”

102. It was pointed out that the proposed definition was consistent with the understanding thus far given by the Working Group to the term “standard”, which had been interpreted in a broad sense so as to include industry practices and trade usages, texts emanating from international governmental or non-governmental organizations.

103. While strong support was expressed to the proposed definition, the prevailing view was that the matter should best be left for the draft guide to enactment, rather than to the body of the uniform rules. It was pointed out that some jurisdictions had established rules governing the hierarchy of international norms, which often gave precedence, in case of conflict, to norms contained in international agreements or which emanated from public international organizations. While it might be useful to remind judges and other authorities involved in the application of the uniform rules of the importance of taking duly into account the standards developed by private sector organizations, it would not be appropriate for the uniform rules to appear to interfere with the rules of the enacting State on the hierarchy of sources of law. It was pointed out, in that connection, that the notion of “general principles”, which was used in draft article 4(2) was not the object of a specific definition. That approach was found to be consistent with the approach that had been taken in article 3(2) of the Model Law, which used the same expression, but left the explanation of its meaning to its guide to enactment. Furthermore, the proposed definition left open the question of what constituted “recognition” and of whom such recognition was required.

104. Having considered the different views that were expressed, the Working Group decided that the proposed

definition should not be included in the text of the uniform rules, but that an appropriate explanation of the meaning of the expression “recognized international standards”, which captured the essential elements of the proposed definition, should be added to the current wording of the draft guide to enactment.

Proposed definition of “relying party”

105. The proposal was made that the uniform rules should contain a definition of the term “relying party”, which although used in various places in the uniform rules, was not frequently used in many jurisdictions.

106. Various objections were expressed on that proposal in view of the perceived difficulty of formulating it with the level of conciseness and generality that would be required to cover all situations in which a party might rely on an electronic signature or on the information contained in a certificate.

107. The Working Group took the view, however, that such a definition would be useful in order to ensure symmetry in the definition of the various parties involved in the operation of electronic signature schemes under the uniform rules. The Working Group decided that “relying party” should be defined as “a person that may act on the basis of a certificate or an electronic signature” and referred the matter to the drafting group.

108. In the context of that discussion, a concern was expressed that, in certain legal systems, the adopted wording (“a person may act”) would insufficiently cover the situation where an omission (as opposed to an “action”) would be the result of the party’s reliance on the certificate or the electronic signature. It was proposed that the words “a person that may act or commit an omission” should replace the words “a person that may act” in the definition of “relying party”. After discussion, however, it was generally agreed that the above-mentioned concern would sufficiently be taken care of if the draft guide to enactment was to make it clear that, for the purposes of that definition, “act” should be interpreted broadly to cover not only a positive action but also an omission.

109. Having concluded its deliberations regarding draft articles 2 and 12, the Working Group proceeded to review the remainder of the provisions contained in the uniform rules to consider matters that had remained unsettled at the end of the thirty-sixth session of the Working Group. Possible changes to be introduced in the text as a result of the decisions taken at the current session were also discussed.

Article 5. Variation by agreement

110. The text of draft article 5 as considered by the Working Group was as follows:

“These Rules may be derogated from or their effect may be varied by agreement, unless that agreement would not be valid or effective under the law of the enacting State [or unless otherwise provided for in these Rules].”

111. The Working Group noted that the substance of draft article 5 had been adopted by the Working Group at its thirty-sixth session (New York, 14-25 February 2000), except for the words within square brackets “unless otherwise provided in these Rules”, which were retained in the draft article pending a decision as to whether the uniform rules would contain any mandatory provision (A/CN.9/467, para. 40).

112. Having considered the matter once more, the Working Group decided to delete the words within square brackets, as it was generally agreed that the uniform rules, as currently formulated, did not contain any mandatory provision. It was understood that the principle of party autonomy applied also in the context of article 13(1). Therefore, although the courts of the enacting State or authorities responsible for the application of the uniform rules should not deny or nullify the legal effects of a foreign certificate only on the basis of the place where the certificate was issued, article 13(1) did not limit the freedom of the parties to a commercial transaction to agree on the use of certificates that originated from a particular place.

113. In the context of that discussion, a concern was expressed that the effect of draft article 5, if read in combination with draft article 6(1), might be inconsistent with that of the corresponding provisions of the Model Law (i.e. articles 4(2) and 7(1) of the Model Law). It was stated that if the uniform rules were to provide for broad recognition of contractual derogations, they might contradict the Model Law, which provided for limited recognition of party autonomy with respect to mandatory requirement for handwritten signatures that might exist in applicable law. In response to that concern, it was explained that the recognition of contractual derogations to the uniform rules under draft article 5 was equally subject to the mandatory rules of applicable law, even if the wording of the uniform rules was not strictly modelled on that of the Model Law in that respect.

Article 9. *Conduct of the certification service provider*

114. The text of draft article 9 as considered by the Working Group was as follows:

“(1) A supplier of certification services shall:

“(a) act in accordance with representations made by it with respect to its policies and practices;

“(b) exercise reasonable care to ensure the accuracy and completeness of all material representations made by it that are relevant to the certificate throughout its lifecycle, or which are included in the certificate;

“(c) provide reasonably accessible means which enable a relying party to ascertain from the certificate:

“(i) the identity of the supplier of certification services;

“(ii) that the person who is identified in the certificate had control of the signature device at the time of signing;

“(iii) that the signature device was operational on or before the date when the certificate was issued;

“(d) provide reasonably accessible means which enable a relying party to ascertain, where relevant, from the certificate or otherwise:

“(i) the method used to identify the signatory;

“(ii) any limitation on the purpose or value for which the signature device or the certificate may be used;

“(iii) that the signature device is operational and has not been compromised;

“(iv) any limitation on the scope or extent of liability stipulated by the supplier of certification services;

“(v) whether means exist for the signatory to give notice that a signature device has been compromised;

“(vi) whether a timely revocation service is offered;

“(e) provide a means for a signatory to give notice that a signature device has been compromised, and ensure the availability of a timely revocation service;

“(f) utilize trustworthy systems, procedures and human resources in performing its services.

“(2) A supplier of certification services shall be liable for its failure to satisfy the requirements of paragraph (1).”

General remarks

115. The Working Group was reminded of its earlier discussion concerning the implications of the deletion of the definition of “enhanced electronic signature”, and of the concerns that had been expressed that the duties and obligations of signatories, relying parties and certification service providers now applied with respect to all classes and types of certificates and electronic signatures, irrespective of their particular level of reliability (see above, paras. 78 and 79). That situation, it was said, was unsatisfactory, since it was not reasonable to subject so-called “low value certificates” (which were merely declaratory in nature and were not intended to support the creation of legally recognized electronic signatures), to substantially the same regime as that governing the type of certificates that would be used in connection with electronic signatures meant to satisfy the requirements of draft article 6.

116. In order to avoid those difficulties, the Working Group was urged to adjust the sphere of application of draft articles 8 and 9 by linking those provisions to draft article 6. It was proposed that opening clauses should be added in draft articles 8 and 9 to the effect that they would only apply where the signatory intended to create an electronic signature that complied with draft article 6 or when a certification service provider rendered services intended to support the creation of such an electronic signature.

117. The Working Group was generally in agreement with the view that it would not be appropriate to require from a signatory or a certification service provider a degree of diligence or trustworthiness that bore no reasonable relationship to the purposes for which the electronic signature or certificate was used. Although the view was expressed that the duties and obligations provided in draft article 9 could reasonably be expected to be complied with by any

certification service provider, and not only those who issued “high value” certificates, the Working Group favoured a solution which linked the obligations set forth in both articles 8 and 9 to the production of legally-significant electronic signatures.

118. Having considered various options, the Working Group expressed a preference for formulations that avoided reference to the intention of the signatory to create a legally-recognized electronic signature or to create a signature that produced legal effects. It was generally felt that the signatory’s intention might not be easily ascertained in concrete situations. It was further pointed out that there were situations in which a signature might become legally relevant despite the absence of a corresponding intention on the part of the signatory. Moreover, the question of whether and to what extent a particular type of electronic signature had legal effects in a given jurisdiction was a matter for the applicable law and not merely a function of the signatory’s intention.

119. After deliberation, the Working Group decided that a phrase along the following lines should be added at the beginning of draft article 8: “Where signature creation data can be used to create an electronic signature that has legal effect [...]”. The Working Group further decided that a phrase such as “Where a certification service provider provides services to support an electronic signature that may be used for legal effect as a signature [...]” should be added at the beginning of draft article 9. The Working Group referred the matter to the drafting group. It was stated that the draft guide to enactment should mention that the additional phrases were not intended to create new types of legal effects for signatures.

Subparagraph (1)(c)

120. In connection with subparagraph (1)(c)(ii), the view was expressed that it would not be appropriate to require the certification service provider to offer “reasonably accessible means which enabled a relying party to ascertain from the certificate that the person who is identified in the certificate has control of the signature creation data at the time of signing”. It was pointed out that a certification service provider could only be expected to state the identity of the holder of the signature creation device, but had no means of establishing whether that person was in fact in control of the signature creation data at the time of signing. If the wording of subparagraph (1)(c)(ii) was retained, that provision could be construed as establishing a strict liability of the certification service provider for damage sustained by the relying party as a result of the misuse of a signature creation device by an unauthorized person. Therefore, the proposal was made that the current words in subparagraph (1)(c)(ii) should be deleted and replaced with “the identity of the signatory at the time the certificate was issued”.

121. A countervailing view was that the proposed amendment was not necessary, since the rule contained in subparagraph (1)(c)(ii) did not require the certification service provider to guarantee that the person who was identified in the certificate had control of the signature creation data at

the time of signing. In fact, subparagraph (1)(c)(ii) only required the certification service provider to offer “reasonably accessible means” which enabled the relying party to establish those facts. The provision, as currently drafted, was a logical consequence of the reliability test established in draft article 6(3)(b) and represented the only practical avenue offered to the relying party to assess the reliability of an electronic signature.

122. In considering those views, the Working Group was sympathetic to the objective of offering the relying party the best possible means, as appropriate in the circumstances, for assessing the reliability of an electronic signature. The most important of those means was indeed the identity of the signatory, which was related to the actual control of the signature creation data. However, it was generally felt that a certification service provider could only be expected to state the identity of the person who held the signature creation data at the time a certificate was issued. For this purpose, the Working Group did not treat the word “control” as differing in meaning from the word “hold”. Subparagraph (1)(c)(ii) was not intended to require certification service providers to develop means of tracing a signature creation device after a certificate was issued or to control the conduct of the holder of such data. Such an obligation, even if it were feasible in practice, would place an unreasonable burden upon certification service providers.

123. The Working Group recognized, however, that the current wording of the subparagraph might lend itself to misunderstanding and decided, after deliberation, that it should be reformulated so as to refer to the “signatory” having “control of the signature creation data at the time when the certificate was issued”. With that understanding, the matter was referred to the drafting group.

Subparagraph (1)(d)

124. It was pointed out that the signatory’s duty to give notice regarding compromised signature creation data under draft article 8(b) covered both cases where the signatory knew that the signature creation data had been compromised and cases where the circumstances known to the signatory gave rise to a substantial risk that the signature data might have been compromised. Subparagraph (1)(d)(v), however, only required the certification service provider to offer reasonably accessible means which enabled a relying party to ascertain whether there were means for the signatory to give notice that a signature device had been compromised. Thus, the current wording of draft article 9(1)(d)(v) did not appear to cover all situations referred to in draft article 8(1)(b). Noting that the same lack of symmetry existed between draft article 9(e) and draft article 8(1)(b), the Working Group decided that both subparagraphs (d)(v) and (e) should be aligned with draft article 8(1)(b), and referred the matter to the drafting group.

125. In connection with subparagraph (1)(d), the concern was expressed that the provision might impose upon the certification service provider the obligation to maintain lists of possibly compromised signature creation data or to issue notices in connection with notices to that effect received from signatories. It was pointed out that, in practice, certifications services providers maintained lists of revoked

certificates, but not other types of lists as might be implied in subparagraph (1)(b). In response, it was recalled that paragraph (1) only required the certification service provider to offer reasonably accessible means which enabled a relying party to ascertain, where relevant, from the certificate or otherwise whether means existed for a signatory to give the notices in question. The only obligation created by that provision was to provide information as to the existence, if any, of those means, which was further made clear by the use of the words “where relevant”.

Subparagraph (1)(e)

126. The view was expressed that subparagraph (1)(e) appeared to suggest that a certification service provider, regardless of the category of certificates it issued, was under the obligation to provide means for the signatory to give notice that a signature creation data had been compromised, and to ensure the availability of a timely revocation service. If that was so, subparagraph (1)(e) was not entirely consistent with subparagraph (1)(d)(v) and (vi), from which it could be inferred that such facilities might not always be provided.

127. The Working Group was of the view that subparagraph (1)(e) was not intended to apply to certificates such as transactional certificates (which are one-time certificates) or other types of certificates that might not be subject to revocation. Thus, the Working Group agreed that the obligations of the certification service provider under subparagraph (1)(e) were not absolute, but applied only where such services were made available to the signatory, whether directly by the certification service provider or indirectly through an intermediary. It was therefore decided that the drafting group should revise the language of subparagraph (1)(e) with a view to ensuring its consistency with subparagraph (1)(d)(v) and (vi).

Article 10. *Trustworthiness*

128. The text of draft article 10 as considered by the Working Group was as follows:

“[In determining whether and the extent to which any systems, procedures and human resources utilized by a supplier of certification services are trustworthy, regard shall be had to the following factors:

“(a) financial and human resources, including existence of assets;

“(b) quality of hardware and software systems;

“(c) procedures for processing of certificates and applications for certificates and retention of records;

“(d) availability of information to signatories identified in certificates and to potential relying parties;

“(e) regularity and extent of audit by an independent body;

“(f) the existence of a declaration by the State, an accreditation body or the supplier of certification services regarding compliance with or existence of the foregoing; and

“(g) any other relevant factor.]”

129. The Working Group engaged in a discussion as to whether article 10 should be retained in the body of the uniform rules, or whether the substance of the provision should be included in the draft guide to enactment.

130. In favour of retaining draft article 10, it was stated that the provision offered useful guidance to assist with the interpretation of the notion of “trustworthy systems, procedures and human resources” in article 9(1)(f). It was also pointed out that a similar list, which had originally been contained in an earlier version of draft article 12, had been deleted by the Working Group, among other reasons because its elements were already contained in draft article 10. If the draft article, too, was deleted the courts of the enacting State and other authorities responsible for the application of the uniform rules would be left with no guidance to assess whether, in a given case, the requirements of article 9(1)(f) had been met.

131. In favour of removing the substance of the draft article and placing it in the draft guide to enactment, it was stated that the draft article merely elaborated on a matter dealt with only in draft article 9(1)(f) and nowhere else in the uniform rules. Furthermore, the elements listed in the draft article set a standard of trustworthiness which, while appropriate in connection with the type of electronic signatures previously referred to as “enhanced electronic signatures”, might be too high for issuers of low-value certificates.

132. The Working Group noted that draft article 10 contained a non-exhaustive list of factors to be taken into account in determining trustworthiness. That list was intended to provide a flexible notion of trustworthiness, which could vary in content depending upon what was expected of the certificate in the context in which it was created. In view of the flexible formulation used in the draft article, the standard set therein provided a reasonable level of trustworthiness and was not as stringent as the standards set in some jurisdictions for assessing the trustworthiness of persons or entities that issued certificates to be used in connection with the type of electronic signatures previously referred to by the Working Group as “enhanced electronic signatures”. Moreover, the amendments that had been introduced by the Working Group in the chapeaux of draft articles 8 and 9 (see above, paras. 117-119) had already taken into account the particular situation of certification service providers that issued low-value certificates and for whom the requirements of draft articles 9 and 10 might be excessive.

133. The Working Group concluded its deliberation by deciding to remove the square brackets around draft article 10 and requested the drafting group to consider whether, for ease of reading, the provision should be retained as a separate article, or whether it should be incorporated into draft article 9. With a view to emphasizing the non-exhaustive nature of the list set forth in draft article 10, it was decided that the words “regard shall be had” should be replaced by the words “regard may be had”, while the conjunction “or” should be substituted for “and” at the end of subparagraph (f).

C. Form of the instrument

134. Having concluded its consideration of the individual provisions contained in the uniform rules, the Working Group proceeded to consider the appropriate form that should be given to the rules.

135. The Working Group noted that, in the course of the preparation of the uniform rules, different approaches had been suggested as to what the form might be, which included contractual rules, legislative provisions, or guidelines for States considering enacting legislation on electronic signatures. The Working Group also noted that it had been agreed as a working assumption that the uniform rules should be prepared as legislative rules with commentary, and not merely as guidelines (see A/CN.9/437, para. 27; A/CN.9/446, para. 25; and A/CN.9/457, paras. 51 and 72). Since no suggestion had been made that the uniform rules should take the form of an international convention, the options offered for the consideration of the Working Group, at the current stage, were essentially to present the instrument as a model law, to retain the denomination "uniform rules", or to use the title "model legislative provisions".

136. In favour of retaining the denomination "uniform rules", or using a title such as "model legislative provisions", it was recalled that the uniform rules had been prepared on the assumption that they should be directly derived from article 7 of the Model Law and should be considered as a way to provide detailed information as to the concept of a reliable "method used to identify" a person and "to indicate that person's approval" of the information contained in a data message (see A/CN.9/WG.IV/WP.71, para. 49). Such a denomination would facilitate understanding of the relationship between the uniform rules and the Model Law, as well as the incorporation of the uniform rules in the legal systems of enacting States. Indeed, the relationship between the uniform rules and the Model Law was analogous to the relationship that existed in many legal systems between a statute and its implementing regulations.

137. In favour of calling the instrument a "model law", it was said that the title "rules", as used in the practice of UNCITRAL, had thus far been reserved to instruments of a contractual nature which, rather than being addressed to legislators, were offered to parties for incorporation into their contracts. Prominent examples were the UNCITRAL Arbitration Rules (1976) and the UNCITRAL Conciliation Rules (1980). To the extent that the uniform rules represented a legislative text that was recommended to States for adoption as part of their national law, the title "model law" would be more appropriate. The word "law", in that context, was not equivalent to "statute", and did not express a recommendation concerning the form or hierarchy of the instrument which each enacting State might choose for enacting it. Those States that had already enacted general statutes on electronic commerce or that wished to do so, but preferred to issue regulations on electronic signatures under the authority of such general statutes, would in no way be hindered in proceeding as they saw fit.

138. After considering the various options, the Working Group decided to suggest to the Commission that the instrument, once adopted, should bear the title "UNCITRAL Model Law on Electronic Signatures".

D. Relationship with the UNCITRAL Model Law on Electronic Commerce

139. The Working Group was reminded of the close relationship between the draft Model Law on Electronic Signatures, and the UNCITRAL Model Law on Electronic Commerce, in particular with article 7 of the latter text. In that connection, the view was expressed that the Working Group should consider ways in which that relationship might be highlighted, with a view to avoiding the appearance that the two instruments were entirely unrelated to one another.

140. One such possibility might be to incorporate the provisions of the draft Model Law on Electronic Signatures in an extended version of the Model Law, for example to form a new part III of the Model Law. However, that possibility was discarded by the Working Group in view of the practical difficulty of combining the two instruments in one single text.

141. Another possibility considered by the Working Group was to formulate a preamble, which would clearly state that the Model Law on Electronic Signatures had been prepared by the Commission to implement article 7 of the Model Law on Electronic Commerce. While the Working Group saw some attractiveness in the proposal, it was decided that a preamble might not be necessary, if its sole content was a statement of that nature.

142. The Working Group noted that, as was customary for most instruments produced by the Commission, the Model Law on Electronic Commerce, in its published version, was preceded by a text reproducing the resolution of the General Assembly in which the Assembly, inter alia, recommended that all States should give favourable consideration to the Model Law when they enacted or revised their laws. As it was expected that the General Assembly might wish to adopt a similar resolution in respect of the Model Law on Electronic Signatures, following its finalization and adoption by the Commission, the Working Group was of the view that such a resolution might offer an appropriate context for highlighting the relationship between the two model laws.

E. Report of the drafting group

143. Having completed its consideration of the substance of the draft provisions of the draft Model Law, the Working Group requested the secretariat to establish a drafting group to review the entire text with a view to ensure consistency between the various draft articles in the various language versions.

144. In reviewing the report of the drafting group, the Working Group noted that, consistent with the decision taken by the Working Group with respect to the definition of "signature creation data" (see above, paras. 75 and 76), the drafting group had maintained the reference to "the means of creating the electronic signature in draft article 6(3)(a) and (b)". Doubts were expressed as to whether maintaining such a dual terminology was necessary. Having given in-depth consideration to both subparagraphs (a)

and (b) of draft article 6, the Working Group came to the conclusion that, at least in the context of subparagraph (a), there was no inconvenience in replacing the term “means of creating the electronic signature” by “signature creation data”, since the signature creation data was precisely the factor used to establish the link between the electronic signature and the person of the signatory. The situation under subparagraph (b) was more difficult. It was widely understood that, at the time of signing, the reliability of the electronic signature would depend not only on the signatory having control of the signature creation data (e.g. its private key) but also on control of the hardware and software environment that came into play when applying the signature creation data. In that context, a reference to such a concept as “signature creation device” (or a broad interpretation of the notion of “signature creation data”) might be justified to reflect the fact that the signature creation data and the environment in which they were applied to create the electronic signature were equally critical to the reliability of the signature-creation process. While that fact was largely admitted, the Working Group was mindful of the difficulty that might be created if the notion of “signature creation data” were to be given a broad interpretation in the context of draft article 6(3)(b) and a narrow interpretation in the remainder of the draft Model Law. After discussion, the Working Group decided that the term “signature creation data” should be used throughout the uniform rules, including draft article 6(3)(a) and (b), and should be given consistently the narrow interpretation decided upon in the earlier part of the discussion (see above, para. 76). As a reason for not covering in draft article 6(3)(b) the hardware and software environment in which the signature creation data were applied, it was stated that the signatory could be expected to exercise control over the signature creation data but not necessarily over its hardware and software environment.

III. DRAFT GUIDE TO ENACTMENT

A. General remarks

145. The Working Group expressed overall satisfaction with the structure and contents of the draft guide to enactment contained in documents A/CN.9/WG.IV/WP.86 and Add.1.

146. Various views were expressed as to the appropriateness of maintaining in the draft guide a relatively long account of the history of the preparation of the draft Model Law. One view was that such a historical report should be deleted as unnecessary. Another view was that its length should be considerably reduced. Yet another view was that it should be placed in an annex to the document. A widely shared view, however, was that, in a number of countries, such a record of the history would be regarded as useful by legislators, legal scholars and other users of the text. After discussion, the Working Group decided that the section concerning the history of the draft Model Law should be maintained in its current form.

147. A similar debate took place regarding the section of the draft guide dealing with the description of PKI issues.

The view was expressed that the technology described in the draft guide might become rapidly obsolete. Placing too much emphasis on the technological background against which the draft Model Law had been prepared, might adversely affect the ability of the instrument to stand the test of time. However, the widely prevailing view was that, while the draft Model Law had been prepared in technologically-neutral terms, precisely with a view to reinforcing its durability, it was important to provide its readers with a somewhat detailed view of the technical environment that prevailed at the time when it was prepared. It was also felt that another reason for maintaining in the draft guide a comprehensive description of the technical environment of the draft Model Law was to make such information broadly available in those parts of the world where potential users of the draft Model Law and the draft guide might not be expected to be familiar with the technology and its state-of-the-art developments. After discussion, the Working Group decided that the various parts of the draft guide dealing with technology should be maintained in their current form. The possibility of introducing additional explanations might be considered by the secretariat when revising the draft guide, with a view to making it abundantly clear that the draft Model Law was intended by its authors to offer sufficient flexibility to remain useful through some of the foreseeable technological changes.

B. Specific remarks

148. For lack of sufficient time, the Working Group did not engage in a detailed review of the various paragraphs of the draft guide. However, suggestions were made for certain changes, as reported below.

149. Regarding paragraph 32 of document A/CN.9/WG.IV/WP.86, it was generally felt that it would be misleading to suggest that, in the preparation of the draft Model Law, the Working Group had not received sufficient information as to the technical and legal implications of using “signature” devices relying on techniques other than public-key cryptography. It was recalled that numerous presentations had been made by experts regarding, for example, electronic signatures based on biometrics and other non-PKI-based technologies. After discussion, the Working Group decided that paragraph 32 should be deleted.

150. In paragraph 30 of document A/CN.9/WG.IV/WP.86, it was agreed that the words “other models are conceivable” should be replaced by “other models are already commonly used in the marketplace”. In paragraphs 31 and 81 a sentence should be added along the following lines: “Other techniques involve the use of personal identification numbers (PINs), digitized signatures, and other methods, such as clicking an OK-box”.

151. A suggestion was made for inclusion after paragraph 26 of a new paragraph as follows: “It should be noted that some countries consider that the legal issues related to the use of electronic signatures have already been solved by the UNCITRAL Model Law on Electronic Commerce, and do not plan on adopting further rules on electronic signatures until market practices in this new area are better established”. While the suggested text was found generally acceptable as

a statement of the legislative policy followed in some States, the Working Group generally agreed that appropriate wording should be added to the suggested new paragraph to describe the benefits expected from enactment of the draft Model Law and encourage States to adopt it alongside the UNCITRAL Model Law on Electronic Commerce.

152. With respect to paragraph 22 of document A/CN.9/WG.IV/WP.86/Add.1, the view was expressed that the

draft guide should reflect the practices that involved the use of “split keys”, i.e. situations where a single key was operated by two or more persons whose joint action was necessary to make the signature creation data operational. It was generally agreed that a sentence should be added to paragraph 22 along the following lines: “Where a single key is operated by more than one person in the context of a “split-key” or other “shared-secret” scheme, reference to “the signatory” means a reference to those persons jointly”.

ANNEX

DRAFT UNCITRAL MODEL LAW ON ELECTRONIC SIGNATURES

(as approved by the UNCITRAL Working Group on Electronic Commerce at its thirty-seventh session, held at Vienna from 18 to 29 September 2000)

Article 1. *Sphere of application*

This Law applies where electronic signatures are used in the context* of commercial** activities. It does not override any rule of law intended for the protection of consumers.

Article 2. *Definitions*

For the purposes of this Law:

(a) “Electronic signature” means data in electronic form in, affixed to, or logically associated with, a data message, which may be used to identify the signatory in relation to the data message and indicate the signatory’s approval of the information contained in the data message;

(b) “Certificate” means a data message or other record confirming the link between a signatory and signature creation data;

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

(d) “Signatory” means a person that holds signature creation data and acts either on its own behalf or on behalf of the person it represents;

(e) “Certification service provider” means a person that issues certificates and may provide other services related to electronic signatures;

(f) “Relying party” means a person that may act on the basis of a certificate or an electronic signature.

*The Commission suggests the following text for States that might wish to extend the applicability of this Law:

“This Law applies where electronic signatures are used, except in the following situations: [...]”

**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.

Article 3. *Equal treatment of signature technologies*

Nothing in this Law, except article 5, shall be applied so as to exclude, restrict or deprive of legal effect any method of creating an electronic signature that satisfies the requirements referred to in article 6 (1) or otherwise meets the requirements of applicable law.

Article 4. *Interpretation*

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

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

Article 5. *Variation by agreement*

The provisions of this Law may be derogated from or their effect may be varied by agreement, unless that agreement would not be valid or effective under applicable law.

Article 6. *Compliance with a requirement for a signature*

(1) Where the law requires a signature of a person, that requirement is met in relation to a data message if an electronic signature is used which is as reliable as was appropriate for the purpose for which the data message was generated or communicated, in the light of all the circumstances, including any relevant agreement.

(2) Paragraph (1) applies whether the requirement referred to therein is in the form of an obligation or whether the law simply provides consequences for the absence of a signature.

(3) An electronic signature is considered to be reliable for the purpose of satisfying the requirement referred to in paragraph (1) if:

(a) the signature creation data are, within the context in which they are used, linked to the signatory and to no other person;

(b) the signature creation data were, at the time of signing, under the control of the signatory and of no other person;

(c) any alteration to the electronic signature, made after the time of signing, is detectable; and

(d) where a purpose of the legal requirement for a signature is to provide assurance as to the integrity of the information to which

it relates, any alteration made to that information after the time of signing is detectable.

(4) Paragraph (3) does not limit the ability of any person:

(a) to establish in any other way, for the purpose of satisfying the requirement referred to in paragraph (1), the reliability of an electronic signature; or

(b) to adduce evidence of the non-reliability of an electronic signature.

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

Article 7. Satisfaction of article 6

(1) [Any person, organ or authority, whether public or private, specified by the enacting State as competent] may determine which electronic signatures satisfy the provisions of article 6.

(2) Any determination made under paragraph (1) shall be consistent with recognized international standards.

(3) Nothing in this article affects the operation of the rules of private international law.

Article 8. Conduct of the signatory

(1) Where signature creation data can be used to create a signature that has legal effect, each signatory shall:

(a) exercise reasonable care to avoid unauthorized use of its signature creation data;

(b) without undue delay, notify any person that may reasonably be expected by the signatory to rely on or to provide services in support of the electronic signature if:

- (i) the signatory knows that the signature creation data have been compromised; or
- (ii) the circumstances known to the signatory give rise to a substantial risk that the signature creation data may have been compromised;

(c) where a certificate is used to support the electronic signature, exercise reasonable care to ensure the accuracy and completeness of all material representations made by the signatory which are relevant to the certificate throughout its life-cycle, or which are to be included in the certificate.

(2) A signatory shall be liable for its failure to satisfy the requirements of paragraph (1).

Article 9. Conduct of the certification service provider

(1) Where a certification service provider provides services to support an electronic signature that may be used for legal effect as a signature, that certification service provider shall:

(a) act in accordance with representations made by it with respect to its policies and practices;

(b) exercise reasonable care to ensure the accuracy and completeness of all material representations made by it that are relevant to the certificate throughout its life-cycle, or which are included in the certificate;

(c) provide reasonably accessible means which enable a relying party to ascertain from the certificate:

- (i) the identity of the certification service provider;
- (ii) that the signatory that is identified in the certificate had control of the signature creation data at the time when the certificate was issued;
- (iii) that signature creation data were valid at or before the time when the certificate was issued;

(d) provide reasonably accessible means which enable a relying party to ascertain, where relevant, from the certificate or otherwise:

- (i) the method used to identify the signatory;
- (ii) any limitation on the purpose or value for which the signature creation data or the certificate may be used;
- (iii) that the signature creation data are valid and have not been compromised;
- (iv) any limitation on the scope or extent of liability stipulated by the certification service provider;
- (v) whether means exist for the signatory to give notice pursuant to article 8 (1) (b);
- (vi) whether a timely revocation service is offered;

(e) where services under paragraph (d) (v) are offered, provide a means for a signatory to give notice pursuant to article 8 (1) (b) and, where services under paragraph d (vi) are offered, ensure the availability of a timely revocation service;

(f) utilize trustworthy systems, procedures and human resources in performing its services.

(2) A certification service provider shall be liable for its failure to satisfy the requirements of paragraph (1).

Article 10. Trustworthiness

For the purposes of article (9) (1) (f), in determining whether, or to what extent, any systems, procedures and human resources utilized by a certification service provider are trustworthy, regard may be had to the following factors:

- (a) financial and human resources, including existence of assets;
- (b) quality of hardware and software systems;
- (c) procedures for processing of certificates and applications for certificates and retention of records;
- (d) availability of information to signatories identified in certificates and to potential relying parties;
- (e) regularity and extent of audit by an independent body;
- (f) the existence of a declaration by the State, an accreditation body or the certification service provider regarding compliance with or existence of the foregoing; or
- (g) any other relevant factor.

Article 11. Conduct of the relying party

A relying party shall bear the legal consequences of its failure to:

(a) take reasonable steps to verify the reliability of an electronic signature;

or

(b) where an electronic signature is supported by a certificate, take reasonable steps to:

- (i) verify the validity, suspension or revocation of the certificate; and
- (ii) observe any limitation with respect to the certificate.

Article 12. Recognition of foreign certificates and electronic signatures

(1) In determining whether, or to what extent, a certificate or an electronic signature is legally effective, no regard shall be had to:

- (a) the geographic location where the certificate is issued or the electronic signature created or used; or
- (b) the geographic location of the place of business of the issuer or signatory.

(2) A certificate issued outside [*the enacting State*] shall have the same legal effect in [*the enacting State*] as a certificate issued in [*the enacting State*] if it offers a substantially equivalent level of reliability.

(3) An electronic signature created or used outside [*the enacting State*] shall have the same legal effect in [*the enacting State*] as an electronic signature created or used in [*the enacting State*] if it offers a substantially equivalent level of reliability.

(4) In determining whether a certificate or an electronic signature offers a substantially equivalent level of reliability for the purposes of paragraphs (2) or (3), regard shall be had to recognized international standards and to any other relevant factors.

(5) Where, notwithstanding paragraphs (2), (3) and (4), parties agree, as between themselves, to the use of certain types of electronic signatures or certificates, that agreement shall be recognized as sufficient for the purposes of cross-border recognition, unless that agreement would not be valid or effective under applicable law.

**B. Working paper submitted to the Working Group on Electronic Commerce at its thirty-seventh session: draft Guide to Enactment of the UNCITRAL Uniform Rules on Electronic Signatures: note by the secretariat
(A/CN.9/WG.IV/WP.86 and Add.1) [Original: English]**

1. Pursuant to decisions taken by the Commission at its twenty-ninth (1996)¹ and thirtieth (1997)² sessions, the Working Group on Electronic Commerce devoted its thirty-first to thirty-sixth sessions to the preparation of the draft UNCITRAL Uniform Rules of Electronic Signatures (hereinafter referred to as “the Uniform Rules”). Reports of those sessions are found in documents A/CN.9/437, 446, 454, 457, 465 and 467. In preparing the Uniform Rules, the Working Group noted that it would be useful to provide in a commentary additional information concerning the Uniform Rules. Following the approach taken in the preparation of the UNCITRAL Model Law on Electronic Commerce, there was general support for a suggestion that the draft Uniform Rules should be accompanied by a guide to assist States in enacting and applying the Uniform Rules. The guide, much of which could be drawn from the travaux préparatoires of the Uniform Rules, would also be helpful to other users of the Uniform Rules.

2. At its thirty-sixth session, the Working Group discussed the issue of electronic signatures on the basis of the note prepared by the secretariat (A/CN.9/WG.IV/WP.84). After discussion, the Working Group adopted the substance of draft articles 1 and 3 to 11 of the Uniform Rules and referred them to a drafting group to ensure consistency between the provisions of the Uniform Rules. The secretariat was requested to prepare a draft guide to enactment of the provisions adopted. Subject to approval by the Commission, the Working Group recommended that draft articles 2 and 13 of the Uniform Rules, together with the guide to enactment, be reviewed by the Working Group at a future session.³

3. At its thirty-third session (June-July 2000), the Commission noted that the Working Group, at its thirty-sixth session, had adopted the text of draft articles 1 and 3 to 11 of the Uniform Rules. It was stated that some issues remained to be clarified as a result of the decision by the Working Group to delete the notion of enhanced electronic signature from the Uniform Rules. A concern was expressed that, depending on the decisions to be made by the Working Group with respect to draft articles 2 and 13, the remainder of the draft provisions might need to be revisited to avoid creating a situation where the standard set forth by the uniform rules would apply equally to electronic signatures that ensured a high level of security and to low-value certificates that might be used in the context of electronic communications that were not intended to carry significant legal effect.

4. After discussion, the Commission expressed its appreciation for the efforts extended by the Working Group and the progress achieved in the preparation of the Uniform Rules. The Working Group was urged to complete its work with respect to the Uniform Rules at its thirty-seventh session and to review the draft guide to enactment to be prepared by the secretariat.⁴

5. The annex to the present note contains part one and chapter I of part two of the draft Guide prepared by the secretariat. Chapter II of part two is published in document A/CN.9/WG.IV/WP.86/Add.1.

¹Official Records of the General Assembly, Fifty-first Session, Supplement No. 17 (A/51/17), paras. 223 and 224.

²Ibid., Fifty-second Session, Supplement No. 17 (A/52/17), paras. 249-251.

³A/CN.9/467, paras. 18-20.

⁴Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 17 (A/55/17), paras. 380-383.

ANNEX

UNCITRAL UNIFORM RULES ON ELECTRONIC SIGNATURES
WITH GUIDE TO ENACTMENT (2001)

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PART ONE

UNCITRAL UNIFORM RULES ON ELECTRONIC SIGNATURES (2001)

Draft articles 1 and 3 to 11 of the UNCITRAL Uniform Rules on Electronic Signatures (2001)

*(as adopted by the UNCITRAL Working Group on Electronic Commerce
at its thirty-sixth session, held in New York from 14 to 25 February 2000)*

Article 1. *Sphere of application*

These Rules apply where electronic signatures are used in the context* of commercial** activities. They do not override any rule of law intended for the protection of consumers.

*The Commission suggests the following text for States that might wish to extend the applicability of these Rules:

“These Rules apply where electronic signatures are used, except in the following situations: [...]”

**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.

Article 3. *Equal treatment of signature technologies*

None of these Rules, except article 5, shall be applied so as to exclude, restrict or deprive of legal effect any method of creating an electronic signature that satisfies the requirements referred to in article 6 (1) of these Rules or otherwise meets the requirements of applicable law.

Article 4. *Interpretation*

(1) In the interpretation of these Rules, regard is to be had to their international origin and to the need to promote uniformity in their application and the observance of good faith.

(2) Questions concerning matters governed by these Rules which are not expressly settled in them are to be settled in conformity with the general principles on which these Rules are based.

Article 5. *Variation by agreement*

These Rules may be derogated from or their effect may be varied by agreement, unless that agreement would not be valid or effective under the law of the enacting State [or unless otherwise provided for in these Rules].

Article 6. *Compliance with a requirement for a signature*

(1) Where the law requires a signature of a person, that requirement is met in relation to a data message if an electronic signature is used which is as reliable as was appropriate for the purpose for which the data message was generated or communicated, in the light of all the circumstances, including any relevant agreement.

(2) Paragraph (1) applies whether the requirement referred to therein is in the form of an obligation or whether the law simply provides consequences for the absence of a signature.

(3) An electronic signature is considered to be reliable for the purpose of satisfying the requirement referred to in paragraph (1) if:

(a) the means of creating the electronic signature is, within the context in which it is used, linked to the signatory and to no other person;

(b) the means of creating the electronic signature was, at the time of signing, under the control of the signatory and of no other person;

(c) any alteration to the electronic signature, made after the time of signing, is detectable; and

(d) where a purpose of the legal requirement for a signature is to provide assurance as to the integrity of the information to which it relates, any alteration made to that information after the time of signing is detectable.

(4) Paragraph (3) does not limit the ability of any person:

(a) to establish in any other way, for the purpose of satisfying the requirement referred to in paragraph (1), the reliability of an electronic signature; or

(b) to adduce evidence of the non-reliability of an electronic signature.

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

Article 7. *Satisfaction of article 6*

(1) [Any person, organ or authority, whether public or private, specified by the enacting State as competent] may determine which electronic signatures satisfy the provisions of article 6.

(2) Any determination made under paragraph (1) shall be consistent with recognized international standards.

(3) Nothing in this article affects the operation of the rules of private international law.

Article 8. *Conduct of the signatory*

(1) Each signatory shall:

(a) exercise reasonable care to avoid unauthorized use of its signature device;

(b) without undue delay, notify any person who may reasonably be expected by the signatory to rely on or to provide services in support of the electronic signature if:

(i) the signatory knows that the signature device has been compromised; or

(ii) the circumstances known to the signatory give rise to a substantial risk that the signature device may have been compromised;

(c) where a certificate is used to support the electronic signature, exercise reasonable care to ensure the accuracy and completeness of all material representations made by the signatory which are relevant to the certificate throughout its life-cycle, or which are to be included in the certificate.

(2) A signatory shall be liable for its failure to satisfy the requirements of paragraph (1).

Article 9. *Conduct of the supplier of certification services*

(1) A supplier of certification services shall:

(a) act in accordance with representations made by it with respect to its policies and practices;

(b) exercise reasonable care to ensure the accuracy and completeness of all material representations made by it that are relevant to the certificate throughout its life-cycle, or which are included in the certificate;

(c) provide reasonably accessible means which enable a relying party to ascertain from the certificate:

(i) the identity of the supplier of certification services;

(ii) that the person who is identified in the certificate had control of the signature device at the time of signing;

(iii) that the signature device was operational on or before the date when the certificate was issued;

(d) provide reasonably accessible means which enable a relying party to ascertain, where relevant, from the certificate or otherwise:

(i) the method used to identify the signatory;

(ii) any limitation on the purpose or value for which the signature device or the certificate may be used;

(iii) that the signature device is operational and has not been compromised;

(iv) any limitation on the scope or extent of liability stipulated by the supplier of certification services;

(v) whether means exist for the signatory to give notice that a signature device has been compromised;

(vi) whether a timely revocation service is offered;

(e) provide a means for a signatory to give notice that a signature device has been compromised, and ensure the availability of a timely revocation service;

(f) utilize trustworthy systems, procedures and human resources in performing its services.

(2) A supplier of certification services shall be liable for its failure to satisfy the requirements of paragraph (1).

[Article 10. *Trustworthiness*

In determining whether and the extent to which any systems, procedures and human resources utilized by a supplier of certification services are trustworthy, regard shall be had to the following factors:

(a) financial and human resources, including existence of assets;

(b) quality of hardware and software systems;

(c) procedures for processing of certificates and applications for certificates and retention of records;

(d) availability of information to signatories identified in certificates and to potential relying parties;

(e) regularity and extent of audit by an independent body;

(f) the existence of a declaration by the State, an accreditation body or the supplier of certification services regarding compliance with or existence of the foregoing; and

(g) any other relevant factor.]

Article 11. *Conduct of the relying party*

A relying party shall bear the legal consequences of its failure to:

(a) take reasonable steps to verify the reliability of an electronic signature; or

(b) where an electronic signature is supported by a certificate, take reasonable steps to:

(i) verify the validity, suspension or revocation of the certificate; and

(ii) observe any limitation with respect to the certificate.

PART TWO

GUIDE TO ENACTMENT OF THE UNCITRAL UNIFORM RULES ON ELECTRONIC SIGNATURES (2001)

Purpose of this Guide

1. In preparing and adopting the UNCITRAL Uniform Rules on Electronic Signatures (also referred to in this publication as “the Uniform Rules”), the United Nations Commission on International Trade Law (UNCITRAL) was mindful that the Uniform Rules would be a more effective tool for States modernizing their legislation if background and explanatory information were provided to executive branches of Governments and legislators to assist them in using the Uniform Rules. The Commission was also aware of the likelihood that the Uniform Rules would be used in a number of States with limited familiarity with the type of communication techniques considered in the Uniform Rules. This Guide, much of which is drawn from the travaux préparatoires of the Uniform Rules, is also intended to be helpful to other users of the text, such as judges, arbitrators, practitioners and academics. Such information might also assist States in considering which, if any, of the provisions should be varied in order to be adapted to any particular national circumstances necessitating such variation. In the preparation of the Uniform Rules, it was assumed that the draft Uniform Rules 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 Uniform Rules but to address them in the Guide so as to provide guidance to States enacting the Uniform Rules. The information presented in this Guide is intended to explain why the provisions in the Uniform Rules have been included as essential basic features of a statutory device designed to achieve the objectives of the Uniform Rules.

2. The present Guide to Enactment has been prepared by the secretariat pursuant to the request of UNCITRAL made at the close of its thirty-fourth session, in 2001. It is based on the deliberations and decisions of the Commission at that session,⁴ when the Uniform Rules were adopted, as well as on considerations of the Working Group on Electronic Commerce, which conducted the preparatory work.

Chapter I. Introduction to the Uniform Rules

I. PURPOSE AND ORIGIN OF THE UNIFORM RULES

A. Purpose

3. The increased use of electronic authentication techniques as substitutes for handwritten signatures and other traditional authentication procedures has suggested the need for a specific legal framework to reduce uncertainty as to the legal effect that may result from the use of such modern techniques (which may be referred to generally as “electronic signatures”). The risk that diverging legislative approaches be taken in various countries with respect to electronic signatures calls for uniform legislative provisions to establish the basic rules of what is inherently an international phenomenon, where legal (as well as technical) interoperability is essential.

4. Building on the fundamental principles underlying article 7 of the UNCITRAL Model Law on Electronic Commerce (also referred to in this publication as “the Model Law”) with respect to the fulfilment of the signature function in an electronic environment, the Uniform Rules are designed to assist States in establishing a modern, harmonized and fair legislative framework to address more effectively the issues of electronic signatures. In a modest but significant addition to the Model Law, the Uniform Rules offer practical standards against which the technical reliability of electronic signatures may be measured. In addition, the Uniform Rules provide a linkage between such technical reliability and the legal effectiveness that may be expected from a given electronic signature. The Uniform Rules add substantially to the Model Law by adopting an approach under which the legal effectiveness of a given electronic signature technique may be pre-determined (or assessed prior to being actually used). The Uniform Rules are thus intended to foster the understanding of electronic signatures, and the confidence that certain electronic

signature techniques can be relied upon in legally significant transactions. Moreover, by establishing with appropriate flexibility a set of basic rules of conduct for the various parties that may become involved in the use of electronic signatures (i.e. signatories, relying parties and third-party service providers) the Uniform Rules may assist in shaping more harmonious commercial practices in cyberspace.

5. The objectives of the Uniform Rules, which include enabling or facilitating the use of electronic signatures and providing equal treatment to users of paper-based documentation and users of computer-based information, are essential for fostering economy and efficiency in international trade. By incorporating the procedures prescribed in the Uniform Rules (and the Model Law) in its national legislation for those situations where parties opt to use electronic means of communication, an enacting State would appropriately create a media-neutral environment.

B. Background

6. The Uniform Rules constitute a new step in a series of international instruments adopted by UNCITRAL, which are either specifically focused on the needs of electronic commerce or were prepared bearing in mind the needs of modern means of communication. In the first category, specific instruments geared to electronic commerce comprise the Legal Guide on Electronic Funds Transfers (1987), the UNCITRAL Model Law on International Credit Transfers (1992) and the UNCITRAL Model Law on Electronic Commerce (1996 and 1998). The second category consists of all international conventions and other legislative instruments adopted by UNCITRAL since 1978, all of which promote reduced formalism and contain definitions of "writing" that are meant to encompass de-materialized communications.

7. The most specific (and possibly best known) UNCITRAL instrument in the field of electronic commerce is the UNCITRAL Model Law on Electronic Commerce. Its preparation in the early 1990s resulted from the increased use of modern means of communication such as electronic mail and electronic data interchange (EDI) for the conduct of international trade transactions. It was realized that new technologies had been developing rapidly and would develop further as technical supports such as information highways and the Internet became more widely accessible. However, the communication of legally significant information in the form of paperless messages was hindered by legal obstacles to the use of such messages, or by uncertainty as to their legal effect or validity. With a view to facilitating the increased use of modern means of communication, UNCITRAL has prepared the Model Law. The purpose of the Model Law is to offer national legislators a set of internationally acceptable rules as to how a number of such legal obstacles may be removed, and how a more secure legal environment may be created for what has become known as "electronic commerce".

8. The decision by UNCITRAL to formulate model legislation on electronic commerce was taken in response to the fact that in a number of countries the existing legislation governing communication and storage of information was inadequate or outdated because it did not contemplate the use of electronic commerce. In certain cases, existing legislation still imposes or implies restrictions on the use of modern means of communication, for example by prescribing the use of "written", "signed" or "original" documents. With respect to the notions of "written", "signed" and "original" documents, the Model Law adopted a functional-equivalent approach.

9. At the time when the Model Law was being prepared, a few countries had adopted specific provisions to deal with certain aspects of electronic commerce. However, there existed no legisla-

tion dealing with electronic commerce as a whole. This could result in uncertainty as to the legal nature and validity of information presented in a form other than a traditional paper document. Moreover, while sound laws and practices were necessary in all countries where the use of EDI and electronic mail was becoming widespread, this need was also felt in many countries with respect to such communication techniques as telecopy and telex.

10. The Model Law also helped to remedy disadvantages that stemmed from the fact that inadequate legislation at the national level created obstacles to international trade, a significant amount of which is linked to the use of modern communication techniques. To a large extent, disparities among, and uncertainty about, national legal regimes governing the use of such communication techniques may still contribute to limiting the extent to which businesses may access international markets.

11. Furthermore, at an international level, the Model Law may be useful in certain cases as a tool for interpreting existing international conventions and other international instruments that create legal obstacles to the use of electronic commerce, for example by prescribing that certain documents or contractual clauses be made in written form. As between those States parties to such international instruments, the adoption of the Model Law as a rule of interpretation might provide the means to recognize the use of electronic commerce and obviate the need to negotiate a protocol to the international instrument involved.

C. History

12. After adopting the UNCITRAL Model Law on Electronic Commerce, the Commission, at its twenty-ninth session (1996), decided to place the issues of digital signatures and certification authorities on its agenda. The Working Group on Electronic Commerce was requested to examine the desirability and feasibility of preparing uniform rules on those topics. It was agreed that the uniform rules to be prepared should deal with such issues as: the legal basis supporting certification processes, including emerging digital authentication and certification technology; the applicability of the certification process; the allocation of risk and liabilities of users, providers and third parties in the context of the use of certification techniques; the specific issues of certification through the use of registries; and incorporation by reference.⁵

13. At its thirtieth session (1997), the Commission had before it the report of the Working Group on the work of its thirty-first session (A/CN.9/437). The Working Group indicated to the Commission that it had reached consensus as to the importance of, and the need for, working towards harmonization of legislation in that area. While no firm decision as to the form and content of such work had been reached, the Working Group had come to the preliminary conclusion that it was feasible to undertake the preparation of draft uniform rules at least on issues of digital signatures and certification authorities, and possibly on related matters. The Working Group recalled that, alongside digital signatures and certification authorities, future work in the area of electronic commerce might also need to address: issues of technical alternatives to public-key cryptography; general issues of functions performed by third-party service providers; and electronic contracting (A/CN.9/437, paras. 156 and 157). The Commission endorsed the conclusions reached by the Working Group, and entrusted the Working Group with the preparation of uniform rules on the legal issues of digital signatures and certification authorities.

14. With respect to the exact scope and form of the Uniform Rules, the Commission generally agreed that no decision could be made at this early stage of the process. It was felt that, while the

⁵*Ibid.*, *Fifty-first Session, Supplement No. 17 (A/51/17)*, paras. 223 and 224.

Working Group might appropriately focus its attention on the issues of digital signatures in view of the apparently predominant role played by public-key cryptography in the emerging electronic-commerce practice, the Uniform Rules should be consistent with the media-neutral approach taken in the Model Law. Thus, the Uniform Rules should not discourage the use of other authentication techniques. Moreover, in dealing with public-key cryptography, the Uniform Rules might need to accommodate various levels of security and to recognize the various legal effects and levels of liability corresponding to the various types of services being provided in the context of digital signatures. With respect to certification authorities, while the value of market-driven standards was recognized by the Commission, it was widely felt that the Working Group might appropriately envisage the establishment of a minimum set of standards to be met by certification authorities, particularly where cross-border certification was sought.⁶

15. The Working Group began the preparation of the Uniform Rules at its thirty-second session on the basis of a note prepared by the secretariat (A/CN.9/WG.IV/WP.73).

16. At its thirty-first session (1998), the Commission had before it the report of the Working Group on the work of its thirty-second session (A/CN.9/446). It was noted that the Working Group, throughout its thirty-first and thirty-second sessions, had experienced manifest difficulties in reaching a common understanding of the new legal issues that arose from the increased use of digital and other electronic signatures. It was also noted that a consensus was still to be found as to how those issues might be addressed in an internationally acceptable legal framework. However, it was generally felt by the Commission that the progress realized so far indicated that the draft Uniform Rules on Electronic Signatures were progressively being shaped into a workable structure.

17. The Commission reaffirmed the decision made at its thirtieth session as to the feasibility of preparing such Uniform Rules and expressed its confidence that more progress could be accomplished by the Working Group at its thirty-third session on the basis of the revised draft prepared by the secretariat (A/CN.9/WG.IV/WP.76). In the context of that discussion, the Commission noted with satisfaction that the Working Group had become generally recognized as a particularly important international forum for the exchange of views regarding the legal issues of electronic commerce and for the preparation of solutions to those issues.⁷

18. The Working Group continued revision of the Uniform Rules at its thirty-third session (1998) and thirty-fourth session (1999) on the basis of notes prepared by the secretariat (A/CN.9/WG.IV/WP.76 and A/CN.9/WG.IV/WP.79 and 80). The reports of the sessions are contained in documents A/CN.9/454 and 457.

19. At its thirty-second session (1999), the Commission had before it the report of the Working Group on the work of its thirty-third (June-July 1998) and thirty-fourth (February 1999) sessions (A/CN.9/454 and 457). The Commission expressed its appreciation for the efforts accomplished by the Working Group in its preparation of the Uniform Rules. While it was generally agreed that significant progress had been made at those sessions in the understanding of the legal issues of electronic signatures, it was also felt that the Working Group had been faced with difficulties in the building of a consensus as to the legislative policy on which the uniform rules should be based.

20. A view was expressed that the approach currently taken by the Working Group did not sufficiently reflect the business need for flexibility in the use of electronic signatures and other authentication techniques. As currently envisaged by the Working

Group, the Uniform Rules placed excessive emphasis on digital signature techniques and, within the sphere of digital signatures, on a specific application involving third-party certification. Accordingly, it was suggested that work on electronic signatures by the Working Group should either be limited to the legal issues of cross-border certification or be postponed altogether until market practices were better established. A related view expressed was that, for the purposes of international trade, most of the legal issues arising from the use of electronic signatures had already been solved in the UNCITRAL Model Law on Electronic Commerce. While regulation dealing with certain uses of electronic signatures might be needed outside the scope of commercial law, the Working Group should not become involved in any such regulatory activity.

21. The widely prevailing view was that the Working Group should pursue its task on the basis of its original mandate. With respect to the need for uniform rules on electronic signatures, it was explained that, in many countries, guidance from UNCITRAL was expected by governmental and legislative authorities that were in the process of preparing legislation on electronic signature issues, including the establishment of public-key infrastructures (PKI) or other projects on closely related matters (see A/CN.9/457, para. 16). As to the decision made by the Working Group to focus on PKI issues and PKI terminology, it was recalled that the interplay of relationships between three distinct types of parties (i.e. key holders, certification authorities and relying parties) corresponded to one possible PKI model, but that other models were conceivable, e.g. where no independent certification authority was involved. One of the main benefits to be drawn from focusing on PKI issues was to facilitate the structuring of the Uniform Rules by reference to three functions (or roles) with respect to key pairs, namely, the key issuer (or subscriber) function, the certification function, and the relying function. It was generally agreed that those three functions were common to all PKI models. It was also agreed that those three functions should be dealt with irrespective of whether they were in fact served by three separate entities or whether two of those functions were served by the same person (e.g. where the certification authority was also a relying party). In addition, it was widely felt that focusing on the functions typical of PKI and not on any specific model might make it easier to develop a fully media-neutral rule at a later stage (*ibid.*, para. 68).

22. After discussion, the Commission reaffirmed its earlier decisions as to the feasibility of preparing such uniform rules and expressed its confidence that more progress could be accomplished by the Working Group at its forthcoming sessions.⁸

23. The Working Group continued its work at its thirty-fifth (September 1999) and thirty-sixth (February 2000) sessions on the basis of notes prepared by the secretariat (A/CN.9/WG.IV/WP.82 and 84). At its thirty-third (2000) session, the Commission had before it the report of the Working Group on the work of those two sessions (A/CN.9/465 and 467). It was noted that the Working Group, at its thirty-sixth session, had adopted the text of draft articles 1 and 3 to 12 of the Uniform Rules. It was stated that some issues remained to be clarified as a result of the decision by the Working Group to delete the notion of enhanced electronic signature from the draft Uniform Rules. A concern was expressed that, depending on the decisions to be made by the Working Group with respect to draft articles 2 and 13, the remainder of the draft provisions might need to be revisited to avoid creating a situation where the standard set forth by the Uniform Rules would apply equally to electronic signatures that ensured a high level of security and to low-value certificates that might be used in the context of electronic communications that were not intended to carry significant legal effect.

⁶*Ibid.*, *Fifty-second Session, Supplement No. 17 (A/52/17)*, paras. 249-251.

⁷*Ibid.*, *Fifty-third Session, Supplement No. 17 (A/53/17)*, paras. 207-211.

⁸*Ibid.*, *Fifty-fourth Session, Supplement No. 17 (A/54/17)*, paras. 308-314.

24. After discussion, the Commission expressed its appreciation for the efforts extended by the Working Group and the progress achieved in the preparation of the draft Uniform Rules. The Working Group was urged to complete its work with respect to the draft Uniform Rules at its thirty-seventh session and to review the draft guide to enactment to be prepared by the secretariat.⁹ [Note by the secretariat: this section recording the history of the Uniform Rules is to be completed, and possibly made more concise, after final consideration and adoption of the Uniform Rules by the Commission.]

II. THE UNIFORM RULES AS A TOOL FOR HARMONIZING LAWS

25. As the Model Law, the Uniform Rules are 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 Uniform Rules (or any other Model Law resulting from the work of UNCITRAL).

26. In incorporating the text of the model legislation into its legal system, a State may modify or leave out some of its 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 “reservations”) is much more restricted; in particular trade law conventions usually either totally prohibit reservations 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. 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 Uniform Rules into their legal systems. In general, in enacting the Uniform Rules (or 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 as possible for foreign users of the national law.

III. GENERAL REMARKS ON ELECTRONIC SIGNATURES¹⁰

A. Functions of signatures

27. Article 7 of the UNCITRAL Model Law on Electronic Commerce is based on the recognition of the functions of a signature in a paper-based environment. In the preparation of the Model Law, the Working Group discussed the following functions traditionally performed by handwritten signatures: to identify a person; to provide certainty as to the personal involvement of that person in the act of signing; to associate that person with the content of a document. It was noted that, in addition, a signature could perform a variety of functions, depending on the nature of the document that was signed. For example, a signature might

attest to: the intent of a party to be bound by the content of a signed contract; the intent of a person to endorse authorship of a text (thus displaying awareness of the fact that legal consequences might possibly flow from the act of signing); the intent of a person to associate itself with the content of a document written by someone else; the fact that, and the time when, a person had been at a given place. The relationship of the Uniform Rules with article 7 of the Model Law is further discussed below, in paragraphs 67 and 70 to 75 of this Guide.

28. In an electronic environment, the original of a message is indistinguishable from a copy, bears no handwritten signature, and is not on paper. The potential for fraud is considerable, due to the ease of intercepting and altering information in electronic form without detection, and the speed of processing multiple transactions. The purpose of various techniques currently available on the market or still under development is to offer the technical means by which some or all of the functions identified as characteristic of handwritten signatures can be performed in an electronic environment. Such techniques may be referred to broadly as “electronic signatures”.

B. Digital signatures and other electronic signatures

29. In discussing the desirability and feasibility of preparing the Uniform Rules, and in defining the scope of such Uniform Rules, UNCITRAL has examined various electronic signature techniques currently being used or still under development. The common purpose of those techniques is to provide functional equivalents to (1) handwritten signatures; and (2) other kinds of authentication mechanisms used in a paper-based environment (e.g. seals or stamps). The same techniques may perform additional functions in the sphere of electronic commerce, which are derived from the functions of a signature but correspond to no strict equivalent in a paper-based environment.

30. As indicated above, guidance from UNCITRAL is expected in many countries, by governmental and legislative authorities that are in the process of preparing legislation on electronic signature issues, including the establishment of public key infrastructures (PKI) or other projects on closely related matters (see A/CN.9/457, para. 16). As to the decision made by the UNCITRAL to focus on PKI issues and PKI terminology, it should be noted that the interplay of relationships between three distinct types of parties (i.e. signatories, suppliers of certification services and relying parties) corresponds to one possible PKI model, but other models are conceivable (e.g. where no independent certification authority is involved). One of the main benefits to be drawn from focusing on PKI issues is to facilitate the structuring of the Uniform Rules by reference to three functions (or roles) with respect to electronic signatures, namely, the signatory (key issuer or key subscriber) function, the certification function, and the relying function. Those three functions are common to all PKI models and should be dealt with irrespective of whether they are in fact served by three separate entities or whether two of those functions are served by the same person (e.g. where the supplier of certification services is also a relying party). Focusing on the functions performed in a PKI environment and not on any specific model also makes it easier to develop a fully media-neutral rule to the extent that similar functions are served in non-PKI electronic signature technology.

1. Electronic signatures relying on techniques other than public-key cryptography

31. Alongside “digital signatures” based on public-key cryptography, there exist various other devices, also covered in the broader notion of “electronic signature” mechanisms, which may

⁹Ibid., *Fifty-fifth Session, Supplement No. 17 (A/55/17)*, paras. 380-383.

¹⁰This section is drawn from document A/CN.9/WG.IV/WP.71, part I.

currently be used, or considered for future use, with a view to fulfilling one or more of the above-mentioned functions of handwritten signatures. For example, certain techniques would rely on authentication through a biometrical device based on handwritten signatures. In such a device, the signatory would sign manually, using a special pen, either on a computer screen or on a digital pad. The handwritten signature would then be analysed by the computer and stored as a set of numerical values, which could be appended to a data message and displayed by the recipient for authentication purposes. Such an authentication system would presuppose that samples of the handwritten signature have been previously analysed and stored by the biometrical device.

32. Little information was provided to the UNCITRAL Working Group on Electronic Commerce in the preparation of the Uniform Rules as to the technical and legal implications of using "signature" devices relying on techniques other than public-key cryptography. In view of the availability of sufficient preliminary information as to the legal implications of digital signatures, and of the existence of draft legislation on the topic in a number of countries, the work of UNCITRAL focused on issues of digital signatures relying on public-key cryptography.

33. However, UNCITRAL has intended to develop Uniform Rules that can facilitate the use of both digital signatures and other forms of electronic signatures. To that effect, UNCITRAL has attempted to deal with the legal issues of electronic signature issues at a level that is intermediate between the high generality of the Model Law and the specificity that might be required when dealing with a given signature technique. In any event, consistent with media neutrality in the Model Law, the Uniform Rules are not to be interpreted as discouraging the use of any method of electronic signature, whether already existing or to be implemented in the future.

2. Digital signatures relying on public-key cryptography¹¹

34. In view of the increasing use of digital signature techniques in a number of countries, the following introduction may be of assistance to those preparing legislation on electronic signatures.

(a) Technical notions and terminology

(i) Cryptography

35. Digital signatures are created and verified by using cryptography, the branch of applied mathematics that concerns itself with transforming messages into seemingly unintelligible form and back into the original form. Digital signatures use what is known as "public key cryptography", which is often based on the use of algorithmic functions to generate two different but mathematically-related "keys" (i.e. large numbers produced using a series of mathematical formulae applied to prime numbers). One such key is used for creating a digital signature or transforming data into a seemingly unintelligible form, and the other one for verifying a digital signature or returning the message to its original form. Computer equipment and software utilizing two such keys are often collectively referred to as "cryptosystems" or, more specifically, "asymmetric cryptosystems" where they rely on the use of asymmetric algorithms.

36. While the use of cryptography is one of the main features of digital signatures, the mere fact that a digital signature is used to authenticate a message containing information in digital form should not be confused with a more general use of cryptography

for confidentiality purposes. Confidentiality encryption is a method used for encoding an electronic communication so that only the originator and the addressee of the message will be able to read it. In a number of countries, the use of cryptography for confidentiality purposes is limited by law for reasons of public policy that may involve considerations of national defence. However, the use of cryptography for authentication purposes by producing a digital signature does not necessarily imply the use of encryption to make any information confidential in the communication process, since the encrypted digital signature may be merely appended to a non-encrypted message.

(ii) Public and private keys

37. The complementary keys used for digital signatures are named the "private key", which is used only by the signatory to create the digital signature, and the "public key", which is ordinarily more widely known and is used by a relying party to verify the digital signature. The user of a private key is expected to keep the private key secret. It should be noted that the individual user does not need to know the private key. Such a private key is likely to be kept on a smart card, or to be accessible through a personal identification number or, ideally, through a biometrical identification device, e.g. through thumbprint recognition. If many people need to verify the signatory's digital signatures, the public key must be available or distributed to all of them, for example by publication in an on-line repository or any other form of public directory where it is easily accessible. Although the keys of the pair are mathematically related, if an asymmetric cryptosystem has been designed and implemented securely it is virtually infeasible to derive the private key from knowledge of the public key. The most common algorithms for encryption through the use of public and private keys are based on an important feature of large prime numbers: once they are multiplied together to produce a new number, it is particularly difficult and time-consuming to determine which two prime numbers created that new, larger number.¹² Thus, although many people may know the public key of a given signatory and use it to verify that signatory's signatures, they cannot discover that signatory's private key and use it to forge digital signatures.

38. It should be noted, however, that the concept of public-key cryptography does not necessarily imply the use of the above-mentioned algorithms based on prime numbers. Other mathematical techniques are currently used or under development, such as cryptosystems relying on elliptic curves, which are often described as offering a high degree of security through the use of significantly reduced key-lengths.

(iii) Hash function

39. In addition to the generation of key pairs, another fundamental process, generally referred to as a "hash function", is used in both creating and verifying a digital signature. A hash function is a mathematical process, based on an algorithm which creates a digital representation, or compressed form of the message, often referred to as a "message digest", or "fingerprint" of the message, in the form of a "hash value" or "hash result" of a standard length which is usually much smaller than the message but nevertheless substantially unique to it. Any change to the message invariably

¹¹Numerous elements of the description of the functioning of a digital signature system in this section are based on the ABA Digital Signature Guidelines, p. 8 to 17.

¹²Certain existing standards such as the ABA Digital Signature Guidelines refer to the notion of "computational infeasibility" to describe the expected irreversibility of the process, i.e. the hope that it will be impossible to derive a user's secret private key from that user's public key. "Computationally infeasible" is a relative concept based on the value of the data protected, the computing overhead required to protect it, the length of time it needs to be protected, and the cost and time required to attack the data, with such factors assessed both currently and in the light of future technological advance (ABA Digital Signature Guidelines, p. 9, note 23).

produces a different hash result when the same hash function is used. In the case of a secure hash function, sometimes named a “one-way hash function”, it is virtually impossible to derive the original message from knowledge of its hash value. Hash functions therefore enable the software for creating digital signatures to operate on smaller and predictable amounts of data, while still providing robust evidentiary correlation to the original message content, thereby efficiently providing assurance that there has been no modification of the message since it was digitally signed.

(iv) *Digital signature*

40. To sign a document or any other item of information, the signatory first delimits precisely the borders of what is to be signed. Then a hash function in the signatory’s software computes a hash result unique (for all practical purposes) to the information to be signed. The signatory’s software then transforms the hash result into a digital signature using the signatory’s private key. The resulting digital signature is thus unique to both the information being signed and the private key used to create the digital signature.

41. Typically, a digital signature (a digitally signed hash result of the message) is attached to the message and stored or transmitted with that message. However, it may also be sent or stored as a separate data element, as long as it maintains a reliable association with the corresponding message. Since a digital signature is unique to its message, it is useless if permanently disassociated from the message.

(v) *Verification of digital signature*

42. Digital signature verification is the process of checking the digital signature by reference to the original message and a given public key, thereby determining whether the digital signature was created for that same message using the private key that corresponds to the referenced public key. Verification of a digital signature is accomplished by computing a new hash result of the original message by means of the same hash function used to create the digital signature. Then, using the public key and the new hash result, the verifier checks whether the digital signature was created using the corresponding private key, and whether the newly computed hash result matches the original hash result that was transformed into the digital signature during the signing process.

43. The verification software will confirm the digital signature as “verified” if: (1) the signatory’s private key was used to sign digitally the message, which is known to be the case if the signatory’s public key was used to verify the signature because the signatory’s public key will verify only a digital signature created with the signatory’s private key; and (2) the message was unaltered, which is known to be the case if the hash result computed by the verifier is identical to the hash result extracted from the digital signature during the verification process.

(b) *Public key infrastructure (PKI) and suppliers of certification services*

44. To verify a digital signature, the verifier must have access to the signatory’s public key and have assurance that it corresponds to the signatory’s private key. However, a public and private key pair has no intrinsic association with any person; it is simply a pair of numbers. An additional mechanism is necessary to associate reliably a particular person or entity to the key pair. If public key encryption is to serve its intended purposes, it needs to provide a way to send keys to a wide variety of persons, many of whom are not known to the sender, where no relationship of trust has developed between the parties. To that effect, the parties involved must have a high degree of confidence in the public and private keys being issued.

45. The requested level of confidence may exist between parties who trust each other, who have dealt with each other over a period of time, who communicate on closed systems, who operate within a closed group, or who are able to govern their dealings contractually, for example, in a trading partner agreement. In a transaction involving only two parties, each party can simply communicate (by a relatively secure channel such as a courier or telephone, with its inherent feature of voice recognition) the public key of the key pair each party will use. However, the same level of confidence may not be present when the parties deal infrequently with each other, communicate over open systems (e.g. the World Wide Web on the Internet), are not in a closed group, or do not have trading partner agreements or other law governing their relationships.

46. In addition, because public key encryption is a highly mathematical technology, all users must have confidence in the skill, knowledge and security arrangements of the parties issuing the public and private keys.¹³

47. A prospective signatory might issue a public statement indicating that signatures verifiable by a given public key should be treated as originating from that signatory. However, other parties might be unwilling to accept the statement, especially where there is no prior contract establishing the legal effect of that published statement with certainty. A party relying upon such an unsupported published statement in an open system would run a great risk of inadvertently trusting an imposter, or of having to disprove a false denial of a digital signature (an issue often referred to as “non-repudiation”) if a transaction should turn out to prove disadvantageous for the purported signatory.

48. A solution to these problems is the use of one or more trusted third parties to associate an identified signatory or the signatory’s name with a specific public key. That trusted third party is generally referred to as a “certification authority”, “certification services provider” or “supplier of certification services” in most technical standards and guidelines (in the Uniform Rules, the term “supplier of certification services” has been chosen). In a number of countries, such certification authorities are being organized hierarchically into what is often referred to as a public key infrastructure (PKI).

(i) *Public key infrastructure (PKI)*

49. Setting up a public key infrastructure (PKI) is a way to provide confidence that: (1) a user’s public key has not been tampered with and in fact corresponds to that user’s private key; (2) the encryption techniques being used are sound; (3) the entities that issue the cryptographic keys can be trusted to retain or recreate the public and private keys that may be used for confidentiality encryption where the use of such a technique is authorized; (4) different encryption systems are inter-operable. To provide the confidence described above, a PKI may offer a number of services, including the following: (1) managing cryptographic keys used for digital signatures; (2) certifying that a public key corresponds to a private key; (3) providing keys to end users; (4) deciding which users will have which privileges on the system; (5) publishing a secure directory of public keys or certificates; (6) managing personal tokens (e.g. smart cards) that can identify the user with unique personal identification information or can generate and store an individual’s private keys; (7) checking the identification of end users, and providing them with services; (8) providing non-repudiation services; (9) providing time-stamping services; (10) managing encryption keys used for confidentiality encryption where the use of such a technique is authorized.

¹³In situations where public and private cryptographic keys would be issued by the users themselves, such confidence might need to be provided by the certifiers of public keys.

50. A public key infrastructure (PKI) is often based on various hierarchical levels of authority. For example, models considered in certain countries for the establishment of possible PKIs include references to the following levels: (1) a unique “root authority”, which would certify the technology and practices of all parties authorized to issue cryptographic key pairs or certificates in connection with the use of such key pairs, and would register subordinate certification authorities;¹⁴ (2) various certification authorities, placed below the “root” authority, which would certify that a user’s public key actually corresponds to that user’s private key (i.e. has not been tampered with); and (3) various local registration authorities, placed below the certification authorities, and receiving requests from users for cryptographic key pairs or for certificates in connection with the use of such key pairs, requiring proof of identification and checking identities of potential users. In certain countries, it is envisaged that notaries public might act as, or support, local registration authorities.

51. The issues of PKI may not lend themselves easily to international harmonization. The organization of a PKI may involve various technical issues, as well as issues of public policy that may better be left to each individual State at the current stage.¹⁵ In that connection, decisions may need to be made by each State considering the establishment of a PKI, for example as to: (1) the form and number of levels of authority which should be comprised in a PKI; (2) whether only certain authorities belonging to the PKI should be allowed to issue cryptographic key pairs or whether such key pairs might be issued by the users themselves; (3) whether the certification authorities certifying the validity of cryptographic key pairs should be public entities or whether private entities might act as certification authorities; (4) whether the process of allowing a given entity to act as a certification authority should take the form of an express authorization, or “licensing”, by the State, or whether other methods should be used to control the quality of certification authorities if they were allowed to operate in the absence of a specific authorization; (5) the extent to which the use of cryptography should be authorized for confidentiality purposes; and (6) whether government authorities should retain access to encrypted information, through a mechanism of “key escrow” or otherwise. The Uniform Rules do not deal with those issues.

(ii) *Supplier of certification services*

52. To associate a key pair with a prospective signatory, a supplier of certification services (or certification authority) issues a certificate, an electronic record which lists a public key together with the name of the certificate subscriber as the “subject” of the certificate, and may confirm that the prospective signatory identified in the certificate holds the corresponding private key. The principal function of a certificate is to bind a public key with a particular holder. A “recipient” of the certificate desiring to rely upon a digital signature created by the holder named in the certificate can use the public key listed in the certificate to verify that the digital signature was created with the corresponding private key. If such verification is successful, assurance is provided that the digital signature was created by the holder of the public key named in the certificate, and that the corresponding message had not been modified since it was digitally signed.

53. To ensure the authenticity of the certificate with respect to both its contents and its source, the certification authority digitally signs it. The issuing certification authority’s digital signature on the

certificate can be verified by using the public key of the certification authority listed in another certificate by another certification authority (which may but need not be on a higher level in a hierarchy), and that other certificate can in turn be authenticated by the public key listed in yet another certificate, and so on, until the person relying on the digital signature is adequately assured of its genuineness. In each case, the issuing certification authority must digitally sign its own certificate during the operational period of the other certificate used to verify the certification authority’s digital signature.

54. A digital signature corresponding to a message, whether created by the holder of a key pair to authenticate a message or by a certification authority to authenticate its certificate, should generally be reliably time-stamped to allow the verifier to determine reliably whether the digital signature was created during the “operational period” stated in the certificate, which is a condition of the verifiability of a digital signature.

55. To make a public key and its correspondence to a specific holder readily available for verification, the certificate may be published in a repository or made available by other means. Typically, repositories are online databases of certificates and other information available for retrieval and use in verifying digital signatures.

56. Once issued, a certificate may prove to be unreliable, for example in situations where the holder misrepresents its identity to the certification authority. In other circumstances, a certificate may be reliable enough when issued but it may become unreliable sometime thereafter. If the private key is “compromised”, for example through loss of control of the private key by its holder, the certificate may lose its trustworthiness or become unreliable, and the certification authority (at the holder’s request or even without the holder’s consent, depending on the circumstances) may suspend (temporarily interrupt the operational period) or revoke (permanently invalidate) the certificate. Immediately upon suspending or revoking a certificate, the certification authority is generally expected to publish notice of the revocation or suspension or notify persons who inquire or who are known to have received a digital signature verifiable by reference to the unreliable certificate.

57. Certification authorities could be operated by government authorities or by private sector service providers. In a number of countries, it is envisaged that, for public policy reasons, only government entities should be authorized to operate as certification authorities. In other countries, it is considered that certification services should be open to competition from the private sector. Irrespective of whether certification authorities are operated by public entities or by private sector service providers, and of whether certification authorities would need to obtain a licence to operate, there is typically more than one certification authority operating within the PKI. Of particular concern is the relationship between the various certification authorities. Certification authorities within a PKI can be established in an hierarchical structure, where some certification authorities only certify other certification authorities, which provide services directly to users. In such a structure, certification authorities are subordinate to other certification authorities. In other conceivable structures, some certification authorities may operate on an equal footing with other certification authorities. In any large PKI, there would likely be both subordinate and superior certification authorities. In any event, in the absence of an international PKI, a number of concerns may arise with respect to the recognition of certificates by certification authorities in foreign countries. The recognition of foreign certificates is often achieved by a method called “cross certification”. In such a case, it is necessary that substantially equivalent certification authorities (or certification authorities willing to assume certain risks with regard to the certificates issued by other certification authorities) recognize the services provided by each other, so

¹⁴The question as to whether a government should have the technical ability to retain or recreate private confidentiality keys may be dealt with at the level of the root authority.

¹⁵However, in the context of cross-certification, the need for global interoperability requires that PKIs established in various countries should be capable of communicating with each other.

their respective users can communicate with each other more efficiently and with greater confidence in the trustworthiness of the certificates being issued.

58. Legal issues may arise with regard to cross-certifying or chaining of certificates when there are multiple security policies involved. Examples of such issues may include determining whose misconduct caused a loss, and upon whose representations the user relied. It should be noted that legal rules considered for adoption in certain countries provide that, where the levels of security and policies are made known to the users, and there is no negligence on the part of certification authorities, there should be no liability.

59. It may be incumbent upon the certification authority or the root authority to ensure that its policy requirements are met on an ongoing basis. While the selection of certification authorities may be based on a number of factors, including the strength of the public key being used and the identity of the user, the trustworthiness of any certification authority may also depend on its enforcement of certificate-issuing standards and the reliability of its evaluation of data received from users who request certificates. Of particular importance is the liability regime applying to any certification authority with respect to its compliance with the policy and security requirements of the root authority or superior certification authority, or with any other applicable requirement, on an ongoing basis.

60. In the preparation of the Uniform Rules, the following elements were considered as possible factors to be taken into account when assessing the trustworthiness of a certification authority: (1) independence (i.e. absence of financial or other interest in underlying transactions); (2) financial resources and financial ability to bear the risk of being held liable for loss; (3) expertise in public-key technology and familiarity with proper security procedures; (4) longevity (certification authorities may be required to produce evidence of certification or decryption keys many years after the underlying transaction has been completed, in the context of a lawsuit or property claim); (5) approval of hardware and software; (6) maintenance of an audit trail and audit by an independent entity; (7) existence of a contingency plan (e.g. "disaster recovery" software or key escrow); (8) personnel selection and management; (9) protection arrangements for the certification authority's own private key; (10) internal security; (11) arrangements for termination of operations, including notice to users; (12) warranties and representations (given or excluded); (13) limitation of liability; (14) insurance; (15) inter-operability with other certification authorities; (16) revocation procedures (in cases where cryptographic keys might be lost or compromised).

(c) Summary of the digital signature process

61. The use of digital signatures usually involves the following processes, performed either by the signatory or by the receiver of the digitally signed message:

- (1) The user generates or is given a unique cryptographic key pair;
- (2) The sender prepares a message (for example, in the form of an electronic mail message) on a computer;
- (3) The sender prepares a "message digest", using a secure hash algorithm. Digital signature creation uses a hash result derived from and unique to both the signed message and a given private key. For the hash result to be secure, there must be only a negligible possibility that the same digital signature could be created by the combination of any other message or private key;
- (4) The sender encrypts the message digest with the private key. The private key is applied to the message digest text using a mathematical algorithm. The digital signature consists of the encrypted message digest;

(5) The sender typically attaches or appends its digital signature to the message;

(6) The sender sends the digital signature and the (unencrypted or encrypted) message to the recipient electronically;

(7) The recipient uses the sender's public key to verify the sender's digital signature. Verification using the sender's public key proves that the message came exclusively from the sender;

(8) The recipient also creates a "message digest" of the message, using the same secure hash algorithm;

(9) The recipient compares the two message digests. If they are the same, then the recipient knows that the message has not been altered after it was signed. Even if one bit in the message has been altered after the message has been digitally signed, the message digest created by the recipient will be different from the message digest created by the sender;

(10) The recipient obtains a certificate from the certification authority (or via the originator of the message), which confirms the digital signature on the sender's message. The certification authority is typically a trusted third party which administers certification in the digital signature system. The certificate contains the public key and name of the sender (and possibly additional information), digitally signed by the certification authority.

IV. MAIN FEATURES OF THE UNIFORM RULES

A. Legislative nature of the Uniform Rules

62. The Uniform Rules were prepared on the assumption that they should be directly derived from article 7 of the Model Law and should be considered as a way to provide detailed information as to the concept of a reliable "method used to identify" a person and "to indicate that person's approval" of the information contained in a data message (see A/CN.9/WG.IV/WP.71, para. 49).

63. The question of what form the draft Uniform Rules might take was raised and the importance of considering the relationship of the form to the content was noted. Different approaches were suggested as to what the form might be, which included contractual rules, legislative provisions, or guidelines for States considering enacting legislation on electronic signatures. It was agreed as a working assumption that the Uniform Rules should be prepared as legislative rules with commentary, and not merely as guidelines (see A/CN.9/437, para. 27; A/CN.9/446, para. 25; and A/CN.9/457, paras. 51 and 72).

B. Relationship with the UNCITRAL Model Law on Electronic Commerce

1. Uniform Rules as a separate legal instrument

64. The Uniform Rules could have been incorporated in an extended version of the Model Law, for example to form a new part III of the Model Law. With a view to indicating clearly that the Uniform Rules could be enacted either independently or in combination with the Model Law, it was eventually decided that the Uniform Rules should be prepared as a separate legal instrument (see A/CN.9/465, para. 37). That decision results mainly from the fact that, at the time the Uniform Rules were being finalized, the Model Law had already been successfully implemented in a number of countries and was being considered for adoption in many other countries. The preparation of an extended version of the Model Law might have compromised the success of the original version by suggesting a need to improve on that text by way of an update. In addition, preparing a new version of the Model Law might have introduced confusion in those countries that had recently adopted the Model Law.

2. *Uniform Rules fully consistent with the Model Law*

65. In drafting the Uniform Rules, every effort was made to ensure consistency with both the substance and the terminology of the Model Law (A/CN.9/465, para. 37). The general provisions of the Model Law have been reproduced in the Uniform Rules. These are articles 1 (Sphere of application), 2(a), (c) and (e) (Definitions of “data message”, “originator” and “addressee”), 3 (Interpretation), 4 (Variation by agreement) and 7 (Signature) of the Model Law.

66. Based on the Model Law, the Uniform Rules are intended to reflect in particular: the principle of media-neutrality; an approach under which functional equivalents of traditional paper-based concepts and practices should not be discriminated against; and extensive reliance on party autonomy (A/CN.9/WG.IV/WP.84, para. 16). They are intended for use both as minimum standards in an “open” environment (i.e. where parties communicate electronically without prior agreement) and as default rules in a “closed” environment (i.e. where parties are bound by pre-existing contractual rules and procedures to be followed in communicating by electronic means).

3. *Relationship with article 7 of the Model Law*

67. In the preparation of the Uniform Rules, the view was expressed that the reference to article 7 of the Model Law in the text of article 6 of the Uniform Rules was to be interpreted as limiting the scope of the Uniform Rules to situations where an electronic signature was used to meet a mandatory requirement of law that certain documents had to be signed for *validity* purposes. Under that view, since the law contained very few such requirements with respect to documents used for commercial transactions, the scope of the Uniform Rules was very narrow. It was generally agreed, in response, that such interpretation of draft article 6 (and of article 7 of the Model Law) was inconsistent with the interpretation of the words the law adopted by the Commission in paragraph 68 of the Guide to Enactment of the Model Law, under which “the words ‘the law’ are to be understood as encompassing not only statutory or regulatory law but also judicially-created law and other procedural law”. In fact, the scope of both article 7 of the Model Law and article 6 of the Uniform Rules is particularly broad, since most documents used in the context of commercial transactions are likely to be faced, in practice, with the requirements of the law of evidence regarding proof in writing (A/CN.9/465, para. 67).

C. *“Framework” rules to be supplemented by technical regulations and contract*

68. As a supplement to the UNCITRAL Model Law on Electronic Commerce, the Uniform Rules are intended to provide essential principles for facilitating the use of electronic signatures. However, as a “framework”, the Uniform Rules themselves do not set forth all the rules and regulations that may be necessary (in addition to contractual arrangements between users) to implement those techniques in an enacting State. Moreover, as indicated in this Guide, the Uniform Rules are not intended to cover every aspect of the use of electronic signatures. Accordingly, an enacting State may wish to issue regulations to fill in the procedural details for procedures authorized by the Uniform Rules and to take account of the specific, possibly changing, circumstances at play in the enacting State, without compromising the objectives of the Uniform Rules. It is recommended that, should it decide to issue such regulations, an enacting State should give particular attention to the need to preserve flexibility in the operation of electronic signature systems by their users.

69. It should be noted that the electronic signature techniques considered in the Uniform Rules, beyond raising matters of procedure that may need to be addressed in the implementing technical regulations, may raise certain legal questions, the answers to which will not necessarily be found in the Uniform Rules, but rather in other bodies of law. Such other bodies of law may include, for example, the applicable administrative, contract, criminal and judicial-procedure law, which the Uniform Rules are not intended to deal with.

D. *Added certainty as to the legal effects of electronic signatures*

70. One of the main features of the Uniform Rules is to add certainty to the operation of the flexible criterion set forth in article 7 of the Model Law for the recognition of an electronic signature as functionally equivalent to a handwritten signature.

Article 7 of the Model Law reads as follows:

“(1) Where the law requires a signature of a person, that requirement is met in relation to a data message if:

“(a) a method is used to identify that person and to indicate that person’s approval of the information contained in the data message; and

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

“(2) Paragraph (1) applies whether the requirement therein is in the form of an obligation or whether the law simply provides consequences for the absence of a signature.

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

71. Article 7 is based on the recognition of the functions of a signature in a paper-based environment. In the preparation of the Model Law, the following functions of a signature were considered: to identify a person; to provide certainty as to the personal involvement of that person in the act of signing; to associate that person with the content of a document. It was noted that, in addition, a signature could perform a variety of functions, depending on the nature of the document that was signed. For example, a signature might attest to the intent of a party to be bound by the content of a signed contract; the intent of a person to endorse authorship of a text; the intent of a person to associate itself with the content of a document written by someone else; the fact that, and the time when, a person had been at a given place.

72. With a view to ensuring that a message that was required to be authenticated should not be denied legal value for the sole reason that it was not authenticated in a manner peculiar to paper documents, article 7 adopts a comprehensive approach. It establishes the general conditions under which data messages would be regarded as authenticated with sufficient credibility and would be enforceable in the face of signature requirements that currently present barriers to electronic commerce. Article 7 focuses on the two basic functions of a signature, namely to identify the author of a document and to confirm that the author approved the content of that document. Paragraph (1)(a) establishes the principle that, in an electronic environment, the basic legal functions of a signature are performed by way of a method that identifies the originator of a data message and confirms that the originator approved the content of that data message.

73. Paragraph (1)(b) establishes a flexible approach to the level of security to be achieved by the method of identification used under paragraph (1)(a). The method used under paragraph (1)(a) should be as reliable as is appropriate for the purpose for which the data

message is generated or communicated, in the light of all the circumstances, including any agreement between the originator and the addressee of the data message.

74. In determining whether the method used under paragraph (1) is appropriate, legal, technical and commercial factors that may be taken into account include the following: (1) the sophistication of the equipment used by each of the parties; (2) the nature of their trade activity; (3) the frequency at which commercial transactions take place between the parties; (4) the kind and size of the transaction; (5) the function of signature requirements in a given statutory and regulatory environment; (6) the capability of communication systems; (7) compliance with authentication procedures set forth by intermediaries; (8) the range of authentication procedures made available by any intermediary; (9) compliance with trade customs and practice; (10) the existence of insurance coverage mechanisms against unauthorized messages; (11) the importance and the value of the information contained in the data message; (12) the availability of alternative methods of identification and the cost of implementation; (13) the degree of acceptance or non-acceptance of the method of identification in the relevant industry or field both at the time the method was agreed upon and the time when the data message was communicated; and (14) any other relevant factor (Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce, paras. 53 and 56 to 58).

75. Building on the flexible criterion expressed in article 7(1)(b) of the Model Law, articles 6 and 7 of the Uniform Rules establish a mechanism through which electronic signatures that meet objective criteria of technical reliability can be made to benefit from early determination as to their legal effectiveness. The effect of the Uniform Rules is to recognize two categories of electronic signatures. The first and broader category is that described in article 7 of the Model Law. It consists of any "method" that may be used to fulfil a legal requirement for a handwritten signature. The legal effectiveness of such a "method" as an equivalent of a handwritten signature depends upon demonstration of its "reliability" to a trier of fact. The second and narrower category is that created by the Uniform Rules. It consists of methods of electronic signature that may be recognized by a State authority, a private accredited entity, or the parties themselves, as meeting the criteria of technical reliability set forth in the Uniform Rules. The advantage of such a recognition is that it brings certainty to the users of such electronic signature techniques (sometimes referred to as "enhanced", "secure" or "qualified" electronic signatures) before they actually use the electronic signature technique.

E. Basic rules of conduct for the parties involved

76. The Uniform Rules do not deal in any detail with the issues of liability that may affect the various parties involved in the operation of electronic signature systems. Those issues are left to applicable law outside the Uniform Rules. However, the Uniform Rules set out criteria against which to assess the conduct of those parties, i.e. the signatory, the relying party and the supplier of certification services.

77. As to the signatory, the Uniform Rules elaborate on the basic principle that the signatory should apply reasonable care with respect to its electronic signature device. The signatory is expected to exercise reasonable care to avoid unauthorized use of that signature device. Where the signatory knows or should have known that the signature device has been compromised, the signatory should give notice without undue delay to any person who may reasonably be expected to rely on, or to provide services in support of, the electronic signature. Where a certificate is used to support the electronic signature, the signatory is expected to exercise reasonable care to ensure the accuracy and completeness of all material representations made by the signatory in connection with the certificate.

78. A relying party is expected to take reasonable steps to verify the reliability of an electronic signature. Where the electronic signature is supported by a certificate, the relying party should take reasonable steps to verify the validity, suspension or revocation of the certificate, and observe any limitation with respect to the certificate.

79. The general duty of a supplier of certification services is to utilize trustworthy systems, procedures and human resources, and to act in accordance with representations that the supplier makes with respect to its policies and practices. In addition, the supplier of certification services is expected to exercise reasonable care to ensure the accuracy and completeness of all material representations it makes in connection with a certificate. In the certificate, the supplier should provide essential information allowing the relying party to identify the supplier. It should also represent that: (1) the person who is identified in the certificate had control of the signature device at the time of signing; and (2) the signature device was operational on or before the date when the certificate was issued. In its dealings with the relying party, the supplier of certification services should provide additional information as to: (1) the method used to identify the signatory; (2) any limitation on the purpose or value for which the signature device or the certificate may be used; (3) the operational condition of the signature device; (4) any limitation on the scope or extent of liability of the supplier of certification services; (5) whether means exist for the signatory to give notice that a signature device has been compromised; and (6) whether a timely revocation service is offered.

80. For the assessment of the trustworthiness of the systems, procedures and human resources utilized by the supplier of certification services, the Uniform Rules provide an open-ended list of indicative factors.

F. A technology-neutral framework

81. Given the pace of technological innovation, the Uniform Rules provide for the legal recognition of electronic signatures irrespective of the technology used (e.g. digital signatures relying on asymmetric cryptography, or biometrics).

V. ASSISTANCE FROM THE UNCITRAL SECRETARIAT

A. Assistance in drafting legislation

82. 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 UNCITRAL Uniform Rules on Electronic Signatures. The same assistance is brought to Governments considering legislation based on other UNCITRAL model laws, or considering adhesion to one of the international trade law conventions prepared by UNCITRAL.

83. Further information concerning the Uniform Rules and other model laws and conventions developed by UNCITRAL, may be obtained from the secretariat at the address below:

International Trade Law Branch, 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: <http://www.uncitral.org>

B. Information on the interpretation of legislation based on the Uniform Rules

84. The secretariat welcomes comments concerning the Uniform Rules and the Guide, as well as information concerning enactment of legislation based on the Uniform Rules. Once enacted, the Uniform Rules 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 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 secretariat in hard copy (A/CN.9/SER.C/GUIDE/1) and on the above-mentioned Internet home page of UNCITRAL.

A/CN.9/WG.IV/WP.86/Add.1

NOTE BY THE SECRETARIAT

1. Pursuant to decisions taken by the Commission at its twenty-ninth (1996)¹ and thirtieth (1997)² sessions, the Working Group on Electronic Commerce devoted its thirty-first to thirty-sixth sessions to the preparation of the draft UNCITRAL Uniform Rules of Electronic Signatures (hereinafter referred to as "the Uniform Rules"). Reports of those sessions are found in documents A/CN.9/437, 446, 454, 457, 465 and 467. In preparing the Uniform Rules, the Working Group noted that it would be useful to provide in a commentary additional information concerning the Uniform Rules. Following the approach taken in the preparation of the UNCITRAL Model Law on Electronic Commerce, there was general support for a suggestion that the draft Uniform Rules should be accompanied by a guide to assist States in enacting and applying the Uniform Rules. The guide, much of which could be drawn from the travaux préparatoires of the Uniform Rules, would also be helpful to other users of the Uniform Rules.

2. At its thirty-sixth session, the Working Group discussed the issue of electronic signatures on the basis of the note prepared by the secretariat (A/CN.9/WG.IV/WP.84). After discussion, the Working Group adopted the substance of draft articles 1 and 3 to 11 of the Uniform Rules and referred them to a drafting group to ensure consistency between the provisions of the Uniform Rules. The secretariat was requested to prepare a draft guide to enactment of the provisions adopted. Subject to approval by the Commission, the Working Group recommended that draft articles 2 and 13 of the Uniform Rules, together with the guide

to enactment, be reviewed by the Working Group at a future session.³

3. At its thirty-third session (June-July 2000), the Commission noted that the Working Group, at its thirty-sixth session, had adopted the text of draft articles 1 and 3 to 11 of the Uniform Rules. It was stated that some issues remained to be clarified as a result of the decision by the Working Group to delete the notion of enhanced electronic signature from the draft uniform rules. A concern was expressed that, depending on the decisions to be made by the Working Group with respect to draft articles 2 and 13, the remainder of the draft provisions might need to be revisited to avoid creating a situation where the standard set forth by the Uniform Rules would apply equally to electronic signatures that ensured a high level of security and to low-value certificates that might be used in the context of electronic communications that were not intended to carry significant legal effect.

4. After discussion, the Commission expressed its appreciation for the efforts extended by the Working Group and the progress achieved in the preparation of the Uniform Rules. The Working Group was urged to complete its work with respect to the Uniform Rules at its thirty-seventh session and to review the draft guide to enactment to be prepared by the secretariat.⁴

5. The annex to the present note contains chapter II of part two of the draft Guide prepared by the secretariat. Part one and chapter I of part two are published in document A/CN.9/WG.IV/WP.86.

¹Official Records of the General Assembly, Fifty-first Session, Supplement No. 17 (A/51/17), paras. 223 and 224.

²Ibid., Fifty-second Session, Supplement No. 17 (A/52/17), paras. 249-251.

³A/CN.9/467, paras. 18-20.

⁴Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 17 (A/55/17), paras. 380-383.

ANNEX

Chapter II. Article-by-article remarks

(see A/CN.9/WG.IV/WP.86/Add.1)

(Draft articles 1 and 3 to 11 of the UNCITRAL Uniform Rules on Electronic Signatures, as adopted by the UNCITRAL Working Group on Electronic Commerce at its thirty-sixth session, held in New York from 14 to 25 February 2000)

TITLE

Footnote**

“Uniform Rules”

1. The title “Uniform Rules” has been used pending a final decision by the Working Group and the Commission as to the legal nature of the instrument and its relationship with the Model Law. However, throughout its preparation, the instrument has been conceived of as an addition to the Model Law, which should be dealt with on an equal footing and share the legal nature of its forerunner.

3. It was felt that the Uniform Rules should contain an indication that their focus was on the types of situations encountered in the commercial area and that they had been prepared against the background of relationships in trade and finance. For that reason, article 1 refers to “commercial activities” and provides, in footnote**, indications as to what is meant thereby. Such indications, which may be particularly useful for those countries where there does not exist a discrete body of commercial law, are modelled, for reasons of consistency, on the footnote to article 1 of the UNCITRAL Model Law on International Commercial Arbitration (also reproduced as footnote**** to article 1 of the UNCITRAL Model Law on Electronic Commerce). In certain countries, the use of footnotes in a statutory text would not be regarded as acceptable legislative practice. National authorities enacting the Uniform Rules might thus consider the possible inclusion of the text of footnotes in the body of the text itself.

Article 1. Sphere of application

These Rules apply where electronic signatures are used in the context* of commercial** activities. They do not override any rule of law intended for the protection of consumers.

*The Commission suggests the following text for States that might wish to extend the applicability of these Rules:

“These Rules apply where electronic signatures are used, except in the following situations: [...]”

**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.

Footnote*

4. The Uniform Rules apply to all kinds of data messages to which a legally significant electronic signature is attached, and nothing in the Uniform Rules should prevent an enacting State from extending the scope of the Uniform Rules to cover uses of electronic signatures outside the commercial sphere. For example, while the focus of the Uniform Rules is not on the relationships between users of electronic signatures and public authorities, the Uniform Rules are not intended to be inapplicable to such relationships. Footnote* provides for alternative wordings, for possible use by enacting States that would consider it appropriate to extend the scope of the Uniform Rules beyond the commercial sphere.

*Consumer protection**General remarks*

2. The purpose of article 1 is to delineate the scope of application of the Uniform Rules. The approach used in the Uniform Rules is to provide in principle for the coverage of all factual situations where electronic signatures are used, irrespective of the specific electronic signature or authentication technique being applied. It was felt during the preparation of the Uniform Rules that exclusion of any form or medium by way of a limitation in the scope of the Uniform Rules might result in practical difficulties and would run counter to the purpose of providing truly “media-neutral” rules. However, in the preparation of the Uniform Rules, special attention has been given to “digital signatures”, i.e. those electronic signatures obtained through the application of dual-key cryptography, which were regarded by the UNCITRAL Working Group on Electronic Commerce as a particularly widespread technology. The focus of the Uniform Rules is on the use of modern technology and, except where they expressly provide otherwise, the Uniform Rules are not intended to alter traditional rules on handwritten signatures.

5. Some countries have special consumer protection laws that may govern certain aspects of the use of information systems. With respect to such consumer legislation, as was the case with previous UNCITRAL instruments (e.g. the UNCITRAL Model Law on International Credit Transfers and the UNCITRAL Model Law on Electronic Commerce), it was felt that an indication should be given that the Uniform Rules had been drafted without special attention being given to issues that might arise in the context of consumer protection. At the same time, it was felt that there was no reason why situations involving consumers should be excluded from the scope of the Uniform Rules by way of a general provision, particularly since the provisions of the Uniform Rules might be found very beneficial for consumer protection, depending on legislation in each enacting State. Article 1 thus recognizes that any such consumer protection law may take precedence over the provisions in the Uniform Rules. Should legislators come to different conclusions as to the beneficial effect of the Uniform Rules on consumer transactions in a given country, they might consider excluding consumers from the sphere of application of the piece of legislation enacting the Uniform Rules. The question of which individuals or corporate bodies would be regarded as “consumers” is left to applicable law outside the Uniform Rules.

Use of electronic signatures in international and domestic transactions

6. It is recommended that application of the Uniform Rules be made as wide as possible. Particular caution should be used in excluding the application of the Uniform Rules by way of a limitation of its scope to international uses of electronic signatures, since such a limitation may be seen as not fully achieving the objectives of the Uniform Rules. Furthermore, the variety of procedures available under the Uniform Rules to limit the use of electronic signatures if necessary (e.g. for purposes of public policy) may make it less necessary to limit the scope of the Uniform Rules. The legal certainty to be provided by the Uniform Rules is necessary for both domestic and international trade, and a duality of regimes governing the use of electronic signatures might create a serious obstacle to the use of such techniques.

References to UNCITRAL documents

A/CN.9/467, paras. 22-24;
A/CN.9/WG.IV/WP.84, para. 22;
A/CN.9/465, paras. 36-42;
A/CN.9/WG.IV/WP.82, para. 21;
A/CN.9/457, paras. 53-64.

Article 3. Equal treatment of signature technologies

None of these Rules, except article 5, shall be applied so as to exclude, restrict or deprive of legal effect any method of creating an electronic signature that satisfies the requirements referred to in article 6 (1) of these Rules or otherwise meets the requirements of applicable law.

Neutrality as to technology

7. Article 3 embodies the fundamental principle that no method of electronic signature should be discriminated against, i.e. that all technologies would be given the same opportunity to satisfy the requirements of article 6. As a result, there should be no disparity of treatment between electronically-signed messages and paper documents bearing handwritten signatures, or between various types of electronically-signed messages, provided that they meet the basic requirements set forth in article 6(1) of the Uniform Rules or any other requirement set forth in applicable law. Such requirements might, for example, prescribe the use of a specifically designated signature technique in certain identified situations, or might otherwise set a standard that might be higher or lower than that set forth in article 7 of the UNCITRAL Model Law on Electronic Commerce (and draft article 6 of the Uniform Rules). The fundamental principle of non-discrimination is intended to find general application. It should be noted, however, that such a principle is not intended to affect the freedom of contract recognized under article 5. As between themselves and to the extent permitted by law, the parties should thus remain free to exclude by agreement the use of certain electronic signature techniques. By stating that "these Rules shall not be applied so as to exclude, restrict or deprive of legal effect any method of creating an electronic signature", article 3 merely indicates that the form in which a certain electronic signature is applied cannot be used as the only reason for which that signature would be denied legal effectiveness. However, article 3 should not be misinterpreted as establishing the legal validity of any given signature technique or of any electronically-signed information.

References to UNCITRAL documents

A/CN.9/467, paras. 25-32;
A/CN.9/WG.IV/WP.84, para. 37;
A/CN.9/465, paras. 43-48;
A/CN.9/WG.IV/WP.82, para. 34;
A/CN.9/457, paras. 53-64.

Article 4. Interpretation

(1) In the interpretation of these Rules, regard is to be had to their international origin and to the need to promote uniformity in their application and the observance of good faith.

(2) Questions concerning matters governed by these Rules which are not expressly settled in them are to be settled in conformity with the general principles on which these Rules are based.

Source

8. Article 4 is inspired by article 7 of the United Nations Convention on Contracts for the International Sale of Goods, and reproduced from article 3 of the UNCITRAL Model Law on Electronic Commerce. It is intended to provide guidance for interpretation of the Uniform Rules by arbitral tribunals, courts and other national or local authorities. The expected effect of article 4 is to limit the extent to which a uniform text, once incorporated in local legislation, would be interpreted only by reference to the concepts of local law.

Paragraph (1)

9. The purpose of paragraph (1) is to draw the attention of any person who might be called upon to apply the Uniform Rules to the fact that the provisions of the Uniform Rules (or the provisions of the instrument implementing the Uniform Rules), while enacted as part of domestic legislation and therefore domestic in character, should be interpreted with reference to its international origin in order to ensure uniformity in the interpretation of the Uniform Rules in various countries.

Paragraph (2)

10. Amongst the general principles on which the Uniform Rules are based, the following non-exhaustive list may be found applicable: (1) to facilitate electronic commerce among and within nations; (2) to validate transactions entered into by means of new information technologies; (3) to promote and encourage in a technology-neutral way the implementation of new information technologies in general and electronic signatures in particular; (4) to promote the uniformity of law; and (5) to support commercial practice. While the general purpose of the Uniform Rules is to facilitate the use of electronic signatures, it should not be construed in any way as imposing their use.

References to UNCITRAL documents

A/CN.9/467, paras. 33-35;
A/CN.9/WG.IV/WP.84, para. 38.
A/CN.9/465, paras. 49 and 50;
A/CN.9/WG.IV/WP.82, para. 35.

Article 5. Variation by agreement

These Rules may be derogated from or their effect may be varied by agreement, unless that agreement would not be valid or effective under the law of the enacting State [or unless otherwise provided for in these Rules].

Deference to applicable law

11. The decision to undertake the preparation of the Uniform Rules was based on the recognition that, in practice, solutions to the legal difficulties raised by the use of modern means of communication are mostly sought within contracts. The Uniform Rules are thus intended to support the principle of party autonomy. However, applicable law may set limits to the application of that principle. Article 5 should not be misinterpreted as allowing the parties to derogate from mandatory rules, e.g. rules adopted for reasons of public policy. Neither should article 5 be misinterpreted as encouraging States to establish mandatory legislation limiting the effect of party autonomy with respect to electronic signatures or otherwise inviting States to restrict the freedom of parties to agree as between themselves on issues of form requirements governing their communications.

12. With respect to the words “unless otherwise provided in these Rules”, the Working Group agreed at its thirty-sixth session that the matter might need to be reconsidered after the Working Group had completed its review of the draft articles. Pending a decision as to whether the Uniform Rules would contain any mandatory provision, the words “unless otherwise provided in these Rules” have been placed within square brackets (A/CN.9/467, para. 40).

Expressed or implied agreement

13. As to the way in which the principle of party autonomy is expressed in article 5, it was generally admitted in the preparation of the Uniform Rules that variation by agreement might be expressed or implied. The wording of draft article 5 has been kept in line with article 6 of the United Nations Convention on Contracts for the International Sale of Goods (A/CN.9/467, para. 38).

Bilateral or multilateral agreement

14. Article 5 is intended to apply not only in the context of relationships between originators and addressees of data messages but also in the context of relationships involving intermediaries. Thus, the provisions of the Uniform Rules could be varied either by bilateral or multilateral agreements between the parties, or by system rules agreed to by the parties. Typically, applicable law would limit party autonomy to rights and obligations arising as between parties so as to avoid any implication as to the rights and obligations of third parties.

References to UNCITRAL documents

- A/CN.9/467, paras. 36-43;
- A/CN.9/WG.IV/WP.84, paras. 39 and 40;
- A/CN.9/465, paras. 51-61;
- A/CN.9/WG.IV/WP.82, paras. 36-40;
- A/CN.9/457, paras. 53-64.

Article 6. Compliance with a requirement for a signature

(1) Where the law requires a signature of a person, that requirement is met in relation to a data message if an electronic signature is used which is as reliable as was appropriate for the purpose for which the data message was generated or communicated, in the light of all the circumstances, including any relevant agreement.

(2) Paragraph (1) applies whether the requirement referred to therein is in the form of an obligation or whether the law simply provides consequences for the absence of a signature.

(3) An electronic signature is considered to be reliable for the purpose of satisfying the requirement referred to in paragraph (1) if:

(a) the means of creating the electronic signature is, within the context in which it is used, linked to the signatory and to no other person;

(b) the means of creating the electronic signature was, at the time of signing, under the control of the signatory and of no other person;

(c) any alteration to the electronic signature, made after the time of signing, is detectable; and

(d) where a purpose of the legal requirement for a signature is to provide assurance as to the integrity of the information to which it relates, any alteration made to that information after the time of signing is detectable.

(4) Paragraph (3) does not limit the ability of any person:

(a) to establish in any other way, for the purpose of satisfying the requirement referred to in paragraph (1), the reliability of an electronic signature; or

(b) to adduce evidence of the non-reliability of an electronic signature.

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

Importance of article 6

15. Article 6 is one of the core provisions of the Uniform Rules. Article 6 is intended to build upon article 7 of the Model Law and to provide guidance as to how the test of reliability in article 7(1)(b) can be satisfied. In interpreting article 6, it should be borne in mind that the purpose of that provision is to ensure that, where any legal consequence would have flowed from the use of a handwritten signature, the same consequence should flow from the use of a reliable electronic signature.

16. At its thirty-sixth session, the Working Group adopted the following wording as a definition of “Electronic signature”, subject to possible reconsideration to ensure consistency between the provisions of the Uniform Rules (A/CN.9/467, para. 57):

“Electronic signature” means any method that is used to identify the signature holder in relation to the data message and indicate the signature holder’s approval of the information contained in the data message.

Paragraphs (1), (2) and (5)

17. Paragraphs (1), (2), and (5) of draft article 6 introduce provisions drawn from article 7(1)(b), 7(2), and 7(3) of the UNCITRAL Model Law on Electronic Commerce, respectively. Wording inspired by article 7(1)(a) of the Model Law is already included in the definition of “electronic signature” under draft article 2(a).

Notions of "identity" and "identification"

18. The Working Group agreed that, for the purpose of defining "electronic signature" under the Uniform Rules, the term "identification" could be broader than mere identification of the signatory by name. The concept of identity or identification includes distinguishing him or her, by name or otherwise, from any other person, and may refer to other significant characteristics, such as position or authority, either in combination with a name or without reference to the name. On that basis, it is not necessary to distinguish between identity and other significant characteristics, nor to limit the Uniform Rules to those situations in which only identity certificates which name the signature device holder are used (A/CN.9/467, paras. 56-58).

Effect of the Uniform Rules varying with level of technical reliability

19. In the preparation of the Uniform Rules, the view was expressed that (either through a reference to the notion of "enhanced electronic signature" or through a direct mention of criteria for establishing the technical reliability of a given signature technique) a dual purpose of draft article 6 should be to establish: (1) that legal effects would result from the application of those electronic signature techniques that were recognized as reliable; and (2), conversely, that no such legal effects would flow from the use of techniques of a lesser reliability. It was generally felt, however, that a more subtle distinction might need to be drawn between the various possible electronic signature techniques, since the Uniform Rules should avoid discriminating against any form of electronic signature, unsophisticated and insecure though it might appear in given circumstances. Therefore, any electronic signature technique applied for the purpose of signing a data message under article 7(1)(a) of the Model Law would be likely to produce legal effects, provided that it was sufficiently reliable in the light of all the circumstances, including any agreement between the parties. However, under article 7 of the Model Law, the determination of what constitutes a reliable method of signature in the light of the circumstances, can be made only by a court or other trier of fact intervening *ex post*, possibly long after the electronic signature has been used. In contrast, the Uniform Rules are expected to create a benefit in favour of certain techniques, which are recognized as particularly reliable, irrespective of the circumstances in which they are used. That is the purpose of paragraph (3), which is expected to create certainty (through either a presumption or a substantive rule), at or before the time any such technique of electronic signature is used (*ex ante*), that using a recognized technique will result in legal effects equivalent to those of a handwritten signature. Thus, paragraph (3) is an essential provision if the Uniform Rules are to meet their goal of providing more certainty than readily offered by the Model Law as to the legal effect to be expected from the use of particularly reliable types of electronic signatures (see A/CN.9/465, para. 64).

Presumption or substantive rule

20. In order to provide certainty as to the legal effect resulting from the use of what might or might not be called an "enhanced electronic signature" under draft article 2, paragraph (3) expressly establishes the legal effects that would result from the conjunction of certain technical characteristics of an electronic signature. As to how those legal effects would be established, enacting States, depending on their law of civil and commercial procedure, should be free to adopt a presumption or to proceed by way of a direct assertion of the linkage between certain technical characteristics and the legal effect of a signature (see A/CN.9/467, paras. 61 and 62).

Intent of signatory

21. A question remains as to whether any legal effect should result from the use of electronic signature techniques that may be made with no clear intent by the signatory of becoming legally bound by approval of the information being electronically signed. In any such circumstance, the second function described in article 7(1)(a) of the Model Law is not fulfilled since there is no "intent of indicating any approval of the information contained in the data message". The approach taken in the Uniform Rules is that the legal consequences of the use of a handwritten signature should be replicated in an electronic environment. Thus, by appending a signature (whether handwritten or electronic) to certain information, the signatory should be presumed to have approved the linking of its identity with that information. Whether such a linking should produce legal effects (contractual or other) would result from the nature of the information being signed, and from any other circumstances, to be assessed according to the law applicable outside the Uniform Rules. In that context, the Uniform Rules are not intended to interfere with the general law of contracts or obligations (see A/CN.9/465, para. 65).

Criteria of technical reliability

22. Subparagraphs (a) to (d) of paragraph (3) are intended to express objective criteria of technical reliability of electronic signatures. Subparagraph (a) focuses on the objective characteristics of the signature creation device, which must be "linked to the signatory and to no other person". From a technical point of view, the signature creation device could be uniquely "linked" to the signatory, without being "unique" in itself. The linkage between the data used for creation of the signature and the signatory is the essential element (A/CN.9/467, para. 63). While certain electronic signature creation devices may be shared by a variety of users, for example where several employees would share the use of a corporate signature-creation device, that device must be capable of identifying one user unambiguously in the context of each electronic signature.

Sole control of signature device by the signatory

23. Subparagraph (b) deals with the circumstances in which the signature creation device is used. At the time it is used, the signature creation device must be under the sole control of the signatory. In relation to the notion of sole control by the signatory, a question is whether the signatory would retain its ability to authorize another person to use the signature device on its behalf. Such a situation might arise where the signature device is used in the corporate context where the corporate entity would be the signatory but would require a number of persons to be able to sign on its behalf (A/CN.9/467, para. 66). Another example may be found in business applications such as the one where the signature device exists on a network and is capable of being used by a number of people. In that situation, the network would presumably relate to a particular entity which would be the signatory and maintain control over the signature creation device. If that was not the case, and the signature device was widely available, it should not be covered by the Uniform Rules (A/CN.9/467, para. 67).

Agency

24. Subparagraphs (a) and (b) converge to ensure that the signature device is capable of being used by only one person at any given time, principally the time at which the signature is created, and not by some other person as well. The question of agency or authorized use of the signature device should be addressed in the definition of "signatory", not in the substance of the rules (A/CN.9/467, para. 68).

Integrity

25. Subparagraphs (c) and (d) deal with the issues of integrity of the electronic signature and integrity of the information being signed electronically. It would have been possible to combine the two provisions to emphasize that, where a signature is attached to a document, the integrity of the document and the integrity of the signature are so closely related that it is difficult to conceive of one without the other. Where a signature is used to sign a document, the idea of the integrity of the document is inherent in the use of the signature. However, it was decided that the Uniform Rules should follow the distinction drawn in the Model Law between articles 7 and 8. Although some technologies provide both authentication (article 7 of the Model Law) and integrity (article 8 of the Model Law), those concepts can be seen as distinct legal concepts and treated as such. Since a handwritten signature provides neither a guarantee of the integrity of the document to which it is attached nor a guarantee that any change made to the document would be detectable, the functional equivalence approach requires that those concepts should not be dealt with in a single provision. The purpose of paragraph (3)(c) is to set forth the criterion to be met in order to demonstrate that a particular method of electronic signature is reliable enough to satisfy a requirement of law for a signature. That requirement of law could be met without having to demonstrate the integrity of the entire document (see A/CN.9/467, paras. 72-80).

Functional equivalent of original document

26. Subparagraph (d) is intended primarily for use in those countries where existing legal rules governing the use of handwritten signatures could not accommodate a distinction between integrity of the signature and integrity of the information being signed. In other countries, subparagraph (d) might create a signature that would be more reliable than a handwritten signature and thus go beyond the concept of functional equivalent to a signature. In any circumstances, the effect of subparagraph (d) would be to create a functional equivalent to an original document.

Electronic signature of portion of a message

27. In subparagraph (d), the necessary linkage between the signature and the information being signed is expressed so as to avoid the implication that the electronic signature could apply only to the full contents of a data message. In fact, the information being signed, in many instances, will be only a portion of the information contained in the data message. For example, an electronic signature may relate only to information appended to the message for transmission purposes.

Variation by agreement

28. Paragraph (3) is not intended to limit the application of article 5 and of any applicable law recognizing the freedom of the parties to stipulate in any relevant agreement that a given signature technique would be treated among themselves as a reliable equivalent of a handwritten signature.

References to UNCITRAL documents

- A/CN.9/467, paras. 44-87;
- A/CN.9/WG.IV/WP.84, paras. 41-47;
- A/CN.9/465, paras. 62-82;
- A/CN.9/WG.IV/WP.82, paras. 42-44;
- A/CN.9/457, paras. 48-52;
- A/CN.9/WG.IV/WP.80, paras. 11 and 12.

Article 7. Satisfaction of article 6

(1) [Any person, organ or authority, whether public or private, specified by the enacting State as competent] may determine which electronic signatures satisfy the provisions of article 6.

(2) Any determination made under paragraph (1) shall be consistent with recognized international standards.

(3) Nothing in this article affects the operation of the rules of private international law.

Pre-determination of status of electronic signature

29. Article 7 describes the role played by the enacting State in establishing or recognizing any entity that might validate the use of electronic signatures or otherwise certify their quality. Like article 6, article 7 is based on the idea that what is required to facilitate the development of electronic commerce is certainty and predictability at the time when commercial parties make use of electronic signature techniques, not at the time when there is a dispute before a court. Where a particular signature technique can satisfy requirements for a high degree of reliability and security, there should be a means for assessing the technical aspects of reliability and security and according the signature technique some form of recognition.

Purpose of article 7

30. The purpose of article 7 is to make it clear that an enacting State may designate an organ or authority that will have the power to make determinations as to what specific technologies may benefit from the presumptions or substantive rule established under article 6. Article 7 is not an enabling provision that could, or would, necessarily be enacted by States in its present form. However, it is intended to convey a clear message that certainty and predictability can be achieved by determining which electronic signature techniques satisfy the reliability criteria of article 6, provided that such determination is made in accordance with international standards. Article 7 should not be interpreted in a manner that would either prescribe mandatory legal effects for the use of certain types of signature techniques, or would restrict the use of technology to those techniques determined to satisfy the reliability requirements of article 6. Parties should be free, for example, to use techniques that had not been determined to satisfy articles 6, if that was what they had agreed to do. They should also be free to show, before a court or arbitral tribunal, that the method of signature they had chosen to use did satisfy the requirements of article 6, even though not the subject of a prior determination to that effect.

Paragraph (1)

31. Paragraph (1) makes it clear that any entity that might validate the use of electronic signatures or otherwise certify their quality would not always have to be established as a State authority. Paragraph (1) should not be read as making a recommendation to States as to the only means of achieving recognition of signature technologies, but rather as indicating the limitations that should apply if States wished to adopt such an approach.

Paragraph (2)

32. With respect to paragraph (2), the notion of "standard" should not be limited to official standards developed, for example, by the International Organization for Standardization (ISO) and the Internet Engineering Task Force (IETF), or to other technical stand-

ards. The word “standards” should be interpreted in a broad sense, which would include industry practices and trade usages, texts emanating from such international organizations as the International Chamber of Commerce, as well as the work of UNCITRAL itself (including these Rules and the Model Law). The possible lack of relevant standards should not prevent the competent persons or authorities from making the determination referred to in paragraph (1). As to the reference to “recognized” standards, a question might be raised as to what constitutes “recognition” and of whom such recognition is required (see A/CN.9/465, para. 94)

Paragraph (3)

33. Paragraph (3) is intended to make it abundantly clear that the purpose of article 7 is not to interfere with the normal operation of the rules of private international law (see A/CN.9/467, para. 94). In the absence of such a provision, draft article 7 might be misinterpreted as encouraging enacting States to discriminate against foreign electronic signatures on the basis of non-compliance with the rules set forth by the relevant person or authority under paragraph (1).

References to UNCITRAL documents

- A/CN.9/467, paras. 90-95;
- A/CN.9/WG.IV/WP.84, para. 49-51;
- A/CN.9/465, paras. 90-98;
- A/CN.9/WG.IV/WP.82, para. 46;
- A/CN.9/457, paras. 48-52;
- A/CN.9/WG.IV/WP.80, para. 15.

Article 8. Conduct of the signatory

(1) Each signatory shall:

(a) exercise reasonable care to avoid unauthorized use of its signature device;

(b) without undue delay, notify any person who may reasonably be expected by the signatory to rely on or to provide services in support of the electronic signature if:

- (i) the signatory knows that the signature device has been compromised; or
- (ii) the circumstances known to the signatory give rise to a substantial risk that the signature device may have been compromised;

(c) where a certificate is used to support the electronic signature, exercise reasonable care to ensure the accuracy and completeness of all material representations made by the signatory which are relevant to the certificate throughout its life-cycle, or which are to be included in the certificate.

(2) A signatory shall be liable for its failure to satisfy the requirements of paragraph (1).

Title

34. Article 8 (and articles 9 and 11) had been initially planned to contain rules regarding the obligations and liabilities of the various parties involved (the signatory, the relying party and any certification services provider). However, the rapid changes affecting the technical and commercial aspects of electronic commerce, together with the role currently played by self-regulation in the field of electronic commerce in certain countries, made it difficult to achieve consensus as to the contents of such rules. The articles have been drafted so as to embody a minimal “code of conduct” of the various parties. The consequences of failure to abide by that code of conduct are left to applicable law outside the Uniform Rules.

Paragraph (1)

35. Subparagraphs (a) and (b) apply generally to all electronic signatures, while subparagraph (c) applies only to those electronic signatures that are supported by a certificate. The obligation in paragraph (1) (a), in particular, to exercise reasonable care to prevent unauthorized use of a signature device, constitutes a basic obligation that is, for example, generally contained in agreements concerning the use of credit cards. Under the policy adopted in paragraph (1), such an obligation should also apply to any electronic signature device that could be used for the purpose of expressing legally significant intent. However, the provision for variation by agreement in article 5 allows the standards set in article 8 to be varied in areas where they would be thought to be inappropriate, or to lead to unintended consequences.

36. Paragraph (1) (b) refers to the notion of “person who may reasonably be expected by the signatory to rely on or to provide services in support of the electronic signature”. Depending on the technology being used, such a “relying party” may be not only a person who might seek to rely on the signature, but also to persons such as certification service providers, certificate revocation service providers and others.

37. Paragraph (1) (c) applies where a certificate is used to support the signature device. The “life cycle of the certificate” is intended to be interpreted broadly as covering the period starting with the application for the certificate or the creation of the certificate and ending with the expiry or revocation of the certificate.

Paragraph (2)

38. Paragraph (2) does not specify either the consequences or the limits of liability, both of which are left to national law. However, even though it leaves the consequences of liability up to national law, paragraph (2) serves to give a clear signal to enacting States that liability should attach to a failure to satisfy the obligations set forth in paragraph (1). Paragraph (2) is based on the conclusion reached by the Working Group at its thirty-fifth session that it might be difficult to achieve consensus as to what consequences might flow from the liability of the signature device holder. Depending on the context in which the electronic signature is used, such consequences might range, under existing law, from the signature device holder being bound by the contents of the message to liability for damages. Accordingly, paragraph (2) merely establishes the principle that the signature device holder should be held liable for failure to meet the requirements of paragraph (1), and leaves it to the law applicable outside the Uniform Rules in each enacting State to deal with the legal consequences that would flow from such liability (A/CN.9/465, para. 108).

References to UNCITRAL documents

- A/CN.9/467, paras. 96-104;
- A/CN.9/WG.IV/WP.84, paras. 52 and 53;
- A/CN.9/465, paras. 99-108;
- A/CN.9/WG.IV/WP.82, paras. 50-55;
- A/CN.9/457, paras. 65-98;
- A/CN.9/WG.IV/WP.80, paras. 18 and 19.

Article 9. Conduct of the supplier of certification services

(1) A supplier of certification services shall:

(a) act in accordance with representations made by it with respect to its policies and practices;

(b) exercise reasonable care to ensure the accuracy and completeness of all material representations made by it that are relevant to the certificate throughout its life cycle, or which are included in the certificate;

(c) provide reasonably accessible means which enable a relying party to ascertain from the certificate:

- (i) the identity of the supplier of certification services;
- (ii) that the person who is identified in the certificate had control of the signature device at the time of signing;
- (iii) that the signature device was operational on or before the date when the certificate was issued;

(d) provide reasonably accessible means which enable a relying party to ascertain, where relevant, from the certificate or otherwise:

- (i) the method used to identify the signatory;
- (ii) any limitation on the purpose or value for which the signature device or the certificate may be used;
- (iii) that the signature device is operational and has not been compromised;
- (iv) any limitation on the scope or extent of liability stipulated by the supplier of certification services;
- (v) whether means exist for the signatory to give notice that a signature device has been compromised;
- (vi) whether a timely revocation service is offered;

(e) provide a means for a signatory to give notice that a signature device has been compromised, and ensure the availability of a timely revocation service;

(f) utilize trustworthy systems, procedures and human resources in performing its services.

(2) A supplier of certification services shall be liable for its failure to satisfy the requirements of paragraph (1).

Paragraph (1)

39. Subparagraph (a) expresses the basic rule that a supplier of certification services should adhere to the representations and commitments made by that supplier, for example in a certification practices statement or in any other type of policy statement. Subparagraph (b) replicates in the context of the activities of the supplier of certification services the standard of conduct set forth in article 8(1)(c) with respect to the signatory.

40. Subparagraph (c) defines the essential contents and the core effect of any certificate under the Uniform Rules. Subparagraph (d) lists additional elements to be included in the certificate or otherwise made available or accessible to the relying party, where they would be relevant to a particular certificate. Subparagraph (e) is not intended to apply to certificates such as transactional certificates, which are one-time certificates, or low-cost certificates for low-risk applications, both of which might not be subject to revocation.

Paragraph (2)

41. Paragraph (2) mirrors the basic rule of liability set forth in article 8(2) with respect to the signatory. The effect of that provision is to leave it up to national law to determine the consequences of liability. Subject to applicable rules of national law, paragraph (2) is not intended by its authors to be interpreted as a rule of absolute liability. It was not foreseen that the effect of paragraph (2) would be to exclude the possibility for the supplier of certification services to prove, for example, the absence of fault or contributory fault.

42. Early drafts of article 9 contained an additional paragraph, which addressed the consequences of liability as set forth in paragraph (2). In the preparation of the Uniform Rules, it was observed that suppliers of certification services performed intermediary functions that were fundamental to electronic commerce and that the question of the liability of such professionals would not be sufficiently addressed by adopting a single provision along the lines of paragraph (2). While paragraph (2) may state an appropriate principle for application to signatories, it may not be sufficient for addressing the professional and commercial activities covered by article 9. One possible way of compensating such insufficiency would have been to list in the text of the Uniform Rules the factors to be taken into account in assessing any loss resulting from failure by the supplier of certification services to satisfy the requirements of paragraph (1). It was finally decided that a non-exhaustive list of indicative factors should be contained in this Guide. In assessing the loss, the following factors should be taken into account, inter alia: (a) the cost of obtaining the certificate; (b) the nature of the information being certified; (c) the existence and extent of any limitation on the purpose for which the certificate may be used; (d) the existence of any statement limiting the scope or extent of the liability of the supplier of certification services; and (e) any contributory conduct by the relying party.

References to UNCITRAL documents

- A/CN.9/467, paras. 105-129;
- A/CN.9/WG.IV/WP.84, para. 54-60;
- A/CN.9/465, paras. 123-142 (draft article 12);
- A/CN.9/WG.IV/WP.82, paras. 59-68 (draft article 12);
- A/CN.9/457, paras. 108-119;
- A/CN.9/WG.IV/WP.80, paras. 22-24.

[Article 10. Trustworthiness

In determining whether and the extent to which any systems, procedures and human resources utilized by a supplier of certification services are trustworthy, regard shall be had to the following factors:

- (a) financial and human resources, including existence of assets;
- (b) quality of hardware and software systems;
- (c) procedures for processing of certificates and applications for certificates and retention of records;
- (d) availability of information to signatories identified in certificates and to potential relying parties;
- (e) regularity and extent of audit by an independent body;
- (f) the existence of a declaration by the State, an accreditation body or the supplier of certification services regarding compliance with or existence of the foregoing; and
- (g) any other relevant factor.]

Flexibility of the notion of "trustworthiness"

43. Article 10 was initially drafted as part of article 9. Although that part later became a separate article, it is mainly intended to assist with the interpretation of the notion of "trustworthy systems, procedures and human resources" in article 9(1)(f). Article 10 is set forth as a non-exhaustive list of factors to be taken into account in determining trustworthiness. That list is intended to provide a flexible notion of trustworthiness, which could vary in content depending upon what is expected of the certificate in the context in which it is created.

Reference to UNCITRAL document

- A/CN.9/467, paras. 114-119.

Article 11. Conduct of the relying party

A relying party shall bear the legal consequences of its failure to:

- (a) take reasonable steps to verify the reliability of an electronic signature; or
- (b) where an electronic signature is supported by a certificate, take reasonable steps to:
 - (i) verify the validity, suspension or revocation of the certificate; and
 - (ii) observe any limitation with respect to the certificate.

Reasonableness of reliance

44. Article 11 reflects the idea that a party who intends to rely on an electronic signature should bear in mind the question whether and to what extent such reliance is reasonable in the light of the circumstances. It is not intended to deal with the issue of the validity of an electronic signature, which is addressed under article 6 and should not depend upon the conduct of the relying party. The issue of the validity of an electronic signature should be kept separate from the issue of whether it is reasonable for a relying party to rely on a signature that does not meet the standard set forth in article 6.

Consumer issues

45. While article 11 might place a burden on relying parties, particularly where such parties are consumers, it may be recalled that the Uniform Rules are not intended to overrule any rule governing the protection of consumers. However, the Uniform Rules might play a useful role in educating all the parties involved, including relying parties, as to the standard of reasonable conduct to be met with respect to electronic signatures. In addition, establishing a standard of conduct under which the relying party should verify the reliability of the signature through readily accessible means may be seen as essential to the development of any public-key infrastructure system.

Notion of "relying party"

46. The Uniform Rules do not provide a definition of the notion of "relying party". Consistent with industry practice, the scope of the notion of "relying party" is intended to cover any party that might rely on an electronic signature. Depending on the circumstances, a "relying party" might thus be any person having or not a contractual relationship with the signatory or the certification services provider. It is even conceivable that the certification services provider or the signatory might itself become a "relying party". However, that broad notion of "relying party" should not result in the subscriber of a certificate being placed under an obligation to verify the validity of the certificate it purchases from the certification services provider.

Failure to comply with requirements of article 11

47. As to the possible impact of establishing as a general obligation that the relying party should verify the validity of the electronic signature or certificate, a question arises where the relying party fails to comply with the requirements of article 11. Should it fail to comply with those requirements, the relying party should not be precluded from availing itself of the signature or certificate if reasonable verification would not have revealed that the signature or certificate was invalid. Such a situation may need to be dealt with by the law applicable outside the Uniform Rules.

References to UNCITRAL documents

- A/CN.9/467, paras. 130-143;
- A/CN.9/WG.IV/WP.84, paras. 61-63;
- A/CN.9/465, paras. 109-122 (draft articles 10 and 11);
- A/CN.9/WG.IV/WP.82, paras 56-58 (draft articles 10 and 11);
- A/CN.9/457, paras. 99-107;
- A/CN.9/WG.IV/WP.80, paras. 20 and 21.

C. Report of the Working Group on Electronic Commerce on its thirty-eighth session (New York, 12-23 March 2001)

(A/CN.9/484) [Original: English]

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INTRODUCTION

1. The United Nations Commission on International Trade Law (UNCITRAL), at its thirtieth session, in 1997, endorsed the conclusions reached by the Working Group on Electronic Commerce at its thirty-first session with respect to the desirability and feasibility of preparing uniform rules on issues of digital signatures and certification authorities and possibly on related matters (A/CN.9/437, paras. 156 and 157). The Commission entrusted the Working Group with the preparation of uniform rules on the legal issues of digital signatures and certification authorities.¹ The Working Group began the preparation of uniform rules for electronic signatures at its thirty-second session (January 1998) on the basis of a note by the secretariat (A/CN.9/WG.IV/WP.73). At its thirty-first session, in 1998, the Commission had before it the report of the Working Group (A/CN.9/446). The Commission noted that the Working Group, throughout its thirty-first and thirty-second sessions, had experienced manifest difficulties in reaching a common understanding of the new legal issues that had arisen from the increased use of digital and other electronic signatures. However, it was generally felt that the progress achieved so far indicated that the draft uniform rules on electronic signatures were progressively being shaped into a workable structure. The Commission reaffirmed the decision it had taken at its thirtieth session as to the feasibility of preparing such uniform rules and noted with satisfaction that the Working Group had become generally recognized as a particularly important international forum for the exchange of views regarding the legal issues of electronic commerce and for the preparation of solutions to those issues.²

2. The Working Group continued its work at its thirty-third (July 1998) and thirty-fourth (February 1999) sessions

on the basis of notes by the secretariat (A/CN.9/WG.IV/WP.76, A/CN.9/WG.IV/WP.79 and A/CN.9/WG.IV/WP.80). At its thirty-second session, in 1999, the Commission had before it the reports of the Working Group on the work of those two sessions (A/CN.9/454 and A/CN.9/457, respectively). While the Commission generally agreed that significant progress had been made in the understanding of the legal issues of electronic signatures, it was also felt that the Working Group had been faced with difficulties in building a consensus as to the legislative policy on which the uniform rules should be based. After discussion, the Commission reaffirmed its earlier decisions as to the feasibility of preparing such uniform rules and expressed its confidence that more progress could be accomplished by the Working Group at its forthcoming sessions. While it did not set a specific time frame for the Working Group to fulfil its mandate, the Commission urged the Group to proceed expeditiously with the completion of the draft uniform rules. An appeal was made to all delegations to renew their commitment to active participation in the building of a consensus with respect to the scope and content of the draft uniform rules.³

3. The Working Group continued its work at its thirty-fifth (September 1999) and thirty-sixth (February 2000) sessions on the basis of notes by the secretariat (A/CN.9/WG.IV/WP.82 and A/CN.9/WG.IV/WP.84). At its thirty-third session (2000), the Commission had before it the report of the Working Group on the work of those two sessions (A/CN.9/465 and A/CN.9/467, respectively). It was noted that the Working Group, at its thirty-sixth session, had adopted the text of articles 1 and 3 to 12 of the uniform rules. Some issues remained to be clarified as a result of the decision by the Working Group to delete the notion of enhanced electronic signature from the draft uniform rules. Concern was expressed that, depending on the decisions to be made by the Working Group with respect to articles 2 and 13, the remainder of the draft provisions might need to

¹Official Records of the General Assembly, Fifty-second Session, Supplement No. 17 (A/52/17), paras. 249-251.

²Ibid., Fifty-third Session, Supplement No. 17 (A/53/17), paras. 207-211.

³Ibid., Fifty-fourth Session, Supplement No. 17 (A/54/17), paras. 308-314.

be re-examined to avoid creating a situation where the standard set by the uniform rules would apply equally to electronic signatures that ensured a high level of security and to low-value certificates that might be used in the context of electronic communications that were not intended to carry significant legal effect.

4. After discussion, the Commission expressed its appreciation for the efforts made by the Working Group and the progress achieved in the preparation of the draft uniform rules on electronic signatures. The Working Group was urged to complete its work with respect to the draft uniform rules at its thirty-seventh session and to review the draft Guide to Enactment to be prepared by the secretariat.⁴

5. At its thirty-seventh session (September 2000), the Working Group discussed the issues of electronic signatures on the basis of a note by the secretariat (A/CN.9/WG.IV/WP.84) and the draft articles adopted by the Working Group at its thirty-sixth session (A/CN.9/467, annex).

6. After discussing draft articles 2 and 12 (numbered 13 in document A/CN.9/WG.IV/WP.84) and considering consequential changes in other draft articles, the Working Group adopted the substance of the draft articles in the form of the draft UNCITRAL Model Law on Electronic Signatures. The text of the draft Model Law is annexed to the report of the thirty-seventh session of the Working Group (A/CN.9/483).

7. The Working Group discussed the draft Guide to Enactment of the draft Model Law on the basis of notes by the secretariat (A/CN.9/WG.IV/WP.86 and Add.1). The secretariat was requested to prepare a revised version of the draft Guide reflecting the decisions made by the Working Group, based on the various views, suggestions and concerns that had been expressed at the thirty-seventh session. Owing to lack of time, the Working Group did not complete its deliberations regarding the draft Guide to Enactment. It was agreed that some time should be set aside by the Working Group at its thirty-eighth session for completion of that agenda item. It was noted that the draft UNCITRAL Model Law on Electronic Signatures, together with the draft Guide to Enactment, would be submitted to the Commission for review and adoption at its thirty-fourth session, to be held at Vienna from 25 June to 13 July 2001 (A/CN.9/483, paras. 21-23).

8. At its thirty-third session, in 2000, the Commission held a preliminary exchange of views regarding future work in the field of electronic commerce. Three topics were suggested as indicating possible areas where work by the Commission would be desirable and feasible. The first dealt with electronic contracting, considered from the perspective of the United Nations Convention on Contracts for the International Sale of Goods (“the United Nations Sales Convention”),⁵ which was generally felt to constitute a readily acceptable framework for online contracts dealing with the sale of goods. It was pointed out that, for example,

additional studies might need to be undertaken to determine the extent to which uniform rules could be extrapolated from the United Nations Sales Convention to govern dealings in services or “virtual goods”, that is, items (such as software) that might be purchased and delivered in cyberspace. It was widely felt that, in undertaking such studies, careful attention would need to be given to the work of other international organizations such as the World Intellectual Property Organization (WIPO) and the World Trade Organization (WTO).

9. The second topic was dispute settlement. It was noted that the Working Group on Arbitration had already begun discussing ways in which current legal instruments of a statutory nature might need to be amended or interpreted to authorize the use of electronic documentation and, in particular, to do away with existing requirements regarding the written form of arbitration agreements. It was generally agreed that further work might be undertaken to determine whether specific rules were needed to facilitate the increased use of online dispute settlement mechanisms. In that context, it was suggested that special attention might be given to the ways in which dispute settlement techniques such as arbitration and conciliation might be made available to both commercial parties and consumers. It was widely felt that the increased use of electronic commerce tended to blur the distinction between consumers and commercial parties. However, it was recalled that, in a number of countries, the use of arbitration for the settlement of consumer disputes was restricted for reasons involving public policy considerations and might not easily lend itself to harmonization by international organizations. It was also felt that attention should be paid to the work undertaken in that area by other organizations, such as the International Chamber of Commerce (ICC), the Hague Conference on Private International Law and WIPO, which was heavily involved in dispute settlement regarding domain names on the Internet.

10. The third topic was de-materialization of documents of title, in particular in the transport industry. It was suggested that work might be undertaken to assess the desirability and feasibility of establishing a uniform statutory framework to support the development of contractual schemes currently being set up to replace traditional paper-based bills of lading by electronic messages. It was widely felt that such work should not be restricted to maritime bills of lading, but should also envisage other modes of transportation. In addition, outside the sphere of transport law, such a study might also deal with issues of de-materialized securities. It was pointed out that the work of other international organizations on those topics should also be monitored.

11. After discussion, the Commission welcomed the proposal to undertake studies on the three topics. While no decision as to the scope of future work could be made until further discussion had taken place in the Working Group on Electronic Commerce, the Commission generally agreed that, upon completing the preparation of the draft Model Law on Electronic Signatures, the Working Group would be expected, in the context of its general advisory function regarding the issues of electronic commerce, to examine, at its thirty-eighth session, some or all of the above-

⁴Ibid., *Fifty-fifth Session, Supplement No. 17 (A/55/17)*, paras. 380-383.

⁵See *Official Records of the United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March-11 April 1980* (United Nations publication, Sales No. 81.IV.3).

mentioned topics, as well as any additional topic, with a view to making more specific proposals for future work by the Commission at its thirty-fourth session (Vienna, 25 June-13 July 2001). It was agreed that work to be carried out by the Working Group could involve consideration of several topics in parallel as well as preliminary discussion of the contents of possible uniform rules on certain aspects of the above-mentioned topics.

12. Particular emphasis was placed by the Commission on the need to ensure coordination of work among the various international organizations concerned. In view of the rapid development of electronic commerce, a considerable number of projects with possible impact on electronic commerce were being planned or undertaken. The secretariat was requested to carry out appropriate monitoring and to report to the Commission as to how the function of coordination was being fulfilled to avoid duplication of work and ensure harmony in the development of the various projects. The area of electronic commerce was generally regarded as one in which the coordination mandate given to UNCITRAL by the General Assembly could be exercised with particular benefit to the global community and deserved corresponding attention from the Working Group and the secretariat.⁶

13. The Working Group on Electronic Commerce, which was composed of all States members of the Commission, held its thirty-eighth session in New York from 12 to 23 March 2001. The session was attended by representatives of the following States members of the Working Group: Algeria, Argentina, Australia, Austria, Brazil, Bulgaria, Burkina Faso, Cameroon, China, Colombia, Egypt, Fiji, Finland, France, Germany, Honduras, Hungary, India, Iran (Islamic Republic of), Italy, Japan, Kenya, Lithuania, Mexico, Nigeria, Russian Federation, Singapore, Spain, Sudan, Thailand, Uganda, United Kingdom of Great Britain and Northern Ireland and United States of America.

14. The session was attended by observers from the following States: Andorra, Azerbaijan, Bangladesh, Belgium, Canada, Côte d'Ivoire, Czech Republic, Ecuador, Greece, Indonesia, Iraq, Ireland, Jordan, Libyan Arab Jamahiriya, Morocco, New Zealand, Norway, Panama, Peru, Philippines, Poland, Portugal, Republic of Korea, Saudi Arabia, Senegal, Sierra Leone, Sweden, Switzerland, Syrian Arab Republic, the former Yugoslav Republic of Macedonia, Tunisia, Turkey, Uruguay and Venezuela.

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

(a) *United Nations system*

United Nations Educational, Scientific and Cultural Organization (UNESCO)
World Bank
World Intellectual Property Organization (WIPO)

(b) *Intergovernmental organizations*

African Development Bank (ADB)
European Commission

(c) *International non-governmental organizations invited by the Commission*

American Bar Association
Arab Society of Certified Accountants
Asian Clearing Union
Cairo Regional Centre for International Commercial Arbitration
International Maritime Committee (CMI)
Inter-American Bar Association
International Chamber of Commerce (ICC)
Society for Worldwide Interbank Financial Telecommunication
Union internationale des avocats
Union internationale du notariat latin

16. The Working Group elected the following officers:

Chairman: Mr. Jacques GAUTHIER
(Canada, elected in his personal capacity)
Rapporteur: Mr. A. K. CHAKRAVARTI (India)

17. The Working Group had before it the following documents:

- (a) Provisional agenda (A/CN.9/WG.IV/WP.87);
- (b) Note by the secretariat containing a revised Guide to Enactment of the draft UNCITRAL Model Law on Electronic Signatures (A/CN.9/WG.IV/WP.88);
- (c) Notes by the secretariat on:
 - (i) Possible topics for future work by UNCITRAL in the field of electronic commerce: possible convention to remove obstacles to electronic commerce in existing international conventions (A/CN.9/WG.IV/WP.89);
 - (ii) De-materialization of documents of title (A/CN.9/WG.IV/WP.90);
 - (iii) Electronic contracting (A/CN.9/WG.IV/WP.91);
- (d) A proposal by France (A/CN.9/WG.IV/WP.93).

In addition, copies of the note by the secretariat regarding the issues of bills of lading and other maritime transport documents (A/CN.9/WG.IV/WP.69) that had been before the Working Group at its thirtieth session (1996) were supplied for ease of reference.

18. The Working Group adopted the following agenda:

1. Election of officers.
2. Adoption of the agenda.
3. Draft Guide to Enactment of the UNCITRAL Model Law on Electronic Signatures.
4. Possible future work by UNCITRAL in the field of electronic commerce.
5. Other business.
6. Adoption of the report.

⁶Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 17 (A/55/17), paras. 384-388.

I. DELIBERATIONS AND DECISIONS

19. The Working Group reviewed the draft Guide to Enactment of the UNCITRAL Model Law on Electronic Signatures. The decisions and deliberations of the Working Group with respect to the Guide are reflected in section III below. The secretariat was requested to prepare a revised version of the Guide, based on those deliberations and decisions. It was noted that the Guide would be presented for final review and adoption by the Commission at its thirty-fourth session, together with the text of the draft Model Law, as approved by the Working Group at its thirty-seventh session.

20. The Working Group discussed possible suggestions for future work with respect to the legal issues of electronic commerce on the basis of the notes prepared by the secretariat (A/CN.9/WG.IV/WP.89, A/CN.9/WG.IV/WP.90 and A/CN.9/WG.IV/WP.91) of the proposal by France (A/CN.9/WG.IV/WP.93), and on the basis of an oral report presented by the secretariat regarding the issues of online dispute resolution. The deliberations and conclusions of the Working Group with respect to those issues are reflected in section IV below.

II. DRAFT GUIDE TO ENACTMENT OF THE UNCITRAL MODEL LAW ON ELECTRONIC SIGNATURES

21. The Working Group expressed overall satisfaction with the structure and contents of the draft Guide to Enactment contained in part two of the annex to document A/CN.9/WG.IV/WP.88. The Working Group was invited to submit in writing to the secretariat any non-controversial or editorial changes for consideration. The Working Group then proceeded with a paragraph-by-paragraph review of the draft guide.

22. With respect to paragraph 3, doubts were expressed as to whether the words “legal (as well as technical) interoperability is essential” appropriately reflected current practice. The view was expressed that technical interoperability, while it constituted a desirable objective, should not be regarded as a theoretical prerequisite for cross-border use of electronic signatures. It was stated, for example, that certain biometric devices were used satisfactorily in an international context without being interoperable with digital signature devices. As to the concept of “legal interoperability”, it was pointed out that it might be better formulated using more traditional terminology, such as “harmonization of legal rules”. While the suggestion was made that all references to “interoperability” should be deleted from paragraph 3, the prevailing view was that mentioning technical interoperability as a means of facilitating cross-border uses of electronic signatures was important in view of recent technical developments in many countries that were geared to achieving such interoperability. After discussion, it was agreed that the words at the end of paragraph 3 should read along the lines of “legal harmony as well as technical interoperability is a desirable objective”.

23. With respect to paragraph 5, a question was raised as to the meaning of the words “a media-neutral environment”. It was recognized that those words as used in the UNCITRAL Model Law on Electronic Commerce reflected the principle of non-discrimination between information supported by a paper medium and information communicated or stored electronically. It was generally agreed, however, that the draft UNCITRAL Model Law on Electronic Signatures should equally reflect the principle that no discrimination should be made among the various techniques that might be used to communicate or store information electronically, a principle that was often referred to as “technology neutrality”. The secretariat was requested to prepare wording that would adequately explain those two principles.

24. With respect to paragraphs 8 and 9, it was generally felt that further explanations should be given as to the meaning of the terms “functional equivalence” and “electronic data interchange”. The secretariat was requested to prepare appropriate explanations that could be drawn from the UNCITRAL Model Law on Electronic Commerce and its Guide to Enactment.

25. With respect to paragraph 25, the Working Group noted that additional information regarding the history of the draft Model Law would need to be added after completion of the text by the Commission. It was widely felt that no attempt should be made to produce a more concise version of the historical section contained in paragraphs 12 to 25, a section that adequately reflected the various steps taken in the preparation of the Model Law.

26. With respect to paragraph 26, the view was expressed that language should be added in the guide to make it clear that the new Model Law was without prejudice to existing rules of private international law. It was agreed that wording should be introduced to that effect after the first sentence of paragraph 26, together with a reference to paragraph 131, which expressed a similar idea in the context of article 7, paragraph 3, of the new Model Law.

27. With respect to paragraph 27, it was suggested that stronger expression should be given to the idea that “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”. It was generally agreed that additional words should be introduced at the end of the sentence along the following lines: “, and that they take due regard of its basic principles, including technology neutrality, non-discrimination between domestic and foreign electronic signatures, party autonomy and the international origin of this Model Law”.

28. Various proposals were made with respect to paragraph 28. One proposal was that, in view of the changes introduced in paragraph 27, paragraph 28 should be deleted as unnecessary and likely to undermine the acceptability of the new Model Law. It was widely felt, in response, that paragraph 28 was useful and adequately reflected various views that had been expressed in the preparation of the new Model Law. As a matter of drafting, another proposal was that the words “the Model Law

offers guidance” should be replaced with the words “certain provisions of the Model Law offer guidance” to avoid suggesting that the Model Law dealt exclusively with public key infrastructures (PKI). Under yet another proposal, the phrase “three distinct functions that may be involved in any type of electronic signature (i.e. creating, certifying and relying on an electronic signature)” should be amended to indicate that there existed electronic signatures (including digital signatures) that did not rely on a function of certification. Accordingly, it was suggested that the above-mentioned phrase should be redrafted along the following lines: “two distinct functions that are involved in any type of electronic signature (i.e. creating and relying on an electronic signature), and a third function involved in certain types of electronic signatures (i.e. certifying an electronic signature)”. That suggestion was accepted in substance by the Working Group. A further proposal was that the words “three separate entities” did not sufficiently reflect the fact that the three functions considered in paragraph 28 could be served not only by less than three distinct persons but also by more than three parties, for example, where various aspects of the certification function were shared between different entities. After discussion, it was agreed that the words “three or more separate entities” should be used. The secretariat was requested to review the text of paragraph 28 to ensure that it adequately covered situations where more or less than three separate entities were involved.

29. With respect to paragraph 29, it was generally agreed that a cross-reference should also be made to paragraph 65 as one of the sections of the guide where the relationship between the new Model Law and article 7 of the UNCITRAL Model Law on Electronic Commerce is discussed. In that context, the view was expressed that, where a provision of the new Model Law was derived from an article of the UNCITRAL Model Law on Electronic Commerce (e.g. article 6 of the new Model Law and article 7 of the UNCITRAL Model Law on Electronic Commerce), the guide should make it abundantly clear that only the most recent provision should be enacted.

30. With respect to paragraph 32, it was agreed that the words “key issuer or key subscriber”, as used to define the “signatory function”, should be deleted in order not to suggest that a signatory should necessarily be a key subscriber or a key issuer. As regards the words “those three functions are common to all PKI models”, it was agreed that the text of paragraph 32 should be brought in line with paragraph 28 to refer separately to the two functions that were common to all PKI models (i.e. signing and relying on the electronic signature) and the third function that was characteristic of some PKI models (i.e. the certification function). It was also felt that the text of paragraph 32 should mirror the reference to “three or more separate entities” introduced in paragraph 28.

31. With respect to paragraph 35, it was agreed that the words “to those preparing legislation on electronic signatures” should be deleted.

32. With respect to paragraph 38, it was agreed that the word “ideally” should be deleted so as not to suggest negative implications of electronic signatures on data privacy.

As a matter of drafting, it was generally felt that the words “virtually infeasible” should be replaced with “virtually impossible”, to ensure consistency with the wording used in paragraph 40.

33. With respect to paragraph 42, the view was expressed that the indication that a digital signature was “useless if permanently disassociated from the message” merely stated the obvious and could also apply to handwritten signatures. It was suggested that the guide should better reflect the idea that the digital signature was technically invalid or inoperable if permanently disassociated from the message. After discussion, the Working Group decided that the word “useless” should be replaced with the word “inoperable”.

34. With respect to paragraph 45, it was stated that the reference to “a high degree of confidence” would not adequately cover the situation where low-value certificates were used. With a view to covering all types of certificates, it was agreed that the last sentence of paragraph 45 should refer more generally to “a degree of confidence”. As a matter of drafting, the Working Group decided that the words “to send keys” should be replaced with the words “to make keys available”.

35. With respect to paragraph 47, it was decided that the words “public key encryption” should be replaced with “public key cryptography”. In that context, the secretariat was requested to review the use of the notions of encryption and cryptography throughout the Guide to ensure that both words were used adequately and consistently.

36. With respect to paragraph 48, it was suggested that the Guide should recognize that, under the laws of some States, a presumption of attribution of electronic signatures to a particular signatory could be established through publication of the statement referred to in paragraph 48 in an official bulletin or in a document recognized as “authentic” by public authorities. To that effect, it was decided that a sentence should be inserted in paragraph 48 along the following lines: “The form and the legal effectiveness of such a statement is governed by the law of the enacting State.”

37. With respect to paragraph 49, the view was expressed that the Guide should not suggest that reliance on third parties was necessarily the only solution to establish confidence in digital signatures. Accordingly, it was agreed that the opening words of paragraph 48 should read “One type of solution to some of these problems ...” and that a final sentence should be added along the following lines: “Other solutions include, for example, certificates issued by relying parties.” As a matter of drafting, it was suggested that the term “trusted third party” in the Guide should be replaced with the more neutral term “third party”. It was explained that, in certain countries, the notion of “trusted third party” was a term of art used only to describe the narrowly defined activity of those entities which performed key escrow functions in the context of specific uses of cryptography for confidentiality purposes.

38. With respect to paragraph 50, the Working Group was reminded of the need to review the use of the notions of

encryption and cryptography throughout the Guide to ensure that both words were used adequately and consistently (see A/CN.9/WG.IV/XXXVIII/CRP.1/Add.1, para. 15). Concern was expressed that some of the elements listed among the factors of confidence that would result from the establishment of a PKI were not relevant to the sphere of electronic signatures. In particular, it was suggested that the references to cryptography as used for confidentiality purposes and to interoperability of encryption systems should be deleted. After discussion, the Working Group decided to delete those two references (listed as points 3 and 4 on the first list contained in para. 50). In the same vein, it was suggested that the list of services typically offered by PKIs to provide confidence should not refer to “deciding which users will have which privileges on the system”, since such a decision pertained to the realm of system management and not to the building of confidence. In addition, it was pointed out that the reference to the provision of “non-repudiation services” in the context of a PKI was unclear. After discussion, it was decided that those two references (listed as points 4 and 8 on the second list contained in para. 50) should be deleted.

39. With respect to paragraph 52, doubts were expressed as to whether the Guide should mention the issue of Governments possibly retaining access to encrypted information. The view was expressed that point 6 should be deleted since it might reflect negatively on the role of Governments regarding the use of cryptography. The prevailing view, however, was that the issue was worth mentioning as an element of the context in which a PKI might develop, although that issue was not dealt with in the Model Law. It was decided that, in order to better focus on the legal regime of cryptography, point 6 should be rephrased along the following lines: “whether government authorities should have the right to gain access to encrypted information”.

40. With respect to paragraph 53, the discussion focused on the last sentence of the paragraph. The view was expressed that the word “assurance” was misleading, since it might be read as a reference to a form of strict legal assurance or irrebuttable presumption that the digital signature had been created by the signatory mentioned in the certificate. It was suggested that the opening words of the sentence should read: “If such verification is successful, a level of assurance is provided technically ...”. Doubts were expressed as to whether the last words of the sentence (“and that the corresponding message had not been modified since it was digitally signed”) should be retained. In favour of deletion of those last words, it was stated that verification of the integrity of the information was an attribute of the hash function and not of the digital signature in and of itself. The view was expressed that, in order to better reflect the operation of the hash function, the end of the sentence should be replaced with the following: “and that the portion of the message used in the hash function had not been modified since it was digitally signed”. The prevailing view, however, was that verification of integrity of data messages through a hash function was a feature commonly found in digital signature practice. Accordingly, it was decided that the last sentence of paragraph 53 should read along the following lines: “If such verification is successful, a level of assurance is provided technically that the

digital signature was created by the signatory and that the portion of the message used in the hash function (and, consequently, the corresponding data message) had not been modified since it was digitally signed.” In addition, it was decided that the Guide should be reviewed to ensure that, wherever possible, the concept of “holder of the public key named in the certificate” should be replaced with that of “signatory”.

41. With respect to paragraph 54, it was suggested that the Guide should recognize that, under the laws of some States, a way of building trust in the digital signature of the certification service provider might be to publish the public key of the certification service provider in an official bulletin (see A/CN.9/WG.IV/XXXVIII/CRP.1/Add.1, para. 16). That suggestion was accepted by the Working Group. In the context of that discussion, it was generally felt that, in finalizing the Guide, every effort should be made to ensure consistency in terminology. For example, the term “certification authority” should be replaced, where appropriate, with the term “certification service provider”.

42. With respect to paragraph 57, the view was expressed that the words “Immediately upon suspending or revoking a certificate, the certification authority is generally expected to publish notice” might place an excessive burden on the certification service provider. In addition, it was stated that such publication might contradict the obligations of the certification service provider in the context of legislation protecting data privacy. After discussion, it was decided that the opening words of the last sentence of paragraph 57 should read: “Immediately upon suspending or revoking a certificate, the certification service provider may be expected to publish ...”.

43. With respect to paragraph 60, the Working Group agreed that, among other requirements to be met by a certification service provider, the last sentence should mention the obligation of the certification service provider to act in accordance with the representations made by it with respect to its policies and practices, as envisaged in article 9, paragraph 1 (a).

44. With respect to paragraph 62, it was suggested that the third sentence in subparagraph 3 should be deleted. Another suggestion was that the word “proves” in subparagraph 7 should be replaced with wording along the lines of “provides a level of technical assurance”. Yet another suggestion was that, in subparagraph 10, the opening sentence should read as follows: “Where the certification process is resorted to, the relying party obtains a certificate from the certification service provider (including through the signatory or otherwise), which confirms the digital signature on the signatory’s message.” A further suggestion was that the second sentence of subparagraph 10 should be deleted. Those suggestions were adopted by the Working Group. As regards terminology, it was generally agreed that the terms “sender” and “recipient” should be replaced with “signatory” and “relying party”.

45. With respect to paragraph 67, it was generally agreed that, in order not to suggest that the new Model Law would provide solutions suitable for all “closed” systems, the words “and as model contractual provisions” should be

rephrased along the lines of “and, where appropriate, as model contractual provisions”.

46. With respect to paragraph 69, the suggestion was made that the Guide should place more emphasis on the use of voluntary technical standards. Accordingly, it was suggested that the following should be added at the end of the paragraph:

“Commercial practice has a long-standing reliance on the voluntary technical standards process. Such technical standards form the bases of product specifications, of engineering and design criteria and of consensus for research and development of future products. To assure the flexibility such commercial practice relies on, to promote open standards with a view to facilitating interoperability and to support the objective of cross-border recognition (as described in article 12), States may wish to give due regard to the relationship between any specifications incorporated in or authorized by national regulations, and the voluntary technical standards process.”

That suggestion was adopted by the Working Group.

47. With respect to paragraph 70, it was suggested that tort law should be listed among the bodies of law not expressly dealt with by the Model Law.

48. With respect to paragraph 72, the Working Group generally felt that the functions of handwritten signatures were adequately dealt with in paragraph 29. As a consequence, it was agreed that the paragraph should read along the following lines: “Article 7 is based on the recognition of the functions of a signature in a paper-based environment, as described in paragraph 29.”

49. With respect to paragraph 76, the view was expressed that the Guide should better reflect that the Model Law was not intended to establish two different classes or categories of electronic signatures. After discussion, it was generally agreed that the second sentence (“The effect of the Model Law is to recognize two categories of electronic signatures.”) should be replaced with the following: “Depending on the time at which certainty is achieved as to the recognition of an electronic signature as functionally equivalent to a handwritten signature, the Model Law establishes two distinct regimes.” For similar reasons, it was agreed that the words “(sometimes referred to as ‘enhanced’, ‘secure’ or ‘qualified’ electronic signatures)” should be deleted. As to the references to “The first and broader category” and “The second and narrower category”, it was decided that a better rendition of the policy underpinning the Model Law would require that the text read as follows: “The first and broader regime is that described in article 7 of the UNCITRAL Model Law on Electronic Commerce. It recognizes any ‘method’ ... The second and narrower regime is that created by the new Model Law. It contemplates methods of electronic signature ...”.

50. With respect to paragraph 78, the Working Group agreed that, with a view to explaining why the signatory should exercise care regarding the signature data, wording along the following lines should be inserted: “The digital signature in itself does not guarantee that the person who has in fact signed is the signatory. At best, the digital signature provides assurance that it is attributable to the signa-

ture.” In that context, the view was expressed that the Guide should refer consistently to “signature creation data” and not to “signature device”.

51. With respect to paragraph 80, it was generally felt that, by reference to article 9, paragraph 1 (c) (ii), the words “the person who is identified in the certificate had control of the signature device at the time of signing” should be replaced with the words “the signatory that is identified in the certificate had control of the signature creation data at the time when the certificate was issued”. It was also felt that, in view of the fact that the certification service provider would not necessarily deal directly with the relying party, the words “In its dealings with the relying party” should be replaced with “For the benefit of the relying party”.

52. With respect to paragraph 82, it was suggested that the opening words should refer to “criteria for the legal recognition of electronic signatures” and not merely to “the legal recognition of electronic signatures”. Another suggestion was that the illustrative list of technologies provided in the paragraph should also mention symmetric cryptography. As to the operation of biometrics, it was suggested that the list should elaborate along the following lines: “biometric devices (enabling the identification of individuals by their physical characteristics, whether by hand or face geometry, fingerprint reading, voice recognition or retina scan, etc.)”. Yet another suggestion was that the list should mention signature dynamics. Further suggestions were that the list should mention the possible use of “tokens” as a way of authenticating data messages through a smart card or other device held by the signatory and indicate that the various techniques listed could be used in combination to reduce systemic risk. Those suggestions were adopted by the Working Group.

53. At the close of the discussion of paragraph 82, it was suggested that a subsection should be added to section IV to reflect non-discrimination and recognition of foreign certificates as one of the main features of the Model Law. The secretariat was requested to prepare wording to that effect, based on the deliberations of the Working Group regarding article 12.

54. With respect to paragraph 87, the view was expressed that the reference to “media-neutral rules” was inappropriate and should be replaced with a mention of “technology-neutral rules”. It was generally felt that the focus of the new Model Law was on “technology neutrality” (i.e. non-discrimination between the various techniques used for the transmission and storage of information in an electronic environment). However, it was also felt that media neutrality (i.e. non-discrimination between paper-based and electronic techniques) should be mentioned as one of the objectives of the new Model Law. After discussion, it was decided that the words “media-neutral” should read “media-neutral and technology-neutral”. It was suggested that the penultimate sentence of the paragraph should read as follows: “In the preparation of the Model Law, the principle of technology neutrality was observed by the UNCITRAL Working Group on Electronic Commerce, although it was aware that “digital signatures”, that is, those electronic signatures obtained

through the application of dual-key cryptography, were a particularly widespread technology.” The suggestion was objected to on the grounds that the role of public key cryptography should not be overemphasized. It was also suggested that the word “promising” should be substituted for “widespread”. It was furthermore explained that authentication techniques such as those based on the use of personal identification numbers (PINs) or unauthenticated signatures based on contractual arrangements could be regarded as more widespread than public key cryptography. The prevailing view, however, was that, in view of the importance of public key cryptography, the word “widespread” should be retained. The penultimate sentence was amended as initially suggested. As to the last sentence, in view of the fact that none of the provisions of the Model Law expressly altered the traditional rules governing handwritten signatures, the Working Group agreed that the sentence should be deleted.

55. With respect to paragraph 91, it was generally felt that the reference to “a duality of regimes” in the last sentence should be clarified to avoid suggesting that a particular technological approach was being used, based on various classes of electronic signatures. The secretariat was requested to introduce wording to make it abundantly clear that the “duality” to be avoided would be the result of discrimination between electronic signatures used domestically and electronic signatures used in the context of international trade transactions.

56. With respect to paragraph 94, as a matter of drafting, it was generally felt that the words “The term “certificate” ... differs little” should be made clearer through the addition of the words “other than being in electronic rather than paper form”.

57. With respect to paragraph 96, the view was expressed that the role of the certificate as establishing a link between the public key and the signatory should be made clearer. It was suggested that the paragraph should read along the following lines:

“In the context of electronic signatures that are not digital signatures, the term “signature creation data” is intended to designate those secret keys, codes or other elements which, in the process of creating an electronic signature, are used to provide a secure link between the resulting electronic signature and the person of the signatory. For example, in the context of electronic signatures based on biometric devices, the essential element would be the biometric indicator, such as a fingerprint or retina-scan data. The description covers only those core elements which should be kept confidential to ensure the quality of the signature process, to the exclusion of any other element that, although it might contribute to the signature process, could be disclosed without jeopardizing the reliability of the resulting electronic signature.

“On the other hand, in the context of digital signatures relying on asymmetric cryptography, the core operative element that could be described as ‘linked to the signatory’ is the cryptographic key pair. In the case of digital signatures, both the public and the private key are linked to the person of the signatory. Since the prime purpose of a certificate, in the context of digital signatures, is to

confirm the link between the public key and the signatory (see paras. 53-56 and 62, subpara. 10, above), it is also necessary that the public key be certified as belonging to the signatory.

“While only the private key is covered by this description of ‘signature creation data’, it is important to state, for the avoidance of doubt, that in the context of digital signatures the definition of ‘certificate’ in article 2, subparagraph (b), should be taken to include the confirming of the link between the signatory and the signatory’s public key.

“Also among the elements not to be covered by this description is the text being electronically signed, although it also plays an important role in the signature-creation process (through a hash function or otherwise). Article 6 expresses the idea that the signature creation data should be linked to the signatory and to no other person (A/CN.9/483, para. 75).”

The Working Group agreed with the substance of the suggested text.

58. With respect to paragraph 118, the Working Group decided that the reference to “enhanced electronic signature” should be deleted. Accordingly, it was agreed that the first sentence should read along the following lines: “In order to provide certainty as to the legal effect resulting from the use of an electronic signature as defined under article 2, paragraph 3 expressly establishes the legal effects that would result from the conjunction of certain technical characteristics of an electronic signature.”

59. With respect to paragraph 121, the Working Group was reminded of the need to ensure consistency in the use of the notion of “signature creation data”.

60. With respect to paragraph 122, as a matter of drafting, it was generally agreed that the words “the time at which the signature is created” should be replaced with the words “the time of signing”. It was also agreed that reference should be made in that paragraph to paragraph 102 and that consistency should be ensured between the way in which the two paragraphs referred to the agent of the signatory.

61. With respect to paragraph 123, it was generally agreed that the third sentence (“Where a signature is used to sign a document, the idea of the integrity of the document is inherent in the use of the signature.”) should be deleted as superfluous. As a matter of drafting, it was agreed that the words “to emphasize that” in the second sentence should be replaced with the words “to emphasize the notion that”.

62. With respect to paragraph 124, the view was expressed that the last sentence (“In any circumstances, the effect of subparagraph (d) would be to create a functional equivalent to an original document.”) was too broadly stated. The Working Group decided that it should be replaced with the following: “In certain jurisdictions, the effect of subparagraph (d) may be to create a functional equivalent to an original document.” It was also agreed that the title of the paragraph should be deleted.

63. At the close of the discussion of the portion of the draft Guide dealing with article 6, several suggestions were

made for the insertion of additional paragraphs. One suggestion was that explanations should be provided in the Guide as to the role and operation of article 6, paragraph 4. It was stated that the Guide should make it clear that article 6, paragraph 4, was intended to provide a legal basis for the commercial practice under which many commercial parties would regulate by contract their relationships regarding the use of electronic signatures. Appropriate wording should also be introduced to indicate that article 6, paragraph 4 (b), did not limit the possibility to rebut the presumption contemplated in article 6, paragraph 3. Another suggestion was that explanations should be provided in the Guide as to the role of paragraph 5 of article 6. It was proposed that such explanations be drawn from a combination of paragraphs 51 and 52 of the Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce. Those suggestions were adopted by the Working Group.

64. With respect to paragraph 128, it was widely felt that the words “presumptions or substantive” should be deleted.

65. With respect to paragraph 129, it was decided that, to avoid suggesting that an entity dealing with the validation of electronic signatures would normally be established as a State authority, the word “always” should be deleted.

66. With respect to paragraph 130, it was decided that the word “official” should be deleted. Among the organizations listed as developing standards, it was agreed that the regional accreditation bodies operating under the aegis of the International Organization for Standardization and the World Wide Web Consortium should be mentioned. A suggestion was made to add a reference to “de facto standards” alongside industry practices and trade usages. That suggestion was objected to on the grounds that the notion of “de facto standards” was insufficiently clear and probably covered by the notion of industry practices and trade usages. As a matter of drafting, it was agreed that the word “also” should be deleted from the last sentence.

67. With respect to paragraph 132, it was suggested that wording from paragraph 139 should be replicated in the context of article 8 to indicate that “the authors of the Model Law took care not to require from a signatory a degree of diligence or trustworthiness that bears no reasonable relationship to the purposes for which the electronic signature or certificate is used. The Model Law thus favours a solution that links the obligations set forth in article 8 to the production of legally significant electronic signatures (A/CN.9/483, para. 117).” That suggestion was adopted by the Working Group. Concern was expressed that the last sentence of paragraph 132 did not make it clear whether article 8, in asserting the liability of the signatory, deviated from the general rules governing such liability. It was stated that doubts might exist, in particular, as to whether the effect of article 8 was to create strict liability or whether exonerating factors such as the conduct of the other parties could be invoked by the signatory. With a view to making it abundantly clear that the effect of article 8 was merely to establish the principle of the signatory’s liability, without dealing with any of the consequences that might be derived from that principle under the law applicable, it was agreed that the last sentence should read along the following lines: “The principle of the signatory’s liabil-

ity for failure to comply with paragraph 1 is set forth in paragraph 2; the extent of such liability for failure to abide by that code of conduct is left to the law applicable outside the Model Law (see para. 136 below).”

68. In the context of the review of paragraph 134, a concern was expressed that the rule contained in article 8, paragraph 1 (b), might be difficult to operate in practice. The Working Group noted that that concern might need to be further discussed by the Commission.

69. With respect to paragraph 136, a suggestion was made to replace the words “liability should attach” with the words “liability might attach”, and the words “the signature data holder should be held liable” with the words “the signature data holder could be held liable”. That suggestion was objected to on the grounds that the Guide should not disregard the substance of the rule contained in article 8. As a matter of drafting, it was agreed that the word “held” should be deleted. The view was stated that the language of the text of article 8, paragraph 2, as elaborated upon by the draft Guide with respect to liability, would lead to a result contrary to market expectations and contrary to most developing practices and would be a significant problem for acceptability of the provisions of the Guide.

70. With respect to paragraph 137, it was generally agreed that the last sentence should be deleted as superfluous. The view was expressed that the words “legal effect” might not lead, by themselves, to the necessary differentiation between standards applicable to lower-value signatures, as compared with higher-value signatures.

71. With respect to paragraph 138, it was suggested that a second sentence should be inserted along the following lines: “It is important to note that, in the case of digital signatures, it must also be possible to ascertain the association of the signatory with the public key, as well as with the private key.” That suggestion was adopted by the Working Group. Another suggestion was that the entire paragraph should be made “subject to article 5”. It was stated that, in some jurisdictions, article 9 could be read as derogating to the general rule expressed in article 5. The prevailing view, however, was that article 5 had expressed in sufficiently broad terms the principle that contractual derogation to the Model Law was acceptable. It was widely felt that the only effect of restating the principle of article 5 in the context of certain provisions of the Model Law would be to weaken the effect of that principle as to the remainder of the Model Law. A view was stated that the language of the text of article 9, as elaborated upon by the Guide, would set up standards that were not based on market practice and were not employed by any major certification service provider, could not be met and would set barriers to the enactment of the Model Law. Under that view, the matter would need to be reconsidered by the Commission.

72. With respect to paragraph 139, as a matter of drafting, it was agreed that the words “the authors of the Model Law took care not to require” should be replaced with the words “the Model Law does not require”.

73. With respect to paragraph 140, it was generally felt that the first sentence should be deleted as superfluous.

Accordingly, the opening words of the paragraph should read: "Paragraph 2 leaves it up to national law ...".

74. With respect to paragraph 141, the view was expressed that no reference should be made to earlier discussions in the Working Group. The prevailing view, however, was that explanations should be given in that paragraph as to the reasoning followed by the Working Group when it adopted article 9, paragraph 2. In order not to overemphasize the role of certification service providers, it was agreed that the second sentence ("In the preparation of the Model Law, it was observed that suppliers of certification services performed intermediary functions that were fundamental to electronic commerce and that the question of the liability of such professionals would not be sufficiently addressed by adopting a single provision along the lines of paragraph 2") should be replaced as follows: "In the preparation of the Model Law, it was observed that the question of the liability of certification service providers would not be sufficiently addressed by adopting a single provision along the lines of paragraph 2." The view was expressed that the Guide should make it clear that, where a certification service provider operated under the laws of a foreign State, possible limitations to the liability of the certification service provider should be assessed by reference to the law of that foreign State. More generally, it was stated that, in determining the recoverable loss in the enacting State, weight should be given to the liability regime governing the operation of the certification service provider in the foreign State designated by the relevant conflict-of-laws rule. It was generally agreed that appropriate mention should be made in the Guide of the need to take into account the rules governing limitation of liability in the State where the certification service provider was established or in any other State whose law would be applicable under the relevant conflict-of-laws rule. In line with that discussion, it was agreed that the words "In assessing the loss" should be replaced with the words "In assessing the liability".

75. With respect to paragraph 146, a suggestion was made that wording along the following lines should be inserted as a penultimate sentence: "These requirements are not intended to require the observation of limitations, or verification of information, not readily accessible to the relying party." Another suggestion was that a general statement should be inserted in the paragraph along the following lines: "The consequences of failure by the relying party to comply with the requirements of article 11 are governed by the law applicable outside the Model Law." Those suggestions were adopted by the Working Group. The view was expressed that, if the language in article 11 was also used in article 8, paragraph 2, and article 9, paragraph 2, it would obviate significant problems, and that this issue would need to be reconsidered by the Commission at its next session.

76. With respect to paragraph 147, it was suggested that the words "recognized as legally effective" and "an electronic signature is legally effective" should be replaced with the words "recognized as capable of being legally effective" and "an electronic signature is capable of being legally effective", respectively. That suggestion was adopted by the Working Group. Another suggestion was that the following should be added after paragraph 147: "Paragraph 1 (a) and

(b), in respect of electronic signatures, is not intended to affect the application to electronic signatures of any provisions of other national or international laws under which legal effects or consequences of a signature might depend on, or arise from, where the signature is made or where the signatory has its place of business." That suggestion was objected to on the grounds that it did not sufficiently reflect the basic principle embodied in article 12, under which non-discrimination should entail that equal treatment should be given by the law of the enacting State to domestic and foreign certificates. Accordingly, foreign certificates would not necessarily be treated according to the laws of their country of origin. In the context of that discussion, another suggestion was made that the Guide should indicate that a principle of reciprocity should govern the recognition of the legal effectiveness of foreign certificates. It was generally agreed, however, that reciprocity was not a dimension of article 12. After discussion, the two suggestions were not accepted by the Working Group.

77. With respect to paragraph 150, it was suggested that the second sentence should be reformulated along the following lines: "Depending on their respective level of reliability, certificates and electronic signatures may produce varying legal effects, both domestically and abroad." It was generally agreed that the suggested wording appropriately reflected a practice where even certificates that were sometimes referred to as "low-level" or "low-value" certificates might, in certain circumstances (e.g. where parties had agreed contractually to use such instruments), produce legal effect. A question was raised as to the notion of "certificates of the same type". It was generally agreed that a difficulty might arise in the interpretation of the notion of "equivalence between certificates of the same type", as to whether it referred to certificates of the same hierarchical level or to certificates that performed comparable functions, for example by ensuring commensurate levels of security. After discussion it was agreed that the words "certificates of the same type" should be replaced with words along the lines of "functionally comparable certificates".

78. The Working Group found the remainder of paragraphs 1 to 155 of the draft Guide to be acceptable in substance. The secretariat was requested to review all the provisions of the Guide to ensure consistency regarding both substance and terminology.

III. POSSIBLE FUTURE WORK

79. The Working Group was reminded that the Commission, at its thirty-second session, in 1999, had taken note of a recommendation adopted on 15 March 1999 by the Centre for the Facilitation of Procedures and Practices for Administration, Commerce and Transport (CEFACT) (now the Centre for Trade Facilitation and Electronic Business) of the Economic Commission for Europe that UNCITRAL should consider the actions necessary to ensure that references to "writing", "signature" and "document" in conventions and agreements relating to international trade allowed for electronic equivalents. The Working Group was also reminded that the Commission, at its thirty-third session, in 2000, had held a preliminary exchange of views regarding future work in the field of electronic commerce. The topics

on which the Commission agreed that preliminary studies should be undertaken included electronic contracting, considered from the perspective of the United Nations Sales Convention, and dispute settlement and de-materialization of documents of title and negotiable instruments.

80. Prior to considering concrete proposals for future work in the above areas, the working group was informed about the status of work currently being done by the secretariat or other working groups pursuant to mandates given to them by the Commission. It was noted that the Working Group on Arbitration was considering ways in which current legal instruments of a statutory nature might need to be amended or interpreted to authorize the use of electronic documentation and, in particular, to liberalize existing requirements regarding the written form of arbitration agreements. It was pointed out that online dispute settlement mechanisms were relatively recent and it remained to be seen whether specific rules were needed to facilitate their use. It was also noted that the secretariat, in cooperation with CMI, was conducting a broad investigation of legal issues arising out of gaps left by existing national laws and international conventions in the area of the international carriage of goods by sea (a summary of that work is contained in document A/CN.9/476). Those issues included questions such as the functioning of bills of lading and seaway bills, the relationship of those transport documents to the rights and obligations between the seller and the buyer of the goods and the legal position of the entities that provided financing to a party to the contract of carriage. Lastly, the Working Group was informed that the secretariat, pursuant to a request by the Commission, was finalizing a study on issues related to security interests, which was expected to address questions that arose in connection with registry systems of non-possessory security interests. The Working Group was reminded that the International Institute for the Unification of Private Law (Unidroit) was working on a project concerning substantive law issues related to securities intermediaries and that it was important to avoid overlap with those efforts. The Working Group took note of those developments.

A. Legal barriers to the development of electronic commerce in international instruments relating to international trade

81. The Working Group noted that, in response to the recommendation adopted by CEFAC on 15 March 1999, the secretariat had commissioned a study of the public international law issues that would be raised by the actions necessary to ensure that references to “writing”, “signature” and “document” in conventions and agreements relating to international trade allowed for electronic equivalents. In the study, it was suggested that the most efficient technique for updating, under optimum conditions of speed and coverage, the definitions contained in all the different instruments inventoried in the survey conducted by CEFAC would appear to be the conclusion, at the initiative of UNCITRAL, of an interpretative agreement in simplified form for the purpose of specifying and supplementing the definitions of the terms “signature”, “writing” and “document” in all existing and future international instruments, irrespective of their legal status. It was further suggested

that the effectiveness of such an agreement and its widest possible coverage could be encouraged through a General Assembly resolution and through recommendations issued, in particular, by the Organisation for Economic Cooperation and Development (OECD) and the General Council of WTO. The Working Group also noted a proposal by France that the Commission should prepare an international treaty allowing for electronic equivalents of writing, signatures and documents in international trade and not merely an interpretative instrument (A/CN.9/WG.IV/WP.93).

82. The Working Group heard expressions of doubt about the need for and feasibility of undertaking future work along the lines proposed in the documentation before the Working Group. It was stated that an attempt to amend existing treaties to accommodate the use of electronic means of communication might be a daunting task given the large number of international instruments and their varying nature. It was further stated that the UNCITRAL Model Law on Electronic Commerce already provided adequate guidance for interpreting legal requirements such as “writing”, “signature” and “original” and that, to the extent that many jurisdictions were in the process of adopting legislation on electronic commerce, there was no need for an international instrument of the type under consideration.

83. The prevailing view within the Working Group, however, was that, although the UNCITRAL Model Law on Electronic Commerce was a useful basis for modernizing domestic legislation or interpreting international instruments, the legal barriers to the development of electronic commerce posed by international instruments, in particular multilateral treaties and conventions, required special attention. It was pointed out that in many jurisdictions treaty obligations had precedence over internal legislation. Where an international instrument posed obstacles to the use of electronic means of communication, such obstacles could only be removed by another international instrument of the same hierarchical nature.

84. It was generally agreed that, if feasible, a single international instrument would be preferable to individual amendments to the various treaties and conventions in question. The views varied, however, as to the nature of the instrument that should be prepared. One line of thought was that it would be preferable to draw up a recommendation, conceivably to be adopted by the General Assembly, in which States would be invited to ensure that existing requirements such as “writing”, “signature” and “original” in international treaties and conventions were interpreted in a manner that accommodated their electronic equivalents. The countervailing view was that, given its non-binding nature, such a recommendation would not be sufficient to ensure the degree of legal certainty required by parties engaging in international transactions.

85. In the course of its deliberations, the Working Group noted that the survey of international instruments that had been conducted by CEFAC covered a wide range of international instruments and that requirements such as “writing”, “signature” and “original” did not necessarily have the same meaning or serve the same purpose in all of those instruments. It was also noted that, for the purpose of fully enabling the use of electronic means of communication,

other notions frequently used in international instruments should also be examined, such as the notions of “[contract] formation”, “receipt”, “delivery”, “certified” and similar notions. Particular attention, it was said, should be given in that connection to the specific area or industry governed by each instrument.

86. Having considered the various views expressed, the Working Group agreed to recommend to the Commission to undertake work towards the preparation of an appropriate international instrument or instruments to remove those legal barriers to the use of electronic commerce which might result from international trade law instruments. It was also agreed that further study should be undertaken to enable the Working Group to recommend a particular course of action. In particular, the Working Group agreed to recommend to the Commission that the secretariat should be requested to carry out a comprehensive survey of possible legal barriers to the development of electronic commerce in international instruments, including, but not limited to, those instruments already mentioned in the CEFACT survey. Such a study should aim at identifying the nature and context of such possible barriers with a view to enabling the Working Group to formulate specific recommendations for an appropriate course of action. The study should be carried out by the secretariat with the assistance of outside experts and in consultation with relevant international governmental and non-governmental organizations.

B. Transfer of rights in tangible goods and other rights

87. The Working Group used as a basis for its deliberations a note by the secretariat containing a preliminary study of legal issues related to the use of electronic means of communication for transferring or creating rights in tangible goods and transferring or creating other rights (A/CN.9/WG.IV/WP.90) and an earlier note by the secretariat on legal issues related to the development of electronic substitutes for maritime bills of lading (A/CN.9/WG.IV/WP.69).

88. There was general agreement within the Working Group on the importance of the topics under consideration and the usefulness of examining possible electronic substitutes or alternatives for paper-based documents of title and other forms of de-materialized instruments that represented or incorporated rights in tangible goods or rights having monetary value. The views differed, however, as to the particular issues that should be considered and the priority to be assigned to them.

89. According to one view, the question of the transferability of rights in tangible goods or other rights in an electronic environment touched upon numerous issues, such as property law, in which legal systems varied greatly. It was stated that legal questions related to the establishment of electronic registries or similar systems for transferring rights in tangible goods, recording security interests or transferring other rights were not a suitable area of work, since many jurisdictions did not have such registries and were not contemplating their establishment. Given the difficulties of attempting to develop harmonized solutions in such a broad area, issues related to transferability of rights

could only lend themselves to meaningful work in narrowly defined, specific areas. One such area related to possible electronic substitutes or alternatives for paper-based documents of title and other forms of de-materialized instruments that represented or incorporated rights in tangible goods. Another area was the role of intermediaries in trading of investment securities. As regards the latter area, however, it was also stated that it might be overly ambitious to attempt to achieve consensus on substantive law issues in view of the great disparities between existing solutions in various legal systems. That difficulty, it was added, had become apparent in the course of the work being done by the Hague Conference on Private International Law towards the preparation of an international instrument on the law applicable to the taking of investment securities as collateral.

90. Another view was that it would be useful for the Working Group to examine issues related to the establishment of registries or other methods of achieving negotiability of rights through electronic means with a view to devising appropriate systems for publicizing the transfer of rights in tangible goods, security interests or other rights. As the world economy became increasingly integrated, the creation of such systems might be a helpful mechanism for enhancing legal certainty in cross-border transactions, in particular financial transactions, thus facilitating access of countries across the globe, in particular developing ones, to international capital markets.

91. In that connection, the Working Group was reminded of the current work being carried out by the secretariat in the area of security interests, including security attaching to inventory goods, which was expected to address questions that arose in connection with registry systems of non-possessory security interests. It was suggested that the consideration by the Working Group of issues related to the establishment of electronic registries for the creation and transfer of rights in goods and other rights might usefully complement the work in the area of security interests.

92. Furthermore, it was said that an analysis of issues related to transferability of rights in an electronic environment could usefully complement the work of the Commission in the area of transport law. It was pointed out that, as a result of the current work being carried out by the secretariat in cooperation with CMI, the Commission was expected to undertake work towards the development of a comprehensive new international regime for the international carriage of goods by sea. Thus, an analysis by the Working Group of legal issues related to the creation of electronic substitutes for paper-based transport documents would be a meaningful contribution to that other project, as it might result in the development of specific electronic commerce-focused provisions that might, at an appropriate time, become an integral part of that new international regime expected to be developed by the Commission. The Working Group's particular expertise in the area of electronic commerce might be used to design specific solutions that could be integrated into that other project at an appropriate stage.

93. The Working Group considered at some length the various views that were expressed. It was generally agreed that further study was needed in order for the Working

Group to define in more precise terms the scope of future work in the area. The Working Group therefore agreed to recommend to the Commission that the secretariat be requested to study further the issues related to transfer of rights, in particular rights in tangible goods, by electronic means and mechanisms for publicizing and keeping a record of acts of transfer or creation of security interests in such goods. The study should examine the extent to which electronic systems for transferring rights in goods could affect the rights of third parties. The study should also consider the interface between electronic substitutes for documents of title and financial documentation used in international trade, by giving attention to efforts currently under way to replace paper-based documents, such as letters of credit and bank guarantees, with electronic messages.

C. Possible future work in the field of electronic contracting

94. The Working Group used as a basis for its deliberations a note by the secretariat containing a preliminary study of legal issues related to electronic contracting from the perspective of the United Nations Sales Convention (A/CN.9/WG.IV/WP.91).

1. General comments

95. It was generally agreed that issues related to electronic contracting were suitable for future work by the Working Group, given the already pressing need for internationally harmonized solutions. Such work, it was stated, should probably not be aimed in substance at amending the text of the United Nations Sales Convention, which was considered to be suitable, in general terms, not only to contracts concluded via traditional means, but also to contracts concluded electronically. However, it was widely felt that, although the United Nations Sales Convention could be interpreted in a way that would make it respondent to the specific characteristics of electronic contracting, the extensive recourse to interpretation would increase the risk of disharmony in the legal solutions that might be given to electronic contracting issues. Such possible disharmony, combined with the unpredictability and the slow development of judicial interpretation, might jeopardize the harmonization effect, which had been the result of the wide adoption of the United Nations Sales Convention. In view of the urgent need for the introduction of the legal rules that would be needed to bring certainty and predictability to the international regime governing Internet-based and other electronic commerce transactions, the view was expressed that the Working Group should initially focus its attention on issues raised by electronic contracting in the area of international sales of tangible goods. In that process, efforts should be made to avoid unduly interfering with domestic regimes for the sale of goods. Broadening the scope of such work so as to include transactions involving goods other than tangible goods, such as the so-called “virtual goods” or rights in data, was an avenue that should be approached with caution, given the uncertainty of achieving consensus on a harmonized regime. Whether the new instrument to be prepared to address specifically the issues of electronic contracting would cover only the sales contract or whether

it would address more generally the general theory of contracts, it was agreed that it should avoid any negative interference with the well-established regime of the United Nations Sales Convention.

2. Internationality of transactions

96. The Working Group noted that the United Nations Sales Convention applied only to contracts that were concluded between parties having their places of business in different countries. The requirement of “internationality” was “to be disregarded” under article 1, paragraph 2, “whenever [it] does not appear either from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract”. In the absence of a clear indication of the parties’ places of business, the question arose as to whether there existed circumstances from which the location of the relevant place of business could be inferred.

97. Against that background, the Working Group proceeded to consider which elements, in an electronic environment, were suitable for inferring the place of business of the parties. One possible solution, it was noted, might be to take into account the address from which the electronic messages were sent. For example, where a party used an address linked to a domain name connected to a specific country (such as addresses ending with “.at” for Austria, “.nz” for New Zealand, etc.), it could be argued that the place of business should be located in that country. Thus, a sales contract concluded between a party using an electronic (e)-mail address that designated a specific country and a party using an e-mail address that designated a different country would have to be considered international.

98. However, that proposition was criticized on the ground that an e-mail address or a domain name could not be automatically regarded as the functional equivalent, in an electronic environment, to the physical location of a party’s place of business. It was common in certain branches of business for companies to offer goods or services through various regional web sites bearing domain names linked to countries where such companies did not have a “place of business” in the traditional sense of the term. Furthermore, goods being ordered from any such web site might be delivered from warehouses maintained for the purpose of supplying a particular region and that might be physically located in a country other than those linked to the domain names involved.

99. It was pointed out, in that connection, that the system of assigning domain names for Internet sites had not been originally conceived in strictly geographical terms, which was evident from the use of domain names and e-mail addresses that did not show any link to a particular country, as in those cases where an address was a top-level domain such as .com or .net, for example.

100. In the course of the Working Group’s deliberations, there was growing awareness of the limitations of regarding domain names and e-mail addresses alone as controlling factors for determining internationality in the Internet environment. The Working Group was also reminded of the need

to devise rules that took into account the particular architecture of the Internet and did not require substantial changes in the systems currently being used. Bearing in mind those considerations, the Working Group engaged in a free exchange of views on possible avenues for further analysis.

101. One possibility offered for discussion was to establish a presumption of internationality for transactions conducted over the Internet, unless the parties clearly indicated their places of business as being located in the same country. Such a presumption could be conceived as a default rule combined with a positive obligation, for parties trading over the Internet, to clearly state their places of business. It was argued that the absence of a clear reference to a place of business could be construed to the effect that the party did not want to be located in any specific country or might want to be accessible universally. Such an approach could be combined with article 1, paragraph 2, of the United Nations Sales Convention, provided it could be presumed that anybody contracting electronically with a party that did not disclose its place of business could not have been unaware of the fact that it was contracting “internationally”.

102. However, that proposition was objected to on the ground that it would result in a treatment of Internet-based sales transactions that differed from the treatment given to sales transactions conducted by more traditional means, in respect of which no such presumption of internationality existed. Furthermore, the proposed approach gave rise to the question as to whether the parties should be allowed to freely select the regime governing their transactions by choosing the place they declared to be their place of business. Such a situation was seen as undesirable, to the extent that it made it possible for the parties to transform purely domestic transactions into international ones, only for the purpose of avoiding the application of the law of a particular country.

103. The Working Group was mindful of the need to consider fully the implications of the various proposals that were made. Nevertheless, it was generally felt within the Working Group that, in the interest of achieving predictability as to the law applicable to sales transactions conducted over the Internet, it would be desirable to devise rules that allowed for a positive determination of the “place of business” of the parties for those cases where the contract was concluded electronically. That might include a positive obligation for the parties to disclose their places of business, combined with a set of default rules making it possible to settle the issue of internationality on the basis of relevant factors, in the absence of sufficient indication to that effect by the parties. In establishing such factors, every effort should be made to avoid creating a situation where any given party would be considered as having its place of business in one country when contracting electronically and in another country when contracting by more traditional means.

104. The Working Group agreed that further studies should be undertaken regarding the possible contents of a definition of “place of business” for the purposes of electronic commerce transactions. Such a study should consider, in particular, how notions commonly found in legal literature with respect to the place of business in traditional commerce, such as “stability” or “autonomous character” of the place of business, could be transposed into cyber-

space. While upholding the “functional equivalence” approach taken in the UNCITRAL Model Law on Electronic Commerce, the Working Group did not exclude the possibility of having to resort to more innovative legal thinking to address issues raised by the question of internationality in connection with Internet transactions.

3. *Parties to the sales transaction*

105. The Working Group noted that the United Nations Sales Convention did not define the concept of “party” to a sales transaction, an issue that was left for applicable domestic law. In that context, the Working Group proceeded to consider the question of whether the increasing use of fully automated systems, for example to issue purchase orders, required an adaptation of the concept of “party” to meet the needs of electronic commerce. The Working Group further considered the question of whether such an automated system might be regarded as an electronic equivalent of an agent, as traditionally understood in contract law, and whether the party on whose behalf such an automated system was used could invoke the same defences that a party contracting through an agent could invoke under contract law.

106. At the outset of its deliberations, the Working Group noted that the issue of the “electronic agent” had been discussed by the Working Group in the context of the preparation of the UNCITRAL Model Law on Electronic Commerce. On that occasion, the Working Group had taken the view that the parties should have the possibility to freely organize any automated communication scheme. However, it had been generally felt that a computer should not become the subject of any right or obligation (see the *Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce*, para. 35). The Working Group upheld that earlier position and was of the view that, in the context of contract formation, the use of fully automated systems for commercial transactions should not alter traditional rules on contract formation and legal capacity.

107. The Working Group was further of the view that, while the expression “electronic agent” had been used for purposes of convenience, the analogy between an automated system and a sales agent was not entirely appropriate and that general principles of agency law (for example, principles involving limitation of liability as a result of the faulty behaviour of the agent) could not be used in connection with the operation of such systems. The Working Group reiterated its earlier understanding that, as a general principle, the person (whether a natural or legal one) on whose behalf a computer was programmed should ultimately be responsible for any message generated by the machine.

108. Nevertheless, the Working Group recognized that there might be circumstances that justified a mitigation of that principle, such as when an automated system generated erroneous messages in a manner that could not have reasonably been anticipated by the person on whose behalf the system was operated. It was suggested that elements to be taken into account when considering possible limitations for the responsibility of the party on whose behalf the system was operated included the extent to which the party had

control over the software or other technical aspects used in programming such automated system. It was also suggested that the Working Group should consider, in that context, whether and to what extent an automated system provided an opportunity for the parties contracting through such a system to rectify errors made during the contracting process.

4. *Criteria of applicability of the United Nations Sales Convention*

109. The Working Group noted that in order for the United Nations Sales Convention to be applicable to an international sales contract, not only must the parties have their place of business in different countries, but those countries must also be contracting States to the Convention at a given time (article 100). Where that criterion of applicability set forth in article 1, paragraph 1 (a), was not met, the rules of private international law of the forum must lead to the law of a contracting State, as indicated in article 1, paragraph 1 (b).

110. Mindful of the difficulties of formulating a workable definition of “place of business” in an electronic environment, the Working Group paused to consider the desirability of looking more closely at the place of conclusion of a sales contract as a connecting factor.

111. It was pointed out that articles 11 to 15 of the UNCITRAL Model Law on Electronic Commerce contained a number of provisions that, when applied in conjunction with traditional concepts used in the context of contract formation, allowed for a determination of the place where a contract was concluded, when that question arose in connection with a particular transaction. However, those provisions in the Model Law did not contain a positive indication of the place at which a contract should be deemed to be concluded. Consequently, they might not always allow the parties to ascertain beforehand where the contract had been concluded. It was suggested that, in the interest of ensuring predictability and enhancing legal certainty, it would be useful for the Working Group to consider developing positive criteria for the determination of the place of conclusion of contracts in an electronic environment.

112. In response to that suggestion, it was said that determining the place of conclusion of contracts was of particular importance for the application of rules of private international law, but was of lesser relevance for the application of substantive rules of contract law, which were the focus of the Working Group’s attention. The view was expressed that the Working Group would be well advised to avoid entering into the area of private international law, which was said to be best left for other organizations with particular expertise in that area.

113. The prevailing view within the Working Group, however, was that it would be appropriate for it to formulate specific rules of private international law if that became necessary to clarify issues of contract formation in an electronic environment. Although the focus of its work was not on private international law issues, the Commission had taken a flexible approach in that regard and had not hesitated to formulate appropriate solutions for issues of private international law that arose in connection with specific

topics in its programme of work. As regards the particular issue under consideration, the Working Group agreed, however, that the place of conclusion of a contract, as traditionally understood in private international law, might not provide sufficient basis for a workable solution in an electronic environment and that other, more modern concepts, such as the notion of centre of gravity of a contract or other related notions, might also be considered. Particular attention should be given to the ways in which such issues were being addressed in practice, especially in standard contract terms currently in use in international trade.

5. *Notions of “goods” and “sales contract”*

114. The Working Group noted that the United Nations Sales Convention applied only to contracts for the international sale of “goods”, a term that had traditionally been understood to apply basically to movable tangible goods, thus excluding intangible assets, such as patent rights, trademarks, copyrights, a quota of a limited liability company, as well as know-how. Against that background, the Working Group discussed the question of whether and to what extent the future instrument under consideration by the Working Group should cover transactions involving goods other than tangible movable goods, such as so-called “virtual goods” (for example, software, music or movie files or other information obtainable in electronic format).

115. There was general agreement within the Working Group that existing international instruments, notably the United Nations Sales Convention, did not cover a variety of transactions currently made online and that it might be useful to develop harmonized rules to govern international transactions other than sales of movable tangible goods in the traditional sense. The Working Group proceeded to consider what elements should be taken into account to define the scope of application of such a new international regime.

116. It was generally agreed within the Working Group that, in developing international rules for electronic contracting, a distinction should be drawn between sales and licensing contracts. In the first case, title to the goods passed from the seller to the buyer, whereas in the second case the purchaser only acquired a limited right to use the product, under conditions laid down in the licence agreement. Whether or not the products were the subject of exclusive intellectual property rights, such as copyrights, was not always essential for that distinction, since even non-copyrighted information could be the subject of a licence agreement, as was the case with information accessible online to subscribers of certain online databases or web sites. On the other hand, some transactions involving copyrighted goods, such as software, could in some cases be regarded as sales, where the particular software was incorporated in a tangible good, for example, a navigation software in an automobile, as long as the software was not being licensed separately.

117. A further distinction to be drawn, it was said, was between contracts for the sale of goods and contracts for the provision of services, even though it was recognized that, in practice, it was not always possible to draw a clear

line between those types of transactions. It was pointed out that the existence of a tangible medium that could be referred to as a “good” was not always a sufficient factor for establishing such a distinction. Clear examples of the difficulty of distinguishing between goods and services could be found in transactions involving entertainment articles such as music or video records. The sale online of articles such as minidisks or videotapes would usually be regarded as a sale of goods, whereas the offering of online broadcasts of movies, television shows or music concerts would seem to fall into the category of services. However, modern technology also offered the possibility of purchasing digitalized music or video files that could be downloaded directly from the seller’s web site, without delivery of any tangible medium. In such cases, the intent of the parties had to be more closely examined in order to determine whether the transaction involved goods or services.

118. The Working Group was also reminded of the ongoing discussions under the auspices of WTO as to whether cross-border electronic commerce transactions should be regarded as transactions involving trade in goods or trade in services. It was agreed that, although the perspective from which WTO treated the question might not coincide with that of the Commission, the views expressed within the Working Group should not prejudice the outcome of the deliberations within WTO.

6. Consumer purpose of the sales contract

119. The Working Group was reminded that, according to its article 2, subparagraph (a), the United Nations Sales Convention did not apply to sales “of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use”.

120. There was general agreement that any instrument that might be prepared by UNCITRAL in the field of electronic contracting should not focus on consumer protection issues. However, it was felt that keeping commercial and consumer issues completely separate in the context of electronic contracting might be difficult. It was pointed out that, in electronic selling, the contact between seller and buyer might be so minimal that it would be impossible for the seller to know whether the prospective buyer was a consumer. It was also pointed out that, in view of the many similarities between consumers and certain small businesses that would technically qualify as “merchants”, maintaining a tight distinction between the two categories might be questionable policy. In that context, it was stated that the words “ought to have known” in article 2, subparagraph (a), of the United Nations Sales Convention might be difficult to apply in practice to electronic transactions. More generally, the view was expressed that the notion of “consumer” underlying the provision of article 2, subparagraph (a), might insufficiently reflect recent developments of consumer legislation in certain countries or regions.

121. Various views were expressed as to the manner in which a future instrument dealing with electronic contracting should deal with the issues of consumers. One view

was that two separate instruments might need to be prepared dealing separately with consumer and commercial transactions. Another view, which was widely shared in the Working Group, was that the future instrument should deal with the issues of consumers in much the same way as article 1 of the UNCITRAL Model Law on Electronic Commerce did. The prevailing view was that further efforts should be made towards clarifying the notion of “consumer transactions” to better understand whether a distinction based on the consumer or commercial purpose of the transaction was workable in practice.

122. After discussion, the Working Group came to the preliminary conclusion that, in undertaking studies as to the possible scope of a future instrument on electronic contracting, attention should not focus on consumer protection issues. However, in view of the practical difficulty of distinguishing certain consumer transactions from commercial transactions, the issues arising in the context of consumer transactions should also be borne in mind. In any event, even if consumer transactions were eventually excluded from the scope of the instrument, further consideration should be given to defining “consumer” for the purpose of determining the scope of the instrument. In that respect it was widely felt that the description of consumer transactions contained in article 2, subparagraph (a), of the United Nations Sales Convention might need to be reconsidered with a view to better reflecting electronic commerce practice.

7. Form requirements under the United Nations Sales Convention

123. The Working Group discussed whether contracting States that have made a declaration under article 96 should be encouraged to withdraw such declarations. A widely shared view was that such a development was desirable and would have positive effects on both the development of electronic commerce and the unification of international trade law under the United Nations Sales Convention. The view was expressed, however, that such reservations should not necessarily be regarded as obstacles to the use of electronic commerce, provided that domestic law was sufficiently flexible to accommodate a broad definition of the written form requirement. It was generally agreed that the matter might lend itself to further examination in the context of the general work to be undertaken with respect to the removal of legal barriers to the development of electronic commerce in international instruments relating to international trade (see A/CN.9/WG.IV/XXXVIII/CRP.1/Add.4).

8. Formation of contracts: general issues

124. In the context of the discussion of the issues related to the formation of contracts, the Working Group resumed its deliberations as to whether a future international instrument on electronic contracting should be limited in scope to sales contracts or whether it should address more broadly the general issues of contract theory as applied to electronic commerce (see A/CN.9/WG.IV/XXXVIII/CRP.1/Add.8). It was generally agreed that, while examining the sales contract in the light of the United Nations Sales Convention was an appropriate starting point, the

project to be undertaken should be aimed at providing predictable solutions to the broader issues of contract formation in general. While no recommendation could be made at such an early stage as to whether the instrument should eventually be prepared as an entirely new text or as a protocol to the United Nations Sales Convention, it was widely felt that the working assumption in the preparation of the instrument should be that of a stand-alone convention dealing broadly with the issues of contract formation in electronic commerce. Among possible issues to be touched upon in the instrument, the questions of contract formation through offer and acceptance, location of the parties, timing of communications, receipt and dispatch theory, the treatment of mistake or error and incorporation by reference were generally regarded as useful suggestions. In that context, the attention of the Working Group was drawn to the need to avoid duplicating the work of other organizations active in the field. The secretariat was requested to monitor such efforts by other international organizations. It was generally felt that any project that might be aimed at the production of guidelines or general principles for application in the sphere of electronic contracting (such as possible new chapters of the Unidroit Principles of International Commercial Contracts) would be usefully supplemented by efforts of UNCITRAL to codify non-binding (or “soft law”) rules in the form of an international convention aimed at increasing the certainty and predictability of the legal rules governing electronic commerce.

9. *Formation of contracts: offer and acceptance*

125. It was generally agreed that further analysis of electronic commerce practices should be undertaken to determine how such practices would fit in the existing legal framework of offer and acceptance. It was pointed out that electronic commerce made it possible to address specific information to multiple parties. Such information might not easily fit into the established distinctions between what might constitute an “offer” and what should be interpreted as an “invitation to treat”. The parallel between online catalogues and online shopping malls, on the one hand, and the legal solutions developed in connection with catalogues and shopping malls in traditional commerce, on the other, would also need to be studied.

126. As to how consent could be manifested in online transactions, it was widely felt that the following issues, among others, might need to be studied: the acceptance and binding effect of contract terms displayed on a video screen but not necessarily expected by a party; the ability of the receiving party to print the general conditions of a contract; record retention; and the incorporation by reference of contractual clauses accessible through a hyperlink. It was pointed out that in the software industry the solutions developed concerning the acceptance of the contents of a license agreement through opening of the package containing the tangible support of the software (a situation often referred to as a “shrink-wrap agreement”) could not necessarily be replicated with respect to online delivery of the software, where agreement to the terms of the license contract was requested from the customer prior to the conclusion of the contract (a situation often referred to as a “click-wrap agreement”). After discussion, the Working Group

agreed that the expression of consent through clicking would require particular attention. A note of caution was struck, however, as to the need to maintain a technology-neutral approach to the issues of online contract formation. While attention should be given to the various techniques through which consent might be expressed online, the rules to be developed should be sufficiently general to stand the test of—at least some—technological change. In addition, it was pointed out that a future regime of online contracting should pay attention to the situation where communication techniques used in the formation of contracts combined electronic and paper-based features. In that context, the relationship between the use of signatures and the expression of consent might need to be studied further.

10. *Formation of contracts: receipt and dispatch*

127. With respect to the issues of receipt and dispatch in the formation of distance contracts, it was generally agreed that any future legal instrument should preserve a degree of flexibility to endorse the use of electronic commerce techniques both in the situation where electronic communication was instantaneous and in the situation where electronic messaging was more akin to the use of traditional mail.

D. **Survey of enactment of the UNCITRAL Model Law on Electronic Commerce**

128. At the close of its preliminary discussion of the possible scope and contents of a future instrument on electronic contracting, the Working Group was of the view that its future work would be facilitated if detailed information could be provided as to the level of enactment of the various provisions of the UNCITRAL Model Law on Electronic Commerce. In that context it was suggested that those national statutory provisions should be identified which were sufficiently close to the Model Law for them to be considered enactments of the UNCITRAL Model Law. The secretariat was requested to seek detailed information from member States and observers as to the form in which the general provisions of the UNCITRAL Model Law on Electronic Commerce had been enacted or were being considered for enactment in the respective countries.

129. It was recalled that the Commission had established the system for the collection and dissemination of case law on UNCITRAL texts (CLOUT) and that the system covered enactments of all texts resulting from the work of the Commission, including the UNCITRAL Model Law on Electronic Commerce.⁷ That system depended on the collection of relevant decisions by national correspondents and preparation of abstracts by them in one of the official languages of the United Nations. It was considered that, since a number of countries had enacted legislation based on the Model Law, it would be desirable to report on court or arbitral decisions interpreting such national legislation. It was said that publication of abstracts of such decisions would help promote the UNCITRAL Model Law on Electronic Commerce and foster its uniform interpretation. The Working Group appealed to Governments to provide assist-

⁷For a recent report on the system, see *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 17 (A/55/17)*, paras. 413-415.

ance to the secretariat in obtaining information about decisions interpreting their legislation based on the UNCITRAL Model Law on Electronic Commerce.

E. Online dispute settlement

130. The Working Group noted that issues related to mechanisms for online dispute settlement were receiving increasing attention in various forums, as there was a generally felt need to offer parties to electronic commerce transactions efficient and speedy ways for solving their disputes. That need was magnified by the difficulties related to asserting jurisdiction over Internet transactions and determining the applicable law. However, notwithstanding such wide and strong interest in the topic, concrete attempts to establish online dispute settlement mechanisms were, in practice, only incipient and their results of varying degree of satisfaction.

131. The mechanism for domain name dispute resolution that had been set up by the Internet Corporation for Assigned Names and Numbers (ICANN) was mentioned as one of the few examples of a successful functioning mechanism. However, it was pointed out that the functioning of the ICANN system was facilitated by the very limited scope of the disputes that it handled, namely, only disputes involving the assignment of domain names. Furthermore, as a self-enforcing dispute settlement mechanism, the ICANN system was not faced with the difficulties linked with the enforcement of decisions made in the context of certain non-judicial dispute settlement mechanisms.

132. The Working Group was of the view that, given the importance of the topic and the wide number of international organizations, both governmental and intergovernmental, that had ongoing projects in the area of online dispute resolution, such as ICC, the Hague Conference on Private International Law, OECD and WIPO, it would be appropriate for the secretariat to monitor such work, and for the Commission to take such steps, as it might deem appropriate to ensure a coordinated approach.

133. It was widely felt that the relatively limited experience with online dispute settlement mechanisms made it

difficult to agree at such an early stage on the exact shape of future work on the topic. It was noted that the Working Group on Arbitration had already begun discussing ways in which current legal instruments of a statutory nature might need to be amended or interpreted to do away with existing requirements regarding the written form of arbitration agreements. It was generally agreed that the Working Group should stand ready to provide its expertise to the Working Group on Arbitration at an appropriate stage. It was also agreed that a study should be prepared to examine the UNCITRAL Model Law on International Commercial Arbitration, as well as the UNCITRAL Arbitration Rules, with a view to assessing their appropriateness for meeting the specific needs of online arbitration.

F. Relative priority of future work topics

134. The Working Group agreed to recommend to the Commission that work towards the preparation of an international instrument dealing with certain issues in electronic contracting be begun on a priority basis. At the same time, it was agreed to recommend to the Commission that the secretariat be entrusted with the preparation of the necessary studies concerning three other topics considered by the Working Group, namely: (a) a comprehensive survey of possible legal barriers to the development of electronic commerce in international instruments, including, but not limited to, those instruments already mentioned in the CEFACCT survey; (b) a further study of the issues related to transfer of rights, in particular, rights in tangible goods, by electronic means and mechanisms for publicizing and keeping a record of acts of transfer or the creation of security interests in such goods; and (c) a study discussing the UNCITRAL Model Law on International Commercial Arbitration, as well as the UNCITRAL Arbitration Rules, to assess their appropriateness for meeting the specific needs of online arbitration.

135. The Working Group was mindful of the limited resources available to the Commission's secretariat and acknowledged that it might not be feasible to expect those additional studies to be prepared before the thirty-fifth session of the Commission.

D. Working paper submitted to the Working Group on Electronic Commerce at its thirty-eighth session: draft Guide to Enactment of the UNCITRAL Model Law on Electronic Signatures: note by the secretariat

(A/CN.9/WG.IV/WP.88) [Original: English]

1. Pursuant to decisions taken by the Commission at its twenty-ninth (1996)¹ and thirtieth (1997)² sessions, the Working Group on Electronic Commerce devoted its thirty-first to thirty-seventh sessions to the preparation of

¹Official Records of the General Assembly, Fifty-first Session, Supplement No. 17 (A/51/17), paras. 223 and 224.

²Ibid., Fifty-second Session, Supplement No. 17 (A/52/17), paras. 249-251.

the draft UNCITRAL Model Law on Electronic Signatures (hereinafter referred to as "the Model Law", "the draft Model Law" or "the new Model Law"). Reports of those sessions are found in documents A/CN.9/437, 446, 454, 457, 465, 467 and 483. In preparing the Model Law, the Working Group noted that it would be useful to provide in a commentary additional information concerning the Model Law. Following the approach taken in

the preparation of the UNCITRAL Model Law on Electronic Commerce, there was general support for a suggestion that the new Model Law should be accompanied by a guide to assist States in enacting and applying that Model Law. The guide, much of which could be drawn from the travaux préparatoires of the Model Law, would also be helpful to other users of the Model Law.

2. At its thirty-seventh session, the Working Group completed the preparation of the draft articles of the Model Law and discussed the draft guide to enactment on the basis of a note by the secretariat (A/CN.9/WG.IV/WP.86 and Add.1). The secretariat was requested to prepare a revised version of the draft guide reflecting the decisions

made by the Working Group, based on the various views, suggestions and concerns that had been expressed at the thirty-seventh session. Due to lack of time, the Working Group did not complete its deliberations regarding the draft guide to enactment (see A/CN.9/483, paras. 23 and 145-152). It was agreed that some time should be set aside by the Working Group at its thirty-eighth session for completion of that agenda item. It was noted that the draft Model Law, together with the draft guide to enactment, would be submitted to the Commission for review and adoption at its thirty-fourth session, to be held at Vienna from 25 June to 13 July 2001.

3. The annex to the present note contains a revised version of the draft guide prepared by the secretariat.

ANNEX

UNCITRAL MODEL LAW ON ELECTRONIC SIGNATURES WITH GUIDE TO ENACTMENT 2001

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PART ONE

UNCITRAL MODEL LAW ON ELECTRONIC SIGNATURES WITH GUIDE TO ENACTMENT (2001)

(as approved by the UNCITRAL Working Group on Electronic Commerce at its thirty-seventh session, held at Vienna from 18 to 29 September 2000)

Article 1. *Sphere of application*

This Law applies where electronic signatures are used in the context* of commercial** activities. It does not override any rule of law intended for the protection of consumers.

*The Commission suggests the following text for States that might wish to extend the applicability of this Law:

“This Law applies where electronic signatures are used, except in the following situations: [...]”

**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; licencing; 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.

Article 2. *Definitions*

For the purposes of this Law:

(a) “Electronic signature” means data in electronic form in, affixed to, or logically associated with, a data message, which may be used to identify the signatory in relation to the data message and indicate the signatory’s approval of the information contained in the data message;

(b) “Certificate” means a data message or other record confirming the link between a signatory and signature creation data;

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

(d) “Signatory” means a person that holds signature creation data and acts either on its own behalf or on behalf of the person it represents;

(e) “Certification service provider” means a person that issues certificates and may provide other services related to electronic signatures;

(f) “Relying party” means a person that may act on the basis of a certificate or an electronic signature.

Article 3. *Equal treatment of signature technologies*

Nothing in this Law, except article 5, shall be applied so as to exclude, restrict or deprive of legal effect any method of creating an electronic signature that satisfies the requirements referred to in article 6 (1) or otherwise meets the requirements of applicable law.

Article 4. *Interpretation*

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

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

Article 5. *Variation by agreement*

The provisions of this Law may be derogated from or their effect may be varied by agreement, unless that agreement would not be valid or effective under applicable law.

Article 6. *Compliance with a requirement for a signature*

(1) Where the law requires a signature of a person, that requirement is met in relation to a data message if an electronic signature is used which is as reliable as was appropriate for the purpose for which the data message was generated or communicated, in the light of all the circumstances, including any relevant agreement.

(2) Paragraph (1) applies whether the requirement referred to therein is in the form of an obligation or whether the law simply provides consequences for the absence of a signature.

(3) An electronic signature is considered to be reliable for the purpose of satisfying the requirement referred to in paragraph (1) if:

(a) the signature creation data are, within the context in which they are used, linked to the signatory and to no other person;

(b) the signature creation data were, at the time of signing, under the control of the signatory and of no other person;

(c) Any alteration to the electronic signature, made after the time of signing, is detectable; and

(d) where a purpose of the legal requirement for a signature is to provide assurance as to the integrity of the information to which it relates, any alteration made to that information after the time of signing is detectable.

(4) Paragraph (3) does not limit the ability of any person:

(a) to establish in any other way, for the purpose of satisfying the requirement referred to in paragraph (1), the reliability of an electronic signature; or

(b) to adduce evidence of the non-reliability of an electronic signature.

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

Article 7. *Satisfaction of article 6*

(1) [Any person, organ or authority, whether public or private, specified by the enacting State as competent] may determine which electronic signatures satisfy the provisions of article 6.

(2) Any determination made under paragraph (1) shall be consistent with recognized international standards.

(3) Nothing in this article affects the operation of the rules of private international law.

Article 8. *Conduct of the signatory*

(1) Where signature creation data can be used to create a signature that has legal effect, each signatory shall:

(a) exercise reasonable care to avoid unauthorized use of its signature creation data;

(b) without undue delay, notify any person that may reasonably be expected by the signatory to rely on or to provide services in support of the electronic signature if:

- (i) the signatory knows that the signature creation data have been compromised; or
- (ii) the circumstances known to the signatory give rise to a substantial risk that the signature creation data may have been compromised;

(c) where a certificate is used to support the electronic signature, exercise reasonable care to ensure the accuracy and completeness of all material representations made by the signatory which are relevant to the certificate throughout its life-cycle, or which are to be included in the certificate.

(2) A signatory shall be liable for its failure to satisfy the requirements of paragraph (1).

Article 9. *Conduct of the certification service provider*

(1) Where a certification service provider provides services to support an electronic signature that may be used for legal effect as a signature, that certification service provider shall:

(a) Act in accordance with representations made by it with respect to its policies and practices;

(b) exercise reasonable care to ensure the accuracy and completeness of all material representations made by it that are relevant to the certificate throughout its life-cycle, or which are included in the certificate;

(c) provide reasonably accessible means which enable a relying party to ascertain from the certificate:

- (i) the identity of the certification service provider;
- (ii) that the signatory that is identified in the certificate had control of the signature creation data at the time when the certificate was issued;
- (iii) that signature creation data were valid at or before the time when the certificate was issued;

(d) provide reasonably accessible means which enable a relying party to ascertain, where relevant, from the certificate or otherwise:

- (i) the method used to identify the signatory;
- (ii) Any limitation on the purpose or value for which the signature creation data or the certificate may be used;
- (iii) that the signature creation data are valid and have not been compromised;
- (iv) Any limitation on the scope or extent of liability stipulated by the certification service provider;
- (v) whether means exist for the signatory to give notice pursuant to article 8 (1) (b);
- (vi) whether a timely revocation service is offered;

(e) where services under subparagraph (d) (v) are offered, provide a means for a signatory to give notice pursuant to article 8(1)(b) and, where services under subparagraph d (vi) are offered, ensure the availability of a timely revocation service;

(f) utilize trustworthy systems, procedures and human resources in performing its services.

(2) A certification service provider shall be liable for its failure to satisfy the requirements of paragraph (1).

Article 10. *Trustworthiness*

For the purposes of article 9(1)(f), in determining whether, or to what extent, any systems, procedures and human resources utilized by a certification service provider are trustworthy, regard may be had to the following factors:

(a) financial and human resources, including existence of assets;

(b) quality of hardware and software systems;

(c) procedures for processing of certificates and applications for certificates and retention of records;

(d) Availability of information to signatories identified in certificates and to potential relying parties;

(e) regularity and extent of audit by an independent body;

(f) the existence of a declaration by the State, an accreditation body or the certification service provider regarding compliance with or existence of the foregoing; or

(g) Any other relevant factor.

Article 11. *Conduct of the relying party*

A relying party shall bear the legal consequences of its failure to:

(a) take reasonable steps to verify the reliability of an electronic signature;

or

(b) where an electronic signature is supported by a certificate, take reasonable steps to:

- (i) verify the validity, suspension or revocation of the certificate; and
- (ii) observe any limitation with respect to the certificate.

Article 12. *Recognition of foreign certificates and electronic signatures*

(1) In determining whether, or to what extent, a certificate or an electronic signature is legally effective, no regard shall be had to:

(a) the geographic location where the certificate is issued or the electronic signature created or used; or

(b) the geographic location of the place of business of the issuer or signatory.

(2) A certificate issued outside [*the enacting State*] shall have the same legal effect in [*the enacting State*] as a certificate issued in [*the enacting State*] if it offers a substantially equivalent level of reliability.

(3) An electronic signature created or used outside [*the enacting State*] shall have the same legal effect in [*the enacting State*] as an electronic signature created or used in [*the enacting State*] if it offers a substantially equivalent level of reliability.

(4) In determining whether a certificate or an electronic signature offers a substantially equivalent level of reliability for the purposes of paragraph (2) or (3), regard shall be had to recognized international standards and to any other relevant factors.

(5) Where, notwithstanding paragraphs (2), (3) and (4), parties agree, as between themselves, to the use of certain types of electronic signatures or certificates, that agreement shall be recognized as sufficient for the purposes of cross-border recognition, unless that agreement would not be valid or effective under applicable law.

PART TWO

GUIDE TO ENACTMENT OF THE UNCITRAL MODEL LAW ON ELECTRONIC SIGNATURES (2001)

Purpose of this Guide

1. In preparing and adopting the UNCITRAL Model Law on Electronic Signatures (also referred to in this publication as “the Model Law” or “the new Model Law”), the United Nations Commission on International Trade Law (UNCITRAL) was mindful that the Model Law would be a more effective tool for States modernizing their legislation if background and explanatory information were provided to executive branches of Governments and legislators to assist them in using the Model Law. The Commission was also aware of the likelihood that the Model Law would be used in a number of States with limited familiarity with the type of communication techniques considered in the Model Law. This 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. Such information might also assist States in considering which, if any, of the provisions should be varied in order to be adapted to any particular national circumstances necessitating such variation. 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. The information presented in this Guide is intended to explain why the provisions in the Model Law have been included as essential basic features of a statutory device designed to achieve the objectives of the Model Law.

2. The present Guide to Enactment has been prepared by the secretariat pursuant to the request of UNCITRAL made at the close of its thirty-fourth session, in 2001. It is based on the deliberations and decisions of the Commission at that session, when the Model Law was adopted, as well as on considerations of the Working Group on Electronic Commerce, which conducted the preparatory work.

Chapter I. Introduction to the Model Law**I. PURPOSE AND ORIGIN OF THE MODEL LAW***A. Purpose*

3. The increased use of electronic authentication techniques as substitutes for handwritten signatures and other traditional authentication procedures has suggested the need for a specific legal framework to reduce uncertainty as to the legal effect that may result from the use of such modern techniques (which may be referred to generally as “electronic signatures”). The risk that diverging legislative approaches be taken in various countries with respect to electronic signatures calls for uniform legislative provisions to establish the basic rules of what is inherently an international phenomenon, where legal (as well as technical) interoperability is essential.

4. Building on the fundamental principles underlying article 7 of the UNCITRAL Model Law on Electronic Commerce (always referred to in this publication under its full title to avoid confusion) with respect to the fulfilment of the signature function in an electronic environment, this new Model Law is designed to assist States in establishing a modern, harmonized and fair legislative framework to address more effectively the issues of electronic signatures. In a modest but significant addition to the UNCITRAL Model Law on Electronic Commerce, the new Model Law offers

practical standards against which the technical reliability of electronic signatures may be measured. In addition, the Model Law provides a linkage between such technical reliability and the legal effectiveness that may be expected from a given electronic signature. The Model Law adds substantially to the UNCITRAL Model Law on Electronic Commerce by adopting an approach under which the legal effectiveness of a given electronic signature technique may be pre-determined (or assessed prior to being actually used). The Model Law is thus intended to foster the understanding of electronic signatures, and the confidence that certain electronic signature techniques can be relied upon in legally significant transactions. Moreover, by establishing with appropriate flexibility a set of basic rules of conduct for the various parties that may become involved in the use of electronic signatures (i.e. signatories, relying parties and third-party certification service providers) the Model Law may assist in shaping more harmonious commercial practices in cyberspace.

5. The objectives of the Model Law, which include enabling or facilitating the use of electronic signatures and providing equal treatment to users of paper-based documentation and users of computer-based information, are essential for fostering economy and efficiency in international trade. By incorporating the procedures prescribed in the Model Law (and also the provisions of the UNCITRAL Model Law on Electronic Commerce) in its national legislation for those situations where parties opt to use electronic means of communication, an enacting State would appropriately create a media-neutral environment.

B. Background

6. The Model Law constitutes a new step in a series of international instruments adopted by UNCITRAL, which are either specifically focused on the needs of electronic commerce or were prepared bearing in mind the needs of modern means of communication. In the first category, specific instruments geared to electronic commerce comprise the Legal Guide on Electronic Funds Transfers (1987), the UNCITRAL Model Law on International Credit Transfers (1992) and the UNCITRAL Model Law on Electronic Commerce (1996 and 1998). The second category consists of all international conventions and other legislative instruments adopted by UNCITRAL since 1978, all of which promote reduced formalism and contain definitions of “writing” that are meant to encompass de-materialized communications.

7. The best known UNCITRAL instrument in the field of electronic commerce is the UNCITRAL Model Law on Electronic Commerce. Its preparation in the early 1990s resulted from the increased use of modern means of communication such as electronic mail and electronic data interchange (EDI) for the conduct of international trade transactions. It was realized that new technologies had been developing rapidly and would develop further as technical supports such as information highways and the Internet became more widely accessible. However, the communication of legally significant information in the form of paperless messages was hindered by legal obstacles to the use of such messages, or by uncertainty as to their legal effect or validity. With a view to facilitating the increased use of modern means of communication, UNCITRAL has prepared the UNCITRAL Model Law on Electronic Commerce. The purpose of the UNCITRAL Model Law on Electronic Commerce is to offer national legislators a set of internationally acceptable rules as to how a number of such legal obstacles may be removed, and how a more secure legal environment may be created for what has become known as “electronic commerce”.

8. The decision by UNCITRAL to formulate model legislation on electronic commerce was taken in response to the fact that, in a number of countries, the existing legislation governing communication and storage of information was inadequate or outdated because it did not contemplate the use of electronic commerce. In certain cases, existing legislation still imposes or implies restrictions on the use of modern means of communication, for example by prescribing the use of "written", "signed" or "original" documents. With respect to the notions of "written", "signed" and "original" documents, the UNCITRAL Model Law on Electronic Commerce adopted an approach based on functional equivalence.

9. At the time when the UNCITRAL Model Law on Electronic Commerce was being prepared, a few countries had adopted specific provisions to deal with certain aspects of electronic commerce. However, there existed no legislation dealing with electronic commerce as a whole. This could result in uncertainty as to the legal nature and validity of information presented in a form other than a traditional paper document. Moreover, while sound laws and practices were necessary in all countries where the use of EDI and electronic mail was becoming widespread, this need was also felt in many countries with respect to such communication techniques as telecopy and telex.

10. The UNCITRAL Model Law on Electronic Commerce also helped to remedy disadvantages that stemmed from the fact that inadequate legislation at the national level created obstacles to international trade, a significant amount of which is linked to the use of modern communication techniques. To a large extent, disparities among, and uncertainty about, national legal regimes governing the use of such communication techniques may still contribute to limiting the extent to which businesses may access international markets.

11. Furthermore, at an international level, the UNCITRAL Model Law on Electronic Commerce may be useful in certain cases as a tool for interpreting existing international conventions and other international instruments that create legal obstacles to the use of electronic commerce, for example by prescribing that certain documents or contractual clauses be made in written form. As between those States parties to such international instruments, the adoption of the UNCITRAL Model Law on Electronic Commerce as a rule of interpretation might provide the means to recognize the use of electronic commerce and obviate the need to negotiate a protocol to the international instrument involved.

C. History

12. After adopting the UNCITRAL Model Law on Electronic Commerce, the Commission, at its twenty-ninth session (1996), decided to place the issues of digital signatures and certification authorities on its agenda. The Working Group on Electronic Commerce was requested to examine the desirability and feasibility of preparing uniform rules on those topics. It was agreed that the uniform rules to be prepared should deal with such issues as: the legal basis supporting certification processes, including emerging digital authentication and certification technology; the applicability of the certification process; the allocation of risk and liabilities of users, providers and third parties in the context of the use of certification techniques; the specific issues of certification through the use of registries; and incorporation by reference.³

13. At its thirtieth session (1997), the Commission had before it the report of the Working Group on the work of its thirty-first session (A/CN.9/437). The Working Group indicated to the Com-

mission that it had reached consensus as to the importance of, and the need for, working towards harmonization of legislation in that area. While no firm decision as to the form and content of such work had been reached, the Working Group had come to the preliminary conclusion that it was feasible to undertake the preparation of draft uniform rules at least on issues of digital signatures and certification authorities, and possibly on related matters. The Working Group recalled that, alongside digital signatures and certification authorities, future work in the area of electronic commerce might also need to address: issues of technical alternatives to public-key cryptography; general issues of functions performed by third-party service providers; and electronic contracting (A/CN.9/437, paras. 156 and 157). The Commission endorsed the conclusions reached by the Working Group, and entrusted the Working Group with the preparation of uniform rules on the legal issues of digital signatures and certification authorities.

14. With respect to the exact scope and form of the uniform rules, the Commission generally agreed that no decision could be made at this early stage of the process. It was felt that, while the Working Group might appropriately focus its attention on the issues of digital signatures in view of the apparently predominant role played by public-key cryptography in the emerging electronic-commerce practice, the uniform rules should be consistent with the media-neutral approach taken in the UNCITRAL Model Law on Electronic Commerce. Thus, the uniform rules should not discourage the use of other authentication techniques. Moreover, in dealing with public-key cryptography, the uniform rules might need to accommodate various levels of security and to recognize the various legal effects and levels of liability corresponding to the various types of services being provided in the context of digital signatures. With respect to certification authorities, while the value of market-driven standards was recognized by the Commission, it was widely felt that the Working Group might appropriately envisage the establishment of a minimum set of standards to be met by certification authorities, particularly where cross-border certification was sought.⁴

15. The Working Group began the preparation of the uniform rules (to be adopted later as the Model Law) at its thirty-second session on the basis of a note prepared by the secretariat (A/CN.9/WG.IV/WP.73).

16. At its thirty-first session (1998), the Commission had before it the report of the Working Group on the work of its thirty-second session (A/CN.9/446). It was noted that the Working Group, throughout its thirty-first and thirty-second sessions, had experienced manifest difficulties in reaching a common understanding of the new legal issues that arose from the increased use of digital and other electronic signatures. It was also noted that a consensus was still to be found as to how those issues might be addressed in an internationally acceptable legal framework. However, it was generally felt by the Commission that the progress realized so far indicated that the uniform rules were progressively being shaped into a workable structure.

17. The Commission reaffirmed the decision made at its thirtieth session as to the feasibility of preparing such uniform rules and expressed its confidence that more progress could be accomplished by the Working Group at its thirty-third session on the basis of the revised draft prepared by the secretariat (A/CN.9/WG.IV/WP.76). In the context of that discussion, the Commission noted with satisfaction that the Working Group had become generally recognized as a particularly important international forum for the exchange of views regarding the legal issues of electronic commerce and for the preparation of solutions to those issues.⁵

³Official Records of the General Assembly, Fifty-first Session, Supplement No. 17 (A/51/17), paras. 223 and 224.

⁴Ibid., Fifty-second Session, Supplement No. 17 (A/52/17), paras. 249-251.

⁵Ibid., Fifty-third Session, Supplement No. 17 (A/53/17), paras. 207-211.

18. The Working Group continued revision of the uniform rules at its thirty-third session (1998) and thirty-fourth session (1999) on the basis of notes prepared by the secretariat (A/CN.9/WG.IV/WP.76 and A/CN.9/WG.IV/WP.79 and 80). The reports of the sessions are contained in documents A/CN.9/454 and 457.

19. At its thirty-second session (1999), the Commission had before it the report of the Working Group on those two sessions (A/CN.9/454 and 457). The Commission expressed its appreciation for the efforts accomplished by the Working Group in its preparation of the uniform rules. While it was generally agreed that significant progress had been made at those sessions in the understanding of the legal issues of electronic signatures, it was also felt that the Working Group had been faced with difficulties in the building of a consensus as to the legislative policy on which the uniform rules should be based.

20. A view was expressed that the approach currently taken by the Working Group did not sufficiently reflect the business need for flexibility in the use of electronic signatures and other authentication techniques. As currently envisaged by the Working Group, the uniform rules placed excessive emphasis on digital signature techniques and, within the sphere of digital signatures, on a specific application involving third-party certification. Accordingly, it was suggested that work on electronic signatures by the Working Group should either be limited to the legal issues of cross-border certification or be postponed altogether until market practices were better established. A related view expressed was that, for the purposes of international trade, most of the legal issues arising from the use of electronic signatures had already been solved in the UNCITRAL Model Law on Electronic Commerce (see below, para. 28). While regulation dealing with certain uses of electronic signatures might be needed outside the scope of commercial law, the Working Group should not become involved in any such regulatory activity.

21. The widely prevailing view was that the Working Group should pursue its task on the basis of its original mandate. With respect to the need for uniform rules on electronic signatures, it was explained that, in many countries, guidance from UNCITRAL was expected by governmental and legislative authorities that were in the process of preparing legislation on electronic signature issues, including the establishment of public-key infrastructures (PKI) or other projects on closely related matters (see A/CN.9/457, para. 16). As to the decision made by the Working Group to focus on PKI issues and PKI terminology, it was recalled that the interplay of relationships between three distinct types of parties (i.e. key holders, certification authorities and relying parties) corresponded to one possible PKI model, but that other models were conceivable, e.g. where no independent certification authority was involved. One of the main benefits to be drawn from focusing on PKI issues was to facilitate the structuring of the uniform rules by reference to three functions (or roles) with respect to key pairs, namely, the key issuer (or subscriber) function, the certification function, and the relying function. It was generally agreed that those three functions were common to all PKI models. It was also agreed that those three functions should be dealt with irrespective of whether they were in fact served by three separate entities or whether two of those functions were served by the same person (e.g. where the certification authority was also a relying party). In addition, it was widely felt that focusing on the functions typical of PKI and not on any specific model might make it easier to develop a fully media-neutral rule at a later stage (*ibid.*, para. 68).

22. After discussion, the Commission reaffirmed its earlier decisions as to the feasibility of preparing such uniform rules and expressed its confidence that more progress could be accomplished by the Working Group at its forthcoming sessions.⁶

23. The Working Group continued its work at its thirty-fifth (September 1999) and thirty-sixth (February 2000) sessions on the basis of notes prepared by the secretariat (A/CN.9/WG.IV/WP. 82 and 84). At its thirty-third (2000) session, the Commission had before it the report of the Working Group on the work of those two sessions (A/CN.9/465 and 467). It was noted that the Working Group, at its thirty-sixth session, had adopted the text of draft articles 1 and 3 to 12 of the uniform rules. It was stated that some issues remained to be clarified as a result of the decision by the Working Group to delete the notion of enhanced electronic signature from the uniform rules. A concern was expressed that, depending on the decisions to be made by the Working Group with respect to draft articles 2 and 13, the remainder of the draft provisions might need to be revisited to avoid creating a situation where the standard set forth by the uniform rules would apply equally to electronic signatures that ensured a high level of security and to low-value certificates that might be used in the context of electronic communications that were not intended to carry significant legal effect.

24. After discussion, the Commission expressed its appreciation for the efforts extended by the Working Group and the progress achieved in the preparation of the uniform rules. The Working Group was urged to complete its work with respect to the uniform rules at its thirty-seventh session and to review the draft guide to enactment to be prepared by the secretariat.⁷

25. The Working Group completed the preparation of the uniform rules at its thirty-seventh (September 2000) session. The report of that session is contained in document A/CN.9/483. The Working Group also discussed the draft guide to enactment. The secretariat was requested to prepare a revised version of the draft guide reflecting the decisions made by the Working Group, based on the various views, suggestions and concerns that had been expressed at the current session. Due to lack of time, the Working Group did not complete its deliberations regarding the draft guide to enactment. It was agreed that some time should be set aside by the Working Group at its thirty-eighth session for completion of that agenda item. It was noted that the uniform rules (in the form of a draft UNCITRAL Model Law on Electronic Signatures), together with the draft guide to enactment, would be submitted to the Commission for review and adoption at its thirty-fourth (2001) session. [*Note by the secretariat: this section recording the history of the Model Law is to be completed, and possibly made slightly more concise, after final consideration and adoption of the Model Law by the Commission.*]

II. THE MODEL LAW AS A TOOL FOR HARMONIZING LAWS

26. As the UNCITRAL Model Law on Electronic Commerce, the new 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).

27. In incorporating the text of the model legislation into its legal system, a State may modify or leave out some of its 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 "reservations") is much more restricted; in particular, trade law conventions usually either totally prohibit reservations or allow only very few, specified ones. The flexibility inherent in

⁶*Ibid.*, Fifty-fourth Session, Supplement No. 17 (A/54/17), paras. 308-314.

⁷*Ibid.*, Fifty-fifth Session, Supplement No. 17 (A/55/17), paras. 380-383.

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. 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. In general, in enacting the new Model Law (or the UNCITRAL Model Law on Electronic Commerce), 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.

28. It should be noted that some countries consider that the legal issues related to the use of electronic signatures have already been solved by the UNCITRAL Model Law on Electronic Commerce, and do not plan on adopting further rules on electronic signatures until market practices in this new area are better established. However, States enacting the new Model Law alongside the UNCITRAL Model Law on Electronic Commerce may expect additional benefits. For those countries where governmental and legislative authorities are in the process of preparing legislation on electronic signature issues, including the establishment of public-key infrastructures (PKI), the Model Law offers the guidance of an international instrument that was prepared with PKI issues and PKI terminology in mind. For all countries, the Model Law offers a set of basic rules that can be applied beyond the PKI model, since they envisage the interplay of three distinct functions that may be involved in any type of electronic signature (i.e. creating, certifying and relying on an electronic signature). Those three functions should be dealt with irrespective of whether they are in fact served by three separate entities or whether two of those functions are served by the same person (e.g. where the certification function is served by a relying party). The Model Law thus provides common grounds for PKI systems relying on independent certification authorities and electronic signature systems where no such independent third party is involved in the electronic signature process. In all cases, the new Model Law provides added certainty regarding the legal effectiveness of electronic signatures, without limiting the availability of the flexible criterion embodied in article 7 of the UNCITRAL Model Law on Electronic Commerce (see below, paras. 67 and 70-75).

III. GENERAL REMARKS ON ELECTRONIC SIGNATURES⁸

A. Functions of signatures

29. Article 7 of the UNCITRAL Model Law on Electronic Commerce is based on the recognition of the functions of a signature in a paper-based environment. In the preparation of the UNCITRAL Model Law on Electronic Commerce, the Working Group discussed the following functions traditionally performed by handwritten signatures: to identify a person; to provide certainty as to the personal involvement of that person in the act of signing; to associate that person with the content of a document. It was noted that, in addition, a signature could perform a variety of functions, depending on the nature of the document that was signed. For example, a signature might attest to: the intent of a party to be bound by the content of a signed contract; the intent

of a person to endorse authorship of a text (thus displaying awareness of the fact that legal consequences might possibly flow from the act of signing); the intent of a person to associate itself with the content of a document written by someone else; the fact that, and the time when, a person had been at a given place. The relationship of the new Model Law with article 7 of the UNCITRAL Model Law on Electronic Commerce is further discussed below, in paragraphs 67 and 70 to 75 of this Guide.

30. In an electronic environment, the original of a message is indistinguishable from a copy, bears no handwritten signature, and is not on paper. The potential for fraud is considerable, due to the ease of intercepting and altering information in electronic form without detection, and the speed of processing multiple transactions. The purpose of various techniques currently available on the market or still under development is to offer the technical means by which some or all of the functions identified as characteristic of handwritten signatures can be performed in an electronic environment. Such techniques may be referred to broadly as "electronic signatures".

B. Digital signatures and other electronic signatures

31. In discussing the desirability and feasibility of preparing the new Model Law, and in defining the scope of uniform rules on electronic signatures, UNCITRAL has examined various electronic signature techniques currently being used or still under development. The common purpose of those techniques is to provide functional equivalents to (1) handwritten signatures; and (2) other kinds of authentication mechanisms used in a paper-based environment (e.g. seals or stamps). The same techniques may perform additional functions in the sphere of electronic commerce, which are derived from the functions of a signature but correspond to no strict equivalent in a paper-based environment.

32. As indicated above (see paras. 21 and 28), guidance from UNCITRAL is expected in many countries, by governmental and legislative authorities that are in the process of preparing legislation on electronic signature issues, including the establishment of public key infrastructures (PKI) or other projects on closely related matters (see A/CN.9/457, para. 16). As to the decision made by UNCITRAL to focus on PKI issues and PKI terminology, it should be noted that the interplay of relationships between three distinct types of parties (i.e. signatories, suppliers of certification services and relying parties) corresponds to one possible PKI model, but other models are already commonly used in the marketplace (e.g. where no independent certification authority is involved). One of the main benefits to be drawn from focusing on PKI issues was to facilitate the structuring of the Model Law by reference to three functions (or roles) with respect to electronic signatures, namely, the signatory (key issuer or key subscriber) function, the certification function, and the relying function. Those three functions are common to all PKI models and should be dealt with irrespective of whether they are in fact served by three separate entities or whether two of those functions are served by the same person (e.g. where the certification service provider is also a relying party). Focusing on the functions performed in a PKI environment and not on any specific model also makes it easier to develop a fully media-neutral rule to the extent that similar functions are served in non-PKI electronic signature technology.

1. Electronic signatures relying on techniques other than public-key cryptography

33. Alongside "digital signatures" based on public-key cryptography, there exist various other devices, also covered in the broader notion of "electronic signature" mechanisms, which may currently be used, or considered for future use, with a view to

⁸This section is drawn from document A/CN.9/WG.IV/WP.71, part I.

fulfilling one or more of the above-mentioned functions of handwritten signatures. For example, certain techniques would rely on authentication through a biometric device based on handwritten signatures. In such a device, the signatory would sign manually, using a special pen, either on a computer screen or on a digital pad. The handwritten signature would then be analysed by the computer and stored as a set of numerical values, which could be appended to a data message and displayed by the recipient for authentication purposes. Such an authentication system would presuppose that samples of the handwritten signature have been previously analysed and stored by the biometric device. Other techniques would involve the use of personal identification numbers (PINs), digitized versions of handwritten signatures, and other methods, such as clicking an “OK-box”.

34. UNCITRAL has intended to develop uniform legislation that can facilitate the use of both digital signatures and other forms of electronic signatures. To that effect, UNCITRAL has attempted to deal with the legal issues of electronic signature issues at a level that is intermediate between the high generality of the UNCITRAL Model Law on Electronic Commerce and the specificity that might be required when dealing with a given signature technique. In any event, consistent with media neutrality in the UNCITRAL Model Law on Electronic Commerce, the new Model Law is not to be interpreted as discouraging the use of any method of electronic signature, whether already existing or to be implemented in the future.

2. *Digital signatures relying on public-key cryptography*⁹

35. In view of the increasing use of digital signature techniques in a number of countries, the following introduction may be of assistance to those preparing legislation on electronic signatures.

(a) *Technical notions and terminology*

(i) *Cryptography*

36. Digital signatures are created and verified by using cryptography, the branch of applied mathematics that concerns itself with transforming messages into seemingly unintelligible form and back into the original form. Digital signatures use what is known as “public key cryptography”, which is often based on the use of algorithmic functions to generate two different but mathematically-related “keys” (i.e. large numbers produced using a series of mathematical formulae applied to prime numbers). One such key is used for creating a digital signature or transforming data into a seemingly unintelligible form, and the other one for verifying a digital signature or returning the message to its original form. Computer equipment and software utilizing two such keys are often collectively referred to as “cryptosystems” or, more specifically, “asymmetric cryptosystems” where they rely on the use of asymmetric algorithms.

37. While the use of cryptography is one of the main features of digital signatures, the mere fact that a digital signature is used to authenticate a message containing information in digital form should not be confused with a more general use of cryptography for confidentiality purposes. Confidentiality encryption is a method used for encoding an electronic communication so that only the originator and the addressee of the message will be able to read it. In a number of countries, the use of cryptography for confidentiality purposes is limited by law for reasons of public policy that may involve considerations of national defence. However, the use of cryptography for authentication purposes by producing a digital signature does not necessarily imply the use of

encryption to make any information confidential in the communication process, since the encrypted digital signature may be merely appended to a non-encrypted message.

(ii) *Public and private keys*

38. The complementary keys used for digital signatures are named the “private key”, which is used only by the signatory to create the digital signature, and the “public key”, which is ordinarily more widely known and is used by a relying party to verify the digital signature. The user of a private key is expected to keep the private key secret. It should be noted that the individual user does not need to know the private key. Such a private key is likely to be kept on a smart card, or to be accessible through a personal identification number or, ideally, through a biometric identification device, e.g. through thumbprint recognition. If many people need to verify the signatory’s digital signatures, the public key must be available or distributed to all of them, for example by publication in an on-line repository or any other form of public directory where it is easily accessible. Although the keys of the pair are mathematically related, if an asymmetric cryptosystem has been designed and implemented securely it is virtually infeasible to derive the private key from knowledge of the public key. The most common algorithms for encryption through the use of public and private keys are based on an important feature of large prime numbers: once they are multiplied together to produce a new number, it is particularly difficult and time-consuming to determine which two prime numbers created that new, larger number.¹⁰ Thus, although many people may know the public key of a given signatory and use it to verify that signatory’s signatures, they cannot discover that signatory’s private key and use it to forge digital signatures.

39. It should be noted, however, that the concept of public-key cryptography does not necessarily imply the use of the above-mentioned algorithms based on prime numbers. Other mathematical techniques are currently used or under development, such as cryptosystems relying on elliptic curves, which are often described as offering a high degree of security through the use of significantly reduced key-lengths.

(iii) *Hash function*

40. In addition to the generation of key pairs, another fundamental process, generally referred to as a “hash function”, is used in both creating and verifying a digital signature. A hash function is a mathematical process, based on an algorithm which creates a digital representation, or compressed form of the message, often referred to as a “message digest”, or “fingerprint” of the message, in the form of a “hash value” or “hash result” of a standard length which is usually much smaller than the message but nevertheless substantially unique to it. Any change to the message invariably produces a different hash result when the same hash function is used. In the case of a secure hash function, sometimes named a “one-way hash function”, it is virtually impossible to derive the original message from knowledge of its hash value. Hash functions therefore enable the software for creating digital signatures to operate on smaller and predictable amounts of data, while still providing robust evidentiary correlation to the original message content, thereby efficiently providing assurance that there has been no modification of the message since it was digitally signed.

⁹Numerous elements of the description of the functioning of a digital signature system in this section are based on the ABA Digital Signature Guidelines, p. 8 to 17.

¹⁰Certain existing standards such as the ABA Digital Signature Guidelines refer to the notion of “computational infeasibility” to describe the expected irreversibility of the process, i.e. the hope that it will be impossible to derive a user’s secret private key from that user’s public key. “‘Computationally infeasible’ is a relative concept based on the value of the data protected, the computing overhead required to protect it, the length of time it needs to be protected, and the cost and time required to attack the data, with such factors assessed both currently and in the light of future technological advance” (ABA Digital Signature Guidelines, p. 9, note 23).

(iv) Digital signature

41. To sign a document or any other item of information, the signatory first delimits precisely the borders of what is to be signed. Then a hash function in the signatory's software computes a hash result unique (for all practical purposes) to the information to be signed. The signatory's software then transforms the hash result into a digital signature using the signatory's private key. The resulting digital signature is thus unique to both the information being signed and the private key used to create the digital signature.

42. Typically, a digital signature (a digitally signed hash result of the message) is attached to the message and stored or transmitted with that message. However, it may also be sent or stored as a separate data element, as long as it maintains a reliable association with the corresponding message. Since a digital signature is unique to its message, it is useless if permanently disassociated from the message.

(v) Verification of digital signature

43. Digital signature verification is the process of checking the digital signature by reference to the original message and a given public key, thereby determining whether the digital signature was created for that same message using the private key that corresponds to the referenced public key. Verification of a digital signature is accomplished by computing a new hash result of the original message by means of the same hash function used to create the digital signature. Then, using the public key and the new hash result, the verifier checks whether the digital signature was created using the corresponding private key, and whether the newly computed hash result matches the original hash result that was transformed into the digital signature during the signing process.

44. The verification software will confirm the digital signature as "verified" if: (1) the signatory's private key was used to sign digitally the message, which is known to be the case if the signatory's public key was used to verify the signature because the signatory's public key will verify only a digital signature created with the signatory's private key; and (2) the message was unaltered, which is known to be the case if the hash result computed by the verifier is identical to the hash result extracted from the digital signature during the verification process.

(b) Public key infrastructure (PKI) and suppliers of certification services

45. To verify a digital signature, the verifier must have access to the signatory's public key and have assurance that it corresponds to the signatory's private key. However, a public and private key pair has no intrinsic association with any person; it is simply a pair of numbers. An additional mechanism is necessary to associate reliably a particular person or entity to the key pair. If public key encryption is to serve its intended purposes, it needs to provide a way to send keys to a wide variety of persons, many of whom are not known to the sender, where no relationship of trust has developed between the parties. To that effect, the parties involved must have a high degree of confidence in the public and private keys being issued.

46. The requested level of confidence may exist between parties who trust each other, who have dealt with each other over a period of time, who communicate on closed systems, who operate within a closed group, or who are able to govern their dealings contractually, for example, in a trading partner agreement. In a transaction involving only two parties, each party can simply communicate (by a relatively secure channel such as a courier or telephone, with its inherent feature of voice recognition) the public key of the key

pair each party will use. However, the same level of confidence may not be present when the parties deal infrequently with each other, communicate over open systems (e.g. the World Wide Web on the Internet), are not in a closed group, or do not have trading partner agreements or other law governing their relationships.

47. In addition, because public key encryption is a highly mathematical technology, all users must have confidence in the skill, knowledge and security arrangements of the parties issuing the public and private keys.¹¹

48. A prospective signatory might issue a public statement indicating that signatures verifiable by a given public key should be treated as originating from that signatory. However, other parties might be unwilling to accept the statement, especially where there is no prior contract establishing the legal effect of that published statement with certainty. A party relying upon such an unsupported published statement in an open system would run a great risk of inadvertently trusting an imposter, or of having to disprove a false denial of a digital signature (an issue often referred to in the context of "non-repudiation" of digital signatures) if a transaction should turn out to prove disadvantageous for the purported signatory.

49. A solution to these problems is the use of one or more trusted third parties to associate an identified signatory or the signatory's name with a specific public key. That trusted third party is generally referred to as a "certification authority", "certification service provider" or "supplier of certification services" in most technical standards and guidelines (in the Model Law, the term "certification service provider" has been chosen). In a number of countries, such certification authorities are being organized hierarchically into what is often referred to as a public key infrastructure (PKI).

(i) Public key infrastructure (PKI)

50. Setting up a public key infrastructure (PKI) is a way to provide confidence that: (1) a user's public key has not been tampered with and in fact corresponds to that user's private key; (2) the encryption techniques being used are sound; (3) the entities that issue the cryptographic keys can be trusted to retain or recreate the public and private keys that may be used for confidentiality encryption where the use of such a technique is authorized; (4) different encryption systems are inter-operable. To provide the confidence described above, a PKI may offer a number of services, including the following: (1) managing cryptographic keys used for digital signatures; (2) certifying that a public key corresponds to a private key; (3) providing keys to end users; (4) deciding which users will have which privileges on the system; (5) publishing a secure directory of public keys or certificates; (6) managing personal tokens (e.g. smart cards) that can identify the user with unique personal identification information or can generate and store an individual's private keys; (7) checking the identification of end users, and providing them with services; (8) providing non-repudiation services; (9) providing time-stamping services; (10) managing encryption keys used for confidentiality encryption where the use of such a technique is authorized.

51. A public key infrastructure (PKI) is often based on various hierarchical levels of authority. For example, models considered in certain countries for the establishment of possible PKIs include references to the following levels: (1) a unique "root authority", which would certify the technology and practices of all parties authorized to issue cryptographic key pairs or certificates in connection with the use of such key pairs, and would register subor-

¹¹In situations where public and private cryptographic keys would be issued by the users themselves, such confidence might need to be provided by the certifiers of public keys.

dinate certification authorities;¹² (2) various certification authorities, placed below the “root” authority, which would certify that a user’s public key actually corresponds to that user’s private key (i.e. has not been tampered with); and (3) various local registration authorities, placed below the certification authorities, and receiving requests from users for cryptographic key pairs or for certificates in connection with the use of such key pairs, requiring proof of identification and checking identities of potential users. In certain countries, it is envisaged that notaries public might act as, or support, local registration authorities.

52. The issues of PKI may not lend themselves easily to international harmonization. The organization of a PKI may involve various technical issues, as well as issues of public policy that may better be left to each individual State at the current stage.¹³ In that connection, decisions may need to be made by each State considering the establishment of a PKI, for example as to: (1) the form and number of levels of authority which should be comprised in a PKI; (2) whether only certain authorities belonging to the PKI should be allowed to issue cryptographic key pairs or whether such key pairs might be issued by the users themselves; (3) whether the certification authorities certifying the validity of cryptographic key pairs should be public entities or whether private entities might act as certification authorities; (4) whether the process of allowing a given entity to act as a certification authority should take the form of an express authorization, or “licensing”, by the State, or whether other methods should be used to control the quality of certification authorities if they were allowed to operate in the absence of a specific authorization; (5) the extent to which the use of cryptography should be authorized for confidentiality purposes; and (6) whether government authorities should retain access to encrypted information, through a mechanism of “key escrow” or otherwise. The Model Law does not deal with those issues.

(ii) *Certification service providers*

53. To associate a key pair with a prospective signatory, a certification service provider (or certification authority) issues a certificate, an electronic record which lists a public key together with the name of the certificate subscriber as the “subject” of the certificate, and may confirm that the prospective signatory identified in the certificate holds the corresponding private key. The principal function of a certificate is to bind a public key with a particular holder. A “recipient” of the certificate desiring to rely upon a digital signature created by the holder named in the certificate can use the public key listed in the certificate to verify that the digital signature was created with the corresponding private key. If such verification is successful, assurance is provided that the digital signature was created by the holder of the public key named in the certificate, and that the corresponding message had not been modified since it was digitally signed.

54. To ensure the authenticity of the certificate with respect to both its contents and its source, the certification authority digitally signs it. The issuing certification authority’s digital signature on the certificate can be verified by using the public key of the certification authority listed in another certificate by another certification authority (which may but need not be on a higher level in a hierarchy), and that other certificate can in turn be authenticated by the public key listed in yet another certificate, and so on, until the person relying on the digital signature is adequately assured of its genuineness. In each case, the issuing certification authority must digitally sign its own certificate during the operational period of the other certificate used to verify the certification authority’s digital signature.

¹²The question as to whether a government should have the technical ability to retain or recreate private confidentiality keys may be dealt with at the level of the root authority.

¹³However, in the context of cross-certification, the need for global interoperability requires that PKIs established in various countries should be capable of communicating with each other.

55. A digital signature corresponding to a message, whether created by the holder of a key pair to authenticate a message or by a certification authority to authenticate its certificate, should generally be reliably time-stamped to allow the verifier to determine reliably whether the digital signature was created during the “operational period” stated in the certificate, which is a condition of the verifiability of a digital signature.

56. To make a public key and its correspondence to a specific holder readily available for verification, the certificate may be published in a repository or made available by other means. Typically, repositories are on-line databases of certificates and other information available for retrieval and use in verifying digital signatures.

57. Once issued, a certificate may prove to be unreliable, for example in situations where the holder misrepresents its identity to the certification authority. In other circumstances, a certificate may be reliable enough when issued but it may become unreliable some time thereafter. If the private key is “compromised”, for example through loss of control of the private key by its holder, the certificate may lose its trustworthiness or become unreliable, and the certification authority (at the holder’s request or even without the holder’s consent, depending on the circumstances) may suspend (temporarily interrupt the operational period) or revoke (permanently invalidate) the certificate. Immediately upon suspending or revoking a certificate, the certification authority is generally expected to publish notice of the revocation or suspension or notify persons who inquire or who are known to have received a digital signature verifiable by reference to the unreliable certificate.

58. Certification authorities could be operated by government authorities or by private sector service providers. In a number of countries, it is envisaged that, for public policy reasons, only government entities should be authorized to operate as certification authorities. In other countries, it is considered that certification services should be open to competition from the private sector. Irrespective of whether certification authorities are operated by public entities or by private sector service providers, and of whether certification authorities would need to obtain a licence to operate, there is typically more than one certification authority operating within the PKI. Of particular concern is the relationship between the various certification authorities. Certification authorities within a PKI can be established in an hierarchical structure, where some certification authorities only certify other certification authorities, which provide services directly to users. In such a structure, certification authorities are subordinate to other certification authorities. In other conceivable structures, all certification authorities may operate on an equal footing. In any large PKI, there would likely be both subordinate and superior certification authorities. In any event, in the absence of an international PKI, a number of concerns may arise with respect to the recognition of certificates by certification authorities in foreign countries. The recognition of foreign certificates is often achieved by a method called “cross certification”. In such a case, it is necessary that substantially equivalent certification authorities (or certification authorities willing to assume certain risks with regard to the certificates issued by other certification authorities) recognize the services provided by each other, so their respective users can communicate with each other more efficiently and with greater confidence in the trustworthiness of the certificates being issued.

59. Legal issues may arise with regard to cross-certifying or chaining of certificates when there are multiple security policies involved. Examples of such issues may include determining whose misconduct caused a loss, and upon whose representations the user relied. It should be noted that legal rules considered for adoption in certain countries provide that, where the levels of security and policies are made known to the users, and there is no negligence on the part of certification authorities, there should be no liability.

60. It may be incumbent upon the certification authority or the root authority to ensure that its policy requirements are met on an ongoing basis. While the selection of certification authorities may be based on a number of factors, including the strength of the public key being used and the identity of the user, the trustworthiness of any certification authority may also depend on its enforcement of certificate-issuing standards and the reliability of its evaluation of data received from users who request certificates. Of particular importance is the liability regime applying to any certification authority with respect to its compliance with the policy and security requirements of the root authority or superior certification authority, or with any other applicable requirement, on an ongoing basis.

61. In the preparation of the Model Law, the following elements were considered as possible factors to be taken into account when assessing the trustworthiness of a certification authority: (1) independence (i.e. absence of financial or other interest in underlying transactions); (2) financial resources and financial ability to bear the risk of being held liable for loss; (3) expertise in public-key technology and familiarity with proper security procedures; (4) longevity (certification authorities may be required to produce evidence of certification or decryption keys many years after the underlying transaction has been completed, in the context of a lawsuit or property claim); (5) approval of hardware and software; (6) maintenance of an audit trail and audit by an independent entity; (7) existence of a contingency plan (e.g. "disaster recovery" software or key escrow); (8) personnel selection and management; (9) protection arrangements for the certification authority's own private key; (10) internal security; (11) arrangements for termination of operations, including notice to users; (12) warranties and representations (given or excluded); (13) limitation of liability; (14) insurance; (15) inter-operability with other certification authorities; (16) revocation procedures (in cases where cryptographic keys might be lost or compromised).

(c) *Summary of the digital signature process*

62. The use of digital signatures usually involves the following processes, performed either by the signatory or by the receiver of the digitally signed message:

- (1) The user generates or is given a unique cryptographic key pair;
- (2) The sender prepares a message (for example, in the form of an electronic mail message) on a computer;
- (3) The sender prepares a "message digest", using a secure hash algorithm. Digital signature creation uses a hash result derived from and unique to both the signed message and a given private key. For the hash result to be secure, there must be only a negligible possibility that the same digital signature could be created by the combination of any other message or private key;
- (4) The sender encrypts the message digest with the private key. The private key is applied to the message digest text using a mathematical algorithm. The digital signature consists of the encrypted message digest;
- (5) The sender typically attaches or appends its digital signature to the message;
- (6) The sender sends the digital signature and the (unencrypted or encrypted) message to the recipient electronically;
- (7) The recipient uses the sender's public key to verify the sender's digital signature. Verification using the sender's public key proves that the message came exclusively from the sender;
- (8) The recipient also creates a "message digest" of the message, using the same secure hash algorithm;

(9) The recipient compares the two message digests. If they are the same, then the recipient knows that the message has not been altered after it was signed. Even if one bit in the message has been altered after the message has been digitally signed, the message digest created by the recipient will be different from the message digest created by the sender;

(10) The recipient obtains a certificate from the certification authority (or via the originator of the message), which confirms the digital signature on the sender's message. The certification authority is typically a trusted third party which administers certification in the digital signature system. The certificate contains the public key and name of the sender (and possibly additional information), digitally signed by the certification authority.

IV. MAIN FEATURES OF THE MODEL LAW

A. *Legislative nature of the Model Law*

63. The new Model Law was prepared on the assumption that it should be directly derived from article 7 of the UNCITRAL Model Law on Electronic Commerce and should be considered as a way to provide detailed information as to the concept of a reliable "method used to identify" a person and "to indicate that person's approval" of the information contained in a data message (see A/CN.9/WG.IV/WP.71, para. 49).

64. The question of what form the instrument might take was raised and the importance of considering the relationship of the form to the content was noted. Different approaches were suggested as to what the form might be, which included contractual rules, legislative provisions, or guidelines for States considering enacting legislation on electronic signatures. It was agreed as a working assumption that the text should be prepared as a set of legislative rules with commentary, and not merely as guidelines (see A/CN.9/437, para. 27; A/CN.9/446, para. 25; and A/CN.9/457, paras. 51 and 72). The text was finally adopted as a Model Law (A/CN.9/483, paras. 137 and 138).

B. *Relationship with the UNCITRAL Model Law on Electronic Commerce*

1. *New Model Law as a separate legal instrument*

65. The new provisions could have been incorporated in an extended version of the UNCITRAL Model Law on Electronic Commerce, for example to form a new part III of the UNCITRAL Model Law on Electronic Commerce. With a view to indicating clearly that the new Model Law could be enacted either independently or in combination with the UNCITRAL Model Law on Electronic Commerce, it was eventually decided that the new Model Law should be prepared as a separate legal instrument (see A/CN.9/465, para. 37). That decision results mainly from the fact that, at the time the new Model Law was being finalized, the UNCITRAL Model Law on Electronic Commerce had already been successfully implemented in a number of countries and was being considered for adoption in many other countries. The preparation of an extended version of the UNCITRAL Model Law on Electronic Commerce might have compromised the success of the original version by suggesting a need to improve on that text by way of an update. In addition, preparing a new version of the UNCITRAL Model Law on Electronic Commerce might have introduced confusion in those countries that had recently adopted the UNCITRAL Model Law on Electronic Commerce.

2. *New Model Law fully consistent with the UNCITRAL Model Law on Electronic Commerce*

66. In drafting the new Model Law, every effort was made to ensure consistency with both the substance and the terminology of the UNCITRAL Model Law on Electronic Commerce (A/CN.9/465, para. 37). The general provisions of the UNCITRAL Model Law on Electronic Commerce have been reproduced in the new instrument. These are articles 1 (Sphere of application), 2(a), (c) and (e) (Definitions of “data message”, “originator” and “addressee”), 3 (Interpretation), 4 (Variation by agreement) and 7 (Signature) of the UNCITRAL Model Law on Electronic Commerce.

67. Based on the UNCITRAL Model Law on Electronic Commerce, the new Model Law is intended to reflect in particular: the principle of media-neutrality; an approach under which functional equivalents of traditional paper-based concepts and practices should not be discriminated against; and extensive reliance on party autonomy (A/CN.9/WG.IV/WP.84, para. 16). It is intended for use both as minimum standards in an “open” environment (i.e. where parties communicate electronically without prior agreement) and as model contractual provisions or default rules in a “closed” environment (i.e. where parties are bound by pre-existing contractual rules and procedures to be followed in communicating by electronic means).

3. *Relationship with article 7 of the UNCITRAL Model Law on Electronic Commerce*

68. In the preparation of the new Model Law, the view was expressed that the reference to article 7 of the UNCITRAL Model Law on Electronic Commerce in the text of article 6 of the new Model Law was to be interpreted as limiting the scope of the new Model Law to situations where an electronic signature was used to meet a mandatory requirement of law that certain documents had to be signed for *validity* purposes. Under that view, since the law of most nations contained very few such requirements with respect to documents used for commercial transactions, the scope of the new Model Law was very narrow. It was generally agreed, in response, that such interpretation of article 6 (and of article 7 of the UNCITRAL Model Law on Electronic Commerce) was inconsistent with the interpretation of the words “the law” adopted by the Commission in paragraph 68 of the Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce, under which “the words ‘the law’ are to be understood as encompassing not only statutory or regulatory law but also judicially-created law and other procedural law”. In fact, the scope of both article 7 of the UNCITRAL Model Law on Electronic Commerce and article 6 of the new Model Law is particularly broad, since most documents used in the context of commercial transactions are likely to be faced, in practice, with the requirements of the law of evidence regarding proof in writing (A/CN.9/465, para. 67).

C. *“Framework” rules to be supplemented by technical regulations and contract*

69. As a supplement to the UNCITRAL Model Law on Electronic Commerce, the new Model Law is intended to provide essential principles for facilitating the use of electronic signatures. However, as a “framework”, the Model Law itself does not set forth all the rules and regulations that may be necessary (in addition to contractual arrangements between users) to implement those techniques in an enacting State. Moreover, as indicated in this Guide, the Model Law is not intended to cover every aspect of the use of electronic signatures. Accordingly, an enacting State may wish to issue regulations to fill in the procedural details for procedures authorized by the Model Law and to take account of

the specific, possibly changing, circumstances at play in the enacting State, without compromising the objectives of the Model Law. It is recommended that, should it decide to issue such regulation, an enacting State should give particular attention to the need to preserve flexibility in the operation of electronic signature systems by their users.

70. It should be noted that the electronic signature techniques considered in the Model Law, beyond raising matters of procedure that may need to be addressed in the implementing technical regulations, may raise certain legal questions, the answers to which will not necessarily be found in the Model Law, but rather in other bodies of law. Such other bodies of law may include, for example, the applicable administrative, contract, criminal and judicial-procedure law, which the Model Law is not intended to deal with.

D. *Added certainty as to the legal effects of electronic signatures*

71. One of the main features of the new Model Law is to add certainty to the operation of the flexible criterion set forth in article 7 of the UNCITRAL Model Law on Electronic Commerce for the recognition of an electronic signature as functionally equivalent to a handwritten signature. Article 7 of the UNCITRAL Model Law on Electronic Commerce reads as follows:

“(1) Where the law requires a signature of a person, that requirement is met in relation to a data message if:

(a) A method is used to identify that person and to indicate that person’s approval of the information contained in the data message; and

(b) that method is as reliable as was appropriate for the purpose for which the data message was generated or communicated, in the light of all the circumstances, including any relevant agreement.

“(2) Paragraph (1) applies whether the requirement therein is in the form of an obligation or whether the law simply provides consequences for the absence of a signature.

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

72. Article 7 is based on the recognition of the functions of a signature in a paper-based environment. In the preparation of the UNCITRAL Model Law on Electronic Commerce, the following functions of a signature were considered: to identify a person; to provide certainty as to the personal involvement of that person in the act of signing; to associate that person with the content of a document. It was noted that, in addition, a signature could perform a variety of functions, depending on the nature of the document that was signed. For example, a signature might attest to the intent of a party to be bound by the content of a signed contract; the intent of a person to endorse authorship of a text; the intent of a person to associate itself with the content of a document written by someone else; the fact that, and the time when, a person had been at a given place.

73. With a view to ensuring that a message that was required to be authenticated should not be denied legal value for the sole reason that it was not authenticated in a manner peculiar to paper documents, article 7 adopts a comprehensive approach. It establishes the general conditions under which data messages would be regarded as authenticated with sufficient credibility and would be enforceable in the face of signature requirements that currently present barriers to electronic commerce. Article 7 focuses on the two basic functions of a signature, namely to identify the author of a document and to confirm that the author approved the content of that document. Paragraph (1)(a) establishes the principle that, in an electronic environment, the basic legal functions of a

signature are performed by way of a method that identifies the originator of a data message and confirms that the originator approved the content of that data message.

74. Paragraph (1)(b) establishes a flexible approach to the level of security to be achieved by the method of identification used under paragraph (1)(a). The method used under paragraph (1)(a) should be as reliable as is appropriate for the purpose for which the data message is generated or communicated, in the light of all the circumstances, including any agreement between the originator and the addressee of the data message.

75. In determining whether the method used under paragraph (1) is appropriate, legal, technical and commercial factors that may be taken into account include the following: (1) the sophistication of the equipment used by each of the parties; (2) the nature of their trade activity; (3) the frequency at which commercial transactions take place between the parties; (4) the kind and size of the transaction; (5) the function of signature requirements in a given statutory and regulatory environment; (6) the capability of communication systems; (7) compliance with authentication procedures set forth by intermediaries; (8) the range of authentication procedures made available by any intermediary; (9) compliance with trade customs and practice; (10) the existence of insurance coverage mechanisms against unauthorized messages; (11) the importance and the value of the information contained in the data message; (12) the availability of alternative methods of identification and the cost of implementation; (13) the degree of acceptance or non-acceptance of the method of identification in the relevant industry or field both at the time the method was agreed upon and the time when the data message was communicated; and (14) any other relevant factor (Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce, paras. 53 and 56-58).

76. Building on the flexible criterion expressed in article 7(1)(b) of the UNCITRAL Model Law on Electronic Commerce, articles 6 and 7 of the new Model Law establish a mechanism through which electronic signatures that meet objective criteria of technical reliability can be made to benefit from early determination as to their legal effectiveness. The effect of the Model Law is to recognize two categories of electronic signatures. The first and broader category is that described in article 7 of the UNCITRAL Model Law on Electronic Commerce. It consists of any "method" that may be used to fulfil a legal requirement for a handwritten signature. The legal effectiveness of such a "method" as an equivalent of a handwritten signature depends upon demonstration of its "reliability" to a trier of fact. The second and narrower category is that created by the Model Law. It consists of methods of electronic signature that may be recognized by a State authority, a private accredited entity, or the parties themselves, as meeting the criteria of technical reliability set forth in the Model Law. The advantage of such a recognition is that it brings certainty to the users of such electronic signature techniques (sometimes referred to as "enhanced", "secure" or "qualified" electronic signatures) before they actually use the electronic signature technique.

E. Basic rules of conduct for the parties involved

77. The Model Law does not deal in any detail with the issues of liability that may affect the various parties involved in the operation of electronic signature systems. Those issues are left to applicable law outside the Model Law. However, the Model Law sets out criteria against which to assess the conduct of those parties, i.e. the signatory, the relying party and the certification service provider.

78. As to the signatory, the Model Law elaborates on the basic principle that the signatory should apply reasonable care with respect to its electronic signature device. The signatory is expected to exercise reasonable care to avoid unauthorized use of that signature

device. Where the signatory knows or should have known that the signature device has been compromised, the signatory should give notice without undue delay to any person who may reasonably be expected to rely on, or to provide services in support of, the electronic signature. Where a certificate is used to support the electronic signature, the signatory is expected to exercise reasonable care to ensure the accuracy and completeness of all material representations made by the signatory in connection with the certificate.

79. A relying party is expected to take reasonable steps to verify the reliability of an electronic signature. Where the electronic signature is supported by a certificate, the relying party should take reasonable steps to verify the validity, suspension or revocation of the certificate, and observe any limitation with respect to the certificate.

80. The general duty of a certification service provider is to utilize trustworthy systems, procedures and human resources, and to act in accordance with representations that the supplier makes with respect to its policies and practices. In addition, the certification service provider is expected to exercise reasonable care to ensure the accuracy and completeness of all material representations it makes in connection with a certificate. In the certificate, the supplier should provide essential information allowing the relying party to identify the supplier. It should also represent that: (1) the person who is identified in the certificate had control of the signature device at the time of signing; and (2) the signature device was operational on or before the date when the certificate was issued. In its dealings with the relying party, the certification service provider should provide additional information as to: (1) the method used to identify the signatory; (2) any limitation on the purpose or value for which the signature device or the certificate may be used; (3) the operational condition of the signature device; (4) any limitation on the scope or extent of liability of the certification service provider; (5) whether means exist for the signatory to give notice that a signature device has been compromised; and (6) whether a timely revocation service is offered.

81. For the assessment of the trustworthiness of the systems, procedures and human resources utilized by the certification service provider, the Model Law provides an open-ended list of indicative factors.

F. A technology-neutral framework

82. Given the pace of technological innovation, the Model Law provides for the legal recognition of electronic signatures irrespective of the technology used (e.g. digital signatures relying on asymmetric cryptography; biometrics; the use of personal identification numbers (PINs); digitized versions of handwritten signatures; and other methods, such as clicking an "OK-box").

V. ASSISTANCE FROM THE UNCITRAL SECRETARIAT

A. Assistance in drafting legislation

83. 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 UNCITRAL Model Law on Electronic Signatures. The same assistance is brought to Governments considering legislation based on other UNCITRAL model laws (i.e. the UNCITRAL Model Law on International Commercial Arbitration, the UNCITRAL Model Law on International Credit Transfers, the UNCITRAL Model Law on Procurement of Goods, Construction and Services, the UNCITRAL Model Law on Electronic Commerce, and the UNCITRAL Model Law on Cross-Border Insolvency), or considering adhesion to one of the international trade law conventions prepared by UNCITRAL.

84. Further information concerning the Model Law and other model laws and conventions developed by UNCITRAL, may be obtained from the secretariat at the address below:

International Trade Law Branch, 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: <http://www.uncitral.org>

*B. Information on the interpretation of legislation
 based on the Model Law*

85. The 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 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 secretariat in hard copy (A/CN.9/SER.C/GUIDE/1) and on the above-mentioned Internet home page of UNCITRAL.

Chapter II. Article-by-article remarks

TITLE

"Model Law"

86. Throughout its preparation, the instrument has been conceived of as an addition to the UNCITRAL Model Law on Electronic Commerce, which should be dealt with on an equal footing and share the legal nature of its forerunner.

Article 1. Sphere of application

This Law applies where electronic signatures are used in the context* of commercial** activities. It does not override any rule of law intended for the protection of consumers.

*The Commission suggests the following text for States that might wish to extend the applicability of this Law:

"This Law applies where electronic signatures are used, except in the following situations: [...]."

**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.

General remarks

87. The purpose of article 1 is to delineate the scope of application of the Model Law. The approach used in the Model Law is to provide in principle for the coverage of all factual situations where electronic signatures are used, irrespective of the specific electronic signature or authentication technique being applied. It was felt during the preparation of the Model Law that exclusion of any form or medium by way of a limitation in the scope of the Model Law might result in practical difficulties and would run counter to the purpose of providing truly "media-neutral" rules. However, in the preparation of the Model Law, special attention has been given to "digital signatures", i.e. those electronic signatures obtained through the application of dual-key cryptography, which were regarded by the UNCITRAL Working Group on Electronic Commerce as a particularly widespread technology. The focus of the Model Law is on the use of modern technology and, except where it expressly provides otherwise, the Model Law is not intended to alter traditional rules on handwritten signatures.

*Footnote***

88. It was felt that the Model Law should contain an indication that its focus was on the types of situations encountered in the commercial area and that it had been prepared against the background of relationships in trade and finance. For that reason, article 1 refers to "commercial activities" and provides, in footnote**, indications as to what is meant thereby. Such indications, which may be particularly useful for those countries where there does not exist a discrete body of commercial law, are modelled, for reasons of consistency, on the footnote to article 1 of the UNCITRAL Model Law on International Commercial Arbitration (also reproduced as footnote**** to article 1 of the UNCITRAL Model Law on Electronic Commerce). In certain countries, the use of footnotes in a statutory text would not be regarded as acceptable legislative practice. National authorities enacting the Model Law might thus consider the possible inclusion of the text of footnotes in the body of the text itself.

*Footnote**

89. The Model Law applies to all kinds of data messages to which a legally significant electronic signature is attached, and nothing in the Model Law should prevent an enacting State from extending the scope of the Model Law to cover uses of electronic signatures outside the commercial sphere. For example, while the focus of the Model Law is not on the relationships between users of electronic signatures and public authorities, the Model Law is not intended to be inapplicable to such relationships. Footnote* provides for alternative wordings, for possible use by enacting States that would consider it appropriate to extend the scope of the Model Law beyond the commercial sphere.

Consumer protection

90. Some countries have special consumer protection laws that may govern certain aspects of the use of information systems. With respect to such consumer legislation, as was the case with previous UNCITRAL instruments (e.g. the UNCITRAL Model Law on International Credit Transfers and the UNCITRAL Model Law on Electronic Commerce), it was felt that an indication should be given that the Model Law had been drafted without special attention being given to issues that might arise in the context of consumer protection. At the same time, it was felt that there was no reason why situations involving consumers should

be excluded from the scope of the Model Law by way of a general provision, particularly since the provisions of the Model Law might be found very beneficial for consumer protection, depending on legislation in each enacting State. Article 1 thus recognizes that any such consumer protection law may take precedence over the provisions in the Model Law. Should legislators come to different conclusions as to the beneficial effect of the Model Law on consumer transactions in a given country, they might consider excluding consumers from the sphere of application of the piece of legislation enacting the Model Law. The question of which individuals or corporate bodies would be regarded as “consumers” is left to applicable law outside the Model Law.

Use of electronic signatures in international and domestic transactions

91. It is recommended that application of the Model Law be made as wide as possible. Particular caution should be used in excluding the application of the Model Law by way of a limitation of its scope to international uses of electronic signatures, since such a limitation may be seen as not fully achieving the objectives of the Model Law. Furthermore, the variety of procedures available under the Model Law to limit the use of electronic signatures if necessary (e.g. for purposes of public policy) may make it less necessary to limit the scope of the Model Law. The legal certainty to be provided by the Model Law is necessary for both domestic and international trade, and a duality of regimes governing the use of electronic signatures might create a serious obstacle to the use of such techniques.

References to UNCITRAL documents

- A/CN.9/467, paras. 22-24;
- A/CN.9/WG.IV/WP.84, para. 22;
- A/CN.9/465, paras. 36-42;
- A/CN.9/WG.IV/WP.82, para. 21;
- A/CN.9/457, paras. 53-64.

Article 2. Definitions

For the purposes of this Law:

(a) “Electronic signature” means data in electronic form in, affixed to, or logically associated with, a data message, which may be used to identify the signatory in relation to the data message and indicate the signatory’s approval of the information contained in the data message;

(b) “Certificate” means a data message or other record confirming the link between a signatory and signature creation data;

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

(d) “Signatory” means a person that holds signature creation data and acts either on its own behalf or on behalf of the person it represents;

(e) “Certification service provider” means a person that issues certificates and may provide other services related to electronic signatures;

(f) “Relying party” means a person that may act on the basis of a certificate or an electronic signature.

Definition of “electronic signature”

Electronic signature as functional equivalent of handwritten signature

92. The notion of “electronic signature” is intended to cover all traditional uses of a handwritten signature for legal effect, the identification of the signatory and the intent to sign being no more than the smallest common denominator to the various approaches to “signature” found in the various legal systems. Those functions of a handwritten signature were already discussed in the context of the preparation of article 7 of the UNCITRAL Model Law on Electronic Commerce. Thus, defining an electronic signature as capable of indicating approval of information amounts primarily to establishing a technical prerequisite for the recognition of a given technology as capable of creating an equivalent to a handwritten signature. The definition does not disregard the fact that technologies commonly referred to as “electronic signatures” could be used for purposes other than creating a legally-significant signature. The definition simply illustrates the focus of the Model Law on the use of electronic signatures as functional equivalents of handwritten signatures (see A/CN.9/483, para. 62).

Possible other uses of an electronic signature

93. A distinction should be drawn between the legal notion of “signature” and the technical notion of “electronic signature”, a term of art which covers practices that do not necessarily involve the production of legally significant signatures. In the preparation of the Model Law, it was felt that the attention of users should be brought to the risk of confusion that might result from the use of the same technical tool for the production of a legally meaningful signature and for other authentication or identification functions (ibid.).

Definition of “certificate”

Need for a definition

94. The term “certificate” as used in the context of certain types of electronic signatures and as defined in the Model Law differs little from its general meaning of a document by which a person would confirm certain facts. However, since the general notion of “certificate” does not exist in all legal systems or indeed in all languages, it was felt useful to include a definition in the context of the Model Law (ibid., para. 65).

Purpose of a certificate

95. The purpose of the certificate is to recognize, show or confirm a link between signature creation data and the signatory. That link is created when the signature creation data is generated (ibid., para. 67).

“signature creation data”

96. The terms “signature creation data” is intended to designate those secret keys, codes, or other elements that, in the process of creating an electronic signature, are used to provide a secure link between the resulting electronic signature and the person of the signatory. For example, in the context of digital signatures relying on asymmetric cryptography, the core operative element that could be described as “linked to the signatory and to no other person” is the cryptographic key pair. In the context of electronic signatures based on biometric devices, the essential element would be the biometric indicator, such as a fingerprint or retina-scan data. The

definition covers only those core elements that should be kept confidential to ensure the quality of the signature process, to the exclusion of any other element which, although it might contribute to the signature process, could be disclosed without jeopardizing the reliability of the resulting electronic signature. For example, in the case of digital signatures, while both the public and the private key are linked to the person of the signatory, only the private key needs to be covered by the definition, since only the private key should be kept confidential and it is of the essence of the public key to be made available to the public (A/CN.9/483, para. 71). Among the elements not to be covered by the definition, the text being electronically signed, although it also plays an important role in the signature-creation process (through a hash function or otherwise), should obviously not be subject to the same confidentiality as the information identifying the signatory (*ibid.*, paras. 72 and 76). Article 6 expresses the idea that the signature creation data should be linked to the signatory and to no other person (*ibid.*, para. 75).

Definition of "data message"

97. The definition of "data message" is taken from article 2 of the UNCITRAL Model Law on Electronic Commerce as a broad notion encompassing all messages generated in the context of electronic commerce, including web-based commerce (*ibid.*, para. 69). The notion of "data message" is not limited to communication but is also intended to encompass computer-generated records that are not intended for communication. Thus, the notion of "message" includes the notion of "record".

98. The reference to "similar means" is intended to reflect the fact that the Model Law was not intended only for application in the context of existing communication techniques but also to accommodate foreseeable technical developments. The aim of the definition of "data message" is to encompass all types of messages that are generated, stored, or communicated in essentially paperless form. For that purpose, all means of communication and storage of information that might be used to perform functions parallel to the functions performed by the means listed in the definition are intended to be covered by the reference to "similar means", although, for example, "electronic" and "optical" means of communication might not be, strictly speaking, similar. For the purposes of the Model Law, the word "similar" connotes "functionally equivalent".

99. The definition of "data message" is also intended to apply in case of revocation or amendment. A data message is presumed to have a fixed information content but it may be revoked or amended by another data message (Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce, paras. 30-32).

Definition of "signatory"

"a person"

100. Consistent with the approach taken in the UNCITRAL Model Law on Electronic Commerce, any reference in the new Model Law to "a person" should be understood as covering all types of persons or entities, whether physical, corporate or other legal persons (A/CN.9/483, para. 86).

"on behalf of the person it represents"

101. The analogy to handwritten signatures may not always be suitable for taking advantage of the possibilities offered by modern technology. In a paper-based environment, for instance, legal entities cannot strictly speaking be signatories of documents

drawn up on their behalf, because only natural persons can produce authentic handwritten signatures. Electronic signatures, however, can be conceived so as to be attributable to companies, or other legal entities (including governmental and other public authorities), and there may be situations where the identity of the person who actually generates the signature, where human action is required, is not relevant for the purposes for which the signature was created (*ibid.*, para. 85).

102. Nevertheless, under the Model Law, the notion of "signatory" cannot be severed from the person or entity that actually generated the electronic signature, since a number of specific obligations of the signatory under the Model Law are logically linked to actual control over the signature creation data. However, in order to cover situations where the signatory would be acting in representation of another person, the phrase "or on behalf of the person it represents" has been retained in the definition of "signatory". The extent to which a person would be bound by an electronic signature generated "on its behalf" is a matter to be settled in accordance with the law governing, as appropriate, the legal relationship between the signatory and the person on whose behalf the electronic signature is generated, on the one hand, and the relying party, on the other hand. That matter, as well as other matters pertaining to the underlying transaction, including issues of agency and other questions as to who bears the ultimate liability for failure by the signatory to comply with its obligations under article 8 (whether the signatory or the person represented by the signatory) are outside the scope of the Model Law (*ibid.*, paras. 86-87).

Definition of "certification service provider"

103. As a minimum, the certification service provider as defined for the purposes of the Model Law would have to provide certification services, possibly together with other services (*ibid.*, para. 100).

104. No distinction has been drawn in the Model Law between situations where a certification service provider engages in the provision of certification services as its main activity or as an ancillary business, on a habitual or an occasional basis, directly or through a subcontractor. The definition covers all entities that provide certification services within the scope of the Model Law, i.e. "in the context of commercial activities". However, in view of that limitation in the scope of application of the Model Law, entities that issued certificates for internal purposes and not for commercial purposes would not fall under the category "certification service providers" as defined in article 2 (*ibid.*, paras. 94-99).

Definition of "relying party"

105. The definition of "relying party" is intended to ensure symmetry in the definition of the various parties involved in the operation of electronic signature schemes under the Model Law (*ibid.*, para. 107). For the purposes of that definition, "act" should be interpreted broadly to cover not only a positive action but also an omission (*ibid.*, para. 108).

References to UNCITRAL documents

- A/CN.9/483, paras. 59-109;
- A/CN.9/WG.IV/WP.84, paras. 23-36;
- A/CN.9/465, para. 42;
- A/CN.9/WG.IV/WP.82, paras. 22-33;
- A/CN.9/457, paras. 22-47; 66 and 67; 89; 109;
- A/CN.9/WG.IV/WP.80, paras. 7-10;
- A/CN.9/WG.IV/WP.79, para. 21;

A/CN.9/454, para. 20;
 A/CN.9/WG.IV/WP.76, paras. 16-20;
 A/CN.9/446, paras. 27-46 (draft article 1),
 62-70 (draft article 4), 113-131 (draft article 8),
 132 and 133 (draft article 9);
 A/CN.9/WG.IV/WP.73, paras. 16-27, 37 and 38, 50-57,
 and 58-60;
 A/CN.9/437, paras. 29-50 and 90-113 (draft articles A, B
 and C); and A/CN.9/WG.IV/WP.71, paras. 52-60.

Article 3. *Equal treatment of signature technologies*

Nothing in this Law, except article 5, shall be applied so as to exclude, restrict or deprive of legal effect any method of creating an electronic signature that satisfies the requirements referred to in article 6(1) or otherwise meets the requirements of applicable law.

Neutrality as to technology

106. Article 3 embodies the fundamental principle that no method of electronic signature should be discriminated against, i.e. that all technologies would be given the same opportunity to satisfy the requirements of article 6. As a result, there should be no disparity of treatment between electronically-signed messages and paper documents bearing handwritten signatures, or between various types of electronically-signed messages, provided that they meet the basic requirements set forth in article 6(1) of the Model Law or any other requirement set forth in applicable law. Such requirements might, for example, prescribe the use of a specifically designated signature technique in certain identified situations, or might otherwise set a standard that might be higher or lower than that set forth in article 7 of the UNCITRAL Model Law on Electronic Commerce (and article 6 of the Model Law). The fundamental principle of non-discrimination is intended to find general application. It should be noted, however, that such a principle is not intended to affect the freedom of contract recognized under article 5. As between themselves and to the extent permitted by law, the parties should thus remain free to exclude by agreement the use of certain electronic signature techniques. By stating that "nothing in this Law shall be applied so as to exclude, restrict or deprive of legal effect any method of creating an electronic signature", article 3 merely indicates that the form in which a certain electronic signature is applied cannot be used as the only reason for which that signature would be denied legal effectiveness. However, article 3 should not be misinterpreted as establishing the legal validity of any given signature technique or of any electronically-signed information.

References to UNCITRAL documents

A/CN.9/467, paras. 25-32;
 A/CN.9/WG.IV/WP.84, para. 37;
 A/CN.9/465, paras. 43-48;
 A/CN.9/WG.IV/WP.82, para. 34;
 A/CN.9/457, paras. 53-64.

Article 4. *Interpretation*

- (1) In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.
- (2) Questions concerning matters governed by this Law which are not expressly settled in it are to be settled in conformity with the general principles on which this Law is based.

Source

107. Article 4 is inspired by article 7 of the United Nations Convention on Contracts for the International Sale of Goods, and reproduced from article 3 of the UNCITRAL Model Law on Electronic Commerce. It is intended to provide guidance for interpretation of the Model Law by arbitral tribunals, courts and national or local administrative authorities. The expected effect of article 4 is to limit the extent to which a uniform text, once incorporated in local legislation, would be interpreted only by reference to the concepts of local law.

Paragraph (1)

108. The purpose of paragraph (1) is to draw the attention of any person who might be called upon to apply the Model Law to the fact that the provisions of the Model Law (or the provisions of the instrument implementing the Model Law), while enacted as part of domestic legislation and therefore domestic in character, should be interpreted with reference to its international origin in order to ensure uniformity in the interpretation of the Model Law in all enacting countries.

Paragraph (2)

109. Amongst the general principles on which the Model Law is based, the following non-exhaustive list may be found applicable: (1) to facilitate electronic commerce among and within nations; (2) to validate transactions entered into by means of new information technologies; (3) to promote and encourage in a technology-neutral way the implementation of new information technologies in general and electronic signatures in particular; (4) to promote the uniformity of law; and (5) to support commercial practice. While the general purpose of the Model Law is to facilitate the use of electronic signatures, it should not be construed in any way as imposing their use.

References to UNCITRAL documents

A/CN.9/467, paras. 33-35;
 A/CN.9/WG.IV/WP.84, para. 38;
 A/CN.9/465, paras. 49 and 50;
 A/CN.9/WG.IV/WP.82, para. 35.

Article 5. *Variation by agreement*

The provisions of this Law may be derogated from or their effect may be varied by agreement, unless that agreement would not be valid or effective under applicable law.

Deference to applicable law

110. The decision to undertake the preparation of the Model Law was based on the recognition that, in practice, solutions to the legal difficulties raised by the use of modern means of communication are mostly sought within contracts. The Model Law is thus intended to support the principle of party autonomy. However, applicable law may set limits to the application of that principle. article 5 should not be misinterpreted as allowing the parties to derogate from mandatory rules, e.g. rules adopted for reasons of public policy. Neither should article 5 be misinterpreted as encouraging States to establish mandatory legislation limiting the effect of party autonomy with respect to electronic signatures or otherwise inviting States to restrict the freedom of parties to agree as between themselves on issues of form requirements governing their communications.

111. The principle of party autonomy applies broadly with respect to the provisions of the Model Law, since the Model Law does not contain any mandatory provision. That principle also applies in the context of article 13(1). Therefore, although the courts of the enacting State or authorities responsible for the application of the Model Law should not deny or nullify the legal effects of a foreign certificate only on the basis of the place where the certificate is issued, article 13(1) does not limit the freedom of the parties to a commercial transaction to agree on the use of certificates that originate from a particular place (A/CN.9/483, para. 112).

Expressed or implied agreement

112. As to the way in which the principle of party autonomy is expressed in article 5, it was generally admitted in the preparation of the Model Law that variation by agreement might be expressed or implied. The wording of article 5 has been kept in line with article 6 of the United Nations Convention on Contracts for the International Sale of Goods (A/CN.9/467, para. 38).

Bilateral or multilateral agreement

113. Article 5 is intended to apply not only in the context of relationships between originators and addressees of data messages but also in the context of relationships involving intermediaries. Thus, the provisions of the Model Law could be varied either by bilateral or multilateral agreements between the parties, or by system rules agreed to by the parties. Typically, applicable law would limit party autonomy to rights and obligations arising as between parties so as to avoid any implication as to the rights and obligations of third parties.

References to UNCITRAL documents

- A/CN.9/467, paras. 36-43;
- A/CN.9/WG.IV/WP.84, paras. 39 and 40;
- A/CN.9/465, paras. 51-61;
- A/CN.9/WG.IV/WP.82, paras. 36-40;
- A/CN.9/457, paras. 53-64.

Article 6. Compliance with a requirement for a signature

(1) Where the law requires a signature of a person, that requirement is met in relation to a data message if an electronic signature is used which is as reliable as was appropriate for the purpose for which the data message was generated or communicated, in the light of all the circumstances, including any relevant agreement.

(2) Paragraph (1) applies whether the requirement referred to therein is in the form of an obligation or whether the law simply provides consequences for the absence of a signature.

(3) An electronic signature is considered to be reliable for the purpose of satisfying the requirement referred to in paragraph (1) if:

(a) the signature creation data are, within the context in which they are used, linked to the signatory and to no other person;

(b) the signature creation data are, at the time of signing, under the control of the signatory and of no other person;

(c) any alteration to the electronic signature, made after the time of signing, is detectable; and

(d) where a purpose of the legal requirement for a signature is to provide assurance as to the integrity of the information to which it relates, any alteration made to that information after the time of signing is detectable.

(4) Paragraph (3) does not limit the ability of any person:

(a) to establish in any other way, for the purpose of satisfying the requirement referred to in paragraph (1), the reliability of an electronic signature; or

(b) to adduce evidence of the non-reliability of an electronic signature.

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

Importance of article 6

114. Article 6 is one of the core provisions of the Model Law. Article 6 is intended to build upon article 7 of the UNCITRAL Model Law on Electronic Commerce and to provide guidance as to how the test of reliability in article 7(1)(b) can be satisfied. In interpreting article 6, it should be borne in mind that the purpose of that provision is to ensure that, where any legal consequence would have flowed from the use of a handwritten signature, the same consequence should flow from the use of a reliable electronic signature.

Paragraphs (1), (2) and (5)

115. Paragraphs (1), (2), and (5) of article 6 introduce provisions drawn from article 7(1)(b), (2), and (3) of the UNCITRAL Model Law on Electronic Commerce, respectively. Wording inspired by article 7(1)(a) of the UNCITRAL Model Law on Electronic Commerce is already included in the definition of “electronic signature” under article 2(a).

Notions of “identity” and “identification”

116. The Working Group agreed that, for the purpose of defining “electronic signature” under the Model Law, the term “identification” could be broader than mere identification of the signatory by name. The concept of identity or identification includes distinguishing him or her, by name or otherwise, from any other person, and may refer to other significant characteristics, such as position or authority, either in combination with a name or without reference to the name. On that basis, it is not necessary to distinguish between identity and other significant characteristics, nor to limit the Model Law to those situations in which only identity certificates which name the signature device holder are used (A/CN.9/467, paras. 56-58).

Effect of the Model Law varying with level of technical reliability

117. In the preparation of the Model Law, the view was expressed that (either through a reference to the notion of “enhanced electronic signature” or through a direct mention of criteria for establishing the technical reliability of a given signature technique) a dual purpose of article 6 should be to establish: (1) that legal effects would result from the application of those electronic signature techniques that were recognized as reliable; and (2), conversely, that no such legal effects would flow from the use of techniques of a lesser reliability. It was generally felt, however, that a more subtle distinction might need to be drawn between the various possible electronic signature techniques, since the Model Law should avoid discriminating against any form of electronic signature, unsophisticated and insecure though it might appear in given circumstances. Therefore, any electronic signature technique applied for the purpose of signing a data message under article 7(1)(a) of the UNCITRAL Model Law on Electronic Commerce would be likely to produce legal effects, provided that it

was sufficiently reliable in the light of all the circumstances, including any agreement between the parties. However, under article 7 of the UNCITRAL Model Law on Electronic Commerce, the determination of what constitutes a reliable method of signature in the light of the circumstances, can be made only by a court or other trier of fact intervening *ex post*, possibly long after the electronic signature has been used. In contrast, the new Model Law is expected to create a benefit in favour of certain techniques, which are recognized as particularly reliable, irrespective of the circumstances in which they are used. That is the purpose of paragraph (3), which is expected to create certainty (through either a presumption or a substantive rule), at or before the time any such technique of electronic signature is used (*ex ante*), that using a recognized technique will result in legal effects equivalent to those of a handwritten signature. Thus, paragraph (3) is an essential provision if the new Model Law is to meet its goal of providing more certainty than readily offered by the UNCITRAL Model Law on Electronic Commerce as to the legal effect to be expected from the use of particularly reliable types of electronic signatures (see A/CN.9/465, para. 64).

Presumption or substantive rule

118. In order to provide certainty as to the legal effect resulting from the use of what might or might not be called an “enhanced electronic signature” under article 2, paragraph (3) expressly establishes the legal effects that would result from the conjunction of certain technical characteristics of an electronic signature. As to how those legal effects would be established, enacting States, depending on their law of civil and commercial procedure, should be free to adopt a presumption or to proceed by way of a direct assertion of the linkage between certain technical characteristics and the legal effect of a signature (see A/CN.9/467, paras. 61 and 62).

Intent of signatory

119. A question remains as to whether any legal effect should result from the use of electronic signature techniques that may be made with no clear intent by the signatory of becoming legally bound by approval of the information being electronically signed. In any such circumstance, the second function described in article 7(1)(a) of the UNCITRAL Model Law on Electronic Commerce is not fulfilled since there is no “intent of indicating any approval of the information contained in the data message”. The approach taken in the Model Law is that the legal consequences of the use of a handwritten signature should be replicated in an electronic environment. Thus, by appending a signature (whether handwritten or electronic) to certain information, the signatory should be presumed to have approved the linking of its identity with that information. Whether such a linking should produce legal effects (contractual or other) would result from the nature of the information being signed, and from any other circumstances, to be assessed according to the law applicable outside the Model Law. In that context, the Model Law is not intended to interfere with the general law of contracts or obligations (see A/CN.9/465, para. 65).

Criteria of technical reliability

120. Subparagraphs (a) to (d) of paragraph (3) are intended to express objective criteria of technical reliability of electronic signatures. Subparagraph (a) focuses on the objective characteristics of the signature creation data, which must be “linked to the signatory and to no other person”. From a technical point of view, the signature creation data could be uniquely “linked” to the signatory, without being “unique” in itself. The linkage between the data used for creation of the signature and the signatory is the essential element (A/CN.9/467, para. 63). While certain elec-

tronic signature creation data may be shared by a variety of users, for example where several employees would share the use of a corporate signature-creation data, that data must be capable of identifying one user unambiguously in the context of each electronic signature.

Sole control of signature data by the signatory

121. Subparagraph (b) deals with the circumstances in which the signature creation data is used. At the time it is used, the signature creation data must be under the sole control of the signatory. In relation to the notion of sole control by the signatory, a question is whether the signatory would retain its ability to authorize another person to use the signature data on its behalf. Such a situation might arise where the signature data is used in the corporate context where the corporate entity would be the signatory but would require a number of persons to be able to sign on its behalf (A/CN.9/467, para. 66). Another example may be found in business applications such as the one where signature data exist on a network and are capable of being used by a number of people. In that situation, the network would presumably relate to a particular entity which would be the signatory and maintain control over the signature creation data. If that was not the case, and the signature data was widely available, it should not be covered by the Model Law (A/CN.9/467, para. 67). Where a single key is operated by more than one person in the context of a “split-key” or other “shared-secret” scheme, reference to “the signatory” means a reference to those persons jointly (A/CN.9/483, para. 152).

Agency

122. Subparagraphs (a) and (b) converge to ensure that the signature data is capable of being used by only one person at any given time, principally the time at which the signature is created, and not by some other person as well. The question of agency or authorized use of the signature data is addressed in the definition of “signatory” (A/CN.9/467, para. 68).

Integrity

123. Subparagraphs (c) and (d) deal with the issues of integrity of the electronic signature and integrity of the information being signed electronically. It would have been possible to combine the two provisions to emphasize that, where a signature is attached to a document, the integrity of the document and the integrity of the signature are so closely related that it is difficult to conceive of one without the other. Where a signature is used to sign a document, the idea of the integrity of the document is inherent in the use of the signature. However, it was decided that the Model Law should follow the distinction drawn in the UNCITRAL Model Law on Electronic Commerce between articles 7 and 8. Although some technologies provide both authentication (article 7 of the UNCITRAL Model Law on Electronic Commerce) and integrity (article 8 of the UNCITRAL Model Law on Electronic Commerce), those concepts can be seen as distinct legal concepts and treated as such. Since a handwritten signature provides neither a guarantee of the integrity of the document to which it is attached nor a guarantee that any change made to the document would be detectable, the functional equivalence approach requires that those concepts should not be dealt with in a single provision. The purpose of paragraph (3)(c) is to set forth the criterion to be met in order to demonstrate that a particular method of electronic signature is reliable enough to satisfy a requirement of law for a signature. That requirement of law could be met without having to demonstrate the integrity of the entire document (see A/CN.9/467, paras. 72-80).

Functional equivalent of original document

124. Subparagraph (d) is intended primarily for use in those countries where existing legal rules governing the use of handwritten signatures could not accommodate a distinction between integrity of the signature and integrity of the information being signed. In other countries, subparagraph (d) might create a signature that would be more reliable than a handwritten signature and thus go beyond the concept of functional equivalent to a signature. In any circumstances, the effect of subparagraph (d) would be to create a functional equivalent to an original document.

Electronic signature of portion of a message

125. In subparagraph (d), the necessary linkage between the signature and the information being signed is expressed so as to avoid the implication that the electronic signature could apply only to the full contents of a data message. In fact, the information being signed, in many instances, will be only a portion of the information contained in the data message. For example, an electronic signature may relate only to information appended to the message for transmission purposes.

Variation by agreement

126. Paragraph (3) is not intended to limit the application of article 5 and of any applicable law recognizing the freedom of the parties to stipulate in any relevant agreement that a given signature technique would be treated among themselves as a reliable equivalent of a handwritten signature.

References to UNCITRAL documents

- A/CN.9/467, paras. 44-87;
- A/CN.9/WG.IV/WP.84, paras. 41-47;
- A/CN.9/465, paras. 62-82;
- A/CN.9/WG.IV/WP.82, paras. 42-44;
- A/CN.9/457, paras. 48-52;
- A/CN.9/WG.IV/WP.80, paras. 11 and 12.

Article 7. Satisfaction of article 6

- (1) [Any person, organ or authority, whether public or private, specified by the enacting State as competent] may determine which electronic signatures satisfy the provisions of article 6.
- (2) Any determination made under paragraph (1) shall be consistent with recognized international standards.
- (3) Nothing in this article affects the operation of the rules of private international law.

Pre-determination of status of electronic signature

127. Article 7 describes the role played by the enacting State in establishing or recognizing any entity that might validate the use of electronic signatures or otherwise certify their quality. Like article 6, article 7 is based on the idea that what is required to facilitate the development of electronic commerce is certainty and predictability at the time when commercial parties make use of electronic signature techniques, not at the time when there is a dispute before a court. Where a particular signature technique can satisfy requirements for a high degree of reliability and security, there should be a means for assessing the technical aspects of reliability and security and for according the signature technique some form of recognition.

Purpose of article 7

128. The purpose of article 7 is to make it clear that an enacting State may designate an organ or authority that will have the power to make determinations as to what specific technologies may benefit from the presumptions or substantive rule established under article 6. Article 7 is not an enabling provision that could, or would, necessarily be enacted by States in its present form. However, it is intended to convey a clear message that certainty and predictability can be achieved by determining which electronic signature techniques satisfy the reliability criteria of article 6, provided that such determination is made in accordance with international standards. Article 7 should not be interpreted in a manner that would either prescribe mandatory legal effects for the use of certain types of signature techniques, or would restrict the use of technology to those techniques determined to satisfy the reliability requirements of article 6. Parties should be free, for example, to use techniques that had not been determined to satisfy article 6, if that was what they had agreed to do. They should also be free to show, before a court or arbitral tribunal, that the method of signature they had chosen to use did satisfy the requirements of article 6, even though not the subject of a prior determination to that effect.

Paragraph (1)

129. Paragraph (1) makes it clear that any entity that might validate the use of electronic signatures or otherwise certify their quality would not always have to be established as a State authority. Paragraph (1) should not be read as making a recommendation to States as to the only means of achieving recognition of signature technologies, but rather as indicating the limitations that should apply if States wished to adopt such an approach.

Paragraph (2)

130. With respect to paragraph (2), the notion of "standard" should not be limited to official standards developed, for example, by the International Organization for Standardization (ISO) and the Internet Engineering Task Force (IETF), or to other technical standards. The word "standards" should be interpreted in a broad sense, which would include industry practices and trade usages, texts emanating from such international organizations as the International Chamber of Commerce, as well as the work of UNCITRAL itself (including this Model Law and the UNCITRAL Model Law on Electronic Commerce). The possible lack of relevant standards should not prevent the competent persons or authorities from making the determination referred to in paragraph (1). As to the reference to "recognized" standards, a question might be raised as to what constitutes "recognition" and of whom such recognition is required (see A/CN.9/465, para. 94). That question is also discussed under article 12 (see below, para. 154).

Paragraph (3)

131. Paragraph (3) is intended to make it abundantly clear that the purpose of article 7 is not to interfere with the normal operation of the rules of private international law (see A/CN.9/467, para. 94). In the absence of such a provision, article 7 might be misinterpreted as encouraging enacting States to discriminate against foreign electronic signatures on the basis of non-compliance with the rules set forth by the relevant person or authority under paragraph (1).

References to UNCITRAL documents

- A/CN.9/467, paras. 90-95;
 A/CN.9/WG.IV/WP.84, paras. 49-51;
 A/CN.9/465, paras. 90-98;
 A/CN.9/WG.IV/WP.82, para. 46;
 A/CN.9/457, paras. 48-52;
 A/CN.9/WG.IV/WP.80, para. 15.

Article 8. Conduct of the signatory

(1) Where signature creation data can be used to create a signature that has legal effect, each signatory shall:

(a) exercise reasonable care to avoid unauthorized use of its signature creation data;

(b) without undue delay, notify any person who may reasonably be expected by the signatory to rely on or to provide services in support of the electronic signature if:

- (i) the signatory knows that the signature creation data has been compromised; or
- (ii) the circumstances known to the signatory give rise to a substantial risk that the signature creation data may have been compromised;

(c) where a certificate is used to support the electronic signature, exercise reasonable care to ensure the accuracy and completeness of all material representations made by the signatory which are relevant to the certificate throughout its life-cycle, or which are to be included in the certificate.

(2) A signatory shall be liable for its failure to satisfy the requirements of paragraph (1).

Title

132. Article 8 (and articles 9 and 11) had been initially planned to contain rules regarding the obligations and liabilities of the various parties involved (the signatory, the relying party and any certification services provider). However, the rapid changes affecting the technical and commercial aspects of electronic commerce, together with the role currently played by self-regulation in the field of electronic commerce in certain countries, made it difficult to achieve consensus as to the contents of such rules. The articles have been drafted so as to embody a minimal “code of conduct” of the various parties. The consequences of failure to abide by that code of conduct are left to applicable law outside the Model Law.

Paragraph (1)

133. Subparagraphs (a) and (b) apply generally to all electronic signatures, while subparagraph (c) applies only to those electronic signatures that are supported by a certificate. The obligation in paragraph (1) (a), in particular, to exercise reasonable care to prevent unauthorized use of a signature data, constitutes a basic obligation that is, for example, generally contained in agreements concerning the use of credit cards. Under the policy adopted in paragraph (1), such an obligation should also apply to any electronic signature data that could be used for the purpose of expressing legally significant intent. However, the provision for variation by agreement in article 5 allows the standards set in article 8 to be varied in areas where they would be thought to be inappropriate, or to lead to unintended consequences.

134. Paragraph (1) (b) refers to the notion of “person who may reasonably be expected by the signatory to rely on or to provide services in support of the electronic signature”. Depending on the technology being used, such a “relying party” may be not only a

person who might seek to rely on the signature, but also a person such as a certification service provider, a certificate revocation service provider and any other interested party.

135. Paragraph (1) (c) applies where a certificate is used to support the signature data. The “life-cycle of the certificate” is intended to be interpreted broadly as covering the period starting with the application for the certificate or the creation of the certificate and ending with the expiry or revocation of the certificate.

Paragraph (2)

136. Paragraph (2) does not specify either the consequences or the limits of liability, both of which are left to national law. However, even though it leaves the consequences of liability up to national law, paragraph (2) serves to give a clear signal to enacting States that liability should attach to a failure to satisfy the obligations set forth in paragraph (1). Paragraph (2) is based on the conclusion reached by the Working Group at its thirty-fifth session that it might be difficult to achieve consensus as to what consequences might flow from the liability of the signature data holder. Depending on the context in which the electronic signature is used, such consequences might range, under existing law, from the signature data holder being bound by the contents of the message to liability for damages. Accordingly, paragraph (2) merely establishes the principle that the signature data holder should be held liable for failure to meet the requirements of paragraph (1), and leaves it to the law applicable outside the Model Law in each enacting State to deal with the legal consequences that would flow from such liability (A/CN.9/465, para. 108).

References to UNCITRAL documents

- A/CN.9/467, paras. 96-104;
 A/CN.9/WG.IV/WP.84, paras. 52 and 53;
 A/CN.9/465, paras. 99-108;
 A/CN.9/WG.IV/WP.82, paras. 50-55;
 A/CN.9/457, paras. 65-98;
 A/CN.9/WG.IV/WP.80, paras. 18 and 19.

Article 9. Conduct of the certification service provider

(1) Where a certification service provider provides services to support an electronic signature that may be used for legal effect as a signature, that certification service provider shall:

(a) act in accordance with representations made by it with respect to its policies and practices;

(b) exercise reasonable care to ensure the accuracy and completeness of all material representations made by it that are relevant to the certificate throughout its life-cycle, or which are included in the certificate;

(c) provide reasonably accessible means which enable a relying party to ascertain from the certificate:

- (i) the identity of the certification service provider;
- (ii) that the signatory that is identified in the certificate had control of the signature creation data at the time when the certificate was issued;
- (iii) that the signature creation data were valid at or before the time when the certificate was issued;

(d) provide reasonably accessible means which enable a relying party to ascertain, where relevant, from the certificate or otherwise:

- (i) the method used to identify the signatory;
- (ii) any limitation on the purpose or value for which the signature creation data or the certificate may be used;

- (iii) that the signature creation data are valid and have not been compromised;
- (iv) any limitation on the scope or extent of liability stipulated by the certification service provider;
- (v) whether means exist for the signatory to give notice pursuant to article 8(1) (b);
- (vi) whether a timely revocation service is offered;

(e) where services under subparagraph (d) (v) are offered, provide a means for a signatory to give notice pursuant to article 8(1)(b) and, where services under subparagraph (d) (vi) are offered, ensure the availability of a timely revocation service;

(f) utilize trustworthy systems, procedures and human resources in performing its services.

(2) A certification service provider shall be liable for its failure to satisfy the requirements of paragraph (1).

Paragraph (1)

137. Subparagraph (a) expresses the basic rule that a certification service provider should adhere to the representations and commitments made by that supplier, for example in a certification practices statement or in any other type of policy statement. Subparagraph (b) replicates in the context of the activities of the certification service provider the standard of conduct set forth in article 8(1)(c) with respect to the signatory.

138. Subparagraph (c) defines the essential contents and the core effect of any certificate under the Model Law. Subparagraph (d) lists additional elements to be included in the certificate or otherwise made available or accessible to the relying party, where they would be relevant to a particular certificate. Subparagraph (e) is not intended to apply to certificates such as transactional certificates, which are one-time certificates, or low-cost certificates for low-risk applications, both of which might not be subject to revocation.

139. It may be thought that the duties and obligations provided in article 9 can reasonably be expected to be complied with by any certification service provider, and not only those who issue “high value” certificates. However, the authors of the Model Law took care not to require from a signatory or a certification service provider a degree of diligence or trustworthiness that bears no reasonable relationship to the purposes for which the electronic signature or certificate is used. The Model Law thus favours a solution which links the obligations set forth in both articles 8 and 9 to the production of legally-significant electronic signatures (A/CN.9/483, para. 117). By limiting the scope of article 9 to the broad range of situations where certification services are provided to support an electronic signature that may be used for legal effect as a signature, the Model Law does not intend to create new types of legal effects for signatures (*ibid.*, para. 119).

Paragraph (2)

140. Paragraph (2) mirrors the basic rule of liability set forth in article 8(2) with respect to the signatory. The effect of that provision is to leave it up to national law to determine the consequences of liability. Subject to applicable rules of national law, paragraph (2) is not intended by its authors to be interpreted as a rule of absolute liability. It was not foreseen that the effect of paragraph (2) would be to exclude the possibility for the certification service provider to prove, for example, the absence of fault or contributory fault.

141. Early drafts of article 9 contained an additional paragraph, which addressed the consequences of liability as set forth in paragraph (2). In the preparation of the Model Law, it was observed that suppliers of certification services performed intermediary functions that were fundamental to electronic commerce and that the question of the liability of such professionals would not be sufficiently addressed by adopting a single provision along the lines of paragraph (2). While paragraph (2) may state an appropriate principle for application to signatories, it may not be sufficient for addressing the professional and commercial activities covered by article 9. One possible way of compensating such insufficiency would have been to list in the text of the Model Law the factors to be taken into account in assessing any loss resulting from failure by the certification service provider to satisfy the requirements of paragraph (1). It was finally decided that a non-exhaustive list of indicative factors should be contained in this Guide. In assessing the loss, the following factors should be taken into account, *inter alia*: (a) the cost of obtaining the certificate; (b) the nature of the information being certified; (c) the existence and extent of any limitation on the purpose for which the certificate may be used; (d) the existence of any statement limiting the scope or extent of the liability of the certification service provider; and (e) any contributory conduct by the relying party.

References to UNCITRAL documents

- A/CN.9/483, paras. 114-127;
- A/CN.9/467, paras. 105-129;
- A/CN.9/WG.IV/WP.84, paras. 54-60;
- A/CN.9/465, paras. 123-142 (draft article 12);
- A/CN.9/WG.IV/WP.82, paras. 59-68 (draft article 12);
- A/CN.9/457, paras. 108-119;
- A/CN.9/WG.IV/WP.80, paras. 22-24.

Article 10. Trustworthiness

For the purposes of article 9(1)(f), in determining whether, or to what extent, any systems, procedures and human resources utilized by a certification service provider are trustworthy, regard may be had to the following factors:

- (a) financial and human resources, including existence of assets;
- (b) quality of hardware and software systems;
- (c) procedures for processing of certificates and applications for certificates and retention of records;
- (d) availability of information to signatories identified in certificates and to potential relying parties;
- (e) regularity and extent of audit by an independent body;
- (f) the existence of a declaration by the State, an accreditation body or the certification service provider regarding compliance with or existence of the foregoing; or
- (g) any other relevant factor.

Flexibility of the notion of “trustworthiness”

142. Article 10 was initially drafted as part of article 9. Although that part later became a separate article, it is mainly intended to assist with the interpretation of the notion of “trustworthy systems, procedures and human resources” in article 9(1)(f). Article 10 is set forth as a non-exhaustive list of factors to be taken into account in determining trustworthiness. That list is intended to provide a flexible notion of trustworthiness, which could vary in content depending upon what is expected of the certificate in the context in which it is created.

References to UNCITRAL documents

A/CN.9/483, paras. 128-133;
A/CN.9/467, paras. 114-119.

Article 11. Conduct of the relying party

A relying party shall bear the legal consequences of its failure to:

- (a) take reasonable steps to verify the reliability of an electronic signature; or
- (b) where an electronic signature is supported by a certificate, take reasonable steps to:
 - (i) verify the validity, suspension or revocation of the certificate; and
 - (ii) observe any limitation with respect to the certificate.

Reasonableness of reliance

143. Article 11 reflects the idea that a party who intends to rely on an electronic signature should bear in mind the question whether and to what extent such reliance is reasonable in the light of the circumstances. It is not intended to deal with the issue of the validity of an electronic signature, which is addressed under article 6 and should not depend upon the conduct of the relying party. The issue of the validity of an electronic signature should be kept separate from the issue of whether it is reasonable for a relying party to rely on a signature that does not meet the standard set forth in article 6.

Consumer issues

144. While article 11 might place a burden on relying parties, particularly where such parties are consumers, it may be recalled that the Model Law is not intended to overrule any rule governing the protection of consumers. However, the Model Law might play a useful role in educating all the parties involved, including relying parties, as to the standard of reasonable conduct to be met with respect to electronic signatures. In addition, establishing a standard of conduct under which the relying party should verify the reliability of the signature through readily accessible means may be seen as essential to the development of any public-key infrastructure system.

Notion of “relying party”

145. Consistent with its definition, the notion of “relying party” is intended to cover any party that might rely on an electronic signature. Depending on the circumstances, a “relying party” might thus be any person having or not a contractual relationship with the signatory or the certification services provider. It is even conceivable that the certification services provider or the signatory might itself become a “relying party”. However, that broad notion of “relying party” should not result in the subscriber of a certificate being placed under an obligation to verify the validity of the certificate it purchases from the certification services provider.

Failure to comply with requirements of article 11

146. As to the possible impact of establishing as a general obligation that the relying party should verify the validity of the electronic signature or certificate, a question arises where the relying party fails to comply with the requirements of article 11. Should it fail to comply with those requirements, the relying party should not be precluded from availing itself of the signature or certificate if reasonable verification would not have revealed that

the signature or certificate was invalid. Such a situation may need to be dealt with by the law applicable outside the Model Law.

References to UNCITRAL documents

A/CN.9/467, paras. 130-143;
A/CN.9/WG.IV/WP.84, paras. 61-63;
A/CN.9/465, paras. 109-122 (draft articles 10 and 11);
A/CN.9/WG.IV/WP.82, paras. 56-58
(draft articles 10 and 11);
A/CN.9/457, paras. 99-107;
A/CN.9/WG.IV/WP.80, paras. 20 and 21.

Article 12. Recognition of foreign certificates and electronic signatures

(1) In determining whether, or to what extent, a certificate or an electronic signature is legally effective, no regard shall be had to:

- (a) the geographic location where the certificate is issued or the electronic signature created or used; or
- (b) the geographic location of the place of business of the issuer or signatory.

(2) A certificate issued outside [*the enacting State*] shall have the same legal effect in [*the enacting State*] as a certificate issued in [*the enacting State*] if it offers a substantially equivalent level of reliability.

(3) An electronic signature created or used outside [*the enacting State*] shall have the same legal effect in [*the enacting State*] as an electronic signature created or used in [*the enacting State*] if it offers a substantially equivalent level of reliability.

(4) In determining whether a certificate or an electronic signature offers a substantially equivalent level of reliability for the purposes of paragraphs (2) or (3), regard shall be had to recognized international standards and to any other relevant factors.

(5) Where, notwithstanding paragraphs (2), (3) and (4), parties agree, as between themselves, to the use of certain types of electronic signatures or certificates, that agreement shall be recognized as sufficient for the purposes of cross-border recognition, unless that agreement would not be valid or effective under applicable law.

General rule of non-discrimination

147. Paragraph (1) is intended to reflect the basic principle that the place of origin, in and of itself, should in no way be a factor determining whether and to what extent foreign certificates or electronic signatures should be recognized as legally effective. Determination of whether, or the extent to which, a certificate or an electronic signature is legally effective should not depend on the place where the certificate or the electronic signature was issued (see A/CN.9/483, para. 27) but on its technical reliability.

“Substantially equivalent level of reliability”

148. The purpose of paragraph (2) is to provide the general criterion for the cross-border recognition of certificates without which suppliers of certification services might face the unreasonable burden of having to obtain licences in multiple jurisdictions. For that purpose, paragraph (2) establishes a threshold for technical equivalence of foreign certificates based on testing their reliability against the reliability requirements established by the

enacting State pursuant to the Model Law (*ibid.*, para. 31). That criterion is to apply regardless of the nature of the certification scheme obtaining in the jurisdiction from which the certificate or signature emanated (*ibid.*, para. 29).

Level of reliability varying with the jurisdiction

149. Through a reference to the central notion of a “substantially equivalent level of reliability”, paragraph (2) acknowledges that there might be significant variance between the requirements of individual jurisdictions. The requirement of equivalence, as used in paragraph (2), does not mean that the level of reliability of a foreign certificate should be exactly identical with that of a domestic certificate (*ibid.*, para. 32).

Level of reliability varying within a jurisdiction

150. In addition, it should be noted that, in practice, suppliers of certification services issue certificates with various levels of reliability, according to the purposes for which the certificates are intended to be used by their customers. Depending on their respective level of reliability, not all certificates are worth producing legal effects, either domestically or abroad. Therefore, in applying the notion of equivalence as used in paragraph (2), it should be borne in mind that the equivalence to be established is between certificates of the same type. However, no attempt has been made in the Model Law to establish a correspondence between certificates of different types issued by different suppliers of certification services in different jurisdictions. The Model Law has been drafted so as to contemplate a possible hierarchy of different types of certificate. In practice, a court or arbitral tribunal called upon to decide on the legal effect of a foreign certificate would normally consider each certificate on its own merit and try to equate it with the closest corresponding level in the enacting State (*ibid.*, para. 33).

Equal treatment of certificates and other types of electronic signatures

151. Paragraph (3) expresses with respect to electronic signatures the same rule as set forth in paragraph (2) regarding certificates (*ibid.*, para. 41).

Recognizing some legal effect to compliance with the laws of a foreign country

152. Paragraphs (2) and (3) deal exclusively with the cross-border reliability test to be applied when assessing the reliability of a foreign certificate or electronic signature. However, in the preparation of the Model Law, it was borne in mind that enacting States might wish to obviate the need for a reliability test in respect of specific signatures or certificates, when the enacting State was satisfied that the law of the jurisdiction from which the signature or the certificate originated provided an adequate standard of reliability. As to the legal techniques through which advance recognition of the reliability of certificates and signatures complying with the law of a foreign country might be made by an enacting State (e.g. a unilateral declaration or a treaty) the Model Law contains no specific suggestion (*ibid.*, paras. 39 and 42).

Factors to be considered when assessing the substantial equivalence of foreign certificates and signatures

153. In the preparation of the Model Law, paragraph (4) was initially formulated as a catalogue of factors to be taken into ac-

count when determining whether a certificate or an electronic signature offers a substantially equivalent level of reliability for the purposes of paragraph (2) or (3). It was later found that most of these factors were already listed under articles 6, 9 and 10. Restating those factors in the context of article 12 would have been superfluous. Alternatively, cross-referencing, in paragraph (4), the appropriate provisions in the Model Law where the relevant criteria were mentioned, possibly with the addition of other criteria particularly important for cross-border recognition, was found to result in an overly complex formulation (see, in particular, A/CN.9/483, paras. 43-49). Paragraph (4) was eventually turned into an unspecific reference to “any relevant factor”, among which the factors listed under articles 6, 9 and 10 for the assessment of domestic certificates and electronic signatures are particularly important. In addition, paragraph (4) draws the consequences from the fact that assessing the equivalence of foreign certificates is somewhat different from assessing the trustworthiness of a certification service provider under articles 9 and 10. To that effect, a reference has been added in paragraph (4) to “recognized international standards”.

Recognized international standards

154. The notion of “recognized international standard” should be interpreted broadly to cover both international technical and commercial standards (i.e. market-driven standards) and standards and norms adopted by governmental or intergovernmental bodies (*ibid.*, para. 49). “Recognized international standard” may be statements of accepted technical, legal or commercial practices, whether developed by the public or private sector (or both), of a normative or interpretative nature, which are generally accepted as applicable internationally. Such standards may be in the form of requirements, recommendations, guidelines, codes of conduct, or statements of either best practices or norms” (*ibid.*, paras. 101-104).

Recognition of agreements between interested parties

155. Paragraph (5) provides for the recognition of agreements between interested parties regarding the use of certain types of electronic signatures or certificates as sufficient grounds for cross-border recognition (as between those parties) of such agreed signatures or certificates (*ibid.*, para. 54). It should be noted that, consistent with article 5, paragraph (5) is not intended to displace any mandatory law, in particular any mandatory requirement for handwritten signatures that enacting States might wish to maintain in applicable law (*ibid.*, para. 113). Paragraph (5) is needed to give effect to contractual stipulations under which parties may agree, as between themselves, to recognize the use of certain electronic signatures or certificates (that might be regarded as foreign in some or all of the States where the parties might seek legal recognition of those signatures or certificates), without those signatures or certificates being subject to the substantial-equivalence test set forth in paragraphs (2), (3) and (4). Paragraph (5) does not affect the legal position of third parties (*ibid.*, para. 56).

References to UNCITRAL documents

- A/CN.9/483, paras. 25-58 (article 12);
- A/CN.9/WG.IV/WP.84, paras. 61-68 (draft article 13);
- A/CN.9/465, paras. 21-35;
- A/CN.9/WG.IV/WP.82, paras. 69-71;
- A/CN.9/454, para. 173;
- A/CN.9/446, paras. 196-207 (draft article 19);
- A/CN.9/WG.IV/WP.73, para. 75;
- A/CN.9/437, paras. 74-89 (draft article 1); and
- A/CN.9/WG.IV/WP.71, paras. 73-75.

**E. Working paper submitted to the Working Group on Electronic Commerce at its thirty-eighth session: legal aspects of electronic commerce: legal barriers to the development of electronic commerce in international instruments relating to international trade: ways of overcoming them: note by the secretariat
(A/CN.9/WG.IV/WP.89) [Original: English]**

1. At the thirty-second session of the Commission, in 1999, various suggestions were made with respect to future work in the field of electronic commerce, for possible consideration by the Commission and the Working Group after completion of the uniform rules on electronic signatures. It was recalled that, at the close of the thirty-second session of the Working Group, a proposal had been made that the Working Group might wish to give preliminary consideration to undertaking the preparation of an international convention based on relevant provisions of the UNCITRAL Model Law on Electronic Commerce and of the draft uniform rules (A/CN.9/446, para. 212).¹ The Commission was informed that interest had been expressed in a number of countries in the preparation of such an instrument.

2. The attention of the Commission was drawn to a recommendation adopted on 15 March 1999 by the Centre for the Facilitation of Procedures and Practices for Administration, Commerce and Transport (CEFACT) of the United Nations Economic Commission for Europe (ECE).² That text recommended that UNCITRAL consider the actions necessary to ensure that references to "writing", "signature" and "document" in conventions and agreements relating to international trade allowed for electronic equivalents. Support was expressed for the preparation of an omnibus protocol to amend multilateral treaty regimes to facilitate the increased use of electronic commerce.

3. Other items suggested for future work included: electronic transactional and contract law; electronic transfer of rights in tangible goods; electronic transfer of intangible rights; rights in electronic data and software (possibly in cooperation with the World Intellectual Property Organization (WIPO)); standard terms for electronic contracting (possibly in cooperation with the International Chamber of Commerce (ICC) and the Internet Law and Policy Forum (ILPF)); applicable law and jurisdiction (possibly in cooperation with the Hague Conference on Private International Law); and on-line dispute settlement systems.³

4. The Commission took note of the above proposals. It was decided that, upon completing its current task, namely, the preparation of draft uniform rules on electronic signa-

tures, the Working Group would be expected, in the context of its general advisory function regarding the issues of electronic commerce, to examine some or all of the above-mentioned items, as well as any additional items, with a view to making more specific proposals for future work by the Commission.⁴

5. At its thirty-third session, the Commission held a preliminary exchange of views regarding future work in the field of electronic commerce. Three topics were suggested as indicating possible areas where work by the Commission would be desirable and feasible. The first dealt with electronic contracting, considered from the perspective of the United Nations Sales Convention, which was generally felt to constitute a readily acceptable framework for on-line contracts dealing with the sale of goods. It was pointed out that, for example, additional studies might need to be undertaken to determine the extent to which uniform rules could be extrapolated from the United Nations Sales Convention to govern dealings in services or "virtual goods", that is, items (such as software) that might be purchased and delivered in cyberspace. It was widely felt that, in undertaking such studies, careful attention would need to be given to the work of other international organizations such as WIPO and the World Trade Organization.

6. The second topic was dispute settlement. It was noted that the Working Group on Arbitration had already begun discussing ways in which current legal instruments of a statutory nature might need to be amended or interpreted to authorize the use of electronic documentation and, in particular, to do away with existing requirements regarding the written form of arbitration agreements. It was generally agreed that further work might be undertaken to determine whether specific rules were needed to facilitate the increased use of on-line dispute settlement mechanisms. In that context, it was suggested that special attention might be given to the ways in which dispute settlement techniques such as arbitration and conciliation might be made available to both commercial parties and consumers. It was widely felt that the increased use of electronic commerce tended to blur the distinction between consumers and commercial parties. However, it was recalled that, in a number of countries, the use of arbitration for the settlement of consumer disputes was restricted for reasons involving public policy considerations and might not easily lend itself to harmonization by international organizations. It was also felt that attention should be paid to the work undertaken in that area by other organizations, such as ICC, the Hague Conference on Private International Law and WIPO, which was heavily involved in dispute settlement regarding domain names on the Internet.

¹Official Records of the General Assembly, Fifty-third Session, Supplement No. 17 (A/53/17), para. 209.

²The text of the recommendation to UNCITRAL is contained in document TRADE/CEFACT/1999/CRP.7. Its adoption by CEFACT is stated in the report of CEFACT on the work of its fiftieth session (TRADE/CEFACT/1999/19, para. 60).

³Official Records of the General Assembly, Fifty-second Session, Supplement No. 17 (A/52/17), para. 251, and *ibid.*, Fifty-third Session, Supplement No. 17 (A/53/17), para. 211.

⁴*Ibid.*, Fifty-fourth Session, Supplement No. 17 (A/54/17), paras. 315-318.

7. The third topic was de-materialization of documents of title, in particular in the transport industry. It was suggested that work might be undertaken to assess the desirability and feasibility of establishing a uniform statutory framework to support the development of contractual schemes currently being set up to replace traditional paper-based bills of lading by electronic messages. It was widely felt that such work should not be restricted to maritime bills of lading, but should also envisage other modes of transportation. In addition, outside the sphere of transport law, such a study might also deal with issues of de-materialized securities. It was pointed out that the work of other international organizations on those topics should also be monitored.

8. After discussion, the Commission welcomed the proposal to undertake studies on the three topics. While no decision as to the scope of future work could be made until further discussion had taken place in the Working Group on Electronic Commerce, the Commission generally agreed that, upon completing its current task, namely, the preparation of draft uniform rules on electronic signatures, the Working Group would be expected, in the context of its general advisory function regarding the issues of electronic commerce, to examine, at its first meeting in 2001, some or all of the above-mentioned topics, as well as any additional topic, with a view to making more specific proposals for future work by the Commission. It was agreed that work to be carried out by the Working Group could involve consideration of several topics in parallel as well as preliminary discussion of the contents of possible uniform rules on certain aspects of the above-mentioned topics.

9. Particular emphasis was placed by the Commission on the need to ensure coordination of work among the various international organizations concerned. In view of the rapid development of electronic commerce, a considerable number of projects with possible impact on electronic commerce were being planned or undertaken. The secretariat was requested to carry out appropriate monitoring and to report to the Commission as to how the function of coordination was fulfilled to avoid duplication of work and ensure harmony in the development of the various projects. The area of electronic commerce was generally regarded as one in which the coordination mandate given to UNCITRAL by the General Assembly could be exercised with particular benefit to the global community and deserved corresponding attention from the Working Group and the secretariat.⁵

10. Concerning the measures to be taken in response to the recommendation adopted by CEFAC on 15 March 1999, the secretariat decided to examine the public international law issues that would be raised by the actions necessary to ensure that references to “writing”, “signature” and “document” in conventions and agreements relating to international trade allowed for electronic equivalents (see above, para. 2). To that end, it sought the assistance of Ms. Geneviève Burdeau, Professor at the University of Paris I—Panthéon Sorbonne, Associate of the International Law Institute and Secretary-General of The Hague Academy of International Law. The text of the advisory opinion prepared by Ms. Burdeau at the request of the secretariat is reproduced as an annex to this note.

ANNEX

ADAPTATION OF THE EVIDENTIARY PROVISIONS OF INTERNATIONAL LEGAL INSTRUMENTS RELATING TO INTERNATIONAL TRADE TO THE SPECIFIC REQUIREMENTS OF ELECTRONIC COMMERCE

Public international law study by Geneviève Burdeau, Professor at the University of Paris I—Panthéon Sorbonne, prepared at the request of the UNCITRAL secretariat

1. The need to adapt the provisions of domestic and international legal instruments to the specific requirements of electronic commerce has been emerging for some 15 years both at the national level and at the international level. That need has not escaped the attention of UNCITRAL, which has played a pioneering role in this respect through the issue, as early as 1985, of a recommendation on the legal value of computer records and the subsequent adoption, in 1996, of a Model Law on Electronic Commerce with Guide to Enactment. At the same time as UNCITRAL was endeavouring, with the support of the General Assembly of the United Nations, to encourage States to adapt their domestic law provisions concerning rules of evidence, the United Nations Economic Commission for Europe (ECE) was also addressing the need to adapt the many international conventions containing references to writings, written documents and the requirement of a handwritten signature and to provide for electronic equivalents. A survey conducted by ECE, published on 22 July 1994 (TRADE/WP.4/R.1096), which carried out an inventory of various conventions and other instruments relating to international trade affected by these definitions as well as a review of the relevant clauses, was the subject of a revision published on 25 February 1999 (TRADE/CEFACT/1999/CRP.2).

2. That study provides an overview of the existing situation and indicates the avenues that might be explored with a view to adapting all these international instruments to the requirements involved in developing the use of computer technology and the Internet in international trade. Every possible effort should be made to avoid undertaking a vast number of specific procedures for revising the conventions in question, as such procedures would frequently prove laborious and in some cases be of uncertain outcome and would not necessarily offer any guarantee of the hoped-for standardization of the definitions.

3. In a recommendation adopted on 15 March 1999 (TRADE/CEFACT/1999/CRP.7 and TRADE/CEFACT/1999/19, para. 60), the Centre for the Facilitation of Procedures and Practices for Administration, Commerce and Transport (CEFACT), established by ECE, stressed the fact that, under the rules set out in some international conventions, electronic messages were unacceptable as forms of evidence, a situation which constituted a barrier to the development of electronic commerce and a disadvantage in relation to traditional commercial practices. CEFACT accordingly urged UNCITRAL to pursue measures in order to ensure that references to “writing”, “signature” and “document” in international agreements and conventions would also allow for their electronic equivalents.

⁵Ibid., *Fifty-fifth Session, Supplement No. 17 (A/55/17)*, paras. 384-388.

I. LEGAL ANALYSIS OF THE EXISTING SITUATION

4. It would be appropriate to start from the facts that can be established by reading the above-mentioned CEFACCT survey (TRADE/CEFACT/1999/CRP.2) on conventions relating to international trade or transport. Two types of clauses form the subject of the inventory: the clauses contained in the substantive parts of the various conventions that refer to "writing", "signature" or "document" and the final clauses of those same conventions that relate to the amendment or revision of the conventions concerned.

5. Those treaty provisions are not, however, the only clauses to be taken into account. It is also necessary to consider the scope of new provisions introduced by States into domestic law in recent years, whether on their own initiative or in response to the General Assembly's recommendation that they incorporate the UNCITRAL Model Law or for the purpose of conforming to a particular regional legal instrument on statutory harmonization (for example, the European Union directive of 13 December 1999 on a "Community framework for electronic signatures", Official Journal of the European Communities, 19 January 2000, L13, p. 12).

6. Consideration should also be given to how the rules concerning formalities and evidence currently laid down by the international conventions might be viewed in relation to the law of the World Trade Organization (WTO) and consequently to the relevance of certain rules of that law.

A. Related substantive provisions

7. It can be seen from the inventory carried out in the aforementioned surveys of 1994 and 1999 (see above, para. 1) that the wording of the clauses concerning formalities and evidence reveals an extremely diversified situation.

8. In several cases, recently established instruments refer directly to forms of evidence that are specific to electronic commerce and may be regarded as wholly or only partly satisfactory. Conversely, some long-standing instruments have been drafted in such a way that they necessarily entail references to a paper-based signature, writing or document. Also, a number of instruments that were drawn up in a context where the focus was on the requirement of written evidence or of evidence authenticated in paper form might, by dint of a "constructive" interpretation, be regarded as applying also to electronic documents, writings and signatures. This last assumption would presuppose that legal interpretations are made to that effect, which is uncertain and risky and does not offer satisfactory answers to the specific questions of international commercial operators, who need to have clear, pre-established rules guaranteeing the legal certainty of their operations and their international recognition.

9. Without examining in detail the different provisions concerned with signatures, writings or documents, it is clear that there is an urgent need to update a number of inventoried instruments. It goes without saying that, if a case-by-case adaptation of the instruments were feasible, it would nevertheless be desirable, for the above-mentioned reasons of legal certainty, for the new definitions of the terms "signature", "writing" and "document" to be unified and for the same type of definition to be adopted in the case of each of the instruments in question by using, for example, the definitions appearing in the UNCITRAL Model Law. The unification work undertaken would thus be completed and it would be possible to avoid the risk of inconsistencies between international and domestic instruments and the resulting uncertainties.

B. Relevant rules of revision

10. The above-mentioned CEFACCT survey provides a quantitative indication of the magnitude of the problem. No less than some thirty conventions, multilateral agreements, uniform model laws or standard rules relating to international commercial dealings or international carriage are involved. The extreme diversity of the legal situations and clauses in question is striking and calls for a number of observations.

1. Legal regime and status of the instruments involved

11. The legal status of these different instruments, which are all intended to serve as a guide to the legal aspects of the practice of international commercial operators, is extremely diverse since they include both multilateral conventions having the nature of treaties as well as recommendations or standard rules established by international organizations (or their bodies), in most instances intergovernmental organizations, such as UNCITRAL or the International Civil Aviation Organization (ICAO), but also non-governmental organizations (the International Chamber of Commerce (ICC), the International Air Transport Association (IATA) or the International Federation of Freight Forwarders' Associations (FIATA)), and even rules derived from previously existing conventions.

12. In the first place, the legal effects of these instruments differ: mandatory legal force solely for the parties in the case of treaties, mandatory force for all members of the organization concerned in the case of the ICAO regulations, professional commitment in the case of the IATA rules, international trade practices, recommendations having no binding legal force and standard provisions proposed to States or operators.

13. The legal regime applicable to these instruments is also varied. In some cases, the rules of public international law relating to treaties have to be consulted and implemented, while in other cases the rules specific to a particular international organization will be concerned. Sometimes, an actual treaty revision will be involved, with its uncertainties regarding, for example, the effects of an amendment, as will be seen below. Other cases will entail the amendment of a unilateral instrument of an international organization.

2. Status of the international conventions

14. In the case of actual international conventions, not all are yet in force. With regard to the conventions already in force, the possible question of their amendment or revision would arise. Several situations can be noted in this respect.

15. Some of these conventions contain clauses relating to their amendment, which would in principle have to be observed if the conventions are to be amended for the purpose of inserting uniform provisions concerning the new definitions of "signature", "writing" and "document". There are few conventions that set out a full or extensive amendment procedure (but see the Convention concerning International Carriage by Rail (COTIF) of 1980).

16. Other conventions contain amendment or revision clauses that lay down special requirements concerning only certain specific aspects of the procedure, for example with regard to calling a review conference, for which purpose several instruments stipulate that a single State party may do so (see, for example, the International Convention for the Unification of Certain Rules relating to Bills of Lading, Brussels, 1924; the Convention for the

Unification of Certain Rules Relating to International Carriage by Air, Warsaw, 1929; and the Convention on the Contract for the International Carriage of Goods by Road (CMR), Geneva, 1956) or that one third of the States parties must do so (United Nations Convention on the Carriage of Goods by Sea, 1978 (the Hamburg Rules)).

17. In most cases, the revision clauses are thus either non-existent or inadequate, which necessarily gives rise to the application of the customary rules of international law concerning the amendment or modification of treaties. These rules have been codified in article 40 of the Vienna Convention on the Law of Treaties, concluded on 23 May 1969. The relatively flexible provisions of that article can probably be regarded at the present time as actually expressing the customary rule in this regard and not as purely treaty rules introduced as part of the progressive development of international law.

18. In article 40 of the Vienna Convention on the Law of Treaties, a number of rules concerned with the procedure for amending multilateral treaties are set out that are of a supplementary nature and, in addition, are not comprehensive. It will be noted that those provisions do not conflict with the revision clauses referred to above that can be found in some of the conventions examined in the aforementioned CEFAC survey. The text of the Vienna Convention provides as follows in this respect:

“1. Unless the treaty otherwise provides, the amendment of multilateral treaties shall be governed by the following paragraphs.

“2. Any proposal to amend a multilateral treaty as between all the parties must be notified to all the contracting States, each one of which shall have the right to take part in:

“(a) The decision as to the action to be taken in regard to such proposal;

“(b) The negotiation and conclusion of any agreement for the amendment of the treaty.

“3. Every State entitled to become a party to the treaty shall also be entitled to become a party to the treaty as amended.”

19. That article also lays down rules concerning the effects of amendments to treaties that duly respect the will of States and the principle of contract privity but have the effect of disrupting the unity of application of the treaty provisions and of introducing a certain inconsistency in the obligations under the treaties depending on whether States have agreed to the amendments or not. The text of article 40 continues as follows:

“4. The amending agreement does not bind any State already a party to the treaty which does not become a party to the amending agreement; article 30, paragraph 4 (b), applies in relation to such States.⁶

“5. Any State which becomes a party to the treaty after the entry into force of the amending agreement shall, failing an expression of a different intention by that State:

“(a) Be considered as a party to the treaty as amended; and

“(b) Be considered as a party to the unamended treaty in relation to any party to the treaty not bound by the amending agreement.”

20. As can be seen, the effect of an amendment to a multilateral convention is conditional upon its acceptance by the States parties to the original treaty. An amended treaty will thus be effective between States that have ratified the amendment but the treaty will

continue to apply in its original wording not only between States that have not ratified the amendment but also between both groups of States. Apart from the fact that the Vienna Convention does not indicate either the majority by which, unless stated in the final clauses, the text of an amendment may be deemed adopted or the conditions under which it may be deemed in force (are two ratifications sufficient?), a situation which could well give rise to possible procedural questions, the latter paragraphs of article 40 do not meet the desired objective of standardization. Indeed, article 40 is concerned only with international conventions, for which it does not provide any guarantee at all that this objective will be easily attained. The amendment approach in fact requires that a vast number of inevitably lengthy and uncertain revision procedures be conducted in parallel in order to produce an effect that is conditional upon the completion of national ratification processes, whose finalization by all the States parties to the conventions could well take some considerable time.

3. *The specific case of conventions not yet in force*

21. The revision procedure would appear to be unusable with regard to conventions not yet in force.

22. In accordance with the law of treaties, the act of signing denotes in principle the end of the negotiations and at the same time authenticates the text of the treaty that is the outcome of the negotiations. Under international law, there is in theory nothing to prevent the States in question from reopening the negotiations. This sometimes happens in the case of bilateral treaties. The issue is more difficult in the case of multilateral treaties, especially where some States have already ratified the original instrument and are thus bound on the basis of its initial wording. Such a situation did, however, occur with regard to the United Nations Convention on the Law of the Sea of 10 December 1982, the Montego Bay convention. Given the time and difficulty involved in collecting the sixty ratifications required for the entry into force of the convention, some of whose provisions were encountering persistent opposition from a number of industrialized countries,⁷ the need arose for the text of the convention to be adapted. It was out of the question to reopen the negotiations on the entire text of the Montego Bay convention, whose preparation had taken approximately ten years. The solution was found in an “Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea” adopted on 29 July 1994 and implemented provisionally even before the required number of ratifications had been obtained for its entry into force on 28 July 1996. Through its annex, that “agreement”, under the guise of a simple “interpretation”, actually amended several provisions of the convention. Such a method of revision, albeit unusual, might possibly serve as guidance in the matter now under examination.

4. *Non-treaty instruments*

23. In the case of non-treaty instruments, reference should be made to the relevant provisions of their issuing organizations. It would at first sight seem that their revision depends primarily on political will, since the procedures are relatively flexible. In several instances, as already emphasized, the instruments in question have no legally binding force but constitute reference texts of practical importance.

⁶Article 30, para. 4 (b): “As between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.”

⁷The requisite number of ratifications (60) was about to be reached in the early 1990s but the non-participation of a sufficient number of industrialized States would probably have jeopardized the establishment of the International Seabed Authority, whose financing was in danger of becoming problematical.

C. The risk of undermining the effect of the UNCITRAL Model Law on Electronic Commerce

24. To conclude this examination of the existing legal situation, attention should be drawn to the risk of the UNCITRAL Model Law on Electronic Commerce being rendered ineffective unless the texts of the international conventions undergo a parallel adaptation. In many States, it is in fact considered that international treaties rank above laws and should prevail in the event of conflict, even if the conflicting law is subsequent to the treaty. It could thus happen that, in a State where a national law that conforms to the UNCITRAL Model Law on Electronic Commerce has been adopted, its provisions are rejected by a court in favour of provisions of old conventions that require paper-based documents or handwritten signatures. The initiative undertaken to unify the law through the dissemination of this model legislation in the different States cannot therefore be regarded as entirely satisfactory and constitutes only a necessary but inadequate stage.

D. Emergence of a barrier to the development of electronic commerce

25. The idea that the incompatibility of the definitions of the terms "signature", "writing" and "document" with the specific requirements of trade via the Internet could constitute a barrier to the development of electronic commerce and cause discrimination between such commerce and traditional commerce is quite clearly apparent from the above-mentioned recommendation adopted by CEFAC on 15 March 1999, which states the following: "Being aware of the need to avoid disadvantage to electronic commerce and support efforts to achieve global parity in law between manual and electronic commerce" (TRADE/CEFACT/1999/CRP.7).

26. To date, this idea appears not to have been developed to any great extent at WTO even though that organization is monitoring the issue of the development of electronic commerce. The discernible discrimination between these two forms of commerce does not at first sight seem to come within the ambit of the two major legal principles laid down by the General Agreement on Tariffs and Trade (GATT) to guarantee non-discrimination: the most-favoured-nation clause (article I) and the national treatment principle (article III). In principle it transcends them but could under certain circumstances be seen as disguising a national preference.

27. It is more likely that a restriction to paper-based forms of evidence and the resulting exclusion of forms of evidence that are specific to electronic commerce could appear either as a new kind of non-tariff barrier or as a limitation on market access.

II. CONSIDERATIONS REGARDING AVENUES TO BE EXPLORED

28. The above analysis of the existing situation appears to indicate several avenues for consideration that might help determine the actions necessary to ensure that the scope of the new definitions of the terms "signature", "writing" and "document" encompasses the legal relations established in the international instruments inventoried in the above-mentioned ECE surveys of 1994 and 1999. However, it would seem from the findings of this examination that UNCITRAL might possibly not confine its objective to a reworking of the existing instruments (in the hope that future international instruments will conform to the definitions set out in the Model Law) but could seek to develop on a broader basis an international reference instrument, as a counterpart, on the international level, to the Model Law, that all States would be encouraged to implement. Thus, both for reasons of legal policy and for strictly technical reasons, efforts might be focused on a general text rather than on a series of specific revisions.

29. Concerning the choice of the type of instrument to be envisaged, thought might be given to the respective advantages of a treaty approach and of a non-treaty (i.e. resolution, recommendation) approach.

30. One question which naturally arises, given the possible reluctance, lack of information or simple apathy of some States, is that of the best way to ensure the widest geographical coverage of the new definitions of forms of evidence.

31. This question has to be viewed in the light of the analysis that can be made of the rules relating to electronic forms of evidence. From the viewpoint of international commercial operators, the question is considered in its traditional private law aspect: evidential rules are of key importance in contractual matters and in the settlement of disputes between commercial parties. It is in this context that UNCITRAL's work has to date been essentially carried out, in line with its mandate of increasing legal security for international commercial operators. Without questioning this traditional approach, which remains fundamental, it would be possible also to take in a more macroeconomic view by referring to the requirements arising under WTO law. From that perspective, might one not in fact regard restrictions on the use of forms of evidence that are specific to electronic commerce as constituting obvious barriers to the development of this type of commerce?

1. Inappropriateness of a specific revision of each international instrument

32. The above analysis of the methods for revising the various instruments affected by the terms "writing", "signature" and "document" clearly shows that an undertaking involving a case-by-case revision approach would be particularly time-consuming, laborious and of uncertain outcome both as regards the content (since it cannot be fully guaranteed that the new definitions adopted in each instance would necessarily be identical) and as regards the *ratione personae* effect of the revisions thus carried out.

33. It is of course quite possible to envisage revisions being undertaken, within the context of each convention or each international organization concerned, for the purpose of progressively incorporating new definitions to replace the old ones but, if the desired outcome is relatively speedy unification, then the revision approach is probably not the most appropriate.

34. Under such circumstances, the desired goal would appear to be a triple one: firstly to arrive at a single definition of the terms in question, which would thereafter constitute a kind of mandatory reference intended not only to supplement the traditional definitions but also to be incorporated in a virtually automatic manner into future instruments; secondly to ensure that this definition is inserted in the existing instruments, irrespective of the nature of those instruments (treaty, subordinate legislation, recommendation); and thirdly to have these definitions apply to the largest possible number of States and, in any case, to all those bound by any of the international instruments inventoried in the above-mentioned CEFAC survey.

2. Preparation of a single instrument: possible options

35. The preparation of a single text, containing a standardized definition of "signature", "writing" and "document", that would ensure a comprehensive revision of all the inventoried international instruments (but without thereby excluding other texts) and give the forms of evidence specific to electronic commerce a status equal to that accorded in traditional commerce thus appears desirable. At this stage, there are several options, each presenting various advantages and drawbacks.

(a) *A treaty or non-treaty instrument?*

36. The first option is basic. It involves deciding whether it would be preferable to have a treaty instrument, such as an interpretative agreement, a supplementary agreement or a protocol, or alternatively to have a non-treaty instrument, such as guidelines or a recommendation on interpretation. As is known, the advantage of the first of these arrangements is that it would mean the emergence of a prescriptive legal instrument having a mandatory scope of application and thus a status equal to that of the already existing treaty instruments. Its drawback lies in the fact that an agreement, in line with established principles of international law, has binding force only as between the States that are parties to it. By contrast, a non-treaty instrument, provided that a sufficiently broad forum is chosen for its preparation (for example, the General Assembly of the United Nations or UNCITRAL), would have, albeit only as a recommendatory document, a wider scope since it is aimed at virtually all member States of the international community.

(b) *A new convention or an interpretative agreement?*

37. If the treaty approach is the desired course of action, it should be recalled at this point that an amendment to an international treaty may be undertaken through a procedure other than the customary revision procedure, as already considered, conducted in conformity with the provisions of the previously existing treaty or in accordance with the rules set out in article 40 of the Vienna Convention. It has always been accepted that States could amend an existing agreement by a subsequent agreement. The effects of such an agreement are simple in the case of two successive bilateral treaties or in circumstances where all the parties to the previous treaty are also parties to the subsequent treaty. The Vienna Convention, in its article 59, in fact provides as follows for the eventuality of a conflicting subsequent agreement:

“1. A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject matter and:

“(a) It appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; or

“(b) The provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.”

38. What is being envisaged in the case under examination is obviously not a conflicting subsequent agreement but rather a simple amending agreement that would be concerned solely with defining the concepts of writing, signature, original and other forms of evidence. The question of the application of successive treaties relating to the same subject matter is provided for under the Vienna Convention in paragraphs 3 and 4 of its article 30, which read as follows:

“3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.

“4. When the parties to the later treaty do not include all the parties to the earlier one:

“(a) As between States parties to both treaties the same rule applies as in paragraph 3;

“(b) As between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.”

39. It is thus clearly possible to envisage a single agreement that would deal with the new definitions of the terms “signature”, “writing” and “document” and would in a way supplement the corresponding provisions of all the previously existing conventions. It may be envisaged that this single agreement would also specify that it is intended to bind the States parties in the implementation of non-treaty instruments involving these definitions.

40. It would be possible to avoid giving this single instrument what could be the formal nature of a “revision” of earlier instruments and to envisage the more bland alternative of an interpretative agreement, since in most instances there is no question of any conflict with previously existing instruments but, as shown above, there is a need in some cases to specify the meaning of terms that are capable of a somewhat restrictive interpretation and in others to give the terms “signature”, “writing” and “document” a meaning that could clearly not have been envisaged when the instruments in question were drawn up. International courts regularly interpret the terms of international conventions in the light of developments that these concepts may have undergone, taking account, in particular, of technological developments.⁸ It would thus be a question of setting out, in an international agreement, the “authentic” interpretation—i.e. the parties’ own interpretation—of the provisions contained in the different instruments that bind them, irrespective of their legal status (international treaty, subordinate legislation, recommendation). With such a single interpretative agreement in simple form that would be common to all the international instruments regardless of their legal force, the standardization goal would appear to be quite easily achievable and it would thereby be possible to avoid directly raising either the question of the actual “amendment” of existing instruments, which in any case is not the desired aim, or the question of the regularity of the revision procedure. Furthermore, the nature of an interpretative agreement would make it possible to counter any criticism as to whether the normal procedure for revising conventions should have been followed.

(c) *Forum for drawing up such an instrument*

41. Provided that the chosen approach is an interpretative agreement rather than an actual amending instrument, UNCITRAL would clearly appear to be the appropriate forum for its preparation since this task comes precisely within its mandate of “promoting ways and means of ensuring a uniform interpretation and application of international conventions and uniform laws in the field of the law of international trade.”⁹ Such an arrangement would make it possible to avoid the issue of the competing suitability of other forums (conferences of the parties to previously existing conventions, international organizations, non-governmental organizations) where the different inventoried instruments were drawn up. It would also have the merit of presenting judges and arbitrators with a single reference. The standard procedure for the agreement’s adoption by an inter-governmental conference open to all States could then enable the agreement to be legally formalized.

⁸Cf., for example, in recent decisions of WTO’s Appellate Body: “The words in Article XX (g), ‘exhaustible natural resources’, were actually crafted more than 50 years ago. They must be read (...) in the light of contemporary concerns of the community of nations about the protection and conservation of the environment. (...) the generic term ‘natural resources’, in Article XX (g), is not ‘static’ in its content or reference but is rather ‘by definition evolutionary’”. United States. Import prohibition of certain shrimp and shrimp products. Report of the Appellate Body, 12 October 1998, WT/DS 58/AB/R, paras. 129 and 130.

⁹General Assembly resolution 2205 (XXI), section II, para. 8 (reproduced in the *UNCITRAL Yearbook 1968-1970*, part one, chap. II, sect. E).

(d) *Form of interpretative agreement*

42. Since an interpretative agreement is generally regarded as being intended not to amend a previously existing treaty but simply to precisely define its terms in order to avoid difficulties of implementation by individuals or judges, States could probably without too much difficulty be satisfied with the alternative of the simplified form of agreement, which is in fact common practice in this field. The major advantage of such an alternative would naturally be simplicity and speed of implementation since the simple signature of the States' representatives would be sufficient. That could take place upon finalization of the interpretative agreement and would avoid the uncertainties and slowness involved in the domestic constitutional procedures that accompany treaty ratifications, not to mention the effects of the frequent failure on the part of national administrations to follow up ratification procedures, which is due more often to inaction rather than to actual substantive objections.

43. Nothing would appear to stand in the way of this solution. Signature is even the first of the means of expressing consent set out in article 11 of the Vienna Convention on the Law of Treaties, which does not establish any hierarchy or differentiation between treaties based on this criterion. The legal literature expresses the unanimous view that an agreement in simplified form is not inferior to a formal treaty and that there is no matter of a nature that could be regarded under international law as barring the use of the simplified form of agreement.¹⁰ The example of GATT 1947 provides an outstanding demonstration of this. In bilateral dealings, simplified interpretative agreements in the form of exchanges of letters or exchanges of notes abound. Although less common in multilateral relations, they do not appear to present any serious legal problems but the most appropriate form of drafting would probably be that of the standard agreement.

44. While States usually prefer to adhere to the traditional procedure of concluding treaties in cases involving instruments whose normative content is substantial and concerned with matters which from a domestic constitutional viewpoint entail a parliamentary examination, since this is a question of respecting parliaments' areas of competence, the situation can be assumed to be different in the case of a simple interpretative agreement whose purpose is not to amend the substantive obligations arising under international conventions but simply to specify the meaning of certain terms or to adapt definitions in line with technological developments.

45. With regard to domestic law, provided that the publication formalities most frequently laid down are observed, national courts have for a long time agreed as a general rule to treat the simplified form of agreement on the same level as a solemn form of agreement, even in States whose constitutions, such as the constitution of the United States of America, do not expressly empower the executive to sign such agreements.¹¹

46. The simplified form of agreement should not normally give rise to any particular reluctance on the part of States in the case of an interpretative agreement. If, however, objections are raised by some States owing to specific aspects of their national constitutional rules, it would be quite possible to provide for a dual system whereby the final clauses of the interpretative agreement would enter into force with respect to a State either upon signature, if the State indicates that its signature has the effect of bind-

¹⁰Cf., for example, Daillier and Pellet, *Droit international public*, 6th edition, LGDJ Paris, 1999, No. 84; Combacau and Sur, *Droit international public*, 4th edition, Montchrestien, Paris, 1999, p. 118; L. Wildhaber, *Executive agreements*, in R. Bernhardt, ed., *Encyclopaedia of Public International Law*, volume II, 1995, p. 316.

¹¹See, on this point, L. Wildhaber, *op. cit.* and the above-mentioned judicial decisions.

ing it, or following notification to the treaty depositary of the completion of the formalities required under the State's domestic law for indicating its consent to being bound by the agreement. Public international law is in fact very flexible in this respect and dual arrangements of this kind are not exceptional in contemporary practice.

3. *How can the universal application of the instrument introducing the new definitions be ensured?*

47. Even if an interpretative agreement is less formal in nature than an amending agreement and if, as suggested above, the use of the simplified form of agreement would make it possible from the outset to expect broad participation by States and immediate entry into force, there is no doubt that it will retain the character of a treaty and that the principles of international law which are concerned with respect for the will of States, in particular the principle of contract privity, will apply in that regard. It cannot therefore be ruled out that some States, for various reasons, will not sign the interpretative agreement straightaway or will feel that it calls for further examination by the national authorities. In such circumstances, the "omnibus" effect being sought through the choice of the alternative of an agreement in simplified form might not be achieved. It is important that the largest possible number of States should be bound by the interpretative agreement not only in order to ensure the development of electronic commerce on an equal footing with traditional commerce but also because, as has been seen, the environments of the States that are bound by the instruments to be revised are extremely diverse and the desired goal is through this single interpretative agreement to encompass all those instruments which contain the terms "signature", "writing" and "document", regardless of the list of States affected by each of these instruments.

(a) *Supplementary involvement of the General Assembly*

48. It would accordingly appear desirable to consider attempting to widen the reach of the interpretative agreement by making use of the universal impact of recommendations of the General Assembly. Consideration might in fact be given to the possible adoption of a resolution by the General Assembly recommending all members to sign the interpretative agreement. If necessary, with a view to making the resolution more forceful, a standard reporting system could be envisaged in order to require States to indicate the measures taken by them to sign the interpretative agreement. It would also be possible to envisage that the United Nations Conference on Trade and Development might lend its support to developing countries' signing of the interpretative agreement through the adoption of a parallel resolution.

(b) *Cooperation with other international organizations*

49. While UNCITRAL's work on forms of evidence that can be used in electronic commerce has already reached a practical legislative stage with the adoption of the Model Law, other international organizations have been looking into the prospects opened up by electronic commerce in the context of trade liberalization, in particular the Organization for Economic Cooperation and Development (OECD), which adopted an action plan at the ministerial conference which was held in Ottawa, in 1998, on the theme "A borderless world: realizing the potential of global electronic commerce", and WTO, which, following the 1998 Ministerial declaration on global electronic commerce, initiated a work programme directed jointly by the Council for Trade in Goods, the Council for Trade-Related Aspects of Intellectual Property Rights, the Council for Trade in Services and the Committee on Trade and Development. The work of those two organizations reflects the desire for

cooperation with other international organizations. It is thus conceivable that OECD and, more especially, WTO might offer their assistance in encouraging States to sign the interpretative agreement.

50. The cooperation of ICAO, with regard to the instruments which involve it, and of IATA should also be sought.

4. *Linkage of the envisaged revision with WTO law*

51. As can be seen from the foregoing, the idea that the incompatibility of the definitions of “signature”, “writing” and “document” with the particular features of electronic commerce may constitute a barrier to the development of this type of commerce and place it on an inferior level to conventional commerce has been put forward within the United Nations. However, as indicated above, the conflict of this inconsistency with WTO law is not glaringly obvious. Indeed, the concern of WTO law is primarily to avoid discrimination in the treatment of the member States’ trade. However, the distinction between traditional commerce and electronic commerce does not come within the ambit of any such discrimination. It would be fruitless to look for provisions addressing that concern in the General Agreement on Trade in Services or in the Agreement on Technical Obstacles to Trade. Similarly, the inadequacy of evidentiary definitions cannot really be regarded as involving a set of administrative formalities. However, there is no doubt that any restraints arising in this area constitute barriers to the development of a certain form of international trade. Therefore, it would probably not be difficult to persuade the WTO

General Council to take up a position on this matter by issuing a recommendation and to encourage the adoption of definitions of the terms “signature”, “writing” and “document” that are compatible with the development of electronic commerce. Such support would be particularly useful given the broad composition of WTO and its training role in the field of international law for the benefit of developing member States.

III. CONCLUSION

52. In conclusion, the most efficient technique for updating, under optimum conditions of speed and coverage, the definitions contained in all the different instruments inventoried in the survey conducted by CEFAC would appear to be the conclusion, at the initiative of UNCITRAL, of an interpretative agreement in simplified form for the purpose of specifying and supplementing the definitions of the terms “signature”, “writing” and “document” in all existing and future international instruments, irrespective of their legal status. The effectiveness of such an agreement and its widest possible coverage could be encouraged through a General Assembly resolution and through recommendations issued, in particular, by OECD and the WTO General Council.

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F. Working paper submitted to the Working Group on Electronic Commerce at its thirty-eighth session: possible future work on electronic commerce: transfer of rights in tangible goods and other rights: note by the secretariat (A/CN.9/WG.IV/WP.90) [Original: English]

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INTRODUCTION

1. The possibility of future work by UNCITRAL with regard to issues of negotiability and transferability of rights in goods in a computer-based environment was first mentioned at the twenty-seventh session of the Commission, in 1994.¹ The Commission considered the matter again at its twenty-eighth session, in 1995, when it adopted the text of articles 1 and 3 to 11 of the UNCITRAL Model Law on Electronic Commerce.² The Commission requested the secretariat to prepare a background study on negotiability and transferability of EDI transport documents, with particular emphasis on EDI maritime transport documents, taking into account the views expressed and the suggestions concerning the scope of possible future work that had been made at the twenty-ninth session of the Working Group.³

2. In accordance with the directives given by the Working Group, the study subsequently prepared by the secretariat (A/CN.9/WG.IV/WP.69) focused on issues of transferable bills of lading in an electronic environment. On the basis of that study, the Working Group discussed the relevant issues at its thirtieth session and approved the text of draft statutory provisions designed to recognize the transmission of data messages as functionally equivalent to the main actions performed under a contract of carriage of goods, such as issuing a receipt for goods, giving instructions to a carrier, claiming delivery of goods, transferring or negotiating rights in goods (for the report on that session, see A/CN.9/421). Those draft provisions were adopted by the Commission at

its twenty-ninth session, in 1996, as articles 16 and 17 of the final text of the Model Law.

3. The possibility of future work in the area of negotiability and transferability of rights in goods in a computer-based environment, beyond the relevant provisions of the Model Law, was again raised at the Commission's thirty-second and thirty-third sessions, in 1999 and 2000, respectively. At the thirty-second session, it was suggested that after completion of the uniform rules on electronic signatures (as the draft instrument was then called), the Commission and the Working Group should consider work, *inter alia*, in the areas of "electronic transfer of rights in tangible goods" and "electronic transfer of intangible rights".⁴ At the thirty-third session, a suggestion was made to consider the possibility of future work on "de-materialization of documents of title, particularly in the transport industry". It was suggested that work might be undertaken to assess the desirability and feasibility of elaborating a uniform statutory framework to support the development of contractual schemes currently being developed to replace traditional paper-based bills of lading by electronic messages. It was widely felt that such work should not be restricted to maritime bills of lading, but should also envisage other modes of transportation. In addition, outside the sphere of transport law, such a study might also deal with the issues of dematerialized securities. It was pointed out that the work of other international organizations should also be monitored in respect of those topics.⁵

4. After discussion, the Commission, at its thirty-third session, welcomed the proposal to undertake studies on that

¹Official Records of the General Assembly, Forty-ninth Session, Supplement No. 17 (A/49/17), para. 201.

²Ibid., Fiftieth Session, Supplement No. 17 (A/50/17), para. 306.

³Ibid., para. 309.

⁴Ibid., Fifty-fourth Session, Supplement No. 17 (A/54/17), para.317.

⁵Ibid., Fifty-fifth Session, Supplement No. 17 (A/55/17), para. 386.

topic among others then proposed for future work.⁶ While no decision as to the scope of future work could be made until further discussion had taken place in the Working Group, the Commission generally agreed that, upon completing its current task, namely, the preparation of draft uniform rules on electronic signatures, the Working Group would be expected, in the context of its general advisory function regarding the issues of electronic commerce, to examine some or all of the above-mentioned topics, as well as any additional topic, with a view to making more specific proposals for future work by the Commission. It was agreed that work to be carried out by the Working Group could involve consideration of several topics in parallel as well as preliminary discussion of the contents of possible uniform rules on certain aspects of the above-mentioned topics.

5. This note contains a preliminary study of legal issues related to the use of electronic means of communication for transferring or creating rights in tangible goods and transferring or creating other rights. It gives special attention to possible electronic substitutes or alternatives for paper-based documents of title and other forms of de-materialized instruments that represent or incorporate rights in tangible goods or intangible rights.

CHAPTER I. TRANSFER AND CREATION OF RIGHTS IN A PAPER-BASED ENVIRONMENT

6. Consistent with the approach taken in the preparation of the Model Law, the Working Group may wish to envisage the issues related to transfer and creation of rights in tangible goods and other rights using a functional approach. In order to consider whether and under what conditions electronic means of communication may be used to effectively transfer and create any such rights, this section sets out the main methods for the transfer of rights in tangible goods and for the transfer of other rights in a paper-based environment. This section is only concerned with the voluntary transfer of rights and does not deal with statutory transfer of property or other rights (for instance, through succession or confiscation). The following information focuses on the main methods used for creating and transferring rights in tangible goods and other rights and is not meant to provide an exhaustive review of all methods used in various legal systems.

A. General remarks

7. As used in this note, the expression “rights in tangible goods” refers to property rights or security interests in corporeal moveable property, including particularly commodities and manufactured goods, other than the money in which the price (in case of a sales contract) is to be paid. The expression “other rights” refers to intangible assets (other than property rights in tangible goods or intellectual property rights), which have an economic value that makes them capable of being negotiated in the course of business, including in particular trade or financial receivables, investment and other securities. Section B briefly discusses meth-

⁶Ibid., para. 387.

ods for transferring rights in tangible goods and other rights. Section C deals with the methods for the creation of security interests in tangible goods or in intangible property.

B. Transfer of rights in tangible goods and other rights

8. Transfer of property interests in tangible goods may serve various purposes according to the nature of the transaction between the parties. Transfer of property usually is the manner in which a debtor performs a contractual obligation, as in the case of delivery of the goods under a sales contract. However, transfer of property may also fulfil other functions, such as when the creditor accepts the transferred property as a substitute for other performance originally owed by the debtor. The same considerations apply to the assignment of other rights, such as trade receivables or investment securities.

9. For the purposes of this section, a distinction may therefore be drawn between (a) the act of transfer of the relevant rights, and (b) the contract or transaction which gives rise to the debtor’s obligation to transfer such rights. Each of these instances may be subject to specific requirements, both formal and substantive ones, as regards their validity and legal effect. This section is only concerned with general methods for transferring or assigning rights and applicable requirements for the legal validity and effectiveness of such transfer or assignment. It does not deal with the conditions for the validity and effectiveness of the various contracts and transactions pursuant to which the rights are transferred or assigned.

10. Methods for transfer of property interests in tangible property are generally based on two legal concepts, namely, the principle of consent⁷ and the principle of delivery.⁸ Additional methods include registration and symbolic delivery. Although these additional methods are usually regarded as conceptual variants of either the principle of consent or the principle of delivery, they are presented hereafter separately for ease of reading.

1. Transfer by consent

11. According to the principle of consent, the property passes from the transferor to the transferee by means of a

⁷Transfer by consent is the prevailing method in common law legal systems and, within the civil law tradition, in jurisdictions influenced by French law (for a comparative overview of methods of transferring moveable property, see Rodolfo Sacco, “Le transfert de la propriété des choses mobilières déterminées par acte entre vifs”, *General Reports to the 10th International Congress of Comparative Law*, Péteri and Lamm, eds. (Budapest, Akadémiai Kiadó, 1981), pp. 247-268; see also Ulrich Drobnig, “Transfer of Property”, *Towards a European Civil Code*, Hartkamp and others eds., 2nd ed. (The Hague/London/Boston, Kluwer, 1998), pp. 495-510; information on various legal systems may further be found in Alexander von Ziegler and others eds., *Transfer of Ownership in International Trade*, (Paris/New York, Kluwer, 1999)).

⁸Transfer by delivery is the general rule in civil law jurisdictions that follow the Roman law distinction between title (titulus) and form (modus) of transfer, such as most Ibero-American legal systems, and in jurisdictions influenced by the German law or in codifications inspired by the German Civil Code.

contract between them implying the transfer of property.⁹ In legal systems that follow the principle of consent, all that is required for the transfer of property under a validly concluded sales contract is the parties' agreement about sale of the goods and their status as buyer and seller. However, some legal systems give special emphasis to the intention of the parties with respect to the transfer of property.¹⁰ Those legal systems require clear evidence of the parties' agreement upon the ownership of the transferee. Such intention may be expressed in the underlying contract (such as a sales contract) but is to be understood individually. It may even be concluded without a contract of sale. However, in some of those legal systems transfers of property in general, or in respect of specific goods, while valid and effective as among the transferor and the transferee, may not be enforceable against third parties until the transfer is registered in a registry system (see paras. 13 and 14), or until the goods are actually delivered to the transferee (see paras. 15 and 16).

12. Apart from tangible goods, the consent of the parties is in many legal systems sufficient for the transfer of other property (intangibles) as well. Special rules are often found, however, in respect of assignments of payment claims (receivables).¹¹ Indeed, while an assignment may be valid and binding on the assignor and the assignee, it has no effects on the debtor, unless the debtor has acquired knowledge of the assignment. In this respect, legal systems differ as to whether a notice to the debtor is required or whether any other act results in the debtor acquiring knowledge of the assignment.

2. Transfer by registration

13. Based also on consent is the principle of registration, which requires consent of the parties and registration by an office with statutory rights to take records.¹² The transfer is completed with the inclusion of a corresponding record of the transaction in the registry system. Registration serves to ensure legal certainty especially when the achieved ownership cannot be primarily shown by physically shifting possession (e.g. with immovables). In some jurisdictions, the consent of the parties (in some cases with the additional requirement of actual delivery of the goods) may be sufficient for the purpose of transferring the property as between the parties, but registration may be required in order for the transfer to become effective vis-à-vis third parties.

14. Transfer by registration is sometimes needed in respect of certain forms of intangible property. For example, transfer of shares or other securities issued by companies may need to be effected through appropriate records in the company's books, at least for the purpose of becoming

⁹E.g. France (Code Civil, Articles 1138, 1583, 938); Italy (Codice Civile, Art. 1376), Japan (Civil Code, Art. 176).

¹⁰This is particularly the case in common law jurisdictions, such as Australia (Alexander von Ziegler, *op. cit.*, p. 12), the common law provinces of Canada (*ibid.* p. 83), England (*ibid.*, p. 135).

¹¹Legal aspects of receivables financing: report of the Secretary-General (A/CN.9/397), para. 30 (*Yearbook of the United Nations Commission on International Trade Law*, volume XXV: 1994 (United Nations publication, Sales No. E.95.V.20), part two, chap. V, sect. A).

¹²E.g. Germany (*Bürgerliches Gesetzbuch* (BGB), § 873 sect. 1) for immovable property.

effective vis-à-vis the company or third parties. Some jurisdictions have also established a system of filing information about assignments of trade receivables for the purpose of providing evidence of title to the receivables, notice about assignment to interested third parties or a method for determining priorities.¹³

3. Transfer by delivery

15. The principle of delivery is also based on consent but requires in addition the physical delivery of the asset to the transferee.¹⁴ States take different approaches as to the relationship between the underlying consent expressed in the contract and an additional consent about the transfer of goods itself ("real agreement") which comes with the delivery. As far as the underlying contractual consent is the basis for the transfer by delivery, the validity of the transfer is affected by the validity of the contract itself.¹⁵ On the other hand, an independent "real agreement" to transfer is not affected by the contract, the validity of the transfer is in this case determined independently (doctrine of abstraction).¹⁶

16. Transfer by delivery is the norm for the effective transfer of certain types of intangible property. Negotiable instruments, such as bills of exchange and promissory notes, are typically negotiated by transfer of possession, whether voluntary or involuntary, of the instrument by a person other than the issuer to a person who thereby becomes its holder. Except for negotiation by a remitter, if an instrument is payable to an identified person, negotiation requires transfer of possession of the instrument and its endorsement by the transferor. If an instrument is payable to bearer, it may be negotiated by transfer of possession alone. Article 13 of the United Nations Convention on International Bills of Exchange and International Promissory Notes reflects this principle by providing that an instrument is transferred by endorsement and delivery of the instrument by the endorser to the endorsee; or by mere delivery of the instrument if the last endorsement is in blank. The same principle can be found in articles 11 and 16 of annex I to the Convention Providing a Uniform Law on Bills of Exchange and Promissory Notes (Geneva, 7 June 1930).¹⁷

4. Transfer by symbolic delivery

17. Even in countries that build on the principle of delivery, physical delivery of the goods is not always necessary. Possession of the goods can be left with the transferor or an agent of the transferor, where the parties agree on a legal relationship that assigns indirect possession to the transferee.¹⁸ Property rights in goods may also be deemed to

¹³A/CN.9/397 (see endnote 8), para. 30.

¹⁴E.g. Austria (*Allgemeines Bürgerliches Gesetzbuch* (ABGB), § 426), Germany (BGB, § 929 sect. 1), Greece (Civil Code Art. 1034), Netherlands (Dutch new Civil Code book 3, Art. 3:84, para. 1), Russian Federation (Civil Code, Art. 223, sect. 1), South Africa (Alexander von Ziegler, *op. cit.*, p. 330), Spain (Código Civil, Art. 609), Switzerland (Civil Code, Art. 714, sect.1).

¹⁵Netherlands.

¹⁶Germany.

¹⁷League of Nations, *Treaty Series*, vol. CXLIII, p. 259, No. 3313 (1933-1934).

¹⁸E.g. Austria (ABGB, § 427), Germany (BGB, § 930).

have been transferred when the transferee is given the means for exercising or claiming control over the goods. Examples include surrendering to the transferee the keys of a warehouse where the goods are stored or surrendering to the transferee the documents (such as a bill of lading or a warehouse receipt) necessary to claim delivery of the goods from a bailee holding such goods to the order of the holder.

18. Transfer of property through symbolic delivery is typically an exception to the general requirement of physical delivery of the goods. Accordingly, in order for a transfer of property to take place, no act by the parties may substitute for failed delivery, except for those symbolic acts to which the law attributes the same function. In other words, the parties typically are not free to create methods of transfer other than those provided in the law.

C. *Security interests in tangible goods and in intangible property*

19. This section briefly describes the main methods for creating and perfecting security interests.¹⁹ For that purpose, it is important to distinguish between formal requirements, if any, for a security agreement to be binding as between the parties and those requirements that need to be met in order for the security creditor to be able to enforce the security against third parties.

20. Except for a few jurisdictions that dispense altogether with form requirements for all or at least for certain kinds of security interests, such as purchase money, security agreements are in most cases subject to certain form requirements and typically need to be in writing.²⁰ In some legal systems, the security agreement can be oral if the secured party has possession of the collateral. Where a security agreement needs to be done in writing, various additional formalities may be required under the applicable law. Such statutory requirements primarily deal with the form of the contract, but occasionally also with its terms. In most cases, there is no single form requirement for types of security interest, and the law provides for a varying level of formality, according to the amount of the secured claim or the nature of the collateral.

21. In most legal systems, a formal contract, whilst necessary, does not exhaust the legal requirements; it must be supplemented by other means of publication. If the secured party does nothing more than enter into the security agreement with the debtor, that security interest is “unperfected”. An unperfected security interest may be completely valid and enforceable against the debtor, but may not be effective against third parties or may be subordinate to the rights of certain third parties, such as the trustee in a bankruptcy

¹⁹The information provided in this section draws on conclusions reached at an earlier study by the secretariat on security interests (A/CN.9/131, *Yearbook of the United Nations Commission on International Trade Law*, volume VIII: 1977 (United Nations publication Sales No. E.78.V.7), part two, chap. II, sect. A) and in an earlier note by the secretariat on article 9 of the Uniform Commercial Code of the United States of America (*ibid.*, part two, chap. II, sect. B). Although some details of the information contained in those documents may be dated, the review conducted by the secretariat while preparing this note allows the conclusion that the basic principles and concepts set out in those documents are still relevant.

²⁰A/CN.9/131, (*UNCITRAL Yearbook* 1977), p. 180.

proceeding or creditors of the debtor. The ways in which a security interest can be perfected typically depend on the nature of the collateral and the underlying transaction.

1. *Perfection by possession*

22. Transfer of possession used to be (and in some legal systems still is) the main method for perfecting security interests in tangible goods. The secured party usually has possession from the moment the collateral is in its physical possession or in the physical possession of a third person who holds it for the secured party’s account. Perfection by possession serves two important purposes. Firstly, possession by the secured creditor serves as a notice to third parties that the creditor has a security interest in the goods in its possession. Secondly, because no two persons can physically possess the same goods at the same time, perfection by possession effectively avoids the creation of conflicting security interests in the same goods, thus guaranteeing the singularity of the creditor’s security interest.

23. However, perfection by possession poses a serious limitation to the debtor’s ability to trade the goods pledged as security. For this reason, in many legal systems, perfection by possession has been increasingly replaced with other methods, and has become of reduced commercial significance. Nevertheless, even in such legal systems, transfer of possession remains essential for the creation of security interests in respect of negotiable instruments, bills of lading, warehouse receipts and other negotiable documents of title. In each case possession of the paper document creates a security interest in the claim, the rights or the goods represented by that document.

2. *Perfection by registration*

24. Another method for perfecting security interests is registration. Generally, a security agreement that is otherwise in accordance with the appropriate requirements has the effect of giving rise to a legal relationship between the contracting parties even before registration. However, registration, where required, is typically a condition precedent for giving effect to a security interest vis-à-vis third persons.²¹

25. A recent study conducted by the secretariat indicates that “[m]ost new legislation accepts, at some level, the idea of registration of non-possessory security interests as a means of giving publicity” (A/CN.9/475, para. 38). One reason for this preference is that registration facilitates searches by third persons. It also avoids, on the part of the creditor, all doubts about the proper place of registration, and avoids re-filing in case of removal of the debtor’s domicile or the location of the goods.

3. *Other methods*

26. Formalities other than a contract or registration mainly take the form of marking the encumbered goods or of advertising the security interest. Marking of the encumbered goods with the secured creditor’s name is prescribed for certain

²¹*Ibid.*, p. 182.

goods in some jurisdictions either in addition to, or in place of, registration; rarely is it the exclusive method of publication. Much the same way as the registration of security interests, marking of encumbered goods is intended to warn third parties against the existence of security interests; it may also help to prevent unauthorized dispositions by the debtor. In some countries private systems of collecting and publishing information on security interests seem, in effect, to combine registration with advertisement. Indeed, in some countries the registration of security interests is published in private trade journals. Advertisement of security interests may serve as the basis of private registers kept by credit agencies.

CHAPTER II. TRANSFER OR CREATION OF RIGHTS BY ELECTRONIC MEANS OF COMMUNICATION

A. *General legal obstacles*

27. Legal obstacles to the electronic transfer of property rights in tangible goods and intangible property or to the creation of security interests in either type of property may result from form requirements for the validity, effectiveness or proof of the agreements to transfer or create the rights in question. Additional obstacles may relate to difficulties in establishing the functional equivalence between the transfer or creation method in a paper-based environment and its electronic analogues.

1. *Writing, signature and original*

28. All the methods for transferring both property rights in tangible goods and intangible property or for creating security interests in either type of property presuppose at least the agreement of the parties on the transfer of such property or creation of the security interest. That agreement may be subject to specific form requirements either as a condition for the validity of transfer under the substantive applicable law, or pursuant to the applicable rules on evidence. The spectrum of form requirements may range from a written document signed by the parties, which in some jurisdictions may be made by a stamp or mechanical means as well as by hand, to a public deed drawn by a notary public. Intermediate requirements include other formalities, such as a certain number of witnesses or authentication of signatures by a notary public. In some legal systems, a statutory contract form is required.

29. The replacement of paper-based methods for transferring rights in tangible goods, transferring intangible property or creating security interests in tangible goods or intangible property with electronic equivalents presupposes therefore the resolution of the following legal issues: the satisfaction of writing and signing requirements; the evidential value of electronic communications; the determination of the place of contract formation.

30. Among such legal obstacles, those arising from the existence of writing and signature requirements and the probative effect of electronic communications have already been settled in articles 5 to 10 of the UNCITRAL Model Law on Electronic Commerce. Matters pertaining to con-

tract formation in an electronic environment are settled in articles 11 to 15 of the Model Law. Also, issues related to the use of electronic means of identification to meet signature requirements have been addressed in article 7 of the UNCITRAL Model Law on Electronic Commerce and are further dealt with in the draft UNCITRAL Model Law on Electronic Signatures, which is expected to be adopted by the Commission at its thirty-fourth session, in 2001.

2. *Registry functions: authority, liability and privacy issues*

31. In addition to general issues such as those referred to above, the establishment of electronic equivalents to paper-based registration systems raises a number of particular problems. They include the satisfaction of legal requirements on record-keeping, the adequacy of certification and authentication methods, possible need of specific legislative authority to operate electronic registration systems, the allocation of liability for erroneous messages, communication failures, and system breakdowns; the incorporation of general terms and conditions; and the safeguarding of privacy.

32. Possible legal obstacles arising out of legal requirements on record-keeping may be removed by means of legislation implementing the principles set forth in articles 8 and 10 of the UNCITRAL Model Law on Electronic Commerce. The incorporation of terms and conditions is addressed in article 5 bis of the Model Law. However, the Model Law does not address other issues specifically relevant for the functioning of electronic registration systems.

3. *Meeting legal requirements on delivery and symbolic delivery*

33. Where the law requires physical delivery of goods for the purpose of transferring property or perfecting security interests in such goods, a mere exchange of electronic messages between the parties would not be sufficient for effectively transferring property or perfecting security interest, however evident the parties' intention to transfer the property or perfect the security interest might have been. Therefore, even in jurisdictions where the law recognizes the legal value and effectiveness of electronic messages or records, no such message or record could alone effectively transfer property or perfect a security interest without an amendment of the law governing transfer of property or perfection of security interests.

34. The prospects for developing electronic equivalents of acts of transfer or perfection might be more positive where the law has at least in part dispensed with the strict requirement of physical delivery, for instance, by attributing to certain symbolic acts the same effect as the physical delivery of certain goods. One such example may be where the law attributes to the transferee or secured creditor the constructive possession of the goods transferred or pledged by virtue of an act of the parties that confers on the transferee the means for claiming control over the goods. Conceivably, the law could attribute the same effect to the entry of the transfer agreement into a registry system administered by a trusted third party or to an acknowledgement sent by the party in physical possession of the goods that these are held to order of the transferee or the secured creditor.

4. Particular issues concerning documents of title and negotiable instruments

35. As noted in an earlier study by the secretariat,²² surmounting the issues of writing and signature in an electronic context does not solve the issue of negotiability which has been said to be “perhaps the most challenging aspect” of implementing EDI in international trade practices.²³ Rights in goods represented by documents of title are typically conditioned by the physical possession of an original paper document (the bill of lading, warehouse receipt, or other similar document). Analyses of the legal basis for the negotiability of documents of title have indicated that “[t]here is generally no statutory means in place by which commercial parties, through the exchange of electronic messages, can validly transfer legal rights in the same manner possible with paper documents.”²⁴ This conclusion is also essentially valid for rights represented by negotiable instruments. Moreover, “the legal regime of negotiable instruments ... is in essence based on the technique of a *tangible original paper document*, susceptible to immediate visual verification on the spot. In the present state of legislation, negotiability cannot be divorced from the physical possession of the original paper document.”²⁵

36. Thus, it has been said that one challenge in developing law to accommodate electronically transmitted documents of title “is to generate them in such a way that holders who claim due negotiation will feel assured that there is a document of title in existence, that it has no defects upon its face, that the signature, or some substitute therefor is genuine, that it is negotiable, and that there is a means to take control of the electronic document equivalent in law to physical possession.”²⁶

37. The development of electronic equivalents to documents of title and negotiable instruments would therefore require the development of systems by which transactions could actually take place using electronic means of communication. This result could be achieved through a registry system, where transactions would be recorded and managed through a central authority, or through a technical device based on cryptography that ensures the singularity of the relevant data message. In the case of transactions that would have used transferable or quasi-negotiable documents to transfer rights which were intended to be exclusive, either the registry system or the technical device would need to provide a reasonable guarantee as to the singularity and the authenticity of the transmitted data.

²²A/CN.9/WG.IV/WP.69 (*UNCITRAL Yearbook* 1996), part two, chap. II, sect. B).

²³See Jeffrey B. Ritter and Judith Y. Gliniecki, “International Electronic Commerce and Administrative Law: The Need for Harmonized National Reforms”, *Harvard Journal of Law and Technology*, vol. 6 (1993), p. 279.

²⁴Ibid.

²⁵See K. Bernauw, “Current developments concerning the form of bills of lading — Belgium”, *Ocean Bills of Lading: Traditional Forms, Substitutes and EDI Systems*, A.N. Yannopoulos, editor (The Hague, Kluwer Law International, 1995), p. 114.

²⁶Donald B. Pedersen, “Electronic data interchange as documents of title for fungible agricultural commodities”, *Idaho Law Review*, vol. 31 (1995), p. 726.

B. International initiatives on transfer of rights through electronic means

38. The following paragraphs provide an overview of recent initiatives for transferring property rights and other rights through electronic means. This information focuses on a few selected examples and is not intended to be an exhaustive account of current or earlier attempts to develop electronic means for transferring rights.

1. Electronic registration of real estate transactions

39. One of the most significant advantages of electronic records and communications is the potential for reducing the physical storage needs for transaction records, expediting the conclusion of transactions and facilitating searches of title. Although the present note does not cover real estate transactions, this information is provided to illustrate how electronic registration systems may be used for transferring property rights.

40. The Land Registration Reform Act 1990 (Ontario) introduced the automation of the land registration system in the province of Ontario, Canada. The system builds upon the databases previously developed under the Province of Ontario Land Registration Information System (POLARIS). The automated system created a paperless electronic record-keeping system and the capability to remotely access the electronic system in order to obtain, create or amend information within that system. Under the new system, documents intended for registration will be drafted, approved, exchanged and registered electronically. Remote access to the systems, among other services, is provided by Teranet Land Information Services, Inc., a joint venture of the Ministry of Consumer and Commercial Relations of Ontario and a consortium of private companies.

41. Each person using the system needs to obtain from Teranet a personalized floppy diskette containing the user’s encrypted pass phrase. Both must be used in conjunction to access the system. Each user must be registered with the entity maintaining the central registry and must be authorized under a law firm’s or an individual’s account to access the system. Security within the system is maintained by an audit trail of all transactions and the party (identified by the pass phrase used) who performed them. There are essentially four levels of access:

(a) *Create/update*. This function allows a user to view and make changes to a document that has been drafted in the system, prior to registration of the document;

(b) *Complete/approval*. This function allows a user to indicate that the document is in a form acceptable for registration. If the document contains statements as to conclusions of law (as defined in the regulations under the *Land Registration Reform Act*), the *complete* signal will only be accepted from a user who is identified as a lawyer authorized to practise in Ontario;

(c) *Release/registration*. This function allows the user to indicate that the document is being released for registration. The signal to effect the *release/registration* function may be indicated by the person who completed the document or may be delegated to a conveyancer or other

user. Both the *complete* and *release* signals must be affixed to a document before it can be accepted by the system for registration;

(d) *Search*. This function only allows the user to view the document.

42. Transactions through the automated system are governed by a Document Registration Agreement, available to be signed by the parties.²⁷ It should be noted that the Document Registration Agreement only deals with the rights and obligations of the parties in respect of the act of registration and not with the rights and obligations of seller and purchaser under the purchase agreement. Accordingly, section 9 of the standard Document Registration Agreement the purchase contract overrides the Document Registration Agreement in case of conflict. The contents of the electronic document depends on the nature of the transfer and is prescribed in sections 4 to 41 of Electronic Registration Ontario Regulation 19/99.

43. A real estate transaction using the electronic registration system may be described as follows: The seller and purchaser of the land give their respective lawyers, who need to have a registration account with the system,²⁸ permission to act on their behalf by signing standard "Acknowledgement and Direction" documents available through the system. Once both lawyers are able to participate in the system, one of the lawyers is selected as being responsible for registration. The funds and closing documents are sent to the parties who will retain those funds and documents after the transfer. The respective parties' lawyers then hold the funds and documents in escrow. Upon receipt of the funds and closing documents to his or her satisfaction, the lawyer not registering the transfer electronically releases for registration the appropriate electronic documents. Upon receipt of the funds and closing documents to his or her satisfaction, the lawyer registering the transfer electronically registers the appropriate electronic documents.²⁹ All documents must be electronically signed by the intervening lawyers. Once the registration is entered, the system reveals if there are any problems with the transfer, for example the subsearch reveals that some document or instrument has been registered against the title to the property which the purchaser has not agreed to accept. In this case, the lawyer with responsibility to register the transfer notifies the other party's lawyer that he or she cannot proceed with the transfer. If there is no problem with the transfer, the lawyer who has registered the documents notifies the other party's lawyer of the registration particulars. Both lawyers then release the funds and documents from escrow.

44. The Land Registration Reform Act confirms that, under the system, the electronic documents transferring the property are not required to be in writing or to be signed by the parties but have the same effect as a document that is in writing and is signed by the parties.³⁰ If a document is registered in an electronic format and the document exists

in a written form that is not a printed copy of the electronic document, the electronic document prevails over the written form of the document in the event of a conflict.³¹

2. De-materialized securities

45. The system of using de-materialized securities essentially seeks to enable transactions of securities to be conducted and completed electronically using a system of account transfers without any physical exchange of items, such as share certificates and transfer deeds. De-materialization has become an essential feature of modern trade in securities by settlement systems such as Euroclear in Brussels, Cedel in Luxembourg, the Depositary Trust Corporation in the United States, CREST and the Central Gilt Office in London, SICOVAM in France, Monte Titoli in Italy and numerous comparable systems elsewhere, e.g. in Canada, Denmark, Germany, Netherlands, the Republic of Korea and Singapore.

46. These securities systems are designed to reduce the paperwork, expense and risks associated with physical documents, which are replaced with records in electronic form. Besides the basic system of using de-materialized securities as mentioned above, some securities systems also offer an immobilization systems, that is, they retain the physical security in a vault and give the holder de-materialized rights to the security by virtue of the holder being the account-holder.

47. De-materialized securities consist of certain essential components in the form of information stored in a central register at a depositary. These normally include the security's identification code, the name of the issuer of the security, a designation of the issuer's liability arising out of the security, par values and dates. Additional information which may be recorded by the depositary includes rights and restrictions in relation to the securities, such as restrictions on transferability, ban on disposals, third party rights if any, including liens, pre-emptive rights, options to purchase and entitlement to dividends and other yields.

48. Although there are variations between jurisdictions, the key participants in a de-materialized securities system are the depositary (sometimes also referred to as "custodian"), the issuer, trading intermediaries and the investor. The depositary is an organization whose primary function is to maintain an electronic system of accounts in a central registry. This central registry contains a record of the holdings of de-materialized securities and the rights and restrictions arising therefrom, which are held by depositary participants on behalf of investors at any time. Trading intermediaries are normally financial institutions, brokers and other entities authorized to be members of the depositary and who hold accounts with the depositary.

49. Generally, when an issuer of securities desires or is otherwise compelled to de-materialize its securities, the issuer will provide the depositary with the relevant consent to henceforth hold and account for those securities in its central register while the issuer continues to meet all liabilities

²⁷Law Society of Upper Canada, *Practice Directives for Electronic Registration of Real Estate Title Documents*, available at: www.lsuc.on.ca/edraftdirectives_en.shtml

²⁸Electronic Registration (Ontario Regulation 19/99) section 2(2).

²⁹Ibid., section 3.

³⁰*Land Registration Reform Act* (1990), section 20.

³¹Ibid., section 21.

towards the holders of their securities. The issuer will also provide the depositary with all relevant information, which includes the essential components of a de-materialized security and the names of the beneficiaries of each security, as well as fulfil any other requisite pre-conditions.

50. Apart from maintaining the central registry and any immobilization of securities, the depositary may also undertake the function of clearing and settlement where this is not undertaken by another organization. Clearing refers specifically to the processing of a trade and establishing what the investors owe each other as a result of that trade. Settlement refers to the transfer of value between the investors so as to complete the transaction. If a separate organization is used for clearing and settlement, the role of the depositary is limited to the maintenance of the central register of information. In the United States, for example, a separate organization known as the “National Securities Clearing Corporation” has been set up to undertake this function.

51. In any securities transaction, investors who trade in de-materialized securities through their trading intermediaries will do so in a recognized securities market such as the stock exchange. Details of these transactions on any given day will normally be transmitted automatically to the depositary for clearing and settlement and, if not, trading intermediaries will inform the depositary on their own accord. Once details of these transactions are transmitted to the depositary, the clearing and settlement process begins and trading intermediaries will begin to deal directly with the depositary.

52. The clearing and settlement process is normally based on a delivery versus payment principle to be settled on a specified number of days after the trading day. In some jurisdictions, settlement may take place on the third day, in others on the fifth day after the trading day (“settlement day”). This implies that, on the third or fifth day, payments will have to be made by the buying investors and securities will have to be transferred from the selling investors to the buyers while the end result is reflected in the central register.

53. In the interim period prior to settlement day, the depositary will transmit computerized reports to all trading intermediaries. These reports are legally binding documents containing every buy and sell order made on the day of trading reported by the securities market and the trading intermediary. The purpose of this is to allow the depositary participants to confirm and make corrections. The depositary will then proceed to process the net securities being traded by multiple trading intermediaries and the net amounts due by each trading intermediary, or rather the balance of securities and payments due or owed by each trading intermediary on behalf of their respective investors. This net settlement information is also transmitted to the trading intermediaries.

54. The transmission of instructions and information during the clearing and settlement process is conducted through various secure communication networks such as S.W.I.F.T. or Cedcom. These instructions may be checked against validation rules such as the International Securities Identification Number (ISIN) to ensure its accuracy. ISIN is a code that uniquely identifies a specific securities issue.

The organization that allocates ISINs in any particular country is the National Numbering Agency (NNA), which is typically a recognized stock exchange.

55. On settlement day, the depositary causes the accounts of each trading intermediary to reflect the net settlement of securities by re-allocating securities from the accounts of the net sellers to the net buyers by electronic means. Trading intermediaries also meet the net financial obligations of each investor by wiring funds between designated settling banks. The intended transfer of de-materialized securities is completed when the latest securities holding information is entered into the central register at the depositary but the transfer of ownership is recognized as of the date of the transaction.

56. A study on issues of cross-border securities settlements prepared by the Bank for International Settlements in 1995³² points out that there are considerable differences among countries with regard to the legal framework applying to the ownership, transfer and pledging of securities. The legal framework for multi-tiered systems falls into one of two general types: one applies the conventional legal framework for securities to book-entry systems by presuming the existence of physical securities; the other builds a new legal framework for “de-materialized” securities that are issued solely in electronic form. The first type of arrangement relies on a legal fiction to fit book-entry securities into a paper-based legal theory. The law pretends that the securities exist in physical form. Ownership rights and the transfer and pledging of book-entry securities are then explained in terms of “possession” and “delivery” through the mechanisms of immobilization or global certificates, in which physical securities are deemed to be deposited and kept in fungible (interchangeable) form. An investor shown on the books of the intermediary is regarded as having “physical possession” of the respective securities and, as a consequence, acquires a “property interest” in them. The completion of book entries is deemed to have the same effect as physical delivery of the relevant securities.

57. A legal arrangement created for entirely de-materialized securities, in turn, may take one of several approaches. The fungible nature of book-entry securities may be explicitly recognized, leading to a new characterization of the investor’s property interest. The investor may be treated as a co-owner of all the securities of the type it has purchased that are held by the intermediary. The investor then retains a specific property interest in the securities but can only claim it on a proportional basis. However, where a different model is used, the legal arrangement may instead deprive the investor of its property interest in the securities and place it in a debtor/creditor relationship with the intermediary. In that case, the deposit of securities becomes analogous to a bank deposit with special characteristics. In such an arrangement, the investor’s interest may be further refined. The investor’s claim may be secured with the specific assets held for the investor serving as collateral for the claim. Alternatively, the investor may become part of a preferred class of creditors, with a claim that is secured generally by all securities held by the intermediary for customers.

³²Cross-border Securities Settlement (Bank for International Settlements, March 1995), p. 50.

58. The expanding trade in de-materialized securities has raised various questions regarding the nature of the securities and the relationships between the parties involved. In some instances, the new medium has led to a redefinition of legal concepts traditionally applied in securities transactions, including, in some cases by legislative action. A study conducted by the French National Council of Credit and Securities³³ has identified the following main issues, and the answers, as appropriate, that have been given to them in practice:

(a) *Legal nature of securities.* Investment securities issued in paper form had traditionally been regarded as corporeal moveable goods that incorporated or represented certain rights (e.g. a credit against the issuing company or shareholder's rights). Without the paper support, it became necessary to reclassify investment securities as intangible property;

(b) *Nature of rights established by a book entry.* As long as investment securities were regarded as tangible property, the rights of the holder in the securities were typically regarded as property rights. That understanding was questioned in the case of de-materialized securities, which often are not individualized, being sometimes not even susceptible of being individualized;

(c) *Effect of book entry.* The introduction of an intermediary between the issuer of the securities and their holder has raised the question as to whether the record of issuance or transfer of the securities in the depository's accounts (book entry) was simply a means of evidencing the rights of the holder or whether it was constitutive of such rights;

(d) *Nature of contract between depository and investor.* As long as investment securities were represented by paper documents, it had been held that the relationship between the holder and the depository of the certificates was assimilated to the relationship between a bailor and a bailee. The absence of a tangible instrument capable of being physically or constructively possessed by either party has given rise to doubts as to the nature of the contract between depository and investors and the extent of the latter's remedies in case of breach by the depository.

59. The aforementioned study by the Bank for International Settlements³⁴ indicates that market participants have made considerable efforts to simplify the flow of securities across borders through the development of global custody networks, international central securities depositories (ICSDs) and links between national central securities depositories (CSDs). The availability of book-entry settlements makes it possible for settlement systems, CSDs and custodians to offer comparable settlement services in a wide range of national markets. However, the comparability of settlement services masks important distinctions between the legal frameworks that may be applied to the same securities in different countries. That study has identified a number of important legal issues that arise in

connection with cross-border securities settlements.³⁵ The main issues of direct relevance for the purposes of this note are briefly summarized below:

(a) *Involvement of intermediaries.* Most securities transactions involve multiple intermediaries for the settlement and custody of securities, which are interposed between the issuer of a security and the ultimate investor. The involvement of each of these intermediaries creates new legal relationships and risks. The intermediaries may become insolvent, act negligently or commit fraud. The issuer seeks discharge of its obligations, but risks performing to the wrong party. The investor risks diversion of the issuer's performance to creditors of one of the many intermediaries involved along the way;

(b) *Accounting practices.* The accounting practices and safekeeping procedures employed by the custodian and sub-custodians may be the most important factors in determining the investor's risk of loss. Separation (segregation) of the investor's assets from the assets of the custodian and other investors is often the key to protecting the investor's interests. This separation can be accomplished in a number of ways. Traditionally, segregation involved the physical separation of securities certificates in the custodian's vault. However, the prevalence of book-entry securities and immobilized global certificates has increased reliance on accounting entries to identify and separate customer interests. There is a risk that custodians and sub-custodians, although making appropriate debits and credits to the investor's accounts, may not have sufficient securities to support the total number of accounting entries they make. Shortfalls in custodial holdings may develop for a number of reasons: inefficiencies in the settlement process, poor accounting controls, or intentional fraud. If the custodian is solvent, the risk of loss from direct acts of the custodian may be small. If, however, the custodian is insolvent, or the shortfall arises from fraud or insolvency on the part of a sub-custodian or depository, the investor's risk of loss may be severe;

(c) *Legal nature of securities.* The wide variation among countries in their legal treatment of securities raises significant issues for cross-border securities transactions. For example, de-materialized securities issued in one country may be handled in the book-entry system of a second country that relies on an immobilization scheme and the legal fiction of possession. In that case, it may be unclear whether the de-materialized securities qualify as securities in the second country. If they do not, the transferee of the de-materialized security may acquire a legal interest, which is significantly different from the one it expected. The question of a security's status under the law becomes critical if an intermediary becomes insolvent. Further difficulties arise in connection with depository receipts. These are instruments that are issued in one country to establish entitlement to a security held in custody in another country. Depository receipts are then traded and settled in the domestic market in place of the foreign securities that they represent. However, the legal status of these "quasi-securities" is not always clear. For example, a depository receipt may not entitle the investor to make a claim on the issuer of the original securities; it may only symbolize a claim on

³³Conseil National du Crédit et du Titre, *Problèmes juridiques liés à la dématérialisation des moyens de paiement et des titres* (Paris, Banque de France, 1997), p. 122.

³⁴Cross-border Securities Settlement (Bank for International Settlements, March 1995), p. 46.

³⁵*Ibid.*, p. 47-57.

the intermediary or serve as evidence of a debtor/creditor relationship between the intermediary and the investor. Moreover, it is not clear what happens to depositary receipts if the underlying securities are invalid, or if depositary receipts are over-issued relative to the amount of the underlying securities.

60. In addition to the issues mentioned above, the study of the Bank for International Settlements discusses a number of other problems in connection with cross-border securities settlements, including systemic risks, conflict-of-laws problems, difficulties in establishing finality of delivery and payment and problems related to the bankruptcy of participants in the system. Although these problems are not specifically related to or caused by the use of electronic records or messages, they are aggravated by the complexities of de-materialization.

3. *Electronic warehouse receipts*

61. Another recent experience with electronic substitutes for paper-based instruments was the introduction of electronic warehouse receipts in some jurisdictions within the United States. Producers of agricultural commodities in the United States usually store their product in public warehouses. Warehousing of agricultural commodities in most cases involves a grain dealer who trades in the same stored commodities in the ordinary course of business.

62. Public warehouses typically operate under licences issued by the United States Department of Agriculture under the United States Warehouse Act, or by a state agency under the pertinent state warehousing licensing law. In 1990, the United States Congress authorized the Secretary of Agriculture to create a central filing system for electronic warehouse receipts for cotton. The system was not made mandatory for federally licensed cotton warehouses, but those warehouses that had the required technology could use the central filing system. In 1992 the Secretary's authorization was broadened so as to include electronic receipts issued by state-licensed warehouses. The electronic warehouse receipt system for cotton began to operate on a commercial basis at the start of the cotton crop year 1995-1996.

63. Electronic warehouse receipts are computer records of the information that is required on a paper-based warehouse receipt. That data record is stored on the disk of a secure computer system operated by a provider that has to be approved by the United States Department of Agriculture, through the Farm Agency Service, as meeting specific operating standards. Electronic warehouse receipts may only be created through an approved provider. Specific regulations governing electronic warehouse receipts are contained in Chapter VII, Part 735, of the United States Code of Federal Regulations.

64. Initially, a warehouse creates a file of receipt records and transmits that file via telephone to the provider's computer system. The records become legal receipts when stored on the computer. The warehouse is the initial holder and can transmit instructions to the provider to make another party the new holder. The provider sends confirmation of these transactions to the sending and to the

receiving holders. An electronic warehouse receipt can have many holders during its existence but can only have one holder at any specific moment. The electronic warehouse receipt comes to an end when a shipper-holder transfers his receipts back to the issuing warehouse (who then becomes the holder) along with instructions regarding shipment of the physical bales. As the warehouse ships the bales, it sends instructions to the provider's computer to cancel the appropriate electronic receipts. Based on these directions from the warehouse, the provider marks the receipt record as cancelled and a legal receipt no longer exists.

65. In accordance with the United States Code of Federal Regulations, § 735.101, electronic warehouse receipts issued thereunder "establish the same rights and obligations with respect to a bale of cotton as a paper receipt." It provides further that with the exception of the requirement that warehouse receipts be issued on paper, all other requirements applicable to paper warehouse receipts shall apply to electronic warehouse receipts.

66. Each receipt record is associated with a party (the "holder") who has access to that receipt record. The identity of the holder must be included as additional information for every electronic warehouse receipt. An electronic warehouse receipt may only designate one holder at any one time. The person identified as the "holder" of an electronic warehouse receipt is entitled to the same rights and privileges as the holder of a paper warehouse receipt. Only the holder of the receipt may transfer the receipt to a new holder. This is accomplished by the holder informing by computer the provider as to who the new holder should be.

67. Holders and licensed warehousemen may authorize any other user of a provider to act on their behalf with respect to their activities with such provider. Such authorization must be contained in a paper document, acknowledged, and retained by the provider.

68. An electronic warehouse receipt may only be issued to replace a paper receipt if the current holder of the warehouse receipt agrees. An electronic warehouse receipt may not be issued for a bale of cotton if another receipt, paper or electronic, on such bale is outstanding. No two warehouse receipts issued by a licensed warehouse may have the same receipt number.

69. Licensed warehousemen may cancel or correct information on the electronic warehouse receipts only when they are the holder of such receipts. Prior to issuing electronic warehouse receipts, each warehouseman shall request and receive from the Service a range of consecutive warehouse receipt numbers, which the warehouseman shall use for the electronic warehouse receipts it issues. If a warehouseman has a contract with a provider, all warehouse receipts issued by the warehouseman shall initially be issued as electronic warehouse receipts.

70. The Code of Federal Regulations, § 735.102, sets forth the provider requirements and standards for applicants. All providers to be approved must have a net worth of at least US\$ 25,000, and maintain two insurance policies; one for "errors and omissions" and another for "fraud and

dishonesty"; each policy with a minimum coverage of US\$ 2 million. Providers are also required to enter into a provider agreement with the Farm Service Agency, which must, *inter alia*, contain provisions on the retention period for records, the liability of the provider and security standards. The Secretary of Agriculture reserves the right to suspend or terminate a provider's agreement for cause at any time.

71. Providers are required to submit to the Secretary of Agriculture an annual audit level financial statement and an electronic data processing audit. The electronic data processing audit must result in an evaluation as to current computer operations, security, and disaster recovery capabilities of the system. The provider has the responsibility for maintaining the integrity of the system. Security devices typically include a series of identification codes and passwords utilized to ensure that only authorized holders have access to their receipts. Providers are required to maintain security copies of the system off-site and to maintain both on-site and off-site record security in case the provider's primary system fails.

72. The new system has also simplified trading on the New York Cotton Exchange (NYCE). Prior to the introduction of electronic warehouse receipts, the traders at NYCE settled their futures contracts by tendering paper-based receipts. The paper receipts had to be sorted by hand and the data manually keypunched into computers, since the document was not designed to be used with a computer card reader. Thus, paper receipts actually had to be physically transported to New York City for delivery among traders. NYCE kept records of when receipts were issued, whether they were tenderable and when they were cancelled. Under the new system, instead of physically moving paper receipts to NYCE, cotton traders use an electronic receipt provider, to deliver so-called "certified receipts" to the Commodity Clearing Corporation, which is the clearing arm of NYCE. The Commodity Clearing Corporation then forwards the receipts to the appropriate party. In order to help track such receipts, NYCE receives both daily and weekly summary reports directly generated by the provider.

73. The provider's electronic receipt system has been adjusted to enable traders to identify those receipt deliveries involving only certified receipts.³⁶ "Certified receipts" represent bales of cotton which already have been classified by one of the Agricultural Marketing Services of the United States Department of Agriculture as meeting the highly specific criteria required for trading in the NYCE. Only such bales are "tenderable" on the NYCE and can be used to close out a futures contract position on the NYCE futures when that cotton contract becomes due. Certified receipts can only be issued by warehouses approved by the New York Cotton Exchange.

74. The experience with electronic warehouse receipts appears to have been highly positive. Since the introduction of the system, it is estimated that about 45 per cent of the cotton crop in the United States has been handled with electronic receipts. One of the first providers of electronic warehouse receipts, a private company established in 1994

by a group of leaders from the warehouse and merchandising segments of the cotton industry, is reported to have handled over 5.7 million receipts—30 percent of the crop—in its first six months of operations.³⁷ Following the successful use of electronic warehouse receipts for the storage and trade in cotton, consideration is being given to extending the system to other agricultural commodities as well. The laws of at least three jurisdictions enable generally the use of electronic warehouse receipts not only for cotton, but also for other agricultural commodities.³⁸

4. *Electronic equivalents of bills of lading: the Bolero project and other developments*

75. During the past few years, many attempts have been made by a number of international organizations, whether intergovernmental or non-governmental, and by various groups of users of electronic communication techniques to reproduce the functions of a traditional paper-based bill of lading in an electronic environment. The following paragraphs focus on the progress made in recent years with the Bolero System.³⁹

76. The initial "Bill of Lading for Europe (Bolero)" pilot project was funded in part by the European Union in the context of its Infosec Program (DGXIII) and in part through commercial partners. It constitutes one of the latest attempts "to replicate the negotiable bill of lading electronically by employing sophisticated electronic security measures." According to the authors of the project, "[i]n handling all additional trade documentation Bolero offers the shipping world the opportunity to have completely paperless systems with attendant cost savings and customer service improvements." The Bolero system became operational in September 1999.

77. The potential users of a Bolero system, including exporters, importers, shipping companies, freight forwarders and banks have allocated central functions to two distinct corporate entities, the Bolero Association and Bolero International Limited:

(a) *Bolero Association*. The Bolero Association is comprised of all users of the Bolero system and is mainly responsible for the ongoing development of the system, including its legal-infrastructure components. The Bolero Association also fosters development of common functional standards and interoperability among Bolero users in cooperation with Bolero International. To ensure that all users are subject to the same set of rules, the Bolero Association acts on behalf of all users in contractually obligating a new user to comply with the system rules. The Bolero Association further determines the eligibility of applicants for enrolment into the Bolero system and is responsible for ensuring compliance with the rules of the system;

³⁷William Zarfoss, "Electronic cotton warehouse receipts increase efficiency", *Cotton Grower* (May 1996).

³⁸Georgia, State Warehouse Act, Title 10, section 4-19; Indiana, Grain Buyers and Warehouse Licensing & Bonding Law, Section 25; South Carolina, State Warehouse System Law and Regulations, section 39-22-80.

³⁹Information on earlier initiatives, such as the Sea Docs experiment and the CMI Rules for Electronic Bills of Lading is provided elsewhere (see A/CN.9/WG.IV, WP.69) (*UNCITRAL Yearbook* 1996), part two, chap. II, sect. B).

³⁶J.T. Smith, "Electronic cotton receipts are making trading efficient", 10 January 1998 (at <http://www.texnews.com/1998/biz/jt0110.html>).

(b) *Bolero International*. Bolero International operates the central technological components of the Bolero System such as the messaging system, the transaction centre for electronic bills of lading, user and system administration tools, and other similar functions. Bolero International carries out most of the work of fostering new enrolments and informing prospective users about the Bolero system. All transactions in the Bolero system pass through a common gateway operated by Bolero International, which ensures that all participants are subject to the system-wide rules and that all transactions meet minimum agreed requirements regarding security and interoperability.

78. The Bolero system is based on international standards such as X.400 telecommunications standard, X.500 Directory standard and EDIFACT messaging and also the CMI Rules for electronic bills of lading. The Bolero system relies on a store-and-forward messaging system, with users communicating with each other through a central registry application with standard EDI messages. The Bolero system is a closed system in that only subscribers are permitted to use it.

79. Users of the Bolero system are required to accept the terms of the Bolero Rulebook. Appended to the Rulebook are the Operating Procedures, which is a detailed description of Bolero system operations with a few specific and technical rules to ensure that the technology and legal infrastructure mesh together without gaps or inconsistencies. Operational Service Contracts provide for the services that Bolero International supplies, as well as for system security, information dissemination and retention, and similar rights and duties involved in a central information service. A service contract governs the rights and obligations of the Bolero Association and its members and participants.⁴⁰

80. One of the key components of the Bolero system is a registry for Bolero Bills of Lading (BBLs), which will store data on behalf of the users of the Bolero system. A Bolero Bill of Lading is designed to replicate the essential business functions of a bill of lading via fast, efficient electronic messaging tracked in a central database operated by a trustworthy third party. A Bolero Bill of Lading consists of two components, both of which are entirely electronic:

(a) *Bolero Bill of Lading*. The Bolero Bill of Lading is a document in electronic form similar to a conventional bill of lading as issued by a carrier to a shipper. This document may be clausal or clean, indicate receipt on board or for shipment, and so on, in accordance with usual maritime practices. It can incorporate the carrier's general terms and conditions by reference;

(b) *Title Registry Record*. The Title Registry is a register of holders of rights under the Bolero Bill of Lading, not of legal title of the cargo. Accordingly, the registry holds a record for each consignment, which is updated when secure instruction messages are received from the holders of rights to the consignments. In addition to providing the mechanism for exchanging information in the form of electronic data, the registry records the details of Bolero

Bills of Lading and is intended to permit the transfer of rights over goods in transit. The Registry is a passive store of the electronic data and only the holder of the rights is able to transfer those rights to another user. The Registry authenticates the identity of the originator of the data and the holder of the rights and provides a security structure to prohibit interference with the data. The Title Registry Record carries out transactions involving the Bolero Bill of Lading after it is created. The Bolero Bill of Lading may be transferred by changing the roles that users have in the Title Registry Record. Users also surrender the Bolero Bill of Lading or switch it to paper through entries in the Title Registry Record.

81. The legal relationships among all parties involved are set forth in the Bolero Rulebook,⁴¹ which deals, inter alia, with the validity of electronic transactions and the legal effect of Bolero Bills of Lading. The Bolero Rulebook establishes security procedures to ensure that the entitlements were generated, authenticated and transferred only by the authorized holder. For instance, section 2.2.1 of the Rulebook requires all users of the Bolero system to digitally sign their messages, which is done by using private keys duly certified for use within the system. By adhering to the terms of the Rulebook, Bolero users agree to accept the evidential admissibility of electronic data and messages and are estopped from repudiating Bolero messages they send. The Rulebook makes it possible to incorporate, directly or by reference, the provisions of underlying contracts, notably the carriage contract and the letters of credit, so as to bind parties who are liable and to benefit those intended to receive the rights.

82. A Bolero Bill of Lading is designed to replicate the functions of a physical bill of lading as evidence of a contract of carriage, a receipt for the goods, and a document representing the entitlement to possession of the goods. A Bolero Bill of Lading is also intended to offer a means of transferring the contract of carriage. Transfer of the shipper's interest in the goods is effected through attornment, that is, the transfer by the bailor of its rights in the bailed property. As bailor, the shipper is held to have "constructive possession" of the goods. For that transfer, the current constructive possessor attorns its interest in the bailed goods to a successor. Section 3.4.1(1) of the Bolero Rulebook provides that the transfer of constructive possession of the goods, after the creation of a transferable Bolero Bill of Lading, shall be effected by the designation of a new holder (either as a new "holder-to-order", "pledgee holder", "bearer holder", or "consignee holder"). The designation of a new holder becomes effective, as provided in section 3.4.1(2), by means of an acknowledgement, by the carrier, that from that time on it holds the goods described in the Bolero Bill of Lading to the order of such new holder. It is envisaged that transfer of the contract of carriage evidenced by a Bolero Bill of Lading is achieved through novation. Each carrier in the Bolero system appoints Bolero International to act as its agent, and Bolero International re-makes each contract of carriage on behalf of the carrier with each new transferee.

⁴⁰The documents mentioned are online at http://www.bolero.net/enrol/dow_docs.php3 and http://www.boleroassociation.org/dow_docs.htm.

⁴¹<http://www.boleroassociation.org/downloads/rulebook1.pdf>.

83. Thus, an example of a sale of goods financed with a documentary credit using the Bolero system may be as follows: Upon receipt of the cargo from the seller, the carrier creates a Bolero Bill of Lading and designates the seller as the “shipper and holder” of the Bolero Bill of Lading and the importer as the “to order party”. The seller sends a message to the registry designating the confirming bank of the documentary credit as the pledgee holder of the Bolero Bill of Lading and sends on the required documents via digitally signed Bolero messages. The confirming bank examines the Bolero Bill of Lading, finds it in order, credits the seller’s account, and designates a bank that issued the documentary credit as the new pledgee holder. The issuing bank performs any additional checking of the documents that it requires and charges the importer’s account. The issuing bank then relinquishes its pledge and, by message to the registry, designates the importer as the holder of the Bolero Bill of Lading. The importer is already “to order party” for the bill, and now, as holder also, can transfer the bill. On behalf of the carrier, Bolero International notifies the importer that the carrier holds the goods to its order. The importer sells the goods in transit. Accordingly, the importer designates the buyer as the “holder-to-order” (i.e. both holder and “to order party”) of the Bolero Bill of Lading. On behalf of the carrier, Bolero International notifies the holder-to-order that the carrier holds the goods to its order. The goods arrive at the destination port and the buyer surrenders the Bolero Bill of Lading. No further Bolero-based transactions are now possible for the Bolero Bill of Lading. Bolero International gives notice of surrender to the carrier and confirms surrender to the buyer. The buyer’s representative appears at the port with the proof of identification required by the carrier or port. The carrier delivers the goods to the buyer’s representative.

84. The liability of Bolero International Ltd. is subject to the limitations and conditions set forth in the Operational Service Contract, which is entered into between individual users and Bolero International Ltd. Liability in connection with misdirection or loss of messages, delay in sending messages, alteration, incorrect identification, false creation, breach of confidentiality or other errors in connection with messages processed by Bolero International Ltd. is generally subject to a limit of US\$ 100,000 per user per occurrence. The same limit applies to errors and service failures in connection with certificates issued by Bolero International Ltd. However, in the event that all certificates issued by Bolero International become unreliable or unsuitable for usage as stated in their documentary forms, and, as a direct result, the user suffers loss, Bolero International undertakes to pay damages to the user up to the limit of US\$1 million. The aggregate limit of loss per calendar year is US\$ 10 million irrespective of the number of claims or of the number of users entitled to claim in any calendar year.

85. The Bolero Rulebook is governed by English law, with a non-exclusive submission to the jurisdiction of the English courts. Where disputes relate solely to breach or non-compliance with the Rulebook, the jurisdiction of the English courts is exclusive. The legal feasibility of the Bolero system is said to have been the subject of an extensive study involving many of the world’s principal trading jurisdictions.⁴²

⁴²Copies of the study report are available from <http://www.bolero.net/downloads/legfeas.pdf>.

86. In addition to the Bolero system, other systems are being developed to provide electronic equivalents to replace paper documentation in international trade transactions. One such system is the Trade and Settlement EDI (TEDI) system, which is led by a project consortium composed of industrial, financial and commercial transnational corporations from Japan that are active in international trade transactions. According to the information available to the secretariat, TEDI is a web-based system that allows participants to communicate and exchange data messages relevant to trade transactions through the Internet. Similar to the Bolero system, TEDI contemplates the existence of third-party service providers that maintains records of data messages transmitted through the system and maintains records of the status of cargo shipments to which those messages pertain. Data messages exchanged among participants in the TEDI system are intended to reproduce the functions of paper-based bills of lading. In order to ensure security and reliability of the system, data messages are attributed to participants through public key certificates issued by recognized certification authorities.

5. *Attempts to develop an electronic equivalent of negotiable instruments: the United States Uniform Electronic Transactions Act*

87. The Uniform Electronic Transactions Act (1999) was drafted by the National Conference of Commissioners on Uniform State Laws of the United States and approved and recommended by it for enactment in all the states. The Uniform Electronic Transactions Act (UETA) includes a provision on electronic equivalents of negotiable instruments.

88. The rationale for such a provision is explained in the official commentary to UETA as follows:

“Paper negotiable instruments and documents are unique in the fact that a tangible token—a piece of paper—actually embodies intangible rights and obligations. The extreme difficulty of creating a unique electronic token which embodies the singular attributes of a paper negotiable document or instrument dictates that the rules relating to negotiable documents and instruments not be simply amended to allow the use of an electronic record for the requisite paper writing. However, the desirability of establishing rules by which business parties might be able to acquire some of the benefits of negotiability in an electronic environment is recognized by the inclusion of this section on Transferable records.”

89. Section 16, “Transferable records” of UETA establishes the criteria for the legal equivalence of electronic records to notes or records under articles 3 and 7, respectively, of the Uniform Commercial Code. The essential criterion for such equivalence is that the electronic record needs to be of such nature that a person may exercise “control” over the record. Under section 16 acquisition of “control” over an electronic record serves as a substitute for “possession” of an analogous paper negotiable instrument. More precisely, “control” under section 16 serves as the substitute for delivery, endorsement and possession of a negotiable promissory note or negotiable document of title. Section 16(b) allows control to be found so long as “a

system employed for evidencing the transfer of interests in the transferable record reliably establishes [the person claiming control] as the person to whom the transferable record was issued or transferred.” The key point, as indicated in the official commentary, is that “a system, whether involving third party registry or technological safeguards, must be shown to reliably establish the identity of *the* person entitled to payment.”

90. A person is considered to have control of a transferable record “if a system employed for evidencing the transfer of interests in the transferable record reliably establishes that person as the person to whom the transferable record was issued or transferred”. This requirement is further elaborated as follows:

“(c) A system satisfies subsection (b), and a person is deemed to have control of a transferable record, if the transferable record is created, stored, and assigned in such a manner that:

“(1) a single authoritative copy of the transferable record exists which is unique, identifiable, and, except as otherwise provided in paragraphs (4), (5), and (6), unalterable;

“(2) the authoritative copy identifies the person asserting control as the person to which the transferable record was issued; or the authoritative copy indicates that the transferable record has been transferred, the person to which the transferable record was most recently transferred;

“(3) the authoritative copy is communicated to and maintained by the person asserting control or its designated custodian;

“(4) copies or revisions that add or change an identified assignee of the authoritative copy can be made only with the consent of the person asserting control;

“(5) each copy of the authoritative copy and any copy of a copy is readily identifiable as a copy that is not the authoritative copy; and

“(6) any revision of the authoritative copy is readily identifiable as authorized or unauthorized.”

91. A person having control of a transferable record acquires the status of holder of the record, for the purposes of section 1-201(20) of the United States Uniform Commercial Code (UCC), and has the same rights and defences as a holder of an equivalent record or writing under the UCC, including the rights and defences of a holder in due course, a holder to which a negotiable document of title has been duly negotiated, or a purchaser, respectively. Delivery, possession, and endorsement are not required to obtain or exercise any of the rights under this subsection.

92. The definition of transferable record is limited in two significant ways. Firstly, only the equivalent of paper promissory notes and paper documents of title can be created as transferable records. Therefore, section 16 of UETA does not impact the systems that relate to the broader payments mechanisms related, for example, to cheques. The official commentary explains the rationale for the limitation as follows: “[i]mpacting the check collection system by allowing for “electronic checks” has ramifications well beyond the ability of this Act to address. Accordingly, this Act excludes

from its scope transactions governed by UCC Articles 3 and 4.” Secondly, not only is section 16 limited to electronic records which would qualify as negotiable promissory notes or documents if they were in writing, but the issuer of the electronic record must expressly agree that the electronic record is to be considered a transferable record. The purpose of such a restriction is to ensure that transferable records can only be created at the time of issuance by the obligor. The possibility that a paper note might be converted to an electronic record and then intentionally destroyed, and the effect of such action, was not intended to be covered by section 16.

93. The official commentary suggests that control requirements may be satisfied through the use of a trusted third-party registry system, but “a technological system which met such exacting standards would also be permitted under section 16.”

94. According to the official commentary, section 16 “provides legal support for the creation, transferability and enforceability of electronic note and document equivalents, as against the issuer/obligor.” The certainty created by the section provides “the requisite incentive for industry to develop the systems and processes, which involve significant expenditures of time and resources, to enable the use of such electronic documents.” Thus far, no existing system appears to fully meet the stringent standards set by UETA section 16. An evaluation of UETA section 16 has come to the following conclusions:

“Meeting those standards will not be an easy task, and will require a carefully designed and supervised set of systems and practices. The key element will be data integrity. Courts evaluating the control of a transferable record may be expected to focus on the systemic protections—e.g. division of labour, complexity of backup systems, activity logs, security of copies stored offsite to verify content—which make it difficult to tamper with the record without detection.”⁴³

CONCLUSIONS

95. As noted earlier, developing electronic equivalents of traditional, mainly paper-based, methods for transferring or creating rights in tangible goods or intangible property may face serious obstacles where the law requires physical delivery of goods or of paper documents for the purpose of transferring property or perfecting security interests in such goods or in the rights represented by the document (see paras. 33-37). The particular problem presented by electronic commerce is how to provide a guarantee of uniqueness (or singularity) equivalent to possession of a document of title or negotiable instrument.

96. It should be noted that this is not the first time the Working Group considers these issues. In fact, substantive discussion on the matter took place during the preparation of the Model Law on Electronic Commerce.⁴⁴ In an earlier

⁴³R. David Whitaker, “Rules under the Uniform Electronic Transactions Act for an Electronic Equivalent to a Negotiable Promissory Note”, *The Business Lawyer*, vol. 55 (November 1999), p. 449.

⁴⁴See, in particular, A/CN.9/421(UNCITRAL Yearbook 1996), part two, chap. II, sect. A).

note by the secretariat conveying a proposal by the United Kingdom of Great Britain and Northern Ireland⁴⁵ it was pointed out that modern technology makes it possible to transmit information in electronic form satisfactorily down a chain of parties. The same process could conceivably be used by any of the parties to transmit the information that it renounces its title in favour of another person, thus amounting to an endorsement of the instrument. However, if a person is to receive an exclusive benefit, such as possessory title, by receiving a particular electronic message, the addressee will need to be satisfied that no identical message could have been sent to any other person by any preceding party in the chain, creating the possibility of other claimants to the title. It is true that no electronic message can be actually the very same message as another; but so long as it is technically possible for a message, with no possibility of detection, to be replicated exactly and sent to someone else, there could be no guarantee of singularity.

97. That note acknowledged that techniques, such as those based on a combination of time-stamping and other security techniques, had come close to proving a technical solution to the problem of singularity. But until an entirely satisfactory solution was found, electronic equivalents of paper-based negotiability had to rely on "central registry" systems, in which a central entity managed the transfer of title from one party to the next.⁴⁶

98. The Working Group may wish to consider the desirability of developing harmonized rules to support the development of electronic registry systems, which, in the absence of a technical solution guaranteeing the singularity of data messages, are a common feature of all recent initiatives for developments for transferring property rights and other rights through electronic means (see paras. 39-94). Such registry systems may be divided into three main categories, as pointed out in an earlier note by the secretariat conveying proposals for future work by the United States of America:⁴⁷

(a) *Governmental registries.* An agency of the state records transfers as public records, and may authenticate or certify such transfers, as in the case of the electronic registration of real estate in Canada. For public policy reasons, the state is usually not liable for any errors, and the cost is borne through user fees;

(b) *Central registries.* Central registries are established where a commercial group conducts its transactions over a private network (such as SWIFT), accessible only to its members. This type of registry, which has been used for the various securities settlement systems, has been found necessary where security and speed are critical. Its limited access permits party verification to be done quickly thereby facilitating speed and enhancing security. Access to the actual records of the transactions is usually limited to the users, but summaries of the transactions can be reported publicly in summary form (as in securities trading). The rules of the network usually govern the liabilities and costs.

⁴⁵A/CN.9/WG.IV/WP.66 (UNCITRAL Yearbook 1995), part two, chap. II, sect. D, No. 3), annex II, para. 8.

⁴⁶Ibid., para. 10.

⁴⁷A/CN.9/WG.IV/WP.67 (UNCITRAL Yearbook 1995), part two, chap. II, sect. D, No. 3), annex.

Depending on the jurisdiction concerned, such rules may be of a contractual nature or may have regulatory character by way of legislative endorsement;

(c) *Private registries.* These registries are conducted over open or semi-open networks, where the issuer of the document, its agent (as in the systems of electronic warehouse receipts in the United States) or a trusted third party (as in the Bolero system) administers the transfer or negotiation process. The records are private, and the costs may be borne by each user. Liability parallels the present practice with paper, in that the administrator is obliged to deliver to the proper party unless excused by another party's error, in which case local law may apply. Such systems may be based exclusively or primarily on contractual arrangements (as in the Bolero system) or be derived from enabling legislation (as in the systems of electronic warehouse receipts in the United States).

99. International experience has shown that these categories of registry are complementary, rather than mutually exclusive. Indeed, different types of transactions may require the development of different registry systems. Therefore, the Working Group may wish to focus on the areas that are more likely to benefit from an internationally harmonized legislative framework, rather than on the type of registry system used.

100. One possible area might include general or asset-specific registries of transfers of title or security interests in international transactions. In that connection, the Working Group may wish to take note of other ongoing projects of the Commission and other organizations. One such project is the draft convention on assignment of receivables in international trade, which envisages, in its annex, the establishment of a registration system for the registration of data about assignments covered by the draft convention. The draft convention is expected to be adopted by the Commission at its thirty-fourth session, in 2001. In addition to the draft convention, the secretariat is currently preparing a study on legal problems in the field of secured credit law, including security interests in investment securities, and the possible solutions for consideration by the Commission at its thirty-fourth session, in 2001. Pursuant to a suggestion made at the Commission's thirty-third session, in 2000, that study might consider issues related to the establishment of an international register of security rights.⁴⁸ Another initiative that the Working Group may wish to take into account, is the draft convention on international interests in mobile equipment currently being prepared by the International Institute for the Unification of Private Law (Unidroit) ("the draft Unidroit Convention") and other organizations.⁴⁹ The draft Unidroit Convention and the protocols thereto deal in an industry-specific way with remedies upon default of the debtor and introduce a priority regime based on international, equipment-specific registries. The Working Group may wish to await the outcome of those ongoing projects in order to evaluate better the need for specific rules dealing with electronic registries that might cover secured transactions.

⁴⁸Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 17 (A/55/17), para. 462.

⁴⁹A summary of the work done thus far by Unidroit, and the latest English and French versions of the draft Convention and Protocols thereto are available on <http://www.unidroit.org/english/internationalinterests/main.htm>.

101. Another possible area of work relates to registry systems for securities transactions. The analysis of the legal issues that arise in connection with cross-border transactions in de-materialized securities (see paras. 58 and 59) indicates that the functioning of central registries might benefit from the development of an internationally harmonized legislative framework. However, most of the legal problems that have thus far been identified in connection with de-materialized securities are not primarily a function of the use of electronic messages, as they are closely related to conflicts of law or to substantive law issues regarding, for instance, the legal nature of de-materialized securities or the rights and obligations of the various categories of intermediaries. In this connection, the Working Group may wish to consider the following:

(a) *Conflict-of-laws issues.* The Working Group may wish to note that the Special Commission on General Affairs and Policy of the Hague Conference on Private International Law, which met from 8 to 12 May 2000 in The Hague, recommended, inter alia, that “the question of the law applicable to the taking of securities as collateral” be included, with priority, in the Conference’s agenda for future work.⁵⁰ Following that recommendation, the Secretary General of the Hague Conference has convened a group of experts to meet from 15 to 19 January 2001 in order to examine the possibility of preparing and adopting, through a “fast-track” procedure, a new instrument dealing in particular with the issue of the law applicable to the proprietary aspects of collateral transactions effected through indirect holding systems.⁵¹

(b) *Substantive law issues.* Pursuant to a request by the Commission,⁵² the secretariat is currently preparing a study on legal problems in the field of secured credit law, including security interests in investment securities, and the possible solutions for consideration by the Commission at its thirty-fourth session, in 2001. Issues more specifically related to the use of electronic means of communication (such as conditions for cross-border recognition of records; standards of trustworthiness of registry keepers and certification services providers; and liability) are inseparable from policy concerns on matters such as capital market regulation, inter-bank settlements and monetary policy. The Working Group may thus wish to consider whether such a wide range of issues may be accommodated within the mandate that it has received from the Commission.

⁵⁰See the *Conclusions of the Special Commission of May 2000 on General Affairs and Policy of the Conference*, prepared by the Permanent Bureau of the Hague Conference, Preliminary Document No 10 of June 2000, for the attention of the Nineteenth Session, pp. 25-26 and 27; these Conclusions are available on the website of the Hague Conference (<http://www.hcch.net>) under the heading *Work in progress*. See also annex VI to the Conclusions, reproducing Working Document No. 1 which introduced the joint proposal made by the experts of Australia, the United Kingdom and the United States for the Hague Conference to develop a “short multilateral Convention clarifying applicable law rules for securities held through intermediaries” (p. 1 of annex VI).

⁵¹Hague Conference on Private International Law, *Report on the Law Applicable to Dispositions of Securities Held Through Indirect Holding Systems*, prepared by Christophe Bernasconi (Prel. Doc. No. 1 of November 2000 for the attention of the Working Group of January 2001), p. 61 (available from <http://www.hcch.net/e/workprog/securities.html>).

⁵²*Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 17 (A/55/17)*, para. 463.

102. A third area for possible work relates to registry systems established to administer the transfer and registration process of documents of title such as warehouse receipts and bills of lading. The review of international practice has indicated a preference for the use of private registries in those cases. It is conceivable that similar systems might be developed for negotiable instruments, which is anticipated by section 16 of the Uniform Electronic Transactions Act of the United States. Transfer of title to tangible goods, or creation of security interests in tangible goods often requires transfer of physical or symbolic possession of such goods (see paras. 15-18 and 22 and 23). The development of documents that represent such goods has greatly facilitated the movement of goods in international trade. That result was legally possible by legislative recognition of the function of transport and warehousing documents as substitutes for physical delivery of the goods. A similar conclusion may be reached in connection with the function of the endorsement of negotiable instruments such as letters of exchange and promissory notes. Systems whereby title to goods and receivables might be transferred by means of electronic messages, without creation and circulation of paper documents, might result in significant savings in the overall cost of trade transactions. To a large extent, practical solutions may be crafted by contractual arrangements binding upon the users of any such systems. However, voluntary rules, upon which some systems may be based, “give way when they conflict with a State’s laws”⁵³ and may not be enforceable against or binding upon third parties.

103. The Working Group may therefore wish to consider the extent to which voluntary systems by which parties to commercial transactions agree to use the services of a trusted third party to administer the transfer or negotiation process in respect of tangible goods and other rights might be supported by, or benefit from, the development of internationally harmonized legislative provisions.

104. Initial steps towards an internationally harmonized regime for electronic equivalents of paper-based documents of title were made with articles 16 and 17 of the Model Law on Electronic Commerce. Article 16 of the Model Law identifies key actions in connection with a transport of carriage of goods that might be performed by the transmission of electronic messages. Article 17, paragraph (3), of the Model Law lays down the essential requirements for the use of electronic messages as a substitute for paper documents in connection with the grant of rights or acquisition of obligations under a contract of carriage of goods. Consistent with the principle of technological neutrality, paragraph (3) does not require the use of any specific method or system for transferring rights by means of data messages, “provided that a reliable method is used to render such data message or messages unique.”

105. “Creating a unique electronic document is challenging,” as indicated in the annotations to part 3 of the Uniform Electronic Commerce Act, which was adopted in

⁵³A/CN.9/WG.IV/WP.67 (*UNCITRAL Yearbook* 1995), part two, chap. II, sect. D, No. 3), annex.

1999 by the Uniform Law Conference of Canada.⁵⁴ This difficulty, and the relatively limited experience with the technical solutions thus far developed, may explain why, with the exception of Canada and Colombia, most jurisdictions that have so far enacted the Model Law on Electronic Commerce have chosen not to adopt provisions modelled after its articles 16 and 17. The Working Group may wish to consider the desirability of developing a more detailed set of rules for the implementation of the general principles set forth in these provisions of the Model Law. The Working Group may also wish to focus, at least initially, on issues relating to the functioning of electronic registry systems, which, in the absence of a technical solution guaranteeing the singularity of data messages, are a common feature of all recent initiatives for developments for transferring property rights and other rights through electronic means (see paras. 39-94).

⁵⁴<http://www.law.ualberta.ca/alri/ulc/current/euecafa.htm#3>

106. In that connection, the Working Group may wish to note that the secretariat, in cooperation with the Comité Maritime International (CMI), is currently conducting a broad investigation of legal issues arising out of gaps left by existing national laws and international conventions in the area of the international carriage of goods by sea (a summary of that work is contained in A/CN.9/476). Those issues include questions such as the functioning of bills of lading and seaway bills, the relation of those transport documents to the rights and obligations between the seller and the buyer of the goods and the legal position of the entities that provided financing to a party to the contract of carriage. A report on the progress of that project since the thirty-third session of the Commission will be presented by the secretariat at the next session of the Commission (Vienna, 25 June-13 July 2001). The Working Group may wish to consider possible common and complementary elements between its mandate and that other ongoing project.

**G. Working paper submitted to the Working Group on Electronic Commerce at its thirty-eighth session: legal aspects of electronic commerce: possible future work in the field of electronic contracting: an analysis of the United Nations Convention on Contracts for the International Sale of Goods: note by the secretariat
(A/CN.9/WG.IV/WP.91) [Original: English]**

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INTRODUCTION

1. At its thirty-third session, in 2000, the Commission held a preliminary exchange of views regarding future work in the field of electronic commerce. Three topics were suggested as indicating possible areas where work by the Commission would be desirable and feasible. The first dealt with electronic contracting, considered from the perspective of the United Nations Convention on Contracts for the International Sale of Goods (hereinafter referred to as “the United Nations Sales Convention” or “the Convention”), which was generally felt to constitute a readily acceptable framework for on-line contracts dealing with the sale of goods. It was pointed out that, for example, additional studies might need to be undertaken to determine the extent to which uniform rules could be extrapolated from the United Nations Sales Convention to govern dealings in services or “virtual goods”, that is, items (such as software) that might be purchased and delivered in cyberspace. It was widely felt that, in undertaking such studies, careful attention would need to be given to the work of other international organizations such as the World Intellectual Property Organization (WIPO) and the World Trade Organization (WTO).

2. The second topic was dispute settlement. It was noted that the Working Group on Arbitration had already begun discussing ways in which current legal instruments of a statutory nature might need to be amended or interpreted to authorize the use of electronic documentation and, in particular, to do away with existing requirements regarding the written form of arbitration agreements. It was generally agreed that further work might be undertaken to determine whether specific rules were needed to facilitate the increased use of on-line dispute settlement mechanisms. In that context, it was suggested that special attention might be given to the ways in which dispute settlement techniques such as arbitration and conciliation might be made available to both commercial parties and consumers. It was widely felt that the increased use of electronic commerce tended to blur the distinction between consumers and commercial parties. However, it was recalled that, in a number of countries, the use of arbitration for the settlement of consumer disputes was restricted for reasons involving public policy considerations and might not easily lend itself to harmonization by international organizations. It was also felt that attention should be paid to the work undertaken in that area by other organizations, such as the International Chamber of Commerce (ICC), the Hague Conference on Private International Law and WIPO, which was heavily involved in dispute settlement regarding domain names on the Internet.

3. The third topic was de-materialization of documents of title, in particular in the transport industry. It was suggested that work might be undertaken to assess the desirability and feasibility of establishing a uniform statutory framework to support the development of contractual schemes currently being set up to replace traditional paper-based bills of lading by electronic messages. It was widely felt that such work should not be restricted to maritime bills of lading, but should also envisage other modes of transportation. In addition, outside the sphere of transport law, such a study might also deal with issues of de-materialized securities. It was pointed out that the work of other international organizations on those topics should also be monitored.

4. After discussion, the Commission welcomed the proposal to undertake studies on the three topics. While no decision as to the scope of future work could be made until further discussion had taken place in the Working Group on Electronic Commerce, the Commission generally agreed that, upon completing its current task, namely, the preparation of draft uniform rules on electronic signatures, the Working Group would be expected, in the context of its general advisory function regarding the issues of electronic commerce, to examine, at its first meeting in 2001, some or all of the above-mentioned topics, as well as any additional topic, with a view to making more specific proposals for future work by the Commission. It was agreed that work to be carried out by the Working Group could involve consideration of several topics in parallel as well as preliminary discussion of the contents of possible uniform rules on certain aspects of the above-mentioned topics.

5. Particular emphasis was placed by the Commission on the need to ensure coordination of work among the various international organizations concerned. In view of the rapid development of electronic commerce, a considerable number of projects with possible impact on electronic commerce were being planned or undertaken. The secretariat was requested to carry out appropriate monitoring and to report to the Commission as to how the function of coordination was fulfilled to avoid duplication of work and ensure harmony in the development of the various projects. The area of electronic commerce was generally regarded as one in which the coordination mandate given to UNCITRAL by the General Assembly could be exercised with particular benefit to the global community and deserved corresponding attention from the Working Group and the secretariat.¹

6. The current note is intended to bring preliminary information to the Working Group regarding issues of electronic contracting. It investigates very tentatively whether electronic contracting requires the development of new legal rules or whether the rules applied to traditional contracts can respond to the need of new communication techniques (either unchanged or with a degree of adaptation to be determined). For that purpose, the note reviews some of the rules set forth by the United Nations Sales Convention, which is widely recognized by academics and practitioners as not only covering one of the main commercial contracts, but also as laying down rules relevant to general contract law (for example, with respect to such issues as the formation of contracts, damages, etc.).

7. The Working Group may wish to use the analysis of the United Nations Sales Convention provided in this note as a basis for its deliberations, bearing in mind that further studies may need to be undertaken regarding existing or draft rules and other instruments designed specifically to harmonize certain aspects of the law governing electronic commerce transactions. As an example of such rules that may require further study, the Uniform Computer Information Transactions Act (UCITA) was developed in the United States of America, since it was felt that the approach of the “sale of goods” transactions embodied in the

¹*Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 17 (A/54/17), paras. 384-388.*

Uniform Commercial Code (UCC) was not adequate to address the way in which technology services and items such as software were being sold. Other attempts at providing uniform rules for electronic commerce such as the draft Uniform Rules and Guidelines for Electronic Trade and Settlement (URETS) and the Model Electronic Sale Contract (both instruments being prepared by the ICC) may also need to be taken into account.

I. INTERNATIONAL AND PERSONAL SPHERE OF APPLICATION OF THE UNITED NATIONS SALES CONVENTION

A. Internationality of the sales transaction

8. As indicated in article 1, the United Nations Sales Convention is applicable only to contracts that are concluded between parties having their place of business in different countries. This "internationality" is "to be disregarded" under article 1(2) "whenever [it] does not appear either from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract". Since electronic commerce tends to blur the distinction between domestic and international transactions, a closer look at the above-mentioned provisions of the Convention becomes necessary.

9. Where the parties to a contract concluded electronically clearly indicate where their relevant place of business is located, that place of business is to be taken into consideration in determining the internationality of the sales transaction. In that situation, electronic contracting hardly differs from the case where the contract is concluded by more traditional means. The same remark applies even in those instances where a party has more than one place of business (an issue dealt with by article 10 of the Convention). Indeed, according to a number of legal writers an indication by a party as to which of several places of business is the relevant one in relation to a specific transaction is an important criterion, if not the most important one, in determining the internationality of a contract under the Convention where a party has multiple places of business. A clear indication of the relevant place of business also avoids any difficulty as to whether the internationality of the transaction was sufficiently disclosed to the parties, as required by article 1(2) for application of the Convention.

10. If the relevant place of business has not been clearly indicated by the parties before or at the time of conclusion of the contract, the question arises as to whether there exist circumstances from which the location of the relevant place of business can be inferred. In this respect, it may be appropriate to consider taking into account the address from which the electronic messages are sent. Where a party uses an address linked to a domain name connected to a specific country (such as addresses ending with ".at" for Austria, ".nz" for New Zealand, etc.), it can be argued that the place of business should be located in that country. Thus, a sales contract concluded between a party using an e-mail address

that designates a specific country and a party using an e-mail address that designates a different country would have to be considered international. Recognizing the legal significance of an e-mail address being linked to a specific country through a domain name would have the advantage of necessarily making the parties aware that the contract may not be a domestic one. Consequently, the application of the United Nations Sales Convention could not be avoided on the grounds that the parties were unaware of the international character of their transaction, a situation considered in article 1(2).

11. The above-mentioned solution locates a party's place of business (where it has not otherwise been indicated or where it cannot be determined otherwise) in the country designated by the e-mail address. That solution would leave open the case where the address does not allow for a similar solution because it does not evidence any link to a particular country, as in those cases where an address is a top level domain such as .com, .net, etc. It could be argued that, in such a case, the contract should always be presumed to be international; this could be justified by the fact that the use of an address which is not linked to any particular country is presumably due to the fact that the party does not want to be located in any specific country or may want to be accessible universally. Such an approach could be combined with article 1(2) of the United Nations Sales Convention, provided it could be presumed that anybody contracting electronically with a party using such an address could not have been unaware of the fact that it was contracting "internationally". While this approach might be consistent with the United Nations Sales Convention, additional rules might be needed to establish such presumptions.

12. Another approach might be used to determine the internationality of an electronically-concluded sales transaction under the Convention. That alternative approach would rely on a definition of the "place of business" for those cases where the contract is concluded electronically. Such a definition should of course not displace the generally-understood meaning of the notion of "place of business" under the Convention, as developed in legal literature in the absence of a definition of "place of business" in the Convention. It should also accommodate the need for each party's place of business to be easily determinable. To that effect, every effort should be made to avoid creating a situation where any given party would be considered as having its place of business in one country when contracting electronically and in another country when contracting by more traditional means.

13. This alternative approach would have the advantage of making applicable to electronically-concluded sales transactions all the rules (on internationality, on multiple places of business (article 10), as well as on party awareness regarding the international character of the transaction) applicable to sales transactions concluded by more traditional means. The Working Group may wish to consider whether further studies should be undertaken regarding the possible contents of a definition of "place of business" for the purposes of electronic commerce transactions. In that context, questions may be raised as to how notions commonly found in legal literature with respect to the place

of business in traditional commerce, such as “stability” or “autonomous character” of the place of business could be transposed in cyberspace. While the Working Group may wish to preserve the “functional equivalence” approach taken in the UNCITRAL Model Law on Electronic Commerce, more innovative legal thinking may also need to be resorted to.

B. Parties to the sales transaction

14. Although the international character of the transaction and thus the applicability of the United Nations Sales Convention depend on where the “parties” have their place of business, the concept of “party” is not defined in the Convention. A question therefore arises as to who is party to a contract. This question, however, is not unique to electronic contracting, since it also arises where the contract is concluded by more traditional means, for instance where a seller avails itself of the collaboration of an intermediary.

15. As the Convention does not deal with the issue of agency,² the applicable domestic law is to be applied when determining who is to be considered a “party” to a contract. Thus, it will be up to the applicable domestic law to decide, for instance, whether the principal or its agent is party to a specific contract. The same solution (applicability of domestic law to the issue of agency) should apply to electronic agents as well.

16. When examining whether the above-mentioned solution is appropriate, it should be borne in mind that the issue of the electronic agent has been discussed by the UNCITRAL Working Group in the context of the preparation of the UNCITRAL Model Law on Electronic Commerce, where it was generally felt that a computer should not become the subject of any right or obligation (see the Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce, para. 35). The person (whether a natural or legal one) on whose behalf a computer is programmed, for example to issue purchase orders, should ultimately be responsible for any message generated by the machine. It was also felt that the parties should, however, subject to the aforementioned principle, have the possibility to freely organize any automated communication scheme. In this respect it may be worth noting that such an automated scheme would not conflict with the Convention, which expressly allows the parties to create their own rules (article 6). The Working Group may wish to explore the possibility of further studying the implications of the operation of a fully automated communication scheme in the context of contract formation.

²See, e.g. OGH, 20 March 1997, *Österreichische Juristenzeitung* 829 (1997)—CLOUT case n. 189; AG Tessin, 12 February 1996, *Schweizerische Zeitschrift für europäisches und internationales Recht* 135 (1996); AG Alsfeld, 12 May 1995, *Neue Juristische Wochenschrift Rechtsprechungs-Report* 120 (1996); KG Berlin, 24 January 1994, *Recht der internationalen Wirtschaft* 683 (1994)—CLOUT case n. 80; LG Hamburg, 26 September 1990, *Praxis des internationalen Privat- und Verfahrensrechts* 400 (1991)—CLOUT case n. 5.

C. Criteria of applicability of the United Nations Sales Convention

17. In order for the Convention to be applicable to an international sales contract, the parties must not only have their place of business in different countries, but these countries must also be Contracting States to the Convention at a given time (article 100) or, where this criterion of applicability set forth in article 1(1)(a) is not met, the rules of private international law of the forum must lead to the law of a Contracting State, as indicated in article 1(1)(b).

18. As far as the first of these criteria of applicability is concerned, it makes no difference whether the contract is concluded electronically or by any other means, since the required feature is that the countries in which the parties have their place of business are Contracting States. Indeed, once the location of the place of business has been determined, it should be easy to establish whether the country in which the place of business is located was, at the time of the conclusion of the contract, a Contracting State. This point further illustrates the importance of a workable definition of “place of business” in an electronic environment.

19. As far as the second criterion of applicability is concerned, the use of electronic means (as opposed to more traditional means of communication) when concluding international sales contracts becomes relevant where the rules of private international law of the forum refer, as a connecting factor, to the place of conclusion of the contract. In this case, the determination of the place of conclusion of the contract may cause difficulties, among others due to the lack of specific rules on this issue. Where, however, the rules of private international law of the forum do refer to connecting factors different from the place of conclusion of the contract, as do for instance the 1994 Inter-American Convention on the Law Applicable to Contractual Obligations and the 1980 Rome Convention on the Law Applicable to Contractual Obligations, the use of electronic means should not lead to problems that are any different from those arising out of the use of more traditional means. In that area, therefore, it does not appear that electronically-concluded contracts should be treated differently from contracts concluded by any other means. The Working Group may wish to envisage the possibility of further investigating the notion of “place of conclusion” of the contract in parallel with the notion of “place of business”.

II. SUBSTANTIVE SPHERE OF APPLICATION

A. Goods

20. The United Nations Sales Convention is solely applicable to contracts for the international sale of “goods”, but the Convention does not include a definition of what is to be considered as “goods”. However, this does not mean that the notion of “good” under the Convention should be interpreted by reference to domestic concepts. As with most concepts in the United Nations Sales Convention (article 7), the concept of “goods” is to be understood “autonomously”, i.e. not in the light of any particular domestic legal system, in order to ensure uniformity.

21. The Convention seems to embody a rather conservative concept of “goods”, as it is considered both in legal writings and case law to apply basically to moveable tangible goods.³ Thus, according to most commentators intangible rights, such as patent rights, trademarks, copyrights, a quota of a limited liability company,⁴ as well as know-how, are not to be considered “goods”. The same is true for immovable property.

22. It is obvious that the above-mentioned interpretation of the concept of “goods” is valid irrespective of whether the sales contract is concluded electronically or otherwise. Thus, there seems to be no need to modify the concept of “goods” as currently understood under the Convention to fit specific needs of electronic contracting. However, the question remains as to whether the Convention does (and, if not, whether it should) cover what is sometimes defined as “virtual goods” and could also fall under a definition of “services”. In this respect it may be helpful to consider how software is dealt with under the Convention both by commentators and courts. According to many legal writers, the sale of software may fall under the Convention’s substantive sphere of application, although software is not a tangible good, to the extent it is not custom-made or, even where it is standard software, to the extent it is not extensively modified to fit the buyer’s particular needs. This view has been justified on the grounds that in this line of cases (not unlike cases where books or disks are sold), the intellectual activity is incorporated in tangible goods. Ultimately, this view would, however, exclude the sale of software from the Convention’s substantive sphere of application whenever it is not incorporated in a tangible good, as in those cases where the software is sent electronically.

23. The view that the sale of software can be covered by the United Nations Sales Convention was recently upheld by several courts as well. In an obiter dictum, a German court of appeal stated that the sale of standard software can be considered a sale of goods, at least where the software is not custom-made.⁵ A German court of first instance reached the same result on a previous occasion.⁶

24. In view of the above-mentioned case law, it is apparent that a clarification of whether the software should be considered as “goods” in the sense of the Convention would be useful in order to ensure uniformity. Should the Convention’s sphere of application be extended to include software, careful consideration should be given to the scope of such an extension. In that respect, a policy decision may be needed as to whether it would be appropriate for the Convention to cover the sale of software only where the software is incorporated in a tangible goods or whether it would be better to have the Convention govern regardless of the manner in which the software is delivered.

³See OLG Köln, 26 August 1994, *Neue Juristische Wochenschrift Rechtsprechungs-Report* 246 (1995)—CLOUT case n. 122.

⁴See Arbitration Court attached to the Hungarian Chamber of Commerce and Industry, 20 December 1993—CLOUT case n. 161.

⁵OLG Köln, 26 August 1994, *Neue Juristische Wochenschrift Rechtsprechungs-Report* 246 (1995)—CLOUT case n. 122.

⁶See also OLG Koblenz, 17 September 1993, *Recht der internationalen Wirtschaft* 934 (1993)—CLOUT case n. 281.

25. Even if software was to be regarded as “goods” in the sense of the Convention, the sale of “custom-made software” would probably have to be excluded from the current sphere of application of the Convention since, according to article 3(2), the Convention “does not apply to contracts in which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services”. The Working Group may wish to consider whether further study should explore the possibility of introducing rules modelled on an extended version of the scope of the United Nations Sales Convention to cover the sale of software or other de-materialized products in cyberspace and the possible ambit of the required extension.

B. Sales contract

26. The issue whether “virtual goods” (which might also be regarded as services) should be included in the notion of “goods” under the Convention is not the only relevant one when one has to decide whether the Convention should cover transactions concerning “virtual goods”. Another notion that is paramount is that of “sales contract”.

27. Although the Convention does not expressly define the sales contract,⁷ a concept of what is to be considered a “sales contract” falling within the Convention’s sphere of application can be inferred from the different rights and obligations of the parties. Thus, the “sales contract” can be (and has been) defined in case law as a contract by virtue of which the seller must deliver the goods, hand over any documents relating to them and transfer the property in the goods sold, whereas the buyer is bound to pay the price for the goods and take delivery of them.

28. Given the above-mentioned contents of the notion of “sales contract”, a question may arise as to whether the transactions in “virtual goods” (or services) do actually fall under that definition. According to some commentators, transactions in these goods do not fall under this definition, since they are in the form of licences, not sales. The differences in these approaches are considerable. A sales contract, for instance, frees the buyer (i.e. “user”) from restrictions as to the use of the product bought and, thus, clearly delineates the boundaries of control that may be exercised by a patent or copyright owner over the use of the product that incorporates the patented or copyrighted work. In contrast, a licence agreement allows the producer or developer of the “virtual good” (or service) to exercise control over the product down through the licensing chain (where sales, as mentioned, would free users from those controls).

29. As a consequence, it becomes apparent that it is not just sufficient to decide whether the United Nations Sales Convention should extend to the “sale” of “virtual goods” (or services), an issue one could solve simply by extending the scope of the Convention. Starting from the various hypotheses of web-based transactions regarding software (or other de-materialized products incorporating intellectual property rights), the Working Group may need to have

⁷See OGH, 10 November 1994, *Österreichische Juristische Blätter* 253 (1995)—CLOUT case n. 106.

preliminary discussion of, at least, the following three sets of issues: (1) If those transactions are to be regarded as contracts for the “sale of goods” (possibly as a result of the establishment of a rule based on a revised version of article 3 of the Convention), do the substantive rules laid down by the Convention accommodate the practical needs of those kinds of transactions? (2) If the Working Group wishes to recommend to the Commission that rules should be laid down for web-based transactions involving directly the sale of services, can those rules be derived from the United Nations Sales Convention? (3) If the recommendation to the Commission were to undertake work with respect to web-based transactions that involve sales and other contracts (e.g. licensing) over goods and services (and any intermediate or additional category that might be created), can the Convention provide any inspiration in designing a set of rules for such a broad spectrum? In that discussion, the Working Group may wish to bear in mind that the ongoing debate within the World Trade Organization (WTO) on the nature of goods, virtual goods or services exchanged in cyberspace.

C. Consumer purpose of the sale

30. According to article 2(a), the United Nations Sales Convention does not apply to sales “of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use”. In respect of this exclusion, the issue of whether contracting is conducted electronically as opposed to contracting by more traditional means does not appear to make any difference. As the case would be in instances where the contract is concluded by more traditional means, the buyer is the only one to know about the purpose of the transaction. Where the buyer informs the seller about its purpose, and this purpose is exclusively a personal, household or domestic one, the Convention is not applicable. However, according to legal literature, where the buyer does not inform the seller of such a purpose, the Convention’s applicability depends on the seller’s possibility of recognizing that purpose. In order to determine whether this possibility exists, just as in cases where the contract is not formed electronically, elements such as the number of items bought, their nature, etc., should be taken into account.

III. FORM

A. General issues

31. Although the Convention does not generally deal with issues of validity, as indicated in article 4(a), it expressly deals with the formal validity of contracts for the international sale of goods. Indeed, article 11 establishes that “a contract for the international sale of goods need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses.” Thus, article 11 establishes the principle that the formation and the evidence of a contract subject to the Convention is free of any form

requirement,⁸ and therefore can be concluded orally, in writing⁹ or in any other way. As a result, exchange of e-mail messages should suffice to form a contract under the United Nations Sales Convention, an opinion to which most legal writers have subscribed.

32. However, freedom of form of the sales contract is subject to the effects of the reservation which the States are allowed to declare according to article 96. Under that provision, “a Contracting State whose legislation requires contracts of sale to be concluded in or evidenced by writing may at any time make a declaration in accordance with article 12 that any provision of article 11, article 29, or part II of this Convention, that allows a contract of sale or its modification or termination by agreement or any offer, acceptance, or other indication of intention to be made in any form other than in writing, does not apply where any party has his place of business in that State.”

33. Some legal writers interpret this provision to mean that whenever one party has its place of business in a State that has made a declaration under article 96, the courts are not allowed to disregard form requirements. According to these writers, courts should take into account the domestic form requirements of the State that made the declaration. Thus, if this view were accepted, this would mean that it would depend on the domestic law of the State that made the declaration whether contracts could be concluded or evidenced by electronic means. Only where that State’s domestic law allows such freedom of form would electronic contracting thus become possible.

34. According to other legal writers, the effects of the article 96 declaration are different, i.e. the reservation would not automatically lead to the application of the domestic law form requirements of the State that made the declaration. Rather, it should be up to the rules of private international law of the forum to determine which law is to be applied to the form issue. Thus, if the rules of private international were to lead to the law of a Contracting State that did not make a declaration, the principle of informality set forth in article 11 would be applicable despite the fact that one party has its place of business in a State that made a reservation under article 96. If the conflict-of-laws rules were to lead to the law of a State that made a declaration, that State’s rules on form requirements would apply.

35. As a result of the above reasoning, there may remain instances where, despite the Convention’s applicability, electronic forms of communication would still be deprived of legal effects. The most effective way to solve this problem would be the withdrawal of the various declarations under article 96, since by doing so one would extend the principle of informality to all contracts for the international sale of goods to which the Convention applies. The Working Group may wish to explore the ways in which Contracting States that have made a declaration under article 96 could be encouraged to withdraw such declarations.

⁸See OGH, 6 February 1996, österreichische Zeitschrift für Rechtsvergleichung 248 (1996)—CLOUT case n. 176

⁹For this statement, see, e.g. OLG München, 8 March 1995—CLOUT case n. 134.

B. Definition of "writing" under article 13

36. Whereas article 11 deals with the issue of form requirements both in respect of how a contract is formed and the form in which a contract for the international sale of goods is to be evidenced, article 13 is a relevant provision for the interpretation of the term "writing". According to that article, "for the purposes of this Convention "writing" includes telegram and telex". Thus, if the parties do not provide otherwise, both telex and telegram will satisfy the writing requirement. According to many authors, article 13 should be applied by analogy to telefax communications as well, on the grounds that it merely constitutes a technical development of telex. Some of the authors who favour this view, argue that messages transferred via computer do not satisfy the writing requirement, fundamentally on the grounds that no hard copy is received. This view is opposed by other authors who state that electronic forms of communication (as the ones covered by the UNCITRAL Model Law on Electronic Commerce) should also be considered "writings" under the United Nations Sales Convention. These authors base their view on the fact that the issue is not expressly settled in the Convention, even though it is governed by it, and that under article 7 it must therefore be settled in conformity with its general principles, namely that of informality which allows for an extensive interpretation of article 13.

37. Even if the Working Group were to agree with the latter view, this would not necessarily lead to a uniform response to the question whether, whenever the Convention is applicable, electronic forms of communication always satisfy the "writing" requirements. There remain divergent views regarding the effects of article 13 in cases where a State that has made a declaration under article 96 excluding the application of article 11. Some commentators hold the view that since no reservation may be made to article 13, that article ensures that, even where the law of a State that has made a declaration is applicable, that State's form requirements are satisfied by telex and telegram, as well as by electronic forms of communication, at least if one holds that article 13 also covers these kind of communications.

38. According to a different view, article 13 has more limited effects, i.e. it only applies to those instances where the Convention itself refers to a "writing" requirement. If one were to adopt this view, one could not be sure that electronic forms of communication would always satisfy the "writing" requirement. If, for instance, the domestic law of a State that made an article 96 declaration regarding article 11 is applicable, the reply depends on whether, under that domestic law, electronic forms of communication are considered "writings". The Working Group may wish to explore whether promotion of the UNCITRAL Model Law on Electronic Commerce might sufficiently address the issue of the definition of "writing" under the Convention (see Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce, para. 5).

IV. SUBSTANTIVE ISSUES

39. The issue whether the United Nations Sales Convention applies to contracts for the international sale of goods concluded electronically must be distinguished from that of whether the rules set forth in the Convention are appropriate for electronic contracting. In the following paragraphs some of the main rules of the Convention are examined in the light of their appropriateness in an electronic context. On that basis, the Working Group may wish to discuss whether the rules of the Convention, in particular those rules that are relevant to contract law in general, can be taken into account in trying to elaborate rules for general application to electronic contracting.

A. Formation of contract: general issues

40. The rules on the formation of contracts set forth by the United Nations Sales Convention, namely articles 14 to 24, are among those rules dealing with an issue which goes beyond sales law and which, therefore, could be used as a model when elaborating rules on electronic contracting.

41. The advantage of the Convention's rules on formation consists in their having demonstrated their workable character in an international environment. This is evidenced, *inter alia*, by the fact that they have been used as models for Unidroit's unification efforts which led to the "Principles of International Commercial Contracts".¹⁰ However, despite the success of the Convention's rules on offer and acceptance, which is due to their ability to transcend the traditional differences in the approaches taken by civil and common law, questions may be asked as to whether they deal exhaustively with all the issues relating to contract formation and, consequently, whether they can be resorted to when drafting general rules on electronic contracting.

42. The rules set forth in the Convention rules have been drafted mainly with a view to dealing with those cases where a contract is formed through offer and acceptance. The fact that those cases do not cover all the ways by which an agreement can be reached, becomes evident if attention is given to the possible complexity of negotiations which may include a great deal of communication between the parties, and which does not necessarily fit within the traditional analysis of offer and acceptance. According to one school of thought, agreements reached without an offer and an acceptance being clearly discernible do not fall within the scope of the Convention scope and should therefore be dealt with by resorting to the applicable domestic law. Under such an approach, it might be impossible to use the body of the Convention's rules on formation of the sales contract as model for an exhaustive body of rules on the formation of electronic contracts.

43. However, according to a majority of commentators, the Convention covers even the agreements reached without resorting to the traditional "offer-acceptance" scheme. The fact that the Convention does not expressly refer to

¹⁰Compare articles 2.1 et seq. of the Unidroit Principles of International Commercial Contracts.

them is not due to their being excluded from the scope of the Convention, but rather to the fact that the drafters did not consider it necessary to address them specifically and to tackle the additional difficulties they might have encountered in trying to devise appropriate wording for those types of agreements. Thus, like any other matter which is governed by (albeit not expressly settled in) the Convention, the issue of whether there is an agreement even without a clear offer and acceptance, has “to be settled in conformity with the general principles on which it is based” under article 7 (1), for example, the principle of a consensual nature of the contract as well as the principle according to which the existence of the contract depends on whether it is possible to discern the minimum contents required for the conclusion of the contract (such as the elements defined in article 14 for the sales contract).

44. Irrespective of which of the two above-mentioned approaches is taken with respect to the United Nations Sales Convention, it is apparent that the elaboration of rules on electronic contracting will have to take into account this lack of express reference in the Convention to the agreements reached in ways other than a discrete offer and acceptance.

B. Formation of contracts: offer and acceptance

45. Article 14 of the Convention lays down the substantive criteria that a declaration has to meet in order to be considered an offer: it has to be addressed to one or more specific persons, it has to be sufficiently definite (in the sense that it must indicate the goods and somehow fix or make provision for determining the quantity and the price) and it must indicate the intention of the offeror to be bound in case of acceptance.¹¹

46. As far as the element of specificity is concerned, it appears to make no difference what form of communication one uses. In respect of this substantive feature of the offer, there are, in other words, no more problems intrinsic to electronic forms of communication than to other forms of communication.

47. This is basically also true in respect of the required intention to be bound which distinguishes an offer from an invitation to make an offer. Generally, advertisements in newspapers, radio and television, catalogues, brochures, price lists, etc., are considered invitations to submit offers (according to some legal writers, even in those cases where they are directed to a specific group of customers), since in these cases the intention to be bound is considered to be lacking. The same interpretation might be extended to websites through which a prospective buyer can buy goods: where a company advertises its goods on the Internet, it should be considered as merely inviting those who access the site to make offers.

48. In order to be considered an offer, a declaration must also be addressed to one or more specific persons. Thus, price circulars sent to an indefinite group of people are

considered not to constitute offers, even where the addressees are individually named. The same general rule can apply as far as electronic messages are concerned: via electronic means it will be even less problematic to address messages to a very large number of specific persons.

49. The above reasoning in respect of the offer and its substantive requirements is *mutatis mutandis* applicable as well in respect of the acceptance.

50. According to the Convention, both the offer and the acceptance (at least in most cases) become effective upon their “receipt”, as defined in article 24, according to which “for the purposes of this Part of the Convention, an offer, declaration of acceptance [. . .] ‘reaches’ the addressee when it is made orally to him or delivered by any other means to him personally, to his place of business or mailing address”.

51. In respect of the traditional forms of communication, such as oral or paper-based communications, the above-mentioned provision does not seem to cause any problems. A question arises, however, about electronic forms of communications, as to whether article 24 can apply without creating problems. That question has probably to be answered affirmatively. The issue is only one of defining the “receipt” of the electronic message. In this respect, recourse may be had to the UNCITRAL Model Law on Electronic Commerce, which states, in article 15(2), when an electronic message is to be considered received. Thus, it can be concluded that the United Nations Sales Convention, in particular article 24, contains a rule that can serve as a general model even in an electronic environment. The Working Group may wish to consider the extent to which the rule should be made more specific to be useful in electronic contracting practice.

52. The same approach may be taken in respect of the “dispatch” theory which (as far as the formation of contracts is concerned) is relevant for instance under article 16(1), which provides that “an offer may be revoked if the revocation reaches the offeree before he has dispatched an acceptance”. The rule may be appropriate even for an electronic context, but it does not seem to be specific enough. Whereas it appears obvious when a paper-based statement is dispatched, there are doubts when an electronic message must be considered as having been sent. In this respect, the UNCITRAL Model Law on Electronic Commerce is once again helpful, since it defines “dispatch” in article 15(1), according to which “dispatch of a data message occurs when it enters an information system outside the control of the originator or of the person who sent the message on behalf of the originator.”

53. There appears to be, however, one instance where problems may arise if electronic messages are compared to more traditional ones, such as telegrams, letters, telex, as the Convention contains one provision which makes a distinction between these forms of communications. Namely, according to article 20(1) “a period of time for acceptance fixed by the offeror in a telegram or a letter begins to run from the moment the telegram is handed in for dispatch or from the date shown on the letter or, if no such date is

¹¹See OGH, 10 November 1994, *Österreichische Juristische Blätter* 253 (1995)—CLOUT case n. 106.

shown, from the date shown on the envelope. A period of time for acceptance fixed by the offeror by telephone, telex or other means of instantaneous communication, begins to run from the moment that the offer reaches the offeree.” Thus, for the purpose of deciding when the time for acceptance begins to run, a decision should be made as to whether the electronic message should be compared to a means of instantaneous communication rather than to a letter or telegram.

C. Effectiveness of communications made according to part III of the United Nations Sales Convention

54. Whereas part II of the Convention is based upon the principle that communications are effective upon receipt,¹² part III is based upon a different principle. By providing that “a delay or error in the transmission of the communication or its failure to arrive does not deprive that party of the right to rely on the communication”, the drafters of the Convention favoured, at least according to most commentators, the “dispatch theory”, since, where the parties did not agree otherwise or where the Convention itself does not provide differently,¹³ the addressee bears the risk of loss, delay or alteration of the message.

¹²For exceptions, see articles 19(2) and 21(1).

¹³See, for instance, articles 47(2), 48(2) and (3).

55. The problem, like in respect of the “receipt theory”, is one of defining “dispatch” for the purposes of electronic contracting; it is not one of appropriateness of the rule in an electronic context. In order to solve this issue, it may be sufficient to refer to the earlier suggestion to have recourse to the definition set forth in article 15(1) of the UNCITRAL Model Law on Electronic Commerce (see above, para. 52).

CONCLUSION

56. It appears that the United Nations Sales Convention is, in general terms, suitable not only to contracts concluded via traditional means, but also to contracts concluded electronically. The rules set forth in the Convention do appear to offer workable solutions in an electronic context as well. Some of the rules, such as those relating to the effectiveness of communications, may need to be adapted to an electronic context.

57. The question of applicability of the Convention to electronically-concluded contracts must be distinguished from the question of whether the Convention also covers the sale of “virtual goods”. As mentioned earlier, the transactions in these kinds of goods (or services) may appear not to be sales, but rather licence agreements. The Working group may wish to discuss whether rules derived from the United Nations Sales Convention should be developed for these kinds of transactions.

H. Working paper submitted to the Working Group on Electronic Commerce at its thirty-eighth session: legal aspects of electronic commerce: proposal by France: note by the secretariat (A/CN.9/WG.IV/WP.93) [Original: English]

Following the publication of document A/CN.9/WG.IV/WP.89, the secretariat received a proposal by the French delegation, the text of which is reproduced in the annex to this note in the form in which it was received by the secretariat.

ANNEX

LEGAL BARRIERS TO THE DEVELOPMENT OF ELECTRONIC COMMERCE IN INTERNATIONAL INSTRUMENTS RELATING TO INTERNATIONAL TRADE: WAYS OF OVERCOMING THEM

Note by France

1. The French delegation wishes to express its appreciation of document A/CN.9/WG.IV/WP.89, which is of high quality, and to make the following observations on the subject that it deals with.

2. Allowance should be made for electronic equivalents, not only with respect to certain specific international treaties currently

in force but also with respect to other instruments. While the aim is to enable the evolution of treaty instruments that have already been concluded, it is also to incorporate electronic equivalents in new treaty instruments concluded in the area of international trade and to facilitate the evolution of non-treaty instruments (models of uniform laws, standard rules, regulations and recommendations of international organizations).

3. As emphasized in document WP.89, adopting a variety of procedures for revising treaty-related instruments is unlikely to prove satisfactory because each revision would depend on the specific procedure provided for in the treaty and the procedure could turn out to be lengthy. Also, the success of the revisions would be very much a matter of chance. The fact that, after renegotiation, the revisions would not necessarily result in a uniform definition of the terms “writing”, “signature” and “document” casts even more doubt on the prospects for success of such a process.

4. It should however be noted that the intended objective is not to interpret, modify or revise earlier agreements; it is far broader in scope, namely to facilitate the use of means of communication other than paper-based documents in international trade.

5. The French delegation is therefore of the opinion that it is advisable to draft a text that is as general as possible and obviates the need for specific revisions instrument by instrument. Furthermore, since the instruments that have already been drawn up are often mandatory in nature (international treaties) what needs to be concluded in this case is again a mandatory instrument. It is therefore necessary to conclude an international treaty. The conclusion of one treaty only is recommended as a sensible solution to prevent the proliferation of competing definitions in different treaties. The definitions contained in the UNCITRAL model law might constitute a basis for negotiation.

6. A new agreement allowing for electronic equivalents of writing, signatures and documents in international trade is not incompatible with earlier treaties on international trade which are based on the conventional media. There is no real contradiction between the law prior to the conclusion of the new agreement and the new agreement introducing electronic equivalents. A clause in the new treaty should indicate this explicitly. Article 30, paragraph 2, of the Vienna Convention on the Law of Treaties of 23 May 1969 indicates that when a treaty specifies that it is not to be considered incompatible with another treaty, the provisions of that other treaty prevail.

7. An agreement that interprets an existing treaty would most probably not achieve the intended objective. It is not a case of negotiating an agreement that would interpret, modify or amend existing treaties, but of concluding a new agreement allowing for electronic equivalents. Including the list of earlier treaties in the new agreement should therefore be avoided. Thus, the will of the States set to be parties to the new agreement will be taken into account, without any implication that the non-participation of other States in the new agreement might be considered a rejection of electronic equivalents.

8. UNCITRAL would certainly be the appropriate framework for elaborating such a document as it has already begun to consider these issues. The simplified procedure would doubtless facilitate the rapid entry into force of the new agreement by simple signature, but States should nevertheless be allowed to abide by their domestic procedures, and the possibility of resorting to other procedures (ratification, acceptance, approval and accession) should not be ruled out at the present juncture. The important thing is for the new agreement to enjoy the broadest level of participation possible.

9. At the time of signature of the agreement, the adoption of a United Nations General Assembly resolution encouraging States to become parties to it would be useful in highlighting the importance of recognizing new means of electronic communication in order to promote international trade. Other organizations might also be enlisted (recommendation of the WTO General Council, OECD recommendation, ICAO recommendation).

10. The increasing number of these legal texts that are binding to varying degrees and the conclusion of a new treaty would very likely help to engender a practice and an *opinio juris* resulting in the emergence of a new customary rule allowing for electronic equivalents in the context of international trade.

I. Draft Model Law on Electronic Signatures: compilation of comments by Governments and international organizations (A/CN.9/492 and Add. 1-3) [Original: English]

A/CN.9/492

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INTRODUCTION

1. The Commission, at its thirtieth session, in 1997, endorsed the conclusions reached by the Working Group on

Electronic Commerce at its thirty-first session with respect to the desirability and feasibility of preparing uniform rules on issues of digital signatures and certification authorities and possibly on related matters (A/CN.9/437, paras. 156 and

157). The Commission entrusted the Working Group with the preparation of uniform rules on the legal issues of digital signatures and certification authorities.¹ The Working Group began the preparation of uniform rules for electronic signatures at its thirty-second session (January 1998) on the basis of a note prepared by the secretariat (A/CN.9/WG.IV/WP.73). At its thirty-first session, in 1998, the Commission had before it the report of the Working Group (A/CN.9/446). The Commission noted that the Working Group, throughout its thirty-first and thirty-second sessions, had experienced manifest difficulties in reaching a common understanding of the new legal issues that had arisen from the increased use of digital and other electronic signatures. However, it was generally felt that the progress achieved so far indicated that the draft uniform rules on electronic signatures were progressively being shaped into a workable structure. The Commission reaffirmed the decision it had taken at its thirtieth session as to the feasibility of preparing such uniform rules and noted with satisfaction that the Working Group had become generally recognized as a particularly important international forum for the exchange of views regarding the legal issues of electronic commerce and for the preparation of solutions to those issues.²

2. The Working Group continued its work at its thirty-third (July 1998) and thirty-fourth (February 1999) sessions on the basis of notes prepared by the secretariat (A/CN.9/WG.IV/WP.76, 79 and 80). At its thirty-second session, in 1999, the Commission had before it the reports of the Working Group on the work of those two sessions (A/CN.9/454 and A/CN.9/457, respectively). While the Commission generally agreed that significant progress had been made in the understanding of the legal issues of electronic signatures, it was also felt that the Working Group had been faced with difficulties in building a consensus as to the legislative policy on which the uniform rules should be based. After discussion, the Commission reaffirmed its earlier decisions as to the feasibility of preparing such uniform rules and expressed its confidence that more progress could be accomplished by the Working Group at its forthcoming sessions. While it did not set a specific time-frame for the Working Group to fulfil its mandate, the Commission urged the Group to proceed expeditiously with the completion of the draft uniform rules. An appeal was made to all delegations to renew their commitment to active participation in the building of a consensus with respect to the scope and content of the draft uniform rules.³

3. The Working Group continued its work at its thirty-fifth (September 1999) and thirty-sixth (February 2000) sessions on the basis of notes prepared by the secretariat (A/CN.9/WG.IV/WP.82 and 84). At its thirty-third session (2000), the Commission had before it the report of the Working Group on the work of those two sessions (A/CN.9/465 and 467, respectively). It was noted that the Working Group, at its thirty-sixth session, had adopted the text of articles 1 and 3 to 12 of the uniform rules. Some issues remained to be clarified as a result of the decision by the Working Group to delete the notion of enhanced elec-

tronic signature from the draft uniform rules. A concern was expressed that, depending on the decisions to be made by the Working Group with respect to articles 2 and 13, the remainder of the draft provisions might need to be re-examined to avoid creating a situation where the standard set by the uniform rules would apply equally to electronic signatures that ensured a high level of security and to low-value certificates that might be used in the context of electronic communications that were not intended to carry significant legal effect.

4. After discussion, the Commission expressed its appreciation for the efforts made by the Working Group and the progress achieved in the preparation of the draft uniform rules on electronic signatures. The Working Group was urged to complete its work with respect to the draft uniform rules at its thirty-seventh session and to review the draft guide to enactment to be prepared by the secretariat.⁴

5. At its thirty-seventh session (September 2000), the Working Group discussed the issues of electronic signatures on the basis of the note prepared by the secretariat (A/CN.9/WG.IV/WP.84) and the draft articles adopted by the Working Group at its thirty-sixth session (A/CN.9/467, annex).

6. After discussing draft articles 2 and 12 (numbered 13 in document A/CN.9/WG.IV/WP.84), and considering consequential changes in other draft articles, the Working Group adopted the substance of the draft articles in the form of the draft United Nations Commission on International Trade Law (UNCITRAL) Model Law on Electronic Signatures. The text of the draft Model Law is annexed to the report of the thirty-seventh session of the Working Group (A/CN.9/483).

7. The Working Group discussed the draft guide to enactment of the draft Model Law on the basis of the notes prepared by the secretariat (A/CN.9/WG.IV/WP.86 and WP.86/Add.1). The secretariat was requested to prepare a revised version of the draft guide reflecting the decisions made by the Working Group, based on the various views, suggestions and concerns that had been expressed at the thirty-seventh session. Due to lack of time, the Working Group did not complete its deliberations regarding the draft guide to enactment. It was agreed that some time should be set aside by the Working Group at its thirty-eighth session for completion of that agenda item. It was noted that the draft UNCITRAL Model Law on Electronic Signatures, together with the draft guide to enactment, would be submitted to the Commission for review and adoption at its thirty-fourth session, to be held at Vienna from 25 June to 13 July 2001.⁵

8. In preparation for the thirty-fourth session of the Commission, the text of the draft Model Law as approved by the Working Group was circulated to all governments and to interested international organizations for comment. The comments received as of 15 May 2001 from three governments and one non-governmental organization are reproduced below in the form in which they were communicated to the secretariat.

¹Official Records of the General Assembly, Fifty-second Session, Supplement No. 17 (A/52/17), paras. 249-251.

²Ibid., Fifty-third Session, Supplement No. 17 (A/53/17), paras. 207-211.

³Ibid., Fifty-fourth Session, Supplement No. 17 (A/54/17), paras. 308-

314.

⁴Ibid., Fifty-fifth Session, Supplement No. 17 (A/55/17), paras. 380-

COMPILATION OF COMMENTS

A. States

Colombia

[Original: Spanish]

1. *General context*

The Government of Colombia has been closely following the work being done in UNCITRAL; not only has it participated in this work, but it has incorporated its proposals in Colombian domestic legislation. Law 527 of 1999 is a clear example of this in that it incorporates the 1996 UNCITRAL Model Law on Electronic Commerce, with a few modifications reflecting Colombia's desire to give greater legal security to transactions using data messages.

Given the importance of the text adopted by UNCITRAL, the principles of the Model Law were included in Law 527 of 1999. However, in spite of the advances brought about in this way, the Colombian Drafting Commission also introduced a section on the conditions to govern the operations of certifying authorities,⁶ as well as on the functions of the national agency responsible for authorizing their operations and performing functions of control, inspection and monitoring in order to protect users and consumers in the new market served by the companies concerned.

In order to ensure greater legal security for the users of electronic commerce, an obligation was created for corporate bodies wishing to provide certification services to register⁷ with a State organ.⁸ This provision was implemented by Decree 1747 of the year 2000, through which the Government laid down the conditions for the exercise of certifying activities, and the regulating process was completed with the issuance in the same year of Resolution 26930 of the Supervisory Authority for Industry and Commerce.

In addition, to make it possible to keep abreast, at the national level, with the work of UNCITRAL and in particular of the Working Group on Electronic Commerce, an ad hoc inter-agency committee has been set up to study the implications for Colombia of the draft Model Law on Electronic Signatures drawn up by the Working Group.

2. *Comments on the draft Model Law on Electronic Signatures*

Recognition must be given to the excellent work done by the Working Group, and the merits of the document submitted to delegations, which reflects careful, dedicated work taking into account the complexity of the subject, deserve to be stressed.

However, the concrete objective of the draft text and its relationship with the earlier work done by the Working Group in adopting the Model Law on Electronic Commerce is not clear from the text.

383.

⁵A/CN.9/483, paras. 21-23.

⁶Referred to as certifying entities in the Colombian text.

⁷Law 527 of 1999 refers in this regard to "authorization for the

The 1996 Model Law is a general proposal regarding the legal treatment of data messages and the legal security that is needed for commercial relations using such messages. It enshrines the fundamental principles that States may follow in adopting regulations on electronic commerce, thus contributing to the desired legal harmonization.

Although it is clear that the draft under consideration⁹ deals with a specific subject, important for the identification and authentication of users, it must be remembered that the draft belongs in a broader context and is difficult to separate from that context. This is why the first problem for the Colombian Government relates to the objective of the Model Law and its consistency with earlier work on electronic commerce within UNCITRAL.

It is not sufficiently clear what the purpose of the draft is and what its relationship is with the Model Law on Electronic Commerce. It is evident for Colombia that there must be enough consistency in the work of UNCITRAL for a clear message to be given to States that are in the process of incorporating the Commission's proposals in their legislation, so that they can understand the background of each proposal and ensure that their legal provisions are not contradictory but rather complementary, and so that they can see that the two texts are aimed at common objectives, such as the harmonization and unification of law in this area, the creation of legal security and the lessening of uncertainty in electronic commercial relations.

In this regard, it is to be noted that the present draft does not take into account the general guidelines given in the Model Law on Electronic Commerce, such as those relating to functional equivalents, to which it does not make specific reference. In some cases it follows the guidelines expressly, as with the sphere of application, interpretation, variation by agreement and the definition of a "data message", to give some examples.

Functional equivalents are basic to the application of the model laws, since they are inherent in the legal security offered by technological tools, tools that also make it possible to establish a firm link between a document and the signature confirming it.

The draft indicates that it applies where "electronic signatures" are used in the context of commercial activities, whereas the Model Law on Electronic Commerce refers to "data messages" related to commercial activities. In the case of Colombia, Law 527 of 1999 provides for a wider definition because it applies to all information in the form of data messages, without limiting them to "data messages" used in the context of commercial activities.

Colombia shares the view that the reference to commercial activities and the use of the word "commercial" to define the scope of the draft are sufficiently broad to avoid exercise of their activities".

⁸Supervisory Authority for Industry and Commerce.

limitations, and it is proposed to leave the text as it has been approved, bearing in mind that States can enlarge its scope.

The draft would apparently complement the 1996 Model Law on Electronic Commerce, in view of the fact that there are no definitions, for example, of “writing” or “original”, which are basic concepts for the interchange of data messages in digital form, in application of the principle of functional equivalence, together with the other principles set out in chapter III on the communication of data messages.

However, this situation is not clear from the draft, because it cannot be inferred from a reading of the draft whether the two instruments are complementary or totally independent, so that States could opt for one or the other, which would lead to ambiguities from the point of view of States whose legislatures have adopted the 1996 Model Law on Electronic Commerce as a frame of reference. A recommendation should be included for these countries, as well as a more specific recommendation, concerning the two texts, for countries that have not yet adopted them or are in the process of doing so.

This point should be clarified in the legal guide to enactment of the draft Model Law, and the recommendation should be included in the resolution of the Commission approving the Model Law on Electronic Signatures and the guide to enactment, making it clear that the Model Law on Electronic Signatures and the Model Law on Electronic Commerce should be adopted together or in a complementary manner.

In addition, the draft does not include a definition of an “electronic signature considered reliable” or an “electronic signature with legal effects” as determined by a provider of certification services, to be distinguished from the definition of an “electronic signature”; that would help to remove ambiguities.

The signature should be linked to a document and express the agreement of the signatory to the content of the document; in this light, article 6 on compliance with a requirement for a signature is not very clear, and its drafting could be improved, especially with regard to legal effects.

Article 6 establishes that the requirement for a signature is met in relation to a data message if a method of electronic signature is used which is as reliable as appropriate for the purposes concerned. This would permit the parties to establish an agreement on the matter.

It also indicates that an electronic signature is considered to be reliable when the signature creation data are linked to the signatory and to no other person, when they are under the signatory’s exclusive control, when any alteration to the signature made after the time of signing is detectable¹⁰ and, additionally, when a purpose of the legal requirement for a signature is to provide assurance as to the integrity of the relevant information and any alteration made to that information is detectable.

It is therefore to be understood that an electronic signature that is considered reliable is the functional equivalent of a handwritten signature.

⁹Draft Model Law on Electronic Signatures.

¹⁰These requirements are similar to those set out in article 28 of Law

It must be added that, although reference is made to the question of an alteration made after the time of signing, this is not linked to a specific date, something that would make it possible to detect an alteration with greater certainty and, in turn, determine the legal effects of such alteration. The subject needs to be considered in greater detail.

The draft also foresees that there will be a person, organ or authority, whether public or private, competent to determine what electronic signatures are considered reliable, and the appropriate method, which must be compatible with recognized international standards.

It is proposed that, to avoid a duplication of competencies between organs of different States, the Commission should designate an appropriate international organ to fix international standards. It would be understood that this organ would make proposals and recommendations to States so that, through their regular, internal channels, they could establish the necessary conditions for their adoption, always without prejudice to the application of the principle of autonomy that is applicable to all aspects of the draft.

It must be borne in mind that the overriding principle is the right of private persons to establish the technological conditions that will govern their relations; if they do not exercise this right, what applies are international standards previously defined by an international organ and adopted by the State, either through a domestic body or as a result of the development of the practices of electronic commerce.

It would make no sense to restrict the freedom of private persons to agree on a particular technology for an electronic signature that is suitable for the conduct of their relations, still less to exclude its use, by fixing an obligatory standard. International standards will make it possible to guide users of electronic commerce in the appropriate and reliable utilization of information technologies.

The international organ proposed for establishing international standards must bear in mind that the standards must not contradict the principle of technological neutrality.

The question of international standards becomes important when one seeks to promote the harmonization and uniform application of the legal aspects of electronic commerce, since they will permit States, technologically, to achieve minimum levels of protection and consequent security.

The existence of an organ to consider and establish international standards would help to reduce the technological gap between the various countries and allow a homogeneous application of the tools of electronic commerce.

The draft expressly introduces the criterion of technological neutrality in the form of “equal treatment of signature technologies”, by indicating, among other things, that, unless the parties agree otherwise, signature technologies must receive equal treatment and no method of creating an electronic signature that satisfies the requirements in article 6 (1) or meets the requirements of applicable law is to be excluded, restricted or deprived of legal effect. This criterion is met, from our point of view, in the Model Law on Electronic Commerce and in Law 527 of 1999, in the definition of a signature in article 7, which is not so specific but has similar legal consequences.

In regard to this aspect, the draft is inconsistent. Article 3, combined with article 5, gives the parties the possibility to assign legal validity to particular methods of creating electronic signatures. If, however, one reads article 7 carefully, this possibility will be limited, because the compliance of the electronic signature used with article 6 will be determined by the person, organ or authority, whether public or private, specified by the enacting State as competent to determine which electronic signatures satisfy the provisions of article 6—that is to say, comply with a requirement for a signature. The possibility for the parties to make exceptions or agree on something else is thus reduced.

Legal systems based on written law, if they accepted this type of provision, would have to adopt it in an imperative form, because otherwise it would have no concrete effect, apart from the fact that non-compliance would lead to sanctions. For Colombia, this aspect would have no practical function if it is taken into account that party autonomy takes precedence in the whole context of the law. In other words, an agreement between the parties could not change what had been previously established by a competent organ regarding compliance of an electronic signature with article 6.

The proposal would be that international standards should be determined by an international organ designated by the Commission to serve as the point of reference for States, that States should determine the manner of adoption of these proposed standards, and that what appears in square brackets should be deleted: “[*Any person, organ or authority, whether public or private, specified by the enacting State as competent*]”.

Otherwise, if the proposal to designate an international organ for fixing standards is not accepted, it would then be important to preserve the principle of autonomy by adding to the proposed article the words “without prejudice to the right of the parties to agree on the use of any method for creating an electronic signature”—so that the article would read as follows: “*Any person, organ or authority, whether public or private, specified by the enacting State as competent may determine which electronic signatures satisfy the provisions of article 6, without prejudice to the possibility for the parties to agree on the use of any method for creating an electronic signature.*”

The draft provides that whether any systems, procedures and human resources utilized by a certification service provider are trustworthy (reliable) is to be determined in the light of factors such as: (a) financial and human resources, including existence of assets; (b) quality of hardware and software systems; (c) certification procedures and availability of information; (d) regularity and extent of audit by an independent body; (e) the existence of a declaration by the State, an accreditation body or the “certification service provider” regarding compliance with or existence of these factors.

In this way, the certification service provider is being given discretion to make a declaration regarding compliance with or existence of the factors determining the reliability of the systems, procedures and human resources utilized. It would be more appropriate, as happens in Colombia, for such a declaration to be made by the independent body that carries out the audit, which would be a neutral third party on the same footing as the State of an

accreditation body, and not the certification service provider himself, as that would lead to many different interpretations. It is therefore proposed to eliminate this reference.

Article 10 (f) would read as follows:

“(f) *The existence of a declaration by the State, an accreditation body or an independent auditing body regarding compliance with or existence of the foregoing*”.

The draft again mentions a signature that is “legally effective”. It would be important to clarify what type of electronic signature is referred to; this might be the functional equivalent of a handwritten signature, which would be an electronic signature considered reliable. Under this provision, there may exist electronic signatures that are used for other purposes than to produce legal effects, such as those referred to in article 7 of the Model Law on Electronic Commerce. This point may take on more importance if we bear in mind that in other legislations concepts exist such as a reliable electronic signature, an advanced electronic signature, a certified electronic signature or, in the case of Colombia, a digital signature, as functional equivalents of a handwritten signature.

With regard to digital certificates, the draft provides that a certificate issued or electronic signature created or used abroad shall have the same legal effect domestically as certificates issued or electronic signatures created or used in the territory of the receiving State, provided that they offer a “substantially equivalent level of reliability”, this level being established in conformity with recognized international standards and any other relevant factors. This system of cross-border recognition also allows for an agreement between the parties, unless this agreement would not be valid or effective under applicable law.

There is a problem concerning the definition of a “substantially equivalent level of reliability”, a rather ambiguous and broad expression which represents a difficulty for countries that rely on written laws, because there needs to be certainty about the elements composing this definition so that it can be applied and misinterpretations avoided.

There can be no doubt that, while electronic commerce has demonstrated the advantages that it offers in facilitating transactions, its use generates uncertainty in view of the need to guarantee not only the security of transactions but also confidence in them. For this reason, there is a need for vigilance and, if appropriate, supervision on the part of State organs that will ensure the proper operation of the system and the protection of the rights of users and consumers.

3. *General outlines for a guide to enactment of the Model Law on Electronic Signatures*

The Colombian Government would incline towards having the terms of the guide reflect, in the first place, the basic principles of the Model Law on Electronic Commerce—namely, the international character of the Law, technological neutrality, functional equivalents, autonomy and flexibility, so as to preserve the link with the work done on the Model Law on Electronic Commerce and to contribute to legal harmonization.

The guide must state the specific objective of the Model Law and indicate the importance of States taking into account the work done by the Working Group on Electronic Commerce since 1985, so that they can consider the subject as a whole and so that harmony will be preserved in their incorporation of the provisions in national legislation.

Those States that have not yet defined their internal position with regard to electronic commerce need a general, overall vision of the work of UNCITRAL and must not see the documents as isolated pieces of work.

If the text of the Model Law does not give any details regarding international standards or the organ to determine them, it will be useful for them to be mentioned in the guide so that they can be taken into account by States when they consider the reliability of their systems and the criteria to be taken into account when they accept the use of these technologies.

Similarly, if provisions concerning monitoring and supervision are not included in the Model Law, it will be important to mention the usefulness of these aspects in the digital environment, taking into account not only the application of the principles of electronic commerce but also the good faith of those who engage in electronic transactions and the protection of the rights of consumers.

Through the protection of consumers' rights, States can be helped to adopt effective, acceptable tools that will permit the development of electronic commerce, because the existence of effective supervision does not limit development; on the contrary, it creates certainty for those using electronic means in their commercial relations.

4. *Legal aspects of electronic commerce*

Throughout the discussions that have taken place within UNCITRAL and the Working Group on Electronic Commerce, an attempt has been made to provide legal mechanisms which will eliminate uncertainty in electronic relations and create the necessary validity and legal force to allow these transactions to be relied on.

This quest for legal security has led to the formulation of the Model Law on Electronic Commerce and the Model Law on Electronic Signatures, aimed at harmonizing the application of law in the field of electronic commerce, taking into account technological inequalities in the various States of the world, so that they can adopt general principles permitting legal harmonization.

However, there are still many issues that have not been resolved, and for some States proposals like the model laws are not sufficient. For this reason, discussion has commenced on the possibility of concluding a binding international instrument on electronic commerce, in which the legal conditions to govern commerce using data messages will be established in a uniform manner.

At the present time, there are other legal arguments that might justify the preparation of such an instrument so as to develop the principle of functional equivalents and the definitions of "signature", "writing" and "original" in order to extend their scope of application, so that the different legal systems can be integrated.

For the moment, it will be important for Colombia to hear the views of other delegations in this regard and examine the issues arising.

5. *Possible future work on electronic commerce*

Colombia considers the three topics proposed for the future work of the Working Group to be highly relevant. It also considers that all three subjects are equally important and topical in the developing area of electronic commerce.

In view of the importance of these topics, it is suggested that relevant work should begin in coordination with those working groups and international organizations that are now considering the subjects simultaneously, in order not to lose time and so as to avoid duplication. In this connection, it should be recalled that the Commission has held a debate on the appropriate forum for discussing and studying possible subjects for the Working Group on Electronic Commerce, and the conclusion was reached that the appropriate forum was undoubtedly UNCITRAL.

For Colombia, the proposed topics of electronic contracting and on-line arbitration are of particular importance, without detracting from the importance of the question of de-materialization of documents.

With regard to electronic contracting, this is a subject of considerable uncertainty at the present time, and doubts surround the prospects for its development. Stress has been laid on the relevance of autonomy and good faith of the parties in electronic contracting, and the links with the *Unidroit Principles of International Commercial Contracts* will have to be strengthened further.

In the case of Colombia, this topic is particularly relevant in the light of efforts being made to ensure that electronic commerce becomes a tool used by Colombian entrepreneurs, within the parameters of flexible and reliable legislation, with electronic contracting taking place constantly.

With regard to the topic of on-line arbitration, its connection with electronic contracting must be taken into account. Traditionally, arbitration has helped to expedite the settlement of conflicts between contracting parties, and has produced solutions to questions of applicable jurisdiction, legislation and domicile.

There can be no doubt that the topic is closely linked to the day-to-day activities of entrepreneurs and to the use of electronic contracting to govern their relations.

However, Colombia considers that it would be relevant to begin a specific study on the importance of the activities of the public administration, in view of the fact that the latter is increasingly becoming a major actor in commerce and that its intervention is vital for the development of commerce.

Despite the various economic theories calling for non-intervention of the State in the economy, it has to be remembered that the State is one of the main promoters of interaction between enterprises, whether as an intermediary in procedures relating to external trade, exchange control, customs, etc. or as a purchaser and contractor of goods and services.

It must also be recognized that great changes are taking place in the manner in which States operate. They require a physical and technological infrastructure and procedures of high quality, and they need to be more productive, competitive and efficient so as to be able to provide a public service under the best possible conditions.

Against this background, the great majority of States have embarked on public policies enabling them to take up the challenges of the new economy and to develop an appropriate physical, technological and human infrastructure to cope with the needs of the new forms of commercial relations.

These policies are aimed not just at allowing the country to keep technologically abreast of other countries, but also at the practical development of procedures that will permit interaction with users in a framework of security and legal certainty.

This makes it important to draw up uniform rules on the utilization of data messages and electronic signatures in activities or contracts associated with the public administration, the notarization function and documents subject to special formal requirements for their validity or confirmation, and develop ways of allowing the procedures concerned to adapt to a digital environment without losing their essential character.

For Colombia, it is clear that the UNCITRAL Working Group on Electronic Commerce, on the basis of the principles set out in the Model Law on Electronic Commerce and in the draft Model Law on Electronic Signatures, can give effective guidance to national legislators in countries with a continental legal tradition, or countries whose legal provisions call for administrative and notarization procedures involving an obligatory signature or authentication by a third party, with additional requirements relating to the identification of the participants and/or the personal appearance of the parties.

Functional equivalents can be developed using security techniques such as digital signatures and digital certificates which will guarantee the security, integrity and confidentiality of the information sent or received by the parties to an act or transaction and a third party confirming the identity of the parties and the content of their declarations.

The formulation of uniform principles of functional equivalence in these areas would help the State to shift more efficiently to electronic information systems, and would establish standards of legal security with regard to information made available by enterprises and citizens to the State or government agencies.

6. Conclusions

The Colombian Government, through the inter-agency committee representing various public and private bodies concerned with electronic commerce, is closely following the discussions in the various international forums concerning this subject, and especially the discussions within UNCITRAL, which is considered the appropriate forum for considering matters related to electronic commerce.

In view of the interest in electronic commerce in Colombia, the Government intends to continue working in this field. The present document is therefore a preliminary indication of the position of the Government, and it hopes to develop these points further during the session of the Commission.

Czech Republic

[Original: English]

General comments

We highly appreciate all activities and work done by the UNCITRAL in the sphere of unification of rules, concerning electronic commerce. We would like to use this opportunity to inform you, that on 1 October 2000, Act No. 227/2000 Coll., on electronic signatures, entered into force in the Czech Republic.

Specific comments

Article 1: The scope of Czech Act No. 227/2000 Coll. is broader than the scope of the draft UNCITRAL Model Law, as defined in this article. It is not limited to commercial activities. Nevertheless, due to the aim of the draft Model Law, we find the sphere of application to be sufficient and satisfactory.

Article 7: We agree with the proposed wording in square brackets. Under the above-mentioned Act No. 227/2000 Coll. special authority, the Office for Personal Data Protection, is given the power to accredit qualified certification services providers. This accreditation is related to the enhanced electronic signature, which is to be used for specific purposes. We consider this to be the kind of determination anticipated in this provision of the Model Law.

Conclusion

We have found the draft of UNCITRAL Model Law to be a highly valuable source of legal information during the recent (and also future) process of preparation of relevant Czech law. At the present stage, a matter of high priority for our country is the harmonization of our law with the law of the European Union.

France

[Original: French]

In general, France would not like to see the text, which is the result of several years of negotiation, reopened for discussion at the next session of the United Nations Commission on International Trade Law.

It wishes to make the following brief suggestions, which should not affect the balance of the text.

Article 9 (1) (d) (iv): The end of the sentence refers to liability stipulated by the certification service provider,

which is already the subject of the main sentence; subparagraph (d) (iv) should therefore read:

“any limitation on the scope or extent of *its* liability stipulated by *it*”

It should nevertheless be borne in mind that liability is, moreover, stipulated by each of the parties (certification service provider and signatory) and not only by the provider. Consequently, the following sentence could be

added to the end of article 8, which deals with the conduct of the signatory:

“It shall provide to the certification service provider for any party relying on the certificate reasonably accessible means to ascertain, where relevant, from the certificate

referred to in article 9 or otherwise, any limitation on its responsibility.”

Article 11 (b): The words “where an electronic signature is supported by” should be replaced by “where a signature is based on”.

B. Non-governmental organizations

Cairo Regional Centre for International Commercial Arbitration

[Original: English]

It appears that more time will be required to study the draft.

An accurate determination of the legal responsibility in some cases of violation is still missing in the draft.

However, it appears that reference to the general rules of responsibility would still be necessary in cases where it would not be required to have special treatment.

Also, the limits of responsibility of parties in several articles would give space to some problems and difficulties, as it appears that up till now the technicalities of guaranteeing the signatures are not yet complete, and until such development is reached the application of these provisions would be highly risky.

This defect is reflected in the drafting of the project in many instances. Moreover, reference is made to standards and factors which are not determined accurately in considering a certificate or e-signature having a substantially level of reliability.

It is very important also to note that due to the fact that many Arab States are now drafting laws of e-commerce and e-signature, accurate translation of documents and provisions would be greatly helpful. In comparing the Arabic and English versions it appears that the Arabic version is far from being satisfactory.

A detailed memo is being prepared to be sent to UNCITRAL Headquarters.

A/CN.9/492/Add.15

INTRODUCTION

1. In preparation for the thirty-fourth session of the Commission, the text of the draft Model Law on Electronic Signatures as approved by the Working Group on Electronic Commerce at its 35th session was circulated to all Governments and to interested international organizations for comment. On 15 June 2001 the secretariat received a note by the United Kingdom of Great Britain and Northern Ireland. That note is reproduced below in the form in which it was communicated to the secretariat.

The United Kingdom does not wish to see the text of the articles reopened for widespread discussion at the forthcoming plenary session of UNCITRAL. However, a suggestion is made for a slight amendment to the text which, it is hoped, will clarify a matter related to one of the purposes of a certificate.

At the last meeting of the Working Group on Electronic Signatures it was agreed to improve the text of the Guide to Enactment so as to clarify that, when there is a dual-key “Digital Signature” and a related certificate, an important purpose of a certificate is to certify that it is the “public key” which belongs to the signatory. This is now reflected in the draft Guide at paragraph 97 (annex to A/CN.9/493).

In order to ensure that the Model Law also clearly shows this, and that it and the Guide are in alignment, two minor drafting changes to articles 2 and 9 are suggested.

(a) In the Definitions, article 2(b) should now read:

Article 2(b)

“Certificate” means a data message or other record confirming:

- (i) in a case where a private and a public cryptographic key are used respectively to create and verify an electronic signature, the link between the signatory and the public cryptographic key; and
- (ii) in any case, the link between the signatory and the signature creation data.

(b) In article 9(1)(c) a new sub-paragraph (iv) be inserted after (iii) to read:

Article 9(1)(c)

- (iii); and
- (iv) in any case falling within article 2(b)(i), that the public cryptographic key is that of the signatory identified in the certificate;

A/CN.9/492/Add.2

INTRODUCTION

1. In preparation for the thirty-fourth session of the Commission, the text of the draft Model Law on Electronic Signatures as approved by the Working Group on Electronic Commerce at its 35th session was circulated to all

Governments and to interested international organizations for comment. On 29 June 2001 the secretariat received a note by the United States of America and a note by the International Chamber of Commerce. The texts of those notes, both of which contain comments and proposals with respect to the draft Model Law on Electronic Signatures, are reproduced below in the form in which they were communicated to the secretariat.

COMPILATION OF COMMENTS

A. States

United States of America

We believe, as stated at the 38th session of the Working Group, taking into account considerable representation from industry and e-commerce law groups, that certain changes, at a minimum, should be made if the draft Model Law is to promote trade and avoid having a negative effect on e-commerce.

Other changes and technical corrections will be raised as appropriate. The most important changes we believe necessary are within articles 8 to 11:

(1) *Articles 8 to 11* should be subject to a general limitation that the criteria and rules therein be applied as is reasonable under the circumstances of the type of transaction and the nature of the parties. The imposition of strict obligations is inappropriate if applied to a wide variety of transactions that have developed in e-commerce.

(2) *Article 8 (1)(a)*: The terms “in accordance with accepted commercial practices” should be inserted before “reasonable care”.

(3) *Article 8 (1)(b)* should be restated to remove an overly broad standard, rejected by commentators as infeasible, as follows:

“(b) without undue delay, use reasonable efforts to initiate any procedures made available to the signatory to notify relying parties if: ”

(4) *Article 8 (2)*: Determining liability rules for one party is an exceptional position to take within the commercial law, which fails to balance the actions of other parties and will unduly burden the use of e-commerce signatures. Article 8 (2) should thus be revised to reflect the standard used in article 11: “A signatory shall bear the legal consequences of its failure to ...”.

(5) *Articles 9 and 10*: These articles focus on a technology application that in commerce is used for certain purposes

but may be inappropriate if applied to a wider range of e-commerce functions. Moreover, the standards set out cannot be met for most e-signatures and few services could comply. Both articles insufficiently protect the ability of service providers to limit the scope of what they offer and the extent to which they can avoid unreasonable exposure to liabilities.

(6) *Article 9 (1)(f)*: In addition to language that should be added to assure service providers the ability to control the extent to which their services can be relied on and the limits of the services offered, article 9 (1)(f) should not be connected to article 10, since article 10 sets out standards well exceeding the resources and services offered generally by participants in this field.

(7) *Article 9 (2)*: As with article 8, this article purports to assign liability without reference to the role of other parties, an inappropriate result for the commercial law.

Article 9 (2) should be amended as follows:

“Subject to any reasonably accessible limitations on the scope or extent of services to be provided, as well as liability limits stipulated by the certification service provider, such a provider shall bear the legal consequences of its failure to comply with paragraph (1).”

(8) *Article 10*: As noted, the standards set out considerably exceed actual practices for services generally provided today. The leading sentence should thus be modified by adding “... factors, if and to the extent generally applied in commercial practice for the level of service provided, and if relied on by a relying party: ”

(9) *Article 11*: Article 11 should be amended to provide, in accordance with commercial and transactional practices where applicable, that relying parties assume a greater responsibility for ascertaining the reliability of a signature than is now provided by this article.

B. Non-governmental organizations

International Chamber of Commerce (ICC)

The International Chamber of Commerce’s delegation (ICC) to UNCITRAL has contributed its knowledge of business realities and technology expertise throughout the development of the UNCITRAL Working Group on Electronic Commerce’s Draft Uniform Rules on Electronic Signatures and complementary Guide to Enactment.

ICC acknowledges its full support of the UNCITRAL process and believes that—as the World Business

Organization—it can benefit the process through its unique private sector perspective. To this end, ICC wishes to address three issues regarding the current versions of the Model law and the Guide to Enactment which will be discussed during the current round of discussions by UNCITRAL.

ICC’s concerns are presented forthwith in order of importance.

1. *Guide to Enactment, paragraphs 69, 135 and 159*

ICC is primarily concerned that paragraphs 135 and 159 of the current version of the Guide to Enactment be amended to reflect changes made to paragraph 69 of the same version during the 13 March 2001 session in New York. At that session, both ICC and the Spanish delegation requested these paragraphs be amended to limit the risk of industry-led voluntary standards processes being given anything less than due regard. ICC suggests that this concept be incorporated into paragraphs 135 and 159 either directly or by reference to paragraph 69.

2. *Model Law, article 5*

ICC member companies from around the world have indicated substantial concern that Model Law, article 5 could, if unchanged, have a substantial negative effect on the use of electronic signatures and electronic commerce. Thus, ICC urges that Model Law, article 5 be changed by way of one of the following options (listed in order of preference):

Option 1

Delete the final clause of article 5 (“unless that agreement would not be valid or effective under applicable law”);

Option 2

Replace the words “applicable law” with “mandatory principles of public policy.”

ICC offers the following justification for either of the above proposed changes:

- *Danger of confusion.* Many national judges may not have access to the Guide to Enactment when applying the Model Law as implemented in national law, and could construe the reference to “applicable law” to mean that any

sort of statute, case law, or other legal provision, even if it is not very weighty, should override party autonomy (see below). “Applicable law” is thus in this sense potentially over-broad.

- *Clarification.* The Guide to Enactment (see para. 110) makes it clear that any limitation on party autonomy is intended to apply only to “mandatory rules, e.g. rules adopted for reasons of public policy,” which term would be construed quite narrowly in most legal systems to refer to principles in which there was an overwhelming public or governmental interest. However, the text of article 5 allows party autonomy to be overridden by “applicable law,” which could refer to almost any sort of legal provision. Removing the reference to “applicable law” is thus not a change in substance, but will only realize the intent of the Working Group.

- *Elimination of superfluous language.* The limitation on party autonomy is unnecessary, since in most legal systems, mandatory rules of public policy or *ordre public* would override party autonomy in all cases (i.e. whether or not they are mentioned in the text).

- *Danger of harmful business effects.* Many uses of electronic signatures are presently dependent on full effect being given to the contractual relations between the parties. Electronic commerce could be significantly harmed if national legislators and courts were given the mistaken impression that UNCITRAL intended to limit party autonomy more than is absolutely necessary.

3. *Model Law, articles 8 to 11*

ICC is concerned that Model Law articles 8 to 11 are over-broad, difficult to apply and unreflective of business reality. ICC welcomes an opportunity to further discuss the impact of these provisions in light of business realities.

9A/CN.9/492/Add.3

INTRODUCTION

1. In preparation for the thirty-fourth session of the Commission, the text of the draft Model Law on Electronic Signatures as approved by the Working Group on Elec-

tronic Commerce at its 35th session was circulated to all Governments and to interested international organizations for comment. On 3 July 2001 the secretariat received a note by the delegation of Greece. The text of this note, which contains comments and proposals with respect to the draft Model Law on Electronic Signatures, is reproduced below in the form in which it was communicated to the secretariat.

COMPILATION OF COMMENTS

A. States

Greece

1. *Article 2(d)*

The “signatory” is a person that acts either on its own behalf or on behalf “of a person it represents”. Apparently, the signatory is a physical person, while the person it may represent may be either a physical or a legal person. The question is whether it would be good to add, after the word “person” (second line) the words: “physical or legal”.

2. *Article 2(e)*

One may wonder, which “other services related to electronic signature: the certification service provider” may, in practice, provide, except to issue certificates.

3. *Article 3*

The “applicable law” (last two words in the article) is the law to be found by the application of the proper rule of private international law of the “given forum”. The question is whether, after the words “applicable law”, it should be added: “in accordance with the appropriate rule of private international law”.

4. *Article 4(1)*

(a) Perhaps, which mostly matters “in the interpretation of this Law” is the international character (or, nature) of it, as well as its purpose. If that is correct, it should, after the word “origin” (first line), add the words: “, character, and purpose”.

(b) “Questions concerning matters governed by this Law, which are not expressly settled in it” can be settled, not only “in conformity of the general principles on which this Law is based”, but “by application of rules of an analogy”, as well. The question is if it is advisable to add these (six) words.

5. *Article 5*

“Applicable law” (last two words): the comment of article 3 (see para. 3 above) applies here, too.

6. *Article 6(3)(a)*

It is suggestable to add the word “only”, after the word “linked” (second line), for emphasis.

7. *Article 6(3)(b)*

For the same reason, before the word “control” (first line), the word “exclusive” may be added.

8. *Article 7(2)*

This paragraph seems to state the obvious. It is retainable, or would it be better to delete it?

9. *Article 8(2)*

Certainly, liability is the result of “failure to satisfy the requirements...” but such a failure must be a “product” of not giving reasonable care to satisfy the requirements... Perhaps, some qualification of the “failure” is necessary to be inserted in the text.

10. *Article 9(1)(f)*

To “(trustworthy) systems, procedures and human resources”, perhaps, “means” may be added, preferably between the words: “systems” and “procedures”.

11. *Article 9(2)*

On the word “failure”, the comment on Article 8(2) (see para. 10 above) applies here, too.

12. *Article 10*

(a) The comment on article 9(1)(f) (see para. 8 above), to qualify the word “failure”, applies also here (in the second line).

(b) If the “factors” enumerated in this article are not exhaustive, but indicative, the word “indicative” might be inserted between the words “following” and “factors” (in the third line). In such a case, “article 10(g)” should be deleted, as superfluous.

13. *Article 10(e)*

Only “body” (i.e. legal person)? What about “(an independent) physical person”? Permitted, or prohibited?

14. *Article 11(b)*

Is the idea of this provision to establish a (legal) “presumption” of failure etc? Perhaps, some clarification, even of a drafting character, is necessary, or useful.

J. Draft Guide to Enactment of the UNCITRAL Model Law on Electronic Signatures: note by the secretariat

(A/CN.9/493) [Original: English]

1. Pursuant to decisions taken by the Commission at its twenty-ninth (1996)¹ and thirtieth (1997)² sessions, the Working Group on Electronic Commerce devoted its

527 of 1999 concerning the legal attributes of a digital signature, when it is considered equivalent to a handwritten signature.

¹Official Records of the General Assembly, Fifty-first Session, Sup-

thirty-first to thirty-seventh sessions to the preparation of the draft UNCITRAL Model Law on Electronic Signatures (hereinafter referred to as “the Model Law”, “the draft Model Law” or “the new Model Law”). Reports of those sessions are found in documents A/CN.9/437, 446, 454, 457, 465, 467 and 483. In preparing the Model Law, the Working Group noted that it would be useful to provide in

a commentary additional information concerning the Model Law. Following the approach taken in the preparation of the UNCITRAL Model Law on Electronic Commerce, there was general support for a suggestion that the new Model Law should be accompanied by a guide to assist States in enacting and applying that Model Law. The guide, much of which could be drawn from the travaux préparatoires of the Model Law, would also be helpful to other users of the Model Law.

2. At its thirty-seventh session (Vienna, September 2000), the Working Group completed the preparation of the draft articles of the Model Law and discussed the draft guide to enactment on the basis of a note by the secretariat (A/CN.9/WG.IV/WP.86 and Add.1). The secretariat was requested to prepare a revised version of the draft guide reflecting the decisions made by the Working Group, based on the various views, suggestions and concerns that had been expressed at the thirty-seventh session. Due to lack of time, the Working Group did not complete its deliberations

regarding the draft guide to enactment (see A/CN.9/483, paras. 23 and 145-152). It was agreed that some time should be set aside by the Working Group at its thirty-eighth session for completion of that agenda item. It was noted that the draft Model Law, together with the draft guide to enactment, would be submitted to the Commission for review and adoption at its thirty-fourth session, to be held at Vienna from 25 June to 13 July 2001.

3. At its thirty-eighth session (New York, March 2001), the Working Group reviewed the draft guide to enactment of the UNCITRAL Model Law on Electronic Signatures, based on a revised draft prepared by the secretariat (A/CN.9/WG.IV/WP.88). The deliberations and decisions of the Working Group with respect to the draft guide are reflected in the report of that session (A/CN.9/484). The secretariat was requested to prepare a revised version of the guide, based on those deliberations and decisions (A/CN.9/484, para. 19). The revised version of the draft guide prepared by the secretariat is annexed to this note.

ANNEX

UNCITRAL MODEL LAW ON ELECTRONIC SIGNATURES WITH GUIDE TO ENACTMENT 2001

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PART ONE

UNCITRAL MODEL LAW ON ELECTRONIC SIGNATURES (2001)

(as approved by the UNCITRAL Working Group on Electronic Commerce at its thirty-seventh session, held at Vienna from 18 to 29 September 2000)

Article 1. *Sphere of application*

This Law applies where electronic signatures are used in the context* of commercial** activities. It does not override any rule of law intended for the protection of consumers.

*The Commission suggests the following text for States that might wish to extend the applicability of this Law:

“This Law applies where electronic signatures are used, except in the following situations: [...]”

**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.

Article 2. *Definitions*

For the purposes of this Law:

(a) “Electronic signature” means data in electronic form in, affixed to, or logically associated with, a data message, which may be used to identify the signatory in relation to the data message and indicate the signatory’s approval of the information contained in the data message;

(b) “Certificate” means a data message or other record confirming the link between a signatory and signature creation data;

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

(d) “Signatory” means a person that holds signature creation data and acts either on its own behalf or on behalf of the person it represents;

(e) “Certification service provider” means a person that issues certificates and may provide other services related to electronic signatures;

(f) “Relying party” means a person that may act on the basis of a certificate or an electronic signature.

Article 3. *Equal treatment of signature technologies*

Nothing in this Law, except article 5, shall be applied so as to exclude, restrict or deprive of legal effect any method of creating an electronic signature that satisfies the requirements referred to in article 6 (1) or otherwise meets the requirements of applicable law.

Article 4. *Interpretation*

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

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

Article 5. *Variation by agreement*

The provisions of this Law may be derogated from or their effect may be varied by agreement, unless that agreement would not be valid or effective under applicable law.

Article 6. *Compliance with a requirement for a signature*

(1) Where the law requires a signature of a person, that requirement is met in relation to a data message if an electronic signature is used which is as reliable as was appropriate for the purpose for which the data message was generated or communicated, in the light of all the circumstances, including any relevant agreement.

(2) Paragraph (1) applies whether the requirement referred to therein is in the form of an obligation or whether the law simply provides consequences for the absence of a signature.

(3) An electronic signature is considered to be reliable for the purpose of satisfying the requirement referred to in paragraph (1) if:

(a) the signature creation data are, within the context in which they are used, linked to the signatory and to no other person;

(b) the signature creation data were, at the time of signing, under the control of the signatory and of no other person;

(c) any alteration to the electronic signature, made after the time of signing, is detectable; and

(d) where a purpose of the legal requirement for a signature is to provide assurance as to the integrity of the information to which it relates, any alteration made to that information after the time of signing is detectable.

(4) Paragraph (3) does not limit the ability of any person:

(a) to establish in any other way, for the purpose of satisfying the requirement referred to in paragraph (1), the reliability of an electronic signature; or

(b) to adduce evidence of the non-reliability of an electronic signature.

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

Article 7. *Satisfaction of article 6*

(1) [Any person, organ or authority, whether public or private, specified by the enacting State as competent] may determine which electronic signatures satisfy the provisions of article 6.

(2) Any determination made under paragraph (1) shall be consistent with recognized international standards.

(3) Nothing in this article affects the operation of the rules of private international law.

Article 8. *Conduct of the signatory*

(1) Where signature creation data can be used to create a signature that has legal effect, each signatory shall:

(a) exercise reasonable care to avoid unauthorized use of its signature creation data;

(b) without undue delay, notify any person that may reasonably be expected by the signatory to rely on or to provide services in support of the electronic signature if:

- (i) the signatory knows that the signature creation data have been compromised; or
- (ii) the circumstances known to the signatory give rise to a substantial risk that the signature creation data may have been compromised;

(c) where a certificate is used to support the electronic signature, exercise reasonable care to ensure the accuracy and completeness of all material representations made by the signatory which are relevant to the certificate throughout its life-cycle, or which are to be included in the certificate.

(2) A signatory shall be liable for its failure to satisfy the requirements of paragraph (1).

Article 9. *Conduct of the certification service provider*

(1) Where a certification service provider provides services to support an electronic signature that may be used for legal effect as a signature, that certification service provider shall:

(a) act in accordance with representations made by it with respect to its policies and practices;

(b) exercise reasonable care to ensure the accuracy and completeness of all material representations made by it that are relevant to the certificate throughout its life-cycle, or which are included in the certificate;

(c) provide reasonably accessible means which enable a relying party to ascertain from the certificate:

- (i) the identity of the certification service provider;
- (ii) that the signatory that is identified in the certificate had control of the signature creation data at the time when the certificate was issued;
- (iii) that signature creation data were valid at or before the time when the certificate was issued;

(d) provide reasonably accessible means which enable a relying party to ascertain, where relevant, from the certificate or otherwise:

- (i) the method used to identify the signatory;
- (ii) any limitation on the purpose or value for which the signature creation data or the certificate may be used;
- (iii) that the signature creation data are valid and have not been compromised;
- (iv) any limitation on the scope or extent of liability stipulated by the certification service provider;
- (v) whether means exist for the signatory to give notice pursuant to article 8 (1) (b);
- (vi) whether a timely revocation service is offered;

(e) where services under subparagraph (d) (v) are offered, provide a means for a signatory to give notice pursuant to article 8(1)(b) and, where services under subparagraph (d) (vi) are offered, ensure the availability of a timely revocation service;

(f) utilize trustworthy systems, procedures and human resources in performing its services.

(2) A certification service provider shall be liable for its failure to satisfy the requirements of paragraph (1).

Article 10. *Trustworthiness*

For the purposes of article 9(1)(f), in determining whether, or to what extent, any systems, procedures and human resources utilized by a certification service provider are trustworthy, regard may be had to the following factors:

- (a) financial and human resources, including existence of assets;
- (b) quality of hardware and software systems;
- (c) procedures for processing of certificates and applications for certificates and retention of records;
- (d) availability of information to signatories identified in certificates and to potential relying parties;
- (e) regularity and extent of audit by an independent body;
- (f) the existence of a declaration by the State, an accreditation body or the certification service provider regarding compliance with or existence of the foregoing; or
- (g) any other relevant factor.

Article 11. *Conduct of the relying party*

A relying party shall bear the legal consequences of its failure to:

(a) take reasonable steps to verify the reliability of an electronic signature;

or

(b) where an electronic signature is supported by a certificate, take reasonable steps to:

- (i) verify the validity, suspension or revocation of the certificate; and
- (ii) observe any limitation with respect to the certificate.

Article 12. *Recognition of foreign certificates and electronic signatures*

(1) In determining whether, or to what extent, a certificate or an electronic signature is legally effective, no regard shall be had to:

(a) the geographic location where the certificate is issued or the electronic signature created or used; or

(b) the geographic location of the place of business of the issuer or signatory.

(2) A certificate issued outside [*the enacting State*] shall have the same legal effect in [*the enacting State*] as a certificate issued in [*the enacting State*] if it offers a substantially equivalent level of reliability.

(3) An electronic signature created or used outside [*the enacting State*] shall have the same legal effect in [*the enacting State*] as an electronic signature created or used in [*the enacting State*] if it offers a substantially equivalent level of reliability.

(4) In determining whether a certificate or an electronic signature offers a substantially equivalent level of reliability for the purposes of paragraph (2) or (3), regard shall be had to recognized international standards and to any other relevant factors.

(5) Where, notwithstanding paragraphs (2), (3) and (4), parties agree, as between themselves, to the use of certain types of electronic signatures or certificates, that agreement shall be recognized as sufficient for the purposes of cross-border recognition, unless that agreement would not be valid or effective under applicable law.

PART TWO

GUIDE TO ENACTMENT OF THE UNCITRAL MODEL LAW ON ELECTRONIC SIGNATURES (2001)

Purpose of this Guide

1. In preparing and adopting the UNCITRAL Model Law on Electronic Signatures (also referred to in this publication as “the Model Law” or “the new Model Law”), the United Nations Commission on International Trade Law (UNCITRAL) was mindful that the Model Law would be a more effective tool for States modernizing their legislation if background and explanatory information were provided to executive branches of Governments and legislators to assist them in using the Model Law. The Commission was also aware of the likelihood that the Model Law would be used in a number of States with limited familiarity with the type of communication techniques considered in the Model Law. This 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. Such information might also assist States in considering which, if any, of the provisions should be varied in order to be adapted to any particular national circumstances necessitating such variation. 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. The information presented in this Guide is intended to explain why the provisions in the Model Law have been included as essential basic features of a statutory device designed to achieve the objectives of the Model Law.

2. The present Guide to Enactment has been prepared by the secretariat pursuant to the request of UNCITRAL made at the close of its thirty-fourth session, in 2001. It is based on the deliberations and decisions of the Commission at that session, when the Model Law was adopted, as well as on considerations of the Working Group on Electronic Commerce, which conducted the preparatory work.

CHAPTER I. INTRODUCTION TO THE MODEL LAW

I. PURPOSE AND ORIGIN OF THE MODEL LAW

A. *Purpose*

3. The increased use of electronic authentication techniques as substitutes for handwritten signatures and other traditional authentication procedures has suggested the need for a specific legal framework to reduce uncertainty as to the legal effect that may result from the use of such modern techniques (which may be referred to generally as “electronic signatures”). The risk that diverging legislative approaches be taken in various countries with respect to electronic signatures calls for uniform legislative provisions to establish the basic rules of what is inherently an international phenomenon, where legal harmony as well as technical interoperability is a desirable objective.

4. Building on the fundamental principles underlying article 7 of the UNCITRAL Model Law on Electronic Commerce (always referred to in this publication under its full title to avoid confusion) with respect to the fulfilment of the signature function in an electronic environment, this new Model Law is designed to assist States in establishing a modern, harmonized and fair legislative framework to address more effectively the issues of electronic signatures. In a modest but significant addition to the UNCITRAL Model Law on Electronic Commerce, the new Model Law offers

practical standards against which the technical reliability of electronic signatures may be measured. In addition, the Model Law provides a linkage between such technical reliability and the legal effectiveness that may be expected from a given electronic signature. The Model Law adds substantially to the UNCITRAL Model Law on Electronic Commerce by adopting an approach under which the legal effectiveness of a given electronic signature technique may be pre-determined (or assessed prior to being actually used). The Model Law is thus intended to foster the understanding of electronic signatures, and the confidence that certain electronic signature techniques can be relied upon in legally significant transactions. Moreover, by establishing with appropriate flexibility a set of basic rules of conduct for the various parties that may become involved in the use of electronic signatures (i.e. signatories, relying parties and third-party certification service providers) the Model Law may assist in shaping more harmonious commercial practices in cyberspace.

5. The objectives of the Model Law, which include enabling or facilitating the use of electronic signatures and providing equal treatment to users of paper-based documentation and users of computer-based information, are essential for fostering economy and efficiency in international trade. By incorporating the procedures prescribed in the Model Law (and also the provisions of the UNCITRAL Model Law on Electronic Commerce) in its national legislation for those situations where parties opt to use electronic means of communication, an enacting State would appropriately create a media-neutral environment. The media-neutral approach also used in the UNCITRAL Model Law on Electronic Commerce is intended to provide in principle for the coverage of all factual situations where information is generated, stored or communicated, irrespective of the medium on which such information may be affixed (see Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce, para. 24). The words “a media-neutral environment”, as used in the UNCITRAL Model Law on Electronic Commerce, reflect the principle of non-discrimination between information supported by a paper medium and information communicated or stored electronically. The new Model Law equally reflects the principle that no discrimination should be made among the various techniques that may be used to communicate or store information electronically, a principle that is often referred to as “technology neutrality” (A/CN.9/484, para. 23).

B. *Background*

6. The Model Law constitutes a new step in a series of international instruments adopted by UNCITRAL, which are either specifically focused on the needs of electronic commerce or were prepared bearing in mind the needs of modern means of communication. In the first category, specific instruments geared to electronic commerce comprise the Legal Guide on Electronic Funds Transfers (1987), the UNCITRAL Model Law on International Credit Transfers (1992) and the UNCITRAL Model Law on Electronic Commerce (1996 and 1998). The second category consists of all international conventions and other legislative instruments adopted by UNCITRAL since 1978, all of which promote reduced formalism and contain definitions of “writing” that are meant to encompass de-materialized communications.

7. The best known UNCITRAL instrument in the field of electronic commerce is the UNCITRAL Model Law on Electronic Commerce. Its preparation in the early 1990s resulted from the increased use of modern means of communication such as electronic mail and electronic data interchange (EDI) for the conduct of international trade transactions. It was realized that new

technologies had been developing rapidly and would develop further as technical supports such as information highways and the Internet became more widely accessible. However, the communication of legally significant information in the form of paperless messages was hindered by legal obstacles to the use of such messages, or by uncertainty as to their legal effect or validity. With a view to facilitating the increased use of modern means of communication, UNCITRAL has prepared the UNCITRAL Model Law on Electronic Commerce. The purpose of the UNCITRAL Model Law on Electronic Commerce is to offer national legislators a set of internationally acceptable rules as to how a number of such legal obstacles may be removed, and how a more secure legal environment may be created for what has become known as “electronic commerce”.

8. The decision by UNCITRAL to formulate model legislation on electronic commerce was taken in response to the fact that, in a number of countries, the existing legislation governing communication and storage of information was inadequate or outdated because it did not contemplate the use of electronic commerce. In certain cases, existing legislation still imposes or implies restrictions on the use of modern means of communication, for example by prescribing the use of “written”, “signed” or “original” documents. With respect to the notions of “written”, “signed” and “original” documents, the UNCITRAL Model Law on Electronic Commerce adopted an approach based on functional equivalence. The “functional equivalent approach” is based on an analysis of the purposes and functions of the traditional paper-based requirement with a view to determining how those purposes or functions can be fulfilled through electronic-commerce techniques (see Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce, paras. 15-18).

9. At the time when the UNCITRAL Model Law on Electronic Commerce was being prepared, a few countries had adopted specific provisions to deal with certain aspects of electronic commerce. However, there existed no legislation dealing with electronic commerce as a whole. This could result in uncertainty as to the legal nature and validity of information presented in a form other than a traditional paper document. Moreover, while sound laws and practices were necessary in all countries where the use of electronic data interchange (EDI) and electronic mail was becoming widespread, this need was also felt in many countries with respect to such communication techniques as telecopy and telex. Under article 2(b) of the UNCITRAL Model Law on Electronic Commerce, EDI is defined as “the electronic transfer from computer to computer of information using an agreed standard to structure the information”.

10. The UNCITRAL Model Law on Electronic Commerce also helped to remedy disadvantages that stemmed from the fact that inadequate legislation at the national level created obstacles to international trade, a significant amount of which is linked to the use of modern communication techniques. To a large extent, disparities among, and uncertainty about, national legal regimes governing the use of such communication techniques may still contribute to limiting the extent to which businesses may access international markets.

11. Furthermore, at an international level, the UNCITRAL Model Law on Electronic Commerce may be useful in certain cases as a tool for interpreting existing international conventions and other international instruments that create legal obstacles to the use of electronic commerce, for example by prescribing that certain documents or contractual clauses be made in written form. As between those States parties to such international instruments, the adoption of the UNCITRAL Model Law on Electronic Commerce as a rule of interpretation might provide the means to recognize the use of electronic commerce and obviate the need to negotiate a protocol to the international instrument involved.

C. History

12. After adopting the UNCITRAL Model Law on Electronic Commerce, the Commission, at its twenty-ninth session (1996), decided to place the issues of digital signatures and certification authorities on its agenda. The Working Group on Electronic Commerce was requested to examine the desirability and feasibility of preparing uniform rules on those topics. It was agreed that the uniform rules to be prepared should deal with such issues as: the legal basis supporting certification processes, including emerging digital authentication and certification technology; the applicability of the certification process; the allocation of risk and liabilities of users, providers and third parties in the context of the use of certification techniques; the specific issues of certification through the use of registries; and incorporation by reference.³

13. At its thirtieth session (1997), the Commission had before it the report of the Working Group on the work of its thirty-first session (A/CN.9/437). The Working Group indicated to the Commission that it had reached consensus as to the importance of, and the need for, working towards harmonization of legislation in that area. While no firm decision as to the form and content of such work had been reached, the Working Group had come to the preliminary conclusion that it was feasible to undertake the preparation of draft uniform rules at least on issues of digital signatures and certification authorities, and possibly on related matters. The Working Group recalled that, alongside digital signatures and certification authorities, future work in the area of electronic commerce might also need to address: issues of technical alternatives to public-key cryptography; general issues of functions performed by third-party service providers; and electronic contracting (A/CN.9/437, paras. 156 and 157). The Commission endorsed the conclusions reached by the Working Group, and entrusted the Working Group with the preparation of uniform rules on the legal issues of digital signatures and certification authorities.

14. With respect to the exact scope and form of the uniform rules, the Commission generally agreed that no decision could be made at this early stage of the process. It was felt that, while the Working Group might appropriately focus its attention on the issues of digital signatures in view of the apparently predominant role played by public-key cryptography in the emerging electronic-commerce practice, the uniform rules should be consistent with the media-neutral approach taken in the UNCITRAL Model Law on Electronic Commerce. Thus, the uniform rules should not discourage the use of other authentication techniques. Moreover, in dealing with public-key cryptography, the uniform rules might need to accommodate various levels of security and to recognize the various legal effects and levels of liability corresponding to the various types of services being provided in the context of digital signatures. With respect to certification authorities, while the value of market-driven standards was recognized by the Commission, it was widely felt that the Working Group might appropriately envisage the establishment of a minimum set of standards to be met by certification authorities, particularly where cross-border certification was sought.⁴

15. The Working Group began the preparation of the uniform rules (to be adopted later as the Model Law) at its thirty-second session on the basis of a note prepared by the secretariat (A/CN.9/WG.IV/WP.73).

16. At its thirty-first session (1998), the Commission had before it the report of the Working Group on the work of its thirty-second session (A/CN.9/446). It was noted that the Working Group, throughout its thirty-first and thirty-second sessions, had experi-

plement No. 17 (A/51/17), paras. 223 and 224.

²*Ibid.*, *Fifty-second Session, Supplement No. 17 (A/52/17)*, paras. 249-251.

enced manifest difficulties in reaching a common understanding of the new legal issues that arose from the increased use of digital and other electronic signatures. It was also noted that a consensus was still to be found as to how those issues might be addressed in an internationally acceptable legal framework. However, it was generally felt by the Commission that the progress realized so far indicated that the uniform rules were progressively being shaped into a workable structure.

17. The Commission reaffirmed the decision made at its thirtieth session as to the feasibility of preparing such uniform rules and expressed its confidence that more progress could be accomplished by the Working Group at its thirty-third session on the basis of the revised draft prepared by the secretariat (A/CN.9/WG.IV/WP.76). In the context of that discussion, the Commission noted with satisfaction that the Working Group had become generally recognized as a particularly important international forum for the exchange of views regarding the legal issues of electronic commerce and for the preparation of solutions to those issues.⁵

18. The Working Group continued revision of the uniform rules at its thirty-third session (1998) and thirty-fourth session (1999) on the basis of notes prepared by the secretariat (A/CN.9/WG.IV/WP.76 and A/CN.9/WG.IV/WP.79 and 80). The reports of the sessions are contained in documents A/CN.9/454 and 457.

19. At its thirty-second session (1999), the Commission had before it the report of the Working Group on those two sessions (A/CN.9/454 and 457). The Commission expressed its appreciation for the efforts accomplished by the Working Group in its preparation of the uniform rules. While it was generally agreed that significant progress had been made at those sessions in the understanding of the legal issues of electronic signatures, it was also felt that the Working Group had been faced with difficulties in the building of a consensus as to the legislative policy on which the uniform rules should be based.

20. A view was expressed that the approach currently taken by the Working Group did not sufficiently reflect the business need for flexibility in the use of electronic signatures and other authentication techniques. As currently envisaged by the Working Group, the uniform rules placed excessive emphasis on digital signature techniques and, within the sphere of digital signatures, on a specific application involving third-party certification. Accordingly, it was suggested that work on electronic signatures by the Working Group should either be limited to the legal issues of cross-border certification or be postponed altogether until market practices were better established. A related view expressed was that, for the purposes of international trade, most of the legal issues arising from the use of electronic signatures had already been solved in the UNCITRAL Model Law on Electronic Commerce (see below, para. 28). While regulation dealing with certain uses of electronic signatures might be needed outside the scope of commercial law, the Working Group should not become involved in any such regulatory activity.

21. The widely prevailing view was that the Working Group should pursue its task on the basis of its original mandate. With respect to the need for uniform rules on electronic signatures, it was explained that, in many countries, guidance from UNCITRAL was expected by governmental and legislative authorities that were in the process of preparing legislation on electronic signature issues, including the establishment of public-key infrastructures (PKI) or other projects on closely related matters (see A/CN.9/457, para. 16). As to the decision made by the Working Group to focus on PKI issues and PKI terminology, it was recalled that the interplay of relationships between three distinct types of parties (i.e. signatories, certification authorities and relying parties) corre-

sponded to one possible PKI model, but that other models were conceivable, e.g. where no independent certification service provider was involved. One of the main benefits to be drawn from focusing on PKI issues was to facilitate the structuring of the uniform rules by reference to three functions (or roles) with respect to key pairs, namely, the key issuer (or subscriber) function, the certification function, and the relying function. It was generally agreed that those three functions were common to all PKI models. It was also agreed that those three functions should be dealt with irrespective of whether they were in fact served by three separate entities or whether two of those functions were served by the same person (e.g. where the certification service provider was also a relying party). In addition, it was widely felt that focusing on the functions typical of PKI and not on any specific model might make it easier to develop a fully media-neutral rule at a later stage (*ibid.*, para. 68).

22. After discussion, the Commission reaffirmed its earlier decisions as to the feasibility of preparing such uniform rules and expressed its confidence that more progress could be accomplished by the Working Group at its forthcoming sessions.⁶

23. The Working Group continued its work at its thirty-fifth (September 1999) and thirty-sixth (February 2000) sessions on the basis of notes prepared by the secretariat (A/CN.9/WG.IV/WP. 82 and 84). At its thirty-third (2000) session, the Commission had before it the report of the Working Group on the work of those two sessions (A/CN.9/465 and 467). It was noted that the Working Group, at its thirty-sixth session, had adopted the text of draft articles 1 and 3 to 12 of the uniform rules. It was stated that some issues remained to be clarified as a result of the decision by the Working Group to delete the notion of enhanced electronic signature from the uniform rules. A concern was expressed that, depending on the decisions to be made by the Working Group with respect to draft articles 2 and 13, the remainder of the draft provisions might need to be revisited to avoid creating a situation where the standard set forth by the uniform rules would apply equally to electronic signatures that ensured a high level of security and to low-value certificates that might be used in the context of electronic communications that were not intended to carry significant legal effect.

24. After discussion, the Commission expressed its appreciation for the efforts extended by the Working Group and the progress achieved in the preparation of the uniform rules. The Working Group was urged to complete its work with respect to the uniform rules at its thirty-seventh session and to review the draft guide to enactment to be prepared by the secretariat.⁷

25. The Working Group completed the preparation of the uniform rules at its thirty-seventh (September 2000) session. The report of that session is contained in document A/CN.9/483. The Working Group also discussed the draft guide to enactment. The secretariat was requested to prepare a revised version of the draft guide reflecting the decisions made by the Working Group, based on the various views, suggestions and concerns that had been expressed at the current session. Due to lack of time, the Working Group did not complete its deliberations regarding the draft guide to enactment. It was agreed that some time should be set aside by the Working Group at its thirty-eighth session for completion of that agenda item. It was noted that the uniform rules (in the form of a draft UNCITRAL Model Law on Electronic Signatures), together with the draft guide to enactment, would be submitted to the Commission for review and adoption at its thirty-fourth (2001) session. [*Note by the secretariat: this section recording the history of the Model Law is to be completed after final consideration and adoption of the Model Law by the Commission.*]

251.

⁵*Ibid.*

⁶*Ibid.*, Fifty-second Session, Supplement No. 17 (A/52/17), paras. 249-

⁷*Ibid.*, Fifty-third Session, Supplement No. 17 (A/53/17), paras. 207-

II. THE MODEL LAW AS A TOOL FOR HARMONIZING LAWS

26. As the UNCITRAL Model Law on Electronic Commerce, the new Model Law is in the form of a legislative text that is recommended to States for incorporation into their national law. The Model Law is not intended to interfere with the normal operation of the rules of private international law (see below, para. 136). 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).

27. In incorporating the text of the model legislation into its legal system, a State may modify or leave out some of its 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 “reservations”) is much more restricted; in particular trade law conventions usually either totally prohibit reservations 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. 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 technology neutrality, non-discrimination between domestic and foreign electronic signatures, party autonomy and the international origin of the Model Law. In general, in enacting the new Model Law (or the UNCITRAL Model Law on Electronic Commerce), 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.

28. It should be noted that some countries consider that the legal issues related to the use of electronic signatures have already been solved by the UNCITRAL Model Law on Electronic Commerce, and do not plan on adopting further rules on electronic signatures until market practices in this new area are better established. However, States enacting the new Model Law alongside the UNCITRAL Model Law on Electronic Commerce may expect additional benefits. For those countries where governmental and legislative authorities are in the process of preparing legislation on electronic signature issues, including the establishment of public-key infrastructures (PKI), certain provisions of the Model Law offer the guidance of an international instrument that was prepared with PKI issues and PKI terminology in mind. For all countries, the Model Law offers a set of basic rules that can be applied beyond the PKI model, since they envisage the interplay of two distinct functions that are involved in any type of electronic signature (i.e. creating and relying on an electronic signature), and a third function involved in certain types of electronic signatures (i.e. certifying an electronic signature). Those three functions should be dealt with irrespective of whether they are in fact served by three or more separate entities (e.g. where various aspects of the certification function are shared between different entities) or whether two of those functions are served by the same person (e.g. where the certification function is served by a relying party). The Model Law thus provides common grounds for PKI systems

relying on independent certification authorities and electronic signature systems where no such independent third party is involved in the electronic signature process. In all cases, the new Model Law provides added certainty regarding the legal effectiveness of electronic signatures, without limiting the availability of the flexible criterion embodied in article 7 of the UNCITRAL Model Law on Electronic Commerce (see below, paras. 67 and 70-75).

III. GENERAL REMARKS ON ELECTRONIC SIGNATURES⁸

A. *Functions of signatures*

29. Article 7 of the UNCITRAL Model Law on Electronic Commerce is based on the recognition of the functions of a signature in a paper-based environment. In the preparation of the UNCITRAL Model Law on Electronic Commerce, the Working Group discussed the following functions traditionally performed by handwritten signatures: to identify a person; to provide certainty as to the personal involvement of that person in the act of signing; to associate that person with the content of a document. It was noted that, in addition, a signature could perform a variety of functions, depending on the nature of the document that was signed. For example, a signature might attest to: the intent of a party to be bound by the content of a signed contract; the intent of a person to endorse authorship of a text (thus displaying awareness of the fact that legal consequences might possibly flow from the act of signing); the intent of a person to associate itself with the content of a document written by someone else; the fact that, and the time when, a person had been at a given place. The relationship of the new Model Law with article 7 of the UNCITRAL Model Law on Electronic Commerce is further discussed below, in paragraphs 65, 67 and 70 to 75 of this Guide.

30. In an electronic environment, the original of a message is indistinguishable from a copy, bears no handwritten signature, and is not on paper. The potential for fraud is considerable, due to the ease of intercepting and altering information in electronic form without detection, and the speed of processing multiple transactions. The purpose of various techniques currently available on the market or still under development is to offer the technical means by which some or all of the functions identified as characteristic of handwritten signatures can be performed in an electronic environment. Such techniques may be referred to broadly as “electronic signatures”.

B. *Digital signatures and other electronic signatures*

31. In discussing the desirability and feasibility of preparing the new Model Law, and in defining the scope of uniform rules on electronic signatures, UNCITRAL has examined various electronic signature techniques currently being used or still under development. The common purpose of those techniques is to provide functional equivalents to (1) handwritten signatures; and (2) other kinds of authentication mechanisms used in a paper-based environment (e.g. seals or stamps). The same techniques may perform additional functions in the sphere of electronic commerce, which are derived from the functions of a signature but correspond to no strict equivalent in a paper-based environment.

32. As indicated above (see paras. 21 and 28), guidance from UNCITRAL is expected in many countries, by governmental and legislative authorities that are in the process of preparing legislation on electronic signature issues, including the establishment of public key infrastructures (PKI) or other projects on closely

related matters (see A/CN.9/457, para. 16). As to the decision made by UNCITRAL to focus on PKI issues and PKI terminology, it should be noted that the interplay of relationships between three distinct types of parties (i.e. signatories, suppliers of certification services and relying parties) corresponds to one possible PKI model, but other models are already commonly used in the marketplace (e.g. where no independent certification service provider is involved). One of the main benefits to be drawn from focusing on PKI issues was to facilitate the structuring of the Model Law by reference to three functions (or roles) with respect to electronic signatures, namely, the signatory function, the certification function, and the relying function. Two of those functions are common to all PKI models (i.e. creating and relying on an electronic signature). The third function is involved in many PKI models (i.e. certifying an electronic signature). Those three functions should be dealt with irrespective of whether they are in fact served by three or more separate entities (e.g. where various aspects of the certification function are shared between different entities), or whether two of those functions are served by the same person (e.g. where the certification service provider is also a relying party). Focusing on the functions performed in a PKI environment and not on any specific model also makes it easier to develop a fully media-neutral rule to the extent that similar functions are served in non-PKI electronic signature technology.

1. *Electronic signatures relying on techniques other than public-key cryptography*

33. Alongside “digital signatures” based on public-key cryptography, there exist various other devices, also covered in the broader notion of “electronic signature” mechanisms, which may currently be used, or considered for future use, with a view to fulfilling one or more of the above-mentioned functions of handwritten signatures. For example, certain techniques would rely on authentication through a biometric device based on handwritten signatures. In such a device, the signatory would sign manually, using a special pen, either on a computer screen or on a digital pad. The handwritten signature would then be analysed by the computer and stored as a set of numerical values, which could be appended to a data message and displayed by the relying party for authentication purposes. Such an authentication system would presuppose that samples of the handwritten signature have been previously analysed and stored by the biometric device. Other techniques would involve the use of personal identification numbers (PINs), digitized versions of handwritten signatures, and other methods, such as clicking an “OK-box”.

34. UNCITRAL has intended to develop uniform legislation that can facilitate the use of both digital signatures and other forms of electronic signatures. To that effect, UNCITRAL has attempted to deal with the legal issues of electronic signature issues at a level that is intermediate between the high generality of the UNCITRAL Model Law on Electronic Commerce and the specificity that might be required when dealing with a given signature technique. In any event, consistent with media neutrality in the UNCITRAL Model Law on Electronic Commerce, the new Model Law is not to be interpreted as discouraging the use of any method of electronic signature, whether already existing or to be implemented in the future.

2. *Digital signatures relying on public-key cryptography*⁹

35. In view of the increasing use of digital signature techniques in a number of countries, the following introduction may be of assistance.

⁶*Ibid.*, Fifty-fourth Session, Supplement No. 17 (A/54/17), paras. 308-314.

⁷*Ibid.*, Fifty-fifth Session, Supplement No. 17 (A/55/17), paras. 380-383.

(a) *Technical notions and terminology*

(i) *Cryptography*

36. Digital signatures are created and verified by using cryptography, the branch of applied mathematics that concerns itself with transforming messages into seemingly unintelligible form and back into the original form. Digital signatures use what is known as “public key cryptography”, which is often based on the use of algorithmic functions to generate two different but mathematically-related “keys” (i.e. large numbers produced using a series of mathematical formulae applied to prime numbers). One such key is used for creating a digital signature or transforming data into a seemingly unintelligible form, and the other one for verifying a digital signature or returning the message to its original form. Computer equipment and software utilizing two such keys are often collectively referred to as “cryptosystems” or, more specifically, “asymmetric cryptosystems” where they rely on the use of asymmetric algorithms.

37. While the use of cryptography is one of the main features of digital signatures, the mere fact that a digital signature is used to authenticate a message containing information in digital form should not be confused with a more general use of cryptography for confidentiality purposes. Confidentiality encryption is a method used for encoding an electronic communication so that only the originator and the addressee of the message will be able to read it. In a number of countries, the use of cryptography for confidentiality purposes is limited by law for reasons of public policy that may involve considerations of national defence. However, the use of cryptography for authentication purposes by producing a digital signature does not necessarily imply the use of cryptography to make any information confidential in the communication process, since the encrypted digital signature may be merely appended to a non-encrypted message.

(ii) *Public and private keys*

38. The complementary keys used for digital signatures are named the “private key”, which is used only by the signatory to create the digital signature, and the “public key”, which is ordinarily more widely known and is used by a relying party to verify the digital signature. The user of a private key is expected to keep the private key secret. It should be noted that the individual user does not need to know the private key. Such a private key is likely to be kept on a smart card, or to be accessible through a personal identification number or through a biometric identification device, e.g. through thumbprint recognition. If many people need to verify the signatory’s digital signatures, the public key must be available or distributed to all of them, for example by publication in an online repository or any other form of public directory where it is easily accessible. Although the keys of the pair are mathematically related, if an asymmetric cryptosystem has been designed and implemented securely it is virtually impossible to derive the private key from knowledge of the public key. The most common algorithms for encryption through the use of public and private keys are based on an important feature of large prime numbers: once they are multiplied together to produce a new number, it is particularly difficult and time-consuming to determine which two prime numbers created that new, larger number.¹⁰ Thus, although

⁸This section is drawn from document A/CN.9/WG.IV/WP.71, part I.

⁹Numerous elements of the description of the functioning of a digital signature system in this section are based on the ABA Digital Signature Guidelines, p. 8 to 17.

¹⁰Certain existing standards such as the ABA Digital Signature Guidelines refer to the notion of “computational infeasibility” to describe the expected irreversibility of the process, i.e. the hope that

many people may know the public key of a given signatory and use it to verify that signatory's signatures, they cannot discover that signatory's private key and use it to forge digital signatures.

39. It should be noted, however, that the concept of public-key cryptography does not necessarily imply the use of the above-mentioned algorithms based on prime numbers. Other mathematical techniques are currently used or under development, such as cryptosystems relying on elliptic curves, which are often described as offering a high degree of security through the use of significantly reduced key-lengths.

(iii) *Hash function*

40. In addition to the generation of key pairs, another fundamental process, generally referred to as a "hash function", is used in both creating and verifying a digital signature. A hash function is a mathematical process, based on an algorithm which creates a digital representation, or compressed form of the message, often referred to as a "message digest", or "fingerprint" of the message, in the form of a "hash value" or "hash result" of a standard length which is usually much smaller than the message but nevertheless substantially unique to it. Any change to the message invariably produces a different hash result when the same hash function is used. In the case of a secure hash function, sometimes named a "one-way hash function", it is virtually impossible to derive the original message from knowledge of its hash value. Hash functions therefore enable the software for creating digital signatures to operate on smaller and predictable amounts of data, while still providing robust evidentiary correlation to the original message content, thereby efficiently providing assurance that there has been no modification of the message since it was digitally signed.

(iv) *Digital signature*

41. To sign a document or any other item of information, the signatory first delimits precisely the borders of what is to be signed. Then a hash function in the signatory's software computes a hash result unique (for all practical purposes) to the information to be signed. The signatory's software then transforms the hash result into a digital signature using the signatory's private key. The resulting digital signature is thus unique to both the information being signed and the private key used to create the digital signature.

42. Typically, a digital signature (a digitally signed hash result of the message) is attached to the message and stored or transmitted with that message. However, it may also be sent or stored as a separate data element, as long as it maintains a reliable association with the corresponding message. Since a digital signature is unique to its message, it is inoperable if permanently disassociated from the message.

(v) *Verification of digital signature*

43. Digital signature verification is the process of checking the digital signature by reference to the original message and a given public key, thereby determining whether the digital signature was created for that same message using the private key that corresponds to the referenced public key. Verification of a digital signature is accomplished by computing a new hash result of the original message by means of the same hash function used to create the digital signature. Then, using the public key and the new hash result, the verifier checks whether the digital signature was created using the corresponding private key, and whether the newly computed hash result matches the original hash result that was transformed into the digital signature during the signing process.

44. The verification software will confirm the digital signature as "verified" if: (1) the signatory's private key was used to sign digitally the message, which is known to be the case if the signatory's public key was used to verify the signature because the signatory's public key will verify only a digital signature created with the signatory's private key; and (2) the message was unaltered, which is known to be the case if the hash result computed by the verifier is identical to the hash result extracted from the digital signature during the verification process.

(b) *Public key infrastructure (PKI) and suppliers of certification services*

45. To verify a digital signature, the verifier must have access to the signatory's public key and have assurance that it corresponds to the signatory's private key. However, a public and private key pair has no intrinsic association with any person; it is simply a pair of numbers. An additional mechanism is necessary to associate reliably a particular person or entity to the key pair. If public key cryptography is to serve its intended purposes, it needs to provide a way to make keys available to a wide variety of persons, many of whom are not known to the signatory, where no relationship of trust has developed between the parties. To that effect, the parties involved must have a degree of confidence in the public and private keys being issued.

46. The requested level of confidence may exist between parties who trust each other, who have dealt with each other over a period of time, who communicate on closed systems, who operate within a closed group, or who are able to govern their dealings contractually, for example, in a trading partner agreement. In a transaction involving only two parties, each party can simply communicate (by a relatively secure channel such as a courier or telephone, with its inherent feature of voice recognition) the public key of the key pair each party will use. However, the same level of confidence may not be present when the parties deal infrequently with each other, communicate over open systems (e.g. the World Wide Web on the Internet), are not in a closed group, or do not have trading partner agreements or other law governing their relationships.

47. In addition, because public-key cryptography is a highly mathematical technology, all users must have confidence in the skill, knowledge and security arrangements of the parties issuing the public and private keys.¹¹

48. A prospective signatory might issue a public statement indicating that signatures verifiable by a given public key should be treated as originating from that signatory. The form and the legal effectiveness of such a statement would be governed by the law of the enacting State. For example, a presumption of attribution of electronic signatures to a particular signatory could be established through publication of the statement in an official bulletin or in a document recognized as "authentic" by public authorities (see A/CN.9/484, para. 36). However, other parties might be unwilling to accept the statement, especially where there is no prior contract establishing the legal effect of that published statement with certainty. A party relying upon such an unsupported published statement in an open system would run a great risk of inadvertently trusting an imposter, or of having to disprove a false denial of a digital signature (an issue often referred to in the context of "non-repudiation" of digital signatures) if a transaction should turn out to prove disadvantageous for the purported signatory.

49. One type of solution to some of these problems is the use of one or more third parties to associate an identified signatory or the

it will be impossible to derive a user's secret private key from that user's public key. "'Computationally unfeasible' is a relative concept based on the value of the data protected, the computing overhead

signatory's name with a specific public key. That third party is generally referred to as a "certification authority", "certification service provider" or "supplier of certification services" in most technical standards and guidelines (in the Model Law, the term "certification service provider" has been chosen). In a number of countries, such certification authorities are being organized hierarchically into what is often referred to as a public key infrastructure (PKI). Other solutions may include, for example, certificates issued by relying parties.

(i) *Public key infrastructure (PKI)*

50. Setting up a public key infrastructure (PKI) is a way to provide confidence that: (1) a user's public key has not been tampered with and in fact corresponds to that user's private key; and (2) the cryptographic techniques being used are sound. To provide the confidence described above, a PKI may offer a number of services, including the following: (1) managing cryptographic keys used for digital signatures; (2) certifying that a public key corresponds to a private key; (3) providing keys to end users; (4) publishing a secure directory of public keys or certificates; (5) managing personal tokens (e.g. smart cards) that can identify the user with unique personal identification information or can generate and store an individual's private keys; (6) checking the identification of end users, and providing them with services; (7) providing time-stamping services; and (8) managing cryptographic keys used for confidentiality encryption where the use of such a technique is authorized.

51. A public key infrastructure (PKI) is often based on various hierarchical levels of authority. For example, models considered in certain countries for the establishment of possible PKIs include references to the following levels: (1) a unique "root authority", which would certify the technology and practices of all parties authorized to issue cryptographic key pairs or certificates in connection with the use of such key pairs, and would register subordinate certification authorities;¹² (2) various certification authorities, placed below the "root" authority, which would certify that a user's public key actually corresponds to that user's private key (i.e. has not been tampered with); and (3) various local registration authorities, placed below the certification authorities, and receiving requests from users for cryptographic key pairs or for certificates in connection with the use of such key pairs, requiring proof of identification and checking identities of potential users. In certain countries, it is envisaged that notaries public might act as, or support, local registration authorities.

52. The issues of PKI may not lend themselves easily to international harmonization. The organization of a PKI may involve various technical issues, as well as issues of public policy that may better be left to each individual State at the current stage.¹³ In that connection, decisions may need to be made by each State considering the establishment of a PKI, for example as to: (1) the form and number of levels of authority which should be comprised in a PKI; (2) whether only certain authorities belonging to the PKI should be allowed to issue cryptographic key pairs or whether such key pairs might be issued by the users themselves; (3) whether the certification authorities certifying the validity of cryptographic key pairs should be public entities or whether private entities might act as certification authorities; (4) whether the process of allowing a given entity to act as a certification service provider should take the form of an express authorization, or

required to protect it, the length of time it needs to be protected, and the cost and time required to attack the data, with such factors assessed both currently and in the light of future technological advance" (ABA Digital Signature Guidelines, p. 9, note 23).

¹¹In situations where public and private cryptographic keys would be issued by the users themselves, such confidence might need to be provided by the certifiers of public keys.

¹²The question as to whether a government should have the technical ability to retain or recreate private confidentiality keys may be dealt with at the level of the root authority.

¹³However, in the context of cross-certification, the need for global

"licensing", by the State, or whether other methods should be used to control the quality of certification authorities if they were allowed to operate in the absence of a specific authorization; (5) the extent to which the use of cryptography should be authorized for confidentiality purposes; and (6) whether government authorities should have the right to gain access to encrypted information, through a mechanism of "key escrow" or otherwise. The Model Law does not deal with those issues.

(ii) *Certification service providers*

53. To associate a key pair with a prospective signatory, a certification service provider (or certification authority) issues a certificate, an electronic record which lists a public key together with the name of the certificate subscriber as the "subject" of the certificate, and may confirm that the prospective signatory identified in the certificate holds the corresponding private key. The principal function of a certificate is to bind a public key with a particular signatory. A "recipient" of the certificate desiring to rely upon a digital signature created by the signatory named in the certificate can use the public key listed in the certificate to verify that the digital signature was created with the corresponding private key. If such verification is successful, a level of assurance is provided technically that the digital signature was created by the signatory, and that the portion of the message used in the hash function (and, consequently, the corresponding data message) has not been modified since it was digitally signed."

54. To ensure the authenticity of the certificate with respect to both its contents and its source, the certification service provider digitally signs it. The issuing certification service provider's digital signature on the certificate can be verified by using the public key of the certification service provider listed in another certificate by another certification service provider (which may but need not be on a higher level in a hierarchy), and that other certificate can in turn be authenticated by the public key listed in yet another certificate, and so on, until the person relying on the digital signature is adequately assured of its genuineness. In each case, the issuing certification service provider must digitally sign its own certificate during the operational period of the other certificate used to verify the certification service provider's digital signature. Under the laws of some States, a way of building trust in the digital signature of the certification service provider might be to publish the public key of the certification service provider in an official bulletin (see A/CN.9/484, para. 41).

55. A digital signature corresponding to a message, whether created by the signatory to authenticate a message or by a certification service provider to authenticate its certificate, should generally be reliably time-stamped to allow the verifier to determine reliably whether the digital signature was created during the "operational period" stated in the certificate, which is a condition of the verifiability of a digital signature.

56. To make a public key and its correspondence to a specific signatory readily available for verification, the certificate may be published in a repository or made available by other means. Typically, repositories are on-line databases of certificates and other information available for retrieval and use in verifying digital signatures.

57. Once issued, a certificate may prove to be unreliable, for example in situations where the signatory misrepresents its identity to the certification service provider. In other circumstances, a certificate may be reliable enough when issued but it may become unreliable sometime thereafter. If the private key is "compromised", for example through loss of control of the private key by the signatory, the certificate may lose its trustworthiness or be-

come unreliable, and the certification service provider (at the signatory's request or even without the signatory's consent, depending on the circumstances) may suspend (temporarily interrupt the operational period) or revoke (permanently invalidate) the certificate. Immediately upon suspending or revoking a certificate, the certification service provider may be expected to publish notice of the revocation or suspension or notify persons who enquire or who are known to have received a digital signature verifiable by reference to the unreliable certificate.

58. Certification authorities could be operated by government authorities or by private sector service providers. In a number of countries, it is envisaged that, for public policy reasons, only government entities should be authorized to operate as certification authorities. In other countries, it is considered that certification services should be open to competition from the private sector. Irrespective of whether certification authorities are operated by public entities or by private sector service providers, and of whether certification authorities would need to obtain a licence to operate, there is typically more than one certification service provider operating within the PKI. Of particular concern is the relationship between the various certification authorities. Certification authorities within a PKI can be established in a hierarchical structure, where some certification authorities only certify other certification authorities, which provide services directly to users. In such a structure, certification authorities are subordinate to other certification authorities. In other conceivable structures, all certification authorities may operate on an equal footing. In any large PKI, there would likely be both subordinate and superior certification authorities. In any event, in the absence of an international PKI, a number of concerns may arise with respect to the recognition of certificates by certification authorities in foreign countries. The recognition of foreign certificates is often achieved by a method called "cross certification". In such a case, it is necessary that substantially equivalent certification authorities (or certification authorities willing to assume certain risks with regard to the certificates issued by other certification authorities) recognize the services provided by each other, so their respective users can communicate with each other more efficiently and with greater confidence in the trustworthiness of the certificates being issued.

59. Legal issues may arise with regard to cross-certifying or chaining of certificates when there are multiple security policies involved. Examples of such issues may include determining whose misconduct caused a loss, and upon whose representations the user relied. It should be noted that legal rules considered for adoption in certain countries provide that, where the levels of security and policies are made known to the users, and there is no negligence on the part of certification authorities, there should be no liability.

60. It may be incumbent upon the certification service provider or the root authority to ensure that its policy requirements are met on an ongoing basis. While the selection of certification authorities may be based on a number of factors, including the strength of the public key being used and the identity of the user, the trustworthiness of any certification service provider may also depend on its enforcement of certificate-issuing standards and the reliability of its evaluation of data received from users who request certificates. Of particular importance is the liability regime applying to any certification service provider with respect to its compliance with the policy and security requirements of the root authority or superior certification service provider, or with any other applicable requirement, on an ongoing basis. Of equal importance is the obligation of the certification service provider to act in accordance with the representations made by it with respect to its policies and practices, as envisaged in article 9(1)(a) of the new Model Law (see A/CN.9/484, para. 43).

61. In the preparation of the Model Law, the following elements were considered as possible factors to be taken into account when assessing the trustworthiness of a certification service provider: (1) independence (i.e. absence of financial or other interest in underlying transactions); (2) financial resources and financial ability to bear the risk of being held liable for loss; (3) expertise in public-key technology and familiarity with proper security procedures; (4) longevity (certification authorities may be required to produce evidence of certification or decryption keys many years after the underlying transaction has been completed, in the context of a lawsuit or property claim); (5) approval of hardware and software; (6) maintenance of an audit trail and audit by an independent entity; (7) existence of a contingency plan (e.g. "disaster recovery" software or key escrow); (8) personnel selection and management; (9) protection arrangements for the certification service provider's own private key; (10) internal security; (11) arrangements for termination of operations, including notice to users; (12) warranties and representations (given or excluded); (13) limitation of liability; (14) insurance; (15) inter-operability with other certification authorities; (16) revocation procedures (in cases where cryptographic keys might be lost or compromised).

(c) *Summary of the digital signature process*

62. The use of digital signatures usually involves the following processes, performed either by the signatory or by the receiver of the digitally signed message:

- (1) The user generates or is given a unique cryptographic key pair;
- (2) The signatory prepares a message (for example, in the form of an electronic mail message) on a computer;
- (3) The signatory prepares a "message digest", using a secure hash algorithm. Digital signature creation uses a hash result derived from and unique to both the signed message and a given private key;
- (4) The signatory encrypts the message digest with the private key. The private key is applied to the message digest text using a mathematical algorithm. The digital signature consists of the encrypted message digest;
- (5) The signatory typically attaches or appends its digital signature to the message;
- (6) The signatory sends the digital signature and the (unencrypted or encrypted) message to the relying party electronically;
- (7) The relying party uses the signatory's public key to verify the signatory's digital signature. Verification using the signatory's public key provides a level of technical assurance that the message came exclusively from the signatory;
- (8) The relying party also creates a "message digest" of the message, using the same secure hash algorithm;
- (9) The relying party compares the two message digests. If they are the same, then the relying party knows that the message has not been altered after it was signed. Even if one bit in the message has been altered after the message has been digitally signed, the message digest created by the relying party will be different from the message digest created by the signatory;
- (10) Where the certification process is resorted to, the relying party obtains a certificate from the certification service provider (including through the signatory or otherwise), which confirms the digital signature on the signatory's message (see A/CN.9/484, para. 44). The certificate contains the public key and name of the signatory (and possibly additional information), digitally signed by the certification service provider.

IV. MAIN FEATURES OF THE MODEL LAW

A. *Legislative nature of the Model Law*

63. The new Model Law was prepared on the assumption that it should be directly derived from article 7 of the UNCITRAL Model Law on Electronic Commerce and should be considered as a way to provide detailed information as to the concept of a reliable “method used to identify” a person and “to indicate that person’s approval” of the information contained in a data message (see A/CN.9/WG.IV/WP.71, para. 49).

64. The question of what form the instrument might take was raised and the importance of considering the relationship of the form to the content was noted. Different approaches were suggested as to what the form might be, which included contractual rules, legislative provisions, or guidelines for States considering enacting legislation on electronic signatures. It was agreed as a working assumption that the text should be prepared as a set of legislative rules with commentary, and not merely as guidelines (see A/CN.9/437, para. 27; A/CN.9/446, para. 25; and A/CN.9/457, paras. 51 and 72). The text was finally adopted as a Model Law (A/CN.9/483, paras. 137 and 138).

B. *Relationship with the UNCITRAL Model Law on Electronic Commerce*

1. *New Model Law as a separate legal instrument*

65. The new provisions could have been incorporated in an extended version of the UNCITRAL Model Law on Electronic Commerce, for example to form a new part III of the UNCITRAL Model Law on Electronic Commerce. With a view to indicating clearly that the new Model Law could be enacted either independently or in combination with the UNCITRAL Model Law on Electronic Commerce, it was eventually decided that the new Model Law should be prepared as a separate legal instrument (see A/CN.9/465, para. 37). That decision results mainly from the fact that, at the time the new Model Law was being finalized, the UNCITRAL Model Law on Electronic Commerce had already been successfully implemented in a number of countries and was being considered for adoption in many other countries. The preparation of an extended version of the UNCITRAL Model Law on Electronic Commerce might have compromised the success of the original version by suggesting a need to improve on that text by way of an update. In addition, preparing a new version of the UNCITRAL Model Law on Electronic Commerce might have introduced confusion in those countries that had recently adopted the UNCITRAL Model Law on Electronic Commerce.

2. *New Model Law fully consistent with the UNCITRAL Model Law on Electronic Commerce*

66. In drafting the new Model Law, every effort was made to ensure consistency with both the substance and the terminology of the UNCITRAL Model Law on Electronic Commerce (A/CN.9/465, para. 37). The general provisions of the UNCITRAL Model Law on Electronic Commerce have been reproduced in the new instrument. These are articles 1 (Sphere of application), 2(a), (c) and (d) (Definitions of “data message”, “originator” and “addressee”), 3 (Interpretation), 4 (Variation by agreement) and 7 (Signature) of the UNCITRAL Model Law on Electronic Commerce.

67. Based on the UNCITRAL Model Law on Electronic Commerce, the new Model Law is intended to reflect in particular: the principle of media-neutrality; an approach under which functional

equivalents of traditional paper-based concepts and practices should not be discriminated against; and extensive reliance on party autonomy (A/CN.9/WG.IV/WP.84, para. 16). It is intended for use both as minimum standards in an “open” environment (i.e. where parties communicate electronically without prior agreement) and, where appropriate, as model contractual provisions or default rules in a “closed” environment (i.e. where parties are bound by pre-existing contractual rules and procedures to be followed in communicating by electronic means).

3. *Relationship with article 7 of the UNCITRAL Model Law on Electronic Commerce*

68. In the preparation of the new Model Law, the view was expressed that the reference to article 7 of the UNCITRAL Model Law on Electronic Commerce in the text of article 6 of the new Model Law was to be interpreted as limiting the scope of the new Model Law to situations where an electronic signature was used to meet a mandatory requirement of law that certain documents had to be signed for “validity” purposes. Under that view, since the law of most nations contained very few such requirements with respect to documents used for commercial transactions, the scope of the new Model Law was very narrow. It was generally agreed, in response, that such interpretation of article 6 (and of article 7 of the UNCITRAL Model Law on Electronic Commerce) was inconsistent with the interpretation of the words “the law” adopted by the Commission in paragraph 68 of the Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce, under which “the words ‘the law’ are to be understood as encompassing not only statutory or regulatory law but also judicially-created law and other procedural law”. In fact, the scope of both article 7 of the UNCITRAL Model Law on Electronic Commerce and article 6 of the new Model Law is particularly broad, since most documents used in the context of commercial transactions are likely to be faced, in practice, with the requirements of the law of evidence regarding proof in writing (A/CN.9/465, para. 67).

C. *“Framework” rules to be supplemented by technical regulations and contract*

69. As a supplement to the UNCITRAL Model Law on Electronic Commerce, the new Model Law is intended to provide essential principles for facilitating the use of electronic signatures. However, as a “framework”, the Model Law itself does not set forth all the rules and regulations that may be necessary (in addition to contractual arrangements between users) to implement those techniques in an enacting State. Moreover, as indicated in this Guide, the Model Law is not intended to cover every aspect of the use of electronic signatures. Accordingly, an enacting State may wish to issue regulations to fill in the procedural details for procedures authorized by the Model Law and to take account of the specific, possibly changing, circumstances at play in the enacting State, without compromising the objectives of the Model Law. It is recommended that, should it decide to issue such regulation, an enacting State should give particular attention to the need to preserve flexibility in the operation of electronic signature systems by their users. Commercial practice has a long-standing reliance on the voluntary technical standards process. Such technical standards form the bases of product specifications, of engineering and design criteria and of consensus for research and development of future products. To ensure the flexibility such commercial practice relies on, to promote open standards with a view to facilitating interoperability, and to support the objective of cross-border recognition (as described in article 12), States may wish to give due regard to the relationship between any specifications incorporated in or authorized by national regulations, and the voluntary technical standards process (see A/CN.9/484, para. 46).

70. It should be noted that the electronic signature techniques considered in the Model Law, beyond raising matters of procedure that may need to be addressed in the implementing technical regulations, may raise certain legal questions, the answers to which will not necessarily be found in the Model Law, but rather in other bodies of law. Such other bodies of law may include, for example, the applicable administrative, contract, tort, criminal and judicial-procedure law, which the Model Law is not intended to deal with.

D. *Added certainty as to the legal effects of electronic signatures*

71. One of the main features of the new Model Law is to add certainty to the operation of the flexible criterion set forth in article 7 of the UNCITRAL Model Law on Electronic Commerce for the recognition of an electronic signature as functionally equivalent to a handwritten signature. Article 7 of the UNCITRAL Model Law on Electronic Commerce reads as follows:

“(1) Where the law requires a signature of a person, that requirement is met in relation to a data message if:

“(a) a method is used to identify that person and to indicate that person’s approval of the information contained in the data message; and

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

“(2) Paragraph (1) applies whether the requirement therein is in the form of an obligation or whether the law simply provides consequences for the absence of a signature.

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

72. Article 7 is based on the recognition of the functions of a signature in a paper-based environment, as described in paragraph 29 above.

73. With a view to ensuring that a message that was required to be authenticated should not be denied legal value for the sole reason that it was not authenticated in a manner peculiar to paper documents, article 7 adopts a comprehensive approach. It establishes the general conditions under which data messages would be regarded as authenticated with sufficient credibility and would be enforceable in the face of signature requirements that currently present barriers to electronic commerce. Article 7 focuses on the two basic functions of a signature, namely to identify the author of a document and to confirm that the author approved the content of that document. Paragraph (1)(a) establishes the principle that, in an electronic environment, the basic legal functions of a signature are performed by way of a method that identifies the originator of a data message and confirms that the originator approved the content of that data message.

74. Paragraph (1)(b) establishes a flexible approach to the level of security to be achieved by the method of identification used under paragraph (1)(a). The method used under paragraph (1)(a) should be as reliable as is appropriate for the purpose for which the data message is generated or communicated, in the light of all the circumstances, including any agreement between the originator and the addressee of the data message.

75. In determining whether the method used under paragraph (1) is appropriate, legal, technical and commercial factors that may be taken into account include the following: (1) the sophistication of the equipment used by each of the parties; (2) the

nature of their trade activity; (3) the frequency at which commercial transactions take place between the parties; (4) the kind and size of the transaction; (5) the function of signature requirements in a given statutory and regulatory environment; (6) the capability of communication systems; (7) compliance with authentication procedures set forth by intermediaries; (8) the range of authentication procedures made available by any intermediary; (9) compliance with trade customs and practice; (10) the existence of insurance coverage mechanisms against unauthorized messages; (11) the importance and the value of the information contained in the data message; (12) the availability of alternative methods of identification and the cost of implementation; (13) the degree of acceptance or non-acceptance of the method of identification in the relevant industry or field both at the time the method was agreed upon and the time when the data message was communicated; and (14) any other relevant factor (Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce, paras. 53 and 56-58).

76. Building on the flexible criterion expressed in article 7(1)(b) of the UNCITRAL Model Law on Electronic Commerce, articles 6 and 7 of the new Model Law establish a mechanism through which electronic signatures that meet objective criteria of technical reliability can be made to benefit from early determination as to their legal effectiveness. Depending on the time at which certainty is achieved as to the recognition of an electronic signature as functionally equivalent to a handwritten signature, the Model Law establishes two distinct regimes. The first and broader regime is that described in article 7 of the UNCITRAL Model Law on Electronic Commerce. It recognizes any “method” that may be used to fulfil a legal requirement for a handwritten signature. The legal effectiveness of such a “method” as an equivalent of a handwritten signature depends upon demonstration of its “reliability” to a trier of fact. The second and narrower regime is that created by the new Model Law. It contemplates methods of electronic signature that may be recognized by a State authority, a private accredited entity, or the parties themselves, as meeting the criteria of technical reliability set forth in the Model Law (see A/CN.9/484, para. 49). The advantage of such recognition is that it brings certainty to the users of such electronic signature techniques before they actually use the electronic signature technique.

E. *Basic rules of conduct for the parties involved*

77. The Model Law does not deal in any detail with the issues of liability that may affect the various parties involved in the operation of electronic signature systems. Those issues are left to applicable law outside the Model Law. However, the Model Law sets out criteria against which to assess the conduct of those parties, i.e. the signatory, the relying party and the certification service provider.

78. As to the signatory, the Model Law elaborates on the basic principle that the signatory should apply reasonable care with respect to its electronic signature creation data. The signatory is expected to exercise reasonable care to avoid unauthorized use of that signature creation data. The digital signature in itself does not guarantee that the person who has in fact signed is the signatory. At best, the digital signature provides assurance that it is attributable to the signatory (see A/CN.9/484, para. 50). Where the signatory knows or should have known that the signature creation data has been compromised, the signatory should give notice without undue delay to any person who may reasonably be expected to rely on, or to provide services in support of, the electronic signature. Where a certificate is used to support the electronic signature, the signatory is expected to exercise reasonable care to ensure the accuracy and completeness of all material representations made by the signatory in connection with the certificate.

79. A relying party is expected to take reasonable steps to verify the reliability of an electronic signature. Where the electronic signature is supported by a certificate, the relying party should take reasonable steps to verify the validity, suspension or revocation of the certificate, and observe any limitation with respect to the certificate.

80. The general duty of a certification service provider is to utilize trustworthy systems, procedures and human resources, and to act in accordance with representations that the supplier makes with respect to its policies and practices. In addition, the certification service provider is expected to exercise reasonable care to ensure the accuracy and completeness of all material representations it makes in connection with a certificate. In the certificate, the supplier should provide essential information allowing the relying party to identify the supplier. It should also represent that: (1) the signatory that is identified in the certificate had control of the signature creation data at the time when the certificate was issued; and (2) the signature creation data was operational on or before the date when the certificate was issued. For the benefit of the relying party, the certification service provider should provide additional information as to: (1) the method used to identify the signatory; (2) any limitation on the purpose or value for which the signature creation data or the certificate may be used; (3) the operational condition of the signature creation data; (4) any limitation on the scope or extent of liability of the certification service provider; (5) whether means exist for the signatory to give notice that a signature creation data has been compromised; and (6) whether a timely revocation service is offered.

81. For the assessment of the trustworthiness of the systems, procedures and human resources utilized by the certification service provider, the Model Law provides an open-ended list of indicative factors.

F. *A technology-neutral framework*

82. Given the pace of technological innovation, the Model Law provides criteria for the legal recognition of electronic signatures irrespective of the technology used (e.g. digital signatures relying on asymmetric cryptography; biometric devices (enabling the identification of individuals by their physical characteristics, whether by hand or face geometry, fingerprint reading, voice recognition or retina scan, etc.); symmetric cryptography, the use of personal identification numbers (PINs); the use of "tokens" as a way of authenticating data messages through a smart card or other device held by the signatory; digitized versions of hand-written signatures; signature dynamics; and other methods, such as clicking an "OK-box"). The various techniques listed could be used in combination to reduce systemic risk (see A/CN.9/484, para. 52).

G. *Non-discrimination of foreign electronic signatures*

83. The Model Law establishes as a basic principle that the place of origin, in and of itself, should in no way be a factor determining whether and to what extent foreign certificates or electronic signatures should be recognized as capable of being legally effective in an enacting State (see A/CN.9/484, para. 53). Determination of whether, or the extent to which, a certificate or an electronic signature is capable of being legally effective should not depend on the place where the certificate or the electronic signature was issued (see A/CN.9/483, para. 27) but on its technical reliability). That basic principle is elaborated upon in article 12 (see below, paras. 152-160).

V. ASSISTANCE FROM THE UNCITRAL SECRETARIAT

A. *Assistance in drafting legislation*

84. 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 UNCITRAL Model Law on Electronic Signatures. The same assistance is brought to Governments considering legislation based on other UNCITRAL model laws (i.e. the UNCITRAL Model Law on International Commercial Arbitration, the UNCITRAL Model Law on International Credit Transfers, the UNCITRAL Model Law on Procurement of Goods, Construction and Services, the UNCITRAL Model Law on Electronic Commerce, and the UNCITRAL Model Law on Cross-Border Insolvency), or considering adhesion to one of the international trade law conventions prepared by UNCITRAL.

85. Further information concerning the Model Law and other model laws and conventions developed by UNCITRAL, may be obtained from the secretariat at the address below:

International Trade Law Branch, 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: <http://www.uncitral.org>

B. *Information on the interpretation of legislation based on the Model Law*

86. The 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 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 secretariat in hard copy (A/CN.9/SER.C/GUIDE/1) and on the above-mentioned Internet home page of UNCITRAL.

Chapter II. Article-by-article remarks

TITLE

"Model Law"

87. Throughout its preparation, the instrument has been conceived of as an addition to the UNCITRAL Model Law on Electronic Commerce, which should be dealt with on an equal footing and share the legal nature of its forerunner.

Article 1. *Sphere of application*

This Law applies where electronic signatures are used in the context* of commercial** activities. It does not override any rule of law intended for the protection of consumers.

*The Commission suggests the following text for States that might wish to extend the applicability of this Law:

“This Law applies where electronic signatures are used, except in the following situations: [...]”

**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.

General remarks

88. The purpose of article 1 is to delineate the scope of application of the Model Law. The approach used in the Model Law is to provide in principle for the coverage of all factual situations where electronic signatures are used, irrespective of the specific electronic signature or authentication technique being applied. It was felt during the preparation of the Model Law that exclusion of any form or medium by way of a limitation in the scope of the Model Law might result in practical difficulties and would run counter to the purpose of providing truly “media-neutral” as well as “technology-neutral” rules. In the preparation of the Model Law, the principle of technology neutrality was observed by the UNCITRAL Working Group on Electronic Commerce, although it was aware that “digital signatures”, i.e. those electronic signatures obtained through the application of dual-key cryptography, were a particularly widespread technology (see A/CN.9/484, para. 54).

*Footnote***

89. It was felt that the Model Law should contain an indication that its focus was on the types of situations encountered in the commercial area and that it had been prepared against the background of relationships in trade and finance. For that reason, article 1 refers to “commercial activities” and provides, in footnote **, indications as to what is meant thereby. Such indications, which may be particularly useful for those countries where there does not exist a discrete body of commercial law, are modelled, for reasons of consistency, on the footnote to article 1 of the UNCITRAL Model Law on International Commercial Arbitration (also reproduced as footnote **** to article 1 of the UNCITRAL Model Law on Electronic Commerce). In certain countries, the use of footnotes in a statutory text would not be regarded as acceptable legislative practice. National authorities enacting the Model Law might thus consider the possible inclusion of the text of footnotes in the body of the text itself.

*Footnote**

90. The Model Law applies to all kinds of data messages to which a legally significant electronic signature is attached, and nothing in the Model Law should prevent an enacting State from extending the scope of the Model Law to cover uses of electronic signatures outside the commercial sphere. For example, while the focus of the Model Law is not on the relationships between users

of electronic signatures and public authorities, the Model Law is not intended to be inapplicable to such relationships. Footnote * provides for alternative wordings, for possible use by enacting States that would consider it appropriate to extend the scope of the Model Law beyond the commercial sphere.

Consumer protection

91. Some countries have special consumer protection laws that may govern certain aspects of the use of information systems. With respect to such consumer legislation, as was the case with previous UNCITRAL instruments (e.g. the UNCITRAL Model Law on International Credit Transfers and the UNCITRAL Model Law on Electronic Commerce), it was felt that an indication should be given that the Model Law had been drafted without special attention being given to issues that might arise in the context of consumer protection. At the same time, it was felt that there was no reason why situations involving consumers should be excluded from the scope of the Model Law by way of a general provision, particularly since the provisions of the Model Law might be found very beneficial for consumer protection, depending on legislation in each enacting State. Article 1 thus recognizes that any such consumer protection law may take precedence over the provisions in the Model Law. Should legislators come to different conclusions as to the beneficial effect of the Model Law on consumer transactions in a given country, they might consider excluding consumers from the sphere of application of the piece of legislation enacting the Model Law. The question of which individuals or corporate bodies would be regarded as “consumers” is left to applicable law outside the Model Law.

Use of electronic signatures in international and domestic transactions

92. It is recommended that application of the Model Law be made as wide as possible. Particular caution should be used in excluding the application of the Model Law by way of a limitation of its scope to international uses of electronic signatures, since such a limitation may be seen as not fully achieving the objectives of the Model Law. Furthermore, the variety of procedures available under the Model Law to limit the use of electronic signatures if necessary (e.g. for purposes of public policy) may make it less necessary to limit the scope of the Model Law. The legal certainty to be provided by the Model Law is necessary for both domestic and international trade. Discrimination between electronic signatures used domestically and electronic signatures used in the context of international trade transactions might result in a duality of regimes governing the use of electronic signatures, thus creating a serious obstacle to the use of such techniques (see A/CN.9/484, para. 55).

References to UNCITRAL documents

A/CN.9/484, paras. 54 and 55;
A/CN.9/WG.IV/WP.88, annex, paras. 87-91;
A/CN.9/467, paras. 22-24;
A/CN.9/WG.IV/WP.84, para. 22;
A/CN.9/465, paras. 36-42;
A/CN.9/WG.IV/WP.82, para. 21;
A/CN.9/457, paras. 53-64.

Article 2. *Definitions*

For the purposes of this Law:

(a) “Electronic signature” means data in electronic form in, affixed to, or logically associated with, a data message,

which may be used to identify the signatory in relation to the data message and indicate the signatory's approval of the information contained in the data message;

(b) "Certificate" means a data message or other record confirming the link between a signatory and signature creation data;

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

(d) "Signatory" means a person that holds signature creation data and acts either on its own behalf or on behalf of the person it represents;

(e) "Certification service provider" means a person that issues certificates and may provide other services related to electronic signatures;

(f) "Relying party" means a person that may act on the basis of a certificate or an electronic signature.

Definition of "Electronic signature"

Electronic signature as functional equivalent of handwritten signature

93. The notion of "electronic signature" is intended to cover all traditional uses of a handwritten signature for legal effect, the identification of the signatory and the intent to sign being no more than the smallest common denominator to the various approaches to "signature" found in the various legal systems. Those functions of a handwritten signature were already discussed in the context of the preparation of article 7 of the UNCITRAL Model Law on Electronic Commerce. Thus, defining an electronic signature as capable of indicating approval of information amounts primarily to establishing a technical prerequisite for the recognition of a given technology as capable of creating an equivalent to a handwritten signature. The definition does not disregard the fact that technologies commonly referred to as "electronic signatures" could be used for purposes other than creating a legally-significant signature. The definition simply illustrates the focus of the Model Law on the use of electronic signatures as functional equivalents of handwritten signatures (see A/CN.9/483, para. 62).

Possible other uses of an electronic signature

94. A distinction should be drawn between the legal notion of "signature" and the technical notion of "electronic signature", a term of art which covers practices that do not necessarily involve the production of legally significant signatures. In the preparation of the Model Law, it was felt that the attention of users should be brought to the risk of confusion that might result from the use of the same technical tool for the production of a legally meaningful signature and for other authentication or identification functions (ibid.).

Definition of "Certificate"

Need for a definition

95. The term "certificate", as used in the context of certain types of electronic signatures and as defined in the Model Law, differs little from its general meaning of a document by which a person would confirm certain facts. The only difference is that the certificate is in electronic rather than paper form (see A/CN.9/484, para. 56). However, since the general notion of "certificate" does not

exist in all legal systems or indeed in all languages, it was felt useful to include a definition in the context of the Model Law (see A/CN.9/483, para. 65).

Purpose of a certificate

96. The purpose of the certificate is to recognize, show or confirm a link between signature creation data and the signatory. That link is created when the signature creation data is generated (ibid., para. 67).

"signature creation data"

97. In the context of electronic signatures which are not digital signatures, the term "signature creation data" is intended to designate those secret keys, codes or other elements that, in the process of creating an electronic signature, are used to provide a secure link between the resulting electronic signature and the person of the signatory (see A/CN.9/484, para. 57). For example, in the context of electronic signatures based on biometric devices, the essential element would be the biometric indicator, such as a fingerprint or retina-scan data. The description covers only those core elements that should be kept confidential to ensure the quality of the signature process, to the exclusion of any other element which, although it might contribute to the signature process, could be disclosed without jeopardizing the reliability of the resulting electronic signature. On the other hand, in the context of digital signatures relying on asymmetric cryptography, the core operative element that could be described as "linked to the signatory" is the cryptographic key pair. In the case of digital signatures, both the public and the private key are linked to the person of the signatory. Since the prime purpose of a certificate, in the context of digital signatures, is to confirm the link between the public key and the signatory (see paras. 53-56 and 62 (10) above), it is also necessary that the public key must be certified as belonging to the signatory. While only the private key is covered by this description of "signature creation data", it is important to state, for the avoidance of doubt, that in the context of digital signatures the definition of "certificate" in article 2 (b) should be taken to include the confirming of the link between the signatory and the signatory's public key. Also among the elements not to be covered by this description is the text being electronically signed, although it also plays an important role in the signature-creation process (through a hash function or otherwise). Article 6 expresses the idea that the signature creation data should be linked to the signatory and to no other person (A/CN.9/483, para. 75).

Definition of "Data message"

98. The definition of "data message" is taken from article 2 of the UNCITRAL Model Law on Electronic Commerce as a broad notion encompassing all messages generated in the context of electronic commerce, including web-based commerce (ibid., para. 69). The notion of "data message" is not limited to communication but is also intended to encompass computer-generated records that are not intended for communication. Thus, the notion of "message" includes the notion of "record".

99. The reference to "similar means" is intended to reflect the fact that the Model Law was not intended only for application in the context of existing communication techniques but also to accommodate foreseeable technical developments. The aim of the definition of "data message" is to encompass all types of messages that are generated, stored, or communicated in essentially paperless form. For that purpose, all means of communication and storage of information that might be used to perform functions

parallel to the functions performed by the means listed in the definition are intended to be covered by the reference to “similar means”, although, for example, “electronic” and “optical” means of communication might not be, strictly speaking, similar. For the purposes of the Model Law, the word “similar” connotes “functionally equivalent”.

100. The definition of “data message” is also intended to apply in case of revocation or amendment. A data message is presumed to have a fixed information content but it may be revoked or amended by another data message (Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce, paras. 30-32).

Definition of “Signatory”

“a person”

101. Consistent with the approach taken in the UNCITRAL Model Law on Electronic Commerce, any reference in the new Model Law to a “person” should be understood as covering all types of persons or entities, whether physical, corporate or other legal persons (A/CN.9/483, para. 86).

“on behalf of the person it represents”

102. The analogy to handwritten signatures may not always be suitable for taking advantage of the possibilities offered by modern technology. In a paper-based environment, for instance, legal entities cannot strictly speaking be signatories of documents drawn up on their behalf, because only natural persons can produce authentic handwritten signatures. Electronic signatures, however, can be conceived so as to be attributable to companies, or other legal entities (including governmental and other public authorities), and there may be situations where the identity of the person who actually generates the signature, where human action is required, is not relevant for the purposes for which the signature was created (ibid., para. 85).

103. Nevertheless, under the Model Law, the notion of “signatory” cannot be severed from the person or entity that actually generated the electronic signature, since a number of specific obligations of the signatory under the Model Law are logically linked to actual control over the signature creation data. However, in order to cover situations where the signatory would be acting in representation of another person, the phrase “or on behalf of the person it represents” has been retained in the definition of “signatory”. The extent to which a person would be bound by an electronic signature generated “on its behalf” is a matter to be settled in accordance with the law governing, as appropriate, the legal relationship between the signatory and the person on whose behalf the electronic signature is generated, on the one hand, and the relying party, on the other hand. That matter, as well as other matters pertaining to the underlying transaction, including issues of agency and other questions as to who bears the ultimate liability for failure by the signatory to comply with its obligations under article 8 (whether the signatory or the person represented by the signatory) are outside the scope of the Model Law (ibid., paras. 86 and 87).

Definition of “Certification service provider”

104. As a minimum, the certification service provider as defined for the purposes of the Model Law would have to provide certification services, possibly together with other services (ibid., para. 100).

105. No distinction has been drawn in the Model Law between situations where a certification service provider engages in the provision of certification services as its main activity or as an ancillary business, on a habitual or an occasional basis, directly or through a subcontractor. The definition covers all entities that provide certification services within the scope of the Model Law, i.e. “in the context of commercial activities”. However, in view of that limitation in the scope of application of the Model Law, entities that issued certificates for internal purposes and not for commercial purposes would not fall under the category “certification service providers” as defined in article 2 (ibid., paras. 94-99).

Definition of “Relying party”

106. The definition of “relying party” is intended to ensure symmetry in the definition of the various parties involved in the operation of electronic signature schemes under the Model Law (ibid., para. 107). For the purposes of that definition, “act” should be interpreted broadly to cover not only a positive action but also an omission (ibid., para. 108).

References to UNCITRAL documents

- A/CN.9/484, paras. 56 and 57;
- A/CN.9/WG.IV/WP.88, annex, paras. 92-105;
- A/CN.9/483, paras. 59-109;
- A/CN.9/WG.IV/WP.84, paras. 23-36;
- A/CN.9/465, para. 42;
- A/CN.9/WG.IV/WP.82, paras. 22 and 33;
- A/CN.9/457, paras. 22-47; 66 and 67; 89; 109;
- A/CN.9/WG.IV/WP.80, paras. 7-10;
- A/CN.9/WG.IV/WP.79, para. 21;
- A/CN.9/454, para. 20;
- A/CN.9/WG.IV/WP.76, paras. 16-20;
- A/CN.9/446, paras. 27-46 (draft article 1), 62-70 (draft article 4), 113-131 (draft article 8), 132 and 133 (draft article 9);
- A/CN.9/WG.IV/WP.73, paras. 16-27, 37 and 38, 50-57, and 58-60;
- A/CN.9/437, paras. 29-50 and 90-113 (draft articles A, B and C); and
- A/CN.9/WG.IV/WP.71, paras. 52-60.

Article 3. Equal treatment of signature technologies

Nothing in this Law, except article 5, shall be applied so as to exclude, restrict or deprive of legal effect any method of creating an electronic signature that satisfies the requirements referred to in article 6 (1) or otherwise meets the requirements of applicable law.

Neutrality as to technology

107. Article 3 embodies the fundamental principle that no method of electronic signature should be discriminated against, i.e. that all technologies would be given the same opportunity to satisfy the requirements of article 6. As a result, there should be no disparity of treatment between electronically-signed messages and paper documents bearing handwritten signatures, or between various types of electronically-signed messages, provided that they meet the basic requirements set forth in article 6(1) of the Model Law or any other requirement set forth in applicable law. Such requirements might, for example, prescribe the use of a specifically designated signature technique in certain identified situations, or might otherwise set a standard that might be higher or

lower than that set forth in article 7 of the UNCITRAL Model Law on Electronic Commerce (and article 6 of the Model Law). The fundamental principle of non-discrimination is intended to find general application. It should be noted, however, that such a principle is not intended to affect the freedom of contract recognized under article 5. As between themselves and to the extent permitted by law, the parties should thus remain free to exclude by agreement the use of certain electronic signature techniques. By stating that "nothing in this Law shall be applied so as to exclude, restrict or deprive of legal effect any method of creating an electronic signature", article 3 merely indicates that the form in which a certain electronic signature is applied cannot be used as the only reason for which that signature would be denied legal effectiveness. However, article 3 should not be misinterpreted as establishing the legal validity of any given signature technique or of any electronically-signed information.

References to UNCITRAL documents

A/CN.9/WG.IV/WP.88, annex, para. 106;
A/CN.9/467, paras. 25-32;
A/CN.9/WG.IV/WP.84, para. 37;
A/CN.9/465, paras. 43-48;
A/CN.9/WG.IV/WP.82, para. 34;
A/CN.9/457, paras. 53-64.

Article 4. Interpretation

- (1) In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.
- (2) Questions concerning matters governed by this Law which are not expressly settled in it are to be settled in conformity with the general principles on which this Law is based.

Source

108. Article 4 is inspired by article 7 of the United Nations Convention on Contracts for the International Sale of Goods, and reproduced from article 3 of the UNCITRAL Model Law on Electronic Commerce. It is intended to provide guidance for interpretation of the Model Law by arbitral tribunals, courts and national or local administrative authorities. The expected effect of article 4 is to limit the extent to which a uniform text, once incorporated in local legislation, would be interpreted only by reference to the concepts of local law.

Paragraph (1)

109. The purpose of paragraph (1) is to draw the attention of any person who might be called upon to apply the Model Law to the fact that the provisions of the Model Law (or the provisions of the instrument implementing the Model Law), while enacted as part of domestic legislation and therefore domestic in character, should be interpreted with reference to its international origin in order to ensure uniformity in the interpretation of the Model Law in all enacting countries.

Paragraph (2)

110. Amongst the general principles on which the Model Law is based, the following non-exhaustive list may be found applicable: (1) to facilitate electronic commerce among and within nations;

(2) to validate transactions entered into by means of new information technologies; (3) to promote and encourage in a technology-neutral way the implementation of new information technologies in general and electronic signatures in particular; (4) to promote the uniformity of law; and (5) to support commercial practice. While the general purpose of the Model Law is to facilitate the use of electronic signatures, it should not be construed in any way as imposing their use.

References to UNCITRAL documents

A/CN.9/WG.IV/WP.88, annex, paras. 107-109;
A/CN.9/467, paras. 33-35;
A/CN.9/WG.IV/WP.84, para. 38.
A/CN.9/465, paras. 49-50;
A/CN.9/WG.IV/WP.82, para. 35.

Article 5. Variation by agreement

The provisions of this Law may be derogated from or their effect may be varied by agreement, unless that agreement would not be valid or effective under applicable law.

Deference to applicable law

111. The decision to undertake the preparation of the Model Law was based on the recognition that, in practice, solutions to the legal difficulties raised by the use of modern means of communication are mostly sought within contracts. The Model Law is thus intended to support the principle of party autonomy. However, applicable law may set limits to the application of that principle. Article 5 should not be misinterpreted as allowing the parties to derogate from mandatory rules, e.g. rules adopted for reasons of public policy. Neither should article 5 be misinterpreted as encouraging States to establish mandatory legislation limiting the effect of party autonomy with respect to electronic signatures or otherwise inviting States to restrict the freedom of parties to agree as between themselves on issues of form requirements governing their communications.

112. The principle of party autonomy applies broadly with respect to the provisions of the Model Law, since the Model Law does not contain any mandatory provision. That principle also applies in the context of article 13(1). Therefore, although the courts of the enacting State or authorities responsible for the application of the Model Law should not deny or nullify the legal effects of a foreign certificate only on the basis of the place where the certificate is issued, article 13(1) does not limit the freedom of the parties to a commercial transaction to agree on the use of certificates that originate from a particular place (A/CN.9/483, para. 112).

Expressed or implied agreement

113. As to the way in which the principle of party autonomy is expressed in article 5, it was generally admitted in the preparation of the Model Law that variation by agreement might be expressed or implied. The wording of article 5 has been kept in line with article 6 of the United Nations Convention on Contracts for the International Sale of Goods (A/CN.9/467, para. 38).

Bilateral or multilateral agreement

114. Article 5 is intended to apply not only in the context of relationships between originators and addressees of data messages

but also in the context of relationships involving intermediaries. Thus, the provisions of the Model Law could be varied either by bilateral or multilateral agreements between the parties, or by system rules agreed to by the parties. Typically, applicable law would limit party autonomy to rights and obligations arising as between parties so as to avoid any implication as to the rights and obligations of third parties.

References to UNCITRAL documents

- A/CN.9/WG.IV/WP.88, annex, paras. 110-113;
- A/CN.9/467, paras. 36-43;
- A/CN.9/WG.IV/WP.84, paras. 39 and 40;
- A/CN.9/465, paras. 51-61;
- A/CN.9/WG.IV/WP.82, paras. 36-40;
- A/CN.9/457, paras. 53-64.

Article 6. Compliance with a requirement for a signature

(1) Where the law requires a signature of a person, that requirement is met in relation to a data message if an electronic signature is used which is as reliable as was appropriate for the purpose for which the data message was generated or communicated, in the light of all the circumstances, including any relevant agreement.

(2) Paragraph (1) applies whether the requirement referred to therein is in the form of an obligation or whether the law simply provides consequences for the absence of a signature.

(3) An electronic signature is considered to be reliable for the purpose of satisfying the requirement referred to in paragraph (1) if:

(a) the signature creation data are, within the context in which they are used, linked to the signatory and to no other person;

(b) the signature creation data are, at the time of signing, under the control of the signatory and of no other person;

(c) any alteration to the electronic signature, made after the time of signing, is detectable; and

(d) where a purpose of the legal requirement for a signature is to provide assurance as to the integrity of the information to which it relates, any alteration made to that information after the time of signing is detectable.

(4) Paragraph (3) does not limit the ability of any person:

(a) to establish in any other way, for the purpose of satisfying the requirement referred to in paragraph (1), the reliability of an electronic signature; or

(b) to adduce evidence of the non-reliability of an electronic signature.

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

Importance of article 6

115. Article 6 is one of the core provisions of the Model Law. Article 6 is intended to build upon article 7 of the UNCITRAL Model Law on Electronic Commerce and to provide guidance as to how the test of reliability in article 7(1)(b) can be satisfied. In interpreting article 6, it should be borne in mind that the purpose of that provision is to ensure that, where any legal consequence would have flowed from the use of a handwritten signature, the same consequence should flow from the use of a reliable electronic signature.

Paragraphs (1), (2) and (5)

116. Paragraphs (1), (2), and (5) of article 6 introduce provisions drawn from article 7(1)(b), (2), and (3) of the UNCITRAL Model Law on Electronic Commerce, respectively. Wording inspired by article 7(1)(a) of the UNCITRAL Model Law on Electronic Commerce is already included in the definition of “electronic signature” under article 2(a).

Notions of “identity” and “identification”

117. The Working Group agreed that, for the purpose of defining “electronic signature” under the Model Law, the term “identification” could be broader than mere identification of the signatory by name. The concept of identity or identification includes distinguishing him or her, by name or otherwise, from any other person, and may refer to other significant characteristics, such as position or authority, either in combination with a name or without reference to the name. On that basis, it is not necessary to distinguish between identity and other significant characteristics, nor to limit the Model Law to those situations in which only identity certificates which name the signatory are used (A/CN.9/467, paras. 56-58).

Effect of the Model Law varying with level of technical reliability

118. In the preparation of the Model Law, the view was expressed that (either through a reference to the notion of “enhanced electronic signature” or through a direct mention of criteria for establishing the technical reliability of a given signature technique) a dual purpose of article 6 should be to establish: (1) that legal effects would result from the application of those electronic signature techniques that were recognized as reliable; and (2), conversely, that no such legal effects would flow from the use of techniques of a lesser reliability. It was generally felt, however, that a more subtle distinction might need to be drawn between the various possible electronic signature techniques, since the Model Law should avoid discriminating against any form of electronic signature, unsophisticated and insecure though it might appear in given circumstances. Therefore, any electronic signature technique applied for the purpose of signing a data message under article 7(1)(a) of the UNCITRAL Model Law on Electronic Commerce would be likely to produce legal effects, provided that it was sufficiently reliable in the light of all the circumstances, including any agreement between the parties. However, under article 7 of the UNCITRAL Model Law on Electronic Commerce, the determination of what constitutes a reliable method of signature in the light of the circumstances, can be made only by a court or other trier of fact intervening *ex post*, possibly long after the electronic signature has been used. In contrast, the new Model Law is expected to create a benefit in favour of certain techniques, which are recognized as particularly reliable, irrespective of the circumstances in which they are used. That is the purpose of paragraph (3), which is expected to create certainty (through either a presumption or a substantive rule), at or before the time any such technique of electronic signature is used (*ex ante*), that using a recognized technique will result in legal effects equivalent to those of a handwritten signature. Thus, paragraph (3) is an essential provision if the new Model Law is to meet its goal of providing more certainty than readily offered by the UNCITRAL Model Law on Electronic Commerce as to the legal effect to be expected from the use of particularly reliable types of electronic signatures (see A/CN.9/465, para. 64).

Presumption or substantive rule

119. In order to provide certainty as to the legal effect resulting from the use of an electronic signature as defined under article 2, paragraph (3) expressly establishes the legal effects that would result from the conjunction of certain technical characteristics of an electronic signature (see A/CN.9/484, para. 58). As to how those legal effects would be established, enacting States, depending on their law of civil and commercial procedure, should be free to adopt a presumption or to proceed by way of a direct assertion of the linkage between certain technical characteristics and the legal effect of a signature (see A/CN.9/467, paras. 61 and 62).

Intent of signatory

120. A question remains as to whether any legal effect should result from the use of electronic signature techniques that may be made with no clear intent by the signatory of becoming legally bound by approval of the information being electronically signed. In any such circumstance, the second function described in article 7(1)(a) of the UNCITRAL Model Law on Electronic Commerce is not fulfilled since there is no "intent of indicating any approval of the information contained in the data message". The approach taken in the Model Law is that the legal consequences of the use of a handwritten signature should be replicated in an electronic environment. Thus, by appending a signature (whether handwritten or electronic) to certain information, the signatory should be presumed to have approved the linking of its identity with that information. Whether such a linking should produce legal effects (contractual or other) would result from the nature of the information being signed, and from any other circumstances, to be assessed according to the law applicable outside the Model Law. In that context, the Model Law is not intended to interfere with the general law of contracts or obligations (see A/CN.9/465, para. 65).

Criteria of technical reliability

121. Subparagraphs (a) to (d) of paragraph (3) are intended to express objective criteria of technical reliability of electronic signatures. Subparagraph (a) focuses on the objective characteristics of the signature creation data, which must be "linked to the signatory and to no other person". From a technical point of view, the signature creation data could be uniquely "linked" to the signatory, without being "unique" in itself. The linkage between the data used for creation of the signature and the signatory is the essential element (A/CN.9/467, para. 63). While certain electronic signature creation data may be shared by a variety of users, for example where several employees would share the use of a corporate signature-creation data, that data must be capable of identifying one user unambiguously in the context of each electronic signature.

Sole control of signature creation data by the signatory

122. Subparagraph (b) deals with the circumstances in which the signature creation data is used. At the time it is used, the signature creation data must be under the sole control of the signatory. In relation to the notion of sole control by the signatory, a question is whether the signatory would retain its ability to authorize another person to use the signature creation data on its behalf. Such a situation might arise where the signature creation data is used in the corporate context where the corporate entity would be the signatory but would require a number of persons to be able to sign on its behalf (A/CN.9/467, para. 66). Another example may be found in business applications such as the one where signature creation data exist on a network and are capable of being used by a number of people. In that situation, the network would presum-

ably relate to a particular entity which would be the signatory and maintain control over the signature creation data. If that was not the case, and the signature creation data was widely available, it should not be covered by the Model Law (A/CN.9/467, para. 67). Where a single key is operated by more than one person in the context of a "split-key" or other "shared-secret" scheme, reference to "the signatory" means a reference to those persons jointly (A/CN.9/483, para. 152).

Agency

123. Subparagraphs (a) and (b) converge to ensure that the signature creation data is capable of being used by only one person at any given time, principally the time of signing, and not by some other person as well (see above, para. 103). The question of agency or authorized use of the signature creation data is addressed in the definition of "signatory" (A/CN.9/467, para. 68).

Integrity

124. Subparagraphs (c) and (d) deal with the issues of integrity of the electronic signature and integrity of the information being signed electronically. It would have been possible to combine the two provisions to emphasize the notion that, where a signature is attached to a document, the integrity of the document and the integrity of the signature are so closely related that it is difficult to conceive of one without the other. However, it was decided that the Model Law should follow the distinction drawn in the UNCITRAL Model Law on Electronic Commerce between articles 7 and 8. Although some technologies provide both authentication (article 7 of the UNCITRAL Model Law on Electronic Commerce) and integrity (article 8 of the UNCITRAL Model Law on Electronic Commerce), those concepts can be seen as distinct legal concepts and treated as such. Since a handwritten signature provides neither a guarantee of the integrity of the document to which it is attached nor a guarantee that any change made to the document would be detectable, the functional equivalence approach requires that those concepts should not be dealt with in a single provision. The purpose of paragraph (3)(c) is to set forth the criterion to be met in order to demonstrate that a particular method of electronic signature is reliable enough to satisfy a requirement of law for a signature. That requirement of law could be met without having to demonstrate the integrity of the entire document (see A/CN.9/467, paras. 72-80).

125. Subparagraph (d) is intended primarily for use in those countries where existing legal rules governing the use of handwritten signatures could not accommodate a distinction between integrity of the signature and integrity of the information being signed. In other countries, subparagraph (d) might create a signature that would be more reliable than a handwritten signature and thus go beyond the concept of functional equivalent to a signature. In certain jurisdictions, the effect of subparagraph (d) may be to create a functional equivalent to an original document (see A/CN.9/484, para. 62).

Electronic signature of portion of a message

126. In subparagraph (d), the necessary linkage between the signature and the information being signed is expressed so as to avoid the implication that the electronic signature could apply only to the full contents of a data message. In fact, the information being signed, in many instances, will be only a portion of the information contained in the data message. For example, an electronic signature may relate only to information appended to the message for transmission purposes.

Variation by agreement

127. Paragraph (3) is not intended to limit the application of article 5 and of any applicable law recognizing the freedom of the parties to stipulate in any relevant agreement that a given signature technique would be treated among themselves as a reliable equivalent of a handwritten signature.

128. Paragraph (4)(a) is intended to provide a legal basis for the commercial practice under which many commercial parties would regulate by contract their relationships regarding the use of electronic signatures (see A/CN.9/484, para. 63).

Possibility to adduce evidence of the non-reliability of an electronic signature

129. Paragraph (4)(b) is intended to make it clear that the Model Law does not limit any possibility that may exist to rebut the presumption contemplated in paragraph (3) (see A/CN.9/484, para. 63).

Exclusions from the scope of article 6

130. The principle embodied in paragraph (5) is that an enacting State may exclude from the application article 6 certain situations to be specified in the legislation enacting the Model Law. An enacting State may wish to exclude specifically certain types of situations, depending in particular on the purpose for which a formal requirement for a handwritten signature has been established. A specific exclusion might be considered, for example, in the context of formalities required pursuant to international treaty obligations of the enacting State and other kinds of situations and areas of law that are beyond the power of the enacting State to change by means of a statute.

131. Paragraph (5) was included with a view to enhancing the acceptability of the Model Law. It recognizes that the matter of specifying exclusions should be left to enacting States, an approach that would take better account of differences in national circumstances. However, it should be noted that the objectives of the Model Law would not be achieved if paragraph (5) were used to establish blanket exceptions, and the opportunity provided by paragraph (5) in that respect should be avoided. Numerous exclusions from the scope of article 6 would raise needless obstacles to the development of electronic signatures, since what the Model Law contains are very fundamental principles and approaches that are expected to find general application (see A/CN.9/484, para. 63).

References to UNCITRAL documents

- A/CN.9/484, paras. 58-63;
- A/CN.9/WG.IV/WP.88, annex, paras. 114-126;
- A/CN.9/467, paras. 44-87;
- A/CN.9/WG.IV/WP.84, paras. 41-47;
- A/CN.9/465, paras. 62-82;
- A/CN.9/WG.IV/WP.82, paras. 42-44;
- A/CN.9/457, paras. 48-52;
- A/CN.9/WG.IV/WP.80, paras. 11 and 12.

Article 7. Satisfaction of article 6

(1) [Any person, organ or authority, whether public or private, specified by the enacting State as competent] may determine which electronic signatures satisfy the provisions of article 6.

(2) Any determination made under paragraph (1) shall be consistent with recognized international standards.

(3) Nothing in this article affects the operation of the rules of private international law.

Pre-determination of status of electronic signature

132. Article 7 describes the role played by the enacting State in establishing or recognizing any entity that might validate the use of electronic signatures or otherwise certify their quality. Like article 6, article 7 is based on the idea that what is required to facilitate the development of electronic commerce is certainty and predictability at the time when commercial parties make use of electronic signature techniques, not at the time when there is a dispute before a court. Where a particular signature technique can satisfy requirements for a high degree of reliability and security, there should be a means for assessing the technical aspects of reliability and security and for according the signature technique some form of recognition.

Purpose of article 7

133. The purpose of article 7 is to make it clear that an enacting State may designate an organ or authority that will have the power to make determinations as to what specific technologies may benefit from the rule established under article 6. Article 7 is not an enabling provision that could, or would, necessarily be enacted by States in its present form. However, it is intended to convey a clear message that certainty and predictability can be achieved by determining which electronic signature techniques satisfy the reliability criteria of article 6, provided that such determination is made in accordance with international standards. Article 7 should not be interpreted in a manner that would either prescribe mandatory legal effects for the use of certain types of signature techniques, or would restrict the use of technology to those techniques determined to satisfy the reliability requirements of article 6. Parties should be free, for example, to use techniques that had not been determined to satisfy articles 6, if that was what they had agreed to do. They should also be free to show, before a court or arbitral tribunal, that the method of signature they had chosen to use did satisfy the requirements of article 6, even though not the subject of a prior determination to that effect.

Paragraph (1)

134. Paragraph (1) makes it clear that any entity that might validate the use of electronic signatures or otherwise certify their quality would not have to be established as a State authority. Paragraph (1) should not be read as making a recommendation to States as to the only means of achieving recognition of signature technologies, but rather as indicating the limitations that should apply if States wished to adopt such an approach.

Paragraph (2)

135. With respect to paragraph (2), the notion of "standard" should not be limited to standards developed, for example, by the International Organization for Standardization (ISO) and the Internet Engineering Task Force (IETF), or to other technical standards. The word "standards" should be interpreted in a broad sense, which would include industry practices and trade usages, texts emanating from such international organizations as the International Chamber of Commerce, the regional accreditation bodies operating under the aegis of the ISO (see A/CN.9/484, para. 66), the World Wide Web Consortium (W3C), as well as the work of

UNCITRAL itself (including this Model Law and the UNCITRAL Model Law on Electronic Commerce). The possible lack of relevant standards should not prevent the competent persons or authorities from making the determination referred to in paragraph (1). As to the reference to “recognized” standards, a question might be raised as to what constitutes “recognition” and of whom such recognition is required (see A/CN.9/465, para. 94). That question is discussed under article 12 (see below, para. 159).

Paragraph (3)

136. Paragraph (3) is intended to make it abundantly clear that the purpose of article 7 is not to interfere with the normal operation of the rules of private international law (see A/CN.9/467, para. 94). In the absence of such a provision, article 7 might be misinterpreted as encouraging enacting States to discriminate against foreign electronic signatures on the basis of non-compliance with the rules set forth by the relevant person or authority under paragraph (1).

References to UNCITRAL documents

- A/CN.9/484, paras. 64-66;
- A/CN.9/WG.IV/WP.88, paras. 127-131;
- A/CN.9/467, paras. 90-95;
- A/CN.9/WG.IV/WP.84, paras. 49-51;
- A/CN.9/465, paras. 90-98;
- A/CN.9/WG.IV/WP.82, para. 46;
- A/CN.9/457, paras. 48-52;
- A/CN.9/WG.IV/WP.80, para. 15.

Article 8. Conduct of the signatory

(1) Where signature creation data can be used to create a signature that has legal effect, each signatory shall:

(a) exercise reasonable care to avoid unauthorized use of its signature creation data;

(b) without undue delay, notify any person who may reasonably be expected by the signatory to rely on or to provide services in support of the electronic signature if:

- (i) the signatory knows that the signature creation data has been compromised; or
- (ii) the circumstances known to the signatory give rise to a substantial risk that the signature creation data may have been compromised;

(c) where a certificate is used to support the electronic signature, exercise reasonable care to ensure the accuracy and completeness of all material representations made by the signatory which are relevant to the certificate throughout its life-cycle, or which are to be included in the certificate.

(2) A signatory shall be liable for its failure to satisfy the requirements of paragraph (1).

Title

137. Article 8 (and articles 9 and 11) had been initially planned to contain rules regarding the obligations and liabilities of the various parties involved (the signatory, the relying party and any certification services provider). However, the rapid changes affecting the technical and commercial aspects of electronic commerce, together with the role currently played by self-regulation in the field of electronic commerce in certain countries, made it difficult

to achieve consensus as to the contents of such rules. The articles have been drafted so as to embody a minimal “code of conduct” of the various parties. As indicated in the context of article 9 with respect to certification service providers (see below, para. 144), the Model Law does not require from a signatory a degree of diligence or trustworthiness that bears no reasonable relationship to the purposes for which the electronic signature or certificate is used (see A/CN.9/484, para. 67). The Model Law thus favours a solution which links the obligations set forth in both articles 8 and 9 to the production of legally-significant electronic signatures (A/CN.9/483, para. 117). The principle of the signatory’s liability for failure to comply with paragraph (1) is set forth in paragraph (2); the extent of such liability for failure to abide by that code of conduct is left to the law applicable outside the Model Law (see below, para. 141).

Paragraph (1)

138. Subparagraphs (a) and (b) apply generally to all electronic signatures, while subparagraph (c) applies only to those electronic signatures that are supported by a certificate. The obligation in paragraph (1) (a), in particular, to exercise reasonable care to prevent unauthorized use of a signature creation data, constitutes a basic obligation that is, for example, generally contained in agreements concerning the use of credit cards. Under the policy adopted in paragraph (1), such an obligation should also apply to any electronic signature creation data that could be used for the purpose of expressing legally significant intent. However, the provision for variation by agreement in article 5 allows the standards set in article 8 to be varied in areas where they would be thought to be inappropriate, or to lead to unintended consequences.

139. Paragraph (1) (b) refers to the notion of “person who may reasonably be expected by the signatory to rely on or to provide services in support of the electronic signature”. Depending on the technology being used, such a “relying party” may be not only a person who might seek to rely on the signature, but also a person such as a certification service provider, a certificate revocation service provider and any other interested party.

140. Paragraph (1) (c) applies where a certificate is used to support the signature creation data. The “life-cycle of the certificate” is intended to be interpreted broadly as covering the period starting with the application for the certificate or the creation of the certificate and ending with the expiry or revocation of the certificate.

Paragraph (2)

141. Paragraph (2) does not specify either the consequences or the limits of liability, both of which are left to national law. However, even though it leaves the consequences of liability up to national law, paragraph (2) serves to give a clear signal to enacting States that liability should attach to a failure to satisfy the obligations set forth in paragraph (1). Paragraph (2) is based on the conclusion reached by the Working Group at its thirty-fifth session that it might be difficult to achieve consensus as to what consequences might flow from the liability of the signatory. Depending on the context in which the electronic signature is used, such consequences might range, under existing law, from the signatory being bound by the contents of the message to liability for damages. Accordingly, paragraph (2) merely establishes the principle that the signatory should be liable for failure to meet the requirements of paragraph (1), and leaves it to the law applicable outside the Model Law in each enacting State to deal with the legal consequences that would flow from such liability (A/CN.9/465, para. 108).

References to UNCITRAL documents

- A/CN.9/484, paras. 67-69;
 A/CN.9/WG.IV/WP.88, annex, paras. 132-136;
 A/CN.9/467, paras. 96-104;
 A/CN.9/WG.IV/WP.84, paras. 52 and 53;
 A/CN.9/465, paras. 99-108;
 A/CN.9/WG.IV/WP.82, paras. 50-55;
 A/CN.9/457, paras. 65-98;
 A/CN.9/WG.IV/WP.80, paras. 18 and 19.

Article 9. Conduct of the certification service provider

(1) Where a certification service provider provides services to support an electronic signature that may be used for legal effect as a signature, that certification service provider shall:

(a) act in accordance with representations made by it with respect to its policies and practices;

(b) exercise reasonable care to ensure the accuracy and completeness of all material representations made by it that are relevant to the certificate throughout its life-cycle, or which are included in the certificate;

(c) provide reasonably accessible means which enable a relying party to ascertain from the certificate:

- (i) the identity of the certification service provider;
- (ii) that the signatory that is identified in the certificate had control of the signature creation data at the time when the certificate was issued;
- (iii) that the signature creation data were valid at or before the time when the certificate was issued;

(d) provide reasonably accessible means which enable a relying party to ascertain, where relevant, from the certificate or otherwise:

- (i) the method used to identify the signatory;
- (ii) any limitation on the purpose or value for which the signature creation data or the certificate may be used;
- (iii) that the signature creation data are valid and have not been compromised;
- (iv) any limitation on the scope or extent of liability stipulated by the certification service provider;
- (v) whether means exist for the signatory to give notice pursuant to article 8 (1) (b);
- (vi) whether a timely revocation service is offered;

(e) where services under subparagraph (d) (v) are offered, provide a means for a signatory to give notice pursuant to article 8(1)(b) and, where services under subparagraph (d) (vi) are offered, ensure the availability of a timely revocation service;

(f) utilize trustworthy systems, procedures and human resources in performing its services.

(2) A certification service provider shall be liable for its failure to satisfy the requirements of paragraph (1).

Paragraph (1)

142. Subparagraph (a) expresses the basic rule that a certification service provider should adhere to the representations and commitments made by that supplier, for example in a certification practices statement or in any other type of policy statement.

143. Subparagraph (c) defines the essential contents and the core effect of any certificate under the Model Law. It is important to note that, in the case of digital signatures, it must also be possible to ascertain the association of the signatory with the public key, as well as with the private key (A/CN.9/484, para. 71). Subparagraph (d) lists additional elements to be included in the certificate or otherwise made available or accessible to the relying party, where they would be relevant to a particular certificate. Subparagraph (e) is not intended to apply to certificates such as transactional certificates, which are one-time certificates, or low-cost certificates for low-risk applications, both of which might not be subject to revocation.

144. It may be thought that the duties and obligations provided in article 9 can reasonably be expected to be complied with by any certification service provider, and not only those who issue "high value" certificates. However, the Model Law does not require from a signatory or a certification service provider a degree of diligence or trustworthiness that bears no reasonable relationship to the purposes for which the electronic signature or certificate is used (see above, para. 137). The Model Law thus favours a solution which links the obligations set forth in both articles 8 and 9 to the production of legally-significant electronic signatures (A/CN.9/483, para. 117). By limiting the scope of article 9 to the broad range of situations where certification services are provided to support an electronic signature that may be used for legal effect as a signature, the Model Law does not intend to create new types of legal effects for signatures (*ibid.*, para. 119).

Paragraph (2)

145. Paragraph (2) leaves it up to national law to determine the consequences of liability (see A/CN.9/484, para. 73). Subject to applicable rules of national law, paragraph (2) is not intended by its authors to be interpreted as a rule of absolute liability. It was not foreseen that the effect of paragraph (2) would be to exclude the possibility for the certification service provider to prove, for example, the absence of fault or contributory fault.

146. Early drafts of article 9 contained an additional paragraph, which addressed the consequences of liability as set forth in paragraph (2). In the preparation of the Model Law, it was observed that the question of the liability of certification service providers would not be sufficiently addressed by adopting a single provision along the lines of paragraph (2). While paragraph (2) may state an appropriate principle for application to signatories, it may not be sufficient for addressing the professional and commercial activities covered by article 9. One possible way of compensating such insufficiency would have been to list in the text of the Model Law the factors to be taken into account in assessing any loss resulting from failure by the certification service provider to satisfy the requirements of paragraph (1). It was finally decided that a non-exhaustive list of indicative factors should be contained in this Guide. In assessing the liability of the certification service provider, the following factors should be taken into account, *inter alia*: (a) the cost of obtaining the certificate; (b) the nature of the information being certified; (c) the existence and extent of any limitation on the purpose for which the certificate may be used; (d) the existence of any statement limiting the scope or extent of the liability of the certification service provider; and (e) any contributory conduct by the relying party. In the preparation of the Model Law, it was generally agreed that, in determining the recoverable loss in the enacting State, weight should be given to the rules governing limitation of liability in the State where the certification service provider was established or in any other State whose law would be applicable under the relevant conflict-of-laws rule (A/CN.9/484, para. 74).

References to UNCITRAL documents

- A/CN.9/484, paras. 70-74;
 A/CN.9/WG.IV/WP.88, annex, paras. 137-141;
 A/CN.9/483, paras. 114-127;
 A/CN.9/467, paras. 105-129;
 A/CN.9/WG.IV/WP.84, paras. 54-60;
 A/CN.9/465, paras. 123-142 (draft article 12);
 A/CN.9/WG.IV/WP.82, paras. 59-68 (draft article 12);
 A/CN.9/457, paras. 108-119;
 A/CN.9/WG.IV/WP.80, paras. 22-24.

Article 10. Trustworthiness

For the purposes of article 9(1)(f), in determining whether, or to what extent, any systems, procedures and human resources utilized by a certification service provider are trustworthy, regard may be had to the following factors:

- (a) financial and human resources, including existence of assets;
- (b) quality of hardware and software systems;
- (c) procedures for processing of certificates and applications for certificates and retention of records;
- (d) availability of information to signatories identified in certificates and to potential relying parties;
- (e) regularity and extent of audit by an independent body;
- (f) the existence of a declaration by the State, an accreditation body or the certification service provider regarding compliance with or existence of the foregoing; or
- (g) any other relevant factor.

Flexibility of the notion of "trustworthiness"

147. Article 10 was initially drafted as part of article 9. Although that part later became a separate article, it is mainly intended to assist with the interpretation of the notion of "trustworthy systems, procedures and human resources" in article 9(1)(f). Article 10 is set forth as a non-exhaustive list of factors to be taken into account in determining trustworthiness. That list is intended to provide a flexible notion of trustworthiness, which could vary in content depending upon what is expected of the certificate in the context in which it is created.

References to UNCITRAL documents

- A/CN.9/WG.IV/WP.88, annex, para. 142;
 A/CN.9/483, paras. 128-133;
 A/CN.9/467, paras. 114-119.

Article 11. Conduct of the relying party

A relying party shall bear the legal consequences of its failure to:

- (a) take reasonable steps to verify the reliability of an electronic signature; or
- (b) where an electronic signature is supported by a certificate, take reasonable steps to:
 - (i) verify the validity, suspension or revocation of the certificate; and
 - (ii) observe any limitation with respect to the certificate.

Reasonableness of reliance

148. Article 11 reflects the idea that a party who intends to rely on an electronic signature should bear in mind the question whether and to what extent such reliance is reasonable in the light of the circumstances. It is not intended to deal with the issue of the validity of an electronic signature, which is addressed under article 6 and should not depend upon the conduct of the relying party. The issue of the validity of an electronic signature should be kept separate from the issue of whether it is reasonable for a relying party to rely on a signature that does not meet the standard set forth in article 6.

Consumer issues

149. While article 11 might place a burden on relying parties, particularly where such parties are consumers, it may be recalled that the Model Law is not intended to overrule any rule governing the protection of consumers. However, the Model Law might play a useful role in educating all the parties involved, including relying parties, as to the standard of reasonable conduct to be met with respect to electronic signatures. In addition, establishing a standard of conduct under which the relying party should verify the reliability of the signature through readily accessible means may be seen as essential to the development of any public-key infrastructure system.

Notion of "relying party"

150. Consistent with its definition, the notion of "relying party" is intended to cover any party that might rely on an electronic signature. Depending on the circumstances, a "relying party" might thus be any person having or not a contractual relationship with the signatory or the certification services provider. It is even conceivable that the certification services provider or the signatory might itself become a "relying party". However, that broad notion of "relying party" should not result in the subscriber of a certificate being placed under an obligation to verify the validity of the certificate it purchases from the certification services provider.

Failure to comply with requirements of article 11

151. As to the possible impact of establishing as a general obligation that the relying party should verify the validity of the electronic signature or certificate, a question arises where the relying party fails to comply with the requirements of article 11. Should it fail to comply with those requirements, the relying party should not be precluded from availing itself of the signature or certificate if reasonable verification would not have revealed that the signature or certificate was invalid. The requirements of article 11 are not intended to require the observation of limitations, or verification of information, not readily accessible to the relying party. Such a situation may need to be dealt with by the law applicable outside the Model Law. More generally, the consequences of failure by the relying party to comply with the requirements of article 11 are governed by the law applicable outside the Model Law (see A/CN.9/484, para. 75).

References to UNCITRAL documents

- A/CN.9/484, para. 75;
 A/CN.9/WG.IV/WP.88, annex, paras. 143-146;
 A/CN.9/467, paras. 130-143;
 A/CN.9/WG.IV/WP.84, paras. 61-63;
 A/CN.9/465, paras. 109-122 (draft articles 10 and 11);
 A/CN.9/WG.IV/WP.82, paras. 56-58
 (draft articles 10 and 11);
 A/CN.9/457, paras. 99-107;
 A/CN.9/WG.IV/WP.80, paras. 20 and 21.

Article 12. *Recognition of foreign certificates and electronic signatures*

(1) In determining whether, or to what extent, a certificate or an electronic signature is legally effective, no regard shall be had to:

(a) the geographic location where the certificate is issued or the electronic signature created or used; or

(b) the geographic location of the place of business of the issuer or signatory.

(2) A certificate issued outside [*the enacting State*] shall have the same legal effect in [*the enacting State*] as a certificate issued in [*the enacting State*] if it offers a substantially equivalent level of reliability.

(3) An electronic signature created or used outside [*the enacting State*] shall have the same legal effect in [*the enacting State*] as an electronic signature created or used in [*the enacting State*] if it offers a substantially equivalent level of reliability.

(4) In determining whether a certificate or an electronic signature offers a substantially equivalent level of reliability for the purposes of paragraph (2) or (3), regard shall be had to recognized international standards and to any other relevant factors.

(5) Where, notwithstanding paragraphs (2), (3) and (4), parties agree, as between themselves, to the use of certain types of electronic signatures or certificates, that agreement shall be recognized as sufficient for the purposes of cross-border recognition, unless that agreement would not be valid or effective under applicable law.

General rule of non-discrimination

152. Paragraph (1) is intended to reflect the basic principle that the place of origin, in and of itself, should in no way be a factor determining whether and to what extent foreign certificates or electronic signatures should be recognized as capable of being legally effective. Determination of whether, or the extent to which, a certificate or an electronic signature is capable of being legally effective should not depend on the place where the certificate or the electronic signature was issued (see A/CN.9/483, para. 27) but on its technical reliability.

“Substantially equivalent level of reliability”

153. The purpose of paragraph (2) is to provide the general criterion for the cross-border recognition of certificates without which suppliers of certification services might face the unreasonable burden of having to obtain licences in multiple jurisdictions. For that purpose, paragraph (2) establishes a threshold for technical equivalence of foreign certificates based on testing their reliability against the reliability requirements established by the enacting State pursuant to the Model Law (*ibid.*, para. 31). That criterion is to apply regardless of the nature of the certification scheme obtaining in the jurisdiction from which the certificate or signature emanated (*ibid.*, para. 29).

Level of reliability varying with the jurisdiction

154. Through a reference to the central notion of a “substantially equivalent level of reliability”, paragraph (2) acknowledges that there might be significant variance between the requirements of individual jurisdictions. The requirement of equivalence, as used in paragraph (2), does not mean that the level of reliability of a foreign certificate should be exactly identical with that of a domestic certificate (*ibid.*, para. 32).

Level of reliability varying within a jurisdiction

155. In addition, it should be noted that, in practice, suppliers of certification services issue certificates with various levels of reliability, according to the purposes for which the certificates are intended to be used by their customers. Depending on their respective level of reliability, certificates and electronic signatures may produce varying legal effects, both domestically and abroad. For example, in certain countries, even certificates that are sometimes referred to as “low-level” or “low-value” certificates might, in certain circumstances (e.g. where parties have agreed contractually to use such instruments), produce legal effect (see A/CN.9/484, para. 77). Therefore, in applying the notion of equivalence as used in paragraph (2), it should be borne in mind that the equivalence to be established is between functionally comparable certificates. However, no attempt has been made in the Model Law to establish a correspondence between certificates of different types issued by different suppliers of certification services in different jurisdictions. The Model Law has been drafted so as to contemplate a possible hierarchy of different types of certificate. In practice, a court or arbitral tribunal called upon to decide on the legal effect of a foreign certificate would normally consider each certificate on its own merit and try to equate it with the closest corresponding level in the enacting State (A/CN.9/483, para. 33).

Equal treatment of certificates and other types of electronic signatures

156. Paragraph (3) expresses with respect to electronic signatures the same rule as set forth in paragraph (2) regarding certificates (*ibid.*, para. 41).

Recognizing some legal effect to compliance with the laws of a foreign country

157. Paragraphs (2) and (3) deal exclusively with the cross-border reliability test to be applied when assessing the reliability of a foreign certificate or electronic signature. However, in the preparation of the Model Law, it was borne in mind that enacting States might wish to obviate the need for a reliability test in respect of specific signatures or certificates, when the enacting State was satisfied that the law of the jurisdiction from which the signature or the certificate originated provided an adequate standard of reliability. As to the legal techniques through which advance recognition of the reliability of certificates and signatures complying with the law of a foreign country might be made by an enacting State (e.g. a unilateral declaration or a treaty) the Model Law contains no specific suggestion (*ibid.*, paras. 39 and 42).

Factors to be considered when assessing the substantial equivalence of foreign certificates and signatures

158. In the preparation of the Model Law, paragraph (4) was initially formulated as a catalogue of factors to be taken into account when determining whether a certificate or an electronic signature offers a substantially equivalent level of reliability for the purposes of paragraph (2) or (3). It was later found that most of these factors were already listed under articles 6, 9 and 10. Restating those factors in the context of article 12 would have been superfluous. Alternatively, cross-referencing, in paragraph (4), the appropriate provisions in the Model Law where the relevant criteria were mentioned, possibly with the addition of other criteria particularly important for cross-border recognition, was found to result in an overly complex formulation (see, in particular, A/CN.9/483, paras. 43-49). Paragraph (4) was eventually turned into an unspecific reference to “any relevant factor”, among which the

factors listed under articles 6, 9 and 10 for the assessment of domestic certificates and electronic signatures are particularly important. In addition, paragraph (4) draws the consequences from the fact that assessing the equivalence of foreign certificates is somewhat different from assessing the trustworthiness of a certification service provider under articles 9 and 10. To that effect, a reference has been added in paragraph (4) to “recognized international standards”.

Recognized international standards

159. The notion of “recognized international standard” should be interpreted broadly to cover both international technical and commercial standards (i.e. market-driven standards) and standards and norms adopted by governmental or intergovernmental bodies (ibid., para. 49). “Recognized international standard” may be statements of accepted technical, legal or commercial practices, whether developed by the public or private sector (or both), of a normative or interpretative nature, which are generally accepted as applicable internationally. Such standards may be in the form of requirements, recommendations, guidelines, codes of conduct, or statements of either best practices or norms” (ibid., paras. 101-104).

Recognition of agreements between interested parties

160. Paragraph (5) provides for the recognition of agreements between interested parties regarding the use of certain types of

electronic signatures or certificates as sufficient grounds for cross-border recognition (as between those parties) of such agreed signatures or certificates (ibid., para. 54). It should be noted that, consistent with article 5, paragraph (5) is not intended to displace any mandatory law, in particular any mandatory requirement for handwritten signatures that enacting states might wish to maintain in applicable law (ibid., para. 113). Paragraph (5) is needed to give effect to contractual stipulations under which parties may agree, as between themselves, to recognize the use of certain electronic signatures or certificates (that might be regarded as foreign in some or all of the States where the parties might seek legal recognition of those signatures or certificates), without those signatures or certificates being subject to the substantial-equivalence test set forth in paragraphs (2), (3) and (4). Paragraph (5) does not affect the legal position of third parties (ibid., para. 56).

References to UNCITRAL documents

- A/CN.9/484, paras. 76-78;
- A/CN.9/WG.IV/WP.88, annex, paras. 147-155;
- A/CN.9/483, paras. 25-58 (article 12);
- A/CN.9/WG.IV/WP.84, paras. 61-68 (draft article 13);
- A/CN.9/465, paras. 21-35;
- A/CN.9/WG.IV/WP.82, paras. 69-71;
- A/CN.9/454, para. 173;
- A/CN.9/446, paras. 196-207 (draft article 19);
- A/CN.9/WG.IV/WP.73, para. 75;
- A/CN.9/437, paras. 74-89 (draft article I); and
- A/CN.9/WG.IV/WP.71, paras. 73-75.

III. INTERNATIONAL COMMERCIAL ARBITRATION

A. Report of the Working Group on Arbitration on the work of its thirty-third session: (Vienna, 20 November-1 December 2000)

(A/CN.9/485) [Original: English]

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INTRODUCTION

1. The Commission, during its thirty-first session, held a special commemorative New York Convention Day on 10 June 1998 to celebrate the fortieth anniversary of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) ("New York Convention"). In addition to representatives of States members of the Commission and observers, some 300 invited persons participated in the event. The Secretary-General made the opening speech. In addition to speeches by participants in the diplomatic conference that had adopted the New York Convention, leading arbitration experts presented reports on matters such as the promotion of the Convention, its enactment and application. Reports were also made on matters beyond the Convention itself, such as the interplay between the Convention and other international legal texts on international commercial arbitration and on difficulties encountered in practice but addressed in existing legislative or non-legislative texts on arbitration.¹

2. In reports presented at the commemorative conference, various suggestions were made for presenting to the Commission some of the problems identified in practice so as to enable it to consider whether any related work by the Commission would be desirable and feasible. The Commission, at its thirty-first session in 1998, with reference to the discussions at the New York Convention Day, considered that it would be useful to engage in a discussion of possible future work in the area of arbitration at its thirty-second session. It requested the secretariat to prepare a note that would serve as a basis for the considerations of the Commission.²

3. At its thirty-second session, in 1999, the Commission had before it the requested note, entitled "Possible future work in the area of international commercial arbitration" (A/CN.9/460).³ Welcoming the opportunity to discuss the desirability and feasibility of further development of the law of international commercial arbitration, the Commission had generally considered that the time had arrived to assess the extensive and favourable experience with national enactments of the UNCITRAL Model Law on International Commercial Arbitration ("Model Law on Arbitration"), as well as the use of the UNCITRAL Arbitration Rules and the UNCITRAL Conciliation Rules,

¹*Enforcing Arbitration Awards under the New York Convention: Experience and Prospects* (United Nations publication, Sales No. E.99.V.2).

²*Official Records of the General Assembly, Fifty-third Session, Supplement No. 17 (A/53/17)*, para. 235.

³The note drew on ideas, suggestions and considerations expressed in different contexts, such as the New York Convention Day (*Enforcing Arbitration Awards under the New York Convention: Experience and Prospects*, United Nations publication, Sales No. E.99.V.2); the Congress of the International Council for Commercial Arbitration, Paris, 3-6 May 1998 (*Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention, International Council for Commercial Arbitration Congress Series No. 9*, Kluwer Law International, 1999); and other international conferences and forums, such as the 1998 "Freshfields" lecture: Gerold Herrmann, "Does the world need additional uniform legislation on arbitration?" *Arbitration International*, vol. 15 (1999), No. 3, p. 211.

and to evaluate in the universal forum of the Commission the acceptability of ideas and proposals for improvement of arbitration laws, rules and practices.⁴

4. When the Commission discussed the topic, it left open the question of what form its future work might take. It was agreed that decisions on the matter should be taken later as the substance of proposed solutions became clearer. Uniform provisions might, for example, take the form of a legislative text (such as model legislative provisions or a treaty) or a non-legislative text (such as a model contractual rule or a practice guide). It was stressed that, even if an international treaty were to be considered, it was not intended to be a modification of the New York Convention.⁵

5. The Commission entrusted the work to one of its three working groups, which it named Working Group on Arbitration, and decided that the priority items for the Working Group should be conciliation,⁶ requirement of written form for the arbitration agreement,⁷ enforceability of interim measures of protection,⁸ and possible enforceability of an award that had been set aside in the State of origin.⁹ The Working Group on Arbitration (previously named Working Group on International Contract Practices) commenced its work at its thirty-second session at Vienna from 20 to 31 March 2000 (the report of that session is contained in document A/CN.9/468).

6. The Working Group considered the possible preparation of harmonized texts on conciliation, interim measures of protection and the written form of arbitration agreements. On these three topics the Working Group made decisions, which the secretariat was requested to use in preparing drafts for the current session of the Working Group. In addition, the Working Group exchanged preliminary views on other topics that might be taken up in the future (document A/CN.9/468, paras. 107-114).

7. The Commission, at its thirty-third session (New York, 12 June-7 July 2000), commended the work of the Working Group accomplished so far. The Commission heard various observations to the effect that the work on the items on the agenda of the Working Group was timely and necessary in order to foster the legal certainty and predictability in the use of arbitration and conciliation in international trade. It noted that the Working Group had also identified a number of other topics, with various levels of priority, that had been suggested for possible future work (document A/CN.9/468, paras. 107-114). The Commission reaffirmed the mandate of the Working Group to decide on the time and manner of dealing with them.

⁴*Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 17 (A/54/17)*, para. 337.

⁵*Ibid.*, paras. 337-376 and 380.

⁶*Ibid.*, paras. 340-343.

⁷*Ibid.*, paras. 344-350.

⁸*Ibid.*, paras. 371-373.

⁹*Ibid.*, paras. 374 and 375.

8. Several statements were made to the effect that, generally, the Working Group, in deciding the priorities of the future items on its agenda, should pay particular attention to what was feasible and practical and to issues where court decisions left the legal situation uncertain or unsatisfactory. Topics that were mentioned in the Commission as potentially worthy of consideration, in addition to those that the Working Group might identify as such, were the meaning and effect of the more-favourable-right provision of article VII of the New York Convention (A/55/17, para. 109 (k)); raising claims in arbitral proceedings for the purpose of set-off and the jurisdiction of the arbitral tribunal with respect to such claims (*ibid.*, para. 107 (g)); freedom of parties to be represented in arbitral proceedings by persons of their choice (*ibid.*, para. 108 (c)); residual discretionary power to grant enforcement of an award notwithstanding the existence of a ground for refusal listed in article V of the New York Convention (*ibid.*, para. 109 (i)); and the power by the arbitral tribunal to award interest (*ibid.*, para. 107 (j)). It was noted with approval that, with respect to “on-line” arbitrations (i.e. arbitrations in which significant parts or even all of arbitral proceedings were conducted by using electronic means of communication) (*ibid.*, para. 113), the Working Group on Arbitration would cooperate with the Working Group on Electronic Commerce. With respect to the possible enforceability of awards that had been set aside in the State of origin (*ibid.*, para. 107 (m)), a view was expressed that the issue was not expected to raise many problems and that the case law that gave rise to the issue should not be regarded as a trend.

9. The Working Group on Arbitration was composed of all States members of the Commission. The session was attended by the following States members of the Working Group: Argentina, Australia, Austria, Bulgaria, Burkina Faso, Cameroon, China, Colombia, Egypt, Finland, France, Germany, India, Iran (Islamic Republic of), Italy, Japan, Kenya, Mexico, Nigeria, Romania, Russian Federation, Singapore, Spain, Sudan, Thailand, United Kingdom of Great Britain and Northern Ireland and United States of America.

10. The session was attended by observers from the following States: Angola, Canada, Croatia, Czech Republic, Denmark, Ecuador, Greece, Indonesia, Israel, Lebanon, Libyan Arab Jamahiriya, Malaysia, Morocco, Panama, Peru, Philippines, Republic of Korea, Saudi Arabia, Slovakia, Slovenia, Sweden, Switzerland, the Former Yugoslav Republic of Macedonia, Tunisia, Turkey, Ukraine, United Arab Emirates and Uruguay.

11. The session was attended by observers from the following international organizations: United Nations Economic Commission for Europe (UNECE), Asian-African Legal Consultative Committee, NAFTA Article 2022 Advisory Committee, Permanent Court of Arbitration, Asser College Europe, Comité Maritime International, Gulf Cooperation Council Commercial Arbitration Centre, International Chamber of Commerce (ICC), International Council for Commercial Arbitration (ICCA), London Court of International Arbitration (LCIA), Regional Centre for International Commercial Arbitration, Lagos and The Chartered Institute of Arbitrators.

12. The Working Group elected the following officers:

Chairman: Mr. José María ABASCAL ZAMORA (Mexico)

Rapporteur: Mr. Sani L. MOHAMMED (Nigeria)

13. The Working Group had before it the following documents: provisional agenda (A/CN.9/WG.II/WP.109); report of the Secretary-General: Settlement of commercial disputes: Possible uniform rules on certain issues concerning settlement of commercial disputes: written form for arbitration agreement, interim measures of protection, conciliation” (A/CN.9/WG.II/WP.110); and report of the Secretary-General: Possible future work: court ordered interim measures of protection in support of arbitration, scope of interim measures that may be issued by arbitral tribunals, validity of the agreement to arbitrate (A/CN.9/WG.II/WP.111).

14. The Working Group adopted the following agenda:

1. Election of officers.
2. Adoption of the agenda.
3. Preparation of harmonized texts on: written form for arbitration agreements; interim measures of protection; and conciliation.
4. Other business.
5. Adoption of the report.

I. DELIBERATIONS AND DECISIONS

15. The Working Group discussed agenda item 3 on the basis of the report of the Secretary-General (documents A/CN.9/WG.II/WP.110 and A/CN.9/WG.II/WP.111). The deliberations and conclusions of the Working Group with respect to that item are reflected below in chapters II to V.

16. With regard to requirement of written form for the arbitration agreement, the Working Group considered the draft model legislative provision revising article 7(2) of the Model Law on Arbitration (set forth in document A/CN.9/WG.II/WP.110 at paras. 15-26) and a drafting group prepared a further revised draft for consideration by the Working Group. After a preliminary discussion of that draft, the secretariat was requested to prepare draft texts, possibly with alternatives, for consideration at the next session, based on the discussion in the Working Group. The Working Group also discussed the preliminary draft interpretative instrument regarding article II(2) of the New York Convention (set forth in document A/CN.9/WG.II/WP.110 at paras. 27-51) and requested the secretariat to prepare a revised draft of the instrument taking into account the discussion in the Working Group. The considerations are reflected below in paragraphs 21 to 77.

17. In respect of enforcement of interim measures of protection, the Working Group reviewed the model legislative provisions prepared by the secretariat (set forth in document A/CN.9/WG.II/WP.110 at paras. 52-80) and, due to time constraints, postponed to the next session its consideration of subparagraph (vi) and possible additional

provisions. The considerations are reflected below in paragraphs 78 to 103.

18. With regard to conciliation, the Working Group considered articles 1, 2, 5, 7, 8, 9 and 10 of the draft model legislative provisions (set forth and discussed in document A/CN.9/WG.II/WP.110 at paras. 81-112) and requested the secretariat to prepare revised drafts of those articles, taking into account the views expressed in the Working Group, for consideration at the next session. Articles 3, 4, 6, 11 and 12 were not considered due to lack of time. The considerations are reflected below in paragraphs 107 to 159.

19. The Working Group also considered the three topics set forth in document A/CN.9/WG.II/WP.111 dealing with possible future work on: court-ordered interim measures of protection in support of arbitration; scope of interim measures that may be ordered by arbitral tribunals; and validity of the agreement to arbitrate. The Working Group supported future work being undertaken on all topics and requested the secretariat to prepare for a future session of the Working Group preliminary studies and proposals. The considerations are reflected below in paragraphs 104 to 106.

20. The next meeting of the Working Group is scheduled to be held from 21 May to 1 June 2001 in New York.

II. REQUIREMENT OF WRITTEN FORM FOR THE ARBITRATION AGREEMENT

A. General remarks

21. The Working Group commenced its considerations by noting that the provisions on the form of arbitration agreements (as set out in particular in article II(2) of the New York Convention and article 7(2) of the Model Law on Arbitration) did not conform to current practices and expectations of the parties if they were interpreted narrowly. It was noted that, while national courts increasingly adopted a liberal interpretation of those provisions, views differed as to their proper interpretation. Those differences and the lack of uniformity of interpretation were a problem in international trade which reduced the predictability and certainty of international contractual commitments.

22. The Working Group recalled the decision taken at its thirty-second session that, in order to ensure a uniform interpretation of the form requirement that responded to the needs of international trade, it was necessary to prepare a modification of article 7(2) of the Model Law on Arbitration with an accompanying guide to enactment and to formulate a declaration, resolution or statement addressing the interpretation of article II(2) of the New York Convention that would reflect a broad and liberal understanding of the form requirement. As to the substance of the model provisions and the interpretative instrument to be prepared, the Working Group, recalling its considerations at its previous session (A/CN.9/468, para. 99), confirmed the view that, for a valid arbitration agreement to be concluded, it had to be established that an agreement to arbitrate had been reached and that there existed some written evidence of the terms and conditions of that agreement.

B. Proposed text to revise article 7(2) of Model Law on Arbitration

23. The Working Group proceeded to consider a revision of article 7(2) of the Model Law on Arbitration as presented and commented upon in document A/CN.9/WG.II/WP.110, paragraphs 15 to 26. The draft text discussed by the Working Group was as follows:

“Article 7. Definition and form of arbitration agreement

[Unchanged paragraph (1) of the Model Law on Arbitration:]

(1) “Arbitration agreement” is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

Draft paragraph (2) of article 7:

(2) The arbitration agreement shall be in writing. For the purposes of this Law, “writing” includes any form *[alternative 1:]* provided that the [text] [content] of the arbitration agreement is accessible so as to be usable for subsequent reference, whether or not it is signed by the parties *[alternative 2:]* which [provides] [preserves] a record of the agreement, whether or not it is signed by the parties.

(3) An arbitration agreement meets the requirement in paragraph (2) if:

(a) it is contained in a document established jointly by the parties;

(b) it is made by an exchange of written communications;

(c) it is contained in one party’s written offer or counter-offer, provided that the contract has been [validly] concluded by acceptance, or an act constituting acceptance such as performance or a failure to object, by the other party;

(d) it is contained in a contract confirmation, provided that the terms of the contract confirmation have been [validly] accepted by the other party, either [expressly] [by express reference to the confirmation or its terms] or, to the extent provided by law or usage, by a failure to object;

(e) it is contained in a written communication by a third party to both parties and the content of the communication is considered to be part of the contract;

(f) it is contained in an exchange of statements [of claim and defence] [on the substance of the dispute] in which the existence of an agreement is alleged by one party and not denied by the other;

(g) [it is contained in a text to which reference is made in a contract concluded orally, provided that such conclusion of the contract is customary, [that arbitration agreements in such contracts are customary] and that the reference is such as to make that clause part of the contract.]

(4) The reference in a contract to a text containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract.”

Paragraph (1)

24. The Working Group agreed to leave paragraph (1) unchanged.

Paragraph (2)

25. Some support was expressed for alternative 2 since it was concise and well understood and tested on account of being included in article 7(2) of the Model Law on Arbitration. However, the widely prevailing view was to prepare a provision based on alternative 1, which was modelled on articles 2(a) and 6(1) of the UNCITRAL Model Law on Electronic Commerce. The reasons for the view were: that the UNCITRAL Model Law on Electronic Commerce expressed the most recent view of the Commission on how to deal with issues of electronic commerce; that it was desirable to maintain as much as possible harmony between that Model Law and the Model Law on Arbitration; and that alternative 1 provided more guidance than alternative 2. Having taken that decision, there was no doubt in the Working Group that alternatives 1 and 2 were in substance based on the same policy and that, by adopting alternative 1, the Working Group did not intend to produce a result that would be different from the result obtained under alternative 2.

26. As to the alternative words “text” and “content” in alternative 1, under one view the word “text” was to be preferred since it was more neutral (in that it did not imply the awareness of a party about the content of the terms of the agreement to arbitrate) and since it was more usual in legislative drafting. Under another view, however, the word “content” was preferable because it better expressed the idea of deformatization of the process of concluding an arbitration agreement and included electronic form. Recognizing that neither word was fully satisfactory, the Working Group explored various ideas. One was to replace the notion of text/content with the concept of “information”, which was used in the UNCITRAL Model Law on Electronic Commerce. Another idea was to delete in alternative 1 the words “provided that the [text] [content] of the arbitration agreement is” A further idea was to leave in paragraph (2) its first sentence and to move the substance of the second sentence to paragraph (3) to read along the lines of “an arbitration agreement meets the requirement in paragraph (2) if it is in any form accessible so as to be usable for subsequent reference”. An alternative idea of how to amalgamate the second sentence of paragraph (2) and paragraph (3) was to use the expression “any form which provides a record of the agreement [accessible for subsequent reference] whether or not signed by the parties”. Those ideas of combining the second modified sentence of paragraph (2) with paragraph (3) were criticized. It was said that paragraph (2) defined the form of the arbitration agreement in general and therefore it did not fit in paragraph (3), which dealt with examples of specific

types of contract practices. In addition, it was said that the notion of “record” (which did not imply an exchange of messages) did not adequately reflect the fact that arbitration agreements were often concluded by sending messages. The UNCITRAL Model Law on Electronic Commerce, in order to avoid that narrow meaning of “record”, used in article 6 the concept of “data message”, which was defined in article 2(a) of that Model Law as “information generated, sent, received or stored by electronic, optical or similar means including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy”. It was said that those considerations and the terminology used by the UNCITRAL Model Law on Electronic Commerce spoke in favour of using the term “information”. Yet another idea was to use the expression along the lines of “any form of communication which allows the arbitration agreement to be evidenced by an [electronic or other] record”. After discussion, a consensus developed supporting the idea of avoiding the terms “text” and “content” altogether.

27. It was also suggested that the draft provision should be formulated in terms of “for the avoidance of doubt” so as to make it clear that the provision was not intended to modify article 7 of the Model Law on Arbitration but only to clarify it so as to reflect current practice and the interpretation given by many courts to the current wording of article 7 of that Model Law.

Paragraph (3)

28. The Working Group engaged in a general discussion as to the desirability of listing in paragraph (3) situations in which an arbitration agreement met the requirement of paragraph (2). According to one view, it was not desirable to list those situations since they might prove to be too limiting and may leave uncertain the situations that were not specifically mentioned. Therefore, it was preferable to retain in the model provision the general principle in paragraph (2) and to list situations intended to be covered in a guide to enactment. The opposing view was that, in order to harmonize the interpretations given to the current text of article II(2) of the New York Convention and 7(2) of the Model Law on Arbitration, it was desirable to provide more concrete guidance to judges and arbitrators and that, for that reason, the current concept of paragraph (3) was preferable.

29. Without resolving the approach to the structure and level of generality of paragraphs (2) and (3) at that stage of the discussion, the Working Group embarked on a consideration of the subparagraphs in paragraph (3) in order to take a position as to whether the situations dealt with therein should be covered by the model legislative provision to be drafted.

Subparagraphs (a) and (b)

30. It was noted that the situations dealt with in subparagraphs (a) and (b) were expressly covered by article 7(2) of the Model Law on Arbitration and there was no

doubt that those situations should be encompassed in the model provision. It was agreed that in the situation dealt with in subparagraph (a) the signatures of the parties were not required; to make that clearer, a suggestion was made to state that expressly in subparagraph (a). The expression “document established jointly” was criticized as unclear in that it raised questions as to how a document was to be established and what were the implications of the term “joint”. An alternative expression suggested was “document agreed upon”.

Subparagraph (c)

31. It was agreed that where the contract was concluded tacitly in a manner described in subparagraph (c), an arbitration clause contained in that contract should be binding.

32. It was suggested to include in subparagraph (c) words along the lines of “to the extent permitted by law or usage” (which appeared in subparagraph (d)) in order to indicate that national laws provided conditions under which performance and a failure to object to a contract offer led to a valid contract and that those conditions and usages were not uniform.

33. It was suggested to delete the word “validly” because it was unnecessary or because it raised factual and legal issues that were not related to the form requirement and because it might give rise to unnecessary argument. After discussion, it was decided to delete that word and it was suggested to add a qualification along the lines of “to the extent permitted by law or usage”.

34. Observations were made that the draft provision attempted to deal with both the form required for a valid arbitration agreement and with the issue of whether substantive requirements for the conclusion of the contract and the arbitration agreement were met. It was generally considered that the purpose of the provision was to resolve the issue of form and that the provision should refrain to the extent possible from touching upon the question of the substantive requirements for the validity of agreements.

Subparagraph (d)

35. In response to questions, it was explained that the concept of contract confirmation referred to a situation in which the parties negotiated a contract orally, whereupon one of the parties communicated in writing to the other party the terms of the contract and those terms became binding on the parties if the written terms were not objected to. By relying on that concept it was possible under some legal systems that a contract term contained in a contract confirmation became binding even if the contract confirmation was not in all details the same as the terms agreed upon orally. It was observed that the concept of contract confirmation was not known in many legal systems, that it was ambiguous as regards the fact situations covered and that, if it was to be included in the model provision, it should be clarified. It was suggested that, to the extent that such conclusion of a contract was possible under some national laws, there should be no objection in

principle against considering an arbitration clause contained in a contract confirmation as valid. Replacing the term “contract confirmation” by the expression “a communication confirming the terms of the contract” was proposed.

36. As to the expression “law or usage”, the relationship between the two notions was found to be unclear. Also unclear was said to be the way in which the usage was to be demonstrated. It was therefore suggested that the reference to “usage” should be deleted. Without taking a decision on whether to retain those expressions, the Working Group considered that, if the reference to the applicable law (or usage) be retained in subparagraph (d), it should also be included in subparagraph (c).

Subparagraph (e)

37. It was agreed that the situation where the written communication containing an arbitration agreement was issued only by a third party (such as a broker) should lead to a valid arbitration agreement and should be covered by the model provision.

Subparagraph (f)

38. Agreement was expressed with the broad policy underlying subparagraph (f). As to the alternative wordings in square brackets, one view favoured the words “statements on the substance of the dispute” because they recognized that allegations of the existence of an arbitration agreement may be contained not only in a statement of claim and defence but also in other procedural submissions such as a notice of arbitration. The opposing view favoured the words “statements of claim and defence”. It was said that an arbitration agreement should be deemed to have been concluded only where it could reasonably be expected that the addressee of a procedural submission could be expected to carefully review it and reply to it; and that such an expectation existed with respect to statements of claim and defence but not necessarily with respect to other procedural submissions.

Subparagraph (g)

39. Views were expressed that to recognize an oral reference to a text containing an arbitration clause as an arbitration agreement in writing (as provided in subparagraph (g)) would be excessive because the nexus between the reference and the written terms of the arbitration agreement was too tenuous. Therefore it was suggested that the subparagraph should be deleted.

40. However, the widely prevailing view was that the model legislative provision should recognize the existence of various contract practices in accordance with which oral arbitration agreements were concluded with reference to written terms of an agreement to arbitrate and that in those cases the parties had a legitimate expectation of a binding agreement to arbitrate. On the basis of that view, broad support was expressed for the concept of subparagraph (g).

41. A suggestion was made to make the operation of the provision conditional upon whether the oral form of conclusion of an arbitration agreement was customary in international trade, in much the same manner as with respect to clauses for the prorogation of jurisdiction in article 17 of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Brussels, 1968). However, the widely prevailing view was that references to “customary” in the draft provision should be deleted. It was considered that the reply to the question of what was customary was uncertain, invited argument and went against the trend of deformalizing arbitration agreements. Furthermore, requirements that the oral conclusion of certain types of contracts be customary or that arbitration agreements in certain types of contracts be customary had more to do with substantive conditions for finding that an agreement to arbitrate had been reached than with its form; since it was desirable that the model provision limit itself to issues of form and not deal with substantive conditions for the validity of arbitration agreements, the question of what was customary and how agreement between the parties was reached fell outside the model provision. To the extent the guide to enactment would clarify that any such conditions regarding custom were governed by the law outside the model provision, it was suggested that the guide should recommend to States that it was not necessary for the law to include such conditions.

Paragraph (4) (and its relation to paragraph (3)(g))

42. Agreement was expressed with the concept of paragraph (4). It was noted that paragraphs (3)(g) and (4) dealt with two similar situations, the difference being that in paragraph (3)(g) the reference to the written terms of an agreement to arbitrate (or to a writing containing those written terms) was oral whereas in paragraph (4) the reference was required to be in writing. Having adopted the substance of paragraph (3)(g) and paragraph (4), suggestions were made to merge the two provisions along the following lines: the reference in a contract concluded in any form to a text containing an arbitration clause constitutes an arbitration agreement provided that the reference is such as to make that clause part of the contract.

43. By way of a reservation to those suggestions, it was observed that paragraph (4) stated a general principle (applicable when the parties concluded a contract in writing), which merely clarified the writing requirement in article 7(2) of the Model Law on Arbitration, whereas paragraph (3)(g) referred to a particular situation (such as a marine salvage contract) where the parties, in concluding a binding oral contract, referred orally to a text that contained an arbitration clause; thus, it was said, by merging the two provisions, the particular situation dealt with in paragraph (3)(g) became a principle applicable generally. In the light of that observation, it was suggested that the two provisions should be kept separate.

44. The widely prevailing view, however, was that the purpose of adopting the substance of paragraph (3)(g) was to deal with a broad spectrum of contract practices where the parties orally referred to written terms of an agreement to arbitrate (either directly or indirectly by referring to

writings containing such written terms) and that therefore the two provisions should be merged.

1. Related issues

45. Having concluded consideration of the draft provision, the Working Group discussed cases described in paragraph 17 of document A/CN.9/WG.II/WP.110 which were not covered by the draft model provision as it was taking shape in the discussion. The purpose of the discussion was to assess whether with respect to those cases any action by the Working Group was called for.

46. The situations considered were those described in subparagraphs (f) and (g) of paragraph 17:

“(f) A series of contracts entered into between the same parties in a course of dealing, where previous contracts have included valid arbitration agreements but the contract in question has not been evidenced by a signed writing or there has been no exchange of writings for the contract;

“(g) The original contract contains a validly concluded arbitration clause, but there is no arbitration clause in an addendum to the contract, an extension of the contract, a contract novation or a settlement agreement relating to the contract (such a ‘further’ contract may have been concluded orally or in writing);”

47. Observations were made that, in the situations described in subparagraphs (f) and (g) of paragraph 17 of document A/CN.9/WG.II/WP.110 the courts had sought solutions by interpreting the original contract and the subsequent agreements and establishing whether the parties intended that some terms in the original contract, including the arbitration agreement, were to be carried over into the subsequent or related agreement. However, the general assessment of the Working Group was that the outcome in those situations depended on the facts of each case and the interpretation of the will of the parties and that a general legislative solution was not feasible. Nevertheless, it was suggested that it might be useful to include in a guide to enactment a statement to the effect that the circumstances of the case, usages, practices and the expectations of the parties should be taken into account in interpreting particular cases and discerning the will of the parties. It was also noted that the liberalization of the form requirement as contemplated by the Working Group would help resolve some of the uncertainties arising in those cases.

48. The Working Group then turned to the situations described in subparagraphs (i) and (l) of paragraph 17:

“(i) Third party rights and obligations under arbitration agreements in contracts which bestow benefits on third party beneficiaries or stipulation in favour of a third party (stipulation pour autrui);

...

“(l) Rights and obligations under arbitration agreements where interests in contracts are asserted by successors to parties, following the merger or demerger of companies, so that the corporate entity is no longer the same.”

49. In that connection the Working Group also considered the situation where a bill of lading was assigned to a subsequent holder and the question was whether that holder became bound by the arbitration clause contained in the bill of lading. It was noted that in many States the passing of contractual rights and obligations from one party to another in principle also meant that the arbitration agreement covering those rights and obligations passed. Nevertheless, it was said that a narrow reading of a provision such as article II(2) of the New York Convention could be an obstacle to the principle that the arbitration agreement should follow the contract of which it forms part. Some support was expressed in favour of formulating a model legislative provision that would deal in a general way with those cases (see para. 23 in doc. A/CN.9/WG.II/WP.110). The Working Group, however, was hesitant and decided to consider the matter at a later stage.

2. Preparation of a draft on the basis of considerations in the Working Group

50. Having concluded its consideration of the draft provision as presented by the secretariat, the Working Group requested an informal drafting group composed of interested delegates to prepare, on the basis of the considerations in the Working Group, a draft that would serve as a basis for subsequent discussions.

51. The drafting group was requested to prepare a short version and a long version, each of which would cover all of the circumstances referred to in paragraphs (2) and (3) of article 7 as set forth in paragraph 15 of document A/CN.9/WG.II/WP.110. It was reported that eight States and one non-governmental organization participated in the work of the drafting group. The drafting group prepared not only a short version and a long version, but also a middle version. It was reported that each of those three versions was intended to be identical in substance but with varying degrees of detail.

52. The text prepared by the drafting group was as follows:

Article 7. Definition and form of arbitration agreement

Short version

“(1) ‘Arbitration agreement’ is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

“(2) The arbitration agreement shall be in writing. A writing includes any form accessible so as to be usable for subsequent reference.

“(3) For the avoidance of doubt, in cases where under the applicable law or rules of law an arbitration agreement or contract can be concluded other than in writing,

the writing requirement is met when an arbitration agreement or contract so concluded refers to written arbitration terms and conditions.

“(4) Furthermore, an agreement is in writing if it is contained in an exchange of written statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.

“(5) For purposes of article 35, the written arbitration terms and conditions, together with any writing incorporating by reference or containing those terms and conditions, constitute the arbitration agreement.”

Middle version

“(1) ‘Arbitration agreement’ is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

“(2) The arbitration agreement shall be in writing. A writing includes any form that provides a record of the agreement or is otherwise accessible so as to be usable for subsequent reference, including electronic, optical or other data messages.

“(3) For the avoidance of doubt, in cases where under the applicable law or rules of law a contract or arbitration agreement referred to in paragraph (1) can be concluded orally, by conduct or by other means not in writing, the writing requirement is met when the arbitration terms and conditions are in writing, notwithstanding that the contract or arbitration agreement has been so concluded or has not been signed by the parties.

“(4) Furthermore, an arbitration agreement is in writing if it is contained in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.

“(5) The reference in a contract to an arbitration clause not contained in the contract constitutes an arbitration agreement provided that the reference is such as to make that clause part of the contract.

“(6) For purposes of article 35, the written arbitration terms and conditions, together with any writing incorporating by reference or containing those terms and conditions, constitute the arbitration agreement.”

Long version

“(1) ‘Arbitration agreement’ is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

“(2) The arbitration agreement shall be in writing. A writing includes any form that provides a record of the

agreement or is otherwise accessible so as to be usable for subsequent reference, including electronic, optical or other data messages.

“(3) For the avoidance of doubt, in cases where under the applicable law or rules of law a contract or arbitration agreement referred to in paragraph (1) can be concluded orally, by conduct or by other means not in writing, the writing requirement is met when the arbitration terms and conditions are in writing, notwithstanding that the contract or arbitration agreement has been so concluded or has not been signed by the parties.

“(4) Furthermore, an arbitration agreement is in writing if it is contained in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.

“(5) The reference in a contract to an arbitration clause not contained in the contract constitutes an arbitration agreement provided that the reference is such as to make that clause part of the contract.

“(6) For purposes of article 35, the written arbitration terms and conditions, together with any writing incorporating by reference or containing those terms and conditions, constitute the arbitration agreement.

“(7) Examples of circumstances that meet the requirement that an arbitration agreement be in writing as set forth in this article include, but are not limited to, the following illustrations: [the secretariat was asked to prepare a text based on the Working Group’s discussions].”

53. It was noted that the purpose of the draft provision was to clarify that the requirement of writing was met if the arbitration terms and conditions (as distinguished from the acts constituting the agreement of the parties to arbitrate) were in writing even if the contract of which the arbitration agreement was a part or the arbitration agreement itself was concluded, to the extent permitted under the applicable law or rules of law, in any form other than writing, including orally or by conduct. It was also noted that (except as to paragraph (4), which had served a specific purpose in the context of an arbitration proceeding) the purpose of the draft model provision was to deal with issues of form and not with the substantive issues of how contracts and agreements to arbitrate were entered into. It was noted that those provisions covered all of the circumstances referred to in paragraphs (2) and (3), except those that the Working Group had not approved.

54. Some support was expressed for the level of detail in the middle version. However, the Working Group did not engage in a full consideration of the preferable version or combination of versions or examples of circumstances that met the requirements set forth in the draft provision or the question whether the model provision should include such examples as envisaged in paragraph (7) of the long version.

55. It was observed that the situation dealt with in paragraph (5) in the middle and long versions was covered by paragraph (3); it was explained that it was included in the draft because its substance was contained in article 7 of the Model Law on Arbitration and its exclusion might raise questions as to the implications of such exclusion.

56. As to draft paragraph (2), it was suggested that, as much as possible, the wording in the UNCITRAL Model Law on Electronic Commerce should be followed.

57. Views were expressed that the drafting of paragraph (3) was unclear. In addition, it was suggested that the expression “for the avoidance of doubt” was unusual in a number of legal systems, that it was not needed and that it might be included in the guide to enactment. It was explained that the expression was included in the draft to make clear that the text was not intended to modify the existing requirements of article 7 of the Model Law on Arbitration (or article II of the New York Convention) but only to clarify those requirements. As to the expression “applicable law or rules of law”, it was suggested that, while the distinction between “law” and “rules of law” was properly made with respect to the law governing the substance of the dispute (e.g. in article 28 of the Model Law on Arbitration), it was doubtful whether the distinction was appropriate in the context of the provision on the form in which a contract or an agreement to arbitrate might be concluded.

58. A suggestion was made to delete draft paragraph (5) in the middle and long versions as unnecessary. Another suggestion was that the model provision should refer to usages and possibly also to the course of dealing between the parties, in the same manner as in article 17 of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Brussels, 1968).

59. The secretariat was requested to prepare draft texts, possibly with alternatives, for consideration at the next session, based on the discussion in the Working Group.

III. INTERPRETATIVE INSTRUMENT REGARDING ARTICLE II(2) OF THE NEW YORK CONVENTION

A. General remarks

60. It was recalled that, at its previous session, the Working Group had discussed variations in the interpretation by domestic courts of the writing requirement of article II(2) of the New York Convention. At that time, the prevailing view was that, since formally amending or creating a protocol to the New York Convention was likely to exacerbate the existing lack of harmony in interpretation and that adoption of such a protocol or amendment by a number of countries would take a significant number of years and in the interim create more uncertainty, that approach was essentially impractical. Taking the view that guidance on interpretation of the article would be useful in achieving the objective of ensuring uniform interpretation that responded to the needs of international trade, the Working Group decided that a declaration, resolution or statement addressing the interpretation of the New York Convention that would reflect a broad understanding of the form requirement could be further studied to determine the optimal approach. Those views, acknowledging the difficulties attendant upon amendment of the New York Convention or the development of a protocol and in support of some form

of interpretative instrument, were generally reiterated at the current session of the Working Group, (see also A/CN.9/468, paras. 88-99).

61. The text of the preliminary draft interpretative instrument as considered by the Working Group was as follows:¹⁰

“[Recommendation] regarding interpretation of article II(2) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, 10 June 1958,

“The United Nations Commission on International Trade Law,

[1] *“Recalling* resolution 2205 (XXI) of the General Assembly of 17 December 1966, which established the United Nations Commission on International Trade Law with the object of promoting the progressive harmonization and unification of the law of international trade,

[2] *“Conscious* of the fact that the Commission is composed with due regard to the adequate representation of the principal economic and legal systems of the world, and of developed and developing countries,

[3] *“Conscious also* of its mandate to further the progressive harmonization and unification of the law of international trade by, inter alia, promoting ways and means of ensuring a uniform interpretation and application of international conventions and uniform laws in the field of the law of international trade,

[4] *“Convinced* that the wide adoption of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards has been an essential achievement in the promotion of the rule of law, particularly in the field of international trade,

[5] *“Noting* that according to article II(1) of the Convention “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”; and noting further that pursuant to article II(2) of the Convention “The term ‘agreement in writing’ shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams,

[6] *“Noting also* that the Convention was drafted in the light of business practices in international trade and communication technologies in use at the time, and that those technologies in international commerce have developed along with the development of electronic commerce,

[7] *“Noting further* that the use and acceptance of international commercial arbitration in international trade has been increasing,

[8] *“Recalling* that the Conference of Plenipotentiaries which prepared and opened the Convention for signature

adopted a resolution, which states, inter alia, that the Conference considers that greater uniformity of national laws on arbitration would further the effectiveness of arbitration in the settlement of private law disputes . . . ,

[9] *“Considering* that the purpose of the Convention, as expressed in the Final Act of the United Nations Conference on International Commercial Arbitration, of increasing the effectiveness of arbitration in the settlement of private law disputes requires that the interpretation of the Convention reflect changes in communication technologies and business practices,

[10] *“Taking into account* that subsequent international legal instruments such as the UNCITRAL Model Law on International Commercial Arbitration and the UNCITRAL Model Law on Electronic Commerce reflect the judgement of the Commission and the international community that legislation governing trade and arbitration should reflect new methods of communication and business practices,

[11] *“Convinced* that uniformity in the interpretation of the term ‘agreement in writing’ is necessary for advancing predictability in international commercial transactions,

[12] *“Recommends* to Governments that the definition of ‘agreement in writing’ contained in article II(2) of the Convention should be interpreted to include [. . .] *[It is suggested that the operative part of the text to be inserted at this point should be substantially modelled on the revised text of article 7(2) of the Model Law on International Commercial Arbitration as discussed above at paragraphs 23 to 27.]*”

B. Binding character

62. At the outset of the discussion, the Working Group exchanged views with regard to the binding nature of the draft interpretative instrument. Concerns were expressed that, since under the Convention on the Law of Treaties (Vienna, 1969) an interpretative instrument issued by a body other than the States parties to the New York Convention would not be considered legally authoritative, such an instrument would have no binding legal effect in international law and was therefore unlikely to be followed by those charged with interpretation of the New York Convention. It was observed that the fact that an interpretative instrument of the type proposed would be non-binding made it questionable whether such an instrument would be of practical effect in achieving the objective of uniform interpretation of the New York Convention. In support of that view it was observed by way of analogy that the declaration by the Hague Conference interpreting certain aspects of the Convention on the law applicable to the international sales of goods (The Hague, 1955) had had little practical effect; it was noted however that that declaration was of a different nature to the proposed instrument as it was directed to legislators, informing them that they could act to protect consumers, but if they chose not to act there would be no effect on the existing legal regime.

63. In addition to the difficulties associated with the non-binding nature of such an instrument, it was suggested that

¹⁰Paragraph numbering has been added for ease of reference to the text previously reproduced in A/CN.9/WG.II/WP.110.

it might be difficult to ensure that those responsible for implementing the instrument by interpreting the New York Convention were made adequately aware of its existence and, since the instrument only provided guidance to interpretation, the desired interpretation could only be encouraged, not compelled. A further difficulty noted was the existence of a body of case law interpreting article II of the New York Convention which differed from the interpretation likely to be set forth in the instrument, although there was also a body of case law consistent with that interpretation.

64. In response to those concerns, considerable support was expressed for the view that while the instrument might not be legally binding, the issuance of such a document by a multinational, representative, authoritative body such as the Commission or the United Nations General Assembly was nevertheless likely to have a wide influence on how the New York Convention was to be interpreted. Reference was made to other non-binding instruments in the field of international commercial arbitration, such as the UNCITRAL Arbitration Rules and the UNCITRAL Notes on Organizing Arbitral Proceedings, which had proven to be of considerable influence. It was also noted that such an instrument would provide an expert interpretation which would be very useful to practitioners seeking to persuade courts as to the interpretation of the New York Convention.

C. Form of interpretative instrument

65. In considering the form that a possible interpretative instrument should take, it was observed that a critical distinction should be made between modification of an existing text and clarification of its interpretation. The view was expressed that a modification of the New York Convention might imply that the text could not be understood to encompass a liberal interpretation. A clarification, on the other hand, would imply that there were differing possible interpretations and that “for avoidance of doubt” the text should be interpreted broadly in a particular manner. Furthermore, it was suggested that if an interpretative instrument did not purport to modify or amend a multilateral instrument (which, even if it were possible within the terms of that international instrument, would require legislation), but merely suggested a particular interpretation, the question of form might be of less importance. Support was expressed for formulating an instrument in terms of a clarification issued “for the avoidance of doubt.”

66. On the question of whether the instrument should be a declaration or recommendation, there was general support for a declaration on interpretation. The view was expressed that an instrument in the form of a recommendation might raise problems of deciding to which party it should be addressed. It was observed, for example, that the instrument might be addressed to States or to Governments, but that, typically, neither was directly responsible for the interpretation of such an instrument, which were matters for consideration by courts and judges. It was also suggested that a recommendation to States to adopt a particular interpretation would be of little effect unless it also included an indication of the steps States might wish to take in order to achieve that interpretation.

67. It was also suggested that it could be addressed to legislators, although it was acknowledged that that might be appropriate only where what was sought was modification of the law, such as that proposed for article 7 of the Model Law on Arbitration, rather than a broader interpretation within the existing terms of the New York Convention. It was noted that the Commission had previously addressed recommendations to legislators such as in the 1985 Recommendation on the Legal Value of Computer Records (reproduced in the United Nations Commission on International Trade Law Yearbook, vol. XVI: 1985, paras. 354-360) and in para. 5 of the Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce.¹¹

68. A further possibility was to address the instrument directly to the courts and judges responsible for the interpretation of the New York Convention. Reservations were expressed as to whether courts would follow such a non-binding recommendation, although it was noted that an interpretative declaration could be seen in some legal systems as the functional equivalent of “doctrine” or case-law. Another suggestion as to the form of the instrument was that it should not address any particular party and simply set out an understanding as to interpretation or statement by consensus which could be “by way of clarification”. Some concern was expressed that that possibility might be limited by the perceived relationship between the desired understanding and the existing terms of the New York Convention and that it might not be followed in some countries simply because it was not addressed to those responsible for interpretation of the New York Convention.

69. After discussion, the Working Group noted that although there was broad support for the form of an interpretative declaration and for the Commission to be the body to issue that interpretative declaration, no common view had been reached as to whether the interpretative declaration should be directed to any particular body, such as legislatures or courts.

D. Relationship to revision of article 7 of the Model Law on Arbitration

70. In the course of discussing the form of the instrument, it became clear to the Working Group that the relationship between the proposed instrument and the amendment of article 7 of the Model Law on Arbitration needed to be considered. It was acknowledged that while promoting adoption of an amendment of article 7 of the Model Law on Arbitration would be an effective means of achieving a broad interpretation of the form requirement, although only in countries adopting the Model Law on Arbitration, it could not address the issue of the New York Convention. It was observed that pursuing the interpretative instrument

¹¹“Furthermore, at an international level, the Model Law [on Electronic Commerce] may be useful in certain cases as a tool for interpreting existing international conventions and other international instruments that create legal obstacles to the use of electronic commerce, for example by prescribing that certain documents or contractual clauses be made in written form. As between those States parties to such international instruments, the adoption of the Model Law as a rule of interpretation might provide the means to recognize the use of electronic commerce and obviate the need to negotiate a protocol to the international instrument involved.”

and the amendment to the Model Law on Arbitration at the same time would likely prove a more effective means of achieving of the desired objective. A concern was expressed that basing the operative text of an interpretative declaration on the proposed draft revision of article 7 of the Model Law on Arbitration might be thought by some to go beyond the scope of the written form specified in article II(2) of the New York Convention and in that regard it was suggested that the Working Group would need to consider whether the amendment that the Working Group would decide upon for article 7 of the Model Law on Arbitration should be included in exactly the same form in the interpretative instrument.

E. General remarks on content

71. The view was expressed that the interpretative declaration should include explicit statements to the effect that article II(2) should be broadly interpreted and the basis for that interpretation; that technology had advanced since the New York Convention was drafted in 1958, and that subsequent instruments recognized other forms of writing, particularly in the area of electronic commerce. It was suggested that the operative part of the text (para. 12) should be explicitly phrased in terms of a statement of consensus, in order to lessen any potential misunderstanding that the declaration reflected a change, rather than a clarification, of existing interpretations. It was further noted that it would be useful to include within the body of the declaration a justification along the lines of article 3 of the UNCITRAL Model Law on Electronic Commerce.¹²

F. Paragraph-by-paragraph comments

72. A number of changes of a drafting nature were suggested: the phrase "is composed with due regard to the adequate representation of" should be deleted from paragraph 2 on the basis that it did not accurately reflect the manner in which the Commission was composed and the word "includes" used instead; the word "new" in paragraph 10 should be replaced with "evolving"; the term "advancing" in paragraph 11 should be replaced with a term such as "enhancing" or "achieving".

73. The suggestion was made that additional explanatory text be added to the preambular clauses to amplify on the history of the New York Convention, in particular its relationship to the General Assembly, and to support the authority of the Commission as the appropriate body to issue the interpretative declaration. In that regard, it was noted that reference might be made to the Commission as the "core legal body within the United Nations system in the field of international trade law" (resolution 54/103 of 17 January 2000), as well as to the fact that the Commission was composed with due regard to equitable geographi-

cal distribution which resulted in adequate representation of the world's various geographic regions and its principal economic and legal systems.

74. As a more logical presentation of the drafting and subsequent history of the New York Convention and its application in practice, it was suggested that paragraphs 6 and 7 might be placed before paragraph 5. Another view expressed was that paragraphs 6 and 7 should be deleted because they implied a change both in communications technology and in interpretation from the original intent of article II(2) and might not support the idea of a clarification of the interpretation. On the other hand, it was stated that since the changes proposed might not be thought by some observers to be accommodated within the existing language, the interpretative declaration should indicate reasons as to why it was necessary that the interpretation of the New York Convention should be adapted to reflect recent technological developments. It was also noted that since the problem sought to be addressed was not one of lack of uniformity of interpretation, paragraph 8 should also be omitted. A compromise view suggested was that the draft incorporate words to the effect that the declaration was prepared in response to the "differing interpretations which have occurred in light of changes in communications methods and business forms . . .". It was noted, however, that while it was clear that communication technologies had advanced since the New York Convention was drafted, it was less clear that business practices had changed fundamentally. Rather it was suggested that interpretation of business practices had changed, for example in terms of what might be required to conclude a valid arbitration agreement. Accordingly, it was proposed that references to changing business practices be deleted from the draft interpretative declaration. After discussion, no final decision was reached on that point.

75. In respect of paragraph 10 it was observed that the reference to changing circumstances might cast doubt on the broad interpretation of article II(2) that was currently employed in some jurisdictions and that the paragraph should, accordingly, be deleted. Also since paragraph 11 by itself provided sufficient justification for the interpretative declaration, paragraph 10 could be safely omitted. An alternative view expressed was that paragraph 10 established an important foundation relating to the scope of article II(2), especially since the draft revision to article 7 of the Model Law on Arbitration included language based upon the UNCITRAL Model Law on Electronic Commerce which was a text designed specifically to accommodate new technology. It was further noted that paragraph 10 of document A/CN.9/WG.II/WP.110 contained language which could serve as a useful reference in subsequent drafts of the interpretative declaration.¹³ Support was expressed for that view.

¹²Article 3 states:

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

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

¹³Paragraph 10 states in the relevant part:

"It was also noted that national courts increasingly adopted a liberal interpretation of those provisions in accordance with international practice and the expectations of parties in international trade; nevertheless, it was observed, some doubts remained or views differed as to their proper interpretation."

76. After discussion, the secretariat was requested to prepare a revised draft of the interpretative instrument taking into account the discussion in the Working Group.

G. Other writing and form requirements in the New York Convention

77. Having completed its consideration of the preliminary draft interpretative instrument, the Working Group turned its attention to other writing and form requirements in the New York Convention. It was recalled that other provisions in the New York Convention, as well as other conventions on international commercial arbitration, contained additional requirements of writing which, if not interpreted in line with the decisions of the Working Group regarding the revision of the provisions on the writing requirement, might operate as barriers to the use of modern means of communication in international commercial arbitration. In this regard, it was noted that the UNCITRAL Working Group on Electronic Commerce was expected to undertake further work to consider the issue of how to ensure that treaties governing international trade were interpreted in light of the UNCITRAL Model Law on Electronic Commerce.

IV. MODEL LEGISLATIVE PROVISIONS ON THE ENFORCEMENT OF INTERIM MEASURES OF PROTECTION

A. General remarks

78. It was recalled that there had been a preliminary discussion of the issue of enforceability of interim measures at the previous session of the Working Group (document A/CN.9/468, paras. 60-79), where it had been generally recognized not only that interim measures of protection were increasingly being found in the practice of international commercial arbitration, but also that the effectiveness of arbitration as a method of settling commercial disputes depended on the possibility of enforcing such interim measures (para. 60). General support had been expressed in favour of the proposal to prepare a harmonized and widely acceptable model legislative regime governing the enforcement of interim measures of protection ordered by arbitral tribunals.

B. Text and general consideration of draft proposals

79. The Working Group had before it two draft proposals presented by the secretariat in document A/CN.9/WG.II.WP.110 (after paras. 55 and 57) as follows:

Variant 1

“An interim measure of protection referred to in article 17, irrespective of the country in which it was made, shall be enforced, upon application by the interested party to the competent court of this State, unless:

- (i) Application for a corresponding interim measure has already been made to a court;

- (ii) The arbitration agreement referred to in article 7 was not valid;
- (iii) The party against whom the interim measure is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present its case [with respect to the interim measure];
- (iv) The interim measure has been set aside or amended by the arbitral tribunal;
- (v) The court or an arbitral tribunal in this State could not have ordered the type of interim measure that has been presented for enforcement [or the interim measure is manifestly disproportionate]; or
- (vi) The recognition or enforcement of the interim measure would be contrary to the public policy of this State.”

Variant 2

“The court may, upon application by the interested party, order enforcement of the interim measure of protection referred to in article 17, irrespective of the country in which it was made.”

General remarks

80. It was noted that variant 1, which was drafted in terms of “the court shall enforce, unless ...”, was intended to establish an obligation to enforce if the prescribed conditions were met, whereas variant 2 was in terms of “the court may enforce ...”, expressing a degree of discretion. It was further noted that variant 1 had been prepared on the basis of article 36 of the Model Law on Arbitration (and article V of the New York Convention), but adapted to the specific features of interim measures as opposed to final awards.

81. Variant 2 was supported on the basis of the idea that the court being endowed with a discretionary power as to whether or not to grant enforcement was more in line with the provisional nature of interim measures; that such an approach was likely to assist in those countries where there was resistance to the idea that interim measures issued by an arbitral tribunal could be enforced; and that it was difficult to ensure that the appropriate grounds for refusing enforcement were properly enumerated. Notwithstanding those views, it was generally felt that the discretionary powers entailed by variant 2 might result in lack of uniformity of interpretation and therefore jeopardize harmonization. It was also observed that setting forth an obligation for courts to enforce interim measures might ultimately enhance their effectiveness.

82. The Working Group discussed the approach to defining the interim measures of protection to be covered by the model legislative provision. Views were expressed that the definition should be formulated broadly, similarly to article 17 of the Model Law on Arbitration and article 26 of the UNCITRAL Arbitration Rules; to the extent examples were to be included, they should be illustrative rather than

limiting. It was also suggested that such a definition might be clearer if there was some indication of decisions that were not intended to be covered such as awards for advance payment (which constituted final decisions resolving a part of the claim to the extent it was beyond doubt) or procedural decisions. It was noted that some interim measures of protection concerning evidence might be regarded as covered by article 27 of the Model Law on Arbitration, and that it was necessary to clarify the relationship between article 27 and the draft model provision. The suggestion not to formulate a definition of interim measures but instead to refer to the law of the State of enforcement for such a definition did not receive support.

83. It was noted that in practice arbitrators issued their decisions on interim measures of protection in different forms and under different names, including as orders or interim awards. Sometimes the purpose of designating the decision as an order (as distinguished from an award) was to prevent it being challenged in court, whereas the purpose of designating it as an award was to allow it to be treated as an award. It was, however, observed that different labels did not necessarily ensure different treatment of interim measures of protection in courts and that therefore the model provision should apply to interim measures of protection irrespective of the label given to it by the arbitral tribunal. To the extent it was desirable to leave a degree of control to the arbitral tribunal over whether the party might request its enforcement in court, this might be achieved by providing that enforcement may be requested with the approval of the arbitral tribunal only (in a manner similar to article 27 of the Model Law on Arbitration).

Variant 1

84. There was general approval in the Working Group for the suggestion that the model provision should be structured and drafted in such a way that it would be clear which grounds for refusal of enforcement were to be taken into account on the motion of the respondent and which ones the court should take into account on its own motion. It was observed that the distinction was clear in article 36 of the Model Law on Arbitration (and article V of the New York Convention) and that the structure of those provisions should be adopted also for the model provision.

85. For consistency with article 36 of the Model Law on Arbitration and article V of the New York Convention it was suggested that the word “enforcement ... may be refused only” should be used in the chapeau instead of “shall be enforced ... unless”. That suggestion was opposed on the ground that the word “may” in article V of the New York Convention had given rise to differing interpretations (in some legal systems it was understood as allowing a degree of discretion in permitting enforcement even if a ground for refusal was present, in particular if it was trivial and did not influence the substance of the award, while in other legal systems the expression “might be refused only” was understood only as limiting the grounds on which enforcement may be refused). An alternative proposal was to formulate the provision along the following lines: “shall be enforced

... except that the court may at its discretion refuse enforcement if one of the following circumstances exists ...”. While some opposition was expressed to that proposal (because it was considered that the court should be able to rely on other grounds not listed in the provision for refusal to enforce or because the existence of a ground listed in the provision should allow no other result than refusal to enforce), the prevailing view was that the proposal presented a good basis for future consideration. To the extent a single regime could not be agreed upon (in particular if a national law provided a regime that was more favorable than the one in the model provision), a suggestion was made that the technique of a footnote to the provision (such as the one to article 35(2) of the Model Law on Arbitration) might be used to indicate that it would not be contrary to the harmonization to be achieved by the model provision if a State retained less onerous conditions.

Variant 1, subparagraph (i)

86. It was noted that subparagraph (i) envisaged a situation where a court would receive a request for enforcement of an interim measure while that (or another) court in the State was considering (or had already denied) a request for the same or a similar measure. In order to express such a situation better it was suggested that the expression “corresponding” be replaced by the expression “same or similar”. A suggestion that such cases of coordination between requests regarding interim measures should be exclusively dealt with under the principle of “res judicata” did not receive support. The Working Group requested the secretariat to consider various possible situations where coordination might be needed and to prepare a draft, possibly with alternatives. It was considered that the model provision should deal only with coordination within the enacting State and not attempt to establish a cross-border regime.

Variant 1, subparagraph (ii)

87. Suggestions were made for the deletion of subparagraph (ii) since, at the time of the request for enforcement, the arbitral tribunal was already functioning and any issue regarding its own jurisdiction should be left to the arbitral tribunal to decide. Moreover, it was said that claims that the arbitration agreement was not valid were likely to be intended simply to delay enforcement. Furthermore, the ground of refusal was self-evident and could be relied upon even if it was not specifically listed.

88. However, the widely held view was that the substance of the subparagraph should be retained with the understanding (to be expressed in the guide to enactment or possibly in the provision itself) that the court should not go beyond a prima facie assessment of the validity of the arbitration agreement, thus leaving the full examination of the issue to the arbitral tribunal (whose decision was in any case subject to court control as provided e.g. in article 16 of the Model Law on Arbitration). Moreover, if the model provision were to allow the applicant to request enforcement without the respondent having been given notice of the measure (see below paras. 90-94), the respondent

should be able to raise the issue of the validity of the arbitration agreement in court in the context of opposing enforcement of the interim measure (since that would be the first opportunity of it so doing). A similar situation would exist where the respondent had refused to participate in the arbitration (up to the point of the application for enforcement) because it was convinced that the arbitral tribunal had no jurisdiction.

Variant 1, subparagraph (iii)

89. It was pointed out that subparagraph (iii) was intended to address two distinct situations, namely: the one where the party against whom the interim measure was invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings as a whole and the one where that party had not been able to present its case in respect of issuance of an ex parte interim measure.

90. Allowing the enforcement of ex parte interim measures was opposed on the basis that such interim measures were not entitled to enforcement under the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Brussels, 1968). In response it was noted that that Convention only addressed foreign decisions and that no distinction should be drawn between enforcement of domestic and foreign interim measures. A further ground for opposing enforcement of ex parte interim measures was that their issuance was not allowed in the practice followed, for example, by some major international arbitration institutions, without notice, (such notice might be given by serving the application for the interim measure or by serving of the interim measure on the respondent prior to any application to a court for its enforcement). That objection was based on the fundamental importance to arbitration of the principle of equal treatment of parties as set forth in article 18 of the Model Law on Arbitration.

91. The need to preserve the element of surprise for ensuring the effectiveness of some interim measures was generally recognized (with a view to preventing, for example, the destruction of evidence or, more generally, to address any situations requiring urgent action). It was suggested that objections based upon the equal treatment of parties could possibly be addressed by providing that the validity of ex parte interim measures be limited to a fixed time period, upon expiration of which the responding party should be entitled to fully present its case before any decision was made on maintenance or revocation of the measure. That suggestion of a two-step procedure, combining an ex parte phase with a subsequent inter partes phase, received some support. It was observed that such a procedure (irrespective of whether the inter partes phase was to be held before the arbitral tribunal, the court or both) could counterbalance the risks potentially implied in ex parte interim measures.

92. To ensure equal treatment of the parties and address the potentially great impact that an ex parte interim measure might have on the responding party, a suggestion was made that enforcement of the measure be preceded by

some kind of judicial examination or, as an alternative, that the granting of counter-security might be envisaged. It was also proposed that those issues could be adequately addressed within subparagraph (vi) on the basis of public policy; the prevailing view was that that proposal was unacceptable as it placed too much emphasis on the public policy exception.

93. A further issue for consideration was the degree to which the court would be entitled to evaluate an ex parte measure prior to enforcing it. One view was that it could be distinguished from the review of the validity of the arbitration agreement where the evaluation was "at arm's length" and that in the case of the interim measure the respondent should be given the opportunity to present its case. A different view was that in evaluating an ex parte interim measure a court should, as much as possible, not review the decision of the arbitral tribunal.

94. Following discussion, the Working Group decided that agreement could not be reached on a specific solution at the current session of the Working Group. The secretariat was requested to prepare a revised provision which would address the various concerns expressed with a view to preserving both the element of surprise and the principle of equal treatment of the parties.

Variant 1, subparagraph (iv)

95. It was pointed out that, basically, enforcement of an interim measure required that the measure still be in force as originally issued and that subparagraph (iv) was designed to address the issue of how certainty as to persistence of the interim measure could be achieved by the enforcing court. It was noted that two solutions might be envisaged: the first solution would consist of obliging the applicant for enforcement to inform the court of any changes that might have occurred following granting of the measure; the second in providing that the request for enforcement be submitted to, and approved by, the arbitral tribunal.

96. The Working Group recognized the acceptability of the substance of the rule as drafted, with a reference to suspension of the interim measure as a possible further ground for refusing enforcement.

Variant 1, subparagraph (v)

97. It was pointed out that subparagraph (v) included two grounds that were very different in nature.

98. Concerning the first ground, that is refusal on the basis that the court or an arbitral tribunal in the State could not have ordered the type of measure presented for enforcement, a number of different views were expressed.

99. It was pointed out that it was not necessary to consider what domestic arbitral tribunals could issue, but rather what interim measures would be enforceable under the law of the enforcing State, since the emphasis was upon

enforcement of the interim measure. Accordingly, it was suggested that reference to the arbitral tribunal be deleted. As a matter of drafting, it was proposed to delete the words "in this State", since in many cases enforcement was sought in a country other than the one where the interim measure was granted and no specific relationship was required between the country where the arbitral tribunal was established, the country whose law was applied and the country where enforcement was sought. A suggestion to replace the word "could" with the word "would" was objected to on the basis that it might result in uncertainty as to the kind of examination the court was supposed to undertake.

100. Some concerns were expressed that the provision as drafted might lead to different results in different countries. Given the differences between the measures known in different legal systems, it was suggested that the fact that a court could not issue a particular measure was not sufficient grounds for refusing enforcement of a similar measure issued in another country. A contrary view was that a court could not be expected to enforce a measure that it itself could not issue since in that situation the machinery to enforce the order would not be available and enforcement would therefore be ineffective. A suggestion was made that problems of unknown orders might be resolved in part by allowing the court the ability to reformulate the measure along the lines of "unless the court can reformulate the interim measure in accordance with its own powers and procedures" (it was noted that the issue of possible reformulation was addressed at paras. 71 and 72 of document A/CN.9/WG.II/WP.110 under possible additional provisions). A further suggestion that the provision could be deleted as it was already covered by subparagraph (vi) was not supported.

101. To address the views of the Working Group some alternative drafts were proposed: to draft the provision in terms of "if the type of interim measure cannot be enforced within the limits of the powers of the court as set forth in its procedural rules"; to include the wording "enforcement of an interim measure might be refused to the extent that such measure is incompatible with the procedural power conferred upon the court by its procedural laws". Despite uncertainty as to the best possible solution, there was wide recognition that the provision relied on an acceptable and reasonable principle and should therefore be retained. There was also broad support for the powers of a court to reformulate the measure in accordance with its procedural powers. The secretariat was requested to revise the provision providing alternative solutions, possibly also adding clarification as to the kind of situations which would fall within its scope. A number of examples of interim measures that might be beyond the power of a particular national court were described, including fines, freezing orders over less than all of a party's property, mandatory injunctions requiring a party to build something and, in general, orders for which a court lacked machinery for enforcement.

102. As to the part of the provision relating to disproportionality, the Working Group agreed that it would not be included.

Subparagraph (vi) and possible additional provisions

103. Due to time constraints, it was agreed to postpone consideration of the further draft provisions contained in document A/CN.9/WG.II/WP.110, including subparagraph (vi) of variant 1, to the next session of the Working Group.

C. Future work

104. At its thirty-second session (Vienna, 20-31 March 2000), the Working Group exchanged views and information on a number of arbitration topics which were identified as likely items for future work. Some of those topics arose in the course of the Working Group's deliberations, others had already been considered by the Commission at its thirty-second session (reproduced in document A/CN.9/468 at paras. 107 and 108), while yet others had been proposed by arbitration experts (reproduced at para. 109 of document A/CN.9/468).

105. At the current session Working Group considered document A/CN.9/WG.II/WP.111, which described the preparatory work in the secretariat with respect to three of those topics:

(a) court-ordered interim measures of protection in support of arbitration (with a view to preparing uniform rules addressed to courts when they order such measures) (paras. 2-29);

(b) the scope of interim measures that may be issued by arbitral tribunals (with a view to preparing an empirically based text that would provide guidance to arbitral tribunals when a party requested an interim measure of protection) (paras. 30-32); and

(c) the validity of the agreement to arbitrate (a study of uniform rules on the interrelationship between the principle according to which "the arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement" (art. 16(1) of the Model Law on Arbitration) and the scope of the court's terms of reference in deciding whether to refer the parties to arbitration when the respondent in the court proceedings invoked an arbitration agreement and the claimant argued that the arbitration agreement was invalid (para. 33).

106. Broad support was expressed for future work on all three topics. It was said that building upon the success of texts such as the UNCITRAL Arbitration Rules, the Model Law on Arbitration and the Notes on Organizing Arbitral Proceedings, the Commission could further enhance the effectiveness of arbitration in international trade. While it was noted that topics (a) and (b) concerned court procedure, an area where harmonization had been traditionally difficult to achieve, it was said that more legal certainty in those areas was desirable for the good functioning of international commercial arbitration. As to topic (b), it was considered that the text to be prepared should analyse arbitration practice and that the analysis would in itself be

useful and might lead to a text in the nature of non-binding practice notes. It was noted that in particular the work on topic (b) as well as on the other two topics would have to be founded on broad empirical information and that the secretariat would contact arbitration organizations and Governments with a view to obtaining such information. The Working Group called on Governments and relevant organizations to provide the necessary information to the secretariat. While the Working Group heard some indications that topic (a) should be given the highest priority, it took no decision as to the relative priority among the topics, and it requested the secretariat to prepare for a future session of the Working Group preliminary studies and proposals.

V. CONCILIATION

A. General remarks

107. The Working Group recalled that, at its previous session, there was recognition of the increasing use of conciliation as a method for settling commercial disputes and that strong support had been expressed for the development of draft provisions on conciliation. The Working Group exchanged views on the proposed provisions for a model legislative provisions as set out in paragraphs 87 to 112 of document A/CN.9/WG.II/WP.110.

108. It was observed that, in addition to the term “conciliation”, other terms were used in practice, such as “mediation” and “neutral evaluation”. Frequently these terms were used interchangeably without an apparent difference in meaning. In other cases a distinction was made depending on the procedural styles or techniques used. However, even if a particular meaning was attached to a term, the usage was not consistent.

109. The Working Group then agreed with the assessment that, in view of the fact that the linguistic usage was not settled, the term “conciliation” would be used in the draft to indicate a broad notion encompassing various types of procedures in which parties in dispute were assisted by independent and impartial persons to settle a dispute.

110. The Working Group exchanged general views on the form that the provisions should take but agreed to defer a final decision on the issue of form until the substantive provisions had been settled. While there was some support for developing a model law, the prevailing view was that, in the interim, the Working Group would proceed on the assumption that the provisions would take the form of model legislative provisions.

B. Article 1

111. The text of draft article 1, as considered by the Working Group, was as follows:

“Article 1. Scope of application

[Unless otherwise agreed by the parties,] these legislative provisions apply to conciliation in commercial* transactions.

*The term “commercial” should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road.

(2) 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) one of the following places is situated outside the State in which the parties have their places of business:

(i) the place where meetings with the conciliator are to be held [if determined in, or pursuant to, the agreement to conciliate];

(ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or

(c) the parties have [expressly] agreed that the subject-matter of the agreement to conciliate relates to more than one country.

(3) 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.”

Non-mandatory nature of the draft provisions

112. The Working Group generally agreed to proceed on the basis that the provisions would be non-mandatory and therefore support was expressed for retaining the words “unless otherwise agreed by the parties”. However, the question of whether a provision ought to be included to allow the parties to opt out altogether from the model regime was not finally decided. It was, however, noted that the issue of the degree to which individual draft provisions be non-mandatory would need to be considered as work progressed on the substantive provisions (see also below, para. 142)

Definition of “commercial”

113. The Working Group discussed the question whether the draft provisions ought to be restricted to commercial disputes.

114. Suggestions were made that distinctions between commercial and non-commercial disputes were difficult to draw and that it was premature to adopt a restriction at that point of the deliberations of the Working Group as much would depend on the substance of the final text of the

provisions. Nonetheless there was considerable support for the idea that the Working Group proceed on the assumption that the model provisions apply to commercial transactions only. In that context, the way of expressing that restriction through a footnote as set out in the draft text received wide support.

115. As an alternative to that approach, it was suggested that the current text of the footnote should be modelled on footnote *** to article 1 of the UNCITRAL Model Law on Electronic Commerce (which envisaged the broadest possible application of the Model Law, while providing for specific exclusions) to enable enacting States, should they so choose, to widen the scope of the model legislative provision on conciliation with the option of excluding certain types of transactions from the scope of the model legislative provisions.

116. A further suggestion was made that the term “commercial transactions” used in draft article 1 was too narrow and could depend on the technicalities of national laws. To avoid that narrowness, it was proposed that the term “transactions” be replaced by the term “activities” in line with the terminology used in the UNCITRAL Model Law on Electronic Commerce. However, that proposal was opposed on the basis that the word “transaction” implied that an agreement was required.

International or international and domestic

117. The Working Group noted that it might facilitate the adoption of the model regime if the provisions were to be restricted to international conciliation. However, the Working Group noted that it would reconsider whether or not the legislative provisions would be useful in the domestic context once the substance of the text was finalized. It was also noted that, regardless of a decision by the Working Group in scope, any State could choose to adopt the provisions in respect of both domestic and international conciliation as some States had done in respect of the Model Law on Arbitration.

118. Whilst there was a suggestion that the definition of “international” be restricted to subparagraph (a) of draft article 1(2), the Working Group adopted the view that it was necessary to have additional criteria to cover a broad range of situations and ensure that the requisite “internationality” may be found in certain cases even if the two disputing parties had a place of business within one State. A further reason for retaining the broader definition of “international” was that the current draft was similar in scope to that used in article 1(3) of the Model Law on Arbitration and that it was important, given that arbitration could follow conciliation, to have a similar definition in the conciliation provisions. In support of the view that the draft should retain flexibility in defining “internationality”, a suggestion was made that the Working Group consider including within the scope of the model provisions all situations which had a “foreign element”.

119. The Working Group also discussed whether the draft articles should include further provisions defining when the model legislative provisions would apply. In principle, support was expressed for the model regime applying if the

conciliation proceedings took place in the State that had enacted the model provisions. However, it was noted that, in some circumstances, there were difficulties in determining the place of conciliation; for example in cases where the participants communicated by electronic means without actually meeting in one State. The place of conciliation was questioned as appropriate criterion where the place was chosen for reasons of convenience rather than because of any link between the dispute or the parties and the place of the conciliation.

120. It was also observed that some draft provisions dealt with effects of conciliations in States other than the enacting State and appeared to deal with effects of conciliations not only in the enacting State but also abroad (for example, draft article 7 on the limitation period and draft article 8 dealing with admissibility of evidence in other proceedings). It was suggested that this should be considered in drafting the provision on the application of the model provisions (see also below, para. 134).

C. Article 2

121. The text of draft article 2, as considered by the Working Group, was as follows:

**“Article 2. [General provisions]
[Conduct of conciliation]**

“(1) The conciliator or a panel of conciliators assists the parties in an independent and impartial manner in their attempt to agree on a settlement of their dispute.

“(2) The parties determine, [by reference to conciliation rules or otherwise], the selection of the conciliator or the panel of conciliators, the manner in which the conciliation is to be conducted and other aspects of the conciliation proceedings.

“(3) [Subject to agreement of the parties] [Failing such agreement] the conciliator or the panel of conciliators may conduct the conciliation proceedings in such a manner as it considers appropriate, taking into account the circumstances of the case, the wishes the parties may express, [including any request by a party that the conciliator hear oral statements,] and the need for a speedy settlement of the dispute.

“(4) The conciliator shall be guided by principles of objectivity, fairness and justice. [Subject to agreement of the parties, the conciliator may give consideration to, among other things, the rights and obligations of the parties, the usages of the trade concerned and the circumstances surrounding the dispute, including any previous business practices between the parties.]

“[(5) The conciliator may, at any stage of the conciliation proceedings, make proposals for a settlement of the dispute.]”

122. Suggestions were made for placing paragraph (2) into a separate article with the remainder of the article to be patterned after article 7 of the UNCITRAL Conciliation Rules.

123. During the subsequent discussion, it was suggested (and the Working Group agreed) that the current draft articles 2(2) and 1 should be expanded and transformed into separate provisions which should, following the structure of the UNCITRAL Conciliation Rules, provide for the definition of conciliation, the scope of application of the model provisions, the commencement of conciliation proceedings, the number and selection of conciliators and the role of conciliators, including the principles that should guide the conduct of conciliation.

124. In setting out the elements for the definition of conciliation, it was suggested to take into account the agreement of the parties, the existence of a dispute, the intention of the parties of reaching an amicable settlement and the participation of an impartial and independent third person or persons who assisted the parties in an attempt to reach an amicable settlement. Those elements distinguished conciliation on the one hand from binding arbitration and, on the other hand, from negotiations between the parties or representatives of the parties. According to the wording offered for consideration, conciliation was to be regarded as a process in which a third person, or persons, assisted parties who mutually desired such assistance, to reach a voluntary agreement for amicable settlement of their dispute. While the view was expressed that some forms of conciliation may be without the involvement of a third person, the general view was that such cases would fall outside the scope of the model provisions.

125. It was noted that the text as currently drafted did not provide for any consequences should a conciliator fail to act impartially. It was recognized that in such a case any party was free to terminate the conciliation proceedings. A question was raised, however, whether, in circumstances when the conciliator did not act in an impartial way, that could result in the model legislative provisions not being applicable. While it was generally understood that such conduct of a conciliator would not result in inapplicability of the provisions, such as, for example, the provisions on confidentiality and those on admissibility of evidence in arbitration or judicial proceedings, it was considered necessary to review the text with a view to ensuring that that interpretation would follow from the model provisions.

D. Articles 3 to 5

126. The text of draft articles 3, 4 and 5 as proposed for consideration by the Working Group was as follows (although it should be noted that draft articles 3 and 4 were not considered at the current session of the Working Group):

“Article 3. *Communication between conciliator and parties*

“Unless otherwise agreed by the parties, the conciliator or the panel of conciliators may meet or communicate with the parties together or with each of them separately.

“Article 4. *Disclosure of information*

“*[Alternative 1:]* When the conciliator or the panel of conciliators receives information concerning the dispute from a party, it may disclose the substance of that information to the other party in order that the other party may have the opportunity to present any explanation which it considers appropriate. However, [the parties are free to agree otherwise, including that] the conciliator or the panel of conciliators shall not disclose information received from a party, when the party gives the information to the conciliator or the panel of conciliators subject to a specific condition that it be kept confidential.

“*[Alternative 2:]* Subject to the agreement of the parties, nothing which is communicated to the conciliator or the panel of conciliators by a party in private concerning the dispute may be disclosed to the other party without the express consent of the party who gave the information.

“Article 5. *Commencement of conciliation*

“The conciliation proceedings in respect of a particular dispute commence on the date on which a [written] invitation to conciliate that dispute made by one party is accepted [in writing] by the other party.”

127. Statements were made in the Working Group that it would be useful to clarify when a conciliation could be taken to have commenced, including, for example, for the purpose of determining its effect on draft article 7 (which dealt with the effect of conciliation on the limitation period) and draft article 8 (which dealt with admissibility of evidence in other proceedings). While the Working Group noted that the functioning of a number of subsequent provisions depended on draft article 5, the discussion on that article was undertaken without prejudice to the decision on the following articles.

128. As a preliminary issue, it was proposed that draft article 5 should apply irrespective of whether the agreement to conciliate was made before or after the dispute arose.

129. A widely held view in the Working Group was that draft article 5 was a useful provision which should be retained and that additional text should be added to reflect the idea that if a party did not receive a reply to an invitation to conciliation then the offer to conciliate was assumed to have ended. It was accepted that the provision should be modelled on article 2(4) of the UNCITRAL Conciliation Rules.

130. It was proposed that the parties, in agreeing to commence a conciliation, might do so on the initiative of a party, in compliance with their own agreement or as a result of a suggestion or order from a court or other competent governmental agency and that draft article 5 should be compatible with those situations and should also be coordinated with the substance of draft article 10 (“Resort to arbitral or judicial proceedings”) and, in particular, variant 3 of that article. The Working Group requested the secretariat to consider various examples of orders or

requests by courts or other agencies for commencement of conciliation proceedings and requested Governments to provide those examples to the secretariat.

131. In order not to cast doubt on cases where the agreement to conciliate was made in a way other than in writing, the Working Group generally considered that the express reference to writing in draft article 5 should be deleted. It was, however, observed that, in view of the fact that the commencement of conciliation could produce an effect such as interruption of the running of a limitation period, it would be useful for evidentiary purposes that the commencement of the conciliation be supported by evidence in writing, including forms equivalent to writing.

132. Suggestions were made that draft article 5 be redrafted as a provision that applied unless the parties otherwise agreed and that it remained to be decided whether that principle of freedom of the parties should be expressed in a general way at the start of the draft model provisions or whether this should be provided for specifically in draft article 5.

E. Articles 6 and 7

133. The text of draft articles 6 and 7, as proposed for consideration by the Working Group, was as follows (although it should be noted that article 6 was not discussed at the current session of the Working Group):

“Article 6. *Termination of conciliation*”

“The conciliation proceedings are terminated:

“(a) by the signing of the settlement agreement by the parties, on the date of the agreement;

“(b) by a written declaration of the conciliator, after consultation with the parties, to the effect that further efforts at conciliation are no longer justified, on the date of the declaration;

“(c) by a written declaration of the parties addressed to the conciliator to the effect that the conciliation proceedings are terminated, on the date of the declaration; or

“(d) by a written declaration of a party to the other party and the conciliator, if appointed, to the effect that the conciliation proceedings are terminated, on the date of the declaration.”

“Article 7. *Limitation period*”

“(1) [*Alternative 1:*] When the conciliation proceedings commence, the limitation period regarding the claim that is the subject matter of the conciliation ceases to run. [*Alternative 2:*] For the purposes of the cessation of the limitation period, the commencement of the conciliation proceedings is deemed to be an act that causes the limitation period to cease to run.

“(2) Where the conciliation proceedings have terminated without a settlement, the limitation period is deemed to have continued to run. If in such a case the

limitation period has expired or has less than [six months] to run, the claimant is entitled to a further period of [six months] from the date on which the conciliation proceedings terminated.”

134. Questions were raised as to the effects of draft article 7 in States other than enacting States. It was considered that, ideally, the model provisions should produce effects not only in the State where the conciliation took place, but also in other States. It was recognized, however, that the model provisions could and should deal with the cessation of the running of the limitation period in the enacting State as a result of a conciliation initiated in the enacting State or in a foreign State, but that it could not regulate the cessation of a limitation period in a foreign State. It was suggested that the provision might be redrafted so that it would be more likely that a foreign State would recognize the conciliation in the enacting State as triggering the cessation of the running of the limitation period. A suggestion was made that one possible means of achieving that result might be a provision which deemed that the parties had agreed not to rely on the relevant limitation period.

135. Some of the difficulties with achieving universal application for article 7 were cited as a reason for deleting this provision altogether. It was also stated that the question of limitation should be governed by rules other than the model provisions on conciliation. Another reason was that draft article 7 was not indispensable for the protection of the rights of the claimant because draft article 10 expressly provided for the possibility of a party initiating arbitral or judicial proceedings where, “in its opinion, such proceedings were necessary for preserving its rights”. A further reason was that the parties were free to agree to the extension of the length of the limitation period and that, therefore, there was no real need for cessation of the limitation period (it was responded, however, that such agreements were not permitted in a number of legal systems). A further reason against retaining the article was that, in practice, parties often initiated court proceedings simply to avoid losing their rights as a result of the expiration of the limitation period and that such practice did not hamper conciliation proceedings. Yet another reason given was that, in view of the complexity of the provision and uncertainty whether it produced the intended result in the relevant jurisdiction, the provision might introduce legal technicalities into what might otherwise be an informal process. It was also remarked that draft article 7 seemed to incorrectly equate, for the purpose of the limitation period, conciliation proceedings with judicial or arbitral proceedings; that comparison was questioned because of the fundamental differences between the purely voluntary nature of conciliation and the mandatory finality that resulted from court or arbitral proceedings. In opposition to draft article 7 it was also argued that it might affect the acceptance of the model provisions as a whole as States might hesitate to adopt a text that dealt with a matter that in many States raised issues of public policy.

136. However, in support of retaining the article it was considered that, from a practical viewpoint, it offered a simple and useful solution for a large number of cases and it enhanced the attractiveness of conciliation by preserving the parties’ rights without encouraging them to

initiate adversarial proceedings (which involved potentially unnecessary legal expenses). It was also observed that the provision was particularly useful when the limitation period was short, which was typically the case, for example, in claims arising out of transport contracts.

137. After extensive discussion, the Working Group adopted the view that it would be premature to delete the provision before it was fully considered how it could be improved so as to make it widely acceptable. There was no agreement on whether the provision, if retained, should be in the main body of the text or whether it would be presented in a footnote or in a guide to enactment as a suggestion for States that might wish to enact it. In light of those considerations, it was agreed that draft article 7 would be placed in square brackets and appear in the revised draft.

138. On the question of the substance of draft article 7, there was considerable preference expressed for alternative 1 in subparagraph (1). In respect of paragraph (2), it was noted that there were essentially three ways in which conciliation proceedings might affect the running of the limitation period. One possibility was that after the limitation period was interrupted by the commencement of the conciliation proceedings it would start to run anew. Another possibility was that if the conciliation ended without a settlement, the limitation period would be deemed to have continued to run as if there had been no conciliation (in such a case there would be an additional grace period of [six months] if in the meantime the limitation period had expired or had less than [six months] to run). That approach was reflected in draft article 7(2) before the Working Group and was modelled on article 17 of the Convention on the Limitation Period in the International Sale of Goods (New York, 1974). A third option was that, during the conciliation period, the limitation period would not run and would resume running from the time the conciliation ended unsuccessfully. Of the three, that last option (referred to also as the “chess clock” solution or, in some legal systems, as “suspension”) received considerable support.

F. Article 8

139. The text of draft article 8 as considered by the Working Group was as follows:

“Article 8. *Admissibility of evidence in other proceedings*”

“(1) Unless otherwise agreed by the parties, a party who participated in the conciliation proceedings [or a third party] shall not rely on, or introduce as evidence, in arbitral or judicial proceedings, whether or not such arbitral or judicial proceedings relate to the dispute that was the subject of the conciliation proceedings:

“(a) Views expressed or suggestions made by a party to the conciliation in respect of [matters in dispute or] a possible settlement of the dispute;

“(b) Admissions made by a party in the course of the conciliation proceedings;

“(c) Proposals made by the conciliator;

“(d) The fact that a party to the conciliation had indicated its willingness to accept a proposal for settlement made by the conciliator.

“(2) The disclosure of the information referred to in paragraph (1) of this article shall not be ordered by the arbitral tribunal or the court [whether or not the arbitral or judicial proceedings relate to the dispute that is the subject of the conciliation proceedings].

“(3) Where evidence has been offered in contravention of paragraph (1) of this article, the arbitral tribunal or the court shall treat such evidence as inadmissible.”

140. General support was expressed for the policy underlying draft article 8 which was to facilitate communication between the parties during the conciliation proceeding without fear that, where the conciliation ended unsuccessfully and the parties engaged in litigation or arbitral proceedings, certain information (in particular those listed in paragraphs (a) to (d)) would be used in the judicial or arbitration proceedings. It was recalled that the provision was modelled on article 20 of the UNCITRAL Conciliation Rules. However, it was noted that the draft provision was formulated as a statutory prohibition whereas article 20 established a contractual commitment of the parties not to rely on certain evidence in court or arbitral proceedings.

141. It was generally agreed that the draft provision should be understood in such a way that evidence that was admissible did not become inadmissible by virtue of being used in the conciliation (para. 99 of document A/CN.9/WG.II/WP.110). It was suggested that a clarification along those lines should be included in the model provision or in the guide to enactment. Such a clarification might also highlight the fact that the provision did not deal with the general question of admissibility of evidence in arbitral or judicial proceedings.

142. It was agreed that the provision should be subject to party autonomy. However, it was not decided whether that should be provided in a general manner in the model legislative provisions or in the provision itself. It was, however, said that in order to facilitate the use of the uniform regime by practitioners, the technique adopted should be clear (see also above, para. 112).

143. The suggestion was made to clarify that the reference to “third party” in paragraph (1) was not meant to refer to a party to the conciliation proceedings but to a person that was not a party to the conciliation proceedings and was in a position to use as evidence views, admissions, proposals and other facts referred to in subparagraphs (a) to (d) of paragraph (1). The words “matters in dispute or” in subparagraph (a) were retained in square brackets pending further considerations as to whether the extension of the scope of the provision produced by those words was proper, not too far-reaching and sufficiently clear. The suggestion was made to delete subparagraphs (b), (c), (d) of paragraph (1), leaving subparagraph (a) which should be reformulated as a general rule so as to simplify the provision. The Working Group did not adopt the suggestion because it preferred the greater specificity and clarity of the current paragraph (1). It was proposed that a reference to

an invitation to conciliate or a statement that conciliation had failed should also be included so as to make it clear that neither of those matters could be relied upon or otherwise used.

144. A view was expressed that paragraphs (2) and (3) be deleted because they dealt with the law of evidence in court and arbitral proceedings and that it was not for the law on conciliation to impinge on the law of procedure. However, the Working Group considered that those provisions were necessary because they properly clarified and reinforced paragraph (1) and because the practical significance for the parties of paragraph (1) required an express provision directed to courts and arbitral tribunals. If those provisions were to be retained, it was suggested that they should be qualified by a provision along the lines of “unless such disclosure is permitted or required under the law governing the arbitral or judicial proceedings”. It was pointed out however that such an exception could swallow the rule. There was broad support expressed for the types of public policy exceptions spelled out in paragraph 100 of document A/CN.9/WG.II/WP.110.

145. It was understood that paragraph (1) covered evidence of facts and other information listed in subparagraphs (a) to (d) irrespective of whether they were in writing or in another form. No decision was taken as to whether that understanding followed sufficiently clearly from the provision, or whether it would be useful to include in the provision a clarification on this point.

146. The Working Group considered the question whether the model provisions should contain a rule establishing a general duty for the conciliator and the parties to keep confidential all matters relating to the conciliation along the lines of article 14 of the UNCITRAL Conciliation Rules. There was no support for including such a provision. The reasons given included: the rule would have to set forth a number of exceptions, which would complicate its drafting; a statutory duty of that kind would introduce liability for the violation of the duty, which would raise a number of policy issues that were difficult to solve in the model provisions; and the provision was not needed because the parties could agree on the duty of confidentiality when, and to the extent, they so wished, such as by agreeing to conciliate under the UNCITRAL Conciliation Rules.

G. Article 9

147. The text of draft article 9 as considered by the Working Group was as follows:

“Article 9. Role of conciliator in other proceedings

“(a) Unless otherwise agreed by the parties, the conciliator shall not act as an arbitrator or as a representative or counsel of a party in any arbitral or judicial proceedings in respect of a dispute that is the subject of the conciliation proceedings.

“(b) Testimony of the conciliator regarding the facts referred to in article 7(1) shall not be admissible in any

arbitral or judicial proceedings in respect of a dispute that was or is the subject of the conciliation proceedings.

“(c) Paragraphs (1) and (2) apply also in respect of another dispute that has arisen from the same contract or another contract forming part of a single commercial transaction.”

148. As a matter of drafting, it was suggested that letters (a), (b) and (c) be replaced by numbers (1), (2) and (3) in order to ensure consistency with the general structure of the document. It was also noted that reference in subparagraph (b) to “article 7(1)” should be corrected to read “article 8(1)”.

149. A suggestion was made that the words “unless otherwise agreed by the parties” should be deleted so that the provision would in no case allow a conciliator to act as a representative or counsel of a party or, alternatively, that the model provisions should not deal with cases where the conciliator acted as a representative or counsel of a party. A related proposal was that the possibility of the conciliator acting as an arbitrator should not be left solely to party autonomy because this could impair the integrity of the arbitration process and create problems in the enforcement of the award. However, the Working Group considered that the approach taken by the current wording of paragraph (1), which made the provision subject to party autonomy, was appropriate. It was considered that the parties should retain full control in relation to this issue. As to the appointment of the conciliator as arbitrator, it was understood that, by agreeing to the conciliator serving as arbitrator, the parties would have waived any objections arising therefrom.

150. It was suggested that the words “a dispute that is the subject of the conciliation proceedings” in subparagraph (a) be replaced with the words “a dispute that was or is the subject of conciliation proceedings” in order to align it with subparagraph (b).

151. A view was expressed that the rule set forth in subparagraph (a) should be extended to conciliators acting as judges. It was noted that in some jurisdictions the issue would not be subject to party autonomy. The prevailing view was that such an issue did not fall within the scope of the uniform regime and that it should be left entirely to other laws of the enacting country.

152. A view was expressed that the scope of the prohibition provided in subparagraph (b) would be too narrow, in that, for example, it did not include testimony by a conciliator that a party acted in bad faith during the conciliation and that therefore the scope of the prohibition in subparagraph (b) should be broadened. The Working Group decided to reconsider this issue at a future session.

153. In respect of subparagraph (c), it was widely felt that the phrase “another contract forming part of a single commercial transaction” needed clarification as to the type of contracts which would fall within its scope. Accordingly, the Working Group requested the secretariat to revise the provision.

H. Article 10

154. The text of draft article 10 as considered by the Working Group was as follows:

“Article 10. *Resort to arbitral or judicial proceedings*

[Variant 1]

“The parties shall not initiate, during the conciliation proceedings, any arbitral or judicial proceedings in respect of a dispute that is the subject of the conciliation proceedings, except that a party may initiate arbitral or judicial proceedings where, in its opinion, such proceedings are necessary for preserving its rights.

[Variant 2]

“The parties may agree not to initiate, during the conciliation proceedings, any arbitral or judicial proceedings in respect of a dispute that is the subject of the conciliation proceedings. However, a party may initiate arbitral or judicial proceedings if in its opinion such proceedings are necessary for preserving its rights [and if the party notifies the other party of its intention to commence the proceedings]. The initiation of such proceedings by the party is not in itself regarded as the termination of the conciliation proceedings.

[Variant 3]

“To the extent that the parties have expressly undertaken not to initiate [during a certain time or until conciliation proceedings have been carried out] arbitral or judicial proceedings with respect to a present or future dispute, such an undertaking shall be given effect by the court or the arbitral tribunal until the agreed time has expired or the conciliation proceedings are in progress.”

155. It was pointed out that draft article 10 was intended to convey the idea that parties should be prevented from initiating an arbitral or a judicial proceeding while conciliation was pending and that the various drafts represented alternative ways of expressing that idea.

156. A suggestion was made that draft article 10 be redrafted so as to reflect the following elements: an obligation on the parties not to initiate court or arbitral

proceedings; the effect given to that obligation by a court or the arbitral tribunal; initiation of court or arbitral proceedings merely to preserve rights; initiation of such proceedings not, of itself, being regarded as termination of the conciliation proceedings.

157. Least favoured by the Working Group was variant 2 because it was limited only to recognizing the parties’ right to agree not to initiate arbitral or judicial proceedings and because it did not provide a solution in the absence of an agreement by the parties. Variants 1 or 3, or possibly a combination of the two, were favoured because they offered a straightforward solution and it was decided that they provided the best basis for further discussions.

158. It was suggested that, in redrafting draft article 10, consideration should be given to the question whether the provision should also deal with whether a party was, despite the existence of an agreement to conciliate, free to approach an appointing authority with a view to establishing an arbitral tribunal.

I. Articles 11 and 12

159. The text of draft articles 11 and 12 as proposed for consideration by the Working Group was as follows (although it should be noted that draft articles 11 and 12 were not discussed at the current session of the Working Group due to time constraints and would be considered at the next Working Group session):

“Article 11. *Arbitrator acting as conciliator*

“It is not incompatible with the function of an arbitrator if the arbitrator raises the question of a possible conciliation and, to the extent agreed to by the parties, participates in efforts to reach an agreed settlement.

“Article 12. *Enforceability of settlement*

“If the parties reach agreement on a settlement of the dispute and the parties and the conciliator or the panel of conciliators have signed the binding settlement agreement, that agreement is enforceable [*the enacting State inserts provisions specifying provisions for the enforceability of such agreements*].”

**B. Working paper submitted to the Working Group on Arbitration at
its thirty-third session: Settlement of commercial disputes: possible
uniform rules on certain issues concerning settlement of commercial
disputes: written form for arbitration agreement, interim measures of
protection, conciliation: Report of the Secretary-General
(A/CN.9/WG.II/WP.110) [Original: English]**

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INTRODUCTION

1. The Commission, during its thirty-first session, held a special commemorative New York Convention Day on 10 June 1998 to celebrate the fortieth anniversary of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958) ("New York Convention"). In addition to representatives of States, members of the Commission and observers, some 300 invited persons participated in the event. The Secretary-General made the opening speech. In addition to speeches by participants in the diplomatic conference that had adopted the Convention, leading arbitration experts presented reports on matters such as the promotion of the Convention, its enactment and application. Reports were also made on matters beyond the Convention itself, such as the interplay between the Convention and other international legal texts on international commercial arbitration and on difficulties encountered in practice but not addressed in existing legislative or non-legislative texts on arbitration.¹

2. In reports presented at the commemorative conference, various suggestions were made for presenting to the Commission some of the problems identified in practice so as to enable it to consider whether any related work by the Commission would be desirable and feasible. The Commission, at its thirty-first session in 1998, with reference to the discussions at the New York Convention Day, considered that it would be useful to engage in a discussion of possible future work in the area of arbitration at its thirty-second session. It requested the secretariat to prepare a note that would serve as a basis for the considerations of the Commission.²

3. At its thirty-second session, in 1999, the Commission had before it the requested note, entitled "Possible future work in the area of international commercial arbitration" (A/CN.9/460).³ Welcoming the opportunity to discuss the desirability and feasibility of further development of the law of international commercial arbitration, the Commission had generally considered that the time had arrived to assess the extensive and favourable experience with national enactments of the UNCITRAL Model Law on International Commercial Arbitration (1985), as well as the use of the UNCITRAL Arbitration Rules and the UNCITRAL Conciliation Rules, and to evaluate in the

universal forum of the Commission the acceptability of ideas and proposals for improvement of arbitration laws, rules and practices.⁴

4. When the Commission discussed the topic, it left open the question of what form its future work might take. It was agreed that decisions on the matter should be taken later as the substance of proposed solutions became clearer. Uniform provisions might, for example, take the form of a legislative text (such as model legislative provisions or a treaty) or a non-legislative text (such as a model contractual rule or a practice guide). It was stressed that, even if an international treaty were to be considered, it was not intended to be a modification of the New York Convention.⁵

5. The Commission entrusted the work to one of its three working groups, which it named the Working Group on Arbitration, and decided that the priority items for the Working Group should be conciliation,⁶ requirement of written form for the arbitration agreement,⁷ enforceability of interim measures of protection⁸ and possible enforceability of an award that had been set aside in the State of origin.⁹ The Working Group on Arbitration (previously named Working Group on International Contract Practices) commenced its work at its thirty-second session in Vienna from 20 to 31 March 2000 (the report of that session is contained in document A/CN.9/468).

6. The Working Group considered the possible preparation of harmonized texts on conciliation, interim measures of protection, and on the written form of arbitration agreements. On these three topics the Working Group made decisions, which the secretariat was requested to use in preparing drafts for the current session of the Working Group. In addition, the Working Group exchanged preliminary views on other topics that might be taken up in the future (document A/CN.9/468, paras. 107-114).

7. The Commission, at its thirty-third session (New York, 12 June-7 July 2000), commended the work of the Working Group accomplished so far. The Commission heard various observations to the effect that the work on the items on the agenda of the Working Group was timely and necessary in order to foster the legal certainty and predictability in the use of arbitration and conciliation in international trade. It noted that the Working Group had also identified a number of other topics, with various levels of priority, that had been suggested for possible future work (document A/CN.9/468, paras. 107-114). The Commission reaffirmed the mandate of the Working Group to decide on the time and manner of dealing with them (A/55/17, para. 395).

8. Several statements were made to the effect that, generally, the Working Group, in deciding the priorities of the future items on its agenda, should pay particular attention

¹*Enforcing Arbitration Awards under the New York Convention: Experience and Prospects* (United Nations publication, Sales No. E.99.V.2).

²*Official Records of the General Assembly, Fifty-third Session, Supplement No. 17 (A/53/17)*, para. 235.

³The note drew on ideas, suggestions and considerations expressed in different contexts such as the New York Convention Day (*Enforcing Arbitration Awards under the New York Convention: Experience and Prospects*, United Nations Publication, Sales No. E.99.V.2); the Congress of the International Council for Commercial Arbitration, Paris, 3-6 May 1998 (*Improving the Efficiency of Arbitration Agreements and Awards: 40 years of Application of the New York Convention*, International Council for Commercial Arbitration Congress Series No. 9, Kluwer Law International, 1999); and other international conferences and forums, such as the 1998 "Freshfields" lecture: Gerold Herrmann, "Does the world need additional uniform legislation on arbitration?" *Arbitration International*, vol. 15 (1999), No. 3, p. 211.

⁴*Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 17 (A/54/17)*, para. 337.

⁵*Ibid.*, paras. 337-376 and 380.

⁶*Ibid.*, paras. 340-343.

⁷*Ibid.*, paras. 244-345.

⁸*Ibid.*, paras. 371-373.

⁹*Ibid.*, paras. 374 and 375.

to what was feasible and practical and to issues where court decisions left the legal situation uncertain or unsatisfactory. Topics that were mentioned in the Commission as potentially worthy of consideration, in addition to those that the Working Group might identify as such, were the meaning and effect of the more-favourable-right provision of article VII of the New York Convention; raising claims in arbitral proceedings for the purpose of set-off and the jurisdiction of the arbitral tribunal with respect to such claims; freedom of parties to be represented in arbitral proceedings by persons of their choice; residual discretionary power to grant enforcement of an award notwithstanding the existence of a ground for refusal listed in article V of the New York Convention; and the power by the arbitral tribunal to award interest. It was noted with approval that, with respect to "on-line" arbitrations (i.e. arbitrations in which significant parts or even all of arbitral proceedings were conducted by using electronic means of communication), the Working Group on Arbitration would cooperate with the Working Group on Electronic Commerce. With respect to the possible enforceability of awards that had been set aside in the State of origin, a view was expressed that the issue was not expected to raise many problems and that the case law that gave rise to the issue should not be regarded as a trend (A/55/17, para. 396).

9. The present document has been prepared pursuant to the discussion in the Working Group on the three topics and includes draft provisions prepared on the basis of the decisions taken by the Working Group.

I. Requirement of written form for the arbitration agreement

A. Introductory remarks

10. When the Working Group at its thirty-second session considered the issue of the requirement of written form for an arbitration agreement, it was generally observed that there was a need for provisions which conformed to current practice in international trade with regard to requirements for written form. It was noted that the practice in some respects was no longer reflected by the position set forth in article II(2) of the New York Convention (and other international legislative texts modelled on that article) if interpreted narrowly. It was also noted that national courts increasingly adopted a liberal interpretation of those provisions in accordance with international practice and the expectations of parties in international trade; nevertheless, it was observed, some doubts remained or views differed as to their proper interpretation. The existence of those doubts and a lack of uniformity of interpretation was a problem in international trade in that it reduced the predictability and certainty of international contractual commitments. It was further noted that current arbitration practice was different from what it was at the time the New York Convention was adopted in that arbitration was now widely accepted for resolution of international commercial disputes and could be regarded as usual rather than as an exception that required careful consideration by the parties before choosing something other than litigation before the courts (document A/CN.9/468, para. 88; further discussion is reflected in paras. 89-99 of that document).

11. After discussion, the view was adopted by the Working Group that the objective of ensuring a uniform interpretation of the form requirement that responded to the needs of international trade could be achieved by: preparing a model legislative provision clarifying, for avoidance of doubt, the scope of article 7(2) of the UNCITRAL Model Law on International Commercial Arbitration; preparing a guide explaining the background and purpose of the model legislative provision; and adopting a declaration, resolution or statement addressing the interpretation of the New York Convention that would reflect a broad understanding of the form requirement. As to the substance of the model legislative provision and the interpretative instrument to be prepared, the Working Group adopted the view that, for a valid arbitration agreement to be concluded, it had to be established that an agreement to arbitrate had been reached and that there existed some written evidence of that agreement (A/CN.9/468, para. 99).

12. The Working Group also considered the question of whether article II(2) of the New York Convention should be interpreted broadly to include communications by electronic means as defined by the UNCITRAL Model Law on Electronic Commerce in article 2. It was recalled that the Guide to Enactment of the Model Law on Electronic Commerce, an instrument adopted by the Commission, was drafted with a view to clarifying the relationship between the Model Law on Electronic Commerce and international instruments such as the New York Convention and other trade law instruments. The Guide, at paragraph 6, suggested that the Model Law on Electronic Commerce "may be useful in certain cases as a tool for interpreting existing international conventions and other international instruments that create legal obstacles to the use of electronic commerce for example by prescribing that certain documents or contractual clauses be made in written form" (document A/CN.9/468, para. 100; further discussion is reflected in paras. 101-106).

13. After discussion, the Working Group requested the secretariat to prepare a draft instrument that would confirm that article II(2) of the New York Convention should be interpreted to include electronic communications as defined by article 2 of the Model Law on Electronic Commerce (A/CN.9/468, para. 106).

14. The drafts below in sections B and C have been prepared pursuant to those considerations of the Working Group.

B. Model legislative provision on written form for an arbitration agreement

15. In accordance with the decision of the Working Group, the secretariat has prepared a model legislative text revising article 7(2) of the UNCITRAL Model Law on International Commercial Arbitration.¹⁰

¹⁰Some national legislative texts that were used in preparing the drafts are reproduced in paragraphs 24 to 32 of document A/CN.9/WG.II.WP.108/Add.1, entitled "Possible uniform rules on certain issues concerning the settlement of commercial disputes: conciliation, interim measures of protection, written form for arbitration agreement".

Article 7. Definition and form of arbitration agreement

[Unchanged paragraph (1) of the Model Law:]

(1) “Arbitration agreement” is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

Draft paragraph (2) of article 7:

(2) The arbitration agreement shall be in writing. For the purposes of this Law, “writing” includes any form [alternative 1:] provided that the [text] [content] of the arbitration agreement is accessible so as to be usable for subsequent reference, whether or not it is signed by the parties [alternative 2:] which [provides] [preserves] a record of the agreement,¹¹ whether or not it is signed by the parties.

(3) An arbitration agreement meets the requirement in paragraph (2) if:

(a) it is contained in a document established jointly by the parties;

(b) it is made by an exchange of written communications;

(c) it is contained in one party’s written offer or counter-offer, provided that the contract has been [validly] concluded by acceptance, or an act constituting acceptance such as performance or a failure to object, by the other party;

(d) it is contained in a contract confirmation, provided that the terms of the contract confirmation have been [validly] accepted by the other party, either [expressly] [by express reference to the confirmation or its terms] or, to the extent provided by law or usage, by a failure to object;

(e) it is contained in a written communication by a third party to both parties and the content of the communication is considered to be part of the contract;

(f) it is contained in an exchange of statements [of claim and defence] [on the substance of the dispute] in which the existence of an agreement is alleged by one party and not denied by the other;

(g) [it is contained in a text to which reference is made in a contract concluded orally, provided that such conclusion of the contract is customary, [that arbitration agreements in such contracts are customary] and that the reference is such as to make that clause part of the contract.]

(4) The reference in a contract to a text containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract.

Notes

16. Draft paragraph (3) sets out in some detail the situations in which an arbitration agreement meets the requirement in paragraph (2). The Working Group may wish to consider whether the broad purpose of paragraph (3) might be achieved by a shorter and more general formulation along the lines of:

(3) An arbitration agreement meets the requirement in paragraph (2) if it is contained in a document transmitted from one party to the other party or by a third party to both parties, provided that the content of the document is considered to be part of the contract in accordance with law or usage.

17. The Working Group considered at its thirty-second session several typical examples of situations where the parties have agreed on the content of a contract containing an arbitration agreement and where there is written evidence of the contract, but where, nevertheless, current law, if interpreted narrowly, may be construed as invalidating or calling into question the validity of the arbitration agreement. This may happen where (a) the parties have not signed a document containing the arbitration agreement (which regularly occurs when the parties are not at the same place when concluding the contract) and where (b) the procedure used by the parties for concluding the contract does not meet the test of “exchange of letters or telegrams” (art. II(2) of the New York Convention), if that test is interpreted literally. These fact situations include the following:

(a) A contract containing an arbitration clause is formed by one party sending written terms to the other, which performs its bargain under the contract without returning or making any other “exchange” in writing in relation to the terms of the contract;

(b) A contract containing an arbitration clause is formed on the basis of the contract text proposed by one party, which is not explicitly accepted in writing by the other party, but the other party refers in writing to that contract in subsequent correspondence, invoice or letter of credit by mentioning, for example, its date or contract number;

(c) A contract is concluded through a broker who issues the text evidencing what the parties have agreed upon, including the arbitration clause, without there being any direct written communications between the parties;

(d) Reference in an oral agreement to a written set of terms, which may be in standard form, that contain an arbitration agreement;

(e) Bills of lading which incorporate the terms of the underlying charterparty by reference;

(f) A series of contracts entered into between the same parties in a course of dealing, where previous contracts have included valid arbitration agreements but the contract in question has not been evidenced by a signed writing or there has been no exchange of writings for the contract;

(g) The original contract contains a validly concluded arbitration clause, but there is no arbitration clause in an addendum to the contract, an extension of the contract, a contract novation or a settlement agreement relating to the

¹¹Alternative 1 is based on article 6 of the UNCITRAL Model Law on Electronic Commerce, while alternative 2 is modelled on article 7(2) of the UNCITRAL Model Law on International Commercial Arbitration.

contract (such a “further” contract may have been concluded orally or in writing);

(h) A bill of lading containing an arbitration clause that is not signed by the shipper or the subsequent holder;

(i) Third party rights and obligations under arbitration agreements in contracts which bestow benefits on third party beneficiaries or stipulation in favour of a third party (stipulation pour autrui);

(j) Third party rights and obligations under arbitration agreements following the assignment or novation of the underlying contract to the third party;

(k) Third party rights and obligations under arbitration agreements where the third party exercises subrogated rights;

(l) Rights and obligations under arbitration agreements where interests in contracts are asserted by successors to parties, following the merger or demerger of companies, so that the corporate entity is no longer the same.¹²

18. The Working Group may wish to discuss the draft model provision in the light of these factual situations with a view to determining whether the draft adequately covers them, to the extent the Working Group intends them to be covered.

19. Case (a) (conclusion of the contract other than by sending a message) is intended to be dealt with by draft paragraph (3)(c) and (d) of the draft. Case (b) (reference to the contract terms in subsequent correspondence) may be regarded as resolved in that draft paragraph (3) does not require a written acceptance of the contract terms containing an arbitration clause (moreover, many courts have interpreted the current text of article II of the New York Convention so that a reference in subsequent correspondence to the contract text proposed by the other party constitutes acceptance of those terms including the arbitration clause). Case (c) (broker) is covered by draft paragraph (3)(e). Case (d) (oral reference to written terms) is addressed in draft paragraph (3)(g).

20. As to cases (f) and (g) (a contract with an arbitration agreement is followed by another contract, an addendum, an extension, a novation or settlement), it appears that conclusions reached by the courts to a large extent depended on the facts of the case. In particular, the courts have sought solutions by interpreting the original contract and the subsequent agreements and establishing whether the parties intended that some terms in the original contract, including the arbitration agreement, were to be carried over into the subsequent agreement. Nevertheless, it appears that, in addition to the facts of the case, courts have been guided by their view of arbitration and whether the writing requirement should be interpreted broadly or

narrowly. For example, when considering whether a subsequent oral agreement fell within the scope of the arbitration clause in the original contract, one court said that in view of the strong policy in favour of arbitration only in those cases where it can be said with absolute certainty that the parties did not intend to submit the dispute to arbitration will the dispute not be referred. In a similar case in which the original written contract was followed by another related contract, another court took the view that even if the court were to construe the agreement narrowly, the evidence was insufficient to prove conclusively that the parties did not intend to arbitrate the dispute so the court felt required to refer the dispute to arbitration. On the other hand, in considering whether a protocol to a contract was covered by the arbitration clause in the original contract, the court held that the clause did not extend to the protocol because, in order for the clause to be binding, the parties would have to indicate that intention with utmost precision. The additional question whether, where a dispute on a contract is settled and a further dispute concerning the settlement agreement arises, the arbitration clause in the original contract covers the subsequent dispute has also not been resolved by courts in a uniform manner.

21. The indicated lack of uniformity of approaches to situations (f) and (g) may be regarded as a problem in international trade. However, since the outcome of these situations appears to depend heavily on the facts of each case and the interpretation of the will of the parties, it may be difficult to devise a legislative solution that would be meaningful and generally acceptable. Nevertheless, the draft model provision may help resolve some of those issues, in particular where the parties have intended to subject the subsequent contract to the earlier contract containing an arbitration agreement, but the subsequent contract has not been signed by both parties or is not contained in an exchange of writings.

22. In considering cases (i) to (l) it is assumed that the arbitration agreement has been validly concluded by one pair of parties (or a set of multiple parties) and the issue is whether a third person who later becomes party to the contract, or becomes entitled to rely on the contract term, also becomes party to the arbitration agreement. A third person may become party to the contract, or may assume rights and obligations therefrom, by agreement between the original parties to the contract (such as when a contract confers a benefit to a third party, where a contract or certain contractual rights are assigned to a third party, where a new person becomes party to a contract as a result of novation, or where as a result of a merger or demerger of legal persons a new legal person is in a position to exercise rights and obligations). A third person may also become party to the contract by the operation of law, such as, for example, where an insurer, by way of subrogation, becomes entitled to exercise rights of the insured party. Such cases have been dealt with by courts, and solutions have been reached by interpreting the law governing the transfers of contractual rights and obligations.

23. When the Working Group discussed the cases (i) to (l), it was suggested that they should not be addressed by a model legislative provision (A/CN.9/468, para. 95). The Working Group may wish to agree with the suggestion.

¹²These fact situations were listed in paragraph 12 of document A/CN.9/WG.II.108/Add.1. Among them was also the case where a claimant seeks to initiate an arbitration against an entity not originally party to the arbitration agreement, or where an entity not originally party to the arbitration agreement seeks to rely on it to initiate an arbitration, for example, by relying on the “group of companies” theory (*ibid.*, para. 12 (m)). However, the Working Group considered that that situation raised difficult issues and the idea of a harmonized rule did not gain wide acceptance (A/CN.9/468, para. 95).

Alternatively, it may wish to study the matter further with a view to deciding whether it would be useful to express the principle to the effect that where a person who is not a party to a contract becomes (by agreement of the contract parties or by the operation of law) a party to the contract, or may in its own right invoke or enforce a term of the contract, any arbitration agreement in the contract is binding on that person.

Bill of lading (cases (e) and (h))

24. The use of bills of lading raises various issues regarding the validity of an arbitration agreement. One issue depends on whether the bill of lading itself contains an arbitration clause or whether the bill of lading is issued under a charter-party, which typically means that the bill does not contain an arbitration clause but rather refers, in varying terms, to the clauses contained in the charter-party and among them an arbitration clause. The law (including case law) is not well settled as to what kind of reference is necessary for the arbitration clause to be validly incorporated into the bill of lading. For example, a general reference such as “all terms and conditions as per charter-party” is sometimes considered sufficient to incorporate the arbitration clause, but not always. It has been, for instance, regarded as an insufficient reference if the arbitration clause in the charter-party is worded as covering “disputes arising under the charter-party” without expressly referring to disputes under the bill of lading; in such a case, a more specific reference has been required in order for the wording of the arbitration clause to be “manipulated” to cover also disputes under the bill of lading. On the other hand, a general reference has been regarded as sufficient if the arbitration clause in the charter-party is worded to cover disputes under the charter-party and under the bill of lading issued under the charter-party. Some national laws have adopted a specific provision on this issue. The Working Group may wish to consider that this matter is appropriately dealt with by draft paragraph (4), which leaves the question of what constitutes a valid reference to the law governing the incorporation by reference generally or to any special provisions on the incorporation of arbitration clauses contained in charter-parties into bills of lading.

25. Another issue might arise from the practice according to which bills of lading are signed by the carrier only and not by the other contracting party (the consignee/shipper). Under current law this issue has been solved in different ways such as that arbitration clauses in bills of lading are binding on the shipper, because they are regarded as cases *sui generis* that do not require a written message or signature of the shipper; because the writing requirement is interpreted broadly to cover the practices of issuance of bills of lading; or because the shipper (by preparing and giving to the carrier certain written information to be included in the bill of lading, in particular regarding the description of the goods, or filling out the blank form of a bill which contains an arbitration clause) is considered as having conveyed a written communication to the carrier who in turn signs the bill and gives it to the shipper. In any case, the Working Group may consider that this issue is adequately addressed by draft paragraph (3)(c).

26. A further issue concerning bills of lading is whether the consignee (who is not the contracting party at the time the bill of lading is issued) becomes bound by the arbitration clause in the bill of lading upon a valid transfer or endorsement of the bill.¹³ Although many courts have reached the conclusion (some supported by specific legislation and others not) that the consignee is bound by the arbitration agreement in the bill of lading, there are some that would not reach that conclusion. Even if the consignee becomes bound by the arbitration agreement in the bill of lading, uncertainties may exist as to the exact moment when the consignee becomes so bound (e.g. as of when it has taken or demanded delivery of the goods from the carrier). The Working Group may wish to regard this issue as a specific issue similar to those discussed above in paragraphs 22 and 23, which is rooted in the law of transport and that, if any solution should be adopted, it should not interfere with the law governing the transfer of contractual rights and obligations to third parties.

C. Interpretative instrument regarding article II(2) of the New York Convention

(a) Introduction

27. As noted above in paragraph 11, the Working Group considered that a possible means to achieve the objective of ensuring a uniform interpretation of the form requirement that responded to the needs of international trade could also include the adoption of a declaration, resolution, or statement addressing the interpretation of the New York Convention that would reflect a broad understanding of the form requirement. It was noted that the issue of how best to achieve uniform interpretation of the New York Convention through a declaration, resolution, or statement should be further studied, including the public international law implications, to determine which was the optimal approach (A/CN.9/468, para. 93). The text below has been prepared to facilitate considerations as to the best approach to be taken.

(b) Vienna Convention on the Law of Treaties

28. The Vienna Convention on the Law of Treaties (1969) (the “Vienna Convention”) sets forth several methods for determining the meaning of a treaty provision. Article 31, entitled “General rule of interpretation” reads:

“1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

¹³This issue may be compounded with the incorporation-by-reference issue in a situation where the bill of lading refers to the terms and conditions in the charter-party, including the arbitration clause, and the question is whether the consignee (who may not be aware of the arbitration clause) becomes bound by such a clause upon endorsement of the bill of lading; that question is dealt with, for example, in article 22(2) of the Hamburg Rules.

“2. The context for the purpose of the interpretation of the treaty shall comprise, in addition to the text, including its preamble and annexes:

“(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

“(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

“3. There shall be taken into account, together with the context:

“(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

“(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

“(c) any relevant rules of international law applicable in the relations between the parties. (emphasis added)

“4. A special meaning shall be given to a term if it is established that the parties so intended.”

29. Article 32, entitled “Supplementary means of interpretation” reads:

“Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

“(a) leaves the meaning ambiguous or obscure; or

“(b) leads to a result that is manifestly absurd or unreasonable.”

30. It appears that an interpretative instrument to be considered by the Working Group might be based on article 31(3)(b) of the Vienna Convention, given that the need for clarity in the interpretation of article II(2) of the New York Convention arises from changes in communication technologies and business practices as well as the increased use and acceptance of commercial arbitration in international trade.

31. Another possibility would be to base the instrument on a subsequent agreement of the States Parties to the New York Convention (as envisaged in article 31(3)(a) of the Vienna Convention). However, this possibility would seem to require each State party to express its agreement individually, a process that may take time and during the period in which agreement of the States Parties is occurring, doubt may be cast on the proper way of interpreting the Convention.

32. As stated in article 31(1) and (2) of the Vienna Convention, the context of the treaty and its object and purpose are also relevant for interpretation. An indication of that context and the object and purpose may be found in the resolution contained in the Final Act of the United Nations

Conference on International Commercial Arbitration, which concluded the New York Convention. That resolution states that the Convention aims to “contribute to increasing the effectiveness of arbitration in the settlement of private law disputes ...”.

33. The Conference resolution further states that:

“It considers that greater uniformity of national laws on arbitration would further the effectiveness of arbitration in the settlement of private law disputes, notes the work already done in this field by various existing organizations,² and suggests that by way of supplementing the efforts of these bodies appropriate attention be given to defining suitable subject matter for model arbitration statutes and other appropriate measures for encouraging the development of such legislation;”

²For example, the International Institute for the Unification of Private Law and the Inter-American Council of Jurists.”

(Conference resolution, contained in Final Act of the United Nations Conference on International Commercial Arbitration—10 June 1958)

34. The resolution, which was contemporaneous with the opening for signature of the Convention, expresses the Conference’s “purpose of concluding a convention on the recognition and enforcement of foreign arbitral awards, and to consider other possible measures for increasing the effectiveness of arbitration in the settlement of private law disputes.”

(c) *Example of the use of an interpretative instrument*

35. An example and precedent for the use of an instrument interpreting a convention is a declaration and recommendation issued by the Fourteenth Session of the Hague Conference on Private International Law regarding the 1955 Convention on the law applicable to international sales of goods.

36. The Explanatory Report published by the Hague Conference states that

“In the early 1950s, consumer sales were usually not accorded special treatment in domestic law but were subject to the rules applicable to contracts generally. Accordingly, at the time no need was perceived to develop special choice-of-law rules for consumer sales contracts. The 1955 Convention on the law applicable to international sales of goods thus regulates choice of law for ‘ventes à caractère international d’objet mobiliers corporels’ without distinguishing between consumer sales and other sales.

“Beginning in the 1960s, the domestic law treatment of consumer sales underwent dramatic changes in many countries; in particular, substantial protection was for the first time given the buyer against many unfair practices or special risks.”¹⁴

¹⁴Explanatory Report by Arthur Taylor von Mehren, Conference de La Haye de droit international privé, Hague Conference on private international law, *Actes et documents de la Quatorzième session 6 au 25 octobre 1980, Tome II, Ventes aux consommateurs, Consumer sales, Edités par le Bureau Permanent de la Conférence*, 1982, p. 182.

37. In particular, it was considered that the choice-of-law rules of the Convention were thought to give insufficient scope to protective policies that might be held, for example, by the internal law of the consumer's country of habitual residence. Against that background, it was initially suggested that a protocol to the 1955 Convention be prepared which would make it possible for States Parties to the Convention to make a reservation not to apply it to consumer sales, or excluding such sales from the scope of the Convention.¹⁵ However, as stated in the Explanatory Report:

“The Protocol proposal was seen to raise not only complex questions of public international law but also a general policy issue for the Conference, namely, in what way, if any, could existing Hague Conventions be adapted to take into account the emergence of new problems or the occurrence of fundamental changes in approaches to an area of law.”¹⁶

38. After extensive discussions, a protocol to the 1955 Convention was not adopted. Instead, the Session adopted a decision concerning consumer sales in the form of a declaration and recommendation, reproduced below in paragraph 41.

39. As observed in the Explanatory Report,

“Various views are possible with respect to the Declaration's precise nature and effect, juridically speaking. The Fourteenth Session concluded, nonetheless, that the Declaration represented the most effective and practical solution to the problem of adapting the Convention to the changes over the last quarter century in the substantive law regulation of consumer sales contracts.”¹⁷

40. With a view to gathering and disseminating information regarding action taken under the Declaration, the Recommendation encourages the reporting of such action to the Permanent Bureau of the Hague Conference.¹⁸

41. The text of the Declaration and Recommendation reads:

“Declaration and Recommendation relating to the scope of the Convention on the law applicable to international sales of goods, concluded June 15th, 1955

I—DECLARATION

“The States present at the Fourteenth Session of the Hague Conference on Private International Law,

“Conscious of the existence today in many countries of measures protecting consumers,

“Considering that the interests of consumers were not taken into account when the *Convention of 15th June 1955 on the law applicable to international sale of goods* was negotiated,

“Recognizing the desire of certain States which have ratified the Convention to have special rules on the law applicable to consumer sales,

“Hereby declare that the *Convention of 15th June 1955 on the law applicable to international sale of goods* does not prevent States Parties from applying special rules on the law applicable to consumer sales.

II—RECOMMENDATION

“This Conference recommends that States Parties to the *Convention of 15th June 1955 on the law applicable to international sale of goods*, which apply special rules on the law applicable to consumer sales, inform the Permanent Bureau of this fact.”¹⁹

(d) *Body to issue interpretative instrument*

42. The Working Group, when it considered the possibility of issuing an interpretative instrument regarding article II(2) of the New York Convention, did not fully consider potentially appropriate bodies to issue such an instrument.

43. One possibility would be for the States Parties to the New York Convention to issue it. Such an interpretative instrument agreed upon by the States Parties would be within the scope of article 31(3)(a) of the Vienna Convention.

44. Another possibility would be for the Commission to issue an interpretative instrument. Such an instrument could subsequently be noted in a resolution of the General Assembly.

45. With respect to the authority of the Commission to interpret the New York Convention, the basis for such authority could be derived from the text of General Assembly resolution 2205 (XXI) which established UNCITRAL.²⁰ By that resolution, the General Assembly established the Commission, “which shall have for its object the promotion of the progressive harmonization and unification of the law of international trade ...” (resolution 2205 (XXI), section I).

46. Section II, paragraph 8, of resolution 2205 (XXI) states:

“The Commission shall further the progressive harmonization and unification of the law of international trade by:

“(a) Coordinating the work of organizations active in this field and encouraging cooperation among them;

¹⁹Conference de La Haye de droit international prive, Hague Conference on private international law, *Actes et documents de la Quatorzième session 6 au 25 Octobre 1980, Tome I, Matières diverses, Miscellaneous matters*, p. 62.

²⁰See Establishment of the United Nations Commission on International Trade Law, General Assembly Res. 2205 (XXI) (17 Dec. 1966), reproduced in *UNCITRAL: The United Nations Commission on International Trade Law*, United Nations Sales No. E.86.V.8 (1986), at 55.

¹⁵*Ibid.*, p.183.

¹⁶*Ibid.*, p.184.

¹⁷*Ibid.*, p.186.

¹⁸*Ibid.*, p.187.

“(b) Promoting wider participation in international conventions and wider acceptance of existing model and uniform laws;

“(c) Preparing or promoting the adoption of new international conventions, model laws and uniform laws and promoting the codification and wider acceptance of international trade terms, provisions, customs and practices, in collaboration, where appropriate, with organizations operating in this field;

“(d) Promoting ways and means of ensuring a uniform interpretation and application of international conventions and uniform laws in the field of the law of international trade;

“(e) Collecting and disseminating information on national legislation and modern legal developments, including case law, in the field of the law of international trade;

“(f) Establishing and maintaining a close collaboration with the United Nations Conference on Trade and Development;

“(g) Maintaining liaison with other United Nations organs and specialized agencies concerned with international trade;

“(h) Taking any other action it may deem useful to fulfil its functions.” (*emphasis added*).

47. The General Assembly has repeatedly recognized in its resolutions, the role of the Commission as coordinating body in the area of international trade law. The most recent General Assembly resolution on the work of the Commission (54/103 of 17 January 2000) “reaffirms the mandate of the Commission, as the core legal body within the United Nations system in the field of international trade law, to coordinate legal activities in this field.”

48. If UNCITRAL is considered to be the appropriate issuing body, the attached preliminary draft is presented to stimulate a discussion of the form and content most suitable for an interpretative instrument.

(e) *Preliminary draft of a possible declaration and recommendation*

[Recommendation] regarding interpretation of article II(2) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, 10 June 1958,

The United Nations Commission on International Trade Law,

Recalling resolution 2205 (XXI) of the General Assembly of 17 December 1966, which established the United Nations Commission on International Trade Law with the object of promoting the progressive harmonization and unification of the law of international trade,

Conscious of the fact that the Commission is composed with due regard to the adequate representation of the

principal economic and legal systems of the world, and of developed and developing countries,

Conscious also of its mandate to further the progressive harmonization and unification of the law of international trade by, inter alia, promoting ways and means of ensuring a uniform interpretation and application of international conventions and uniform laws in the field of the law of international trade,

Convinced that the wide adoption of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards has been an essential achievement in the promotion of the rule of law, particularly in the field of international trade,

Noting that according to article II(1) of the Convention “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”; and noting further that pursuant to article II(2) of the Convention “The term ‘agreement in writing’ shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams”,

Noting also that the Convention was drafted in the light of business practices in international trade and communication technologies in use at the time, and that those technologies in international commerce have developed along with the development of electronic commerce,

Noting further that the use and acceptance of international commercial arbitration in international trade has been increasing,

Recalling that the Conference of Plenipotentiaries which prepared and opened the Convention for signature adopted a resolution, which states, inter alia, that the Conference “considers that greater uniformity of national laws on arbitration would further the effectiveness of arbitration in the settlement of private law disputes . . .”,

Considering that the purpose of the Convention, as expressed in the Final Act of the United Nations Conference on International Commercial Arbitration, of increasing the effectiveness of arbitration in the settlement of private law disputes requires that the interpretation of the Convention reflect changes in communication technologies and business practices,

Taking into account that subsequent international legal instruments such as the UNCITRAL Model Law on International Commercial Arbitration and the UNCITRAL Model Law on Electronic Commerce reflect the judgement of the Commission and the international community that legislation governing trade and arbitration should reflect new methods of communication and business practices,

Convinced that uniformity in the interpretation of the term “agreement in writing” is necessary for advancing predictability in international commercial transactions,

Recommends to Governments that the definition of "agreement in writing" contained in article II(2) of the Convention should be interpreted to include [. . .] [It is suggested that the operative part of the text to be inserted at this point should be substantially modelled on the revised text of article 7(2) of the Model Law on International Commercial Arbitration as discussed above at paras. 15-26.]

(f) *Related issues*

49. It may be recalled that other provisions in the New York Convention, as well as other Conventions on international commercial arbitration, contain additional requirements of writing which, if not interpreted in line with the decisions of the Working Group regarding the revision of the provisions on the writing requirement, might operate as barriers to the use of modern means of communication in international commercial arbitration.

50. Included among those requirements of form are, for example, the requirement to provide originals of the arbitration agreement and the award in article IV of the New York Convention, and the provision in article 4 of the Inter-American Convention on International Commercial Arbitration (Panama, 1975), according to which the enforcement of the award is to be ordered in the same manner as that of decisions handed down by national or foreign ordinary courts, in accordance with the procedural laws of the country where it is to be executed and the provisions of international treaties. Also article 35 of the UNCITRAL Model Law on International Commercial Arbitration, modelled on article IV of the New York Convention, provides that the party relying on an award or applying for its enforcement should supply the duly authenticated original award or a duly certified copy thereof, and the original arbitration agreement or a duly certified copy thereof. In considering the drafts regarding the writing requirement for an arbitration agreement, the Working Group may wish to consider ways to ensure that a modified understanding of the writing requirement (art. 7(2) of the Model Law and art. II(2) of the New York Convention) would be reflected in the interpretation of the requirements that the party applying for the enforcement of an award supply the original arbitration agreement or a duly certified copy thereof.

51. At the thirty-second session of the Working Group the view was expressed that the issue of electronic commerce should be approached from a perspective broader than the writing requirement for the arbitration agreement and that, in considering steps to be taken with respect to the writing requirement for arbitration agreements, other form requirements in instruments governing international commercial arbitration should also be studied. It was also suggested that treating these issues as separate had the potential to encourage a proliferation of interpretative declarations on points that may be regarded, in the future, as requiring clarification (A/CN.9/468, para. 105). In that regard it may be noted that the Working Group on Electronic Commerce is expected to consider the issue of how to ensure that treaties governing international trade are interpreted in light of the UNCITRAL Model law on Electronic Commerce. The secretariat will report to the Working Group on Arbitration about those considerations.

II. Enforcement of interim measures of protection

A. Introductory remarks

52. There was general support in the Working Group for the proposal to prepare a legislative regime governing the enforcement of interim measures of protection ordered by arbitral tribunals (document A/CN.9/468, para. 67). It was generally considered that the legislative regime should apply to enforcement of interim measures issued in arbitrations taking place in the State where enforcement was sought as well as outside that State. It was noted that a number of States had adopted legislative provisions dealing with the court enforcement of interim measures, and it was considered desirable that a harmonized and widely acceptable regime be prepared by the Commission (*ibid.*, 68).

53. For the background discussion of interim measures of protection issued by an arbitral tribunal and the considerations concerning the desirability of preparing legislative provisions on their enforceability, reference is made to working paper A/CN.9/WG.II/WP.108, paragraphs 63 to 101, prepared for the thirty-second session of the Working Group.

54. The considerations of the thirty-second session of the Working Group on that matter are reflected in document A/CN.9/468, paragraphs 60 to 79. The Working Group concluded that the secretariat be requested to prepare alternative draft provisions based on the considerations in the Working Group to be discussed at a future session.

55. It may be noted that the Working Group, in view of the preliminary nature of the discussion, did not take a decision as to whether the harmonized regime for the enforcement of interim measures should be in the form of an international convention or in the form of model legislation. While noting the view that the form of a convention was preferable, the Working Group considered that the decision as to the form would be made at a later stage. Notwithstanding that position, much of the discussion in the Working Group proceeded under the assumption that the solutions would be cast in the form of model legislation (A/CN.9/468, para. 78). In light of that discussion, the drafts below are presented as elements for a model legislative provision to be added to the UNCITRAL Model Law on International Commercial Arbitration.

B. Model legislative provision on the enforcement of interim measures of protection

Variant 1

An interim measure of protection referred to in article 17, irrespective of the country in which it was made, shall be enforced, upon application by the interested party to the competent court of this State, unless

- (i) Application for a corresponding interim measure has already been made to a court;
- (ii) If the arbitration agreement referred to in article 7 was not valid;

- (iii) The party against whom the interim measure is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present its case [with respect to the interim measure];²¹
- (iv) The interim measure has been set aside or amended by the arbitral tribunal;
- (v) The court or an arbitral tribunal in this State could not have ordered the type of interim measure that has been presented for enforcement²² [or that the interim measure is manifestly disproportionate]; or
- (vi) The recognition or enforcement of the interim measure would be contrary to the public policy of this State.

Notes

56. The above model legislative provision is based on chapter VIII of the UNCITRAL Model Law on International Commercial Arbitration (arts. 35 and 36), which deals with the enforcement of arbitral awards (see in particular A/CN.9/468, paras. 70-73).

57. Among those jurisdictions that have enacted the Model Law, several have added provisions to the effect that chapter VIII of the Model Law applies to the enforcement of interim measures ordered by the arbitral tribunal under article 17 of the Model Law (or to the effect that an interim measure is treated, for the purposes of enforcement, as if it were an award). The consideration of that approach is reflected in paragraph 70 of document A/CN.9/468. There was considerable support for the view that that approach was too rigid and did not take into account the special features of interim measures of protection, which distinguished them from arbitral awards. In light of that view, the model provision presented above is based on article 36 and adapted to interim measures of protection.

Variant 2

The court may, upon application by the interested party, order enforcement of an interim measure of protection referred to in article 17, irrespective of the country in which it was made.

²¹Since interim measures of protection are typically ordered before the parties have presented their cases regarding the substance of the dispute, it is suggested that the words “unable to present its case” should be understood as relating to the need for and the content of the interim measure in question. The Working Group may wish to consider whether this should be made clear by a wording along the lines of “unable to present its case with respect to the interim measure”.

²²The Working Group may wish to consider, whether the policy considerations regarding the types of interim measures that an arbitral tribunal or a court might order are necessarily the same as the policy considerations underlying the provision on the enforcement of an interim measure, in particular if the measure has been ordered abroad. For example, one reason for narrowing the scope of interim measures may be that there is less need for certain types of interim measures (e.g. because parties may achieve the purpose of a particular measure in other ways including through the judicial system). If the policy considerations are not the same, subparagraph (v) may have to be reworded to allow enforcement of potentially a broader scope of measures than could be ordered by a court of the enacting State in support of arbitration or by an arbitral tribunal in the enacting State.

Notes

58. Variant 1, which is drafted in terms of “the court shall enforce, unless ...”, is intended to establish an obligation to enforce if the prescribed conditions are met, whereas variant 2 is in terms of “the court may enforce ...”, expressing a degree of discretion. However, even variant 1 could be regarded as containing areas of discretionary assessment, such as the one indicated in square brackets in subparagraph (v), according to which the court would assess whether the interim measure is manifestly disproportionate and, if it finds it to be so, would have to refuse enforcement.

59. In deciding the approach to be taken, the Working Group may wish to discuss what the discretion in variant 2 should entail. It is suggested that the discretion should be limited to refusing enforcement of the interim measure (e.g. if the court regards it as grossly or manifestly disproportionate or unnecessary) and, in particular, that the discretion should not include the freedom to issue an enforcement order whose substance deviates from the interim measure ordered by the arbitral tribunal (e.g. if the interim measure consists of an order to a party to provide to the other party security for costs in a certain amount, the court would not be able to issue an enforcement order for security in a lower amount).

60. It may be considered that allowing the court to issue an enforcement order that deviates from the interim measure ordered by the arbitral tribunal would involve the court in an assessment of the merits of the order, which would imply that the court could or would have to repeat the decision-making process that had taken place in the arbitral tribunal. This would effectively mean that the court would not be enforcing the measure ordered by the arbitral tribunal but would be issuing its own measure. In considering the matter, it may be recalled that there was broad agreement in the Working Group that the uniform regime should be based on the assumption that the court should not repeat the decision-making process in the arbitral tribunal and in particular that the court should not review the factual conclusions of the arbitral tribunal or the substance of the measure (A/CN.9/468, para. 71). (For a discussion of the procedural recasting of the measure, see below, paras. 71 and 72.)

61. Pursuant to the general view in the Working Group, both variants provide for the enforceability of interim measures “irrespective of the country in which the measure was made” (see A/CN.9/468, para. 67 and A/CN.9/WG.II/WP.108, para. 92).

62. Many national laws on arbitration have adopted the principle that the party has a choice between requesting the arbitral tribunal to order an interim measure of protection and requesting a court to issue such a measure. Such a principle, widely regarded as appropriate for international commercial arbitration, could also be said to be reflected in articles 9 and 17 of the UNCITRAL Model Law on International Commercial Arbitration. However in light of that principle, a party could, after obtaining an interim measure from the arbitral tribunal, apply to a court for substantially the same measure, and at the same time apply to a court for

the enforcement of the measure issued by the arbitral tribunal. That sequence of events may lead to the undesirable situation where the court ends up considering two interim measures and two decisions might subsequently be issued. In order to avoid such a situation, one national law has a provision according to which the court may permit enforcement of a measure, unless application for a corresponding interim measure has already been made to a court. Such a provision (included in variant 1, subparagraph (i)) may also be considered for inclusion in a provision based on variant 2.

C. Possible additional provisions

63. The Working Group may wish to discuss whether any of the issues mentioned below need to be addressed in the model legislative provision, irrespective of which variant is ultimately adopted.

Duty to inform the court of any changes regarding the interim measure

64. It is in the nature of an interim measure of protection that it may be modified or terminated by the arbitral tribunal before the issuance of the award, and in any case the measure would cease to be operative once the award has been made. It may be an issue for consideration whether the law should require the party requesting enforcement to inform the court of any such changes. The purpose of such a duty to inform (which should exist at the time of requesting enforcement and continue thereafter) would be to enable the court to modify or terminate its enforcement order. The following draft wording, inspired by articles 18 and 22(3) of the UNCITRAL Model Law on Cross-Border Insolvency, is presented to facilitate the discussion:

Following the time it requests enforcement of the interim measure, the party shall inform the court promptly of any decision by the arbitral tribunal changing or repealing the interim measure. The court may, at the request of the party affected by the measure, modify or terminate the order for the enforcement of the interim measure.

Application for enforcement with leave of the arbitral tribunal

65. The Working Group may wish to consider whether the draft provision should state that the interested party may make a request for enforcement “with the approval of the arbitral tribunal”. One purpose of such a provision would be that the enforcing court would have additional assurance that the circumstances have not changed and that the measure is still regarded as necessary by the arbitral tribunal, yet it would avoid putting the arbitral tribunal into a position where it would have to approach a national court with a view to obtaining enforcement (A/CN.9/468, para. 75).

Additional conditions attached to an enforcement order

66. It may be considered by the Working Group whether the model legislative provisions should contain a rule providing that the court might subject an order for the enforcement of an interim measure to conditions it considers appropriate (e.g. regarding security to be provided by the party applying for enforcement).

67. Interim measures of protection often contain orders or conditions (whether they are ordered by an arbitral tribunal or a court). The question here is whether, after the arbitral tribunal has ordered the measure (and made it subject to any orders or conditions considered appropriate), the court should involve itself in the decision-making process so as to establish whether any order or condition should be attached to the enforcement order. It may be considered that a rule giving the court the power to attach conditions to enforcement orders would be against the policy of the Working Group (referred to above in paragraph 60) that the uniform regime should not enable the court to repeat the decision-making process of the arbitral tribunal.

Application for enforcement whilst jurisdiction of arbitral tribunal is challenged

68. It may be, that by the time a party applies for the enforcement of an interim measure of protection, the other party has raised a plea that the arbitral tribunal does not have jurisdiction or that, after the tribunal has ruled that it has jurisdiction, the issue of jurisdiction is disputed in court. This situation is dealt with in article 16 of the Model Law. In such a case the court deciding on the enforcement of the interim measure would be taking a decision on a matter where it might subsequently be found that the arbitral tribunal does not have jurisdiction. This could prompt the court to refrain from deciding on the enforcement of the interim measure until the issue of jurisdiction has been clarified. However, the postponement of the decision could in fact encourage the other party to raise a plea that the arbitral tribunal does not have jurisdiction purely to delay enforcement of the interim measure even if the plea is unlikely to succeed. Due to this fact, the Working Group may wish to consider a provision, inspired by article 36(2) of the UNCITRAL Model Law, along the following lines:

If a request has been made to a court to decide on the ruling by the arbitral tribunal that it has jurisdiction, the court where enforcement of an interim measure is sought may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming enforcement of the interim measure, order the other party to provide appropriate security.

Ex parte measures

69. The Working Group may wish to consider how ex parte interim measures (i.e. measures issued by the arbitral tribunal without hearing the other party) should be treated. It has been said that such measures may be appropriate where an element of surprise is necessary, i.e. where it is

possible that the affected party may try to pre-empt the measure by taking action to make the measure moot or unenforceable. For example, when an interim order is requested to prevent a party from removing assets from the jurisdiction, the party might remove the assets out of the jurisdiction between the time it learns of the request and the time the measure is issued; thus, the party may effectively thwart the order without technically violating it.

70. The Working Group may wish to consider that the model legislative provisions should not interfere with the conditions under which an arbitral tribunal should be able to issue *ex parte* interim measures. However, the question arises whether, by the time the measure is presented to the court for enforcement, the other party should have been given notice of it and given the opportunity to comply with it voluntarily (or to request its termination or amendment). It may be considered that the surprise function of the measure is sufficiently preserved if the arbitral tribunal is to notify the affected party of the measure once it is issued (in such a notification the arbitral tribunal may, for example, call upon the party to comply with it or oppose it within the number of days determined by the arbitral tribunal). If that is so, the question is what should the court do if, by the time the measure has been presented to the court for enforcement, the affected party has not been notified of the measure. One possibility may be for the court to refuse enforcement and another one to delay the issuance of an enforcement order until the affected party has had the opportunity to comply with the measure voluntarily or to present its case.

Possibility of reformulating the interim measure ordered by the arbitral tribunal

71. One national law provides that, for the purpose of enforcing an interim measure, the court may recast or reformulate the measure if necessary. If the Working Group were to find a concept along those lines acceptable, it may be considered necessary to define the scope of possible reformulation or recasting. It is suggested that the possibility of recasting or reformulating the measure should be limited to making the measure capable of enforcement according to the procedural law of the court, and should not include the discretion to change the substance of the measure. If the court considers that the measure is unenforceable because of its substance, it should decline enforcement and not modify the measure.

72. The circumstances in which it may be desirable to allow reformulation of the measure may be, for instance, where the measure, as formulated by the arbitral tribunal, does not correspond to the enforcement rules of the court. For example, the enforcing court may be bound by procedural rules or practices regarding the specific details to be presented in the enforcement order or regarding the manner in which enforcement is to be carried out, which may require the measure to be recast in a such a way that it satisfies those procedural rules and practices. Another example might be an order for an interim measure directing a party to hand over to the other party certain documents. The law in the enforcing country may have

privacy rules and rules of privilege which would require the court to enforce the order excluding documents covered by those rules.

Requirement that the court treat findings by the arbitral tribunal as conclusive

73. Some legal systems which give a party the choice to request an interim measure either from the arbitral tribunal or a national court (see above, para. 62) have adopted a provision to the effect that "where a party applies to a court for an interim injunction or other interim order and an arbitral tribunal has already ruled on any matter relevant to the application, the court shall treat the ruling or any finding of fact made in the course of the ruling as conclusive for the purposes of the application". A similar provision is that "in considering a request for interim relief, the court shall give preclusive effect to any and all findings of fact of the arbitral tribunal including the probable validity of the claim which is the subject of the award for interim relief and which the arbitral tribunal has previously granted in the proceedings in question, provided that such interim award is consistent with public policy".

74. These provisions in national laws do not, strictly speaking, deal with the enforcement of interim measures ordered by an arbitral tribunal; rather, they provide that the court is to issue its own interim measure but that in so doing the court takes as granted certain findings of the arbitral tribunal. It may be considered whether the underlying idea might be adapted to the enforcement provision under consideration in the Working Group; for example, if the court should be given a degree of discretion whether to enforce interim measures ordered by an arbitral tribunal, it might also be provided that certain findings by the arbitral tribunal (e.g. as to the urgency and necessity of the measure, including that the applicant would suffer serious and irreparable loss if the measure is not issued), are not to be reassessed by the court.

Possibility of refusing enforcement of a measure because the arbitral tribunal lacked the power to order it

75. A further issue that the Working Group may wish to consider is whether the court should refuse to enforce an interim measure if the arbitral tribunal, pursuant to the agreement of the parties or pursuant to the law governing the arbitral procedure, did not have the power to issue the measure. For example, according to some national laws, the arbitral tribunal has no power to issue interim measures of protection, or has no power to order certain types of measures (e.g. attachments of property) or is not authorized to order measures unless such authority is based on the agreement of the parties.

76. If the arbitral tribunal's power to order the measure should be among the express conditions for enforcement, an issue to be considered is whether it should be presumed that the arbitral tribunal had the power to order the interim measure, unless shown otherwise. A further question may be whether, in a cross-border enforcement (i.e. where the court is requested to enforce a measure issued in an

arbitration taking place in a foreign country), the arbitral tribunal's power should be judged against the law of the place of arbitration, the law of the enforcing State or both of those laws.

Appeal from a court decision ordering enforcement

77. Urgency is often an element of interim measures of protection. In that light, it may be considered whether the model legislative provision (or the guide to enactment) should recommend limits to the right of appeal against a decision by the court permitting enforcement of the measure (e.g. that there be no appeal or that there be a requirement for leave to appeal).

Scope of enforceable measures

78. It may be recalled that in the Working Group reference was often made to three groups of interim measures of protection: (a) measures aimed at facilitating the conduct of arbitral proceedings, (b) measures to avoid loss or damage and measures aimed at preserving a certain state of affairs until the dispute is resolved, and (c) measures to facilitate later enforcement of the award (further described in document A/CN.9/WG.II/WP.108, para. 63). While noting that that classification was one of a number of possible alternatives and that the examples of measures given under each category were not exhaustive, it was pointed out that the need for an enforcement mechanism was greatest for measures under (c) (e.g. attachments of assets, orders not to remove the subject matter of the dispute out of the jurisdiction or orders to provide security) and for some of the measures under (b) (e.g. orders to continue performing a contract during the arbitral proceedings or orders to refrain from taking action until the award was made). As to measures under (a) it was noted that, because the arbitral tribunal might "draw adverse conclusions" from the failure of the party to comply with the measure or might take the failure into account in the final decision on costs of the arbitral proceedings, there was less need to seek court intervention in the enforcement of the measure. However, no firm view was reached at that stage of the discussion as to whether, and if so in what way, those differences among interim measures should influence the drafting of the future enforcement regime (document A/CN.9/468, para. 69).

79. The Working Group may wish to discuss whether it would be desirable to describe or define the scope of measures to which the model legislative provision should apply. In discussing that question, it may be considered that a broad reference to interim measures that an arbitral tribunal may issue is already contained in article 17 of the UNCITRAL Model Law on International Commercial Arbitration and that no additional description is needed in the provisions on the enforcement of those measures.

80. The Working Group may also wish to consider the relationship between certain interim measures covered by the draft model provisions being prepared (in particular the measures for the preservation or custody of evidence) and article 27 of the UNCITRAL Model Law, which deals with court assistance in taking evidence.

III. Conciliation

A. *Introductory remarks*

81. At its thirty-second session, the Working Group decided to prepare uniform rules on proceedings in which a person or a panel of persons is invited by the parties in dispute to assist them in an independent and impartial manner to reach an amicable settlement of the dispute (conciliation proceedings). The deliberations of the Working Group are contained in the document A/CN.9/468, paras. 18-59.

82. The Working Group did not take any firm decision as to the ultimate form of the uniform rules. However, in line with the preliminary considerations in the Working Group (A/CN.9/468, para. 20), the drafts prepared by the secretariat are in the form of model legislative provisions. There was general agreement in the Working Group that the applicability of any uniform rules to be prepared should be restricted to commercial matters (*ibid.*, para. 21).

83. It may be noted that, in addition to the term "conciliation", other terms are used in practice, such as "mediation" and "neutral evaluation". Frequently these terms are used interchangeably without an apparent difference in meaning. In other cases a distinction is made depending on the procedural styles or techniques used. However, even if a particular meaning is attached to a term, the usage is not consistent. For example, according to one distinction, mediation implies an active involvement of the third person in the process of bringing the parties to an agreed settlement, whereas conciliation is regarded as a process where the conciliator is only a moderator of the dialogue between the parties in dispute. According to another distinction, a conciliator would take on an active role, which would include expressing opinions about the relative strengths and weaknesses of the cases presented by the parties and making suggestions or recommendations as to the content of a possible settlement, whilst a mediator would be expected to refrain from using evaluative methods and would rather facilitate a dialogue between the parties in a way that would be conducive to the parties themselves formulating and reaching a settlement. These different procedural techniques or approaches, even if they can be distinguished conceptually, in practice appear as a spectrum of many techniques which can be selected, combined and adapted to the expectations of the parties. Depending on the parties, the mediator or conciliator may have to use a number of different techniques in order to come to a settlement.

84. In view of the fact that the linguistic usage is not settled, the term "conciliation" has been used in the draft to indicate a broad notion encompassing various types of procedures in which parties in dispute are assisted by an independent and impartial person to settle a dispute.

85. Draft article 2(1) of the model legislative provisions is intended to express such a broad notion of conciliation. A clarification to that effect may be included in an explanatory text accompanying the uniform rules (a "guide to enactment" in the legislative drafting practice of the Commission), which the Working Group might decide to formulate to accompany the model legislative provisions.

86. The draft model legislative provisions, presented below, have been prepared pursuant to the considerations and decisions in the Working Group. After discussing them, the Working Group may wish to request the secretariat to prepare a revised draft for the thirty-fourth session of the Working Group (New York, 21 May-1 June 2001).

B. Model legislative provisions on conciliation

Article 1. *Scope of application*

[Unless otherwise agreed by the parties,] these legislative provisions apply to conciliation in commercial* transactions.

*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.

Notes

87. *Non-mandatory nature of model legislative provisions.* The Working Group has not taken a general stance as to whether all model legislative provisions on conciliation are to be non-mandatory or whether any of the provisions are to apply irrespective of contrary agreement of the parties. The Working Group may wish to consider this matter as it discusses the draft provisions. If all model provisions are to be regarded as non-mandatory, this could be expressed in a general manner, for example, by adding an expression "except if otherwise agreed by the parties" in draft article 1 as presented above.

88. *Footnote on "commercial".* There was general agreement in the Working Group that the applicability of any uniform rules to be prepared should be restricted to commercial matters. It was suggested that a flexible provision such as the one contained in the footnote to article 1 of the UNCITRAL Model Law on International Commercial Arbitration was an appropriate way for defining which matters were to be considered commercial (A/CN.9/468, para. 21). Alternatively, an explanation as to the broad meaning of the term "commercial" could be included in a guide to enactment of the model legislative provisions.

89. *International or international and domestic.* The Working Group may wish to discuss whether the model legislative provisions should apply to conciliation generally, irrespective of whether or not it is considered international, or to international conciliation only. If it is decided that the provisions should apply only to international conciliation, a provision defining the meaning of "international" (modelled on art. 1(3) of the UNCITRAL Model Law on Arbitration) might be along the following lines:

(2) 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) one of the following places is situated outside the State in which the parties have their places of business:

(i) the place where meetings with the conciliator are to be held²³ [if determined in, or pursuant to, the agreement to conciliate];

(ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or

(c) the parties have [expressly] agreed that the subject-matter of the agreement to conciliate relates to more than one country.

(3) 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.

90. *Applicability of the model legislative provisions.* The Working Group may wish to consider whether the draft article should contain further provisions defining when the model legislative provisions are to apply. Possible criteria may be, for example, that the conciliation proceedings take place in the State that has enacted the model legislative provisions (or if meetings with the conciliator are to be held in the enacting State), that one of the parties has a place of business in the State, or that the parties agreed that the law of the enacting State is to apply. It will be noted that in view of the increased use of electronic communications and telephone conference calls for the settlement of commercial disputes, it may be advisable to include further criteria such as the agreement of the parties as to which place is to be regarded as the place of conciliation, the location of the organization that facilitates or administers the process (such as a mediation or conciliation centre) and the place of business or residence of the conciliator or the person presiding the conciliation panel.

Article 2. [General provisions] [Conduct of conciliation]

(1) The conciliator or a panel of conciliators assists the parties in an independent and impartial manner in their attempt to agree on a settlement of their dispute.

(2) The parties determine, [by reference to conciliation rules or otherwise], the selection of the conciliator or the

²³The expression "the place where meetings with the conciliator are to be held" has been modelled on art. 9(2) of the UNCITRAL Conciliation Rules. To cater for cases where the parties would communicate with the conciliator by electronic means without a meeting being envisaged, the conciliator's place of business or habitual residence might be added as an additional criterion in subparagraph (b).

panel of conciliators, the manner in which the conciliation is to be conducted and other aspects of the conciliation proceedings.²⁴

(3) [Subject to agreement of the parties] [Failing such agreement] the conciliator or the panel of conciliators may conduct the conciliation proceedings in such a manner as it considers appropriate, taking into account the circumstances of the case, the wishes the parties may express, [including any request by a party that the conciliator hear oral statements,] and the need for a speedy settlement of the dispute.

(4) The conciliator shall be guided by principles of objectivity, fairness and justice. [Subject to agreement of the parties, the conciliator may give consideration to, among other things, the rights and obligations of the parties, the usages of the trade concerned and the circumstances surrounding the dispute, including any previous business practices between the parties.]

[(5) The conciliator may, at any stage of the conciliation proceedings, make proposals for a settlement of the dispute.]

Notes

91. Draft article 2 has been prepared in response to the view of the Working Group that it would be useful to prepare a uniform provision setting out the guiding principles of conciliation proceedings. Such a general provision would contribute to harmonizing standards of conciliation and would also be helpful in defining conciliation proceedings to which the model legislative provisions on conciliation would apply. It was agreed that article 7 of the UNCITRAL Conciliation Rules provides a good basis for drafting the uniform provision (A/CN.9/468, paras. 56-59; see in particular paragraphs 57 and 58 for possible modifications of the draft article).

92. *Paragraphs (4) and (5).* The Working Group may wish to consider whether the words in the square brackets in paragraph (4) are needed. Given the different approaches to conciliation, the focus of the process will not always be the same: for example, the rights and obligations of the parties or previous business practices indeed play an important role in many conciliations, but there are also many cases where the conciliator refrains from evaluating contractual rights and obligations, or where the solution is sought in a modification of contractual rights and obligations or in future business practice. In order to describe that variety, the text uses the formula “the conciliator *may* give consideration to”. However, because of the use of the word “may”, which makes the provision imprecise, consideration might be given to placing the description of the substance

of the decision-making process in a guide to enactment. For similar reasons, the Working Group may wish to consider whether paragraph (5) is needed. If it is considered that the possibility of making proposals for the settlement would not be in doubt without the provision, the provision may be deleted, in particular since it is often regarded as best practice to avoid, as much as possible, making proposals on how to settle the dispute.

Article 3. *Communication between conciliator and parties*

Unless otherwise agreed by the parties, the conciliator or the panel of conciliators may meet or communicate with the parties together or with each of them separately.

Note

93. Discussion in the Working Group: document A/CN.9/468, paras. 54 and 55. It may be the case that separate meetings between the conciliator and the parties are so usual that a conciliator is presumed to be free to use this technique, save for any express restriction agreed to by the parties. The purpose of this provision is to put the issue beyond doubt.

Article 4. *Disclosure of information*

[*Alternative 1:*] When the conciliator or the panel of conciliators receives information concerning the dispute from a party, it may disclose the substance of that information to the other party in order that the other party may have the opportunity to present any explanation which it considers appropriate. However, [the parties are free to agree otherwise, including that] the conciliator or the panel of conciliators shall not disclose information received from a party, when the party gives the information to the conciliator or the panel of conciliators subject to a specific condition that it be kept confidential.

[*Alternative 2:*] Subject to the agreement of the parties, nothing which is communicated to the conciliator or the panel of conciliators by a party in private concerning the dispute may be disclosed to the other party without the express consent of the party who gave the information.

Note

94. Discussion in the Working Group: document A/CN.9/468, paras. 54 and 55.

Article 5. *Commencement of conciliation*²⁵

The conciliation proceedings in respect of a particular dispute commence on the date on which a [written] invitation to conciliate that dispute made by one party is accepted [in writing] by the other party.

²⁴An alternative provision (somewhat more detailed) may be along the following lines: (2) The parties determine, [by reference to conciliation rules or otherwise], the selection of the conciliator or the panel of conciliators, the time and place of conciliation proceedings, the methods of communications between the conciliator or the panel of conciliators with the parties, any administrative assistance to facilitate the conduct of the conciliation and other aspects of the conciliation proceedings.

²⁵Cf. article 2 of the UNCITRAL Conciliation Rules.

Notes

95. The Working Group might discuss whether it would be acceptable to leave the question of when a conciliation begins (and ends) to the judgement of whoever has to make that judgement (such as a court), according to the facts and circumstances of the case, and not to regulate that question in the model legislative provisions. Certainty as to the date at which conciliation proceedings begin may, however, be desirable if conciliation proceedings were to affect the running of the prescription or limitation period.

96. The Working Group may also wish to consider whether it would be useful to include in the draft article a provision dealing with a situation when there is no response to the invitation to conciliate. Such a provision, modelled on article 4(2) of the UNCITRAL Conciliation Rules, might read: If the party initiating conciliation does not receive a reply within [thirty] days from the date on which the invitation has been sent, or within such other period as specified in the invitation, the party may elect to treat this as a rejection of the invitation to conciliate.

Article 6. *Termination of conciliation*²⁶

The conciliation proceedings are terminated:

(a) by the signing of the settlement agreement by the parties, on the date of the agreement;

(b) by a written declaration of the conciliator, after consultation with the parties, to the effect that further efforts at conciliation are no longer justified, on the date of the declaration;

(c) by a written declaration of the parties addressed to the conciliator to the effect that the conciliation proceedings are terminated, on the date of the declaration; or

(d) by a written declaration of a party to the other party and the conciliator, if appointed, to the effect that the conciliation proceedings are terminated, on the date of the declaration.

Article 7. *Limitation period*²⁷

(1) [*Alternative 1:*] When the conciliation proceedings commence, the limitation period regarding the claim that is the subject matter of the conciliation ceases to run. [*Alternative 2:*] For the purposes of the cessation of the limitation period, the commencement of the conciliation proceedings is deemed to be an act that causes the limitation period to cease to run.

(2) Where the conciliation proceedings have terminated without a settlement, the limitation period is deemed to have continued to run. If in such a case the limitation period has expired or has less than [six months] to run, the claimant is entitled to a further period of [six months] from the date on which the conciliation proceedings terminated.

²⁶Ibid., article 15 of the UNCITRAL Conciliation Rules.

²⁷Cf. articles 13 and 17 of the 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.

Note

97. Discussion in the Working Group: document A/CN.9/468, paras. 50 to 53.

Article 8. *Admissibility of evidence in other proceedings*

(1) Unless otherwise agreed by the parties, a party who participated in the conciliation proceedings [or a third party²⁸] shall not rely on, or introduce as evidence, in arbitral or judicial proceedings, whether or not such arbitral or judicial proceedings relate to the dispute that was the subject of the conciliation proceedings:

(a) Views expressed or suggestions made by a party to the conciliation in respect of [matters in dispute or] a possible settlement of the dispute;

(b) Admissions made by a party in the course of the conciliation proceedings;

(c) Proposals made by the conciliator;

(d) The fact that a party to the conciliation had indicated its willingness to accept a proposal for settlement made by the conciliator.

(2) The disclosure of the information referred to in paragraph (1) of this article shall not be ordered by the arbitral tribunal or the court [whether or not the arbitral or judicial proceedings relate to the dispute that is the subject of the conciliation proceedings].

(3) Where evidence has been offered in contravention of paragraph (1) of this article, the arbitral tribunal or the court shall treat such evidence as inadmissible.²⁹

Notes

98. Discussion in the Working Group: document A/CN.9/468, paras. 22 to 30.

99. The Working Group may wish to consider whether it would be useful to clarify, in the model provision or otherwise, that all information that is admissible in evidence does not become inadmissible solely by reason of it being raised in conciliation. It is only certain statements made in conciliation proceedings (i.e. views, admissions, proposals and indications of willingness to settle) that are inadmissible, not any underlying evidence that gave rise to the statement. Thus, evidence that is used in conciliation is admissible evidence in any subsequent proceedings just as it would be if the conciliation had not taken place.

²⁸It was suggested in the Working Group that the model provision should cover cases where views, admissions or proposals made during conciliation proceedings were sought to be raised in subsequent court or arbitral proceedings not by a party who had participated in the conciliation but by a third party such as a subcontractor of a party; A/CN.9/468, para. 25.

²⁹A/CN.9/468, para. 27.

100. The purpose of establishing the evidentiary privilege for certain types of information in draft article 8 is to promote candour of the parties in the conciliation. In order to achieve that, the parties must be able to enter into the conciliation knowing the scope of the rule and that it will be applied. However, as noted in paragraph 33 of document A/CN.9/468, there may be situations where evidence of certain facts would be inadmissible pursuant to draft article 8, but where the inadmissibility would have to be overridden by an overwhelming need to accommodate compelling reasons of public policy. Such an exceptional situation may arise, for example: where there is a need to disclose threats made by a participant to inflict bodily harm or unlawful loss or damage; where a participant attempts to use the conciliation to plan or commit a crime; where evidence is needed to establish or disprove an allegation of professional misconduct based on the conduct occurring during a conciliation; where evidence is needed in a proceeding in which fraud or duress is in issue regarding the validity or enforceability of an agreement reached by the parties; where statements made during a conciliation evidence a significant threat to public health or safety. While it seems that the evidentiary rule in draft article 8 would be overridden in such situations, irrespective of whether the exception is expressed in the model legislative provision, the question is whether, for clarity and the avoidance of doubt, such exceptions should be expressed in the model legislative provisions or whether it should be left to the applicable law of evidence to deal with those exceptions when they arise.

Article 9. *Role of conciliator in other proceedings*

(a) Unless otherwise agreed by the parties, the conciliator shall not act as an arbitrator³⁰ or as a representative or counsel of a party in any arbitral or judicial proceedings in respect of a dispute that is the subject of the conciliation proceedings.

(b) Testimony of the conciliator regarding the facts referred to in article 7(1) shall not be admissible in any arbitral or judicial proceedings in respect of a dispute that was or is the subject of the conciliation proceedings.

(c) Paragraphs (1) and (2) apply also in respect of another dispute that has arisen from the same contract or another contract forming part of a single commercial transaction.³¹

Note

101. Discussion in the Working Group: document A/CN.9/468, paras. 31-37.

³⁰It may be noted that the existing rules governing the conduct of arbitrators address the question of whether and in what circumstances a person who has acted as a conciliator may accept an appointment as an arbitrator. Nevertheless, the Working Group might wish to consider that it is desirable to refer to arbitrators in subparagraph (a) in order to put it beyond doubt that the parties are free, when they so agree, to appoint a conciliator as an arbitrator.

³¹A/CN.9/468, para. 36.

Article 10. *Resort to arbitral or judicial proceedings*

[Variant 1]

The parties shall not initiate, during the conciliation proceedings, any arbitral or judicial proceedings in respect of a dispute that is the subject of the conciliation proceedings, except that a party may initiate arbitral or judicial proceedings where, in its opinion, such proceedings are necessary for preserving its rights.

[Variant 2]

The parties may agree not to initiate, during the conciliation proceedings, any arbitral or judicial proceedings in respect of a dispute that is the subject of the conciliation proceedings. However, a party may initiate arbitral or judicial proceedings if in its opinion such proceedings are necessary for preserving its rights [and if the party notifies the other party of its intention to commence the proceedings]. The initiation of such proceedings by the party is not in itself regarded as the termination of the conciliation proceedings.

[Variant 3]

To the extent that the parties have expressly undertaken not to initiate [during a certain time or until conciliation proceedings have been carried out] arbitral or judicial proceedings with respect to a present or future dispute, such an undertaking shall be given effect by the court or the arbitral tribunal until the agreed time has expired or the conciliation proceedings are in progress.³²

Note

102. Discussion in the Working Group: document A/CN.9/468, paras. 45 to 49.

Article 11. *Arbitrator acting as conciliator*

It is not incompatible with the function of an arbitrator if the arbitrator raises the question of a possible conciliation and, to the extent agreed to by the parties, participates in efforts to reach an agreed settlement.

Notes

103. Discussion in the Working Group: document A/CN.9/468, paras. 41 to 44.

104. As was noted by the Commission during its preparation of the text that was later adopted as the UNCITRAL Notes on Organizing Arbitral Proceedings (in particular, para. 47 of the Notes), there exist different attitudes and practices regarding the question whether, and if so in what way, it is appropriate for an arbitrator to raise the possibility of settlement and whether an arbitrator might take on

³²A/CN.9/468, para. 48.

some functions of a conciliator.³³ Furthermore, some rules on arbitration (including codes of ethics governing the conduct of arbitrators) have provisions on arbitrators acting as conciliators. In the light of those differences, the Working Group may wish to consider whether it would be preferable not to formulate a uniform provision on the matter and leave it to arbitration rules and practices.

Article 12. *Enforceability of settlement*

If the parties reach agreement on a settlement of the dispute and the parties and the conciliator or the panel of conciliators have signed the binding settlement agreement, that agreement is enforceable [*the enacting State inserts provisions specifying provisions for the enforceability of such agreements*].

Notes

105. Discussion in the Working Group: document A/CN.9/468, paras. 38 to 40.

106. Legislative solutions regarding the enforceability of settlements reached in conciliation proceedings differ widely. Some States have no special provisions on the enforceability of such settlements, with the result that they would be enforceable as any contract between the parties. This understanding that conciliation settlements are enforceable as contracts has been restated in some laws on conciliation.

107. However, there are also laws that provide for expedited enforcement of such settlements. Reasons given for introducing an expedited enforcement usually aim to foster the use of conciliation and to avoid situations where a contract action to enforce a settlement may take months or years to reach judgement and then enforcement.

³³In the report of the Commission on the work of its twenty-seventh session (1994), doc. A/49/17 (reproduced in the *UNCITRAL Yearbook*, vol. XXV: 1994), it is stated:

"143. The views differed as to whether it was appropriate for the arbitral tribunal on its own initiative to raise the question of a possible settlement and as to the manner in which the arbitral tribunal might be involved in any settlement negotiations. It was stated that in some legal systems it was considered incompatible with the function of the arbitrator to inquire about settlement; moreover, it was said that such an inquiry might worsen the procedural atmosphere, might put a party in an uncomfortable situation of having to refuse to settle, might raise doubts about the impartiality of the arbitrators and, in case of unsuccessful conciliation, increase the likelihood of objections against the award.

"144. Statements were made about legal systems where an inquiry about possible settlement was provided for by the law governing court proceedings and where such an inquiry was sometimes considered acceptable and desirable in arbitral proceedings, provided that it was done in a way that did not compromise the impartiality of the tribunal.

"145. As to the case where the parties on their initiative requested the arbitral tribunal to assist them in reaching a settlement, one view that the roles of an arbitrator and a conciliator were difficult to reconcile and that it was therefore appropriate for the arbitrators to refuse to act as conciliators or to be reserved in responding to such an initiative. Another view was that, while the arbitral tribunal should always be careful to maintain its impartiality, the benefits of a settlement justified the arbitral tribunal in being forthcoming in responding to such requests of the parties."

108. Several laws have provisions to the effect that a written settlement agreement is to be treated as an award rendered by an arbitral tribunal and is to have the same effect as a final award in arbitration, provided the result of the conciliation is reduced to writing and signed by the conciliator or conciliators and the parties or their representatives.

109. According to another approach found in one national law, the settlement agreement is deemed to be an enforceable title, and the rights, debts and obligations that are certain, express and capable of being enforced and that are recorded in the settlement agreement are enforceable pursuant to the provisions for the enforcement of court decisions. It should be noted, however, that that provision applies to conciliation administered by approved institutions where the conciliators are selected from a list maintained by an official organ.

110. In other laws, it is provided that conciliation settlements are treated as awards, but that such settlements "may, by leave of the court" be enforced in the same manner as a judgement, a wording that appears to leave a degree of discretion to the court in enforcing the settlement.

111. There is also one draft legislative solution whose elements include the following: a party entering into a settlement agreement may, with the consent of all parties to such agreement, petition a court to enter a judgement in accordance with the settlement agreement, provided that (i) a petition is filed with the court within a certain number of days of the signing of the settlement; (ii) that adequate notice is given to all parties that signed the settlement within a certain number of days of the filing of such petition; and (iii) no party to the settlement files an objection with the court within a certain number of days of receipt of such notice. If an objection has been filed, the court may in certain cases, including where the interests of justice so require, deny the petition, without prejudice to any contractual rights or remedies that may otherwise be available.

112. The Working Group may wish to discuss whether it would be desirable and feasible to prepare a uniform model provision that would be universally acceptable and, if so, what should be the substance of the uniform rule. Alternatively, it may be considered that, because of the diversity of approaches, draft article 12 should not provide a uniform solution; instead, it should be left to the guide to enactment, which the Working Group may wish to adopt along with the model legislative provisions, to discuss possible solutions. The guide to enactment might, in addition to presenting solutions such as those mentioned above, mention mechanisms recognized in some national laws for making settlements capable of expedited enforcement (e.g. if a settlement is notarized, formalized by a judge or co-signed by the counsel of the parties). Another solution that could be mentioned would be to empower the parties who have settled a dispute to appoint an arbitration tribunal with a specific purpose of issuing an award on agreed terms based on the agreement of the parties. Such a specific power might be needed where the law applicable to arbitral proceedings does not allow the initiation of arbitral proceedings if there is no dispute between the parties.

**C. Working paper submitted to the Working Group on Arbitration at its thirty-third session: possible future work: court-ordered interim measures of protection in support of arbitration, scope of interim measures that may be issued by arbitral tribunals, validity of the agreement to arbitrate:
Report of the Secretary-General
(A/CN.9/WG.II/WP.111) [Original: English]**

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INTRODUCTION

1. At its thirty-second session (Vienna, 20-31 March 2000), the Working Group exchanged views and information on a number of arbitration topics which were identified as likely items for future work. Some of those topics arose in the course of the Working Group's deliberations, others had already been considered by the Commission at its thirty-second session (reproduced in A/CN.9/468 at paras. 107 and 108), while yet others had been proposed by arbitration experts (reproduced at para. 109 of A/CN.9/468). The Working Group expressed support in favour of the secretariat undertaking preparatory work on several of those topics and the purpose of this note is to provide the Working Group with a progress report on that preparatory work.

I. COURT-ORDERED INTERIM MEASURES OF PROTECTION IN SUPPORT OF ARBITRATION

2. At its thirty-second session (Vienna, 20-31 March 2000), the Working Group considered, in the context of the discussion of interim measures that might be issued by an

arbitral tribunal, a proposal for the preparation of uniform rules for situations in which a party to an arbitration agreement turned to a court with a request to obtain an interim measure of protection (A/CN.9/468, paras. 85-87). It was pointed out that it was particularly important for parties to have effective access to such court assistance before the arbitral tribunal was constituted, but that also after the constitution of the arbitral tribunal a party might have good reason for requesting court assistance. It was added that such requests might be made to courts in the State of the place of arbitration or in another State.

3. It was observed that in a number of States there were no provisions dealing with the power of courts to issue interim measures of protection in favour of parties to arbitration agreements; the result was that in some States, courts were not willing to issue such interim measures while in other States, it was uncertain whether and under what circumstances such court assistance was available. It was said that, if the Working Group decided to prepare uniform provisions on that topic, the ILA Principles on Provisional and Protective Measures in International Litigation (see para. 8 below), as well as the preparatory work

that led to those Principles would be useful in considering the content of the proposed uniform rules.

4. The Working Group took note of the proposal and decided to consider it at a future session.

5. This note provides a preliminary examination of some of the issues related to the ordering by courts of interim measures of protection in support of arbitration. The Working Group may wish to consider the discussion set forth in this note with a view firstly, to deciding whether it is desirable or feasible to prepare uniform rules or provisions on these issues and secondly, if further work is desirable, to enable the secretariat to prepare a draft text for consideration at a future session.

A. General remarks

6. Interim measures of protection play an essential role in every legal system in facilitating the process of dispute resolution. The aims of such measures are broadly twofold: to preserve the position of the parties pending resolution of their dispute and to ensure the enforceability of the final judgement.

7. Different legal systems have characterized interim measures of protection in different ways and using different classifications. In addition, the scope and variety of interim measures of protection available differ from country to country. This can lead to situations in disputes with an international element where the applicant for an interim measure of protection may be forced to apply to the courts of a foreign country where the measures of protection that may be available and the conditions which need to be met in order for such measures to be ordered are unfamiliar. Yet, there is an ever growing number of requests for effective interim relief on an international level, firstly, because of the ease and speed with which assets can be transferred in the modern world to avoid a court judgement or an arbitral award, and secondly, because contracting parties have higher expectations of their ability to enforce their rights. The fear is that an unscrupulous party might, for example, sell the goods or, even more obviously, transfer funds out of the jurisdiction prior to the judgement, given that modern methods of international bank transfers allow money to be transferred extremely fast.

8. The problems concerning the effectiveness and availability of interim relief on an international level have been the subject of many studies, including work done by the group of experts under the aegis of the International Law Association (ILA). At its 67th Conference in 1996 the ILA adopted the "Principles of Provisional and Protective Measures in International Litigation"¹ (the "ILA Principles", reproduced in paragraph 108 of document A.CN.9/WG.II/WP.108). The ILA Principles seek to establish rules of

general application for the assistance of law reformers both at the national and international level on the exercise by courts of independent jurisdiction for granting provisional and protective measures with the objective of securing assets out of which an ultimate judgement may be satisfied.² The Principles were drafted bearing in mind "a paradigm case of measures to freeze the assets of the defendant held in the form of sums on deposit in a bank account with a third party bank".³ The ILA recommended these Principles for possible use by UNCITRAL and the Hague Conference on Private International Law and in national statutory reforms.⁴ It must be noted however that these Principles were drafted with the international litigation process in mind, as opposed to interim measures granted by a court in support of an international arbitration.

9. The process for obtaining interim measures of protection in arbitration is full of added difficulties. While not the case in all States, it is now widely recognized that parties may apply either to the arbitral tribunal or to the courts for interim measures of protection. However this freedom to choose is limited in a number of situations. First, the power of the arbitral tribunal to issue interim measures of protection is often limited to what the parties have agreed or by the institutional rules that they have chosen to govern their arbitration. Second, the tribunal may only grant interim measures of protection directed to the parties to the dispute.⁵ Third, the tribunal can only act once it has been constituted. Therefore, before the tribunal is in existence, interim measures of protection have to be obtained from the court. Fourth, the power of the courts is also restricted. Where a valid arbitration agreement is in existence, this has been regarded by some courts as a decision by the parties to exclude the jurisdiction of the courts and would preclude the granting of interim relief. The courts in a number of countries have tried to establish the limits of this exclusion and the result is that a number of precedents are slowly building up, defining the situations in which the court may legitimately intervene to support the work of the arbitral tribunal without usurping its authority. Unfortunately, the conclusions being reached vary from country to country, making it difficult to predict the extent to which a national court may be prepared to intervene. Broadly however, a distinction is drawn between the time before the arbitral tribunal has been convened and afterwards. As noted above, before the tribunal has been convened, the court is generally the only body with the power to order interim measures of protection and the range of measures which the court can order at this stage is broader. Once the arbitral tribunal is in existence, it has been suggested that court intervention becomes limited to assisting the arbitral tribunal and providing what is termed "technical assistance" to

¹The International Law Association, Report of the sixty-seventh Conference held at Helsinki from 12 to 17 August 1996—Committee on International Civil and Commercial Litigation, Second interim report on provisional and protective measures in international litigation, published by the ILA, London 1996.

²The principle of independence of the jurisdiction to grant provisional and protective measures is in line with article 24 of the 1968 Brussels Convention (and Lugano Convention) on Jurisdiction and Enforcement of Judgements.

³The International Law Association Report, page 186.

⁴*Ibid.*, page 201.

⁵This follows from the consensual nature of the arbitration agreement: it is the parties who agreed to the resolution of their dispute by arbitration and no one else. If an order is required that would bind third parties, it will be necessary to have recourse to the courts.

enable the good administration of the arbitration.⁶ In addition, the courts in some countries have held that at no time should the power of the court to issue interim measures of protection extend to a discussion of, or preliminary decision on, the substantive law of the dispute.⁷ Finally, in an international dispute where interim relief is sought in a country other than the country where the arbitration takes place, the question of jurisdiction arises: do the national courts have jurisdiction to grant interim relief in support of foreign arbitration and on what grounds?

10. Countries have adopted different approaches to this issue. Some countries have legislation which contains adequate regulations, aimed in particular at the possibility of having recourse to the court not only in cases where the arbitration takes place in the country of the court, but also in cases where the arbitration takes place outside the country yet the debtor's assets, including a non-resident debtor's assets, are in its territory.⁸ However, in many countries the law does not provide for this type of assistance by local courts. For example, in some countries, application to the courts for protective measures is only allowed where an application has already been made to that court for a decision on the merits. This is not possible where there is an arbitration agreement in existence. Equally in some jurisdictions, the court may order protective measures only in cases where the arbitration takes place within the jurisdiction of the court, but not abroad.

11. Therefore whilst some countries may already have adequate legislative regimes which address these issues, the Working Group may take the view that the lack of a uniform approach requires that the topic be considered further. A uniform regime may be considered desirable not only from the viewpoint of countries that wish to have a model facilitating the modernisation of law, but also from the perspective of users of arbitration in countries that do have an effective regime, but who may wish to have access to effective court assistance in other countries

12. Having outlined a number of the issues concerning court ordered interim relief in arbitration, the following discussion raises a number of the topics addressed by the ILA Principles and provides background information and explanation. Solutions to these topics may serve as an inspiration for any text that the Working Group might wish to prepare. References to principles in the headings of

part B are to the relevant ILA Principles. Where a Principle is not applicable in the context of international arbitration it has been omitted.

13. It should also be noted that there may be other additional ways to improve the effectiveness and availability of interim relief in international arbitration. It may be possible to clarify arbitrators' powers, in particular with respect to the scope of measures that may be issued, as discussed at paras. 69 to 72 of document A/CN.9/WG.II/WP.108. In addition it has also been noted that improving the enforceability of arbitral tribunal ordered interim relief would help the situation.⁹

B. Possible issues that might be addressed by a uniform regime

a. Scope (Principles 1-2)

14. The Principles adopt a twofold classification of the purposes performed by provisional measures in civil and commercial litigation, (a) to maintain the status quo pending determination of the issues at trial; or (b) to secure assets out of which an ultimate judgement may be satisfied. The distinction is one which is commonly made in national legal systems and reflects the need for different types of relief (the classification of interim measures into different categories was discussed at para. 63, document A/CN.9/WG.II/WP.108). As noted above in para. 8, the Principles focus upon measures in category (b) simply because those measures represent measures commonly available and thus capable of comparative analysis. Should the Working Group decide that work on the development of a set of uniform rules on these issues is desirable, the question of the types of interim measure to which they should apply would need to be considered.

b. Availability of provisional and protective measures (Principle 3)

15. It is desirable that the measures be available to both foreigners and citizens alike and in respect of arbitrations held in both the country of the court issuing the measure and in a foreign country. In some countries, courts will only issue interim measures in support of arbitral proceedings held in that country.¹⁰ In other countries, measures can be ordered in support of foreign arbitral

⁶ICC, 1993, "Conservatory and Provisional Measures in International Arbitration", ICC Publishing S.A., at page 76.

⁷*Channel Tunnel Group Ltd v. Balfour Beatty Construction Ltd* [1993] 1 All ER 664, House of Lords.

⁸For example, in one country, legislation provides that the powers conferred on the court with regard to interim relief are exercisable even if the seat of the arbitration is outside the country or no seat has been designated or determined. Nevertheless the court may still refuse to grant interim relief if in the opinion of the court the fact that the seat of the arbitration is outside the country makes it inappropriate to do so. Due to the fact that the law has only recently been enacted it is not entirely clear how the courts will exercise this discretion, but it seems likely that if the courts at the place where the arbitration has its seat are themselves competent to order interim measures then the court may regard those courts as the natural forum for the grant of such measures and will itself decline to grant relief.

⁹A/CN.9/468, paras. 60-79; at present Germany is the only country to expressly provide for the enforcement of an interim order granted by a foreign arbitral tribunal: German Arbitration Law 1998, Book 10 of the Civil Procedure Code, s.1041(2), 1062(1), (2).

¹⁰In India, courts have interpreted the 1996 Arbitration and Conciliation Act to mean that an Indian court may only order interim relief in support of a domestic arbitration. Two decisions from the High Court of Delhi and the Calcutta High Court have held that because the provision dealing with interim measures by the courts is in part I of the Act which applies where the arbitration is in India, this means that where the seat of the arbitration is outside India the Indian court has no power to order interim relief. This judgement has been criticized however and there is conflicting case law in existence although the matter is yet to be resolved by the Supreme Court. In addition, in China it would seem that it is not possible to apply for interim relief if the seat of arbitration is not in China.

proceedings, subject to certain conditions, for example, that the foreign arbitral award would be enforceable in that country,¹¹ that full disclosure of the existence of the arbitration agreement has been made,¹² that the request for the interim measure has been made by the arbitral tribunal or that the conditions of the legislation of the country in which the measure is sought are met.¹³ In a third category of countries, the position is not clear either because the relevant legislation does not address the issue or because there have been no reports of cases in which such an order has been sought.¹⁴

16. In addition, where a measure is sought that affects the assets of a party to the arbitral proceedings, it may not be appropriate to draw a distinction between whether those assets are assets of a resident or non-resident of the country in which the measure is sought, since the purpose of the measure is simply the preservation of assets. In some countries, for example, the law requires that the court have jurisdiction over the respondent before an interim measure can be ordered or enforced, while in others certain measures can only be applied where the assets in respect of which the order is sought, belong to non-resident debtors.

c. Discretionary nature of the award of interim measures (Principle 4)

17. The granting of relief would generally be discretionary rather than mandatory and subject to certain specified considerations. Those might include, for example, consideration of the merits of the applicant's case and the relative consequences to the parties if the measure is either granted or refused. This may be problematic in the area of arbitration where case law in a number of countries shows that courts are not prepared to issue interim relief in any situation which would involve a preliminary discussion of the merits of the case. Nevertheless the willingness of the court to grant the interim measure usually depends to a greater extent on the urgency of the measure and the potential damage to the applicant should the measure be refused. If it is clear that the applicant is not merely trying to frustrate the arbitral proceedings it would seem that there is a greater chance that the measure will be ordered and the court will get around the problem of having to look at the substantive issues.

¹¹Austria, s387(2) Exekutionsordnung.

¹²Canada, *Ruhrkohle Handel Inter GmbH et al and Fednav Ltd. et al*, unreported judgement of the Federal Court of Canada, Trial Division T-212-91 supports the view that an arrest may be maintained in a foreign arbitration matter provided full disclosure of the arbitration agreement is made and that proceedings are subsequently stayed.

¹³The German courts do not differentiate between foreign and national arbitral proceedings as long as the Civil Procedure Code provides for a state court's jurisdiction to grant interim relief. Also in Greece, as long as the conditions of the Greek Code of Civil Procedure with regard to interim relief are satisfied, the Greek court will grant interim relief in support of a foreign arbitration.

¹⁴In the US, for example, there is no provision in US state statutes or the Federal Arbitration Act allowing interim remedies by the courts when the parties have agreed to arbitration. However the US courts have often derived their authority to provide interim relief from state law. See further: *David L. Threlkeld & Co. v. Metallgesellschaft Ltd*, 923 F.2d 245, 253 No. 2 (2d Cir.1991), *Borden Inc. v. Meiji Milk Products Co. Ltd.*, 919 F. 2d 822 (2d Cir. 1990).

d. Hiding of assets (Principle 5)

18. The Principles recognize that the respondent should not be able to hide its assets by putting them into, for example, a corporation or a trust, while still remaining either de facto or beneficially the owner of the assets. While stating the general principle, the ILC Committee noted that this problem was a complex one and required further research and elaboration.

e. Due process and protection for the respondent (Principles 6-8)

19. While it might not always be possible to give the respondent prior notice that an order for interim measures is being sought, particularly where the element of surprise is important, as a general rule the respondent is entitled to be informed promptly of the measure ordered. Consistent with article 18 of the Model Law, the respondent should be given the opportunity to be heard within a reasonable time and to object to the provisional and protective measure.

20. As another measure of protection for the respondent, the court may need to have the authority to require security or other conditions (such as an undertaking by the applicant to indemnify the respondent if the measure proves to be unjustified) from the applicant for the potential injury to the respondent or to third parties which may result from the granting of the order, such as where the order is, for example, unjustified or too broad. If an undertaking as to damages might prove insufficient and the court considers ordering security, an additional consideration might relate to the ability of the applicant to respond to a claim for damages for such injury. In some countries, interim relief will only be ordered where the applicant gives at least an undertaking as to damages, the amount of the undertaking depending upon the type of measure requested, this being a common determinant of the conditions attaching to an interim order.¹⁵

f. Access to information concerning the respondent's assets (Principle 9)

21. In some countries little relief is available to an applicant in the area of access to information concerning the respondent's assets and the applicant may have no legal right, for example, to be informed by a third party as to the assets held at the bank by the respondent. Other legal systems make more expansive provision for ancillary disclosure. As the ILC Principles note, there are important competing policies underlying these two different positions; for example, the need for disclosure particularly in fraud cases to enable an applicant to trace and recover assets effectively, as against the importance of maintaining bank secrecy and the right to privacy as to personal financial affairs.

¹⁵For example, in Sweden, section 6, chapter 15 of the Procedural Code prescribes that giving security for an interim measure of protection is essential for the granting of the measure. The security can be in the form of a personal letter or guarantee or a pledge. Bank guarantees are also accepted. If the applicant cannot put up sufficient security he can be exonerated from this demand only by showing extraordinary grounds for his claim (The Execution Code Chapter 2 Section 25).

g. Jurisdiction (Principles 10-12, 16 and 17)

22. A limitation on the granting of interim measures of relief in support of foreign proceedings may be the requirement that courts of the forum in which the measure is sought have jurisdiction over the substantive dispute. In some countries, for example, some interim measures of protection cannot be ordered unless the substantive proceedings are taking place, or would take place, in a court of that jurisdiction or in an arbitral tribunal within that jurisdiction. In other cases, the provision for the granting of interim relief in support of foreign court proceedings is limited to a group of convention countries (e.g. the 1968 Brussels Convention) while in others it will apply to foreign court proceedings anywhere in the world without the need for the party seeking relief to establish any basis on which the court of the country in which relief is sought could assess jurisdiction in relation to the substantive issues in the claim. In such jurisdictions, the courts have indicated that the relief should not be limited to exceptional cases,¹⁶ provided that it is not granted as a matter of routine or without very careful consideration. Such considerations might include, for example, whether the interim relief might hamper or obstruct the management of the case by the court seized of the substantive proceedings; or give rise to a risk of conflicting, overlapping or inconsistent orders in other courts; and whether the primary court was requested to give such relief and declined to do so.

23. The ILA Principles propose that jurisdiction could be derived from the mere presence of assets, subject to conditions which include that the presence of assets (or, in fact, the granting of an interim measure of protection in relation to those assets) should not be used in and of itself as a basis for founding more general substantive jurisdiction, a condition which reflects the common position in a number of different countries; the applicant would have an obligation to file a substantive action, within a reasonable time, either in the forum or abroad and there should be a reasonable possibility that any judgement rendered abroad would be recognized in the forum which granted the interim relief.

24. Where the court is properly exercising jurisdiction over the substance of the matter, the wide scope of orders that may be made over the respondent personally is a feature of the law of many countries. The court's power would cover issuing provisional and protective orders addressed to a respondent personally to freeze his assets, irrespective of their location and regardless of whether the respondent is or was physically present within the jurisdiction.

25. Where, however, the court is not exercising jurisdiction over the substance of the matter, and is exercising jurisdiction purely in relation to the grant of provisional and protective measures, there is a need for caution. The court's jurisdiction may need to be restricted to assets located within the jurisdiction, in particular to ensure that third parties are protected from the conflicts of jurisdiction which might otherwise arise. Subject to international law, national rules (including rules of the conflict of laws) will determine the location of assets.

¹⁶See, for example, the UK case of *Credit Suisse Fides Trust v. Cuoghi* [1998] Queen's Bench Division 818.

h. Duration of the validity of the interim measure (Principle 13)

26. The provisional and protective measure should be valid for a specified limited time. This principle is connected with the respondent's right to be heard. It may also be important where the measure sought may be controversial, such as an ex parte measure, or where it has the potential to be particularly onerous on the respondent if prolonged. In the case of ex parte measures, the requirement that the applicant return to the court for a renewal of the measure will allow the respondent to be heard at that time. The court can then consider renewal in the light of developments in the arbitral tribunal where the substantive action is being heard.

i. Duty to inform (Principle 15)

27. The applicant for provisional and protective measures should be required to promptly inform the arbitral tribunal of orders that have been made at the applicant's request. It is also important that the applicant be required to inform the court requested to make an interim order of the current status of arbitration proceedings on the merits and proceedings for provisional and protective measures in other jurisdictions (the duty to inform is discussed in the context of enforcement of interim measures in document A/CN.9/WG.II/WP.110 at para. 64).

j. Cross-border recognition and international judicial assistance (Principles 18-20)

28. While not seeking to impose an obligation to recognize orders made in other States or to cooperate with courts or arbitral tribunals in other jurisdictions, encouraging cooperation in the making of local complementary orders may lead to tangible results, both in recognition and judicial assistance. At the request of a party, a court may take into account orders granted in other jurisdictions. Further, it may be appropriate for courts to cooperate where necessary in order to achieve the efficacy of orders issued by other courts, and to consider the appropriate local remedy.

29. The fact that an order is provisional in nature, rather than final and conclusive, should not by itself be an obstacle to cooperation or even recognition or enforcement (enforcement of interim measures is addressed in document A/CN.9/WG.II/WP.110 paras. 52-80).

II. SCOPE OF INTERIM MEASURES THAT MAY BE ISSUED BY ARBITRAL TRIBUNALS

30. Legislative solutions regarding the power of the arbitral tribunal to order interim measures of protection are not uniform. In some jurisdictions, the power is implied. In other jurisdictions there are express provisions empowering the arbitral tribunal to order interim measures. According to some arbitration laws, the power of the tribunal to order interim measures depends on the agreement of the parties, and the law limits itself to recognizing the effectiveness of

the parties' agreement to grant such power to the arbitral tribunal. There are also jurisdictions where the arbitral tribunal is deemed not to have the power to order interim measures and it is considered that the parties cannot confer such power on the arbitral tribunal. Many sets of arbitration rules empower the arbitral tribunal to issue interim measures of protection (e.g. article 26 of the UNCITRAL Rules). The rules and laws that do empower the arbitral tribunal to issue interim measures typically leave a broad discretion to the arbitral tribunal as to how it should exercise that power.

31. The Working Group considered (at its thirty-second session in March 2000) the desirability and feasibility of preparing a harmonized non-legislative text on the scope of interim measures of protection that an arbitral tribunal might order and the accompanying procedural rules (A/CN.9/468, paras. 80-84). In that discussion wide support was expressed for the preparation of a non-legislative text, such as guidelines or practice notes, which would discuss issues such as the types of interim measures of protection that an arbitral tribunal might order; discretion for ordering such measures; and guidelines on how the discretion is to be exercised or the conditions under which, or circumstances in which, such measures might be ordered. It was suggested that the clarification provided by such guidelines should be broad in scope and should cover all interim measures of protection mentioned in paragraph 63 of document A/CN.9/WG.II/WP.108 (i.e. (a) measures aimed at facilitating the conduct of arbitral proceedings, (b) measures to avoid loss or damage and measures aimed at preserving a certain state of affairs until the dispute is resolved, and (c) measures to facilitate later enforcement of the award). However, it was added that the guidelines would be particularly useful for measures with respect to which court enforcement was more frequently needed.

32. It was agreed that the secretariat should prepare a document that would analyse rules and practices regarding interim measures of protection issued by arbitral tribunals and set forth elements for a future harmonized non-legislative text. The Working Group was aware that the information needed for the preparation of the document was not readily available and therefore requested the States and international organization participating in the considerations of the Working Group as well as experts interested in its work to send to the secretariat relevant information (e.g. arbitration rules, academic and practice writings, as well as examples of texts of interim measures of protection ordered omitting the names of parties and other confidential information). The secretariat is currently collecting that information and preparing a study, which includes a draft outline of possible guidelines, for

consideration by the Working Group at a future session. Preliminary work indicates that the following issues might be included in possible guidelines: the types of interim measures that might be ordered by an arbitral tribunal; the procedural steps preceding the issuance of an interim measure of protection; the exercise of the discretion to order an interim measures and matters relating to the order once it has been issued, such as the content of the order, the consequences of a failure to comply, and modification of the measure. The Working Group may wish to consider the study being prepared at a future session with a view to deciding whether any action by the Commission is warranted.

III. VALIDITY OF THE AGREEMENT TO ARBITRATE

33. At its thirty-second session, the Working Group considered possible topics for future work which included questions relating to the interpretation of legislative provisions such as those in article II(3) of the New York Convention (or article 8(1) of the UNCITRAL Model Law on International Commercial Arbitration) (A/CN.9/468, paras. 107-114). In practice, those provisions have led to divergent results, in particular the question of the court's terms of reference (i) in deciding whether to refer the parties to arbitration, (ii) in considering whether the arbitration agreement was null and void, inoperative or incapable of being performed, and (iii) where the respondent invoked the fact that an arbitration proceeding was pending or that an arbitral award had been issued (A/CN.9/468, para. 108). The Working Group expressed the view that those issues were of significant practical importance as they caused uncertainty and, potentially, delay in a number of States. The secretariat is currently preparing a study which examines how those issues have been dealt with by the courts and the extent to which interpretations diverge. Preliminary research indicates that although article 8 of the Model Law and article II(3) of the New York Convention are broadly similar they have tended to be interpreted differently in some respects in national courts. In considering the validity of the arbitration agreement, courts examining the issue in respect of article 8 have tended to limit themselves to a prima facie examination of the case, whereas courts examining the same issue under article II(3) have adopted the approach that they have "full power" to examine the arguments, including taking evidence if necessary, in order to examine not only compliance with formal requirements but also substantial validity. The Working Group may wish to consider the study being prepared at a future session with a view to deciding whether any action by the Commission is warranted.

**D. Report of the Working Group on Arbitration
on the work of its thirty-fourth session
(New York, 21 May-1 June 2001)
(A/CN.9/487) [Original: English]**

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INTRODUCTION

1. The Commission, during its thirty-first session, held a special commemorative New York Convention Day on 10 June 1998 to celebrate the fortieth anniversary of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958). In addition to representatives of States members of the Commission and observers, some 300 invited persons participated in the event. Following the opening speech given by the Secretary-General, speeches were made by participants in the diplomatic conference that had adopted the Convention and leading arbitration experts presented reports on matters such as the promotion of the Convention, its enactment and application. Reports were also made on matters

beyond the Convention itself, such as the interplay between the Convention and other international legal texts on international commercial arbitration and on difficulties encountered in practice but not addressed in existing legislative or non-legislative texts on arbitration.¹

2. In reports presented at the commemorative conference, various suggestions were made for presenting to the Commission some of the problems identified in practice so as to enable it to consider whether any related work by the Commission would be desirable and feasible. The Commission, at its thirty-first session in 1998, with reference to the

¹*Enforcing Arbitration Awards under the New York Convention: Experience and Prospects* (United Nations publication, Sales No. E.99.V.2).

discussions at the New York Convention Day, considered that it would be useful to engage in a discussion of possible future work in the area of arbitration at its thirty-second session. It requested the secretariat to prepare a note that would serve as a basis for the considerations of the Commission.²

3. At its thirty-second session, in 1999, the Commission had before it the requested note, entitled "Possible future work in the area of international commercial arbitration" (A/CN.9/460). Welcoming the opportunity to discuss the desirability and feasibility of further development of the law of international commercial arbitration, the Commission had generally considered that the time had arrived to assess the extensive and favourable experience with national enactments of the UNCITRAL Model Law on International Commercial Arbitration (1985), (also referred to in this report as "the Model Law"), as well as the use of the UNCITRAL Arbitration Rules and the UNCITRAL Conciliation Rules, and to evaluate in the universal forum of the Commission the acceptability of ideas and proposals for improvement of arbitration laws, rules and practices.³

4. When the Commission discussed the topic, it left open the question of what form its future work might take. It was agreed that decisions on the matter should be taken later as the substance of proposed solutions became clearer. Uniform provisions might, for example, take the form of a legislative text (such as model legislative provisions or a treaty) or a non-legislative text (such as a model contractual rule or a practice guide). It was stressed that, even if an international treaty were to be considered, it was not intended to be a modification of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958, also referred to in this report as "the New York Convention").⁴

5. The Commission entrusted the work to one of its three working groups, which it named Working Group on Arbitration, and decided that the priority items for the Working Group should be requirement of written form for the arbitration agreement,⁵ enforceability of interim measures of protection,⁶ conciliation,⁷ and possible enforceability of an award that had been set aside in the State of origin.⁸

6. The Working Group on Arbitration (previously named Working Group on International Contract Practices) commenced its work at its thirty-second session in Vienna, from 20 to 31 March 2000 (for the report of that session, see A/CN.9/468). At that session, the Working Group considered the possible preparation of harmonized texts on the written form of arbitration agreements, interim measures of protection, and conciliation. In addition, the Working

Group exchanged preliminary views on other topics that might be taken up in the future (see A/CN.9/468, paras. 107-114).

7. The Commission, at its thirty-third session, in 2000, commended the work accomplished so far by the Working Group and heard various observations according to which work on the items on the agenda of the Working Group was timely and necessary in order to foster the legal certainty and predictability in the use of arbitration and conciliation in international trade. It noted that the Working Group had also identified a number of other topics, with various levels of priority, that had been suggested for possible future work (see A/CN.9/468, paras. 107-114). The Commission reaffirmed the mandate of the Working Group to decide on the time and manner of dealing with them (see A/55/17, para. 395). Several statements were made to the effect that, generally, the Working Group, in deciding the priorities of the future items on its agenda, should pay particular attention to what was feasible and practical and to issues where court decisions left the legal situation uncertain or unsatisfactory. Topics that were mentioned in the Commission as potentially worthy of consideration, in addition to those that the Working Group might identify as such, were the meaning and effect of the more-favourable-right provision of article VII of the 1958 New York Convention; raising claims in arbitral proceedings for the purpose of set-off and the jurisdiction of the arbitral tribunal with respect to such claims; freedom of parties to be represented in arbitral proceedings by persons of their choice; residual discretionary power to grant enforcement of an award notwithstanding the existence of a ground for refusal listed in article V of the 1958 New York Convention; and the power by the arbitral tribunal to award interest. It was noted with approval that, with respect to "on-line" arbitrations (i.e. arbitrations in which significant parts or even all of arbitral proceedings were conducted by using electronic means of communication), the Working Group on Arbitration would cooperate with the Working Group on Electronic Commerce. With respect to the possible enforceability of awards that had been set aside in the State of origin, a view was expressed that the issue was not expected to raise many problems and that the case law that gave rise to the issue should not be regarded as a trend (see A/55/17, para. 396).

8. At its thirty-third session (November/December 2000), the Working Group discussed a draft interpretative instrument in respect of the writing requirement in article II(2) of the New York Convention and the preparation of harmonized texts on: the written form for arbitration agreements; interim measures of protection; and conciliation (on the basis of documents prepared by the secretariat; see A/CN.9/WG.II/WP.110 and 111). The report of that session is contained in document A/CN.9/485.

9. With respect to the writing requirement, the Working Group considered a draft model legislative provision revising article 7 (2) of the Model Law (see A/CN.9/WG.II/WP.110, paras. 15-26) as well as a further draft prepared during the session (see A/CN.9/485, para. 52). The secretariat was requested to prepare draft texts, possibly with alternatives, for consideration at the thirty-fourth session, based on the discussion in the Working Group. As to the

²Official Records of the General Assembly, Fifty-third Session, Supplement No. 17 (A/53/17), para. 235.

³Ibid., Fifty-fourth Session, Supplement No. 17 (A/54/17), para. 337.

⁴Ibid., paras. 337-376 and 380.

⁵Ibid., paras. 344-350.

⁶Ibid., paras. 371-373.

⁷Ibid., paras. 340-343.

⁸Ibid., paras. 374 and 375.

preliminary draft of an interpretative instrument on article II(2) of the New York Convention (see A/CN.9/WG.II/WP.110, paras. 27-51 and A/CN.9/485, para. 61), the Working Group requested the secretariat to prepare a revised draft taking into account the discussion in the Working Group (see A/CN.9/485, paras. 60-77). With respect to interim measures of protection, the Working Group had before it two draft variants prepared by the secretariat (see A/CN.9/WG.II/WP.110, paras. 55 and 57; and A/CN.9/485, para. 79). Due to time constraints, the Working Group postponed to its thirty-fourth session, paragraph (iv) in variant 1 and possible additional provisions (for discussion, see A/CN.9/485, paras. 78 to 103). With respect to conciliation, the Working Group considered articles 1, 2, 5, 7, 8, 9 and 10 of the draft model legislative provisions (see A/CN.9/WG.II/WP.110, paras. 81-111). It requested the secretariat to prepare revised drafts of these articles, taking account of the views expressed in the Working Group (see A/CN.9/485, paras. 107-159). The remainder of the draft articles (3, 4, 6, 11 and 12) were not considered due to lack of time.

10. The Working Group also considered likely items for future work as being: court-ordered interim measures of protection in support of arbitration; scope of interim measures that may be ordered by arbitral tribunals; and validity of agreements to arbitrate. The Working Group supported future work being undertaken on all these topics and requested the secretariat to prepare, for a future session of the Working Group, preliminary studies and proposals (see A/CN.9/485, paras. 104-106).

11. The Working Group on Arbitration, at its thirty-fourth session (New York, 21 May-1 June 2001) was composed of all States members of the Commission. The session was attended by the following States members of the Working Group: Algeria, Australia, Austria, Brazil, Bulgaria, Burkina Faso, Cameroon, China, Colombia, Egypt, Fiji, Finland, France, Germany, Honduras, India, Iran (Islamic Republic of), Italy, Japan, Kenya, Lithuania, Mexico, Nigeria, Russian Federation, Singapore, Spain, Thailand, United Kingdom of Great Britain and Northern Ireland, and United States of America.

12. The session was attended by observers from the following States: Belarus, Bosnia and Herzegovina, Canada, Croatia, Cyprus, Czech Republic, Ecuador, Ethiopia, Gabon, Guatemala, Indonesia, Israel, Kuwait, Lesotho, Malta, Monaco, Peru, Philippines, Republic of Korea, Saudi Arabia, Slovenia, Sweden, Switzerland, the Former Yugoslav Republic of Macedonia and Venezuela.

13. The session was attended by observers from the following international organizations: NAFTA Article 2022 Advisory Committee, Permanent Court of Arbitration, International Institute for the Unification of Private Law (Unidroit), League of Arab States, Cairo Regional Centre for International Commercial Arbitration, Centre d'arbitrage et d'expertise du Rwanda, Comité Maritime International, European Law Students' Association (ELSA), International Chamber of Commerce (ICC), London Court of International Arbitration (LCIA), and The Chartered Institute of Arbitrators.

14. The Working Group elected the following officers:
Chairman: Mr. José María ABASCAL ZAMORA (Mexico)

Rapporteur: Mr. Hossein GHAZIZADEH (Islamic Republic of Iran)

15. The Working Group had before it the following documents:

(a) Provisional agenda (A/CN.9/WG.II/WP.112);

(b) Report of the Secretary-General entitled "Settlement of commercial disputes: Preparation of uniform provisions on: written form for arbitration agreement, interim measures of protection, and conciliation" (A/CN.9/WG.II/WP.113 and Add.1).

16. The Working Group adopted the following agenda:

1. Election of officers.
2. Adoption of the agenda.
3. Preparation of harmonized texts on: written form for arbitration agreements; interim measures of protection; and conciliation.
4. Other business.
5. Adoption of the report.

I. DELIBERATIONS AND DECISIONS

17. The Working Group discussed agenda item 3 on the basis of the documents prepared by the secretariat (A/CN.9/WG.II/WP.113 and Add.1). The deliberations and conclusions of the Working Group with respect to that item are reflected in chapters III to V below. The secretariat was requested to prepare revised draft provisions, based on the discussion in the Working Group, for continuation of the discussion at a later stage.

18. With regard to requirement of written form for the arbitration agreement, the Working Group considered the draft model legislative provision revising article 7 (2) of the Model Law (see A/CN.9/WG.II/WP.113, paras. 13 and 14). The secretariat was requested to prepare a revised draft provision, based on the discussion in the Working Group, for consideration at a future session. The Working Group also discussed a draft interpretative instrument regarding article II (2) of the New York Convention (*ibid.*, para. 16) and requested the secretariat to prepare a revised draft of the instrument, taking into account the discussion in the Working Group, for consideration at a future session.

19. With regard to the issues of interim measures of protection, the Working Group considered a draft text for a revision of article 17 of the Model Law and the text of paragraph (1) (a) (i) of a draft new article prepared by the secretariat for addition to the Model Law (*ibid.*, para. 18). The secretariat was requested to prepare revised draft provisions, based on the discussion in the Working Group, for consideration at a future session. Due to lack of time, the remainder of the additional article was not considered by the Working Group.

20. With regard to conciliation, the Working Group considered articles 1 to 16 of the draft model legislative provisions (A/CN.9/WG.II/WP.113/Add.1). The secretariat was requested to prepare revised drafts of those articles, based on the discussion in the Working Group, for consideration at its next session.

21. It was noted that, subject to a decision to be made by the Commission at its forthcoming session, the thirty-fifth session of the Working Group was scheduled to be held from 19 to 30 November 2001 at Vienna.

II. REQUIREMENT OF WRITTEN FORM FOR THE ARBITRATION AGREEMENT

A. Model legislative provision on written form for the arbitration agreement

22. The Working Group based its deliberations on the draft text prepared by the secretariat pursuant to the request made by the Working Group at its thirty-third session (A/CN.9/485, para. 59). That text read as follows (A/CN.9/WG.II/WP.113, para. 14):

“Article 7. Definition and form of arbitration agreement

“[Unchanged paragraph (1) of the UNCITRAL Model Law on International Commercial Arbitration:] (1) ‘Arbitration agreement’ is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

“(2) The arbitration agreement shall be in writing. [For the avoidance of doubt], ‘writing’ includes any form that provides a record of the agreement or is otherwise accessible so as to be usable for subsequent reference, including electronic, optical or other data messages.

“(3) [For the avoidance of doubt, the writing requirement in paragraph (2) is met] [The arbitration agreement is in writing]

if the

[arbitration clause or arbitration terms and conditions or any arbitration rules referred to by the arbitration agreement are] [the arbitration clause, whether signed or not, is]

in writing,

[Variant 1:] notwithstanding that the contract or the separate arbitration agreement has been concluded [other than in writing] [orally, by conduct or by other means not in writing] [Variant 2:] irrespective of the form in which the parties have agreed to submit to arbitration.”

Paragraph (1)

23. There was general agreement as to the form and substance of paragraph (1), which merely replicated article 7(1) of the Model Law.

Paragraph (2)

24. While there was general agreement as to the substance of the provision, the discussion focused on the appropriateness of maintaining the words between square brackets (“for the avoidance of doubt”) and the final words (“including electronic, optical or other data messages”).

“[for the avoidance of doubt]”

25. The view was expressed that those words were essential to make it clear that the substantial rule embodied in paragraph (2) was not intended to alter any liberal interpretation that might be given readily, through case law or otherwise, to the notion of “writing” under either the Model Law or the New York Convention. It was stated that clarification as to the preservation of existing interpretations of the notion of “writing” was particularly important for those countries that would not adopt the revised version of article 7 of the Model Law, or during the transitional period before the enactment of that revised provision. In response, it was pointed out that a formulation along the lines of “for the avoidance of doubt” was familiar to some legal systems but foreign to legal drafting traditions in many countries. In those countries, such wording might create difficult problems of interpretation as to the nature of the doubt to be avoided. A suggestion was made that the words between square brackets might be replaced by wording along the lines of “without limiting the generality of this requirement”. It was widely felt, however, that such wording would equally be faced with the above-mentioned objection.

26. The prevailing view was that appropriate explanations should be given in the guide to enactment as to the intent that lay behind paragraph (2) not to conflict with existing interpretations given to the notion of “writing”. It was also felt that the inclusion of such explanatory wording might be reconsidered in the context of paragraph (3) and of the interpretative instrument regarding article II (2) of the New York Convention. Subject to those considerations, the Working Group decided that the words “[for the avoidance of doubt]” should be deleted from paragraph (2).

“including electronic, optical or other data message”

27. Various concerns were expressed regarding the reference to “electronic, optical or other data messages”. One concern was that any such list introduced by the word “including” might raise difficult issues of interpretation as to whether the listing was intended to be exhaustive or merely descriptive and open-ended. Should it be read as an exhaustive list, it might unduly limit the generality of the rule embodied in paragraph (2). Another concern was that, while the reference to “electronic, optical or other data messages” was clearly inspired by article 2 (a) of the UNCITRAL Model Law on Electronic Commerce, it

deviated slightly from the formulation of that provision and might thus create difficulties of interpretation. Yet another concern was that notions such as “electronic” and “optical” means of communication might run the risk of becoming rapidly obsolete, thus raising the same difficulties as references to “telegram and telex” in existing international instruments, or to “letters or telegrams” in article II (2) of the New York Convention. In response to that concern, it was explained that the high level of generality of notions such as “electronic or optical messages” made it difficult to foresee rapid technological development that would make such notions obsolete.

28. With a view to alleviating some of the other concerns that had been expressed, while maintaining explicit reference to electronic commerce techniques, it was suggested that wording such as “inter alia”, “including but not limited to” or “such as, for example” should be added to make it abundantly clear that the list was merely illustrative and served an educational purpose. It was also suggested that any such change should take into account the use of the word “includes” earlier in paragraph (2) which was likewise intended to be non-exclusive. After discussion, the Working Group adopted those suggestions and requested the secretariat to prepare appropriate wording.

Paragraph (3)

29. The Working Group recalled that paragraph (3) was based on the widely prevailing view expressed at the thirty-third session of the Working Group that the model legislative provision should recognize the existence of various contract practices by which oral arbitration agreements were concluded with reference to written terms of an agreement to arbitrate, and that in those cases the parties had a legitimate expectation of a binding agreement to arbitrate (see A/CN.9/485, para. 40).

30. In reviewing the draft, there was general agreement expressed in the Working Group that an oral reference to a written arbitration clause expressing an agreement to arbitrate should be regarded as meeting the written form requirement. Differing views, however, were expressed regarding whether a mere reference to arbitration terms and conditions or to a standard set of arbitration rules would satisfy the written form requirement. One view expressed was that this should not be taken as satisfying the form requirement. The reason for this view was that the written text referred to was not the actual agreement to arbitrate but rather a set of procedural rules for carrying out the arbitration. According to that view, the procedures for carrying out the arbitration should be distinguished from the parties’ agreement to arbitrate. It was also considered that that solution would have the effect of discriminating against arbitrations where the parties had agreed to arbitrate but had not agreed on a set of arbitration rules or on specific terms and conditions for the arbitration. For that reason, it was suggested that the writing requirement was only met if the arbitration clause, whether signed or not, was in writing. The prevailing view, however, was that, in an oral agreement to arbitrate, a reference to arbitration terms and conditions or to a standard set of arbitration rules should be taken as satisfying the written form requirement because it

expressed in a sufficiently specific way how the arbitration was to be conducted. It was also considered that that approach would not discriminate against cases where the parties had agreed to arbitrate, without agreeing on a set of arbitration rules, if the law applicable to the arbitration procedure (such as a law based on the UNCITRAL Model Law on International Commercial Arbitration) contained sufficiently specific procedures for carrying out the arbitration. The contrary view was that it was not sufficient if arbitration terms and conditions were in writing, but it was preferable to require the agreement to arbitrate to be in writing. In accordance with that view, it was suggested to adopt the words “[the arbitration clause, whether signed or not]”. It was stated in reply that, in the case of contracts, to the extent that they were required to be in writing, the interpretation of when that requirement was met was interpreted in such a way that an oral agreement that standard written agreements applied was taken as meeting the form requirement. However, the widely prevailing view was that it was sufficient if the arbitration terms and conditions were in writing, irrespective of whether the arbitration clause was in writing. Consequently, the words “[arbitration clause or arbitration terms and conditions or any arbitration rules referred to by the arbitration agreement are]” were to be preferred to “[the arbitration clause, whether signed or not, is]”.

31. Noting the prevailing view that oral agreements to arbitrate that could be linked to written terms and conditions for arbitration (even if those terms and conditions did not actually express the agreement to arbitrate) should be regarded as satisfying the form requirement, it was pointed out that it would be more appropriate to expressly state that oral agreements satisfied the form requirement or that an agreement to arbitrate might be concluded under form requirements that might, or might not, rely on the use of a written document. In opposition to that opinion, it was stated that it was still preferable to declare oral agreements referring to written terms and conditions for arbitration as written agreements because article II of the New York Convention required the arbitration agreement to be in writing and because it was necessary to reflect that the wording was included to confirm existing interpretations of the writing requirement under that article rather than to create a new legal regime. For that very reason, it was also necessary to retain the phrase “for the avoidance of doubt”; that phrase was necessary in order to clarify that liberal interpretations of the written form requirement were within the meaning of the notion of “writing” as expressed in article II of the New York Convention. On that basis, the phrase “[For the avoidance of doubt, the writing requirement in paragraph (2) is met]” was to be preferred to “[The arbitration agreement is in writing]”.

32. Views were expressed that paragraph (3) created a legal fiction by declaring what was effectively an oral agreement as meeting the writing requirement. It was pointed out that the effect of such a provision was far-reaching and its consequences needed to be carefully considered. It was noted that creating such a fiction was an unorthodox drafting technique which might make it more difficult to convince legislative bodies that they should enact the new provision. It was pointed out that some courts might require that the existence of an oral agreement

to arbitrate had to be proved, which might lead to increased uncertainty. With a view to alleviating some of the concerns that might stem from the creation of the above-mentioned legal fiction, it was widely felt that the wording of paragraph (3) should be as descriptive as possible. Accordingly, the words set out in variant 1 were preferred (namely “notwithstanding that the contract or the separate arbitration agreement has been concluded orally, by conduct or by other means not in writing”). It was considered that the use of these words would counter the criticism that the draft was not sufficiently transparent. The Working Group, after discussion, adopted the text of variant 1.

Additional paragraphs for inclusion in a revision of article 7

33. Having completed its deliberations regarding paragraphs (1) to (3), the Working Group discussed whether paragraphs (4) to (7) of the “long version” considered at the end of its thirty-third session (reproduced in A/CN.9/485, para. 52) should be added to the revised text of article 7. The text of those paragraphs read as follows:

“(4) Furthermore, an arbitration agreement is in writing if it is contained in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.

“(5) The reference in a contract to an arbitration clause not contained in the contract constitutes an arbitration agreement provided that the reference is such as to make that clause part of the contract.

“(6) For purposes of article 35, the written arbitration terms and conditions, together with any writing incorporating by reference or containing those terms and conditions, constitute the arbitration agreement.

“(7) Examples of circumstances that meet the requirement that an arbitration agreement be in writing as set forth in this article include, but are not limited to, the following illustrations: *[the secretariat was asked to prepare a text based on the Working Group’s discussions].*”

Paragraph (4)

34. The view was expressed that the substance of paragraph (4) did not, in fact, deal with the question of whether the arbitration agreement met the writing requirement under paragraph (1), but with the existence and validity of an arbitration agreement formed by way of a statement of claim and defence in which the existence of an agreement was alleged by one party and not denied by the other. Under that view, the substance of paragraph (4) should be placed elsewhere in the Model Law.

35. Doubts were expressed as to the usefulness of the rule contained in paragraph (4), in view of the infrequent occurrence of situations where questions about the existence of the arbitration agreement were not raised prior to the exchange of statements of claim and defence.

36. It was widely felt, however, that the substance of paragraph (4) was useful, that it was contained in the

current text of article 7(2) of the Model Law, that its deletion might result in uncertainty, and that it should also appear in the revised text. After discussion, the Working Group adopted the text of paragraph (4) unchanged.

Paragraph (5)

37. It was widely felt that the substance of paragraph (5) was useful, particularly in the context of electronic commerce, which relied heavily on the notion of incorporation by reference. It was recalled that the origin of paragraph (5) was in the current text of article 7(2) of the Model Law, and that it should also appear in the revised text. After discussion, the Working Group adopted the text of paragraph (5). As a matter of drafting, the secretariat was requested to ensure full consistency between the text of paragraphs (3) and (5).

Paragraph (6)

38. Consistent with the views expressed in the context of the discussion regarding paragraph (3), concerns were raised as to the notion of “arbitration terms and conditions”. In view of the decision made by the Working Group as to paragraph (3), it was agreed, however, that the text of paragraph (6), should it be retained, should be consistent with that of paragraph (3).

39. The discussion focused on whether the substance of paragraph (6) should appear in article 7 or whether it should be included in a possible revision of article 35 of the Model Law. The view was expressed that the requirement contained in article 35 (2) that “the original arbitration agreement referred to in article 7 or a duly certified copy thereof” should be supplied by the party applying for the enforcement of an award was inconsistent with the definition of “writing” considered by the Working Group. It was recalled that the Working Group, by adopting a definition of “writing” that encompassed an oral agreement, had made the notions of “original” and “copy” of that agreement irrelevant in practice. Examples were given of countries where the arbitration law had done away with that requirement of article 35.

40. While the proposal to amend article 35 was met with considerable interest and received support from a number of delegations, the prevailing view was that it would be premature for the Working Group to make a decision that the substance of paragraph 6 should be included in article 7, or rather should be included in an amendment to article 35. The secretariat was requested to study the implications of the proposed revision of article 35 for continuation of the discussion by the Working Group at a future session. Pending that discussion, it was decided that the text of paragraph (6) should be placed within square brackets.

Paragraph (7)

41. The view was expressed that paragraph (7) played a useful role and should be retained for educational purposes. The prevailing view, however, was that providing in the

text of the Model Law examples of circumstances⁹ where the writing requirement was met would be unnecessarily cumbersome and potentially dangerous, as it might create difficulties in interpreting whether the list of examples should be treated as exhaustive or illustrative. After discussion, the Working Group decided that paragraph (7) should not appear in the text of article 7 but that its contents might be taken into consideration when preparing the guide to enactment or any explanatory material that might accompany the model legislative provision.

B. Interpretative instrument regarding article II(2) of the New York Convention

42. The Working Group proceeded to consider a preliminary draft interpretative instrument relating to article II(2) of the New York Convention, as contained in paragraph 61 of document A/CN.9/WG.II/WP.113. The draft text discussed by the Working Group read as follows:

“[Declaration] regarding interpretation of article II(2) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, 10 June 1958,

“The United Nations Commission on International Trade Law,

“[1] *Recalling* resolution 2205 (XXI) of the General Assembly of 17 December 1966, which established the United Nations Commission on International Trade Law with the object of promoting the progressive harmonization and unification of the law of international trade,

“[2] *Conscious* of the fact that the Commission includes the principal economic and legal systems of the world, and developed and developing countries,

⁹The examples may be the cases in draft article 7 (3) reproduced in document A/CN.9/485, para. 23, as rewritten pursuant to the discussion in the Working Group (*ibid.*, paras. 24-44):

An arbitration agreement meets the requirement in paragraph (2) if [*ibid.*, paras. 28 and 29]:

(a) it is contained in a document agreed upon by the parties whether or not it is signed by the parties; [*ibid.*, para. 30];

(b) it is made by an exchange of written communications; [*ibid.*, para. 30];

(c) it is contained in one party’s written offer or counter-offer, provided that [to the extent permitted by law of usage] the contract has been concluded by acceptance, or an act constituting acceptance such as performance or a failure to object, by the other party; [*ibid.*, paras. 31-34];

(d) it is contained in a [contract confirmation] [communication confirming the terms of the contract], provided that, to the extent permitted by law or usage, the terms of the confirmation have been accepted by the other party, either [expressly] [by express reference to the confirmation or its terms] or by a failure to object; [*ibid.*, paras. 35 and 36];

(e) it is contained in a written communication by a third party to both parties and the content of the communication is considered to be part of the contract; [*ibid.*, para. 37];

(f) it is contained in an exchange of statements [of claim and defence] on the substance of the dispute] in which the existence of an agreement is alleged by one party and not denied by the other; [*ibid.*, para. 38];

(g) a contract concluded [in any form] [orally] refers to an [arbitration clause] [or arbitration terms conditions] provided that the reference is such as to make [that clause] [those terms and conditions] part of the contract [*ibid.*, paras. 39-41].

“[3] *Recalling* resolution 55/151 of the General Assembly of 12 December 2000 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,

“[4] *Conscious* of its mandate to further the progressive harmonization and unification of the law of international trade by, inter alia, promoting ways and means of ensuring a uniform interpretation and application of international conventions and uniform laws in the field of the law of international trade,

“[5] *Convinced* that the wide adoption of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards has been an essential achievement in the promotion of the rule of law, particularly in the field of international trade,

“[6] *Noting* that the Convention was drafted in the light of business practices in international trade and communication technologies in use at the time, [and that those technologies in international commerce have developed along with the development of electronic commerce],

“[7] *Noting also* that the use and acceptance of international commercial arbitration in international trade has been increasing and that, along with that development, expectations of participants in international trade as regards the form in which an arbitration agreement may be made have changed,

“[8] *Noting further* article II(1) of the Convention, according to which ‘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’, and article II(2) of the Convention, according to which ‘The term “agreement in writing” shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams’,

“[9] *Concerned about* differing interpretations of article II(2) of the Convention,

“[10] *Recalling* that the Conference of Plenipotentiaries which prepared and opened the Convention for signature adopted a resolution, which states, inter alia, that the Conference ‘considers that greater uniformity of national laws on arbitration would further the effectiveness of arbitration in the settlement of private law disputes ...’,

“[11] *Considering* that the purpose of the Convention, as expressed in the Final Act of the United Nations Conference on International Commercial Arbitration, of increasing the effectiveness of arbitration in the settlement of private law disputes requires that the interpretation of the Convention [reflect the needs of international commercial arbitration] [reflect changes in communication technologies and business practices],

“[12] *Being of the opinion* that in interpreting the Convention 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,

“[13] *Taking into account* that subsequent international legal instruments such as the UNCITRAL Model Law on International Commercial Arbitration and the UNCITRAL Model Law on Electronic Commerce reflect the judgement of the Commission and the international community that legislation governing trade and arbitration should reflect evolving methods of communication and business practices,

“[14] *Convinced* that uniformity in the interpretation of the term ‘agreement in writing’ is necessary for enhancing predictability in international commercial transactions,

“[15] *Recommends* to Governments that the definition of ‘agreement in writing’ contained in article II(2) of the Convention should be interpreted to include [...]”.

General comments

43. The Working Group focused initially on the feasibility of an interpretative instrument as compared to an amendment of the New York Convention. Under one view, it was not appropriate to use such an instrument to declare that article II(2) of the Convention should be interpreted as having the meaning of article 7 of the Model Law in the wording being prepared by the Working Group. It was stated that the draft legislative provisions being considered by the Working Group differed significantly from article II(2) in that, for example, under the draft legislative provision an oral agreement that referred to written arbitration terms and conditions would be regarded as valid, whereas under article II(2) of the New York Convention, as interpreted in some legal systems, it would not be so regarded. Support was expressed for the position that the only appropriate way to achieve the goal of uniformity was to amend the Convention itself. The prevailing view, however, was that the Working Group should reconfirm its earlier decision that the New York Convention should not be amended (see A/CN.9/485, para. 60). It was stated that it was appropriate to use a declaratory instrument to recommend a uniform interpretation of article II(2) of the New York Convention in view of the fact that in some States a liberal interpretation of article II(2) was accepted whereas in other States a more narrow interpretation was still prevalent. The purpose of the declaration was to extend to all States the liberal interpretation, and the interpretative declaration was regarded as the most appropriate vehicle for achieving that purpose without amending the Convention.

Title of declaration

44. The substance of the title was found to be acceptable. The secretariat was requested to review its drafting to avoid the unintended meaning that the date referred to the declaration rather than to the Convention. It was agreed that the square brackets should be removed from the word “declaration”.

Recital 1

45. The Working Group approved the substance of recital 1.

Recital 2

46. The Working Group approved the substance of recital 2.

Recital 3

47. The Working Group adopted recital 3, subject to indicating that the General Assembly had repeatedly confirmed the mandate of the Commission as the core legal body within the United Nations system in the field of international trade law.

Recital 4

48. The Working Group approved the substance of recital 4.

Recital 5

49. The Working Group adopted recital 5, subject to replacing the word “essential” with the word “significant”.

Recital 6

50. The view was expressed that recital 6 should not refer to changes in business practices because it was not certain that those practices had in fact changed after the conclusion of the New York Convention. A further view was that the references to changes in practices and technologies in recital 6 might be understood as calling for a change to article II(2), which the Working Group had already decided against. On that basis, the Working Group decided to delete recital 6, noting, however, that developments in communication technologies should still be referred to elsewhere in the preambular statements.

Recital 7

51. It was considered that this recital should be deleted on the basis that it could be understood as calling for a change to article II(2). It was recalled that the purpose of the declaration was not to change the Convention but to provide a uniform interpretation of its article II(2). In opposition, recalling the view already expressed that, on the basis of a plain reading, article II(2) of the Convention could not be given the meaning of the draft legislative provision being considered by the Working Group (see above, para. 43), it was stated that the paragraph was necessary to explain the action being contemplated by the Working Group.

52. After discussion, the Working Group reaffirmed the view taken earlier that the purpose of the draft declaration was not to change article II(2) of the New York Convention

but rather to promote its uniform interpretation; because recital 7 was not necessary to support that position it was decided that it should be deleted.

Recitals 8 and 9

53. While it was noted that recital 8 merely cited article II, paragraphs (1) and (2), it was considered that the citation was not helpful because it did not show the slight differences that existed among the different language versions, which were partly the reason for the differences in interpretations of the phrase “agreement in writing”. It was decided, instead, that a recital should state that differing interpretations in part resulted from differences of expression among the authentic texts of the Convention. It was noted that, for example, the English version of article II(2) (by using the term “include”) indicated that the provision did not exhaustively define the requirements of an arbitration agreement but rather allowed other more liberal ways of meeting the form requirement. By contrast, some other language versions used expressions that indicated that the provision exhaustively enumerated the requirements necessary for a valid arbitration agreement. Moreover, some courts had adopted a construction of article II(2) of the New York Convention according to which the expression “an arbitral clause in a contract” should be read independently from the expression “arbitration agreements, signed by the parties or contained in an exchange of letters or telegrams”. By separating the provision into those two limbs, the courts were able to give the requirements of article II(2) a broad and liberal meaning by recognizing as valid arbitration clauses contained in contracts that were neither signed by both parties nor contained in an exchange of letters or telegrams. Other courts however had taken the position that the requirement “signed by the parties or contained in an exchange of letters or telegrams” applied to both an arbitration clause in a contract and a separate arbitration agreement.

Recital 10

54. The Working Group approved the substance of recital 10.

Recital 11

55. It was decided that recital 11 should be deleted because it implied that the instrument sought to change the interpretation of article II(2).

Recital 12

56. It was suggested that the provision should be deleted because, as had already been argued, the declaration was said to be proposing a change to article II(2) rather than simply promoting its uniform interpretation (see above, para. 43), and that therefore the recital should not be termed as promoting uniformity of interpretation. However, the Working Group, noting its decision that the purpose of the instrument was to promote uniformity rather than to change the Convention, decided to retain the substance of recital 12.

57. It was decided, however, that the words “and the observance of good faith” should be deleted because those words were not relevant to the purpose of the declaration.

Recital 13

58. The substance of recital 13 was retained subject to the deletion of the words “reflect the judgement of the Commission and the international community that legislation governing trade and arbitration should reflect evolving methods of communication and business practices”.

Recital 14

59. The Working Group agreed to retain recital 14, subject to replacing the word “predictability” with “certainty”.

Operative provision (para. 15)

60. There was general agreement to delete the words “to Governments” because judges and arbitrators, and not necessarily national Governments, would be called upon to take the declaration into account. One suggestion was to replace the word “Recommends” with the word “Declares”, which would align the operative paragraph with the title of the declaration. That suggestion received support but was opposed by some on the basis that it was considered to be too prescriptive and might be understood as an attempt to impact directly upon the national enactments of the Convention or state categorically what its interpretation should be. In that context, a doubt was expressed as to whether UNCITRAL, as opposed to the Conference of the States Parties to the New York Convention, could regard itself as entitled to provide an authoritative interpretation of that instrument. It was stated in response that the exercise was in accordance with the law of treaties and consistent with the general mandate of UNCITRAL as the core legal body within the United Nations system in the field of international trade law. The point was not discussed further at the current session.

61. As to the text of the operative provision, a view shared by a number of delegations was that it was necessary to avoid any implication that the declaration was seeking to impose a new interpretation of the New York Convention or that it was declaring what the meaning of the provision as incorporated into national laws was. A contrary view was that, to the extent that the declaration was intended to promote an interpretation of article II(2) of the New York Convention in line with the revised draft article 7 of the Model Law, it would be regarded in a number of countries as bringing forward an innovative or revolutionary interpretation of the form requirement under article II(2) of the New York Convention. While no consensus was achieved on that point, there was general agreement within the Working Group that the effect of the declaration would not be binding on the Governments, national judiciaries or arbitrators to whom it was addressed. It was acknowledged that the text merely reflected a considered conviction or view of the Commission, which was suggested for consideration by persons engaged in interpreting article II(2), in particular judges and arbitrators.

62. The Working Group did not make a final decision as to the appropriate words to be used in the operative provision of the declaration. The secretariat was requested to prepare wording, with possible variants taking into account the various views expressed, for continuation of the discussion at a future session.

63. Following discussion of the text and informal discussions, the Working Group adopted the following text of the draft declaration:

“Declaration regarding interpretation of article II(2) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, 10 June 1958

“The United Nations Commission on International Trade Law,

“[1] Recalling resolution 2205 (XXI) of the General Assembly of 17 December 1966, which established the United Nations Commission on International Trade Law with the object of promoting the progressive harmonization and unification of the law of international trade,

“[2] Conscious of the fact that the Commission comprises the principal economic and legal systems of the world, and developed and developing countries,

“[3] Recalling successive resolutions of the General Assembly 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,

“[4] Conscious of its mandate to further the progressive harmonization and unification of the law of international trade by, inter alia, promoting ways and means of ensuring a uniform interpretation and application of international conventions and uniform laws in the field of the law of international trade,

“[5] Convinced that the wide adoption of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards has been a significant achievement in the promotion of the rule of law, particularly in the field of international trade,

“[6] Recalling that the Conference of Plenipotentiaries which prepared and opened the Convention for signature adopted a resolution, which states, inter alia, that the Conference ‘considers that greater uniformity of national laws on arbitration would further the effectiveness of arbitration in the settlement of private law disputes ...’,

“[7] Concerned about differing interpretations of article II(2) of the Convention that result in part from differences of expression as between the five equally authentic texts of the Convention,

“[8] Desirous of promoting uniform interpretation of the Convention in the light of the development of new communication technologies and of electronic commerce,

“[9] Convinced that uniformity in the interpretation of the term ‘agreement in writing’ is necessary for enhancing certainty in international commercial transactions,

“[10] Considering that in interpreting the Convention regard is to be had to its international origin and to the need to promote uniformity in its application,

“[11] Taking into account subsequent international legal instruments, such as the UNCITRAL Model Law on International Commercial Arbitration and the UNCITRAL Model Law on Electronic Commerce,

“[12] [...] [the operative paragraph to be prepared by the secretariat as indicated above in paragraph 62]”.

III. MODEL LEGISLATIVE PROVISIONS ON THE ENFORCEMENT OF INTERIM MEASURES OF PROTECTION

64. The Working Group proceeded to consider draft article 17 of the Model Law, which contained a definition of interim measures of protection and additional provisions on ex parte interim measures. The text considered by the Working Group was as follows:

“Draft article 17

“Power of arbitral tribunal to order interim measures

“[Unchanged text of article 17 of the UNCITRAL Model Law on International Commercial Arbitration:]

(1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject matter of the dispute. The arbitral tribunal may require any party to provide appropriate security in connection with such measure.

“(2) An interim measure of protection is any temporary measure [, whether it is established in the form of an arbitral award or in another form,] ordered by the arbitral tribunal pending the issuance of the award by which the dispute is finally decided. [The arbitral tribunal may, in order to ensure that any such measure is effective, grant the measure without notice to the party against whom the measure is directed for a period not to exceed [30] days; such a measure may be extended after that party has been given notice and an opportunity to respond.]”

Paragraph (1)

65. According to one view, paragraph (1) was satisfactory in that it allowed the arbitral tribunal a broad scope for the issuance of different types of interim measures of protection as might be considered necessary by the arbitral tribunal. In the light of that view, it was argued that the text should be left unchanged and that perhaps the guide to enactment should explain the scope of the provision. It was noted in that connection that the Working Group had decided to prepare a non-legislative empirically based text that would provide guidance to arbitral tribunals in a situation when a party requested that an interim measure of protection be issued (see A/CN.9/WG.II/WP.111, paras. 30-32, and A/CN.9/485, paras. 104-106). Another

view, however, was that the expression “in respect of the subject matter of the dispute” narrowed the scope of the interim measures that the arbitral tribunal might issue. Since the paragraph established the power of the arbitral tribunal to issue interim measures, it was necessary to consider how that power should be most appropriately expressed in the paragraph. If necessary, the wording should be amended to clarify the scope of that power.

66. In the context of the discussion relating to the power to issue interim measures of protection, it was suggested to draft language that would address the conditions or the criteria for the issuance of those measures. It was also suggested that the draft provision should set out in a generic way the types of interim measures of protection that were intended to be covered. Those additions (which would enhance the certainty as to the power of the arbitral tribunal to issue interim measures of protection) were thought to be desirable because they would also enhance the acceptability of the provision establishing an obligation on courts to enforce those measures. The opposing view was that those additions were unnecessary and even counter-productive since paragraph (1) allowed a broad scope for the issuance of interim measures and providing additional detail would undesirably limit the discretion of the arbitral tribunal, invite argument and hamper the development of arbitration practice. If any explanatory detail was considered necessary, a guide to enactment was the proper place for such detail.

67. Another view taken was that the appropriate place for including the criteria on which, and the circumstances required, to allow an order for interim measures was within the model legislative provision itself. After discussion, it was agreed that the secretariat should seek to establish the terms, conditions and circumstances in which an arbitral tribunal could or should issue interim measures of protection. This could be drafted as a new paragraph (3), which could be considered at future sessions of the Working Group. It was pointed out that this list should be illustrative rather than exhaustive. However, it was noted by several delegations that even a non-exhaustive list ran the risk of being read in such a way as to be limiting and that it also could impede the autonomy of arbitral tribunals in determining the type of interim measures to order. It was suggested that, to avoid this risk, the draft should avoid the use of any detailed list and instead aim for listing general categories following the approach taken in other international instruments, such as the Conventions on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters (Brussels, 1968, and Lugano, 1988). The point was made that the model legislative provisions should include a provision requiring that the party seeking the interim measure provide appropriate security for enforcement of the measure.

68. After discussion, the Working Group did not reach a firm conclusion and requested the secretariat to prepare alternative texts for consideration at a future session of the Working Group. Any drafting to be prepared should take care not to interfere with the autonomy of the arbitral tribunal and also to leave broad scope for the autonomy of the parties. It was stressed that the requirement for appropriate security to be given by the party seeking interim measures

was crucial for the acceptability of the provision. The secretariat was requested to review national enactments of article 17 that might be helpful in future considerations of the provision.

Paragraph (2)

69. In respect of the text allowing an arbitral tribunal to make a temporary interim measure of protection on an ex parte basis (i.e. without notice to the party against whom the measure was directed), broad support was expressed as a matter of principle. While the element of surprise inherent in ex parte measures of protection was described as being more in line with the nature of court proceedings than with the philosophy and the practice of arbitration, it was pointed out that the words “unless otherwise agreed by the parties” in paragraph (1) took care of the situation where the parties would decide to rule out the possibility that such provisional measures would be granted. Subject to such a determination by the parties, the aim of the model legislative provisions should be to allow as much parity as possible between the powers of the arbitral tribunal and those of the court that might be called upon to rule on the same dispute.

70. However, serious concerns were raised as to whether it was appropriate to include a provision allowing ex parte measures at all in the model legislative provisions. These concerns focused on the fact that such a measure had far-reaching consequences for the party against whom it was made and yet the order could be made quickly, without a review of the merits of the case. In addition, it was considered that ex parte orders were completely novel and thus untested, and presented real dangers for commercial users and had the potential to impact negatively on third parties. Support was expressed in favour of eliminating any reference to ex parte measures of protection in the model legislative provision. It was pointed out that the situation of a court of justice was different from that of an arbitral tribunal as far as enforcement of interim measures abroad was concerned. While the application of the model legislative provisions under consideration (or even of the New York Convention) might result in an obligation to enforce foreign measures of protection awarded by the arbitral tribunal, that obligation did not exist to the same extent in respect of interim measures ordered by a foreign court. The Working Group was urged to exercise extreme caution in extending the enforceability of such measures.

71. After discussion, it was generally felt that the acceptability of an express recognition of ex parte measures of protection would largely depend on the safeguards that might be introduced with respect to both the granting and the enforcement of such measures in article 17 and in the proposed new article.

72. A strong view was expressed that, given the ex parte nature of the order and the potentially serious negative impact on the party against whom such a measure was taken, it was important to include certain safeguards in the provision. Such safeguards might include the requirement that the party seeking such a measure should provide appropriate financial security to avoid frivolous claims and

that such an order should only be made in exceptional or urgent circumstances. It was suggested, in addition, that the party seeking such an order should be obliged to provide a full and frank disclosure of all relevant information, including information that might be taken as an argument against the issuance of the interim measure. A drafting suggestion was made to replace the words “The arbitral tribunal may, in order to ensure that any such measure is effective, grant” by such words as “The arbitral tribunal may, where it is necessary to ensure that any such measure is effective, grant” in order to better reflect that ex parte measures were the exception rather than the rule. There was some discussion as to whether the 30-day period for the application of interim measures was appropriate or whether the time period should be left to national legislatures.

73. Further suggestions were made as to how the issue of the enforcement of ex parte measures of protection should be dealt with. One suggestion was that the matter should be dealt with in paragraph (4) of the suggested new article, which should be redrafted along the following lines:

“(4) Paragraph (1)(a)(iii) does not apply to an interim measure of protection that was ordered without notice to the party against whom the measure is invoked, provided that such interim measure is confirmed by the arbitral tribunal after the other party has been given notice of the making of the order and an opportunity to contest the continuation of the order.”

74. Another suggestion was that a provision be prepared based on the following reasoning:

“In cases in which an arbitral tribunal grants a temporary protective measure ex parte, the party granted the measure may seek court enforcement either inter partes or ex parte. When enforcement is sought ex parte, the court shall have discretion to determine whether the circumstances are sufficiently urgent to justify its acting ex parte. If the court decides that acting ex parte is justified in the circumstances, it shall decide the issue of enforcement applying the same standards as apply to enforcement of measures granted by an arbitral tribunal inter partes. If the court enforces the measure, the enforcement order shall be served on the other party, and the arbitral tribunal shall be required to conduct an inter partes proceeding to determine whether the temporary measure shall be terminated or continued. If, after receiving the views of both sides, the arbitral tribunal decides that the temporary measure shall be continued, any request for court enforcement shall be handled in the same way as any other measure granted inter partes.”

75. After discussion, the Working Group requested the secretariat to prepare revised draft provisions, with possible variants, for continuation of the discussion at a later stage.

76. The Working Group proceeded to consider a new draft article concerned with enforcement of interim measures as follows:

“New article: i Enforcement of interim measures of protection

“(1) Upon the application to the competent court by [the arbitral tribunal or by] the interested party made

with the approval of the arbitral tribunal, an interim measure of protection referred to in article 17 shall be enforced, irrespective of the country in which it was made, except that the court may at its discretion refuse enforcement if:*

“(a) The party against whom the measure is invoked furnishes proof that:

“(i) Application for the same or similar interim measure has been made to a court in this State, whether or not the court has taken a decision on the application; or

“(ii) [Variant 1] The arbitration agreement referred to in article 7 is not valid; [Variant 2] The arbitration agreement referred to in article 7 appears not to be valid, in which case the court may refer the issue of the [jurisdiction of the arbitral tribunal] [validity of the arbitration agreement] to be decided by the arbitral tribunal in accordance with article 16 of this Law]; or

“(iii) The party against whom the interim measure is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present its case with respect to the interim measure, [in which case the court may suspend the enforcement proceedings until the parties have been heard by the arbitral tribunal]; or

“(iv) The interim measure has been terminated, suspended or amended by the arbitral tribunal; or

“(b) The court finds that:

“(i) Such a measure is incompatible with the powers conferred upon the court by its procedural laws, unless the court decides to reformulate the measure to the extent necessary to adapt it to its own powers and procedures for the purpose of enforcing the measure; or

“(ii) The recognition or enforcement of the interim measure would be contrary to the public policy of this State.

“(2) The party who is seeking enforcement of an interim measure shall promptly inform the court of any termination, suspension or amendment of that measure.

“(3) In reformulating the measure under paragraph (1)(b)(i), the court shall not modify the substance of the interim measure.

“(4) Paragraph (1)(a)(iii) does not apply to an interim measure of protection that was ordered without notice to the party against whom the measure is invoked, provided that the measure was ordered to be effective for a period not exceeding [30] days and the enforcement of the measure is requested before the expiry of that period.”

*The conditions set forth in this paragraph are intended to set maximum standards. It would not be contrary to the harmonization to be achieved if a State retained less onerous conditions.

Paragraph (1)

“[the arbitral tribunal or by]”

77. The discussion focused on whether the draft new article should provide expressly for an application being made by the arbitral tribunal to a court for enforcement of an interim measure of protection. The view was expressed that mentioning the arbitral tribunal or any party as applying for enforcement was unnecessary since the decision as to the enforcement of the interim measure would be made by the competent court not only on the basis of the model legislative provisions but also with regard to other applicable law. Such domestic law would presumably determine who was eligible to apply for enforcement. Examples were given of countries where the arbitration law allowed for the application for enforcement in such a case to be made by the arbitral tribunal itself. It was pointed out that it would be inappropriate for the model legislative provision to interfere with such legislation. It was noted that another reason for deleting mention of the arbitral tribunal applying for court enforcement was the practical difficulty of tribunals doing so.

78. A contrary view was that it would be contrary to the spirit of arbitration to allow the arbitration tribunal to apply for the enforcement of an interim measure. It was stated that, by applying to a court, the arbitral tribunal would substitute itself to the party in favour of whom the interim measure had been taken, thus compromising its status as an impartial and independent arbitrator. While support was expressed in favour of that view, it was pointed out that, by applying for enforcement of the interim measure it had granted, the arbitral tribunal would not substitute itself to a party but merely seek court assistance in enforcing the interim measure the arbitral tribunal itself had taken as an impartial and independent arbitrator. Action by the arbitral tribunal in that respect would be fully consistent with the decision it had made in the first place to grant the interim measure of protection. Furthermore, it was pointed out that, in certain countries, circumstances might make it extremely difficult for the parties themselves to apply for enforcement of the interim measure. Providing certainty as to whether the arbitral tribunal could intervene directly to seek enforcement of the measure it had granted might thus improve greatly the efficiency of arbitration in those countries.

79. After discussion, the Working Group decided that, for continuation of the discussion, the words “[the arbitral tribunal or by]” should be deleted, on the assumption that the guide to enactment, or possibly a footnote to the provision, would make it clear that the rule was not intended to interfere with the situation where applicable law would allow for the application for enforcement to be made by the arbitral tribunal itself. In that context, a proposal to delete both references to “the arbitral tribunal” and “the interested party” was noted with interest.

“enforced”

80. A question was raised as to whether a reference to “recognition and enforcement” would not be more appropriate than a mere reference to “enforcement”. In support

of that view, it stated that enforcement of an interim measure by a court would presuppose its recognition by that same court. It was pointed out that the notion of recognition as understood in the New York Convention and the Model Law was broader and might carry effects beyond those of enforcement. It was also pointed out that “recognition” under article V of the New York Convention was not necessarily suited for such ephemeral measures as interim measures of protection. However, after discussion, the Working Group decided that, for reasons of consistency with the New York Convention and article 36 of the Model Law, the terms “recognition and enforcement” should be used.

“may, at its discretion”

81. The discussion focused on whether refusing enforcement should be an obligation or a mere discretion for the court under the various circumstances listed in paragraph (1). The attention of the Working Group was drawn to somewhat different formulations on that point in article 36(1) of the Model Law. The view was expressed that listing the grounds for refusal of enforcement following the pattern of article V of the New York Convention might result in an excessively burdensome provision. It was stated in response that the regime set forth in the draft legislative provision was more liberal than article V of the New York Convention, a solution that was justified in view of the provisional nature of the measures of protection. In that context, the view was expressed that the model legislative provision might take into account that, with respect to recognition and enforcement of arbitral awards, legal regimes more liberal than that established by the New York Convention had developed in the world since 1958 and had come to coexist with that Convention. Accordingly, a reference to more liberal regimes, along the lines of the provision contained in article VII of the New York Convention, was useful. It was generally felt that the footnote to the draft legislative provision was helpful in that respect.

82. After discussion, the Working Group decided that no decision could be taken at that early stage as to whether the court would be under an obligation to refuse enforcement or whether it could exercise discretion. It was agreed that the issue would require further discussion after the various grounds for refusing enforcement under subparagraphs (a) and (b) had been examined.

Subparagraph (a) (chapeau)

83. The Working Group approved the substance of the chapeau of the subparagraph. Despite the view that the words “furnishes proof” should be replaced with the words “establishes that”, the Working Group agreed to retain the current wording on the grounds that the suggested words might have a less certain meaning in other languages than the current words and that they reflected the corresponding language in both article 36 of the Model Law and article V of the New York Convention.

Subparagraph (a)(i)

84. The Working Group noted that subparagraph (i) covered a situation where a court would receive a request

for enforcement of an interim measure while that or another court in the State was dealing with or had dealt with a request for the same or similar measure.

85. It was noted that the subparagraph dealt with a ground with respect to which the court should have discretion as to whether it should prevent enforcement of the interim measure. It was suggested that the ground was the only one where such discretion was warranted, that with respect to other grounds listed in the article no such discretion should exist, and that the article should be redrafted accordingly.

86. It was suggested that the court dealing with the request for enforcement of an interim measure should take into account (or should be able to take into account) applications for interim measures not only in “this State” (i.e. the State that enacted the provision) but also in other States. It was added that the court should also be able to take into account applications for enforcement of interim measures to courts in “this State” and other States. It was warned, however, that suggesting or obliging the court to take into account applications to courts outside the country where the enforcement was being sought might delay the enforcement proceedings and would give rise to complex issues regarding the extent to which a civil proceeding in foreign country should produce effects in another State. Those issues were not resolved in civil procedure in general and it might be counterproductive to introduce them in the model provision under consideration.

87. At that point, the Working Group for lack of time suspended its discussions on the enforcement of interim measures of protection until a future session.

IV. MODEL LEGISLATIVE PROVISIONS ON CONCILIATION

Article 1. *Scope of application*

88. The text of draft article 1 as considered by the Working Group was as follows:

“(1) These model legislative provisions apply to a conciliation, as defined in article 2, if:

“(a) It is commercial;*

“(b) It is international, as defined in article 3;

“(c) The place of conciliation is in this State.

*“The term ‘commercial’ should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road”.

“(2) Articles ... apply also if the place of conciliation is not in this State.

“(3) These model legislative provisions apply irrespective of whether a conciliation is carried out on the initiative of a party, in compliance with an agreement of the parties, or pursuant to a direction or request of a court or competent governmental entity.

“(4) These model legislative provisions do not apply to: [...].

“(5) Except as otherwise provided in these model legislative provisions, the parties may agree to exclude or vary any of these provisions.”

Paragraph (1)

Subparagraph (a)

89. The substance of subparagraph (a) was found acceptable by the Working Group, together with footnote *.

Subparagraph (b)

90. The Working Group decided that subparagraph (b) should be discussed in the context of draft article 3.

Subparagraph (c)

91. With respect to the structure of article 1, the view was expressed that the territorial factor should be listed as the first factor to be taken into account when determining the applicability of the draft legislative provisions. Such restructuring would make it clear that the territorial factor was intended to establish a default rule that would trigger application of the model legislative provisions in the absence of other elements listed under paragraph (1), such as the international nature of the conciliation or the agreement of the parties to opt into the legal regime set forth in the model legislative provisions. That view was generally supported by the Working Group.

92. In order to increase certainty as to when the model legislative provisions would apply, it was suggested that a provision should be included in paragraph (1) to the effect that the parties would be free to agree upon the place of conciliation and, failing that agreement, it would be for the conciliator or the panel of conciliators to determine that place (see A/CN.9/WG.II/WP.113/Add.1, footnote 2). Wording along the following lines was proposed as a possible substitute for subparagraph (c): “The place of conciliation, as agreed by the parties, or as determined by the conciliator, is in this State.” Subject to possible restructuring of paragraph (1), the substance of the proposal was found generally acceptable. As a matter of drafting, it was suggested that, in order to emphasize that the conciliation was consensual in essence (and so remained even where the conciliator had to intervene in the choice of the place of conciliation), wording along the lines of “The place of conciliation, as agreed by the parties, or as determined with the assistance of the conciliator, is in this State” was to be preferred.

93. There was general agreement that article 1 should address cases where the place of conciliation had not been agreed upon or determined and where, for other reasons, it was not possible to establish the place of conciliation (for example, when a conciliation was carried out by using telecommunications). It was suggested that the criteria for the applicability of the model legislative provisions might be, for example, the place of the institution that administered the conciliation proceedings, the place of residence of the conciliator, or the place of business of both parties if that place was in the same country (*ibid.*). The Working Group generally agreed that those criteria should be taken into account by the secretariat when preparing a revised draft of article 1.

Paragraph (2)

94. It was recalled that paragraph (2) was intended to indicate whether certain provisions (such as those on the admissibility of evidence in other proceedings, the role of the conciliator in other proceedings or the limitation period) should produce effects in the enacting State even if the conciliation proceedings took place in another country and would thus not generally be governed by the law of the enacting State (see A/CN.9/485, paras. 120 and 134). The substance of the paragraph was found generally acceptable. It was agreed that the issue dealt with in paragraph (2) might need to be considered further in the light of the decisions yet to be made by the Working Group with respect to draft articles 11, 12, 13 and 14.

Paragraph (3)

“on the initiative of a party”

95. The view was expressed that, taking into account the consensual nature of conciliation, the initiative of a party would not be sufficient to carry out a conciliation process, since the other party would, at least, have to agree with that initiative. It was suggested that paragraph (3) should be reworded accordingly.

“pursuant to a direction or request of a court or competent governmental entity”

96. As to whether conciliation could result from a “direction” or any mandatory decision, the view was expressed that in certain countries, it would be inconceivable for a court or any other third party to impose the use of conciliation on parties. It was stated that, in principle and without exception, conciliation presupposed the agreement of both parties. In addition, it was pointed out that, in practice, any conciliation mechanism forced upon the parties would invariably result in failure of the process. While that view was noted by the Working Group, it was recalled that, in a number of countries, legislation might regard conciliation as a necessary step to be taken before litigation could be initiated. Other procedural laws might give courts or other administrative entities the power to suspend the judicial proceedings and order the parties to attempt conciliating prior to carrying on with litigation. Other laws might leave it to the parties to decide whether conciliation should be undertaken in the circumstances. It was generally agreed

that the model legislative provisions should apply to such instances of mandatory conciliation.

97. As a matter of drafting, it was suggested that paragraph (3) might need to be restructured to indicate more clearly that it was intended to cover the three following types of situations: (a) where an agreement to conciliate pre-existed the dispute (for example where a general provision had been made in a contract that possible future disputes would be settled through conciliation); (b) where an agreement to conciliate was made by the parties after the dispute had arisen; and (c) where mandatory conciliation was imposed on the parties by a court, an arbitral tribunal or an administrative entity. After discussion, it was generally agreed that the secretariat should prepare a revised draft of paragraph (3), based on the views that had been expressed, with a view to covering all possible origins of the conciliation process.

Paragraph (4)

98. The substance of paragraph (4) was found generally acceptable. It was agreed that the guide to enactment should seek to provide illustrations and explanations as to the situations that were likely to be regarded by enacting legislators as exceptional cases where the model legislative provisions should not apply. Possible areas of exclusion might cover situations where the judge or the arbitrator, in the course of adjudicating a particular dispute, himself or herself would conduct a conciliatory process either at the request of the disputing parties or exercising his or her prerogatives or discretion. Another area of exclusion might be collective bargaining relationships between employers and employees (A/CN.9/WG.II/WP.113/Add. 1, footnote 5).

Paragraph (5)

99. The substance of paragraph (5) was found generally acceptable. The view was expressed that, irrespective of the general reference to party autonomy contained in the paragraph, such a reference might need to be repeated in the context of a number of specific provisions of the draft legislative provisions. The Working Group agreed that the issue might need to be further discussed in the context of the substantive provisions of the draft instrument.

Article 2. Conciliation

100. The text of draft article 2 as considered by the Working Group was as follows:

“For the purposes of these model legislative provisions, ‘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 a panel of persons, to assist them in an independent and impartial manner in their attempt to reach an amicable settlement of their dispute arising out of or relating to or contract or other legal relationship.”

101. The Working Group recalled that this provision aimed to set out the elements for the definition of conciliation, taking account of the agreement of the parties, the existence of a dispute, the intention of the parties to reach an amicable settlement and the participation of an impartial and independent third person or persons who assisted the parties in an attempt to reach an amicable settlement. The Working Group recalled that these elements distinguished conciliation, on the one hand, from binding arbitration and, on the other hand, from negotiations between the parties or representatives of the parties.

102. A suggestion was made that the words “in an independent and impartial manner” could be deleted on the basis that this would introduce a subjective element to the definition. Furthermore, those words might be understood as establishing a legal requirement whose violation would have consequences beyond the model legislative provisions and might even be misunderstood as an element determining whether the model legislative provisions applied or not. It was said that reference to “an independent and impartial manner” was not necessary for the definition of conciliation and that it was sufficient to make reference to that notion in draft article 6 (5). However, in support of the retention of the phrase, a view was expressed that the phrase was useful because it emphasized the nature of conciliation. The Working Group decided to place the words in brackets and to take a decision on the matter at its next session.

103. Another suggestion was made that draft article 2 should be redrafted to exclude from its application cases where the judge or the arbitrator, in the course of adjudicating a particular dispute, himself or herself conducted a conciliatory process exercising his or her prerogatives or discretion or acting at the request of the disputing parties. It was suggested that that distinction might appropriately be made in article 1 (4). Another suggestion was to clarify in draft article 2 that the conciliator was a person who did not have the authority to impose a binding decision on the parties. The secretariat was requested to prepare a draft reflecting those considerations.

104. Support was expressed for the words in square brackets “[, whether referred to by the expression conciliation, mediation or an expression of similar import.]” which indicated that the draft model legislation applied irrespective of the name given to the process. It was noted that different procedural styles and techniques might be used in practice to facilitate dispute settlement and that different expressions might be used to refer to those styles and techniques. It was agreed that the model legislation should encompass all those styles and techniques provided that they fell within draft article 2.

Article 3. *International conciliation*

105. The text of draft article 3 as considered by the Working Group was as follows:

“(1) 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) one of the following places is situated outside the State in which the parties have their places of business:

“(i) the place of conciliation;

“(ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or

“(c) the parties have [expressly] agreed that the subject-matter of the agreement to conciliate relates to more than one country.

“(2) 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.”

106. Doubts were expressed as to whether domestic conciliation should be excluded from the scope of the model legislative provisions. It was pointed out that the issues were largely identical in all instances where conciliation was resorted to within the commercial sphere. Accordingly, it was suggested that the reference to internationality should be deleted from the text, thus leaving it to enacting States to limit the scope of the enactment of the model legislative provisions through article 1 (4). Another view was that the question of internationality might appropriately be dealt with using the approach taken in the UNCITRAL Model Law on Electronic Commerce. The prevailing view, however, was that the acceptability of the model legislative provisions might be greater if no attempt was made to interfere with domestic conciliation. It was generally agreed that, subject to any agreement by the parties to opt into the legal regime set forth in the model legislative provisions, the instrument should be limited in scope to international conciliation. Accordingly, it was agreed that a test of internationality should be provided.

107. The discussion focused on paragraph (1) (c). With respect to the structure of the provision, a widely shared view was that it was inappropriate to combine in a single paragraph objective criteria such as the place of conciliation and a subjective test such as the agreement of the parties to opt into the legal regime set forth in the model legislative provisions. As to the method used in the draft instrument to refer to the agreement of the parties, it was pointed out that it was artificial to envisage that the parties would agree “that the subject-matter of the agreement to conciliate relates to more than one country”. Should the parties wish to opt into the model legislative provisions, a widely shared view was that they should be allowed to do so directly, by the effect of an appropriate statement to be included in article 1, and not through a fiction regarding the location of the subject-matter of the dispute. Another view was that it was preferable to include the opt-in provision in the definition of “international” as was done in the UNCITRAL Model Law on International Commercial Arbitration.

108. As to whether the word “expressly” should be retained, it was pointed out that, in view of the informal nature of the conciliation process, parties might not always consider it necessary to record their agreement to conciliate in a formal document. Accordingly, a more liberal formulation should be used. Support was expressed, however, for the retention of the word “expressly”. The prevailing view was that the word should be maintained in square brackets, for continuation of the discussion at a later stage.

109. After discussion, the prevailing view was that paragraph (1) (c) should be reworded along the lines of “the parties have [expressly] agreed that these model legislative provisions are applicable”. The secretariat was requested to prepare a revised draft containing those words and to place it at an appropriate location in the draft model legislative provisions.

Article 4. Commencement of conciliation proceedings

110. The text of article 4 as considered by the Working Group was as follows:

“(1) The conciliation proceedings in respect of a particular dispute commence on the day on which an invitation to conciliate that dispute made by one party is accepted by the other party.

“(2) If the party initiating conciliation does not receive a reply within [thirty] days from the day on which the invitation was sent, or within such other period of time as specified in the invitation, the party may elect to treat this as a rejection of the invitation to conciliate.”

111. It was suggested, and the Working Group agreed, that draft article 4(1) (which was drafted exclusively in terms of communications between the parties) should be harmonized with draft article 1(3), which envisaged that conciliation might be carried out as a consequence of a direction or request by a dispute settlement body such as a court or arbitral tribunal.

112. With respect to paragraph (2), some support was expressed for a reconsideration of the concept that the thirty-day period started to run from the day that the invitation was sent and replace it by the day on which the invitation was received. However, there was considerable opposition to that proposal on the ground that the provision was modeled on article 2(4) of the UNCITRAL Conciliation Rules and that it was desirable to maintain harmony between the two texts. Furthermore, the day of dispatch was easier to ascertain for the sender than the day of receipt. It was pointed out, however, that modern means of communication provided sufficient means for establishing the date of the receipt.

113. It was suggested that, in view of modern means of communication, the time period of thirty days should be shortened to two weeks.

114. It was noted that article 4 did not deal with the situation where an invitation to conciliate was withdrawn after it had been made, and a suggestion was made that it might be appropriate to address that situation in the provision.

115. The secretariat was requested to prepare a redraft of article 4 reflecting the considerations of the Working Group. As paragraph (2) did not deal with the commencement of conciliation proceedings, it was suggested that that paragraph might be included elsewhere in draft model legislation. Furthermore, it was noted that the need for maintaining article 4 and its precise content should be decided upon after the Working Group had considered, in particular, draft article 11 and possibly also draft article 10.

Article 5. Number of conciliators

116. The text of article 5 as considered by the Working Group was as follows:

“There shall be one conciliator, unless the parties agree that there shall be a panel of conciliators.”

117. The Working Group agreed with the substance of draft article 5.

Article 6. Appointment of conciliators

118. The text of article 6, as considered by the Working Group was as follows:

“(1) In conciliation proceedings with one conciliator, the parties shall endeavour to reach agreement on the name of the sole conciliator.

“(2) In conciliation proceedings with two conciliators, each party appoints one conciliator.

“(3) In conciliation proceedings consisting of three or more conciliators, each party appoints one conciliator and shall endeavour to reach agreement on the name of the other conciliators.

“(4) Parties may seek the assistance of an appropriate institution or person in connection with the appointment of conciliators. In particular:

“(a) a party may request such an institution or person to recommend names of suitable persons to act as conciliator; or

“(b) the parties may agree that the appointment of one or more conciliators be made directly by such an institution or person.

“(5) In recommending or appointing individuals to act as conciliator, the institution or person shall have regard to such considerations as are likely to secure the appointment of an independent and impartial conciliator and, with respect to a sole or third conciliator, shall take into account the advisability of appointing a conciliator of a nationality other than the nationalities of the parties.”

119. It was suggested that the provision should provide that the appointment of each conciliator be agreed to by both parties. It was said that leaving it to each party, in the case of a conciliation panel of more than one person, to appoint conciliators without consulting and seeking agreement of the other party might create a perception of

partisanship and thereby decrease the confidence of the parties in the conciliation process. However, the prevailing view was that the solution in the current text was more practical, allowed for speedy commencement of the conciliation process and might actually foster settlement in the sense that the two party-appointed conciliators, while acting independently and impartially, would be in a better position to clarify the positions of the parties and thereby enhance the likelihood of settlement.

Article 7. *Conduct of conciliation*

120. The text of article 7 as considered by the Working Group was as follows:

“(1) The parties determine [, by reference to a standard set of rules or otherwise,] the manner in which the conciliation is to be conducted.

“(2) Failing agreement on the manner on which the conciliation is to be conducted, the conciliator or the panel of conciliators may conduct the conciliation proceedings in such a manner as the conciliator or the panel of conciliators considers appropriate, taking into account the circumstances of the case, the wishes that the parties may express, and the need for a speedy settlement of the dispute.

“(3) The conciliator shall be guided by principles of objectivity, fairness and justice. [Unless otherwise agreed by the parties, the conciliator may give consideration to, among other things, the rights and obligations of the parties, the usages of the trade concerned and the circumstances surrounding the dispute, including any previous business practices between the parties.]

“[(4) The conciliator may, at any stage of the conciliation proceedings, make proposals for a settlement of the dispute.]”

121. There was broad agreement for casting paragraph (1) along the lines of article 19 of the UNCITRAL Model Law on International Commercial Arbitration and to stress that the parties were free to agree on the manner in which the conciliation was to be conducted. The words in square brackets were approved, subject to the deletion of the term “standard”. The suggestion to delete paragraph (1) and to provide in paragraph (2) that the conciliator should be able to decide on the manner in which the conciliation should be conducted after hearing the views of the parties did not receive support.

122. It was noted that paragraph (2) (modelled on article 7(3) of the UNCITRAL Conciliation Rules) indicated that the conciliator take into account, inter alia, the “wishes that the parties may express”. The Working Group considered whether the term “wishes” was appropriate in that context and whether some other expressions such as “views”, “expectations” or “intentions” might be more appropriate. It was noted that the expression “wishes” and its equivalents in other languages were unusual for inclusion in legal provisions. The Working Group decided that, given that the term was used in the UNCITRAL Conciliation Rules, it could be retained if no other satisfactory expression could be found.

Paragraph (3)

123. The view was expressed that the text of paragraph (3) was not sufficiently homogeneous, since it combined a general statement of principles that should guide the conduct of the conciliator in the first sentence and more operational advice as to how conciliation should be conducted in the second sentence. One suggestion was that the text should simply mirror the language of article 7(2) of the UNCITRAL Conciliation Rules, on which paragraph (3) was based. Another suggestion was that the two sentences should be embodied in the model statutory provisions as distinct provisions. The Working Group discussed the two sentences separately.

First sentence

124. The substance of the first sentence was found generally acceptable as a statement of principles that should somehow be reflected in the model statutory provisions or in any explanatory material that might accompany the instrument. A concern was expressed, however, as to the effect of enacting such wording as a statutory obligation in article 7. It was stated that, by providing courts with a yardstick against which to measure the conduct of conciliators, the first sentence might have the unintended effect of inviting parties to seek annulment of the settlement agreement through court review of the conciliation process. Accordingly, it was suggested that the statement of principles would be more appropriately located in the guide to enactment of the model statutory provisions. The prevailing view, however, was that the first sentence should be retained as an operative provision of the instrument to provide necessary guidance regarding the conciliation process, in particular for the benefit of less experienced conciliators. It was pointed out that judicial control over the conciliation process was very limited, and that the use of the UNCITRAL Conciliation Rules, which included wording along the lines of the first sentence of paragraph (3), had not resulted in increased litigation. Establishing guiding principles was regarded as useful not only for parties that might become involved in conciliation but also for conciliators themselves. A view was expressed that, in such cases, guiding principles were particularly necessary in view of the absence of judicial review of the conciliation process, which might leave actions based on personal liability as the only recourse open to parties.

125. As to the wording of the first sentence, the attention of the Working Group was drawn to difficulties that might stem from the use of such terms as “fairness”, “équité” and “equidad” as expressions of the same notion in the English, French and Spanish versions. Some support was expressed in favour of using the word “equity” instead of or along with the word “fairness” in the English version. That suggestion was strongly opposed on the grounds that using the word “equity” might raise considerable difficulties of interpretation. Another view was that, in some language versions, the references to “fairness and justice” connoted the role of a decision maker (either a judge or an arbitrator) and not the basic function of a conciliator, which was to assist parties in the search for a settlement agreement. Accordingly, it was suggested that the words “fairness and justice” should be replaced by “impartiality and

independence". The suggestion was noted with interest. A related view was that the notion of fairness might be reflected in paragraph (2), which dealt with a number of procedural issues involved in the conduct of the conciliation process. After discussion, it was agreed that the words "objectivity, fairness and justice" should be retained, at least as one possible variant, for reasons of consistency with the terminology used in the UNCITRAL Conciliation Rules. The secretariat was requested to study the appropriateness of possible substitute wording, based on the views and concerns that had been expressed.

Second sentence

126. To the extent that it dealt with elements to be taken into account in the substance of the settlement agreement, it was generally agreed that the factors listed in the second sentence, together with possible additional factors, such as the business interests of the parties, would be more appropriately reflected in a guide to enactment of the model statutory provisions.

Paragraph (4)

127. Doubts were expressed as to the usefulness of the paragraph. It was pointed out that deleting paragraph (4) would not prevent any conciliator who might wish to do so from making proposals for a settlement of the dispute. It was also pointed out that, in some cases, the making of such proposals by the conciliator might prove counter-productive. It was thus suggested that, from an educational perspective, it might be misleading to draw the attention of less experienced conciliators on such types of initiatives. However, in view of the importance that might be attached to proposals by the conciliator in the practice of conciliation as developed in certain countries, it was decided that the substance of paragraph (4) should be reflected, without square brackets, in the text of draft article 7.

Article 8. *Communication between conciliator and parties*

128. The text of draft article 8 as considered by the Working Group was as follows:

"Unless otherwise agreed by the parties, the conciliator or the panel of conciliators may meet or communicate with the parties together or with each of them separately."

129. The Working Group expressed overall satisfaction with the substance of draft article 8. It was suggested that the draft article might provide an appropriate location for reflection of the principle that both parties should receive equal treatment from the conciliator. While general agreement was expressed as to the spirit of the suggestion, a note of caution was struck about introducing in draft article 8 an operative rule that might result in the imposition of excessive formalism. It was pointed out, for example, that it would be inappropriate to require the conciliator to record the time spent communicating with each of the parties, to ensure that equal time was spent with

both. After discussion, it was generally agreed that a reference to the equality of treatment to be given by the conciliator to both parties would be better reflected in draft article 7. The secretariat was requested to prepare appropriate wording for inclusion in draft article 7. The attention of the secretariat was drawn to the need to avoid wording that might lend itself to confusion between "equality of treatment" and the notion of "equity".

Article 9. *Disclosure of information*

130. The text of draft article 9 as considered by the Working Group was as follows:

"[Alternative 1.] When the conciliator or the panel of conciliators receives information concerning the dispute from a party, the conciliator or the panel of conciliators may disclose the substance of that information to the other party in order that the other party may have the opportunity to present any explanation which it considers appropriate. However, [the parties are free to agree otherwise, including that] the conciliator or the panel of conciliators shall not disclose information received from a party, when the party gives the information to the conciliator or the panel of conciliators subject to a specific condition that it be kept confidential.

"[Alternative 2.] Unless otherwise agreed by the parties, nothing which is communicated to the conciliator or the panel of conciliators by a party in private concerning the dispute may be disclosed to the other party without the express consent of the party who gave the information."

131. Some support was expressed in favour of alternative 2. It was stated that, in the absence of agreement to the contrary, requiring the conciliator to maintain strict confidentiality of the information communicated by a party was the only way of ensuring frankness and openness of communications in the conciliation process. Such confidentiality was reported to be consistent with conciliation practice in certain countries. With a view to introducing some flexibility in the wording of alternative 2, it was suggested that the reference to "the express consent" of the party who gave the information might be replaced by a mere reference to "the consent" of that party. Along the same line, it was suggested that exceptions might need to be made to the general rule contained in alternative 2, for example where issues of criminal law might be at stake.

132. The widely prevailing view, however, was that alternative 1 should be preferred as the better option to ensure circulation of information between the various participants in the conciliation process. It was pointed out that requiring consent by the party who gave the information before any communication of that information to the other party by the conciliator would be overly formalistic, inconsistent with established practice in many countries as reflected in article 10 of the UNCITRAL Conciliation Rules, and likely to inhibit the entire conciliation process. As to the wording of alternative 1, it was generally agreed that the words "in order that the other party may have the opportunity to present any explanation which it considers appropriate"

should be deleted as superfluous, or as introducing an unnecessary degree of formalism. In addition, it was agreed that the words “the parties are free to agree otherwise, including that” should be deleted from the second sentence of alternative 1, in order to ensure that the confidentiality provision would apply in all cases, even without a specific agreement of the parties.

133. A question was asked as to whether the notion of “factual information” as envisaged in article 10 of the UNCITRAL Conciliation Rules should be used instead of “information” in the text of alternative 1. In response, it was generally felt that the broader notion of “information” was preferable in the context of a statutory rule, which should cover all relevant information communicated by a party to the conciliator and avoid any difficulty as to the interpretation of what might constitute “factual” information.

134. It was generally agreed that, in preparing the guide to enactment of draft article 9, it should be made clear that the notion of “information” as used in the draft article should be understood as covering also communications that took place before the actual commencement of the conciliation.

Article 10. *Termination of conciliation*

135. The text of draft article 10 as considered by the Working Group was as follows:

“The conciliation proceedings are terminated:

“(a) by the signing of the settlement agreement by the parties, on the date of the agreement;

“(b) by a written declaration of the conciliator, after consultation with the parties, to the effect that further efforts at conciliation are no longer justified, on the date of the declaration;

“(c) by a written declaration of the parties addressed to the conciliator to the effect that the conciliation proceedings are terminated, on the date of the declaration; or

“(d) by a written declaration of a party to the other party and the conciliator, if appointed, to the effect that the conciliation proceedings are terminated, on the date of the declaration.”

136. Support was expressed for the current draft of article 10 although a number of drafting suggestions were made. In respect of subparagraph (a), support was expressed for the drafting suggestion set out in footnote 23 of A/CN.9/WG.II/WP.113/Add.1 to replace the words “the signing” with the words “the conclusion” so as to better accommodate the use of electronic commerce. In addition, it was stated that subparagraph (b) of draft article 10 was unclear regarding the situation where the conciliation proceedings were conducted by a panel of conciliators but the proceedings were declared as terminated not by the whole panel but by one or more of its members. It was noted that the UNCITRAL Conciliation Rules provided that, where there

was more than one conciliator, they ought, as a general rule, to act jointly. While the view was expressed that subparagraph (b) should be redrafted to clarify that the declaration envisaged therein had to originate from the entire panel of arbitrators, it was widely felt that this was a drafting matter as to which the secretariat was requested to make suggestions in the next draft.

Article 11. *Limitation period*

137. The text of draft article 11 as considered by the Working Group was as follows:

“[(1) When the conciliation proceedings commence, the running of the limitation period regarding the claim that is the subject matter of the conciliation is suspended.

“(2) Where the conciliation proceedings have terminated without a settlement, the limitation period resumes running from the time the conciliation ended without a settlement.]”

138. Some support was expressed in favour of draft article 11 for the reason that, from a practical viewpoint, it offered a simple and useful solution for a large number of cases and it would enhance the attractiveness of conciliation by preserving the parties’ rights without encouraging them to initiate adversarial proceedings. However, considerable opposition was expressed by a large number of delegations. The grounds cited for deletion of draft article 11 included that: the draft article was not indispensable for the protection of the rights of the claimant (because under draft article 14(1) a claimant could initiate court or arbitral proceedings just to preserve its rights); the provision would not produce effects outside the enacting state; the provision would be difficult to incorporate into national procedural regimes which took fundamentally different approaches to the issue (for example, under some legal systems, the provision merely produced procedural effects, whereas in other systems it was considered to be part of substantive law). A further reason cited in opposition to draft article 11 was that the retention of the provision would complicate the finalization of some other provisions in the draft model legislative provisions, such as the definition of conciliation, and provisions dealing with the commencement and termination of conciliation proceedings. It was pointed out that, should draft article 11 be retained, those provisions would have to be redrafted in ways that might undermine the acceptability of the draft model legislative provisions. In support of the deletion of draft article 11, it was noted that, as currently drafted, the provision was unclear as to how it would apply in cases where conciliation was used only with respect to part of a dispute between the parties. After discussion, however, the Working Group considered that it would be premature to delete the provision and agreed to retain it provisionally between square brackets for continuation of the discussion at a later stage. If the provision was ultimately retained, it was noted that it would be necessary to clarify whether the effect of draft article 11 was to interrupt or merely to suspend the running of the limitation period.

**Article 12. Admissibility of evidence
in other proceedings**

139. The text of draft article 12 as considered by the Working Group was as follows:

“(1) [Unless otherwise agreed by the parties,] a party who participated in the conciliation proceedings [or a third person] shall not rely on, or introduce as evidence, in arbitral or judicial proceedings, whether or not such arbitral or judicial proceedings relate to the dispute that was the subject of the conciliation proceedings:

“(a) Views expressed or suggestions made by a party to the conciliation in respect of [matters in dispute or] a possible settlement of the dispute;

“(b) Admissions made by a party in the course of the conciliation proceedings;

“(c) Proposals made by the conciliator;

“(d) The fact that a party to the conciliation had indicated its willingness to accept a proposal for settlement made by the conciliator.

“(2) The disclosure of the information referred to in paragraph (1) of this article shall not be ordered by the arbitral tribunal or the court [whether or not the arbitral or judicial proceedings relate to the dispute that is the subject of the conciliation proceedings unless such disclosure is permitted or required under the law governing the arbitral or judicial proceedings].

“(3) Where evidence has been offered in contravention of paragraph (1) of this article, the arbitral tribunal or the court shall treat such evidence as inadmissible.

“(4) Evidence that is admissible in arbitral or court proceedings does not become inadmissible as a consequence of being used in a conciliation.”

140. The Working Group affirmed its general support for the policy underlying draft article 12, namely, that it was designed to encourage frank and candid discussions in conciliation by prohibiting the use of information listed in paragraph (1) in any later proceedings. Broad support was expressed for retaining the words “or a third person” because it was necessary to ensure that persons other than the party (for example, witnesses or experts) who participated in the conciliation proceedings were also bound by paragraph (1). Doubt was expressed whether it was appropriate for a third person (a concept that might be given a very broad meaning) to be bound by paragraph (1), in particular if the parties to the conciliation controlled the extent to which those third persons were so bound (by virtue of the words “unless otherwise agreed by the parties”). It was observed that conciliation proceedings might still continue when paragraph (1) became applicable; one possible way to reflect that situation would be to rephrase the relevant part of the provision along the following lines: “the dispute that *is or was* the subject of the conciliation proceedings”.

141. As to the scope of the admissibility rule set out in draft article 12, it was suggested that the appropriate balance between evidence that was to be covered by the provision and evidence that remained outside of it would

be achieved by deleting the words “matters in dispute or”, replacing the word “admissions” by the words “statements or admissions” and maintaining the substance of paragraph (4). There was support for the suggestion that even if information of the type covered by paragraph (1) was generated before and in anticipation of conciliation proceedings, such information should also be covered by the draft article. There was agreement that, if there was any doubt that the provision covered oral as well as written evidence, it should be made clear in the provision that the draft article covered any information or evidence, regardless of its form.

Article 13. Role of conciliator in other proceedings

142. The text of draft article 13 as considered by the Working Group was as follows:

“(1) Unless otherwise agreed by the parties, the conciliator shall not act as an arbitrator or as a representative or counsel of a party in any arbitral or judicial proceedings in respect of a dispute that was or is the subject of the conciliation proceedings.

“(2) Testimony of the conciliator regarding the facts referred to in paragraph (1) of article 12 shall not be admissible in any arbitral or judicial proceedings in respect of a dispute that was or is the subject of the conciliation proceedings.

“(3) Paragraphs (1) and (2) apply also in respect of another dispute that has arisen from the same contract [or another contract forming part of a single commercial transaction] [or the same transaction or event] [or any related contract].”

143. Support was expressed for the policy underlying draft article 13, subject to the following suggestions: that the scope of the prohibition provided in paragraph (2) be broadened to include testimony by a conciliator that a party acted in bad faith during the conciliation; and that in paragraph (2), the words “facts” should be replaced by a word such as “matters” or “information”. A view was expressed that perhaps the expression “testimony of the conciliator” was too narrow in the context of paragraph (2) and that words such as “evidence given by the conciliator” would be preferable. It was observed that draft article 12 (1) applied in arbitral or judicial proceedings whether or not those proceedings related to the dispute that was the subject of the conciliation proceedings, whereas the scope of draft article 13 (2) was narrower in that it referred to arbitral or judicial proceedings in respect of a dispute that was the subject of the conciliation proceedings. It was suggested that the relation between the two provisions should be re-considered.

144. With respect to paragraph (3), support was expressed for the broadest possible formulation of the three formulations offered therein expressed by the words “or any related contract”. While not expressing opposition, it was observed that the word “related” and some terms that might be used to express that concept in other language versions, were complex and had given rise to difficulties of interpretation.

145. The secretariat was requested to prepare a revised draft taking account of the comments made.

Article 14. *Resort to arbitral or judicial proceedings*

146. The text of draft article 14 as considered by the Working Group was as follows:

“(1) [During conciliation proceedings the parties shall not initiate any arbitral or judicial proceedings in respect of a dispute that is the subject of the conciliation proceedings, and a court or arbitral tribunal shall give effect to this obligation. Either party may nevertheless initiate arbitral or judicial proceedings where, in its opinion, such proceedings are necessary for preserving its rights. Initiation of such proceedings is not of itself to be regarded as termination of the conciliation proceedings.]

“(2) [To the extent that the parties have expressly undertaken not to initiate [during a certain time or until an event has occurred] arbitral or judicial proceedings with respect to a present or future dispute, such an undertaking shall be given effect by the court or the arbitral tribunal [until the terms of the agreement have been complied with].

“(3) [The provisions of paragraphs (1) and (2) of this article do not prevent a party from approaching an appointing authority with a view to requesting it to appoint a conciliator.]”

147. Support was expressed for the substance of paragraph (1). It was noted that paragraph (1) would serve a function even if draft article 11, which dealt with the effect of conciliation on the limitation period, were to be retained (since the claimant might want to initiate arbitral or judicial proceedings for a purpose other than suspending the running of the limitation period).

148. Support was also expressed for the substance of paragraph (2), including the words placed between square brackets within the paragraph. It was considered that agreements to conciliate should be binding on the parties, in particular where the parties had expressly agreed not to initiate adversary proceedings until they had tried to settle their disputes by conciliation.

149. It was pointed out that paragraph (1), which allowed initiation of arbitral or judicial proceedings in certain circumstances, and paragraph (2), which did not permit initiation of arbitral or judicial proceedings before the parties complied with their commitment to conciliate, sought to achieve possibly conflicting results and that the operation of the two provisions should be coordinated and clarified.

150. It was noted that the words “a conciliator” in paragraph (3) should correctly read “an arbitrator”.

Article 15. *Arbitrator acting as conciliator*

151. The text of draft article 15 as considered by the Working Group was as follows:

“It is not incompatible with the function of an arbitrator if the arbitrator raises the question of a possible conciliation and, to the extent agreed to by the parties, participates in efforts to reach an agreed settlement.”

152. Under one view, draft article 15 should be deleted because its focus was on actions that could be taken during arbitral proceedings rather than actions taken during conciliation proceedings and that therefore, if it was needed at all, its proper place was legislation that dealt with arbitration. Moreover, it was recalled that during the discussion of draft article 1 (4), the Working Group discussed the possibility of excluding from the scope of the draft model legislative provisions those situations where an arbitrator would conduct a conciliation pursuant to his or her procedural prerogatives or discretion (for earlier discussion, see above para. 98). If that were to be the case, the draft article might be deleted. However, if the draft model legislative provisions would also cover situations where an arbitrator, in the course of arbitral proceedings, undertook to act as a conciliator, the substance of draft article 15 would remain useful; in such a case, it was suggested to express the idea of draft article 15 in draft article 1. No objection was expressed to the idea that an arbitrator could act as a conciliator, if both parties so agreed. The secretariat was requested to prepare on the basis of those discussions a draft, possibly with alternative solutions.

Article 16. *Enforceability of settlement*

153. The text of draft article 16 as considered by the Working Group was as follows:

“If the parties reach agreement on a settlement of the dispute and the parties and the conciliator or the panel of conciliators have signed the binding settlement agreement, that agreement is enforceable [*the enacting State inserts provisions specifying provisions for the enforceability of such agreements*].”

154. It was noted that legislative solutions regarding the enforceability of settlements reached in conciliation proceedings differed widely. Some States had no special provisions on the enforceability of such settlements, with the result that they would be enforceable as any contract between the parties. This understanding that conciliation settlements were enforceable as contracts had been restated in some laws on conciliation.

155. However, there were also laws that provided for expedited enforcement of such settlements. Reasons given for introducing an expedited enforcement usually aimed to foster the use of conciliation and to avoid situations where a court action to enforce a settlement might take months or years to reach judgement and then enforcement. Examples were given of legal systems under which a negotiated settlement could be enforced in a summary fashion, provided that the settlement was signed by the parties and their attorneys, and that the settlement agreement contained a statement to the effect that the parties were seeking summary enforcement of the agreement. Another approach taken provided that settlements might be the subject of expedited enforcement (for example, if the settlement agreement was

notarized or formalized by a judge or co-signed by the counsel of the parties). A further approach taken in some national legislation was to empower the parties who had settled a dispute to appoint an arbitration tribunal with a specific purpose of issuing an award on agreed terms based on the agreement of the parties.

156. It was also noted that several laws contained provisions to the effect that a written settlement agreement was to be treated as an award rendered by an arbitral tribunal and was to produce the same effect as a final award in arbitration, provided that the result of the conciliation process was reduced to writing and signed by the conciliator or conciliators and the parties or their representatives.

157. According to another approach found in one national law, the settlement agreement was deemed to be an enforceable title, and the rights, debts and obligations that were certain, express, and capable of being enforced, and that were recorded in the settlement agreement were enforceable pursuant to the provisions established for the enforcement of court decisions. It was pointed out, however, that that approach was used with respect to conciliation administered by approved institutions where the conciliators were selected from a list maintained by an official organ.

158. In yet other laws, it was provided that conciliation settlements were treated as arbitral awards, but that such

settlements “might, by leave of the court” be enforced in the same manner as a judgement, this wording appearing to leave a degree of discretion to the court in enforcing the settlement.

159. The view was expressed that the draft model legislative provisions might give recognition to a situation where the parties appointed an arbitral tribunal with the specific purpose of issuing an award based on the terms settled upon by the parties. Such an award, envisaged in article 30 of the Model Law, would be capable of enforcement as any arbitral award. Other settlements, according to that view, were to be regarded as contracts and to be enforced as such. Under that view, the model legislative provisions should merely state the principle that the settlement agreement was to be enforced, without attempting to provide a unified solution as to how such settlement agreements might become “enforceable”, a matter that should be left to the law of each enacting State. According to other views, however, it would be useful, in order to increase the attractiveness of conciliation, to endow settlements reached during conciliation with the possibility of enforcement. Accordingly, it was considered desirable to prepare a harmonized statutory provision for States that might wish to enact it. After discussion, the secretariat was requested to prepare a revised version of draft article 16, with possible variants to reflect the various views that had been expressed and the legislative approaches that had been discussed.

**E. Working paper submitted to the Working Group on Arbitration at its
thirty-fourth session: Settlement of commercial disputes:
Preparation of uniform provisions on: written form for
arbitration agreements, interim measures of protection, and conciliation:
Report of the Secretary-General
(A/CN.9/WG.II/WP.113 and Add.1 [Original: English])**

A/CN.9/WG.II/WP.113

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INTRODUCTION

1. The Commission, during its thirty-first session, held a special commemorative New York Convention Day on 10 June 1998 to celebrate the fortieth anniversary of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958) ("the New York Convention"). In addition to representatives of States members of the Commission and observers, some 300 invited persons participated in the event. Following the opening speech given by the Secretary-General, speeches were made by participants in the diplomatic conference that had adopted the Convention and leading arbitration experts presented reports on matters such as the promotion of the Convention, its enactment and application. Reports were also made on matters beyond the Convention itself, such as the interplay between the Convention and other international legal texts on international commercial arbitration and on difficulties encountered in practice but not addressed in existing legislative or non-legislative texts on arbitration.¹

2. In reports presented at the commemorative conference, various suggestions were made for presenting to the Commission some of the problems identified in practice so as to enable it to consider whether any related work by the Commission would be desirable and feasible. The Commission, at its thirty-first session in 1998, with reference to the discussions at the New York Convention Day, considered that it would be useful to engage in a discussion of possible future work in the area of arbitration at its thirty-second session. It requested the secretariat to prepare a note that would serve as a basis for the considerations of the Commission.²

3. At its thirty-second session, in 1999, the Commission had before it the requested note, entitled "Possible future work in the area of international commercial arbitration" (A/CN.9/460).³ Welcoming the opportunity to discuss the desirability and feasibility of further development of the law of international commercial arbitration, the Commission had generally considered that the time had arrived to assess the extensive and favourable experience with national enactments of the UNCITRAL Model Law on International Commercial Arbitration (1985) ("the UNCITRAL Model Law on Arbitration"), as well as the use of the UNCITRAL Arbitration Rules and the UNCITRAL Conciliation Rules, and to evaluate in the

universal forum of the Commission the acceptability of ideas and proposals for improvement of arbitration laws, rules and practices.⁴

4. When the Commission discussed the topic, it left open the question of what form its future work might take. It was agreed that decisions on form should be taken later as the substance of proposed solutions became clearer. Uniform provisions might, for example, take the form of a legislative text (such as model legislative provisions or a treaty) or a non-legislative text (such as a model contractual rule or a practice guide). It was stressed that, even if an international treaty were to be considered, it was not intended to be a modification of the New York Convention.⁵

5. The Commission entrusted the work to one of its three working groups, which it named Working Group on Arbitration, and decided that the priority items for the Working Group should be requirement of written form for the arbitration agreement,⁶ enforceability of interim measures of protection,⁷ conciliation,⁸ and possible enforceability of an award that had been set aside in the State of origin.⁹ The Working Group on Arbitration (previously named Working Group on International Contract Practices) commenced its work at its thirty-second session in Vienna from 20 to 31 March 2000 (the report of that session is contained in document A/CN.9/468). It continued its work at its thirty-third session in Vienna from 20 November to 1 December 2000 (the report of that session is contained in document A/CN.9/485).

6. At its thirty-second session (March, 2000) the Working Group considered the possible preparation of harmonized texts on the written form of arbitration agreements, interim measures of protection, and conciliation. In addition, the Working Group exchanged preliminary views on other topics that might be taken up in the future (document A/CN.9/468, paras. 107-114).

7. The Commission, at its thirty-third session (New York, 12 June-7 July 2000), commended the work of the Working Group accomplished so far and heard various observations to the effect that the work on the items on the agenda of the Working Group was timely and necessary in order to foster the legal certainty and predictability in the use of arbitration and conciliation in international trade. It noted that the Working Group had also identified a number of other topics, with various levels of priority, that had been suggested for possible future work (document A/CN.9/468, paras. 107-114). The Commission reaffirmed the mandate of the Working Group to decide on the time and manner of dealing with them (A/55/17, para. 395). Several statements were made to the effect that, generally, the Working Group, in deciding the priorities of the future items on its agenda, should pay particular attention to what was feasible and

¹*Enforcing Arbitration Awards under the New York Convention: Experience and Prospects* (United Nations publication, Sales No. E.99.V.2).

²*Official Records of the General Assembly, Fifty-third Session, Supplement No. 17 (A/53/17)*, para. 235.

³The note drew on ideas, suggestions and considerations expressed in different contexts, such as the New York Convention Day, New York, June 1998 (*Enforcing Arbitration Awards under the New York Convention: Experience and Prospects*, United Nations publication, Sales No. E.99.V.2); the Congress of the International Council for Commercial Arbitration, Paris 3-6 May 1998 (*Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention*, International Council for Commercial Arbitration Congress Series No. 9, Kluwer Law International, 1999); and other international conferences and forums such as the 1998 "Freshfields" lecture: Gerold Herrmann, "Does the world need additional uniform legislation on arbitration?" *Arbitration International*, vol. 15 (1999), No. 3, p. 211.

⁴*Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 17 (A/54/17)*, paragraph 337.

⁵*Ibid.*, paras 337-376 and 380.

⁶*Ibid.*, paras. 344-350.

⁷*Ibid.*, paras. 371-373.

⁸*Ibid.*, paras. 340-343.

⁹*Ibid.*, paras. 374 and 375.

practical and to issues where court decisions left the legal situation uncertain or unsatisfactory. Topics that were mentioned in the Commission as potentially worthy of consideration, in addition to those that the Working Group might identify as such, were the meaning and effect of the more-favourable-right provision of article VII of the New York Convention; raising claims in arbitral proceedings for the purpose of set-off and the jurisdiction of the arbitral tribunal with respect to such claims; freedom of parties to be represented in arbitral proceedings by persons of their choice; residual discretionary power to grant enforcement of an award notwithstanding the existence of a ground for refusal listed in article V of the New York Convention; and the power by the arbitral tribunal to award interest. It was noted with approval that, with respect to “on-line” arbitrations (i.e. arbitrations in which significant parts or even all of arbitral proceedings were conducted by using electronic means of communication), the Working Group on Arbitration would cooperate with the Working Group on Electronic Commerce. With respect to the possible enforceability of awards that had been set aside in the State of origin, a view was expressed that the issue was not expected to raise many problems and that the case law that gave rise to the issue should not be regarded as a trend (A/55/17, paragraph 396).

8. At its thirty-third session (November/December 2000) the Working Group discussed a draft interpretative instrument in respect of the writing requirement in article II(2) of the New York Convention and the preparation of harmonized texts on: the written form for arbitration agreements; interim measures of protection; and conciliation (on the basis of the report of the Secretary-General: documents A/CN.9.WG.II/WP.110 and A/CN.9.WG.II/WP.111). The considerations of the Working Group are reflected in document A/CN.9/485.

9. The Working Group also considered likely items for future work as being: court-ordered interim measures of protection in support of arbitration; scope of interim measures that may be ordered by arbitral tribunals; and validity of agreements to arbitrate (discussed in document A/CN.9/WG.II/WP.111). The Working Group supported future work being undertaken on all these topics and requested the secretariat to prepare, for a future session of the Working Group, preliminary studies and proposals (see paras. 104 to 106 in document A/CN.9/485).

10. The present document has been prepared on the basis of the discussions in the Working Group. It covers the three topics on the current agenda: the written form for arbitration agreements; enforcement of interim measures of protection; and model legislation on conciliation. The document has been issued in two parts: A/CN.9/WG.II/WP.113 on the first two topics and A/CN.9/WG.II/WP.113/Add.1 on conciliation. In considering the present document, the reader should refer in particular to the working paper on these topics (A/CN.9/WG.II/WP.110) that was prepared for the thirty-third session of the Working Group (November/December 2000), and the report of that session, contained in document A/CN.9/485. These documents may also be found on the UNCITRAL website (www.uncitral.org) under “Working Groups” and “Working Group on Arbitration”.

I. REQUIREMENT OF WRITTEN FORM FOR THE ARBITRATION AGREEMENT

References to previous working papers and reports:

Note on possible future work: A/CN.9/460 (April 1999), paragraphs 20 to 31.

Report of the Commission: A/54/17 (May-June 1999), paragraphs 344 to 350;

Working Paper: A/CN.9/WG.II/WP.108/Add.1 (January 2000), paragraphs 1 to 40;

Report of Working Group: A/CN.9/468 (March 2000), paragraphs 88 to 106;

Working Paper: A/CN.9/WG.II/WP.110 (September 2000), paragraphs 10 to 51;

Report of Working Group: A/CN.9/485 (November-December 2000), paragraphs 21 to 59.

A. Model legislative provisions on written form for the arbitration agreement

11. At its previous session (November/December 2000), the Working Group considered a draft model legislative provision revising article 7(2) of the Model Law on Arbitration (set forth in document A/CN.9/WG.II/WP.110 at paras. 15-26). The considerations of the Working Group are reflected in document A/CN.9/485, paras. 21 to 49. Having concluded its considerations of the draft provision, the Working Group requested an informal drafting group to prepare, on the basis of the considerations in the Working Group, a draft that would serve as a basis for subsequent discussions (A/CN.9/485, para. 50).

12. The drafting group was requested to prepare a short version and a long version, each of which would cover all of the circumstances referred to in paragraphs (2) and (3) of article 7 as set forth in paragraph 15 of document A/CN.9/WG.II/WP.110. The drafting group prepared not only a short version and a long version, but also a middle version. It was reported that each of those three versions was intended to be identical in substance but with varying degrees of detail. The text prepared by the drafting group (reproduced in document A/CN.9/485, para. 52) was as follows:

Article 7. Definition and form of arbitration agreement

Short version

“(1) ‘Arbitration agreement’ is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

“(2) The arbitration agreement shall be in writing. A writing includes any form accessible so as to be usable for subsequent reference.

“(3) For the avoidance of doubt, in cases where under the applicable law or rules of law an arbitration agreement or contract can be concluded other than in writing, the writing requirement is met when an arbitration agreement or contract so concluded refers to written arbitration terms and conditions.

“(4) Furthermore, an agreement is in writing if it is contained in an exchange of written statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.

“(5) For purposes of article 35, the written arbitration terms and conditions, together with any writing incorporating by reference or containing those terms and conditions, constitute the arbitration agreement.”

Middle version

“(1) ‘Arbitration agreement’ is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

“(2) The arbitration agreement shall be in writing. A writing includes any form that provides a record of the agreement or is otherwise accessible so as to be usable for subsequent reference, including electronic, optical or other data messages.

“(3) For the avoidance of doubt, in cases where under the applicable law or rules of law a contract or arbitration agreement referred to in paragraph (1) can be concluded orally, by conduct or by other means not in writing, the writing requirement is met when the arbitration terms and conditions are in writing, notwithstanding that the contract or arbitration agreement has been so concluded or has not been signed by the parties.

“(4) Furthermore, an arbitration agreement is in writing if it is contained in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.

“(5) The reference in a contract to an arbitration clause not contained in the contract constitutes an arbitration agreement provided that the reference is such as to make that clause part of the contract.

“(6) For purposes of article 35, the written arbitration terms and conditions, together with any writing incorporating by reference or containing those terms and conditions, constitute the arbitration agreement.”

Long version

“(1) ‘Arbitration agreement’ is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether

contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

“(2) The arbitration agreement shall be in writing. A writing includes any form that provides a record of the agreement or is otherwise accessible so as to be usable for subsequent reference, including electronic, optical or other data messages.

“(3) For the avoidance of doubt, in cases where under the applicable law or rules of law a contract or arbitration agreement referred to in paragraph (1) can be concluded orally, by conduct or by other means not in writing, the writing requirement is met when the arbitration terms and conditions are in writing, notwithstanding that the contract or arbitration agreement has been so concluded or has not been signed by the parties.

“(4) Furthermore, an arbitration agreement is in writing if it is contained in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.

“(5) The reference in a contract to an arbitration clause not contained in the contract constitutes an arbitration agreement provided that the reference is such as to make that clause part of the contract.

“(6) For purposes of article 35, the written arbitration terms and conditions, together with any writing incorporating by reference or containing those terms and conditions, constitute the arbitration agreement.

“(7) Examples of circumstances that meet the requirement that an arbitration agreement be in writing as set forth in this article include, but are not limited to, the following illustrations: [secretariat asked to prepare a text based on Working Group’s discussions].”¹⁰

¹⁰The examples may be the cases in draft article 7(3) reproduced in document A/CN.9/485, para. 23, as rewritten pursuant to the discussion in the Working Group (A/CN.9/485, paras. 24-44):

An arbitration agreement meets the requirement in paragraph (2) if [A/CN.9/485, paras. 28 and 29]:

(a) it is contained in a document agreed upon by the parties whether or not it is signed by the parties; [A/CN.9/485, para. 30];

(b) it is made by an exchange of written communications; [A/CN.9/485, para. 30];

(c) it is contained in one party’s written offer or counter-offer, provided that [to the extent permitted by law of usage] the contract has been concluded by acceptance, or an act constituting acceptance such as performance or a failure to object, by the other party; [A/CN.9/485, paras. 31-34];

(d) it is contained in a [contract confirmation] [communication confirming the terms of the contract], provided that, to the extent permitted by law or usage, the terms of the confirmation have been accepted by the other party, either [expressly] [by express reference to the confirmation or its terms] or by a failure to object; [A/CN.9/485, paras. 35 and 36];

(e) it is contained in a written communication by a third party to both parties and the content of the communication is considered to be part of the contract; [A/CN.9/485, para. 37];

(f) it is contained in an exchange of statements [of claim and defence] [on the substance of the dispute] in which the existence of an agreement is alleged by one party and not denied by the other; [A/CN.9/485, para. 38];

(g) a contract concluded [in any form][orally] refers to an [arbitration clause][or arbitration terms and conditions] provided that the reference is such as to make [that clause][those terms and conditions] part of the contract. [A/CN.9/485, paras. 39-41];

13. The Working Group briefly discussed the text prepared by the informal drafting group (that discussion is reflected in document A/CN.9/485, paras. 53-58). At the close of that discussion, the secretariat was requested to prepare draft texts, possibly with alternatives, for consideration at the next session, based on the discussion in the Working Group (document A/CN.9/485, para. 59). The following text has been prepared pursuant to that request:

**Article 7. Definition and form
of arbitration agreement**

[Unchanged para. (1) of the UNCITRAL Model Law on Arbitration:]

(1) “Arbitration agreement” is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(2) The arbitration agreement shall be in writing. [For the avoidance of doubt], “writing” includes any form that provides a record of the agreement or is otherwise accessible so as to be usable for subsequent reference, including electronic, optical or other data messages.

(3) [For the avoidance of doubt, the writing requirement in paragraph (2) is met] [The arbitration agreement is in writing]

if the

[arbitration clause or arbitration terms and conditions or any arbitration rules referred to by the arbitration agreement are] [the arbitration clause, whether signed or not, is]

in writing,

[Variant 1:] notwithstanding that the contract or the separate arbitration agreement has been concluded [other than in writing] [orally, by conduct or by other means not in writing]. *[Variant 2:]* irrespective of the form in which the parties have agreed to submit to arbitration.

14. The Working Group may wish to add to the above text any of the provisions contained in draft paragraphs (4) and (5) (“short version”), paragraphs (4) to (6) (“middle version”) or paragraphs (4) to (7) (“long version”) reproduced above in paragraph 12.

**B. Interpretative instrument regarding article II(2)
of the New York Convention**

15. The Working Group at its previous session (November/December 2000) discussed a preliminary draft

interpretative instrument relating to article II(2) of the New York Convention. The draft and comments thereon were contained in document A/CN.9/WG.II/WP.110 at para. 48. The considerations in the Working Group are reflected in document A/CN.9/485 at paras. 60 to 77. The Working Group requested the secretariat to prepare a revised draft taking into account the discussion in the Working Group (document A/CN.9/485, para. 76). While the Working Group took the view that guidance on interpretation of article II(2) of the New York Convention would be useful in achieving uniform interpretation that responded to the needs of international trade, the Working Group decided that a declaration, resolution or statement addressing the interpretation of that Convention that would reflect a broad understanding of the form requirement could be further studied to determine the optimal approach (A/CN.9/485, para. 60).

16. The preliminary draft interpretative instrument as contained in paragraph 61 of document A/CN.9/485, has been redrafted to reflect the considerations in the Working Group. The revised text is as follows:

[Declaration]¹¹ regarding interpretation of article II(2) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, 10 June 1958,

The United Nations Commission on International Trade Law,

[1] *Recalling* resolution 2205 (XXI) of the General Assembly of 17 December 1966, which established the United Nations Commission on International Trade Law with the object of promoting the progressive harmonization and unification of the law of international trade,

[2] *Conscious* of the fact that the Commission includes¹² the principal economic and legal systems of the world, and developed and developing countries,

[3] *Recalling* resolution 55/151 of the General Assembly of 12 December 2000 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,¹³

[4] *Conscious* of its mandate to further the progressive harmonization and unification of the law of international trade by, inter alia, promoting ways and means of ensuring a uniform interpretation and application of international conventions and uniform laws in the field of the law of international trade,

¹¹Discussion in the Working Group: paras. 66 and 69 of document A/CN.9/485.

¹²Discussion in the Working Group: para. 72 of document A/CN.9/485.

¹³Discussion in the Working Group: para. 73 of document A/CN.9/485.

[5] *Convinced* that the wide adoption of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards has been an essential achievement in the promotion of the rule of law, particularly in the field of international trade,

[6] *Noting* that the Convention was drafted in the light of business practices in international trade and communication technologies in use at the time, [and that those technologies in international commerce have developed along with the development of electronic commerce],¹⁴

[7] *Noting also* that the use and acceptance of international commercial arbitration in international trade has been increasing and that, along with that development, expectations of participants in international trade as regards the form in which an arbitration agreement may be made have changed,

[8] *Noting further* article II(1) of the Convention, according to which “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”, and article II(2) of the Convention, according to which “The term ‘agreement in writing’ shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams”,

[9] *Concerned about* differing interpretations of article II(2) of the Convention,¹⁵

[10] *Recalling* that the Conference of Plenipotentiaries which prepared and opened the Convention for signature adopted a resolution, which states, inter alia, that the Conference “considers that greater uniformity of national laws on arbitration would further the effectiveness of arbitration in the settlement of private law disputes ...”,

[11] *Considering* that the purpose of the Convention, as expressed in the Final Act of the United Nations Conference on International Commercial Arbitration, of increasing the effectiveness of arbitration in the settlement of private law disputes requires that the interpretation of the Convention [reflect the needs of international commercial arbitration] [reflect changes in communication technologies and business practices],¹⁶

[12] *Being of the opinion* that in interpreting the Convention 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,¹⁷

[13] *Taking into account* that subsequent international legal instruments such as the UNCITRAL Model Law on International Commercial Arbitration and the UNCITRAL Model Law on Electronic Commerce reflect the judgement of the Commission and the international community that legislation governing trade and arbitration should reflect evolving¹⁸ methods of communication and business practices,

[14] *Convinced* that uniformity in the interpretation of the term “agreement in writing” is necessary for enhancing¹⁹ predictability in international commercial transactions,

[15] *Recommends* to Governments that the definition of “agreement in writing” contained in article II(2) of the Convention should be interpreted to include [...] ²⁰

II. MODEL LEGISLATIVE PROVISIONS ON THE ENFORCEMENT OF INTERIM MEASURES OF PROTECTION

17. At its previous session (November/December 2000), the Working Group considered two draft variants of provisions on the enforcement of interim measures of protection (document A/CN.9/WG.II/WP.110, paras. 55 and 57 and reproduced in document A/CN.9/485 at para. 79). The considerations in the Working Group are reflected in document A/CN.9/485, paras. 80 to 102. After discussing both variants, the Working Group decided to take variant 1 as a basis for its further discussions (A/CN.9/485, para. 81). Due to time constraints, the Working Group postponed consideration of several draft provisions in variant 1 and possible additional provisions contained in A/CN.9/WG.II/WP.110, paras. 63 to 80 (A.CN.9/485, para. 103). The draft provisions presented below have been prepared pursuant to the considerations in the Working Group. In discussing these drafts, the Working Group may wish to consider and take decisions on “possible additional provisions” presented to the previous session of the Working Group in document A/CN.9/WG.II/WP.110, paras. 63 to 80.

18. The draft provision presented below consists of current article 17 of the UNCITRAL Model Law on Arbitration as paragraph (1) with additions to accommodate views in the Working Group that the provision contain a definition of interim measures of protection (see paras. 82

¹⁴Discussion in the Working Group: para. 74 of document A/CN.9/485.

¹⁵Ibid.

¹⁶Ibid.

¹⁷Discussion in the Working Group: paragraph 71 of document A/CN.9/485 (the wording is modelled on article 7 of the United Nations Convention on Contracts for the International Sale of Goods (1980) and other texts such as article 3 of the UNCITRAL Model Law on Electronic Commerce (1996)).

¹⁸Discussion in the Working Group: para. 72 of document A/CN.9/485.

¹⁹Ibid.

²⁰For the consideration in the Working Group of the relationship between the draft declaration and the proposed revision of article 7 of the UNCITRAL Model Law on Arbitration, see para. 70 of document A/CN.9/485.

and 83 in document A/CN.9/485) and perhaps additional provisions on ex parte interim measures (see paras. 91-94 in document A/CN.9/485).

Draft article 17. Power of arbitral tribunal to order interim measures²¹

[Unchanged text of article 17:] (1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute. The arbitral tribunal may require any party to provide appropriate security in connection with such measure.

(2) An interim measure of protection is any temporary measure [, whether it is established in the form of an arbitral award or in another form,]²² ordered by the arbitral tribunal pending the issuance of the award by which the dispute is finally decided. [The arbitral tribunal may, in order to ensure that any such measure is effective, grant the measure without notice to the party against whom the measure is directed for a period not to

exceed [30] days; such a measure may be extended after that party has been given notice and an opportunity to respond.]²³

New article. Enforcement of interim measures of protection²⁴

(1) Upon the application to the competent court by [the arbitral tribunal or by] the interested party made with the approval of the arbitral tribunal,²⁵ an interim measure of protection referred to in article 17 shall be enforced, irrespective of the country in which it was made, except that the court may at its discretion refuse enforcement if:

(a) The party against whom the measure is invoked furnishes proof that:²⁶

(i) Application for the same or similar interim measure has been made to a court in this State, whether or not the court has taken a decision on the application;²⁷ or

(ii) [*Variant 1*] The arbitration agreement referred to in article 7 is not valid [*Variant 2*] The arbitration agreement referred to in article 7 appears not to be valid, in which case the court may refer the issue of the [jurisdiction of the arbitral tribunal] [validity of the arbitration agreement] to be decided by the

²¹In view of the discussion in the Working Group regarding the need for examples to illustrate the definition of interim measures (A/CN.9/485, para. 82), it is suggested that examples of interim measures, as well as examples of orders not intended to be understood as interim measures, be explained in the guide to enactment. The elements for the relevant part of the guide might be the following:

Interim measures of protection are referred to by different expressions, including "conservatory measures" or "provisional measures". Characteristics of an interim measure are that the measures are given at the request of one party, made in the form of an order or an award and intended to be temporary, pending a final outcome of the arbitration. Objectives of an interim measure include the following: elimination of obstacles to the conduct of proceedings (e.g. by orders designed to prevent the destruction of evidence); prevention of loss or damage (e.g. an order to continue construction works despite the fact that the obligation to continue is at issue); preservation of the status quo (e.g. an order directing the beneficiary of an independent guarantee not to demand payment under the guarantee); and facilitation of enforcement of the award (e.g. an order requiring a party to provide security for costs or an order aimed at preventing the transfer of assets to a foreign jurisdiction or the dissipation of assets). Not included among interim measures are decisions that relate to the conduct of arbitral proceedings in general, such as: an order that a party produce a particular piece of evidence; an order that a party deposit an amount as an advance for the costs of the arbitration; or an order designed to maintain confidentiality of information relating to the arbitration. Also not included are decisions that are part of, or that will be factored into, the final decision on the dispute submitted to arbitration (e.g. decisions relating to the jurisdiction of the arbitral tribunal, the costs of arbitration, and the law applicable to the substance of the dispute). Moreover, the concept of interim measures would exclude orders issued under the procedures used in some jurisdictions according to which the arbitral tribunal directs a party to make an "interim payment" or "interim partial payment" to the other party to the extent it is beyond doubt that the amount of the interim payment is due and that such payment is to be merged into the final award.

²²The wording "whether it is established in the form of an arbitral award or in another form" reflects the discussion of the Working Group (document A/CN.9/485 at para. 83) which acknowledged that, in practice, arbitrators use a variety of forms and names in issuing interim measures of protection.

²³The draft provision in square brackets has been included to stimulate discussion in the Working Group about the desirability of recognizing the possibility of issuing an interim measure of protection without giving immediate notice thereof to the party ordered to comply with the measure (such measures are often referred to as ex parte measures: see also paras. 91-94 of document A/CN.9/485). The draft provision is intended to recognize not only that the arbitral tribunal may issue an ex parte measure, but also that the court may issue an ex parte order for the enforcement of that measure provided that this is done before the expiry of the [30] day period. If a provision based on such a policy would be acceptable, para. 1(iii) of the "New article: Enforcement of interim measures of protection" would have to be adjusted to allow for the postponement of notice to the party against whom the measure is made until the expiry of the [30] day period or until the court has issued an order for the enforcement of the measure, whichever occurs first.

²⁴The Working Group may wish to consider where the draft provision on enforcement of interim measures might be placed. One possibility is to include it in the UNCITRAL Model Law on International Commercial Arbitration under a new chapter VI bis, as article 33 bis.

²⁵The guide to enactment will clarify that the approval of the arbitral tribunal may be given in the order itself, at the time the order is given or subsequently.

²⁶For a discussion of this subparagraph in the Working Group, see document A/CN.9/485, paras. 84 and 85.

²⁷For the discussion of subparagraph (i), see para. 86 of document A/CN.9/485. The draft provision is intended to cover situations where a request for the same or similar measure is pending with the court, where the request has been denied by the court and where the court has granted the same or similar interim measure. It may be noted, however, that a previous denial of a request by the court would not necessarily lead to the conclusion that the arbitral tribunal's measure was unwarranted and that the court should refuse its enforcement (e.g. when the circumstances have changed after the earlier court decision). Also the existence of an earlier measure by the court may not warrant the refusal of enforcement of a measure ordered subsequently by the arbitral tribunal (e.g. if the measure by the arbitral tribunal refers to a different part of the claim or can be regarded as an additional measure necessary because of changed circumstances). It appears that the principle of discretion, expressed in the chapeau of the draft provision, is appropriate to allow the court to take those circumstances into account, as appropriate.

- arbitral tribunal in accordance with article 16 of this Law],²⁸ or
- (iii) The party against whom the interim measure is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present its case with respect to the interim measure, [in which case the court may suspend the enforcement proceedings until the parties have been heard by the arbitral tribunal];²⁹ or
- (iv) The interim measure has been terminated, suspended or amended by the arbitral tribunal;³⁰ or
- (b) The court finds that:
- (i) Such a measure is incompatible with the powers conferred upon the court by its procedural laws,³¹ unless the court decides to reformulate the measure to the extent necessary to adapt it to its own powers and procedures for the purpose of enforcing the measure; or

- (ii) The recognition or enforcement of the interim measure would be contrary to the public policy of this State.”³²

(2) The party who is seeking enforcement of an interim measure shall promptly inform the court of any termination, suspension or amendment of that measure.³³

(3) In reformulating the measure under paragraph (1)(b)(i), the court shall not modify the substance of the interim measure.³⁴

(4) Paragraph (1)(a)(iii) does not apply to an interim measure of protection that was ordered without notice to the party against whom the measure is invoked, provided that the measure was ordered to be effective for a period not exceeding [30] days and the enforcement of the measure is requested before the expiry of that period.³⁵

*The conditions set forth in this paragraph are intended to set maximum standards. It would not be contrary to the harmonization to be achieved if a State retained less onerous conditions.³⁶

²⁸For the discussion of subparagraph (ii) in the Working Group, see paras. 87 and 88 of document A/CN.9/485. It was considered in the Working Group that it should be understood (either from the provision or from the guide to enactment) that the court should not go beyond a prima facie assessment of the validity of the arbitration agreement, thus leaving the full examination of the validity of the arbitration agreement to the arbitral tribunal (para. 88 of document A/CN.9/485).

²⁹For the discussion of subparagraph (iii) in the Working Group, see paras. 89 to 94 of document A/CN.9/485. Subparagraph (iii) is not intended to prevent the arbitral tribunal from issuing *ex parte* interim measures; it merely requires that, by the time the request for enforcement is made to the court, the party to whom the measure is directed should have been heard by the arbitral tribunal. The wording between square brackets, by adding the discretion to suspend enforcement proceedings, emphasizes the idea that the court, faced with a measure with respect to which the affected party ought to have been heard, should not itself hear the arguments regarding the measure and evaluate its merits, but should rather leave that to the arbitral tribunal. The guide to enactment may clarify that a refusal by the court to enforce a measure on the ground set out in subparagraph (iii) does not prevent the arbitral tribunal from hearing the parties on the measure and issuing an *inter partes* measure which would be capable of enforcement by the court.

³⁰For the discussion of subparagraph (iv), see paras. 95 and 96 of document A/CN.9/485. The requirement (in the chapeau of the article) that the arbitral tribunal should approve the application for enforcement would advance the policy underlying subparagraph (iv). In order to stimulate discussion in the Working Group as to whether that policy should be further advanced, a new draft paragraph (2) has been included.

³¹For discussion in the Working Group, see para. 101 of document A/CN.9/485.

³²Subparagraph (ii) was not discussed at the last Working Group, due to time constraints (see document A/CN.9/485 at para. 103).

³³For discussion in the Working Group, see document A/CN.9/485, paras. 95 and 96.

³⁴Draft paragraph (3) has been included to reflect the discussion in paras. 100 and 101 of document A/CN.9/485 and also reflects the considerations in document A/CN.9/WG.II/WP.110, paras. 71 and 72. A further clarification concerning the possible reformulation of a measure may be included in the guide to enactment.

³⁵See document A/CN.9/485, paras. 91 to 93.

³⁶This footnote has been drafted pursuant to the suggestion, reflected in document A/CN.9/485, para. 85, that, to the extent that a single regime could not be agreed upon, in particular if a national law provided a more favourable regime, a footnote, along the lines of the footnote to article 35(2) of the Model Law on Arbitration could be included.

A/CN.9/WG.II/WP.113/Add.1

ADDENDUM

[Chapters I and II are published in document A/CN.9/WG.II/WP.113]

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CONCILIATION

A. General remarks

References to previous working papers and reports:

- Note on possible future work: A/CN.9/460 (April 1999), paragraphs 8 to 19;
 Report of the Commission: A/54/17 (May-June 1999), paragraphs 340 to 343;
 Working paper: A/CN.9/WG.II/WP.108 (January 2000), paragraphs 11 to 62;
 Report of Working Group: A/CN.9/468 (March 2000), paragraphs 18 to 59;
 Working paper: A/CN.9/WG.II/WP.110 (September 2000), paragraphs 81 to 112;
 Report of Working Group: A/CN.9/485 (November-December 2000), paragraphs 107 to 159.

1. At its previous session (20 November-1 December 2000), the Working Group considered articles 1, 2, 5, 7, 8, 9 and 10 of the

draft model legislative provisions on conciliation (as set out and numbered in A/CN.9/WG.II/WP.110 at paras. 81-111). It requested that the secretariat prepare revised drafts of these articles, taking account of the views expressed in the Working Group (see paras. 107-159 in document A/CN.9/485). The remaining articles (being articles 3, 4, 6, 11 and 12) were not considered due to lack of time.

2. The Working Group did not decide whether ultimately the uniform text would be named as model legislative provisions or a model law. The decision would seem to depend on whether the provisions would be adopted as a discrete model law on conciliation or as a set of model provisions that would be added as a new chapter to the UNCITRAL Model Law on International Commercial Arbitration (in which case the Working Group may wish to rename the Model Law to reflect its broader scope).

3. The revised draft model legislative provisions, presented below, have been prepared pursuant to the considerations and decisions of the Working Group.

B. Model legislative provisions on conciliation

Article 1. *Scope of application*

(1) These model legislative provisions apply to a conciliation, as defined in article 2, if:

- (a) It is commercial;^{*1}
- (b) It is international, as defined in article 3;
- (c) The place of conciliation is in this State.²

(2) Articles ... apply also if the place of conciliation is not in this State.³

(3) These model legislative provisions apply irrespective of whether a conciliation is carried out on the initiative of a party, in compliance with an agreement of the parties, or pursuant to a direction or request of a court or competent governmental entity.⁴

(4) These model legislative provisions do not apply to: [...].⁵

*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.

¹See paras. 113-116 in document A/CN.9/485.

²In order to increase certainty as to when the model legislative provisions apply, the Working Group may wish to discuss the desirability of including a provision according to which the parties would agree upon the place of conciliation and, failing that agreement, it would be for the conciliator or the panel of conciliators to determine that place. In order to address cases where the place of conciliation has not been agreed upon or determined and where, for other reasons, it is not possible to establish the place of conciliation (for example, when a conciliation is carried out by using telecommunications), the criteria for the applicability of the model legislative provisions might be, for example, the place of the institution that administers the conciliation proceedings, the place of residence of the conciliator, or the place of business of both parties if that place is in the same country.

³The draft paragraph has been included to stimulate discussion as to whether certain provisions (such as those on the admissibility of evidence in other proceedings, the role of conciliator in other proceedings or the limitation period) should produce effects in the enacting State even if the conciliation proceedings take, or took, place in another country and would thus not generally be governed by the law of the enacting State (see paras. 120 and 134 of document A/CN.9/485).

⁴The draft paragraph has been drafted in accordance with suggestions made in the Working Group (see para. 130 of document A/CN.9/485).

⁵Assuming that some enacting States may wish to exclude certain cases from the application of the model legislative provisions, the Working Group may wish to consider whether the possibility of exclusion, as proposed in draft article 1, para. 4, should be indicated in the text. Possible areas of exclusion might be indicated in the guide to enactment. Those areas might be, for example, situations where the judge or the arbitrator, in the course of adjudicating a particular dispute, himself or herself conducts a conciliatory process either at the request of the disputing parties or exercising his or her prerogatives or discretion. Another area of exclusion may be collective bargaining relationships between employers and employees.

(5) Except as otherwise provided in these model legislative provisions, the parties may agree to exclude or vary any of these provisions.⁶

Article 2. *Conciliation*

For the purposes of these model legislative provisions, "conciliation" means a process [, whether referred to by the expression conciliation, mediation or an expression of similar import,]⁷ whereby parties request a third person, or a panel of persons, to assist them in an independent and impartial manner in their attempt to reach an amicable settlement of their dispute arising out of or relating to or contract or other legal relationship.⁸

Article 3. *International conciliation*⁹

(1) 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) one of the following places is situated outside the State in which the parties have their places of business:

- (i) the place of conciliation;
- (ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or

(c) the parties have [expressly] agreed that the subject-matter of the agreement to conciliate relates to more than one country.¹⁰

⁶At its previous session, the Working Group agreed to proceed on the basis that the model legislative provisions would be non-mandatory but that the issue of the degree to which specific draft provisions would be mandatory would need to be revisited as work progressed on the provisions (paras. 112 and 142 of document A/CN.9/485). The Working Group may wish to consider whether the extent of the non-mandatory nature of the model legislative provisions should be clarified in one general provision (as has been done in draft para. 5). The Working Group may also wish to consider whether any mandatory provisions should be expressly indicated in draft para. 5.

⁷The reference to "mediation" was included in draft article 2 to reflect observations made at the previous session of the Working Group that, in addition to the term conciliation, other terms are used in practice. Sometimes those terms are used interchangeably (without an apparent difference in meaning) and, in other cases, distinctions are made depending on the procedural styles or techniques used. As the model legislative provisions are designed to cover different procedural styles or techniques when an independent and impartial person assists parties in resolving a dispute, the inclusion clarifies that the model legislative provisions encompass all such styles or techniques (see paras. 108 and 109 of document A/CN.9/485).

⁸For a discussion of this provision, see paras. 123 and 124 of document A/CN.9/485.

⁹For a discussion of this provision, see paras. 117-120 of document A/CN.9/485. In view of the broad scope of the definition of internationality, the Working Group may wish to consider whether the model legislative provisions should apply to all cases of commercial conciliation, without distinguishing between domestic and international cases.

¹⁰The Working Group may wish to consider whether the expression "the subject-matter of the agreement to conciliate relates to more than one country" might be replaced by words such as "these model legislative provisions are applicable".

(2) 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.

Article 4. *Commencement of conciliation proceedings*

(1) The conciliation proceedings in respect of a particular dispute commence on the day on which an invitation to conciliate that dispute made by one party is accepted by the other party.¹¹

(2) If the party initiating conciliation does not receive a reply within [thirty] days from the day on which the invitation was sent, or within such other period of time as specified in the invitation, the party may elect to treat this as a rejection of the invitation to conciliate.¹²

Article 5. *Number of conciliators*

There shall be one conciliator, unless the parties agree that there shall be a panel of conciliators.¹³

Article 6. *Appointment of conciliators*¹⁴

(1) In conciliation proceedings with one conciliator, the parties shall endeavour to reach agreement on the name of the sole conciliator.

(2) In conciliation proceedings with two conciliators, each party appoints one conciliator.

(3) In conciliation proceedings consisting of three or more conciliators, each party appoints one conciliator and shall endeavour to reach agreement on the names of the other conciliators.

(4) Parties may seek the assistance of an appropriate institution or person in connection with the appointment of conciliators. In particular:

(a) a party may request such an institution or person to recommend names of suitable persons to act as conciliators; or

(b) the parties may agree that the appointment of one or more conciliators be made directly by such an institution or person.

(5) In recommending or appointing individuals to act as conciliators, the institution or person shall have regard to such considerations as are likely to secure the appointment of an

independent and impartial conciliator and, with respect to a sole or third conciliator, shall take into account the advisability of appointing a conciliator of a nationality other than the nationalities of the parties.

Article 7. *Conduct of conciliation*¹⁵

(1) The parties determine [, by reference to a standard set of rules or otherwise.] the manner in which the conciliation is to be conducted.

(2) Failing agreement on the manner on which the conciliation is to be conducted, the conciliator or the panel of conciliators may conduct the conciliation proceedings in such a manner as the conciliator or the panel of conciliators considers appropriate, taking into account the circumstances of the case, the wishes that the parties may express, and the need for a speedy settlement of the dispute.¹⁶

(3) The conciliator shall be guided by principles of objectivity, fairness and justice. [Unless otherwise agreed by the parties, the conciliator may give consideration to, among other things, the rights and obligations of the parties, the usages of the trade concerned and the circumstances surrounding the dispute, including any previous business practices between the parties.]¹⁷

[(4) The conciliator may, at any stage of the conciliation proceedings, make proposals for a settlement of the dispute.]¹⁸

Article 8. *Communication between conciliator and parties*¹⁹

Unless otherwise agreed by the parties, the conciliator or the panel of conciliators may meet or communicate with the parties together or with each of them separately.

Article 9. *Disclosure of information*²⁰

[*Alternative 1:*] When the conciliator or the panel of conciliators receives information concerning the dispute from a party, the conciliator or the panel of conciliators may disclose the substance of that information to the other party in order that the other party may have the opportunity to present any explanation which it considers appropriate. However, [the parties are free to agree otherwise, including that] the conciliator or the panel of conciliators shall not disclose information received from a party, when the party gives the information to the conciliator or the panel of conciliators subject to a specific condition that it be kept confidential.²¹

¹⁵For the discussion of this provision, see paras. 122-125 in document A/CN.9/485.

¹⁶See article 7(3) of the UNCITRAL Conciliation Rules.

¹⁷The provision is largely based on para. 2 of article 7 of the UNCITRAL Conciliation Rules.

¹⁸For comments on paras. (3) and (4) of the current draft of article 7, see para. 92 of document A/CN.9/WG.II/WP.110.

¹⁹Article 8 (which in the previous draft, as contained following para. 92 of document A/CN.9/WG.II/ W.P110, was draft article 3) was not considered at the previous session of the Working Group.

²⁰Article 9 (which in the previous draft, as contained following para. 93 of document A/CN.9/WG.II/ W.P110, was draft article 4) was not considered at the previous session of the Working Group. For an earlier discussion on this issue see document A/CN.9/468, paras. 54 and 55.

²¹Alternative 1 is modelled on article 10 of the UNCITRAL Conciliation Rules.

¹¹For the discussion of this provision, see paras. 127-132 of document A/CN.9/485. The draft is largely based on article 2 of the UNCITRAL Conciliation Rules. The Working Group may wish to discuss whether para. (1) adequately covers all situations, including those where the court or a competent governmental entity directs or requests the parties to conciliate.

¹²This paragraph was prepared pursuant to a discussion in the previous Working Group (see para. 129 of document A/CN.9/485).

¹³This has been inserted as requested by the Working Group at para. 123 of document A/CN.9/485. The draft reflects article 3 of the UNCITRAL Conciliation Rules.

¹⁴See para. 123 of A/CN.9/485. This draft article is based on article 4 of the UNCITRAL Conciliation Rules.

[*Alternative 2:*] Unless otherwise agreed by the parties, nothing which is communicated to the conciliator or the panel of conciliators by a party in private concerning the dispute may be disclosed to the other party without the express consent of the party who gave the information.

Article 10. *Termination of conciliation*²²

The conciliation proceedings are terminated:

(a) by the signing of the settlement agreement by the parties, on the date of the agreement;²³

(b) by a written declaration of the conciliator, after consultation with the parties, to the effect that further efforts at conciliation are no longer justified, on the date of the declaration;

(c) by a written declaration of the parties addressed to the conciliator to the effect that the conciliation proceedings are terminated, on the date of the declaration; or

(d) by a written declaration of a party to the other party and the conciliator, if appointed, to the effect that the conciliation proceedings are terminated, on the date of the declaration.

[Article 11. *Limitation period*

(1) When the conciliation proceedings commence, the running of the limitation period regarding the claim that is the subject matter of the conciliation is suspended.

(2) Where the conciliation proceedings have terminated without a settlement, the limitation period resumes running from the time the conciliation ended without a settlement.]²⁴

Article 12. *Admissibility of evidence in other proceedings*²⁵

(1) [Unless otherwise agreed by the parties,]²⁶ a party who participated in the conciliation proceedings [or a third person]²⁷

²²Article 10 (which in the previous draft, as contained following para. 96 of document A/CN.9/WG.II/W.P.110, was draft article 6) was not discussed at the previous session of the Working Group.

²³The Working Group may wish to discuss whether the words “the signing” should be replaced by the words “the conclusion” to better accommodate electronic commerce.

²⁴For the discussion of the question whether draft article 11 (which in the previous draft, as contained following para. 96 in document A/CN.9/WG.II/W.P.110, was draft article 7) should be retained, see paras. 134-138 of document A/CN.9/485.

²⁵General support was expressed for the policy underlying draft article 12 (which in the previous draft, as contained following para. 97 of document A/CN.9/WG.II/W.P.110, was draft article 8). The draft article is largely modelled on article 20 of the UNCITRAL Conciliation Rules although, whereas article 20 is drafted as a contractual commitment, draft article 12 is drafted as a statutory prohibition (para. 140 of document A/CN.9/485). A suggestion to include a rule in the model legislative provisions establishing a general duty for the conciliator and the parties to keep confidential all matters relating to conciliation along the lines set out in article 14 of the UNCITRAL Conciliation Rules, was rejected (see para. 146 of document A/CN.9/485).

²⁶The Working Group agreed that draft article 12 should be subject to party autonomy, but did not finally decide whether this issue should be expressed specifically in the article or whether it should be left to be expressed in a general manner, such as above in draft article 1(5). (see para. 142 of document A/CN.9/485).

²⁷The reference to “third person” is meant to indicate a person that is not a party to the conciliation but that is nevertheless in a position to use as evidence views, admissions, proposals or other facts or information referred to in subparagraphs (a) to (d) of para. (1) (para. 143 of document A/CN.9/485).

shall not rely on, or introduce as evidence, in arbitral or judicial proceedings, whether or not such arbitral or judicial proceedings relate to the dispute that was the subject of the conciliation proceedings:²⁸

(a) Views expressed or suggestions made by a party to the conciliation in respect of [matters in dispute or]²⁹ a possible settlement of the dispute;

(b) Admissions made by a party in the course of the conciliation proceedings;

(c) Proposals made by the conciliator;

(d) The fact that a party to the conciliation had indicated its willingness to accept a proposal for settlement made by the conciliator.

(2) The disclosure³⁰ of the information referred to in paragraph (1) of this article shall not be ordered by the arbitral tribunal or the court [whether or not the arbitral or judicial proceedings relate to the dispute that is the subject of the conciliation proceedings unless such disclosure is permitted or required under the law governing the arbitral or judicial proceedings].³¹

(3) Where evidence has been offered in contravention of paragraph (1) of this article, the arbitral tribunal or the court shall treat such evidence as inadmissible.

(4) Evidence that is admissible in arbitral or court proceedings does not become inadmissible as a consequence of being used in a conciliation.³²

Article 13. *Role of conciliator in other proceedings*

(1) Unless otherwise agreed by the parties, the conciliator shall not act as an arbitrator or as a representative or counsel of a party in any arbitral or judicial proceedings in respect of a dispute that was or is³³ the subject of the conciliation proceedings.

(2) Testimony of the conciliator regarding the facts referred to in paragraph (1) of article 12 shall not be admissible in any

²⁸The Working Group expressed the view that draft para. (1) covered evidence of facts and other information regardless of whether this information was in writing or in other form. No decision was taken as to whether this interpretation was sufficiently clear from the draft article or whether it would be useful to include a clarification on this point (see para. 145 of document A/CN.9/485). The Working Group may wish to consider whether an additional subparagraph should be included in draft para. (1) along the lines of the proposal made in the Working Group prohibiting the disclosure of the content of an invitation to conciliate or a statement that the conciliation has failed (see the last sentence in para. 43 of document A/CN.9/485).

²⁹The Working Group agreed that the words “matters in dispute or” be retained in square brackets pending further consideration of their effect in draft article 12 (see para. 143 of document A/CN.9/485).

³⁰The Working Group may wish to consider whether the expression “disclosure” is the most appropriate term in this context or whether that term should be replaced by a broader formulation to the effect that the court should not order the parties to produce as evidence information referred to in para. (1).

³¹For a discussion of draft paras. (2) and (3) see para. 144 of document A/CN.9/485.

³²See para. 141 of document A/CN.9/485.

³³See para. 150 of document A/CN.9/485.

arbitral or judicial proceedings in respect of a dispute that was or is the subject of the conciliation proceedings.³⁴

(3) Paragraphs (1) and (2) apply also in respect of another dispute that has arisen from the same contract [or another contract forming part of a single commercial transaction] [or the same transaction or event] [or any related contract].³⁵

Article 14. *Resort to arbitral or judicial proceedings*³⁶

(1) [During conciliation proceedings the parties shall not initiate any arbitral or judicial proceedings in respect of a dispute that is the subject of the conciliation proceedings, and a court or arbitral tribunal shall give effect to this obligation. Either party may nevertheless initiate arbitral or judicial proceedings where, in its opinion, such proceedings are necessary for preserving its rights. Initiation of such proceedings is not of itself to be regarded as termination of the conciliation proceedings.]

(2) [To the extent that the parties have expressly undertaken not to initiate [during a certain time or until an event has oc-

curred] arbitral or judicial proceedings with respect to a present or future dispute, such an undertaking shall be given effect by the court or the arbitral tribunal [until the terms of the agreement have been complied with].

[(3) The provisions of paragraph (1) and (2) of this article do not prevent a party from approaching an appointing authority with a view to requesting it to appoint a conciliator.]³⁷

Article 15. *Arbitrator acting as conciliator*

It is not incompatible with the function of an arbitrator if the arbitrator raises the question of a possible conciliation and, to the extent agreed to by the parties, participates in efforts to reach an agreed settlement.³⁸

Article 16. *Enforceability of settlement*

If the parties reach agreement on a settlement of the dispute and the parties and the conciliator or the panel of conciliators have signed the binding settlement agreement, that agreement is enforceable [the enacting State inserts provisions specifying provisions for the enforceability of such agreements].³⁹

³⁴The Working Group decided to reconsider the question whether the provision should be broadened to include testimony by a conciliator that a party acted in bad faith during a conciliation (para. 152 of document A/CN.9/485).

³⁵See para. 153 of document A/CN.9/485.

³⁶See paras. 155-158 of document A/CN.9/485.

³⁷See para. 158 of document A/CN.9/485.

³⁸Article 15 (which in the previous draft, as contained and commented upon in paras. 102-104 of document A/CN.9/WG.II/WP.110, was draft article 11) was not discussed at the previous session of the Working Group.

³⁹Article 16 (which in the previous draft, as contained and commented upon in paras. 104-112 of document A/CN.9/WG.II/WP.110, was draft article 12) was not discussed at the previous session of the Working Group.

IV. INSOLVENCY LAW

Report on UNCITRAL-INSOL-IBA Global Insolvency Colloquium (Vienna, 4-6 December 2000) (A/CN.9/495) [Original: English]

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INTRODUCTION

1. At its thirty-second session (1999) the Commission had before it a proposal by Australia (A/CN.9/462/Add.1) on possible future work in the area of insolvency law. Recognizing the importance to all countries of strong insolvency regimes, the Commission decided to undertake further study of the relevant issues and of work already being undertaken by other organizations. To facilitate that further study, the Commission decided that one session of a working group should be held to ascertain what, in the current landscape of efforts, would be an appropriate work product and to define the issues to be included in that product. That exploratory session of the Working Group on Insolvency Law was held at Vienna from 6 to 17 December 1999 (for the report of that Working Group see document A/CN.9/469).

2. At its thirty-third session (2000) the Commission noted the recommendation that the Working Group had made in its report (A/CN.9/469, para. 140) and gave the Group the mandate to prepare a comprehensive statement of key

objectives and core features for a strong insolvency, debtor-creditor regime, including consideration of out-of-court restructuring, and a legislative guide containing flexible approaches to the implementation of such objectives and features, including a discussion of the alternative approaches possible and the perceived benefits and detriments of such approaches. It was agreed that in carrying out its task the Working Group should be mindful of the work under way or already completed by other organizations, including the World Bank, the International Monetary Fund (IMF), the Asian Development Bank (ADB), INSOL International (INSOL) (an international federation of insolvency professionals) and Committee J of the Section on Business Law of the International Bar Association (IBA). It was noted that, in order to obtain the views and benefit from the expertise of those organizations, the secretariat would organize a colloquium before the next session of the Working Group, in cooperation with INSOL and the IBA, as had been offered by those organizations.¹

¹Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 17, A/55/17, para. 408.

3. That colloquium was organized with the co-sponsorship and organizational assistance of INSOL and in conjunction with the IBA at Vienna, 4 to 6 December 2000. The colloquium was designed to provide a forum for dialogue among insolvency practitioners and experts, international organizations and government representatives on the work of other organizations in the area of insolvency law reform (including the reports of the World Bank, the IMF, the ADB, INSOL and the IBA), the needs of countries either undertaking or considering undertaking reform of part or all of their domestic laws relating to insolvency and to determine the manner in which the Commission and other organizations could assist the process of reform.

4. The approximately 150 participants from 40 countries included lawyers, accountants, bankers, judges and insolvency practitioners, as well as representatives of Governments and international organizations such as the ADB, the European Bank for Reconstruction and Development (EBRD), the IBA, the IMF, INSOL and the World Bank. The main speakers included insolvency officials, judges, practitioners and representatives of organizations who have had significant experience in insolvency law and law reform initiatives.

5. Based on the exchange of views and information that took place amongst participants, the present note provides an evaluation and synthesis of the Colloquium proceedings, including a summary of key issues recommended as the basis for future work by the Commission and addressing the form that that work might take.

I. GENERAL REMARKS

6. The view was widely shared that, as a general objective, the Commission should strive to work out the elements of a functioning insolvency system, which would be clear and understandable by both domestic and foreign participants, which would maximize the utility of the tangible and intangible assets of an enterprise on a fair and balanced basis to the stakeholders and which would proceed without delay to avoid the erosion of value. While it was generally agreed that financial failure, absent fraud or its equivalence, should be recognized as a dynamic of a healthy competitive economy, it was recognized that the social impact and status of bankruptcy in many countries could not be overlooked.

7. It was the general view of participants that the process should be transparent and certain. That would be assisted by suitable information and disclosure standards, since information access and disclosure was important to ensure predictability of outcome and avoid delay in resolving issues. It was felt that there must be a facility to allow the debtor and the creditors of the business community and their advisers and, if insolvency occurs, the participants in the insolvency process including lawyers, insolvency practitioners, work-out managers, regulators and courts, to understand how the system works in practice and their respective roles and interactions.

8. It was generally agreed that an insolvency system should involve a liquidation channel when that was the way

in which the resources of the enterprise could best be employed, with a reorganization (also referred to as rescue or rehabilitation) channel if that was viable and would result in greater value. The relationship between the two channels within the insolvency system needed to be examined with a view to achieving better integration, and the effects of commencement of proceedings considered in the context of that relationship. The analysis, for example, must address the question of the stay so that it was clear whether secured creditors were exempt or whether their enforcement rights were temporarily suspended and whether the stay applied automatically. While liquidation was recognized as being the most established channel, it was suggested that work by the Commission should focus upon establishing an effective reorganization regime, which, in any case, would involve consideration of a number of issues common to both liquidation and reorganization.

9. In terms of economic and social imperatives, it was noted that an insolvency system required an appreciation by the legislative, executive and bureaucratic arms of Government that it was demonstrably in the public interest to have a functioning insolvency regime as a means of encouraging economic development and, with that, the attainment and enhancement of social policy. It was suggested that the focus on economic and credit enhancement should be emphasized in any work undertaken by the Commission, to limit and direct the scope of the project, such focus being consistent with the Commission's mandate on international trade law.

10. The Colloquium heard that many countries in the world were studying reorganization systems, based on the growing realization that such systems were critical to both corporate and economic recovery, either in a recession or a crisis. Additionally, it was observed that it was increasingly apparent that reorganization systems, and the effectiveness with which they functioned, affected the pricing of loans in the capital market, with comparative analysis of such systems becoming both common and essential. Effective reorganization systems were also noted as being important in encouraging entrepreneurial activity and the availability of venture capital, the lack of such a system negatively impacting the availability and development of foreign capital.

11. It was noted also that the social imperatives of insolvency law must be included in any consideration of reform, since the goal of that reform should be broader than credit enhancement. The impact of bankruptcy on those involved in the process, as well as the social status that bankruptcy currently had in many countries, had the potential to strongly influence the success of implementation of insolvency law reform proposals. The social status of insolvency was particularly important where it impacted upon the extent to which insolvency processes were used and, consequently, the likelihood of that regime being implemented in a way that could achieve the economic goals of development and growth.

12. Strong support was expressed in favour of further work being undertaken by the Commission and completed as soon as possible to take advantage of the work of other organizations and the current broad interest in insolvency law reform.

II. KEY ELEMENTS OF AN EFFECTIVE INSOLVENCY REGIME

13. The key elements to be addressed by an insolvency regime were considered to include: eligibility criteria, access criteria; the bankruptcy estate; application of automatic stay; role of management; role of creditors/creditors committees; treatment of contractual obligations; avoidance actions; distribution priorities; and additional issues specific to reorganization (relationship between liquidation and reorganization; business operations and financing; and provisions specific to the reorganization plan).

14. Participants noted that those key elements could not be viewed in isolation and must all interact if the insolvency system was to function smoothly and efficiently. Nor could they be developed in isolation from other relevant elements of economic and commercial law and indeed from the general fabric of a country's laws. Effective debt enforcement regimes, for example, were noted as being of particular importance to the effective operation of an insolvency regime. It was suggested that the linkages between insolvency and other laws and their importance should be highlighted and the implications of different policy options concerning those linkages recognized and considered in future work.

A. Eligibility and access criteria

15. Determination of the scope of application of an insolvency framework and the relevant eligibility criteria was noted as involving consideration of important policy questions such as whether highly regulated institutions such as banks and insurance companies should be included and the degree to which State-owned enterprises should be included.

16. It was felt to be essential that entry criteria should be realistic and fair and take into account modern business practices. Whatever tests were to be applicable (balance sheet, cash flow or other), it was important that they should not lead to a stifling of innovation, should broadly take into consideration modern banking instruments and accounting standards and encourage a process that was quick and efficient, with recognized tests of insolvency and prompt determination as to whether the threshold for insolvency had been met. It was also observed that it was necessary for countries to consider and develop clear goals for an insolvency regime, particularly in terms of what they wanted the regime to achieve, such as early restructuring, protection of creditors, restructuring of insolvent debtors or other policy imperatives.

B. Role of management

17. Experience cited by participants suggested that an insolvency system needed to provide a flexible approach towards the role of management in any particular case. In situations where there was a fear of dissipation of assets and other adverse possibilities, there might be a need to remove existing management immediately. In other cases,

management could continue to run the day-to-day business as the most cost-efficient solution, but be supervised by, for example, a creditor- or court-appointed trustee. It was also pointed out that while the liability of management for continuing to trade whilst insolvent might be self-evident in some countries, that was not a universal principle. In addition, since the manner in which that liability was treated could provide an important incentive for management to negotiate more permanent reorganization solutions with creditors, attention should be drawn to that issue in the Commission's work.

C. Role of creditors

18. On the issue of the role of creditors, it was suggested that it might be necessary to emphasize the interests of creditors as primary stakeholders in the insolvency process. There was general agreement that there was a need to clarify and distinguish the rights of various classes of creditors, in terms of the formation of committees and the voting rights of different classes, as well as liability for participation in such committees and how such liability might be regulated or discharged.

19. Attention was drawn to the important role played by banks in ensuring credit to the economy, particularly in emerging markets and developing jurisdictions. It was suggested that while bank lending should not be treated in a special manner, modern insolvency regimes should adequately reflect the needs of bank creditors, particularly lenders in foreign currency in inflationary economies, and take account of certain currency agreements that might affect the quantum of claims by foreign exchange creditors.

D. Prevention of abuse and role of courts and regulators

20. Participants discussed the role of the court in the insolvency process, noting that one of the key functions of the court was to guide the process to ensure its integrity and fairness both in terms of participation and outcome. Oversight to prevent abuse, by management, by professionals, and in the transfer of assets, was identified as a prime function of courts in insolvency cases.

21. An issue requiring consideration at an early stage of the reform process related to the body which might be given regulatory authority over insolvency cases. It was noted that a number of countries were moving to a private sector type of agency or institution, reflecting a cultural preference for non-court guided solutions, while in others regulation of the insolvency regime was increasingly seen as a judicial function to ensure fair treatment of all parties and provide legal certainty to third parties. A further policy question was whether an effective insolvency system required specialized judges and courts. There was general agreement that it was not desirable to have insolvency cases randomly assigned to members of the general court. While a specialized court of commercially-oriented judges might not always be possible or desirable, flexibility and accessibility would frequently be enhanced if certain

judges of the general court were designated to handle insolvency cases, and, to the maximum extent possible, the same judge should be involved in the continuing insolvency proceeding. It was suggested that policy considerations relating to the different regulatory alternatives should be included in the Commission's work.

E. Professional and judicial training

22. A general view of participants was that a key issue closely related to the prevention of abuse was that of the need for professional and judicial training, especially where judges performed critical supervision and decision functions with respect to insolvency proceedings. It was noted that for an insolvency law to be effective it must be able to be deployed against an effective operational infrastructure. While it was widely recognized that the Commission could only play a limited role with respect to such training, it was felt that it might have a role to play in conveying a message to policy makers and the insolvency community that, for an insolvency system to work, it was not enough simply to have the laws in place, but that the training of professionals was essential.

23. There was general support for the view that it was desirable for judges dealing with insolvency matters to have an approach based upon a commercial mentality and awareness, that they should not only rely upon their own skills and experience, but know-how, and when, to rely upon the business expertise and experience of others involved in the case. It was also desirable for judges to have developed experience in dealing with insolvency proceedings and their special needs, including knowing when to allow the affected parties the opportunity to negotiate outside the court, even with a pending court matter.

24. It was recognized as desirable that the court should be able to be accessed on a timely basis as required, so that matters requiring solution were treated as a priority to enable the insolvency system to function effectively and efficiently. Appeal time should be kept to the minimum, consistent with fairness to the affected parties. The appeal court, especially if it did not have the functional expertise of the lower court, should come to appreciate that reversal, in whole or in part, should rarely occur and only when there was a true miscarriage of justice.

25. Appropriate selection of judges on merit and ability and a regime where judges had economic security and were accountable on objective standards of good behaviour, including non-corruptibility, were widely seen as important to ensuring the neutrality and independence of judges and the development and maintenance of the tradition of the rule of law.

26. Amongst the suggestions for things most needed to assist with training were guidelines and allocated resources to assist courts, implementation guides for insolvency administrators, the establishment of training centres, co-ordination of training to avoid unnecessary duplication and appropriate channelling of resources. There was also a suggestion that future work on insolvency law and infrastructure should include a self-funding mechanism to ensure that training would be sustainable and continuous.

F. Restructuring alternatives

27. It appeared to participants that it would be advantageous to have a system which encouraged the parties to avoid the delay of a formal court proceeding over an extended period of time, which provided alternative processes to assist in and facilitate the rescue of capital at an early stage, and which might be more cost effective than formal proceedings. It was suggested that while such a system worked best where there was a functional law and infrastructure that could ensure certainty of outcome, it was also useful where the institutional framework was not effective.

28. Work by the INSOL Lenders Group on the "Statement of Principles for a global approach to multi-creditor workouts" was introduced. The Principles were designed to expedite rescues, and therefore increase the prospects for success, by providing guidance based on experience, so that debtors and creditors could move the process to a resolution speedily and in a relatively structured manner. It was noted that the Principles were most likely to facilitate workouts where there was an appropriate legal, regulatory and governmental policy framework. The existence and prospective implementation on a consistent basis of a well-designed insolvency law, by providing financial creditors with effective means of recourse against uncooperative debtors, encouraged debtors to cooperate with those creditors with a view to negotiating an agreement outside a formal insolvency in an acceptable timeframe. The formulation of the Principles was welcomed. There were suggestions, however, that the Principles might not go far enough and that something more might be required to ensure that out-of-court agreements were implemented. A further proposal was made to have introduced into the insolvency system an accelerated procedure to implement a work-out plan that was not fully consensual, but that was endorsed by the vast majority of creditors. The plan would be processed through a court (being a court administering insolvency cases) with a view to binding the dissenting minority, provided that it met certain objective criteria specified in the insolvency law. It was widely felt by participants that in-depth analysis would be required in order to decide whether such a proposal should be pursued within the scope of the work on insolvency that the Commission might undertake.

G. UNCITRAL Model Law on Cross-Border Insolvency

29. Strong support was expressed in favour of countries adopting the Model Law as soon as possible. In support of early adoption, it was suggested that it be made clear that any future work on insolvency law undertaken by the Commission would in no way add to or seek to modify the existing text of the Model Law.

III. FORM OF POSSIBLE FUTURE WORK

30. It was generally agreed by participants that, given the complexity of the interrelationship between an insolvency law and the other national laws, as well as the policy issues

related to social and economic concerns, a single model law was neither feasible nor desirable. In addition, the fact that the reform process was a continuing one and that there was a strong need to take account of changing economic and policy considerations underscored the desirability of a flexible work product, designed around key elements of an effective insolvency regime.

31. It was suggested that future work should include three key areas. The first would reflect the key component of the reports from international organizations (the World Bank, the IMF and the ADB), setting out the core elements of an effective insolvency regime and considering alternative policy options and approaches to the different issues identified, including the impact of social and economic factors.

32. The second area would be a comparative analysis of some of the provisions and precedents that are already in existence in national legislation and international instruments, including, where appropriate, experience with those provisions, to the extent that that experience might be relevant in assisting legislators to make choices between different policy options.

33. The third part would set forth suggested legislative provisions or recommendations or outlines of such provisions, including the essential issues to be addressed. The form which that third part might take would depend upon the topic under consideration; as was noted in the discussion at the Colloquium, some of the key elements might lend themselves to formulating draft model provisions because they reflected a more or less general consensus that a particular approach should be taken. Where that was not

the case, the key elements or the key points that should be addressed to deal effectively with certain topics could be formulated.

IV. CONCLUSIONS

34. Broad support was expressed by participants in favour of the Commission undertaking work (in the form outlined in paras. 30-33 above) on the key elements of an effective insolvency regime, as identified in paragraph 13 above. While the Working Group was requested to proceed with that work as expeditiously as possible, the Colloquium strongly recommended that approximately six months be allowed for thorough preparation of drafts for consideration by the Working Group. It was noted also that the mandate given by the Commission to the Working Group² referred to the work underway or already completed by other international organizations and required the Working Group to commence its work after receipt of the reports currently being prepared by other organizations, including the World Bank. The Colloquium heard that the World Bank report was expected to be finalized in early 2001.

35. In light of these factors, the meeting of the Working Group originally scheduled for 26 March to 6 April 2001 in New York has been rescheduled for 23 July to 3 August 2001 in New York. A further Working Group meeting might take place in December 2001 at Vienna.

36. In light of the mandate given to the Working Group,³ the Commission might wish to take note of this report and request the Working Group to proceed with its work expeditiously.

²Ibid. para. 409. The terms of the mandate are based on the recommendation of the Working Group set forth in document A/CN.9/469, para. 140.

³Ibid.

V. POSSIBLE FUTURE WORK

A. Possible future work on privately financed infrastructure projects: note by the secretariat

(A/CN.9/488) [Original: English]

1. At its thirty-third session (New York, 12 June-7 July 2000), the Commission adopted the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects, consisting of the legislative recommendations (A/CN.9/471/Add.9), with the amendments adopted by the Commission at that session and the notes to the legislative recommendations (A/CN.9/471/Add.1-8), which the secretariat was authorized to finalize in the light of the deliberations of the Commission (A/55/17, para. 372).¹ The Guide has since been published in all official languages.

2. At the same session the Commission also considered a proposal for future work in that area. It was suggested that, although the Legislative Guide would be a useful reference for domestic legislators in establishing a legal framework favourable to private investment in public infrastructure, it would be nevertheless desirable for the Commission to formulate more concrete guidance in the form of model legislative provisions or even in the form of a model law dealing with specific issues.²

3. After consideration of that proposal, the Commission decided that the question of the desirability and feasibility of preparing a model law or model legislative provisions on selected issues covered by the Legislative Guide should be considered by the Commission at its thirty-fourth session. In order to assist the Commission in making an informed decision on the matter, the secretariat was requested to organize a colloquium, in cooperation with other interested international organizations or international financial institutions, to disseminate knowledge about the Legislative Guide.³

4. A Colloquium under the title "Privately Financed Infrastructure: Legal Framework and Technical Assistance" was organized with the co-sponsorship and organizational assistance of the Public-Private Infrastructure Advisory Facility (PPIAF), a multi-donor technical assistance facility aimed at helping developing countries improve the quality of their infrastructure through private sector involvement. It was held from 2 to 4 July 2001 at Vienna, during the second week of the thirty-fourth session of the Commission. The Colloquium was aimed at presenting best legislative and regulatory practices, as well as at assessing the

needs of recipient countries for assistance in establishing a legislative and regulatory framework for public-private partnerships. Since the Colloquium was also designed to assist the Commission in deciding the issue of possible future work in the field of privately financed infrastructure projects, participants were invited to make recommendations on the desirability and, especially, the feasibility of a model law or model legislative provisions in that area.

5. There were more than 70 registered participants at the Colloquium, including government officials, bankers and private sector lawyers from more than 20 States, and representatives of organizations of the United Nations system (United Nations Economic Commission for Europe and United Nations Industrial Development Organization), of multilateral financial institutions (such as the African Development Bank, the European Bank for Reconstruction and Development, the International Finance Corporation and the World Bank), of intergovernmental organizations (such as the European Commission and the International Development Law Institute) and non-governmental organizations (such as the European Lawyers Union, the Fédération Internationale des Ingénieurs-Conseils (FIDIC), the Forum Européen des Entreprises Générales, the Panamerican Surety Association (PASA) and the International Surety Association). The participants represented a broad range of practical experience and the perspectives of different legal systems.

6. The more than 20 speakers included representatives from international organizations, leading academics in the field of law, government officials and private practitioners having a significant experience in privately financed infrastructure projects. In addition, open floor segments interspersed in the programme added to the range of experiences and views presented.

7. The present note contains a description of the information presented, the views expressed, the issues raised and the recommendations made at the Colloquium for consideration by the Commission.

8. The first day of the Colloquium was devoted to exploring manners in which international organizations can best assist countries in implementing domestic policies for private infrastructure investment. The types of assistance that international organizations currently provided or envisaged to provide to countries wishing to use private finance to implement their infrastructure were presented in a detailed fashion.

¹Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 17 (A/55/17), paras. 195-368.

²Ibid., para. 375.

³Ibid., para. 379.

9. The second day was devoted to the presentation of the legal framework and the specific experience in selected countries, including Argentina, Brazil, Croatia, France, Hungary, the Philippines, Uganda, the United Kingdom and the United States of America.

10. The third and final day was devoted to exploring the views of the private sector, both from financial institutions and contractors and infrastructure operators, as well as to a final debate on how to disseminate knowledge about the Guide and the desirability and feasibility of preparing a model law on selected issues dealt with in the Guide.

11. The general view of participants was that an adequate legal background was essential to the availability of private investment for infrastructure projects. In this connection, it was noted that the Legislative Guide was not meant to suggest private financing as necessarily the best way to promote and implement public infrastructure but rather as assisting legislators in setting up an adequate legal framework once the decision in favour of privately financed infrastructure was made.

12. Experience cited by participants, especially by representatives of international organizations, suggested that the main factors constraining the availability and development of privately financed infrastructure were the following: poor policies and inadequate regulations, both at a legislative and at an administrative level, this leading to high contracting and bidding costs; poor bankability of projects; lack of effectiveness of contracts; institutional weakness and lack of coordination at the government and administrative level; lack of project management skills at government side; lack of competition and transparency of selection procedures; weakness of domestic markets and of participation of local business.

13. Reciprocally, a number of factors capable of fostering the interest of the private sector in public infrastructure were mentioned. Those factors included the following: strong political will and leadership; clear and permissive legal framework; sound coordinating bodies within the public administration; clarity as to the priorities and objectives to be achieved through involvement of the private sector.

14. Accordingly, the types of assistance that might be provided to host countries included, on the one hand, financial assistance for the following activities: co-financing of project development; advisory services with a view to developing the domestic legislative and administrative framework; identifying guidelines and standard procedures; assistance in training and capacity building; technical assistance for specific infrastructure projects; investment promotion; strengthening and expansion of guarantees. On the other hand, non-financial assistance that might be available to host countries included the following modalities: helping drafting new legislation or amending existing legislation; drafting model concession agreements; advisory services to improve efficiency of relevant government agencies and to increase transparency in public procurement; training in legal matters and in business skills and infrastructure sector reform. The importance of assistance devices aimed at enabling developing and

transition countries to run projects on an autonomous sustainable basis was also stressed. The view was widely shared that a greater level of coordination among those organizations was desirable, with a view to avoiding duplications and overlapping of the different types of assistance they provided.

15. A general view of participants was that the Legislative Guide was a valuable product to assist domestic legislators in establishing a legislative framework favourable to privately financed infrastructure projects and that efforts should be made to ensure its wide dissemination. It was recognized that the Guide could serve well not only as an instrument for drafting new legislation but also as a checklist to establish the adequacy and effectiveness of legislation already in force. Accordingly, the Colloquium strongly recommended that the secretariat, in coordination with other organizations, undertake joint initiatives to ensure the widespread knowledge of the Guide (including its presentation in regional seminars, conferences and workshops, as well as within international conferences on project finance; its advertising in reviews and bulletins of international organizations, of industrial or professional associations and of private law firms; its inclusion in courses run by international organizations; the establishment of hyperlinks within the web sites of relevant organizations).

16. The Colloquium heard a number of views as to the desirability and feasibility of a model law in the field of privately financed infrastructure.

17. On the one hand, several participants stated that there was significant demand for such a model law. It was noted that the Guide represented a good starting point but that more concrete guidance, in the form of model legislative provisions was desirable, especially for those countries with no or only little experience in the field of privately financed infrastructure projects. In that connection, it was noted that a model law would most likely not only encourage those countries to address policy issues underlying privately investment in infrastructure, but also facilitate the legislative process leading to the enactment of legislation. A further view was that the availability of a model law would foster capacity building in developing countries and might help reduce their reliance on advice from experts from developed countries.

18. It was suggested that model provisions could usefully serve as guidance not only to the benefit of legislators, but also throughout the negotiation process, ultimately making it quicker and more effective. Additionally, it was observed that model provisions might also be useful within the Governments, with a view to harmonizing policies and procedures within the various departments and agencies. Furthermore, it was noted that a model law or model legislative provisions might serve an educational purpose to the benefit of legislators, government officers and magistrates.

19. While those views gathered wide support within the audience, the views varied as to the issues that might be usefully dealt with in model legislative provisions. According to one view, the Commission might consider the idea of drafting a short model law, consisting of a limited number

of core, indispensable provisions addressing issues and areas where experience had shown that a sound legal framework was crucial in order to attract private investment. It was observed that such a model law did not have to address the entire range of issues covered in the Legislative Guide. Most of the content of such a model law, it was said, could be derived from the Legislative Guide itself, where most of the controversial issues had been addressed in a manner that was acceptable to various legal systems. Furthermore, it was observed that the undertaking of such a project would not prevent it from undertaking other additional initiatives aimed at ensuring the widest possible dissemination of the Guide. Another proposal was that such model legislative provisions should only address a specific phase of the privately financed infrastructure projects, namely the selection of the concessionaire.

20. The countervailing view, which also attracted strong support among the participants, was that the preparation of a model law was neither feasible nor desirable. As to feasibility, it was recalled that the significant disparity of approach in different legal systems had already led to the failure of less ambitious projects undertaken at a regional level. As to desirability, a general concern was that the immediate undertaking of a project aimed at drafting model legislative provisions in the field of privately financed infrastructure might adversely affect the considerable and valuable work which led to the adoption of the Guide. It was suggested that the desirability of such a project should be considered at a later stage, once the existence and the contents of the Guide had been made better known to legislators and the utility of the Guide had been actually tested. As to the idea of drafting a short model law, doubts were expressed as to the feasibility of preparing a text that would be as acceptable to the various legal systems represented at the Commission as the Legislative Guide. A further view was that a model law would not be able to adequately reflect and address the peculiarities of the different agreements existing in the field. Concerns as to the costs and time that such an effort would require were also expressed. Finally, the need to avoid overlap and interference with other projects currently undertaken by the Commission was also recalled.

21. The participants in the Colloquium were reminded of situations where a model law would not necessarily have a positive impact on the development of infrastructure. It was

noted that many of the crucial issues of private investment in infrastructure did not lend themselves to be properly addressed within the context of a model law, being of a political rather than of a legal nature. It was also pointed out that a number of countries were currently reviewing their legislation in the area of privately financed infrastructure projects and that some of them were already using the Legislative Guide as a basis for that exercise. The concern was expressed that a decision by the Commission to undertake further work in this area might lead to confusion in those countries as to the authoritative nature of the Legislative Guide as a source of guidance for domestic legislators. That risk might be even greater if the final text of the model legislative provisions were to conflict with, or deviate from, the recommendations contained in the Legislative Guide.

22. While there was no sufficient consensus for the Colloquium to formulate a concrete recommendation to the Commission on the desirability and feasibility of preparing model legislative provisions in the area of privately financed infrastructure projects, participants in the Colloquium expressed their hope that the above considerations might help the Commission make an informed decision on the matter.

23. Without prejudice to the decision of the Commission as to possible future work, the Colloquium strongly recommended that the relevant international intergovernmental and non-governmental organizations, as well as multilateral financial institutions, devise joint strategies to promote best practices in the area of privately financed infrastructure projects. The Colloquium also strongly recommended that those organizations give special attention to the need for ensuring consistency of approach in their activities and avoiding unnecessary duplication of efforts.

24. The Commission may wish to express its gratitude to the Public-Private Infrastructure Advisory Facility (PPIAF) for the financial and organizational support extended to the secretariat in the preparation of the Colloquium. The Commission may also wish to express its appreciation to the various international intergovernmental and non-governmental organizations represented at the Colloquium and to the speakers invited by the secretariat. The Commission may further wish to request that the proceedings of the Colloquium be published by the United Nations.

B. Security interests: note by the secretariat
(A/CN.9/496) [Original: English]

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INTRODUCTION

1. The topic of secured transactions has long been of interest to the Commission.¹ In the late 1970s, the United Nations Commission on International Trade Law (UNCITRAL) considered the first studies in that area of law.² Those studies led to the suggestion by the secretariat that the preparation of a model law would be both desirable and feasible (see A/CN.9/165, para. 61). At its thirteenth session, in 1980, the Commission considered a note by the secretariat, which discussed issues to be addressed and made suggestions as to possible solutions.³

2. However, at that session, the Commission concluded that worldwide unification of the law of security interests in goods was in all likelihood unattainable. The Commission was led to that conclusion by the concern that the subject was too complex and the divergences among the different legal systems too many, as well as that it would require unification or harmonization of other areas of law, such as insolvency law, which at that time appeared to be impossible. During the discussion at that session, it was noted that it was advisable for the Commission to await the outcome of the work of other organizations, such as the International Institute for the Unification of Private Law (Unidroit), which was in the process of developing a convention on international factoring (which was finalized in 1988 and entered into force in 1995).

3. It was on the occasion of the UNCITRAL Congress on Uniform Commercial Law in the Twenty-first Century, held in New York in conjunction with the twenty-fifth session of the Commission, in 1992,⁴ that the need for UNCITRAL to resume its work on secured transactions was mentioned again.⁵

4. That need has been reiterated in conferences throughout the world over the last few years and has attracted the attention of legislators at the international, regional and

national levels, as well as of international and regional financial institutions, such as the European Bank for Reconstruction and Development (EBRD), the International Bank for Reconstruction and Development (World Bank) and the Asian Development Bank (ADB). With a view to informing the Commission about current activities in the field of security interests, facilitating coordination of efforts and assisting the Commission in its consideration of the matter, a current activities report was presented to the Commission at its thirty-third session, in 2000 (A/CN.9/475), in which not only the Commission's earlier work on security interests and the developments in the area of security interests law in the last 25 years were considered, but problems were also identified and suggestions made as to possible areas for future work.

5. When discussing the report at its thirty-third session, the Commission emphasized that it was the right time to start work on secured transactions, in particular in view of the close link between security interests and the ongoing work of the Commission on insolvency law. It was widely felt that modern secured credit laws could have a significant impact on the availability and the cost of credit and thus on international trade. It was also stated that modern secured credit laws could alleviate the inequalities in the access to lower-cost credit between parties in developed countries and parties in developing countries and in the share such parties had in the benefits of international trade. A note of caution was struck to the effect that such laws needed to strike an appropriate balance in the treatment of privileged, secured and unsecured creditors so as to become acceptable to all States. It was also stated that, in view of the divergent policies of States, a flexible approach aimed at the preparation of a set of principles with a guide, rather than a model law, could constitute a workable alternative.⁶

6. A number of suggestions were made as to the focus of the work to be undertaken. One suggestion was to deal with security interests in securities (e.g. stocks, bonds, swaps and derivatives). Such securities, which were held as entries in a register, by an intermediary and, physically, by a depository institution, were important instruments on the basis of which vast amounts of credit were extended not only by commercial banks to their clients but also by central banks to commercial banks. It was also observed that, in view of the globalization of financial markets, a number of jurisdictions were normally involved, the laws of which were often incompatible with each other or even inadequate to address the relevant problems. As a result, a great deal of uncertainty existed as to whether investors owning securities and financiers extending credit and being granted a security interest had a right in property and were protected, in particular, in the case of the insolvency of an intermediary. It was also pointed out that a great deal of uncertainty arose even as to the law applicable to security interests in securities held by an intermediary and the fact that the Hague Conference on Private International Law planned to address that matter indicated both its importance and its urgency. In that regard, it must be pointed out that

¹See *Official Records of the General Assembly, Twenty-third Session, Supplement No. 16 (A/7216)*, paras. 40-48, and *ibid.*, *Twenty-fourth Session, Supplement No. 18 (A/7618)*, paras. 139-145.

²The documents prepared in the context of UNCITRAL work on security interests were: A/CN.9/102, "Security interests in goods", discussed in *Official Records of the General Assembly, Thirtieth Session, Supplement No. 17 (A/30/17)*, paras. 47-63; A/CN.9/130, A/CN.9/131 and annex, a study on security interests and legal principles governing security interests (prepared by Ulrich Drobnig (Germany), and A/CN.9/132, on article 9 of the Uniform Commercial Code of the United States of America, discussed in *Official Records of the General Assembly, Thirty-second Session, Supplement No. 17 (A/32/17)*, para. 37, and the report of the Committee of the Whole II, paras. 9-16; A/CN.9/165, "Security interests: feasibility of uniform rules to be used in the financing of trade", discussed in *Official Records of the General Assembly, Thirty-fourth Session, Supplement No. 17 (A/34/17)*, paras. 49-54; and A/CN.9/186, "Security interests: issues to be considered in the preparation of uniform rules", discussed in *Official Records of the General Assembly, Thirty-fifth Session, Supplement No. 17 (A/35/17)*, paras. 23-28.

³Formal requirements for the creation of a security interest, action required for the security interests to be effective as against third parties, priority issues, proceeds and remedies in the case of default (see A/CN.9/186).

⁴See *Uniform Commercial Law in the Twenty-first Century, Proceedings of the Congress of the United Nations Commission on International Trade Law, New York, 18-22 May 1992* (United Nations publication, Sales No. E.94.V.14), paras. 268-274.

⁵*Ibid.*, paras. 159 and 271.

⁶*Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 17 (A/55/17)*, para. 459.

work by the Commission would be compatible with, and could usefully supplement, any work undertaken by the Hague Conference, since the work of the Commission would focus mainly on substantive law aspects whereas the Hague Conference's efforts relate to private international law.⁷

7. Another suggestion made was to deal with security interests in inventory (i.e. a changing pool of tangible movable assets). It was stated that the use of a changing pool of assets, whether tangible or intangible, was an important feature of modern secured financing law. It was also observed that any work on inventory could usefully draw on the Commission's work on receivables and on practices that would be likely to draw a positive response from international financial markets. The following were mentioned as matters that would need to be addressed in such a uniform law: the creation and scope of a security interest (which should include property acquired, and secure debts arising, even after the creation of the interest); remedies upon default of the debtor; clear priority rules; and mechanisms ensuring the transparency of any interest.⁸

8. Yet another suggestion was that a uniform law should consider the establishment of an international registry of security rights. Such a registry would enhance certainty and transparency and, as a result, have a positive impact on the availability and the cost of credit. It was felt that that result could be most easily achieved if the register encompassed all types of security interest in all types of asset.⁹

9. After discussion, the Commission requested the secretariat to prepare a study that would discuss in detail the relevant problems in the field of secured credit law and the possible solutions for consideration by the Commission at its thirty-fourth session, in 2001. It was agreed that, after considering the study, the Commission could decide at that session whether further work could be undertaken, on which topic and in which context. It was further agreed that the study could discuss the advantages and disadvantages of the various solutions (i.e. a uniform law on all types of asset as opposed to a set of principles with a guide or a uniform law on specific types of asset). Moreover, it was agreed that the study should draw upon and build on work carried out by other organizations and that any suggestions should take into account the need to avoid duplication of efforts.

10. The present study has been prepared pursuant to that request by the Commission and is intended to facilitate the Commission's consideration of, and decision on, future work in the area of secured transaction law. After some introductory remarks on the reasons why one resorts to secured lending, the study will briefly discuss the relationship between insolvency law and the law on security rights. It will then address issues pertaining to the development of model legislative solutions on security rights in general, as well as issues relating to the drafting of asset-specific

model legislation, in particular model legislation concerning securities and intellectual property rights. The final chapter is dedicated to issues of private international law.

I. ECONOMIC IMPORTANCE OF SECURED LENDING

11. For the last few years, many policy makers have been seeking to modernize the rules dealing with the granting of security interests to creditors in order to promote commerce. In that respect it suffices to mention that, in 1999, the United States of America thoroughly revised article 9 (which deals with security interest) of its Uniform Commercial Code and both New Zealand and Romania enacted broad statutes on personal property security interests, introducing modern rules dealing with secured transactions. Other countries, such as Bulgaria (1996), Chile (1982), Greece (2000), Indonesia (1999), Latvia (1998), Lithuania (1997), Montenegro (1996) and Poland (1996), also enacted legislation dealing with the issue of security interests (albeit differently than the aforementioned ones).

12. The above references show that there is a clear trend towards the modernization of the legal regime relating to security interests. When drawing up such a modern regime, the reasons for parties resorting to the granting of security interests have to be taken into account. Merely stating that granting security interests lowers the aggregate costs of lending transactions does not appear to explain the phenomenon sufficiently, since, as pointed out by other commentators, secured lending is not ubiquitous, that is, many lenders/creditors do not secure all of their credit or do not secure their credits at all. Explaining why secured lending is—or is not—an efficient practice may be of assistance to the Commission's efforts in that area of the law. Indeed, bearing in mind the reasons that motivate the use of security interests may assist the drafters of future legal instruments.

13. To understand these motivations, it is necessary to examine the perceptions of the parties involved in the credit market that lead them to resort (or refrain from resorting) to secured lending.

14. The advantages that a creditor receives from a grant of security interests can lower its anticipated overall costs and thus indirectly lower the costs that the debtor must pay to induce the creditor to give credit. Two different types of advantages can be distinguished: direct ones and indirect ones. The most obvious direct advantage for the secured lender is that obtaining security increases the likelihood of payment in the event of default. Commentators have identified three different ways to enhance the secured lender's ability to enforce payment: by obtaining security, by granting priority (so that the lender will be paid before other creditors) and by enhancing the lender's remedy (so that the lender can coerce payment more quickly than it could if its debt were not secured). If the lender believes when it gives credit that those advantages increase the likelihood of repayment, it can charge less for the credit, thus lowering the aggregate costs of the transaction.

⁷Ibid., para. 460.

⁸Ibid., para. 461.

⁹Ibid., para. 462.

15. There are other, more indirect, advantages for the secured lender. For example, the grant of a security interest to the creditor is said to enhance its ability to limit subsequent borrowings, increase the debtor's incentive to attempt to repay the loan voluntarily and facilitate restraint of the debtor's risky conduct.

16. As far as the creditor's ability to limit subsequent borrowings is concerned, it is based upon the assumption that the debtor will pay more attention to its business if it has a more substantial stake in the business. By restricting the debtor's ability to obtain large loans in the future, the creditor restricts the debtor's ability to decrease its interest in the business, as long as the creditor also can limit the debtor's ability to sell its ownership interest in the business. Of course, the legal rights that constitute a grant of collateral do not directly bar subsequent borrowings, but a grant of collateral can restrict the debtor's ability to obtain future loans by reducing its ability to grant a valuable security interest to subsequent lenders. It is that limitation that may make future borrowings relatively expensive (and thus less attractive) for the debtor.

17. Another advantage is the leverage given to the creditor by way of the grant of collateral, which increases the borrower's incentive to repay the debt. That leverage of the secured creditor depends on the increased likelihood of the creditor being able to enforce its claim efficiently.

18. A further advantage is the creditor's enhanced ability to prevent the debtor from engaging in risky conduct that—in the creditor's view—could lead to a decrease of the debtor's ability to pay the debt. Since unsecured lending transactions generally allocate to the creditor a substantial part of the risk of loss in the event the debtor's business fails, the debtor may indeed have a higher preference for risk-taking than it would have if it bore all of the risks of failure. This may, on the one hand, diminish the likelihood that the debtor will pay the debt, and, on the other, increase the costs of the transaction. Thus, secured lending mechanisms that narrow that gap can decrease the costs of the transaction by lowering the creditor's pre-credit assessment of the risk of non-payment.

19. The main advantage for the borrower lies in the fact that the more a commercial enterprise is able to use the value inherent in its assets as collateral for a loan, the greater is the likelihood of lowering the cost of it obtaining credit.

20. However, secured lending also gives rise to costs that do not exist in unsecured lending. These are linked mainly to the costs of concluding the secured transaction and to the costs of administering credits. Three types of the former kind of cost can be identified: information costs (such as the costs of acquiring information about the value of the collateral and the debtor's title to it), documentation costs (although a grant of collateral generally does not have a significant effect on the costs of documentation, since all transactions involve some kind of documentation costs; this may not be true where the transactions involve unusual, varied or widely dispersed collateral, although it is also possible to imagine unsecured transactions with particularly high documentation costs) and, where applicable, fil-

ing fees and taxes (i.e. a distinct expenditure incurred solely because of the decision to secure the transaction; it should be noted that compliance with the filing requirement, where applicable, includes not just the actual filing fee, but also all of the costs associated with determining exactly what to file and where to file).

21. As far as the costs of administering credits are concerned, it appears that the large amounts of time and money that creditors and debtors spend administering secured transactions constitute a significant cost of secured credit. Both transaction and administration costs depend to a large extent on the legal regime governing the transaction; any attempt to create a uniform regime aimed at promoting the availability of credit at lower cost should take this into account.

II. INSOLVENCY LAW AND LAW ON SECURITY RIGHTS

22. The laws relating to security rights, on the one hand, and to insolvency, on the other, have different objectives. Security rights laws are designed to protect the creditor extending secured credit to a debtor, whereas the insolvency laws are designed to provide for the orderly liquidation or rehabilitation of a debtor in a manner that is fair, not only to its secured creditors, but to all of its creditors. Thus, it is not surprising that the two subjects are generally dealt with under separate legal regimes.

23. However, there is a significant interrelationship between the two regimes, arising from the fact that a security right is of little or no value to a secured creditor if it is not ultimately enforceable against third parties, including the debtor's insolvency administrator. That is not to say that the insolvency regime of a given jurisdiction must recognize an unconditional and immediate right of secured creditors to enforce that right in order to induce them to provide financing in that jurisdiction. On the contrary, it has been observed that secured creditors generally require only that the insolvency regime be sufficiently fair and predictable to instil in them the belief that their security rights, if properly created, will ultimately be enforceable against the collateral within a reasonable time frame, without excessive cost and without being subject to unanticipated competing claims.

24. The development of an appropriate insolvency regime requires the establishment of various mechanisms designed to achieve a balance between the interests of the insolvency administrator and protection of the rights of secured creditors. One mechanism for assisting in the liquidation or rehabilitation of a debtor is a stay of enforcement actions by creditors against the debtor and its property. In some jurisdictions, the stay is triggered automatically upon the commencement of the insolvency proceeding, while in other jurisdictions it may only be invoked at the discretion of the insolvency tribunal. To a certain extent, the stay of actions against the debtor may also work in the interest of the debtor's secured creditors, who may be interested in avoiding the dismemberment of the debtor's business.

25. Another mechanism aimed at achieving that balance is the ability of the insolvency administrator to challenge, and ultimately to set aside or subordinate, certain security rights and other transactions on the ground that they result in unjustifiable preferential treatment of certain creditors, that they are actually or constructively fraudulent or otherwise unenforceable or inequitable. A third mechanism would be to provide compensation to the secured creditor to avoid diminution of the value of the collateral, whether arising from the imposition of the stay or use of the collateral by the debtor. Possible approaches would include protecting the value of the collateral or protecting the secured portion of the secured creditor's claim in the insolvency. Protection of the value of the collateral could involve a number of steps: providing compensation for depreciation; payment of interest; protection and compensation for use; and lifting of the stay of actions. Another approach would be to protect the value of the secured portion of the claim. Immediately upon commencement, the encumbered asset is valued and, based on that valuation, the value of the secured portion of the creditor's claim is determined. That value remains fixed throughout the proceedings and, upon distribution following liquidation, the secured creditor receives a first-priority claim to the extent of that value. During the proceedings, the secured creditor could also receive the contractual rate of interest on the secured portion of the claim to compensate for delay imposed by the proceedings.

26. However, it has been observed that the existence of mechanisms that may affect a creditor's ability to deal with its collateral will not generally deter a lender from extending credit as long as the lender can develop a sufficient degree of comfort that the insolvency laws will be enforced in a reasonably predictable and transparent manner, that the lender will be compensated in a fair way for the diminution in value of its collateral and that the lender will ultimately be able to realize upon its collateral within a reasonable period of time.

27. It should be noted that there is another potential inter-relationship between security rights laws and insolvency laws. Under the insolvency laws of some jurisdictions, opportunities exist for a creditor to facilitate the rehabilitation of the debtor by providing financing to the debtor during the insolvency proceeding (thereby potentially enhancing the recovery for all of the creditors) and to obtain for that post-insolvency financing a special security right or priority. Often, such financing is provided by the creditor who provided financing to the debtor prior to the commencement of the insolvency proceeding. In such situations, security rights laws and insolvency laws can work together towards a common goal.

28. Because of the strong interrelationship between the secured lending laws and insolvency laws, all efforts on those laws should be closely coordinated, in particular as far as the stay of actions and the protection of the diminution of value is concerned. In addition, because of the critical requirement that properly created security rights be enforceable in preference to other creditors of the debtor and remain effective in insolvency proceedings, it is suggested that any legislative guide address the issue of the relationship between contractual security interests and statutory privileges, such as tax privileges.

III. LEGISLATIVE GUIDE ON SECURITY RIGHTS IN GENERAL

29. One of the most efficient ways of obtaining working capital is pursuant to secured loans. The more a commercial enterprise is able to use the value inherent in its assets as collateral for a loan, the greater is the likelihood of lowering the cost of obtaining credit.

30. No matter how valuable a particular item of property may be to a commercial enterprise, it will have little or no value to a creditor as collateral for a loan unless the creditor is able to obtain a security right in the property that has priority over other creditors and remains effective in insolvency proceedings and that is capable of being enforced by the creditor in a predictable and timely fashion. The less time and expense that it takes to establish and enforce such a security right and the clearer a creditor's rights to its collateral are made, the more available and economical secured credit will be to commercial enterprises. Therefore, it is suggested that a legislative guide on security rights should aim at providing, to the extent possible, harmonized rules that would enable commercial enterprises to grant security rights in a wide range of asset types, allow creditors to be certain about the priority of their security rights against other creditors (including the priority of their security rights in insolvency proceedings) and make it possible for creditors to enforce their security rights, all in a timely, predictable and cost-efficient manner.

31. The present section outlines the main issues to be considered in developing a legislative guide on secured financing in general. Those issues are organized into three broad categories: (a) issues pertaining to the creation of security rights; (b) issues pertaining to priority of security rights; and (c) issues pertaining to enforcement of security rights.

A. Issues pertaining to the creation of security rights

32. The cornerstone of secured financing is the ability of a creditor to obtain a security right in the various types of property owned by the debtor.¹⁰ From the creditor's perspective, such right should be both enforceable against the debtor as a matter of contract and have the requisite priority as against the debtor's other creditors, as well as remaining effective in insolvency proceedings. That concept actually represents a series of rights that are important to a secured creditor, many of which are seriously limited or uncertain under the existing laws of many countries, a circumstance that is not conducive to promoting secured financing in those countries.

¹⁰In this section, the term "debtor" is used to refer to the party granting a security right, regardless of whether such party is the actual borrower under the financing arrangement or a guarantor or other party granting a security right to secure a loan or extension of credit to the actual borrower. In order to allow for the greatest use of assets as collateral in an effort to promote secured financing, it is important not only that borrowers be able to grant security rights in their assets, but also that third parties be able to grant security rights in their assets to support loans made to others.

1. *Limitations on property that may serve as collateral*

33. An important issue for consideration is whether a legislative guide on secured transactions should impose any limitations upon the property that may serve as collateral for loans. As the exclusion of a given property type from serving as collateral for loans would deprive a debtor from obtaining secured financing based on the value of such property, careful consideration should be given before providing for any such exclusion.

34. In many countries, fixed assets such as real estate and equipment have traditionally served as the primary forms of collateral for secured financing. Fixtures, such as heavy equipment that is affixed to real estate, which have characteristics of both real estate and equipment, traditionally have also served as an important form of collateral. More recently, receivables,¹¹ inventory destined for further production or sale and investment securities,¹² have become increasingly important forms of collateral for secured loans in various countries. In the past decade there has been a trend in some countries towards loans secured by patents, trademarks, copyrights and other forms of intellectual property, which reflects the increasing importance of intellectual property as a component of the value of commercial enterprises (a trend in secured lending that is expected to continue).¹³ It has been suggested that, if the goal of a legislative guide on secured financing is to promote secured financing, the guide should accommodate security rights in virtually all property of a commercial enterprise.¹⁴

35. A related issue is whether a legislative guide should permit security rights to extend to property that is not presently owned by the debtor. In many countries, a creditor is only able to obtain a security right in assets that are owned by the debtor at the time of the creation of the security right. Although that limitation works well for loans secured by real estate or equipment, it is generally not adequate for loans secured by assets that continually turn over, such as receivables and inventory of raw materials, unfinished products or finished products. It is generally viewed as being costly and administratively impractical for a creditor to amend its security documents with sufficient frequency to reflect the creation and collection of receivables and the acquisition and sales of inventory in the ordinary course of the debtor's business. It should be noted, in that connection, that the UNCITRAL draft convention on

¹¹This section does not include a detailed discussion on obtaining security rights in receivables, inasmuch as this is already the subject of the UNCITRAL draft convention on assignment of receivables; for the latest version of this draft, see the report of the Working Group on International Contract Practices on the work of its twenty-third session (A/CN.9/486, annex).

¹²See below the section entitled "Security over specific assets: investment securities" (paras. 62-122), for additional discussion pertaining to security rights in investment securities.

¹³See below the section entitled "Security over specific assets: intellectual property rights" (paras. 123-136), for additional discussion pertaining to security rights in intellectual property rights.

¹⁴This view has been adopted in the EBRD model law, where article 5, para. 2, provides for a broad range of potential collateral types. Specifically, article 5, para. 2, provides that "charged property may comprise anything capable of being owned, in the public sector or in the private sector, whether rights or movable or immovable things".

assignment of receivables provides that, unless otherwise agreed, a security right in receivables extends to future receivables, without the requirement of any further documentation or action on the part of the creditor or debtor.¹⁵ A related issue is whether the security right already created can secure future advances of loans in addition to the loans already given.¹⁶

36. In the case of inventory financing, it has been observed that a security right in inventory that automatically extends to goods acquired after the creation of the security interest ("after-acquired" inventory) and secures future advances is essential to the concept of a revolving inventory loan facility, which is a highly efficient form of secured financing used in some countries. That type of loan facility is generally used by the debtor to finance its ongoing working capital needs. Under such a facility, advances are made from time to time at the request of the debtor, based upon a specified percentage of the value of the debtor's inventory. That percentage (generally known as the "advance rate") is determined by the creditor based upon the creditor's estimate of the amount it would realize on the inventory if it were to look to that inventory as a source for repayment of the loan. Typically, the advance rate ranges from 40 per cent to 60 per cent. If the inventory is located in a country that has unfavourable secured financing laws, the inventory may well be deemed ineligible for borrowing purposes. By matching borrowings to the debtor's cash conversion cycle (that is, acquiring inventory, selling inventory, creating receivables, receiving payments on the receivables and acquiring more inventory to begin the cycle again), the revolving inventory loan structure is, from an economic standpoint, highly efficient and generally considered to be beneficial to the debtor.

37. The question arises as to whether a security right that automatically extends to after-acquired property and automatically secures both existing and future advances should be limited to receivables and inventory or should also be permitted for other types of collateral, such as equipment or intellectual property. Commentators have suggested that there are no apparent policy reasons against such an extension and that in fact doing so would promote secured financing. Consideration may be given to whether the maximum amount of future advances that a security right can secure must be specified at the time the security right is created. That would allow other creditors to provide additional financing to the debtor based on the value of the same assets if the other creditors believe that the value of such assets exceeds the maximum amount of such future advances.

2. *Description of collateral*

38. Another important aspect concerns the flexibility given to the parties to describe specifically the assets that are given as security. In some legal systems, broad freedom

¹⁵See article 9 of the UNCITRAL draft convention on assignment of receivables.

¹⁶See article 4, para. 3, of the EBRD model law, which provides for securing future advances as long as the maximum amount of the secured debt is shown on the registration statement. Article 5 also provides for securing after-acquired property.

is given to the parties in the description of assets that may be given as security. It is possible, for example, to create security that covers inventory of a constantly changing pool of products. Furthermore, in some legal systems it is possible to use as security the totality or a part of the assets of an enterprise without the need to list specifically the components of the asset, making it possible to sell the enterprise as a going concern. That may enable an enterprise in financial difficulties to be rescued while increasing the recovery of the secured creditor. Other legal systems, however, allow only the creation of security relating to specific assets and do not recognize security of inventory of goods without itemizing the components of the inventory. That requirement can be especially problematic in the case of a security right in inventory, receivables or intellectual property rights, where the requirement of specificity can make it impractical to obtain a security right in a constantly changing pool of receivables, a stock of inventory that turns over frequently or is comprised of many different products or intellectual property rights that are continually being refined and updated. It has been stated that the requirement that collateral be described with great specificity has resulted in the complete unavailability of inventory finance.¹⁷

39. In response to that problem, the laws of many jurisdictions only require that collateral descriptions contain enough detail reasonably to identify the property covered by the security right. For example, in some jurisdictions, a collateral description such as “all of the debtor’s existing and after-acquired inventory” is sufficient. The latitude given to the parties in those jurisdictions avoids the need for the creditor to compile lengthy listings detailing each item of collateral.

40. Given its important implications in financing practice, provisions allowing the parties adequate flexibility in the description of assets would be a suitable solution in a harmonized text for universal use.

3. *Non-possessory security rights*

41. Secured creditors generally finance ongoing businesses and typically take as collateral assets that are used in those businesses. It is essential that debtors be able to retain possession of their property for use in their businesses. However, in the case of security rights in tangible personal property, the laws of many countries provide that the debtor must be “dispossessed” of such property if it is to serve as collateral—that is, the creditor must, either itself or through an agent, maintain physical possession of the property in order for the creditor to obtain a security right in the property that has priority over the debtor’s other creditors and remains effective in insolvency proceedings. Such laws frequently render such property useless as collateral in situations where possession of the property by the debtor is essential for the operation of its business and thereby discourage or make impossible secured financing in those situations.

42. There are certain situations where such dispossession is not inconsistent with the debtor’s business. For example, some distributors of goods may routinely store the goods in a public warehouse pending shipment to customers. In such a situation, the warehouse operator can agree, in some countries, to serve as the agent for the creditor, with the result that possession by the agent can constitute possession by the creditor for purposes of perfecting a security right in the goods. Another example of a situation in which dispossession may be possible is an arrangement known as “field warehousing”, in which an agent of the creditor resides on the debtor’s premises to monitor the collateral. However, in both of those situations, in order to be deemed to have possession under applicable law, the creditor must exercise a substantial degree of control over the outflow of the collateral. Such control either may be impractical or may add a significant layer of cost to the financing arrangement, thereby making the financing more expensive for the debtor or inhibiting it.

43. The requirement that the debtor be dispossessed is in some jurisdictions applied to all property of the debtor, tangible and intangible. As a result, debtors in those jurisdictions are not able to grant security rights in their intangible personal property, such as intellectual property rights, since it is impossible to convey possession of intangible property.

44. The availability of non-possessory security rights in property generally is regarded as being particularly critical to the growth of cross-border secured financing.¹⁸ The creation of an appropriate public notice filing system may serve the role of publicizing the existence of a security right. In that way, third parties relying on the debtor’s possession of the property as an indication of the absence of any security right in the property are not misled.

4. *Proceeds of collateral*

45. A number of important issues for consideration arise in connection with sales or other dispositions of collateral by the debtor. The first issue is the extent to which a security right in collateral should automatically extend to proceeds arising from the sale or other disposition of such collateral. One has to wonder, for example, whether a security right in inventory should automatically extend to the receivables or cash proceeds arising from the sale of the inventory in the ordinary course of the debtor’s business. It has been observed that this issue is of critical importance in those jurisdictions in which financing secured by inventory is widespread. Since inventory is continually sold in the ordinary course of a debtor’s business to purchasers who take title to the inventory free of any security right, the value of an inventory creditor’s collateral would be depleted each time the debtor sold inventory. For that reason, in some legal systems the security right of an inventory creditor extends to the debtor’s right to receive payment

¹⁷See “Law and Policy Reform at the Asian Development Bank”, vol. II, 20 December 2000, p. 10.

¹⁸The need for non-possessory security rights to promote commercial finance has been recognized in the EBRD model law, article 6 of which establishes a registered charge on movable property, without the need for possession, as one of its three principal charges.

from its customers for the inventory sold. In other legal systems, however, a security right in inventory does not automatically extend to proceeds of the inventory.

46. There are a number of ways in which the issue is approached in the various legal systems. One approach is to permit creditors to obtain a security right in proceeds that is not only enforceable against the debtor but also against the debtor's other creditors and remains effective in insolvency proceedings. Jurisdictions that have adopted such an approach focus on whether the proceeds can be traced back to the original collateral.

47. A second issue is the extent to which the sale or other disposition of collateral extinguishes a creditor's security right in that collateral. It may well be appropriate that the sale or other disposition of collateral (such as sales of inventory) in the ordinary course of business, or with the consent of the creditor, should extinguish the creditor's security right in the collateral. For a harmonized provision, the extent to which that solution is not appropriate for sales out of the ordinary course of business, unless the creditor consents to the sale, should be considered.

5. Retention of title arrangements

48. In many countries, it is customary for sellers of goods to retain title to the goods until the purchase price is paid in full. This is generally accomplished by a provision in the sales contract. In those situations, a creditor's security right in property subject to such retention of title may be null, inasmuch as a debtor cannot grant a security right in property that it does not own. Creditors wishing to extend loans against a debtor's inventory or equipment in those countries must engage in costly information gathering to determine if such assets are subject to retention of title agreements and, if so, the creditors must obtain releases from the sellers in order to obtain a security right in those assets.

49. Some countries have enacted laws recharacterizing title retention arrangements as security rights and requiring holders of such rights to comply with publicity requirements pertaining to security rights. It has been suggested that that approach has advantages. To the extent public notice of the title retention arrangement is required,¹⁹ a subsequent creditor will not be required to engage in the information gathering referred to above. Secondly, if title retention arrangements are subject to the same rules of compliance as other forms of secured financing, the costs of establishing a title retention arrangement will be more closely equivalent to the costs of establishing such other forms of secured financing, thereby fostering competition among secured creditors based on cost of credit alone. It is therefore suggested that the possible future security interest regime should adopt a position regarding retention of title.

¹⁹This approach is similar to that taken in article 9 of the EBRD model law. Under the model law, however, an unpaid vendor does not need to register its charge unless the vendor desires to have its charge continue to be effective against third parties for more than six months after its creation. See also paras. 55 and 56 below for a discussion of purchase-money security rights.

6. Non-discrimination against non-domestic creditors

50. Another issue for consideration is the treatment of domestic and non-domestic creditors. It has been observed that some jurisdictions already have laws that promote secured financing, but do not extend the benefits of those laws to non-domestic creditors. As a result, many potential creditors are precluded from obtaining the benefits of such laws, a circumstance depriving commercial enterprises located in those jurisdictions of exposure to a broad range of potential creditors. Extending the benefit of financing laws in a given jurisdiction to non-domestic and domestic creditors alike, on a non-discriminatory basis, would help to promote greater access to secured financing in that jurisdiction. Such provisions may further reduce the costs of financing in that jurisdiction by encouraging competition not only among creditors located in that particular jurisdiction, but also among creditors located outside it. It should be noted, however, that the regulatory regime for banking activities in many jurisdictions subjects financial institutions to a specific regulatory oversight and may include requirements such as prior licensing with the appropriate authorities in order for foreign financing institutions to operate in that jurisdiction. Non-discriminatory provisions of the type mentioned above would not be meant to interfere with the domestic regulatory regime for banking activities in the jurisdiction implementing them.

B. Issues pertaining to priority of security rights

1. The priority of the security right; the establishment of a notice filing system

51. In order for a creditor to achieve the requisite level of certainty to induce it to engage in secured financing, it is not sufficient that the creditor be able merely to obtain a security right in the collateral that is enforceable against the debtor as a matter of contract. The creditor needs to be able to assess, with a high degree of certainty, the extent to which its security right has priority over other creditors and remains effective in insolvency proceedings.

52. In order to facilitate that assessment by the creditor, some countries have introduced a notice filing system, under which public notice of security rights in various forms of collateral must be given and priority is based, with some exceptions, on the earliest filing.²⁰ It has been suggested that an accessible, reliable and efficient filing system, both with respect to searching the system for competing security rights and registering security rights, may be an effective means of establishing priorities and notifying creditors of the presence of conflicting security rights. Such a system may also be conducive to promoting the availability of low-cost secured financing. From a creditor's perspective, a filing or registration system avoids the risk of relying on representations of the debtor as to the absence of conflicting security rights and may reduce the need to

²⁰A registration system is a cornerstone of the Unidroit draft convention on international interests in mobile equipment. In addition, the EBRD model law recognizes public registration of security rights.

obtain assurances from third parties. However, in other legal systems no such notice filing system exists. In such systems, financiers rely on representations by borrowers and on information available to financing institutions.

53. In view of the above, when examining the matters that might be addressed in a legislative guide on secured financing, the Commission may wish to consider the advantages and disadvantages of the establishment of a public notice filing system with respect to non-possessory security rights. While in the past there were logistical impediments to establishing a notice filing system, recent technological advances have considerably facilitated the establishment of such a system.

54. The Commission may further wish to consider a number of particular implications related to the establishment of a system for publicizing the existence of security rights, such as privacy issues and rules for determining the priority of conflicting security rights. Priority may be based on the time when the security right is created, as is the case in some jurisdictions, or on the time when the security right is publicized.

2. *Purchase-money security rights*

55. Some jurisdictions have enacted laws encouraging various forms of “purchase-money financing”. This term refers to a financing arrangement under which a seller of goods or other property extends credit to its purchaser to enable the purchaser to acquire the property or a creditor lends funds to the purchaser to enable the purchaser to acquire the property. In both cases, the seller or creditor will receive a security right in the property to secure the extension of credit. Such laws generally provide that, under some circumstances, a purchase-money security right in property can have priority over other security rights in the same property, thereby enabling a creditor to make purchase-money loans without having to negotiate a subordination agreement with the debtor’s other secured creditors, who may have an otherwise prior security right in the same property, each time the purchase-money creditor makes a loan. In order for purchase-money creditors to obtain that security right, such creditors are often required to give notice to the debtor’s other secured creditors, so that those other secured creditors do not make loans predicated on the property subject to purchase-money security rights.

56. It has been suggested that purchase-money financing provides an effective and useful form of financing for debtors and one that also encourages competition among creditors. One common type of purchase-money financing is known as “floor-planning”. Under a floor-planning facility, a creditor makes loans to finance the acquisition of a debtor’s stock of inventory. Such a facility is often provided to debtors that are dealers in items such as automobiles, trucks or other vehicles, computers and large consumer appliances. The creditors in those arrangements are often finance entities affiliated with the manufacturers. Another common type of purchase-money financing is known as “purchase order financing”. Under that type of facility, the creditor typically provides funds to finance the fulfilment by the debtor of specific purchase orders, which often

includes the purchase by the debtor of the inventory required to complete the orders. The loan will be secured by the purchase orders, the purchased inventory and the resulting receivables. Among its other benefits to debtors, purchase-money financing serves a pro-competitive purpose in that it enables a debtor to choose different creditors to finance different components of the debtor’s business in the most efficient and cost-effective way.

3. *Other preferential claims*

57. Another set of issues to be considered in connection with the establishment of a legislative guide on secured financing relates to the treatment of preferential claims. In many countries, there are various categories of preferred creditors whose security rights could rank ahead of those of a secured creditor. Such preferential claims often relate to unpaid taxes and wage-related claims and may cause uncertainty for secured creditors to the extent they are unpredictable and could rank ahead of a creditor’s security rights even if the claims arise after the time that the creditor obtains and publicizes its security right.

58. To avoid discouraging the availability of secured financing, it may be considered that preferential claims should only be provided to the extent that there is no other effective means of satisfying the underlying objective of the preferential claims. To the extent that preferential claims are created, the laws establishing them should be sufficiently clear that the secured creditor is able to calculate the potential amount of the preferential claims and to reserve for such amount.

59. A legislative guide on secured financing could approach the issue of preferential claims in a number of different ways. One way would be to adopt the approach taken in the UNCITRAL draft convention on assignment of receivables, which looks to the law of a particular jurisdiction to determine the nature and extent of preferential claims. Another approach would be to establish a system ensuring publicity for preferential claims.

C. *Issues pertaining to enforcement of security rights*

60. The value of a security right is significantly impaired if the creditor is unable to enforce it in a reasonably predictable and timely manner and without having to incur excessive costs. When assessing the risks of extending secured loans to debtors in a given country, creditors typically review carefully the reliability and efficiency of the existing procedures for enforcing their security rights. The laws of some countries provide for non-judicial procedures for enforcing security rights in certain types of collateral, while in many countries resort to a judicial proceeding is required. In the latter case, the perceived risk of extending credit in any given country will be dependent on the efficiency of the national judicial system and the availability of effective forms of judicial enforcement of security rights.

61. Certain issues for consideration in connection with establishing a legislative guide on secured financing relate to the creditor's ability to take possession of its collateral upon the occurrence of a default by the debtor. In that respect one has to wonder, for example, under what circumstances, if any, a creditor should be permitted to take possession of its collateral without resort to judicial process (an issue sometimes referred to as "self-help"). One also has to wonder whether the creditor should be permitted to do so as long as there is no breach of the peace; whether the creditor, under appropriate safeguards, should be permitted to use the collateral, or the debtor's premises, under certain circumstances (such as to turn inventory consisting of work in process into finished goods); what types of disposition proceedings should be permitted; whether a public sale should be required; or whether the creditor should be permitted to conduct a non-judicial private sale or other disposition of the collateral. There must be a balance between a creditor's need to obtain control of its collateral quickly before it is depleted or loses market value and the establishment of safeguards to ensure that the rights of the debtor and other creditors of the debtor are adequately protected.²¹

IV. SECURITY OVER SPECIFIC ASSETS: INVESTMENT SECURITIES

62. The development of a legislative guide on secured transactions in general does not necessarily render superfluous the drafting of other, more asset-specific, uniform rules, since the solutions on secured transactions in general may not be suited to solving all the specific problems linked to taking security interests over specific assets. Thus, one may conclude that general rules should rather be regarded as default rules, applicable where asset-specific rules do not provide any solution. At its thirty-third session, the Commission identified securities as one of the assets that may require asset-specific solutions.²²

63. "Securities" or "investment securities" is an economic rather than a legal category, understood differently in various countries. For the purposes of the present paper, it will suffice to indicate some major categories of security by way of example: bonds (a marketable document incorporating or evidencing a monetary debt of the issuer); shares (a marketable document incorporating or evidencing a right of membership in a corporation); depository receipts (a marketable document representing or evidencing either shares or bonds issued in another country); participating certificates (a marketable document incorporating or evidencing the right to share in the profits and the proceeds of

liquidation of a corporation); warrants (a marketable document incorporating or evidencing a right of option for bonds, shares or monetary amounts); investment certificates (a marketable document incorporating or evidencing participation in an investment fund); all other marketable documents that are comparable to the preceding categories of security; equity rights in privately held companies; and loan participations.

64. The common denominator of the aforementioned categories is their marketable character. However, as a result of recent developments referred to below, the documentary character of the aforementioned categories of security has been weakened, if it has not, as in some cases, disappeared entirely. Where this has happened, since the document incorporating or evidencing the right has disappeared, the "naked" right itself has become the object of the securities. The emphasis, therefore, has shifted from the marketable document to the marketability of the right.

A. Recent economic and technical developments

65. The difficulties now besetting the legal regime of securities and also the creation of security rights in them are due primarily to economic and technical developments that have occurred in recent times.

66. One can distinguish primary and secondary causes. Among the most important primary causes are the tremendous increase of the amount of capital that is raised in the market by the issue of investment securities; the dramatic increase of the number of direct and indirect market participants, as a consequence of the general expansion of wealth, of policies directed at a "capitalism for all" and of facilitated market access; the internationalization and globalization of the securities markets generally, caused by the desire to seek the most profitable national markets and to spread risks, which has enabled market participants to hold, trade and pledge securities issued in different countries and to switch investments from one country to another.

67. Among the related secondary causes, the first is the increase in the quantity of certificates of investment securities that are traded and the increase in costs for storing, guarding, insuring, accounting and moving the certificates. Attempts have been made to solve this "paperwork crisis" in order to save costs and to increase marketability by speeding up the settlement of transactions on securities exchanges. First steps, dating back to the 1920s, consisted of developing systems of indirect holding, where the certificates for investment securities were held by the investor's bank.

68. The other secondary cause is a consequence of the internationalization and globalization of the securities markets generally, because of which systems of indirect holding are even more necessary when the issuer is domiciled in a country other than that of the investor, since physical transfer of such certificates to the investor's home country would be risky and expensive. Moreover, such transfers would be particularly impractical where a strong market existed only in the issuer's home country, except (which is less frequent) when the foreign securities were formally

²¹The ability to enforce one's security right in collateral efficiently through a non-judicial procedure is fundamental to most current and proposed multilateral security rights projects. For example, see article 8 of the Unidroit draft convention on international interests in mobile equipment and articles 22-24 of the EBRD model law. Under the latter, certain measures used to protect the chargeholder's property or provide for its disposition are available once the chargeholder delivers an enforcement notice pursuant to article 22, para. 2. This includes the right to take possession (art. 23, para. 1) and, after 60 days have elapsed, take title to and sell the property (art. 24).

²²See *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 17 (A/55/17)*, para. 460.

admitted by and quoted also on an exchange in the investor's country. An alternative, developed especially in the United States, has been the issuance of domestic depository receipts in that country as American depository receipts. They incorporate or evidence an obligation of the issuer to deliver shares of the foreign company for which the depository receipts were issued; this makes possible an indirect domestic trading of the represented shares.

69. Any such system of indirect holding of securities certificates can help to facilitate only one, though an important, element of the paperwork crisis, that is, the burden of moving certificates. A real cure can only be expected from measures aiming at a decisive reduction of securities certificates and this must be, and has been, achieved on the legal level (see paras. 70-74). Thorough reforms in that respect have been and will be greatly assisted by very recent technological developments. In particular, the computerization of the holding and transfer of securities can facilitate or even replace the issue and movement of securities certificates.

B. Legal repercussions of recent developments

70. In order to appreciate the repercussions of recent economic and technological developments on the legal regime of security and other proprietary rights in investment securities, it is first necessary to set out briefly the legal role of certificates (see paras. 71-74). Thereafter the consequences of restrictions upon the role of certificates will be described (see paras. 75-91) and finally the implications of abolishing certificates altogether (see paras. 92-110).

1. *Certificates as documents of evidence or of title*

71. Since it is the specific feature of securities to be marketable, domestic laws as well as any international regulation must pay special attention to facilitating their marketability. Until about 40 years ago, marketability of securities was widely achieved by the issue of certificates embodying or at least evidencing the proprietary rights connected with securities. In general terms, those traditional rules differentiate between bearer securities and registered securities.

72. The highest degree of negotiability is attributed in most countries to bearer certificates of securities, such as bearer bonds or bearer shares, and to registered securities that are endorsed in blank. The right embodied in the instrument is created by its issuance; its transfer takes place by handing over the certificate to the transferee; the existence of the right depends on the existence of the certificate. Depending on the differing national regulations, bearer certificates may be treated like cash. Since the certificate as the document of title is the only and exclusive evidence, the certificate must be produced if its holder intends to exercise any of the rights embodied in the instrument, such as collecting dividends or interest or voting as a shareholder.

73. By contrast, no negotiability attaches to certificates of investment securities that merely serve as evidence of an

entitlement. In those cases, the right is not created by the issue of the certificate but by acts occurring outside the document, such as registration of a shareholder in the company's register or of the owner of bonds in the issuer's books. Transfers require deregistration of the previous and registration of the new owner and those entries will ordinarily only be made against presentation of the certificate and its amendment or the issuance of a new certificate. The evidentiary value of a certificate for registered securities is rebuttable since, in principle, the register prevails over the certificate.

74. The relative importance of bearer and registered certificates of investment securities differs from country to country. Investors often prefer bearer certificates as a visible indication of their investment assets; in some countries tax authorities have insisted on registered securities in order to fight tax evasion and varying traditions have made their influences felt.

2. *Restricting the role of certificates*

75. In order to overcome the paperwork crisis (see above para. 67), the original role of certificates has been increasingly restricted. As a first step, this has been achieved by developing new techniques of deposit and transfer of securities, which in fact limit the relevance of certificates, yet without abolishing them. The two most important techniques that were developed in many countries are the immobilization of certificates of securities, on the one hand, and the issue of (permanent) global certificates, on the other (their legal effects are summarized below in paras. 84-91). The first step that was often taken was not sufficient to reduce the number of certificates issued, but it achieved a practical result by immobilizing the existing multitude of certificates and replacing them by another medium. This was and is achieved either on a voluntary basis by persuading investors (by offering them favourable rates) or on a compulsory basis by obliging investors to entrust their certificates to banks or brokers for delivery into collective deposits held by a specialized institution acting exclusively as a central depository. Such central (or decentralized) collective depositories have been instituted for instance in Argentina, Brazil, Canada, France, Germany, Italy, Japan, Mexico, the Netherlands, Singapore and the United States. Comprehensive special legislation was enacted for instance in Italy (1986), Japan (1984) and the Netherlands (1977).

76. This basic two-tier system—bank or broker in the lower tier, central depository in the upper tier—is often increased by adding one or more tiers. For instance, the central depositories may not in fact keep all certificates but may delegate that task to specialized agents. In practice, this occurs regularly where securities of foreign issuers are involved (as indicated before; see para. 68). The certificates for such securities are normally kept in their countries of issue, on the basis of differing arrangements between the central depository in the investor's country with (central or other) depositories in the various countries of issue. Alternatively, foreign securities may be deposited with specialized international depositories.

77. Whatever the number of tiers involved, the basic legal effects of all collective deposits are essentially the same. They may be summarized as follows: the specific certificates deposited by an investor and integrated into the collective deposit are no longer allocated to its depositor. If and in so far as redelivery of specific certificates is admitted at all, each depositor is merely entitled to request redelivery of the same number (in the case of shares) or the same amount (in the case of bonds) of the kind of securities certificates originally deposited by it. Correspondingly, in the case of any other disposition, for example, a sale or pledge, the same number or amount of the deposited kind of securities is disposed of.

78. The administration, including the necessary book-keeping, takes place on at least two levels. The types and amounts of securities deposited by the individual investors are entered in the books of the bank, broker or other agent whose customer the investor is. Those intermediaries, in their turn, are members of a central depository and deliver to it all the securities certificates received from their customers. The types and numbers of certificates delivered collectively by each of the intermediaries are entered under its name in the books of the collective depository. Only the intermediaries, therefore, can dispose, on the instructions of their customers, of the securities entered in the intermediary's name in the books of the central depository. This applies, for instance, to sales or pledges ordered by the customers.

79. As far as the exercise of the monetary rights embodied in the securities certificates is concerned, for instance, the collection of dividends or interest, a distinction has to be made as to whether bearer or registered certificates are involved. In the former case, the intermediaries communicate the collective entitlement of all their customer-depositors to the issuer, receive the global payment and distribute it to their individual customer-investors according to their respective entitlements. In the case of registered certificates, these may be registered individually for each investor with the issuer; alternatively, a collective registration either of each intermediary or of some neutral third institution may have been agreed.

80. The exercise of voting rights is more individualized since each shareholder who elects not to attend a members' meeting will be asked to record its vote individually in writing.

81. What is relevant in the present context is that in none of these cases of exercise of the rights inherent in securities or of dispositions of them do certificates need to be moved or presented. The exercise of rights embodied in securities is made on the basis of book entries at the two or more levels at which books are being kept. The same is true for dispositions of the securities. The immobilization of certificates thus means that the presentation of the certificates and their transfer are replaced by corresponding book entries. And yet, in the final analysis, those book entries are backed up by corresponding quantities of certificates.

82. Technically, a great step forward can be made by omitting to issue any individual certificates for securities. They are replaced by issuing one permanent global

certificate that embodies or evidences the whole issue, that is, the total number of shares "issued" or the total amount of a bond issue. If that step is taken (which may require some legal basis, such as the right of a corporation not to issue individual shares certificates), the very considerable expenses for printing, storing, guarding, moving and ensuring individual certificates are saved.

83. The implications of a securities system based on global certificates do not differ essentially from those of a system of immobilized certificates. This explains also why the two systems often exist side by side. Somewhat simplified, one might say that the issue of a global certificate triggers the same consequences as the immobilization of individual certificates, except that those consequences arise right from the beginning, that is, upon issuance of the global certificate, and not only after deposit of the individual certificates. Thus, in the basic two-tier hierarchy, the bankers or brokers share directly and proportionately in the rights embodied in or evidenced by the global share and the customers share indirectly in those rights via their intermediaries.

3. Legal consequences of restricting the role of certificates

84. The major development that has been noted is that the investor has lost its direct connection with the issuer of its securities. The investor no longer directly possesses bearer securities that would enable the investor to assert the rights embodied in those certificates against the issuer. Frequently, the same is true for registered securities provided that, as frequently happens, the individual share- or bondholder is no longer registered by the issuer, but only by its banker or broker.

85. The intervention of those and other intermediaries creates new risks, especially in the case of insolvency of any member in the chain of intermediaries. Most countries seem to counter that risk by asserting that the investor, instead of the former exclusive ownership in the certificated securities, has obtained a co-ownership share in the collective fund of certificates or the global certificate deposited with the central depository. Thus, the immobilized securities certificates or the global certificate still serve as a basis from which a proprietary entitlement through all tiers down to the customer investor is derived. However, in those civil law countries where transfer of ownership also requires transfer of possession, difficulties are seen in effectuating those transfers through the chain of intermediaries.

86. Moreover, doubts are being expressed as to whether in fact the rules on transfer of ownership that are designed for transfer of tangible movables are applicable at all, since the investor now has an intangible right and possession of an intangible is difficult to perceive. More and more, therefore, legislative clarification is demanded in order to dispel any doubts on the legal status and protection of all the participants of the modern tiered systems of holding securities.

87. Closely connected with the preceding issue of protecting the investor as holder of securities is its protection as buyer or seller. How is its position in transfers of securities legally assured? In particular, how can the protection of rights predicated upon the transfer of possession be assured in a system where intangible rights are being transferred that are incapable of possession?

88. A third aspect concerns the protection of the investor's secured creditors. It must be emphasized that the taking of security in investment securities plays an important role in practice since securities are an ideal type of collateral: they are easily available, they can easily be created and they can easily be sold and enforced.

89. Three questions arise. Firstly, is it possible to obtain quickly reliable security in the debtor's securities? Secondly, is the secured creditor sufficiently protected against competing rights of third parties? And, finally, are the rules on enforcement of the security interest in keeping with the special features of a highly marketable collateral?

90. In view of the globalization of the securities markets and also of individual investor's holdings of securities, the de-emphasis of certificates raises an important problem as to the applicable law. Individual certificates of securities that embody the investor's rights, such as bearer certificates, must be regarded as tangibles and therefore are governed by the law of the State where they are located (*lex rei sitae*). For registered securities, especially registered shares, it depends upon the issuer's law whether and to what degree that qualification applies.

91. In view of the modern restriction of the role of certificates, serious doubts have been raised as to the adequacy of the traditional generally recognized rule of the *lex rei sitae*.

C. Abolition of certificates

92. In the legal systems where the role of certificates for securities was merely restricted, either the certificates were preserved and immobilized or only one permanent global certificate was issued. Technically it is only a small step from the one global certificate to omitting the issuance of any certificate. However, legally that small step has far-reaching implications.

93. The decision to omit issue of any certificate may be taken voluntarily by individual issuers, provided they are authorized to take such a decision. Alternatively, the abolition of certificates may be imposed by legislation for all investment securities. The first alternative has been chosen, *inter alia*, by Belgium (1995), India (1996), Spain (1988/1992) and the United States (1977). For public debts a system of de-materialization was introduced earlier, the central registry being kept usually by an institution supervised by the ministry of finance. De-materialization has been ordered, *inter alia*, in Denmark (1980/1982), France (1982/1983), Italy (1998), Norway (1985), Singapore (1993) and Sweden (1989).

94. Whether the voluntary or the forced approach is chosen, it is necessary to regulate the legal regime of de-

materialized investment securities and that has been done in all of the aforementioned countries. In the context of the present report it is not necessary to present a comparative survey of that legislation. It suffices to mention the most important issues addressed by the various laws and decrees.

95. Institutionally, the two-tier system, as described in outline above (paras. 75 and 76), for systems restricting the role of certificates has been adopted. In the present context, of course, the intermediaries of the lower rank, banks and brokers, that is, no longer act as collective depositories, nor does the central institution in the upper level act as central depository. Rather, the role of all those institutions is restricted to a bookkeeping function—that of the bankers/brokers with respect to their customer investors and that of the central institution with respect to the banks and brokers that are their members.

96. The function of book entries is the same as in the systems restricting the role of certificates. The holdings of securities, their transfer and also their pledging depend upon corresponding entries in all tiers of the system, but primarily in the lower tier.

97. With the complete abolition of any certification of securities, the basis for qualifying both the intermediary's and the investor's entitlements as co-ownership of either the fungible certificates in the collective deposit or in the permanent global certificate deposited has fallen away. This is especially true for legal systems that limit ownership to tangibles that are capable of possession. Much speaks for the assumption that the rights that are evidenced or constituted by book entries are intangibles and therefore incapable of possession.

98. According to general rules that in essence seem to be followed everywhere, proprietary dispositions over intangibles, that is, especially transfer of ownership and creation of security rights, are subject to special rules on assignment that deviate from corresponding rules on proprietary dispositions over tangible movables. The differences affect the mode of transfer since physical delivery is obviously impossible. Moreover, such rules do not, in general, provide a clear-cut protection of a good faith transferee against defects affecting the transferor's entitlement to, or power of disposition over, the intangible.

99. Even more important is the different degree of protection that intangibles enjoy in the insolvency of the intermediate holder of the right. The issue is the investor's protection in the insolvencies of the "new" intermediate holders, that is, the various members of the two (or more) tiers of intermediate and central collective depositories. In economic terms, such risk is very low with respect to the various national central depositories, in so far as their functions are usually strictly limited to the keeping of central records and, under the "certificate restricting systems" (see paras. 75-77), to the deposit of immobilized or global certificates. Thus there is almost no credit exposure. The same probably applies to specialized depository companies. The matter is quite different with the members of the lower tier, that is, banks, brokers and similar institutions pursuing broad business purposes; the intermediary function of keeping books for entries concerning customer entitlements

in collective deposits is only one (and possibly of minor importance) among many others. The entitlement to intangibles is traditionally, as a rule, regarded as a personal right only and one which therefore does not entitle its holder to proprietary protection in any intermediary's insolvency. That result is a decisive setback vis-à-vis the full protection that the investor as co-owner enjoys under the rules governing collective deposits based upon immobilized certificates or a permanent global certificate. In order to avoid such diminution of the investor's protection, the special statutes that govern completely de-materialized investment securities usually provide that the investor's position is that of a co-owner of the securities booked in his name. The guarantee of that proprietary status is an essential element of any modern national as well as international regulation of the holding, transfer and pledging of uncertificated securities.

100. The "reification" of the investor's entitlements to investment securities is also an important element for regulating the creation, status, protection and enforcement of security rights in those securities. In that respect, there is an important difference between the common law and the civil law systems: while the latter allow a pledging of intangibles, the common law does not, on the ground that the essential prerequisite of delivery of the pledged movables to the pledgee cannot be effected in the case of intangibles. The civil law countries substitute a notification of the debtor for delivery. As a substitute for the inadmissible pledge, the common law system permits the (security) assignment of intangibles. Such a form of strong security is also allowed by some civil law countries; others regard it as a circumvention of the statutory pledge rules and therefore do not allow assignment for security.

101. The dilemma arising from such basic (and additional minor) divergences can be remedied by the reification of the intangible entitlement of investors in securities. Then the ordinary rules on pledges of tangible movables become applicable.

102. An adaptation to the general system of book entries for investment securities is still necessary. That, however, can be achieved by providing either for special pledge accounts or for pledge notations on the pledgor's existing account.

103. While the regime for pledges is relatively coherent in all countries, certain differences do exist and ought to be adapted to the special requirements of an effective security right in securities. One (probably controversial) point is the desire of lenders against securities to be entitled to repledge the pledged securities. Other points relate to the relaxation of certain cumbersome and expensive formalities for the valid creation of a pledge and especially to an easy and fast regime for enforcement by the pledgee, which, in view of the existing well-functioning securities exchanges, should clearly be more liberal than for pledges of other assets.

104. In that context, two further issues arise. Firstly, one has to wonder whether it is possible to merge any regulation of a modernized pledge with alternative legal or functional equivalents. Legal alternatives are security transfers of ownership; functional alternatives include

sales-and-repurchase agreements ("repos"), which are used very frequently, probably because of lack of adequate modern forms of pledging. However, this appears to be an issue that cannot and need not be solved at the present stage, but can be left to subsequent deliberations.

105. Another problem is whether any regulation of a specific application of security interests does not prejudice potentially broader plans to develop harmonized general rules for modern security interests, covering all types of assets. However, it would seem that the peculiarities of creating, protecting and enforcing security interests in investment securities are so strong that deviations from a general regime can be justified by the special features of the collateral involved.

106. In view of the globalization of the securities markets in general and consequently also of the holdings of both major professional and small private investors, a final but difficult issue is which law applies to the proprietary aspects of holding, transferring and pledging securities.

107. Under the traditional system of certificated and individually held securities, the general rule was that the property aspects of securities were governed by the issuer's law, unless that law referred—as it usually did for bearer and equivalent securities—to the *lex situs* of the certificates. However, the new economic and legal developments that have been briefly described above (paras. 65-69 and 71-74) give rise to doubts as to whether those two basic conflict rules are still adequate in the present situation.

108. In view of the generally restricted role of certificates (see paras. 75-83) and their eventual abolition in certain countries, the strongest doubts affect the subsidiary conflict rule that refers to the *lex situs* of the certificates. Where the vast majority or all certificates of one issue are immobilized and deposited at one place or where the only global certificate happens to be located, should the law of that place—as *lex situs*—really govern the proprietary rights of all owners, possibly residing in all corners of the world? Consider a purchase by a Japanese resident of shares in a German company that are centrally deposited in Germany: should the question of whether and when the buyer acquires title be governed by German law even though the steps for transferring title are taken in Japan by corresponding book entries effected by the seller's and the buyer's banks in Japan? Does it make a difference whether the seller is a Japanese bank in Japan or a German bank in Germany? In an exchange transaction, the buyer normally will not know the identity or residence of its seller. The same problems arise if a security interest is to be created, except that the parties then know their identities.

109. Of course, in the case of a total abolition of certificates, the question as to the location of the securities becomes moot.

110. A substitute for the *lex situs* that has been suggested by some authors and adopted by a few legislators is the law governing the book entry. This appears to make sense in many cases where both parties reside in the same country and their identities are known. However, the rule does not seem to work in a border-crossing disposition where book

entries in both countries are necessary, since it would be difficult to determine whether one of the two book entries should prevail over the other and, if so, which one.

D. Work in progress on security rights in securities

111. It has been said that the lack of harmonization of laws and regulation regarding collateral hinders the growth of collateralization in many areas, especially Europe and that legal uncertainty is still a major concern of institutions collateralizing transactions around the globe.²³ This is why it is not surprising that various initiatives for legislative improvements of the legal regime for securities are under way. Those efforts are of two types: those aimed at the unification of substantive rules and those relating to the unification of conflict of laws rules.

112. The Commission of the European Communities published a preliminary draft of a directive on the cross-border use of collateral in 2000. However, article 1 makes clear that only "financial collateral" will be covered. The draft covers both "security" and "title transfer". As to substance, the draft deals briefly with creation of security interest; it allows use of the collateral and covers enforcement by the creditor. Enforcement is not to be barred if the collateral provider becomes subject to insolvency proceedings; certain arrangements are also to be immune from insolvency rules affecting the validity of transactions effected in the suspect period. Finally, a conflict of laws rule for book-entry securities is suggested; it would apply, whether or not the law to which reference is made is the law of a member State.

113. Some member States of the Hague Conference on Private International Law requested in early May 2000 that the Hague Conference put on its agenda the conflict of laws relating to securities held through intermediaries. The original proposal had been confined to dealing only with the conflict of laws issues arising in the context of taking securities as collateral. However, it was subsequently pointed out that it would seem undesirable to clarify the conflict of laws principles only with respect to one type of disposition; there was no reason why the proposed convention should not deal with all dispositions of securities held through intermediaries.

114. After discussion, the Hague Conference decided that the proposed new topic should be made part of the agenda for the next diplomatic conference, which is to convene in June 2001. A working group was instituted. It was suggested that the conflicts rule to be drafted should lay down the criterion of the law of the "place of the relevant intermediary".

115. It should be mentioned that the aforementioned draft European Union directive on the cross-border use of collateral also contains a conflict of laws rule for book-entry securities. The proposed article 11 lays down that priority

and enforcement of any title to or interest in book-entry securities is governed by the law of the country in which the relevant account is maintained.

116. As described above (paras. 65-69), in the last 30 years the holding, transfer and pledging of securities have been subject to change in many countries. The laws of the different countries have taken those developments into account only to a limited extent and in widely different manners. Generally speaking, most general private law is quite inadequate to deal with the demands of the modern securities industry. That lack of adequate national rules and rules for cross-border transactions increases costs for all such transactions and impedes economic progress. Data clearly show the high volume of financial values that is involved. And, finally, recent initiatives of the securities industry support the preceding findings and emphasize the need for a more modern law, both at the national and the international level.

117. When deciding whether to embark on work relating to security interests, the first issue to be considered is whether new rules should be considered only for the creation and enforcement of security interests in securities. However, the observations made above (paras. 65-69 and 70-74) suggest that the insufficiencies of legal regimes are not limited to the creation and enforcement of security rights. Rather, the same factors also affect the related legal rules on the holding and transfer of securities.

118. Those issues form one integrated, interdependent whole. Each issue depends on the solution that is followed for the basic regime, that is, the legal form of holding securities by the investors and their intermediaries. And since the legal regime for all those issues is partly uncertain and partly unsatisfactory, it would not be wise to deal with only one of them.

119. Nevertheless, it would be possible to restrict the topic to security rights in securities. Feasibility is demonstrated, for instance, subject to closer analysis of details, by the existence of the draft directive on cross-border collateral of the European Communities.

120. Another issue relating to the delimitation of the work is whether any new proposals should be limited to "pure" book entry systems where all certificates have been completely abolished or whether the regimes for immobilized securities or those based upon a global certificate should also be included. The broader view may be preferred. As has been shown, the decisive legal "break" occurs as soon as certificates are taken out of service and are put to rest, so that book entries and substitutes based upon them must take their place.

121. A different question of delimitation is whether an instrument should deal with both domestic and international situations or whether it should deal only with international ones.

122. The development of a set of rules covering both domestic and cross-border holdings and dispositions does not eliminate the need to deal with possible conflicts of laws. Such conflicts may arise whenever a country that has not adopted the rules to be prepared is affected.

²³International Swaps and Derivatives Association, Inc., *Collateral Survey 2000*, pp. 11 and 61.

V. SECURITY OVER SPECIFIC ASSETS: INTELLECTUAL PROPERTY RIGHTS

123. At its thirty-third session, the Commission identified intellectual property rights as a further topic for possible asset-specific future work in the area of security interests.²⁴

124. For the purposes of the present discussion, the term “intellectual property rights” is understood as including copyright and related rights; trademarks, trade names and other distinguishing business signs; geographical indications; industrial designs; patents; layout designs (topographies) of integrated circuits; and trade secrets and, more generally, undisclosed information.

125. The increasing value of such rights and the fact that they offer an essential component of the value of companies has led them to be considered as assets suitable to be used as collateral.

126. From a legal perspective, difficulties arise in connection with the fact that intellectual property laws usually focus on the transfer of ownership of those rights and do not contain specific rules on the creation of security interests in those rights. Accordingly, the task of adapting the general rules on security interests to intellectual property rights is usually left to case law. As a consequence, many uncertainties exist as to the substantive rules governing the exercise of the intellectual property right throughout the duration of the security. Such uncertainties relate, for example, to the conclusion of licence agreements; the treatment of infringements; the extension of the security over benefits and revenues resulting from the right (like royalties); the consequences of the right being declared invalid or of the commencement of insolvency proceedings in respect of the debtor owning the intellectual property right; the scope of party autonomy; and the formalities required for perfection of the security interest.

127. A further area of uncertainty exists in respect of trademarks. Some laws provide that trademarks cannot be transferred separately from the goodwill of the business or product they represent, the assignment being otherwise invalid. Since enforcement of the security in the trademark would require assignment of both the trademark and the business concern, the effectiveness of the security interest in the trademark requires the contemporaneous creation of a security over the business concern as a whole.²⁵

128. Obstacles seem also to arise in connection with the identification and evaluation of intellectual property rights. On the one hand, such obstacles may arise where no registry is provided for specific types of intellectual property rights. On the other hand, even when a registry is in place, registration may prove impractical and costly for items constantly being revised and replaced by more updated and sophisticated versions.

²⁴*Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 17 (A/55/17)*, para. 155.

²⁵This used to be a major obstacle for most European countries. Following the implementation of the European directive for harmonization of trademark laws, as well as the enactment of the Community trademark, countries belonging to the European Union no longer require the goodwill to be transferred together with the trademark.

129. One way to rely on an intellectual property right for the purpose of obtaining financing, while avoiding the uncertainties connected with security interests therein, is to transfer ownership of that right to the creditor. As the holder of title to the right, the creditor is entitled subsequently to license the right back to the debtor, who can continue to exercise and exploit it. A drawback of that approach is that the creditor, as the holder of title, is subject to all filings and other actions required to ensure maintenance of the right, irrespective of the extent to which such creditor is involved in the business of the debtor. Furthermore, the creditor is also obliged to take action against infringements of the intellectual property right. Further difficulties might arise in connection with the need for the licence to provide for devices ensuring that the debtor does not use the intellectual property right in such a way as to diminish the value of the security interest, thus adversely affecting the position of the creditor. Such difficulties and risks might reduce the appeal of the approach to creditors, the more so when they are not willing to become directly involved in the business of the debtor.

130. Some civil law countries allow the creation of security interests in intellectual property rights under the mechanism of a pledge of rights. Under a pledge of right, the creditor is entitled to the proceeds of the sale of such right upon the debtor’s default.

131. Other countries allow the use of intellectual property rights as collateral under different legal mechanisms, usually referred to as “fixed” or “floating” charges. The central feature distinguishing a floating charge from a fixed charge is that security is given not on a specific asset, but rather on a fluctuating body of assets that the debtor is entitled to use in the course of business. Those assets, possibly including one or more intellectual property rights, remain under the full control of the debtor throughout the duration of the security and may include, among other things, equipment specifically designed for the production of a patented product or inventory branded with one or more of the debtor’s trademarks. Since exploitation is essential to the survival of intellectual property rights as valuable economic assets, that mechanism allows such value to be preserved in spite of the existence of a security interest. In case of enforcement of the security, under a floating charge the creditor is only entitled to receive the amount for which the security was given out of the proceeds of the sale of the assets of the debtor and participates in their distribution together with other creditors, whether secured or unsecured.

132. When a security interest in an intellectual property right is given in the form of a “fixed charge”, such right is secured to the exclusive benefit of a specific creditor. Accordingly, such creditor is entitled to receive preference vis-à-vis any other creditor in respect of the proceeds arising from its sale. Under a fixed charge, however, title to the secured asset is transferred to the creditor, who is vested with all of the incidents of legal ownership. That feature may create inconveniences similar to those arising under the solution of straightforward assignment coupled with licence back to the debtor whenever the creditor is not willing to oversee the use and the exploitation of the intellectual property right.

133. A further difficulty arises in connection with the so-called "territorial rule" of intellectual property rights, namely, registered trademarks and patents. The expression defines a general and universal rule according to which the exclusive rights arising from registration are geographically limited to the territory of the State in which registration of the trademark or of the patent was granted and are governed by the law of that State.²⁶

134. The territorial rule also implies that intellectual property rights are subject to filing and registration with administrative authorities established within the jurisdiction where protection and enforcement are sought. The legal effect of such registrations varies. In some systems the registry is meant as a mere source of information; in others the existence of the intellectual property right (or of any kind of right therein, such as a security interest) is conditional upon registration. That disparity of treatment inevitably results in adding further uncertainties and making it more difficult to rely on intellectual property rights as a means of obtaining financing.

135. Such difficulties are expected to increase in respect of new forms of intellectual property rights that may develop in connection with the expanding use of electronic commerce. So far, the most significant example is that of domain name addresses, whose relationship to traditional trademarks is still unclear.

136. Substantive and procedural uncertainties as to the regime applicable to security interests in intellectual property rights affect the availability of credit linked to those rights. In order to facilitate the use of intellectual property rights as collateral, both owners of intellectual property rights and creditors would require more predictability and legal certainty.

VI. PRIVATE INTERNATIONAL LAW ISSUES

A. Scope of conflicts of law rules in the context of substantive law unification

137. It is commonly understood that the unification of substantive rules is to be preferred over the unification of conflicts of law rules.²⁷ This does not mean that conflicts of law issues are irrelevant in the context of substantive law unification. There are cases where, even if broad substantive uniformity were to be achieved, there would remain a need for conflict of laws guidance for various reasons. Firstly, to the extent that the effectiveness of security rights, whether between the parties or only against third parties, depends under national law on public registration of notice of the right or an equivalent act of publicity, secured creditors require choice of law guidance as to the relevant venue (barring establishment of an international registry). Secondly, secured transactions law is not a

²⁶So far, the most significant exception to this limit has been the establishing of the Community trademark, which vests the owner with an exclusive right extending to the whole territory of the European Community. A similar solution in respect of a Community patent right is expected to be established soon.

²⁷See Trib. Vigevano, 2000, CLOUT case No. 378.

self-contained body of law. It intersects with a variety of other areas, notably contract, debtor/creditor and judgment enforcement law, consumer protection law and corporate, bankruptcy and insolvency law. An internationally uniform substantive regime for security rights cannot achieve uniformity throughout those neighbouring areas. There will remain a need for choice of law guidance to varying degrees on the law applicable to questions that arise at the intersection of secured transactions and the neighbouring areas. Thirdly, to the extent a uniform substantive secured transaction is set out in an international convention there will inevitably be gaps within the text.

B. Tangibles

138. As in the other parts of the present paper, the generic term "security right" is used here to refer to property rights created by a device that is secured both in form and function (e.g. pledge, hypothec or charge), as well as security rights created through the use of other arrangements (e.g. sale, lease, transfer or retention of title or trust) to secure sales or loan credit. The present section makes a distinction between purely contractual issues arising between the immediate parties to a transaction creating or evidencing property rights, on the one hand, and the property aspects, on the other, with the former generally subject to the principle of party autonomy.²⁸

139. It is widely agreed that, as a general rule, the proprietary aspects of contracts for the transfer or creation of property rights in tangible movables, including security rights, are governed by the law of the place where the asset is located. This includes the formalities for a valid security right, the essential validity of the right, the time of creation of the right, the effectiveness of the right against third parties and its priority ranking.

140. An alternative approach is based on a distinction between disputes involving the immediate parties to a transaction and disputes involving third parties, rather than on a distinction between contractual and property effects of the transaction. In that view, both the contractual and property effects of the transaction would be capable of regulation by a freely chosen law when the dispute involves only the immediate parties.²⁹ That approach has the advantage of enhancing party autonomy. However, to the extent that the parties contemplate from the outset that an ultimate disposition and sale of the secured assets to a third party may be necessary if the debtor defaults, it may be that property disputes can only with difficulty be confined purely to the immediate contracting parties.

²⁸See, for instance, the contractual choice of law provisions in the Unidroit draft convention on interests in mobile equipment/aircraft protocol. Under the draft UNCITRAL convention on the assignment of receivables in international trade, the assignor (secured debtor) and assignee (secured creditor) are free to choose the substantive law to govern the contractual aspects of their reciprocal rights and obligations.

²⁹Article 9 of the Uniform Commercial Code of the United States, for example, leaves issues of "attachment [i.e. formal validity and transfer of a property interest as between the secured creditor and the debtor], validity, characterization (e.g. true lease or security interest), and enforcement" to the Code's general rules of private international law that would enforce the parties' choice of the law applicable to those issues if there is a reasonable relation of the jurisdiction chosen and the secured transaction.

141. Formalities seem to present special problems as regards movables since the contract is typically also the vehicle by which the security right is created yet compliance with certain contract formalities (e.g. writing, a notarized “certain date” or registration of the contract document) may be a precondition for the validity of the security right as a property right under the law of the location of the asset. In theory, the distinction between contractual and property effects means that the contract may still survive as a contract if valid by the law or laws applicable to purely contractual formalities (with the result that the debtor remains under a personal obligation to effect the transfer or creation of the property right contemplated by that contract). On the other hand, if non-compliance with the contract formalities for security agreements imposed by the law of the location of the asset prevents a valid property right from being constituted, no security right will vest in the creditor.

142. However, the distinction between the validity of the contract creating or evidencing the security right and the validity of the security right as a property right is not universally prevalent, with some legal regimes extending the liberal validating rules of private international law applicable to the formal validity of contracts to the formal validity of the security right as a property right. Concerns about reduction of transaction costs and certainty would suggest that the law of the location of the asset exclusively govern the validity of the security right as a property right. Such a solution might obviate the need for interested third parties to investigate the formal requirements of all closely connected laws to determine whether a security right that is clearly invalid because of non-compliance with the formalities under the law of the location of the asset is nonetheless validated under some other law.

1. Choice of law problems resulting from possible relocation of assets

143. Conflict of laws problems are more acute with tangible movables compared to immovables because movables can change their location to a new State after the security right has been created. As long as legal systems restrict security rights in tangibles to the possessory pledge (i.e. where the creditor has the possession of the collateral), mobility does not present acute difficulties. The requirement for delivery of physical possession under a possessory pledge means that most relevant connecting factors are localized at the place where the asset is situated. Even if the pledged asset is removed to another State, the basic substantive law framework for the pledge is remarkably uniform from State to State, so that true conflicts are rare. As long as the creditor retains actual possession at the new place, the security right will generally be recognized.

144. If the asset is not removed to another place, the law of the location of the asset will normally coincide with the law of the forum. The most prominent exception is where insolvency proceedings are pursued against the debtor in a State that takes jurisdiction over the debtor’s worldwide assets and the relevant assets are located outside the insolvency forum. Here it is necessary to reconcile the operation of the law of the location of the asset and the law governing

the insolvency proceedings. It is widely agreed today that the validity of the security right and its priority status should be governed by the law applicable to it under the relevant national or international choice of law rule. It is then for the insolvency forum to decide, assuming the security right is found to have been validly created under the applicable foreign law, whether it should nonetheless be refused recognition as transactions detrimental to creditors under the substantive law governing insolvency proceedings.

145. The typical problem arising in the case of relocation of the asset given as security occurs when the debtor removes the asset to another State without the consent of the secured creditor and then purports to sell it or borrow money against it or when the asset is attached in that State by one of the debtor’s creditors. Which law governs the dispute between the secured creditor and the subsequent purchaser or creditor? Despite some differences in formulation, the general principle in both common law and civil law countries is that the laws of the two locations of the asset will govern successively. The initial validity of the security right is governed by the original law of the location of the asset, while the law of the subsequent location of the asset determines the legal consequences of events that occur after relocation.

2. Transposition of the security right: problems and possible solutions

146. If the law of the new location of the asset governs the fate of the security right, it is important to know what effect that law will give domestically to foreign imported security rights. In general, the foreign security right will be recognized as valid only if it is capable of being approximated to a domestic security right. The problems of approximation can be acute because of the widely different concepts of security adopted in different legal systems. For example, retention of title arrangements are recognized in many legal systems, so there will usually be no difficulty recognizing a foreign security right created by such an agreement. However, other non-possessory security rights, for example, chattel mortgages, will be recognized only if an analogy can be made to an equivalent domestic security right. Thus, if the domestic law does not recognize security rights that allow the debtor to keep possession of the collateral, the security right may be refused recognition as long as the goods remain in the new law of the location of the asset.

147. Even if an analogous security right can be found for the foreign security right under domestic law, the foreign security right will only be given the legal effects that the corresponding domestic right produces. Non-possessory security rights produce widely varying effects in different countries. Even retention of title agreements, despite their wide use, are not given uniform treatment. In some countries, they are ineffective against third parties. In other countries, they are effective only upon registration or only if the parties can produce certain documentation or otherwise comply with certain formalities. In still other countries, they are effective against creditors and insolvency administrators, but not against bona fide purchasers for value without notice. The divergences among legal systems

are even more radical when it comes to other kinds of non-possessory security devices, with some countries continuing not to recognize such rights.

148. One solution to the transposition problem might be a multilateral convention requiring the mutual recognition among contracting States of security rights validly created under the original law of the location of the asset and regulating the substantive effects of such clauses against third parties in the recognizing jurisdiction in a uniform fashion. However, it has proved difficult in practice to implement that solution. States whose domestic laws exclude or restrict the effectiveness of non-possessory rights are unlikely to give greater weight to the third-party effectiveness of foreign rights to the potential prejudice of local buyers and creditors when a domestic security right would not enjoy such protection. Such a convention is therefore apt to be feasible only among States that share at least broadly similar policies on the validity and effects of security rights. In other words, harmonization of internal substantive law seems to be a precondition in practice to uniformity at the conflict of laws level.³⁰

149. A potentially more effective solution would be to develop model rules for domestic adoption providing the conversion of a foreign security right into a domestic security right and guaranteeing that right a minimum time period of protection against third parties after relocation to the new law of the location of the asset.³¹ States that remain totally opposed to security without debtor dispossession would not be willing to adopt a rule of that kind, but most States now permit some form of security or quasi-security right to exist without dispossession of the debtor, so this is unlikely to be a serious problem.

3. *Goods in transit and goods destined for export*

150. In the case of goods in transit, the law of the location of the asset rule in principle requires a creditor to comply both with the actual law of the location of the asset at the time of the transaction and the law of the place of destination. However, the location may be either unknown or so

³⁰See, for example, the failed 1973 draft directive on the recognition of securities over movables without dispossession and of clauses providing for the retention of ownership upon sale of movables prepared by the European Commission.

³¹An intermediate solution is found, for example, in Canadian secured transactions legislation, which provides a limited "grace period" for foreign security rights after the goods are relocated into Canada (or relocated from one province to another within Canada). During the term of the grace period, the foreign security right is deemed to be effective against third parties (except certain bona fide purchasers) without having conformed to the local requirements, typically filing of notice in a public registry, required to make a domestic security right effective against third parties. To maintain its "deemed perfected" status, the foreign creditor must eventually comply with the requirements applicable to domestic security rights of the same kind (the grace period is typically 60 days). However, the grace period at least gives the secured party time to discover that the asset has been moved and to take steps to protect its rights under the new applicable law. (A similar approach was also taken in the United States until a recent revision substituted the law of the location of the debtor for the law of the location of the collateral to determine the law applicable to perfection of the security interest. Under the revised law, the grace period will apply to changes in the location of the debtor rather than changes in the location of tangible property.)

clearly transitory as to make compliance practically or economically non-feasible. The latter problem can sometimes be resolved by dealing with the goods through a negotiable document of title to the goods since the applicable law is then the location of the document at the time of its delivery with any necessary endorsement. One has to wonder what happens if the goods are made the subject of an independent sale or seizure by creditors when they come to rest in the course of transit. Furthermore, one has to wonder what law then applies, the actual law of the location of the asset of the goods or the place of delivery of the document of title.

151. To address those difficulties, the Hague Convention on the Law Applicable to the Transfer of Ownership in International Sales of Movables of 1958 provides that the law of the place of delivery of the goods or of the documents applies in lieu of the actual law of the location of the goods. Application of the law of the place of destination has also been adopted in a number of national legal systems.

4. *Application of the lex rei sitae in the case of mobile goods*

152. Application of the law of the location of the asset is problematic in the case of security rights in mobile goods, that is, goods that by virtue of their normal function as means of transport or carriage are used in more than one State. In order to avoid the risks inherent in a constant change in the applicable law, a more stable connecting factor is needed. Choice of law theories on mobile goods under national law vary. Some legal systems apply the law of the location of the secured debtor on the theory that that is the place from which the debtor mainly manages the business that relates to the collateral and where third parties, in view of the mobile nature of the collateral, would reasonably expect credit information regarding the debtor to be centred. Other legal systems have attempted to address the problem by establishing public registries for recording both ownership and security rights in cars, transports and similar mobile goods and in some cases for certain machinery used in business.

153. For high-value assets routinely and widely used in international transport (ships and aeroplanes), most States have established national registries to provide for the public registration of title and security rights where the owners are nationals of that State, with priority generally determined on the basis of the registry. Here, the law of the place of registration offers an obvious alternative to the law of the location of the asset. Domestic registration systems are supported by international instruments, such as the Convention on the International Recognition of Rights in Aircraft of 1948 or the International Convention for the Unification of Certain Rules relating to Maritime Liens and Mortgages of 1926 (see also the International Convention on Preferential Rights and Ship Mortgages, adopted by the International Maritime Organization in Brussels in 1967, and the International Convention on Ship Mortgages adopted on 6 May 1993) and the draft aircraft protocol under the draft Unidroit convention on mobile equipment.

C. Law applicable to security rights in intangibles

1. General remarks

154. Property rights in intangibles, including security rights, represent one of the most intractable areas of choice of law owing to the great diversity among legal systems as regards the appropriate connecting factor to determine the applicable law. Diversity at the choice of law level reflects in part diversity at the substantive level in the basic treatment of intangible assets. In some systems a right to payment or other benefit under a contract is viewed as a sort of property right once its value has been assigned. In other systems, the right retains its contractual character even after it is assigned, on the theory that the assignee in effect merely steps into the shoes of the assignor under the contract.

155. Legal systems that adopt the property view often provide for the application of the law of the State where the "account debtor" (the obligor under the assigned obligation) is located. That solution is consistent with the idea of practical control that underlies, in part, the reference to the law of the location of the asset for tangibles (except that, instead of control over the property, that place has control over the person responsible for payment or performance of the assigned intangible). Legal systems that resist the property approach have tended to settle instead on the law governing the contract between the secured debtor and the account debtor on the theory that the effect of the assignment is merely to substitute the contracting party to whom the obligation is owed.

156. However, application of the law that governs the original contract between the secured debtor and the account debtor may be difficult in the receivables financing context. For instance, in a bulk assignment of receivables owed by debtors located in a number of countries, the assignee would have first to scrutinize the original contracts to determine the applicable law and would then be forced to conform to the priority rules of all relevant States. The law applicable to priority would vary for different contract receivables, increasing the costs of dispute resolution and insolvency administration. If the assignment included future receivables to be owed by unidentified debtors, the assignee would not even be able to predict what law might apply.

157. In contrast, the debtor/assignor's location leads to a single predictable governing law for the bulk assignment of multiple receivables owed by debtors in different States and for the assignment of future receivables. This is the rule incorporated into the UNCITRAL draft convention on the assignment of receivables in international trade to govern the priority of the secured creditor/assignee's rights in contract receivables against third parties.

2. Intellectual property

158. The rules of private international law governing property rights in intellectual property remain fairly undeveloped. Nonetheless, most analysts seem to agree that issues related to the validity, nature, transfer and third-party effects of intellectual property are governed by the law of

each of the States within whose territory protection of the right is claimed. That choice of law rule is thought to follow logically from the fact that the essence of an intellectual property right is the owner's right to prevent others from engaging in certain types of activity. Under the principle of territoriality, which pervades the whole field of intellectual property, protection is granted on a state-by-state basis for activity within that State in accordance with national intellectual property law. The linkage between the essence of the intellectual property right and the territoriality principle that governs choice of law for protection and enforcement leads to the conclusion that the law governing the ownership and transfer of intellectual property rights is the law of the State for which protection is sought.

159. Little analysis has been done on whether the same choice of law principle applies to security rights in intellectual property. It would seem to follow that the law of each protecting country also determines the validity and priority of security rights in intellectual property within the territory of that country.

160. From a commercial financing perspective, however, a territorially divided choice of law approach is inimical to the use of intellectual property rights as collateral in international financing. Firstly, while multilateral conventions have succeeded in harmonizing many aspects of intellectual property law, analysts consider it unlikely that ownership and property rights issues will become uniform or harmonized in the near future. Secondly, national intellectual property laws are often not structured to accommodate secured financing. Although there are many domestic recording systems for patents and certain other rights, and in some countries for copyrights as well, recording systems may not explicitly cover the assignment of rights by way of security, leaving it unclear as to how a security right is to be validly effected against subsequent assignees and competing creditors. Thirdly, even if national laws were brought into line with modern commercial financing concerns, a secured creditor would still have to undertake the burden and expense of satisfying the requirements for taking an effective security right in each State within which protection is sought.

161. One has to wonder to what extent an international convention on secured financing in intellectual property rights could resolve some of those concerns. One possibility might be to establish an international registry for filing notice of security rights in a debtor's intellectual property with worldwide priority effect. A less ambitious alternative to an international registry might be a rule referring the priority of security rights in intellectual property worldwide to a single law, for example, the law of the assignor's location.

3. Investment securities

162. For many years, shares in corporations were held and transferred or pledged by way of a delivery of the share certificate embodying the right or by registration in a record book maintained by the issuer of the investment share. As long as issuers and the holders of rights in the company were in that kind of direct relationship and as

long as there was some physical or objective record of the right, the rules of private international law were relatively straightforward and workable. At present, however, securities are more frequently held through tiers of intermediaries and traded cross-border, without the transfer ever being reflected in a certificate or registry at the issuer level. That change in practice has created commensurate pressures for a more responsive uniform choice of law analysis. The Hague Conference on Private International Law has recently undertaken the preparation of a "fast track" convention designed to create uniformity in the relevant conflicts rules and the European Union's draft directive on collateral also endorses a mix of substantive rules and rules of private international law. National legal systems have also undertaken reform, the recent revisions of articles 8 (Investment securities) and 9 (Secured transactions) of the Uniform Commercial Code of the United States being a prominent example.

4. Law applicable to property rights in cash deposit accounts with financial institutions

163. There is little agreement at the national law level on the appropriate law to govern property rights in cash deposit accounts with financial institutions. Such an agreement is in essence the assignment of a debt owed by the bank to the depositor. Some legal systems treat cash deposit accounts no differently from other categories of payment receivables, referring to the law of the assignor's location consistently with the general rule in the UNCITRAL draft convention on the assignment of receivables in international trade. Other systems apply a law of the location of the asset analysis, treating the debt as situated in the State where the account debtor (i.e. the refinancing institution) is located. Where the bank has branches in more than one country, reference is then made to the particular branch at which the account is maintained or where the monies are payable. Some countries have used that approach with a view to ensuring the application of special priority rules for bank deposit accounts, rules that give first priority to the bank over any competing security interest, essentially require the bank's active consent to any assignment or transfer of an effective right to the account in favour of third parties and prioritize the bank's set-off rights. In contrast, States whose substantive law treats deposit accounts no differently from other categories of payment receivables and does not give special priority rights to banks simply because they also happen to be the account debtor are content to use the general connecting factor for other receivables to deposit accounts, relying on the general rules protecting an account debtor's set-off rights against assignees to preserve the bank's set-off rights against the assigned account.

D. Additional categories where special rules of private international law may be needed

164. Special rules of private international law may be desirable to determine the appropriate law applicable to a number of other classes of property. As the preceding analysis demonstrates, formulation of those special rules of private international law requires analysis not only of

existing national law solutions but also study of existing financing practices. Special rules might, for example, be developed for money due under an insurance policy, the proceeds of letters of credit, negotiable documents, assignment of secured obligations and land-related rights (including, e.g. fixtures, crops, timber and minerals to be extracted).

VII. CONCLUSION

165. The Commission may wish to take note of the present report and consider whether work should be undertaken with respect to the topics discussed. As to the form that work might take, while a model law might be more desirable from the point of view of completeness and uniformity, to the extent that it would need to reflect certain fundamental guiding principles that would not be common ground to all legal systems, it would represent a significant change from current law in many countries and might, as a result, not meet with sufficient acceptance. At its thirty-third session, the Commission was of the view that a more flexible approach was desirable, along the lines of the preparation of a set of key objectives and core principles for an efficient legal regime governing secured credit along with a legislative guide (containing flexible approaches to the implementation of such objectives and principles and a discussion of alternative approaches possible and of the perceived benefits and detriments of such approaches).³² If work is to be undertaken towards a set of principles with a legislative guide on security interests, it could also include model legislative provisions where feasible. Possible topics to be addressed in such a guide might include the scope of the assets that can serve as collateral, the perfection of security, the degree of formalities to be complied with, the scope of the debt that may be secured, the limitations, if any, on the creditors entitled to the security right, the effects of bankruptcy on the enforcement of security right and the certainty and predictability of the creditor's priority over competing interests.

166. While the development of model legislative solutions for secured transactions in general may be suited to address some general aspects of security interests over specific types of assets (such as securities and intellectual property, as discussed in the present paper), there will be a need for special provisions solving specific issues. The Commission may therefore wish to request the secretariat to undertake further study in close cooperation with international organizations specializing in relevant areas of law, such as *Unidroit*, the Hague Conference on Private International Law and the World Intellectual Property Organization, with a view to ascertaining whether and to what extent a uniform regime addressing those more specific types of assets would be desirable and feasible and which organizations should be involved in that work. Such a request for further study of the two specific types of asset should not necessarily prevent the commencement of work on a set of principles with a legislative guide for a more general regime on security interests.

³²*Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 17 (A/55/17)*, para. 459.

**C. Possible future work on transport law: Report of the Secretary-General
(A/CN.9/497) [Original: English]**

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INTRODUCTION

1. When considering future work in the area of electronic commerce, following the adoption of the UNCITRAL Model Law on Electronic Commerce at its twenty-ninth session, in 1996,¹ the United Nations Commission on Trade Law (UNCITRAL) considered a proposal to include in its work programme a review of current practices and laws in the area of the international carriage of goods by sea, with a view to establishing the need for uniform rules where no such rules existed and with a view to achieving greater uniformity of laws.²

2. The Commission was told that existing national laws and international conventions left significant gaps regarding issues such as the functioning of bills of lading and seaway bills, the relation of those transport documents to the rights and obligations between the seller and the buyer of the goods and the legal position of the entities that provided financing to a party to the contract of carriage. Some States had provisions on those issues, but the fact that those provisions were disparate and that many States lacked them constituted an obstacle to the free flow of goods and

increased the cost of transactions. The growing use of electronic means of communication in the carriage of goods further aggravated the consequences of those fragmentary and disparate laws and also created the need for uniform provisions addressing the issues particular to the use of new technologies (see A/CN.9/476, para. 2).

3. It was then suggested that the secretariat should be requested to solicit views and suggestions on those difficulties not only from Governments but in particular from the relevant intergovernmental and non-governmental organizations representing the various interests in the international carriage of goods by sea. An analysis of those views and suggestions would enable the secretariat to present, at a future session, a report that would allow the Commission to take an informed decision as to the desirable course of action (see A/CN.9/476, para. 3).

4. Several reservations were expressed with regard to the suggestion. One was that the issues to be covered were numerous and complex, which would strain the limited resources of the secretariat. Priority should instead be given to other topics that were, or were about to be, put on the agenda of the Commission. Furthermore, it was said that the continued coexistence of different treaties governing the liability in the carriage of goods by sea and the slow process of adherence to the United Nations Convention on

¹Official Records of the General Assembly, Fifty-first Session, Supplement No. 17 (A/51/17).

²Ibid., para. 210.

the Carriage of Goods by Sea, 1978 (Hamburg Rules),³ made it unlikely that adding a new treaty to the existing ones would lead to greater harmony of laws. Indeed, there was some danger that the disharmony of laws would increase (see A/CN.9/476, para. 4).

5. In addition, it was said that any work that would include the reconsideration of the liability regime was likely to discourage States from adhering to the Hamburg Rules, which would be an unfortunate result. It was stressed that, if an investigation were to be carried out, it should not cover the liability regime. It was, however, stated in reply that the review of the liability regime was not the main objective of the suggested work; rather, what was necessary was to provide modern solutions to the issues that either were not adequately dealt with or were not dealt with at all in treaties (see A/CN.9/476, para. 5).

6. Having regard to those differing views, the Commission did not include the consideration of the suggested issues on its agenda at that stage. Nevertheless, it decided that the secretariat should be the focal point for gathering information, ideas and opinions as to the problems that arose in practice and possible solutions to those problems. Such information-gathering should be broadly based and should include, in addition to Governments, the international organizations representing the commercial sectors involved in the carriage of goods by sea, such as the International Maritime Committee (CMI), the International Chamber of Commerce (ICC), the International Union of Marine Insurance (IUMI), the International Federation of Freight Forwarders Associations (FIATA), the International Chamber of Shipping (ICS) and the International Association of Ports and Harbors (see A/CN.9/476, para. 6).

7. At its thirty-first session, in 1998, the Commission heard a statement on behalf of CMI to the effect that it welcomed the invitation to cooperate with the secretariat in soliciting views of the sectors involved in the international carriage of goods and in preparing an analysis of that information. That analysis would allow the Commission to take an informed decision as to the desirable course of action.⁴ Strong support was expressed at that session for the exploratory work being undertaken by CMI and the secretariat of the Commission. The Commission expressed its appreciation to CMI for its willingness to embark on that important and far-reaching project, for which few or no precedents existed at the international level.⁵

8. At the thirty-second session of the Commission, in 1999, it was reported on behalf of CMI that a CMI working group had been instructed to prepare a study on a broad range of issues in international transport law with the aim of identifying the areas where unification or harmonization was needed by the industries involved. In undertaking the study, it had been realized that the industries involved were extremely interested in pursuing the project and had

offered their technical and legal knowledge to assist in that endeavour. Based on that favourable reaction and the preliminary findings of the working group, it appeared that further harmonization in the field of transport law would greatly benefit international trade. The working group had found a number of issues that had not been covered by the current unifying instruments. Some of the issues were regulated by national laws that were not internationally harmonized. Evaluated in the context of electronic commerce, that lack of harmonization became even more significant. It was reported that the working group had identified numerous interfaces between the different types of contracts involved in international trade and transport of goods (such as sales contracts, contracts of carriage, insurance contracts, letters of credit, freight forwarding contracts and a number of other ancillary contracts). The working group intended to clarify the nature and function of those interfaces and to collect and analyse the rules currently governing them. That exercise would at a later stage include a re-evaluation of principles of liability to determine their compatibility with a broader area of rules on the carriage of goods.⁶

9. It was also reported at the thirty-second session of the Commission that the working group had sent a questionnaire to all CMI member organizations covering a large number of legal systems. The intention of CMI was, once the replies to the questionnaire had been received, to create an international subcommittee to analyse the data and find a basis for further work towards harmonizing the law in the area of international transport of goods. The Commission had been assured that CMI would provide it with assistance in preparing a universally acceptable harmonizing instrument.⁷

10. At its thirty-second session, the Commission had expressed its appreciation to CMI for having acted upon its request for cooperation and had requested the secretariat to continue to cooperate with CMI in gathering and analysing information. The Commission was looking forward to receiving a report at a future session presenting the results of the study with proposals for future work.⁸

11. At the thirty-third session of the Commission, in 2000, the Commission had before it a report of the Secretary-General on possible future work in transport law (A/CN.9/476), which described the progress of the work carried out by CMI in cooperation with the secretariat of the Commission. It also heard an oral report on behalf of CMI. In cooperation with the secretariat of the Commission, the CMI working group had launched an investigation based on a questionnaire covering different legal systems addressed to the CMI member organizations. At the same time, a number of round-table meetings had been held in order to discuss features of the future work with international organizations representing various industries. Those meetings showed the continued support and interest of the industry in the project.

³Official Records of the United Nations Conference on the Carriage of Goods by Sea, Hamburg, 6-31 March 1978 (United Nations publication, Sales No. E.80.VIII.1), document A/CONF.89/13, annex I.

⁴Official Records of the General Assembly, Fifty-third Session, Supplement No. 17 (A/53/17), para. 264.

⁵Ibid., para. 266.

⁶Ibid., Fifty-fourth Session, Supplement No. 17 (A/54/17), para. 413.

⁷Ibid., para. 415.

⁸Ibid., para. 418.

12. Pursuant to the receipt of replies to the questionnaire, CMI had created an international subcommittee with a view to analysing the information and finding a basis for further work towards harmonizing the law in the area of international transport of goods. It was reported that the enthusiasm encountered so far in the industry and the provisional findings about the areas of law that needed further harmonization made it likely that the project would be eventually transformed into a universally acceptable harmonizing instrument.

13. In the course of the discussions in the CMI subcommittee, it had been noted that although bills of lading were still used, especially where a negotiable document was required, the actual carriage of goods by sea sometimes represented only a relatively short leg of an international transport of goods. In the container trade, even a port-to-port bill of lading would involve receipt and delivery at some point not directly connected with the loading on to, or discharge from, the ocean vessel. Moreover, in most situations it was not possible to take delivery alongside the vessel. Furthermore, where different modes of transport were used, there were often gaps between mandatory regimes applying to the various transport modes involved. It had been proposed, therefore, that in developing an internationally harmonized regime covering the relationships between the parties to the contract of carriage for the full duration of the carrier's custody of the cargo, issues that arose in connection with activities that were integral to the carriage agreed to by the parties and that took place before loading and after discharge should also be considered, as well as issues that arose under shipments where more than one mode of transport was contemplated. Furthermore, while the emphasis of the work, as originally conceived, had been on the review of areas of law governing the transport of goods that had not previously been covered by international agreement, it had been increasingly felt that the current broad-based project should be extended to include an updated liability regime that would complement the terms of the proposed harmonizing instrument.

14. Several statements were made in the Commission to the effect that the time had come for active pursuit of harmonization in the area of the carriage of goods by sea, that increasing disharmony in the area of international carriage of goods was a source of concern and that it was necessary to provide a certain legal basis to modern contract and transport practices. The carriage of goods by sea was increasingly part of a warehouse-to-warehouse operation and that factor should be borne in mind in conceiving future solutions. Approval was expressed for a concept of work that went beyond liability issues and dealt with the contract of carriage in such a way that it would facilitate the export-import operation, which included the relationship between the seller and the buyer (and possible subsequent buyers) as well as the relationship between the parties to the commercial transaction and providers of financing. It was recognized that such a broad approach would involve some re-examination of the rules governing the liability for loss of or damage to goods.

15. It was observed that some regional organizations, such as the Organization of American States and the Economic Commission for Europe (ECE), were currently considering

transport law issues. It was considered that the texts already formulated by those organizations would be useful in the work of the Commission and also that their work would be facilitated by universally applicable texts to be developed by the Commission. It was observed that ECE was currently considering whether to undertake work on uniform rules for the multimodal transport of goods. Concern was expressed that, if any such work were to be undertaken by an organization in which not all regions of the world were represented, it would interfere with efforts to prepare a universally applicable regime. Hope was expressed that the organizations concerned would coordinate their work so as to avoid duplication and that States would be mindful of the need for coordination within their own administrations of the work of their delegates in those organizations.

16. In the context of the thirty-third session of the Commission, a transport law colloquium, organized jointly by the secretariat and CMI, was held in New York on 6 July 2000.

17. The purpose of the colloquium was to gather ideas and expert opinions on problems that arose in the international carriage of goods, in particular the carriage of goods by sea, and to incorporate that information into a report to be presented to the Commission at its thirty-fourth session, in 2001, identifying issues in transport law in respect of which the Commission might wish to consider undertaking future work and, to the extent possible, suggesting possible solutions.

18. The papers and debate arising from the colloquium provide invaluable preparatory work to determine with greater clarity possible approaches to resolving transport law problems that should become the subject of the Commission's work. It allowed a broad range of interested organizations, including CMI and FIATA, and representatives of both carrier and shipper industry bodies, to provide their views on possible areas where transport law was in need of reform.

19. A majority of speakers acknowledged that existing national laws and international conventions left significant gaps regarding issues such as the functioning of a bill of lading and seaway bills, the relation of those transport documents to the rights and obligations between the seller and the buyer of the goods and the legal position of the entities that provided financing to a party to a contract of carriage. There was general consensus that, with the changes wrought by the development of multimodalism and the use of electronic commerce, the transport law regime was in need of reform to regulate all transport contracts, whether applying to one or more modes of transport and whether the contract was made electronically or in writing. Some issues raised for consideration in any reform process included formulating more exact definitions of the roles, responsibilities, duties and rights of all parties involved and clearer definitions of when delivery was assumed to occur; rules for dealing with cases where it was not clear at which leg of the carriage cargo had been lost or damaged; and identifying the terms or liability regime that should apply as well as the financial limits of liability and the inclusion of provisions designed to prevent the fraudulent use of bills of lading.

20. The Commission welcomed the fruitful cooperation between CMI and the secretariat. Several statements were made to the effect that it was necessary throughout the preparatory work to involve other interested organizations, including those representing the interests of cargo owners. It was stressed that only by ensuring the cooperation of all interested industries at all stages of the preparatory work was there hope to develop a regime that would be both broadly acceptable and capable of being implemented within a short span of time. The Commission requested the secretariat to continue to cooperate actively with CMI with a view to presenting, at the next session of the Commission, a report identifying issues in transport law in respect of which the Commission might undertake future work and, to the extent possible, also presenting possible solutions. The present report has been prepared pursuant to that request.

I. POSSIBLE SCOPE OF WORK AND ISSUES TO BE DEALT WITH IN A FUTURE INSTRUMENT ON THE CARRIAGE OF GOODS BY SEA

21. The CMI International Subcommittee, in which all maritime law association members of CMI are invited to participate, met four times during 2000 to consider the scope and possible substantive solutions for a future instrument on transport law (27 and 28 January, 6 and 7 April, 7 and 8 July and 12 and 13 October). A number of other non-governmental organizations participated as observers in those meetings, including FIATA, the Baltic and International Maritime Council (BIMCO), ICC, ICS, IUMI and the International Group of P&I Clubs. The tasks of the Subcommittee, as laid down by CMI in consultation with the secretariat of the Commission, have been to consider in what areas of transport law that are not at present governed by international liability regimes greater international uniformity may be achieved; to prepare an outline of an instrument designed to bring about uniformity of transport law; and then to draft provisions to be incorporated into the proposed instrument, including provisions relating to liability; in addition, the Subcommittee is to consider how the instrument might accommodate other forms of carriage associated with carriage by sea. The draft outline instrument and a paper on door-to-door issues were discussed at the major CMI international conference held in Singapore from 12 to 16 February 2001; pursuant to the discussion at the conference, the Subcommittee will continue its work with a view to identifying solutions that are likely to attract agreement among the industries involved in the international carriage of goods by sea.

22. What follows is a summary of the considerations and suggestions that have resulted so far from the above-mentioned discussions prior to the Singapore conference. The details of possible legislative solutions are not presented here because they are currently being worked on by the International Subcommittee to take into account the views expressed at the Singapore conference and other views. However, the summary should enable the Commission to assess the thrust and scope of possible solutions and decide on how it wishes to proceed with respect to this topic.

A. Definitions

23. It is suggested that the future instrument should contain definitions designed to facilitate the operation of the substantive chapters. Some definitions, such as the definition of the term "performing carrier", have provoked significant discussion within the International Subcommittee and at the Singapore conference. Those discussions have concerned the underlying rule and will be outlined below.

B. Scope of application

24. A specific chapter, based broadly on article 2 of the Hamburg Rules, should address the issue of the scope of application of the instrument. The chapter has not been particularly controversial in its own right, but its drafting will be dependent on the resolution of the "period of responsibility" question, that is, the geographical reach of the draft outline instrument. This closely related issue is addressed below.

25. The current international regimes include an exclusion for carriage under charter parties. The exclusion dates from the International Convention for the Unification of Certain Rules relating to Bills of Lading (Hague Rules), and has been retained in essentially the same form ever since. During the work of the International Subcommittee, the question was raised as to how broadly the exclusion should apply. Modern practice goes well beyond traditional charter parties. It will thus be necessary to decide if that traditional exclusion should continue to be limited to traditional charter parties or if it should be expanded to other contracts of carriage such as contracts of affreightment, volume contracts, service contracts and similar agreements.

C. Period of responsibility

26. Any instrument must resolve the "period of responsibility" question, that is, the geographical reach of the instrument. Two possible resolutions are illustrated under current law by the Hague Rules as Amended by the Brussels Protocol 1968 (the Hague-Visby Rules) and the Hamburg Rules. The former apply on a "tackle-to-tackle" basis, meaning that responsibility is imposed during the period from the time when the goods are loaded on to the time when they are discharged from the ship. The latter apply more broadly on a "port-to-port" basis, meaning that responsibility is imposed for the period during which the carrier is in charge of the goods at the port of loading, during the carriage and at the port of discharge. A third possibility would be a further broadening of the period of responsibility to cover any time during which the carrier is in charge of the goods, whether in the port area, on board the vessel, or elsewhere. As such it would cover the period often referred to as "door-to-door". While considerable support has been expressed for a door-to-door cover, more investigations must be conducted in order to accommodate all the consequences such an expansion of the scope would entail.

27. Once the basic period of responsibility is resolved, subsidiary issues remain to be determined. The most

prominent of those questions is the extent to which a carrier may limit its period of responsibility by the structure of its contract. For example, may the issuer of a “through transport” document assume a carrier’s liability for one portion of the carriage covered by the document but only a forwarding agent’s liability for the remainder of the carriage?

D. Obligations of the carrier

28. It is suggested that one chapter should set out the obligations of the carrier in general terms. Controversial issues that relate to the carrier’s obligations should be covered in other parts of the draft outline instrument, including the chapter dedicated to the period of responsibility and that dedicated to the liability of the carrier.

E. Liability of the carrier

29. One chapter should address what most people in the field consider to be the core issue in any legal regime governing the relationship between carrier and cargo interests, namely, the question of the extent to which a carrier is required to compensate the cargo owner when goods for which it is responsible are lost or damaged or when their delivery is delayed. There appears to be substantial support for a fault-based regime, as opposed to a more stringent basis of liability, as, for example, in the Convention on the Contract for the International Carriage of Goods by Road.⁹ It remains for further discussion how detailed the liability provisions should be and the nature of any exemptions to the carrier’s liability.

30. In addition, a number of more specific, subsidiary issues should also be addressed in the chapter dealing with the liability of the carrier. One unresolved issue is the allocation of damages when two or more causes combine to cause a loss and the carrier is responsible for one or more of those causes but not for all of them. One approach, illustrated by article 5.7 of the Hamburg Rules, puts the full burden of proving the allocation of damages on the carrier. Another approach, illustrated by the proposed amendments to the Carriage of Goods by Sea Act that are now pending before the Congress of the United States of America, would put equal burdens on both parties, with an equal division of damages if neither party can carry its burden of proof.

31. Another unresolved issue is the extent to which a carrier’s agents, servants and independent contractors, or any other party performing any of a carrier’s obligations under a contract of carriage, are liable for the loss or damage that may be attributed to their breach of duty. (Those parties have been called “performing carriers” in the early work of the International Subcommittee, but the use of the term is subject to review.) One approach, common in some countries before the successful invocation of the “Himalaya clause”, was to impose full liability on the performing carriers (typically on a tort basis) and deny them the benefit of the carrier’s limitations and exclusions. Another approach, which may loosely be seen as the object of the Himalaya

clause, is to make no provision for the performing carriers’ liability but to ensure that any liability that might exist would be subject to the carrier’s limitations and exclusions. A third approach, illustrated by the proposed amendments to the United States Carriage of Goods by Sea Act, would impose uniform liability on performing carriers (on the same basis as the contracting carriers) and give them the benefit of the carrier’s limitations and exclusions. A fourth approach would impose liability on a “network” basis, whereby each performing carrier would assume liability on the basis of the legal regime that would apply if it were the only carrier and had contracted with the shipper directly. Thus, for example, a European road carrier could be liable on the basis of the Convention on the Contract for the International Carriage of Goods by Road.

32. Another unresolved issue is the extent to which a carrier should be liable for delay in delivery and the basis, if any, on which the carrier could limit its liability. One approach would hold the carrier liable for any unreasonable delay. An alternative approach would hold the carrier liable for delay only if the parties had made a special agreement governing the time when the goods would be delivered.

F. Obligations of the shipper

33. Under current international regimes, very little responsibility is imposed on the shipper, and the shipper’s obligations—to the extent that they exist—are not well defined. During the work of the International Subcommittee, it was suggested that it would be beneficial to list the shipper’s obligations more precisely.

G. Transport documents

34. In most cases, the contractual relationship between carrier and cargo interests is governed by a bill of lading or other transport document. The rules governing that transport document, however, are often not too well defined. Existing international conventions govern some of the core provisions (such as the description of the goods that must be included in the transport document), but also omit many important aspects (such as whether the transport document must be dated and the significance of an ambiguous date). During the work of the International Subcommittee, it was suggested that it would be beneficial to set out more fully the rules applicable in this area.

35. A number of discrete issues must still be resolved. For example, it is agreed that the carrier must issue a transport document if the shipper demands one. It is not clear, however, which of the parties that might be described as “the shipper” is entitled to make this demand—the contracting shipper (the party that is bound by the contract of carriage), the consignee (the party that delivers the goods to the carrier, perhaps on behalf of the contracting shipper) or some other party. Similarly, it is agreed that certain information should be included in the transport document, but it is not clear what liability, if any, should be imposed for failing to include the required information.

⁹United Nations, *Treaty Series*, vol. 399, No. 5742.

36. To give one more example, it is agreed that in some circumstances a transport document should be not simply prima facie evidence but conclusive evidence of the issuing carrier's receipt of the goods as described in the transport document. But it is not clear how those circumstances should be defined. One possibility would be to limit the rule to the context of a negotiable transport document that has been duly negotiated to a third party acting in good faith. Another possibility would be to extend the rule to protect any third party acting in good faith that has paid value or otherwise altered its position in reliance on the description of the goods in the transport document.

37. Perhaps the most troublesome set of issues regarding transport documents relates to the carrier's ability to limit its liability for descriptions in the transport document that it has failed to verify. It is agreed that in some circumstances a carrier may qualify a description in the transport document with a phrase such as "said to contain" or "shipper's load and count", but it is not clear how those circumstances should be defined. One possibility, broadly speaking, which is generally consistent with the law in some countries, would be to recognize and give effect to such qualifying phrases with little regard for the circumstances under which they were included in the transport document. A second possibility, again in broad terms, which is generally consistent with the law in other countries, would be to hold the qualifying phrases invalid as attempts to limit the carrier's liability in a manner not permitted by the governing rules. A third, compromise, possibility is suggested by the proposed amendments to the United States Carriage of Goods by Sea Act, which would recognize and give effect to the qualifying phrases only in carefully defined circumstances so as to protect the interests of cargo as well.

H. Freight

38. During the work of the International Subcommittee, it was suggested that in order to list all of the obligations and rights of the parties, it would be advisable to include a chapter containing a default system regulating freight. Such a chapter should be non-mandatory, as the parties should be free to regulate the details of the freight in their own contract. Traditional problems to be covered should include when the freight is considered to be earned and when the freight is payable. Furthermore, the instrument should provide that freight is not subject to set-off, deduction or discount.

39. A particular issue arises when the parties to a sales contract have agreed that the freight should be paid by the shipper (e.g. in a cost, insurance and freight (CIF) contract). In such a case the consignee (and buyer) would wish to be protected from having to incur freight costs when taking delivery of the goods. Therefore, the instrument could provide that, if the transport documentation shows that the freight has been pre-paid, the carrier loses any right to claim that freight from the consignee (even if the freight was, in fact, not pre-paid).

40. An important question related to freight is whether the carrier may retain the cargo when the consignee is not prepared to pay the freight and costs relating to the

transportation of the goods. Most national laws provide for such right and many contracts provide for a contractual right of retention. Often, that right is also referred to as a "lien", which under some national laws includes a preferred right of the carrier to the value of the goods in cases of bankruptcy of the consignee. International trade would gain much certainty if an instrument could clearly define the basic right of retention or lien that a carrier has against the cargo owners. In doing that, the instrument must define the claims for which the lien exists and the steps the carrier must take to obtain financial security or the privileges of the lien in the event of the cargo interests' insolvency.

I. Delivery to the consignee

41. Delivery is a key concept for the carriage of goods. Among other things, it typically marks the completion of the contract of carriage and the termination of the carrier's responsibilities. Existing international regimes deal with delivery only to a limited extent. Under the Hague-Visby Rules, for example, the notice period and the time-for-suit period both start upon delivery of the goods concerned, but the term is not defined.

42. During the work of the International Subcommittee, it was suggested that it would be beneficial to define the term "delivery" and its consequences more precisely.

J. Right of control

43. During the time the cargo is in the custody of the carrier, the parties interested in the cargo (e.g. the shipper, the holder of any security right and the consignee) may wish to give particular instructions to the carrier for the performance of the contract of carriage. The carrier, in turn, would like to know from whom it is required to take instructions and with whom it could, in case a particular issue arises, negotiate different terms of the contract of carriage and collect additional costs. It is, therefore, thought that the new instrument should contain a rule on the right of control during transit. In doing so, maritime transportation would come into line with most of the transport conventions applicable for other modes of transport that contain specific provisions on the right of control. Of course, the provisions should follow patterns adapted to the particular needs of maritime transport.

44. The first issue is what type of controlling rights may arise and should, therefore, be covered by the provisions of the instrument. Such rights to instruct the carrier may include the demand to stop the goods and deliver them before their arrival at the place of destination. That particular right is a collateral of the law provided for in the sales contract to stop the goods in transit, in cases when the buyer faces financial problems that would frustrate the sales contract. Another example is the shipper that has sold the goods to a party other than the consignee initially named in the contract of carriage and would like to substitute the consignee for that other party. Apart from these cases, there are a number of instructions that amount to a variation of the contract of carriage, such as a change in destination.

45. A major issue relating to the right of control is to determine the technique and the time when such a right of control is transferred from the shipper to another party and eventually to the consignee. The easiest case is when the transport is evidenced by a bill of lading. There, trade and national law provide that in order for the bill of lading holder to instruct the carrier it must present a full set of original bills of lading. This avoids any abuse when a holder of one of the original bills of lading relies on a particular right (including to request delivery at destination). The situation is slightly more complicated when no bill of lading but another transport document has been issued. Two variants are conceivable, neither of which has yet gained clear support. One solution would be to follow the concept stated in other transport conventions: if sea waybills have been issued, the party wanting to instruct the carrier or otherwise control the goods would have to present such documents to the carrier. The view was expressed, however, that this would highly overvalue the sea waybill in its current form and, therefore, the right of control should remain with the shipper until the cargo has been finally tendered to the consignee at destination.

46. The harmonizing instrument should further clarify that the carrier is allowed to request the instructing party to secure its costs before it actually follows the instructions.

K. Transfer of rights

47. The subject of transfer of rights is in many ways closely related to the issue of right of control addressed above. In order to determine who has a right of control, it is necessary to know who has a sufficient interest in the cargo. To the extent that a third party (i.e. not an original party to the contract of carriage) claims an interest in the cargo because it is the holder of a negotiable transport document (which will frequently be the case in practice), it is necessary to know how rights governed by a negotiable transport document are transferred.

48. Existing international regimes do not deal with this subject in any detail and national laws in many countries are not fully developed. During the work of the International Subcommittee, it was suggested that it would be beneficial to define the rules governing the subject more precisely. That effort could be particularly valuable as paper documents are replaced by electronic messages. When the introduction of new practices makes it more difficult to rely on prior practices, it becomes more important to have well-defined rules to facilitate the new practices. Some provisions would therefore simply attempt to restate and codify generally accepted laws and practices under current conditions. Other provisions would be more innovative and, probably, more controversial. For each new provision, there is generally a clear choice to be made as to whether or not to include it in the instrument being developed.

L. Rights of suit

49. In some legal systems, identifying the party that is entitled to bring an action against a carrier for loss, damage or delay can sometimes be a difficult problem. During the

work of the International Subcommittee, it was suggested that it would be beneficial to define the rules governing the subject more precisely.

M. Time bar

50. There is widespread agreement that a cargo claimant should be permitted only a limited time period in which to bring an action for loss, damage or delay against a carrier. It remains to be determined whether that period should be one year (as in the Hague and Hague-Visby Rules) or two years (as in the Hamburg Rules).

N. Jurisdiction and arbitration

51. It would have to be considered whether and in what way the instrument to be drafted should address issues of jurisdiction and arbitration.

II. CONCLUSION

52. The preceding section summarizes the considerations in CMI, including the discussion at its conference in Singapore regarding issues that are giving rise to difficulties in the international carriage of goods and where modern solutions are needed. In the meantime the CMI International Subcommittee on transport law is continuing its work on identifying solutions, with alternatives and accompanying comments, designed to improve certainty and predictability in the international carriage of goods by sea and operations related thereto.

53. Consultations that the secretariat has been conducting pursuant to the mandate it received from the Commission in 1996 indicate that work could now usefully be commenced towards an international instrument, possibly having the nature of an international treaty, that would modernize the law of carriage, take into account the latest developments in technology, including electronic commerce, and eliminate legal difficulties in the international transport of goods by sea that were identified by the Commission. Considerations of possible legislative solutions by CMI are making good progress and it is expected that a preliminary text containing drafts of possible solutions for a future legislative instrument, with alternatives and comments, could be prepared by December 2001.

54. It would thus be possible for the Commission to commence consideration of the feasibility, scope and content of a future legislative instrument in 2002. One possibility may be to entrust that task to an intergovernmental working group. Alternatively, the Commission may decide to undertake that consideration itself at its thirty-fifth session, in 2002. The decision as to whether the task should be assigned to a working group or whether the Commission should initially consider the matter itself may depend on whether the Commission has before it in 2002 a text to be

finalized at that session. In line with well-established practice, in addition to States members of the Commission, other interested States and relevant intergovernmental and international non-governmental organizations would be invited in the capacity of observers to participate actively in the discussions. It is expected that CMI as well as other organizations representing the industries involved in the

transport of goods by sea and in related operations will wish to be involved in those considerations.

55. If the Commission agrees with the suggested course of action, it may wish to request the secretariat to prepare the necessary documentation for an intergovernmental UNCITRAL session during the second quarter of 2002.

VI. CASE LAW ON UNCITRAL TEXTS

Uniform interpretation of UNCITRAL texts: sample digest of case law on the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980): note by the secretariat

(A/CN.9/498) [Original: English]

1. In 1966, when the General Assembly established the United Nations Commission on International Trade Law and gave it the mandate to promote the progressive harmonization and unification of the law of international trade, it also stated that the Commission was to do so, *inter alia*, by promoting ways and means of ensuring a uniform interpretation and application of international conventions and uniform laws in the field of the law of international trade and by collecting and disseminating information on national legislation and modern legal developments, including case law, in the field of international trade.¹

2. At its twenty-first session, in 1988, the Commission considered the need and means for collecting and disseminating court decisions and arbitral awards relating to legal texts emanating from its work, noting that information on the application and interpretation of the international text would help to further the desired uniformity in application and would be of general informational use to judges, arbitrators, lawyers and parties to business transactions.² In deciding to establish the case reporting system, the Commission also considered the desirability of establishing an editorial board, which, amongst other things, could undertake a comparative analysis of the collected decisions and report to the Commission on the state of application of the legal texts. Those reports could evidence the existence of uniformity or divergence in the interpretation of individual provisions of the legal texts, as well as gaps in the texts that might come to light in actual court practice. The Commission decided not to establish the board at that time, but to reconsider the proposal in the light of experience gathered in the collection of decisions and the dissemination of information under the CLOUT system.³

3. It is submitted that it would be appropriate for the Commission to reconsider the question of how it should contribute to the uniform interpretation of the texts resulting from its work. Such reconsideration is timely because, since the establishment of the CLOUT system, some 400 cases have been reported, including more than 250 on the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980). In the light of the fact that divergences in the interpretation of the Convention

have been noted, it has been repeatedly suggested by users of that material that appropriate advice and guidance would be useful to foster a more uniform interpretation of the Convention. The preparation of an analytical digest of court and arbitration cases, identifying trends in interpretation, would be one way of providing such advice and guidance. The digest could be prepared for the Commission by the secretariat in consultation with experts from different regions to ensure that it is as accurate and balanced a reflection of the cases on the Convention as possible. In preparing the digest, one possible way may be simply to note diverging case law for information purposes; alternatively, guidance as to the interpretation of the Convention may be provided, based in particular on the legislative history of the provision and the reasons underlying it.

4. The present document contains summaries of case law on articles 6 and 78 of the Convention and is intended to offer to the Commission an example of how court and arbitral decisions might be presented with a view to fostering uniform interpretation. The Commission may wish to consider whether the secretariat, in consultation with experts from the different regions, should prepare a complete digest of cases reported on the various articles of the Convention. If so, the Commission may wish to consider whether the approach taken in preparing the sample digest presented below, including the style of presentation and the level of detail, is appropriate.

5. Reasons for which the Commission may wish to take steps to foster uniform interpretation of the Convention apply similarly to the UNCITRAL Model Law on International Commercial Arbitration (1985). With respect to the Model Law, some 120 cases have been reported, with some unsettled or divergent trends noted. The provisions that have most frequently been interpreted by reported court decisions include those regarding the scope of application of the Model Law (art. 1), the extent of court intervention (art. 5), the definition and form of the arbitration agreement (art. 7), the referral of the parties to arbitration by the court before which an action has been brought (art. 8), the arbitration agreement and interim measures of protection granted by a court (art. 9), the appointment of arbitrators by the court (art. 11), the competence of the arbitral tribunal to rule on its jurisdiction (art. 16), correction and interpretation of the award (art. 33), the recourse against the award (art. 34) and the recognition and enforcement of the award (arts. 35 and 36). Against that background, the Commission may wish to request the secretariat to analyse the cases interpreting uniform provisions of the Model Law and to

¹General Assembly resolution 2205 (XXI), sect. II, paras. 8 (d) and (e); *UNCITRAL Yearbook*, vol. I, 1968-1970, part one, II, E.

²*Official Records of the General Assembly, Forty-third Session, Supplement No. 17 (A/43/17)*; *UNCITRAL Yearbook*, vol. XIX, 1988, part one, para. 99.

³*Ibid.*, paras. 107-109.

submit a digest of those cases to a future session of the Commission or its Working Group on Arbitration so as to enable the Commission to decide whether any action, similar to that suggested above with respect to the United Nations Sales Convention, should be taken.

6. The sample summaries of case law on articles 6 and 78 of the Convention are as follows:

Article 6

The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.

Introduction

1. According to article 6 of the Convention, the parties may exclude the Convention's application (totally or partially) or derogate from its provisions. Therefore, even if the Convention is otherwise applicable, one must nevertheless determine whether the parties have excluded it or derogated from its provisions in order to conclude that the Convention applies in a particular case.⁴

2. By allowing the parties to exclude the Convention and derogate from its provisions, the drafters affirmed the principle according to which the primary source of the rules governing international sales contracts is party autonomy.⁵ In doing so, the drafters clearly acknowledged the Convention's non-mandatory nature⁶ and the central role that party autonomy plays in international commerce and, in particular, in international sales.⁷

Derogation

3. Article 6 makes a distinction between the exclusion of the application of the Convention and the derogation from some of its provisions. Whereas the former does not encounter any limitations, the latter does. Where one of the parties to the contract for the international sale of goods has its place of business in a State that has made a reservation under article 96,⁸ the parties may not

derogate from or vary the effect of article 12. In those cases, any provision "that allows a contract of sale or its modification or termination by agreement or any offer, acceptance or other indication of intention to be made in any form other than in writing does not apply" (art. 12). All other provisions may be derogated from.⁹

4. Although the Convention does not expressly mention it, there are other provisions that the parties cannot derogate from, more specifically, the public international law provisions (i.e. arts. 89-101). This is due to the fact that those provisions address issues relevant to contracting States rather than private parties. It should be noted that this issue has not yet been addressed by case law.

Express exclusion

5. The applicability of the Convention can be expressly excluded by the parties. In respect of this kind of exclusion, two lines of cases have to be distinguished: the exclusion with and the exclusion without any indication by the parties of the law applicable to the contract between the parties. In those cases in which the Convention's application is excluded with an indication of the applicable law, which in some countries can be made in the course of the legal proceedings,¹⁰ the law applicable will be that applicable by virtue of the rules of private international law of the forum,¹¹ which in most countries makes applicable the law chosen by the parties.¹² Where the Convention is expressly excluded without an indication of the applicable law, the applicable law is to be identified by means of the private international law rules of the forum. Whenever these rules refer to the law of a contracting State, it appears that the domestic sales law and not the Convention should apply.

Implicit exclusion

6. A number of courts have considered the question of whether the Convention's applicability can be excluded

⁴See CLOUT case No. 378, Italy, 2000; CLOUT case No. 338, Germany, 1998; CLOUT case No. 223, France, 1997; CLOUT case No. 230, Germany, 1997; CLOUT case No. 190, Austria, 1997; CLOUT case No. 311, Germany, 1997; CLOUT case No. 211, Switzerland, 1996; CLOUT case No. 170, Germany, 1995; CLOUT case No. 106, Austria, 1994; CLOUT case No. 199, Switzerland, 1994; CLOUT case No. 317, Germany, 1992.

⁵For a reference to this principle, see CLOUT case No. 229, Germany, 1996.

⁶For an express reference to the Convention's non-mandatory nature, see Oberster Gerichtshof, Austria, 21 March 2000, *Internationales Handelsrecht*, 2001, p. 41; CLOUT case No. 240, Austria, 1998.

⁷Landgericht Stendal, Germany, 12 October 2000, *Internationales Handelsrecht*, 2001, p. 32.

⁸See article 96: "A Contracting State whose legislation requires contracts of sale to be concluded in or evidenced by writing may at any time make a declaration in accordance with article 12 that any provision of article 11, article 29, or part II of this Convention, that allows a contract of sale or its modification or termination by agreement or any offer, acceptance, or other indication of intention to be made in any form other than in writing, does not apply where any party has his place of business in that State."

⁹Thus, it cannot surprise that a court has recently stated that article 55, relating to open-price contracts, is only applicable where the parties have not agreed to the contrary (CLOUT case No. 151, France, 1995). Neither is a court decision surprising which expressly states that article 39, relating to the notice requirement, is not mandatory and can be derogated from (Landgericht Gießen, Germany, 5 July 1994, *Neue Juristische Wochenschrift Rechtsprechungs-Report*, 1995, p. 438). To take another example, according to the Austrian Supreme Court, article 57 also can be derogated from (CLOUT case No. 106, Austria, 1994).

¹⁰This is true for instance in Germany, as pointed out in case law; see, for example, CLOUT case No. 122, Germany, 1994; CLOUT case No. 292, Germany, 1993.

¹¹See CLOUT case No. 231, Germany, 1997; Oberlandesgericht Frankfurt, Germany, 15 March 1996, *Neue Juristische Wochenschrift Rechtsprechungs-Report*, 1997, pp. 170 ff.

¹²Where the rules of private international law of the forum are those laid down either in the 1955 Hague Convention on the Law Applicable to International Sales of Goods (United Nations publication, Sales No. 73.V.3), in the 1980 Rome Convention on the Law Applicable to Contractual Obligations (United Nations, *Treaty Series*, vol. 1605, No. 28023), or in the 1994 Inter-American Convention on the Law Applicable to Contractual Obligations, the law chosen by the parties will govern.

implicitly. According to many courts,¹³ the lack of an express reference to the possibility of implicitly excluding the Convention does not preclude it. This view is supported by a reference in the *Official Records*, which shows that the majority of delegations was opposed to the proposal advanced during the diplomatic conference according to which a total or partial exclusion of the Convention could only be made “expressly”.¹⁴ The express reference in the Convention to the possibility of an implicit exclusion merely “has been eliminated lest the special reference to ‘implied’ exclusion might encourage courts to conclude, on insufficient grounds, that the Convention had been wholly excluded”.¹⁵ According to few court decisions, however, the Convention cannot be excluded implicitly, on the grounds that the Convention does not expressly provide for that possibility.¹⁶

7. A variety of ways of implicitly excluding the Convention have been suggested. One possibility is for the parties to choose the law¹⁷ of a non-contracting State as the law applicable to their contract.¹⁸

8. The choice of the law of a contracting State as the law governing the contract poses more difficult problems. It has been suggested in an arbitral award¹⁹ and several court decisions²⁰ that the choice of the law of a contracting State ought to amount to an implicit exclusion of the Convention’s application, since otherwise the choice of the parties would have no practical meaning. Most court decisions²¹ and arbitral awards,²² however,

take a different view. The grounds for that view may be summarized as follows: on the one hand, the Convention is part of the law of the contracting State chosen by the parties and, on the other, the choice of the law of the contracting State functions to identify the law by which the gaps in the Convention must be filled. According to this line of decisions, the choice of the law of a contracting State, if made without particular reference to the domestic law of that State, does not appear to exclude the Convention’s applicability.

9. The choice of a forum may also lead to the implicit exclusion of the Convention’s applicability. In those cases, however, where the forum chosen is located in a contracting State and there is evidence that the parties wanted to apply the law of the forum, two arbitral tribunals have applied the Convention.²³

10. The question has arisen of whether the Convention’s application is also excluded where the parties argue a case on the sole basis of a domestic law despite the fact that all of the Convention’s criteria of applicability are met. In those countries where the judge must always apply the correct law even if the parties based their arguments on a law that does not apply in the case (*jura novit curia*), the mere fact that the parties argue on the sole basis of a domestic law does not in itself lead to the exclusion of the Convention.²⁴ If the parties are not aware of the Convention’s applicability and argue on the basis of a domestic law merely because they believe that this law is applicable, the judges will nevertheless have to apply the Convention.²⁵ In one country where the principle *jura novit curia* is not acknowledged, when the parties argued their case by reference to a domestic law of sales, a court applied that domestic law.²⁶

Opting in

11. While the Convention expressly provides the parties with the possibility of excluding its application either in whole or in part, it does not address the issue of whether the parties may make the Convention applicable when it would not otherwise apply. This issue was expressly dealt with by the 1964 Hague Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods, which contained a provision, article 4, that expressly provided the parties with the possibility of “opting in”. The fact that the Convention does not contain a provision comparable to that article does not necessarily mean that the parties are not allowed to “opt in”. This view is also supported by the fact that a proposal made during the diplomatic conference (by the former German Democratic Republic)²⁷ accord-

¹³See CLOUT case No. 378, Italy, 2000; CLOUT case No. 273, Germany, 1997; Landgericht München, Germany, 29 May 1995, *Neue Juristische Wochenschrift*, 1996, pp. 401 f.; CLOUT case No. 136, Germany, 1995.

¹⁴*Official Records of the United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March-11 April 1980* (United Nations publication, Sales No. E.81.IV.3), pp. 85-86.

¹⁵*Ibid.*, p. 17.

¹⁶See Landgericht Landshut, Germany, 5 April 1995, published on the Internet at: <http://www.jura.uni-freiburg.de/fprl/Convention/>; *Orbisphere Corp. v. United States*, United States of America, 726 Fed. Supp. 1344 (1990).

¹⁷Whether such a choice is to be acknowledged at all depends on the rules of private international law of the forum.

¹⁸See CLOUT case No. 49, Germany, 1993.

¹⁹See CLOUT case No. 92, Arbitration, 1994.

²⁰See Cour d’Appel Colmar, France, 26 September 1995, published on the Internet at: <http://witz.jura.uni-sb.de/cisg/decisions/260995.htm>; CLOUT case No. 326, Switzerland, 1995; CLOUT case No. 54, Italy, 1993.

²¹CLOUT case No. 270, Germany, 1998; CLOUT case No. 297, Germany, 1998; CLOUT case No. 220, Germany, 1997; CLOUT case No. 236, Germany, 1997; CLOUT case No. 287, Germany, 1997; CLOUT case No. 230, Germany, 1997; CLOUT case No. 214, Germany, 1997; CLOUT case No. 206, France, 1996; Landgericht Kassel, Germany, 15 February 1996, *Neue Juristische Wochenschrift Rechtsprechungs-Report*, 1996, pp. 1146 f.; CLOUT case No. 125, Germany, 1995; Rechtbank s’Gravenhage, the Netherlands, 7 June 1995, *Nederlands Internationaal Privaatrecht*, 1995, No. 524; CLOUT case No. 167, Germany, 1995; CLOUT case No. 120, Germany, 1994; CLOUT case No. 281, Germany, 1993; CLOUT case No. 48, Germany, 1993.

²²See CLOUT case No. 166, Arbitration; Arbitration Court attached to the Hungarian Chamber of Commerce and Industry, Hungary, 17 November, UNILEX; ICC International Court of Arbitration, France, award No. 8324, *Journal du droit international*, 1996, pp. 1019 ff.; ICC International Court of Arbitration, France, award No. 7844, UNILEX; ICC International Court of Arbitration, France, award No. 7660, UNILEX; ICC International Court of Arbitration, France, award No. 7565, *Journal du droit international*, 1995, pp. 1015 ff.; CLOUT case No. 103, Arbitration; CLOUT case No. 93, Arbitration.

²³Schiedsgericht der Hamburger freundlichen Arbitrage, Germany, 29 December 1998, *Internationales Handelsrecht*, 2001, pp. 36-37; CLOUT case No. 166, Arbitration.

²⁴See CLOUT case No. 378, Italy, 2000; CLOUT case No. 125, Germany, 1995; Landgericht Landshut, Germany, 5 April 1995, UNILEX.

²⁵CLOUT case No. 136, Germany, 1995.

²⁶*GPL Treatment Ltd. v. Louisiana-Pacific Group*, United States of America, 133 Or. App. 633 (1995).

²⁷See *Official Records of the United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March-11 April 1980* (United Nations publication, Sales No. E.81.IV.3), p. 86.

ing to which the Convention should apply even where the preconditions for its application are not met, as long as the parties wanted it to be applicable, was rejected on the ground that, to allow the parties to “opt in”, an express provision was unnecessary, because of the existence of the principle of the party autonomy.

Article 78

If a party fails to pay the price or any other sum that is in arrears, the other party is entitled to interest on it, without prejudice to any claim for damages recoverable under article 74.

Prerequisites for entitlement to interest

1. This provision deals with the right to interest on “the price or any other sum that is in arrears”, with the exception of the instance where the seller has to refund the purchase price after the contract has been avoided, in which case article 84 of the Convention applies.

2. The only prerequisite for the entitlement to interest is the debtor’s failure to comply with its obligation to pay the price or any other sum by the time specified in the contract or, absent such specification, by the Convention.²⁸ Thus, unlike under many national laws, the entitlement to interest does not depend on any formal notice given to the debtor.²⁹ Therefore, interest starts to accrue as soon as the debtor is in arrears.

3. The entitlement to interest also does not depend on the creditor being able to prove to have suffered any loss. Therefore, interest can be claimed pursuant to article 78 independently from the damage caused by the payment in arrears.³⁰

4. As can be derived from the text of article 78, the entitlement to interest on sums in arrears is without prejudice to any claim by the creditor for damages recoverable under article 74.³¹ Of course, in order for this

claim for damages to be successful, all requirements set forth in article 74 must be met.³²

Interest rate

5. This provision merely sets forth a general entitlement to interest;³³ it does not specify the interest rate to be applied.

6. The lack of a specific formula to calculate the rate of interest has led some courts to consider this matter as one governed by, albeit not expressly settled in, the Convention.³⁴ Other courts consider this matter one that is not governed at all by the Convention. This difference in qualifying this matter has led to diverging solutions as to the applicable interest rate, since under the Convention, the matters governed by, but not expressly settled in, the Convention have to be dealt with differently than those falling outside the Convention’s scope. According to article 7, paragraph 2, of the Convention, the former matters have to be settled in conformity with the general principles on which the Convention is based or, in the absence of those principles, in conformity with the law applicable by virtue of the rules of private international law. However, if a matter is considered to fall outside the Convention’s scope, it must be settled in conformity with the law applicable by virtue of the rules of private international law, without any recourse to the “general principles” of the Convention.

7. Several decisions have sought a solution on the basis of general principles on which the Convention is based. Some court decisions³⁵ invoked article 9 of the Convention in order to solve the issue of the applicable rates of interest and determined the amount of interest payable according to the relevant trade usages. According to two arbitral awards³⁶ “the applicable interest rate is to be determined autonomously on the basis of the general principles underlying the Convention”, on the grounds that the recourse to domestic law would lead to results contrary to those promoted by the Convention. In these two cases, the issue of the interest rate was solved by resorting to the general principle of full compensation, which led to the application of the law of the

²⁸For cases where the courts had to resort to the rules of the Convention, namely, article 58, to determine when the payment was due, since the parties had not agreed upon a specific time of performance, see CLOUT case No. 79, Germany, 1994; CLOUT case No. 1, Germany, 1991.

²⁹For this statement in case law, see Landgericht Aachen, Germany, 20 July 1995, published on the Internet at <http://www.jura.uni-freiburg.de/ipr1/Convention/>; ICC International Court of Arbitration, France, award No. 7585, *Journal du droit international*, 1995, pp. 1015 ff.; CLOUT case No. 166, Arbitration; CLOUT case No. 152, France, 1995; ICC International Court of Arbitration, France, award No. 7331, *Journal du droit international*, 1995, pp. 1001 ff.; Amtsgericht Nordhorn, Germany, 14 June 1994, published on the Internet at <http://www.jura.uni-freiburg.de/ipr1/Convention/>; CLOUT case No. 55, Switzerland, 1991; for a court decision stating the contrary, see Landgericht Zwickau, Germany, 19 March 1999, published on the Internet at <http://www.jura.uni-freiburg.de/ipr1/Convention/>.

³⁰See CLOUT case No. 79, Germany, 1994; CLOUT case No. 5, Germany, 1990; CLOUT case No. 7, Germany, 1990.

³¹This has often been emphasized in case law; see, e.g., CLOUT case No. 248, Switzerland, 1998; CLOUT case No. 195, Switzerland, 1995; CLOUT case No. 79, Germany, 1994; CLOUT case No. 130, Germany, 1994; CLOUT case No. 281, Germany, 1993; CLOUT case No. 104, Arbitration; CLOUT case No. 7, Germany, 1990.

³²See Landgericht Oldenburg, Germany, 9 November 1994, *Recht der internationalen Wirtschaft*, 1996, pp. 65 f., where the creditor’s claim for damages caused by the failure to pay was dismissed on the grounds that the creditor did not prove that it had suffered any additional loss.

³³See ICC International Court of Arbitration, France, award No. 7585, *Journal du droit international*, 1995, pp. 1015 ff.; CLOUT case No. 83, Germany, 1994; CLOUT case No. 79, Germany, 1994; Oberlandesgericht Koblenz, Germany, 17 September 1993, *Recht der internationalen Wirtschaft*, 1993, p. 938; CLOUT case No. 1, Germany, 1991.

³⁴For a case listing various criteria used in case law to determine the rate of interest, see ICC International Court of Arbitration, France, award No. 7585, *Journal du droit international*, 1995, pp. 1015 ff.

³⁵See Juzgado Nacional de Primera Instancia en lo Comercial n. 10, Buenos Aires, Argentina, 6 October 1994, UNILEX; Juzgado Nacional de Primera Instancia en lo Comercial n. 10, Buenos Aires, Argentina, 23 October 1991, UNILEX.

³⁶See CLOUT cases Nos. 93 and 94, Arbitration.

creditor, since it is the creditor who has to borrow money in order to be as liquid as it would be had the debtor paid the sum it owed in due time.³⁷ This solution has been criticized by commentators on the grounds that it contrasts with the legislative history of the Convention, since during the diplomatic conference a proposal to link the rate of interest to the law where the creditor had its place of business was unsuccessful.³⁸ Furthermore this solution appears not to take into account the line that article 78 expressly draws between the damages to be awarded on the basis of articles 74 to 77 and interest on sums in arrears, a line acknowledged by many other tribunals.³⁹

8. Most courts consider the issue at hand as one not governed at all by the Convention and therefore tend to apply domestic law.⁴⁰ In respect of this approach some courts applied the domestic law of a specific country by virtue of the rules of private international law of the

forum⁴¹ and others applied the domestic law of the creditor without it being necessarily the law made applicable by the rules of private international law.⁴² There also are a few cases in which the rate was determined by reference to the law of the country in whose legal tender the sum of money has to be paid was (lex monetae);⁴³ in a few other cases, the courts applied the rate of the country in which the price had to be paid.⁴⁴

⁴¹See Landgericht Stendal, Germany, 12 October 2000, *Internationales Handelsrecht*, 2001, p. 31; Oberlandesgericht Stuttgart, Germany, 28 February 2000, *OLG-Report Stuttgart*, 2000, 407 f.; CLOUT case No. 380, Italy, 1999; CLOUT case No. 327, Switzerland, 1999; CLOUT case No. 377, Germany, 1999; CLOUT case No. 248, Switzerland, 1998; CLOUT case No. 282, Germany, 1997; ICC International Court of Arbitration, France, award No. 8611, UNILEX (stating that the relevant interest rate is either that of the lex contractus or, in exceptional cases, that of the lex monetae); CLOUT case No. 376, Germany, 1996; Tribunal de la Glane, Switzerland, 20 May 1996, *Schweizerische Zeitschrift für Internationales und Europäisches Recht*, 1997, p. 136; CLOUT case No. 166, Arbitration; Appellationsgericht Tessin, Switzerland, 12 February 1996, *Schweizerische Zeitschrift für Internationales und Europäisches Recht*, 1996, p. 125; Amtsgericht Augsburg, Germany, 29 January 1996, UNILEX; CLOUT case No. 330, Switzerland, 1995; Amtsgericht Kehl, Germany, 6 October 1995, *Recht der internationalen Wirtschaft*, 1996, pp. 957 f.; CLOUT case No. 195, Switzerland, 1995; CLOUT case No. 228, Germany, 1995; Landgericht Aachen, Germany, 20 July 1995, UNILEX; Landgericht Kassel, Germany, 22 June 1995, published on the Internet at <http://www.jura.uni-freiburg.de/ipr1/Convention/>; CLOUT case No. 136, Germany, 1995; Amtsgericht Alsfeld, Germany, 12 May 1995, *Neue Juristische Wochenschrift Rechtsprechungs-Report*, 1996, pp. 120 f.; Landgericht Landshut, Germany, 5 April 1995, published on the Internet at <http://www.jura.uni-freiburg.de/ipr1/Convention/>; Landgericht München, Germany, 20 March 1995, *Praxis des internationalen Privat- und Verfahrensrechts*, 1996, pp. 31 ff.; Landgericht Oldenburg, Germany, 15 February 1995, published on the Internet at <http://www.jura.uni-freiburg.de/ipr1/Convention/>; CLOUT case No. 132, Germany, 1995; CLOUT case No. 300, Arbitration; Kantonsgericht Zug, Switzerland, 15 December 1994, *Schweizerische Zeitschrift für Internationales und Europäisches Recht*, 1997, p. 134; Landgericht Oldenburg, Germany, 9 November 1994, *Neue Juristische Wochenschrift Rechtsprechungs-Report*, 1995, p. 438; Kantonsgericht Zug, Switzerland, 1 September 1994, *Schweizerische Zeitschrift für Internationales und Europäisches Recht*, 1997, pp. 134 f.; Landgericht Düsseldorf, Germany, 25 August 1994, published on the Internet at <http://www.jura.uni-freiburg.de/ipr1/Convention/>; Landgericht Gießen, Germany, 5 July 1994, *Neue Juristische Wochenschrift Rechtsprechungs-Report*, 1995, pp. 438 f.; Rechtbank Amsterdam, the Netherlands, 15 June 1994, *Nederlands Internationaal Privaatrecht*, 1995, pp. 194 f.; Amtsgericht Nordhorn, Germany, 14 June 1994, published on the Internet at <http://www.jura.uni-freiburg.de/ipr1/Convention/>; CLOUT case No. 83, Germany, 1994; CLOUT case No. 82, Germany, 1994; CLOUT case No. 81, Germany, 1994; CLOUT case No. 80, Germany, 1994; CLOUT case No. 79, Germany, 1994; CLOUT case No. 100, the Netherlands, 1993; Tribunal Cantonal Vaud, Switzerland, 6 December 1993, UNILEX; CLOUT case No. 281, Germany, 1993; CLOUT case No. 97, Switzerland, 1993; Rechtbank Roermond, the Netherlands, 6 May 1993, UNILEX; Landgericht Verden, Germany, 8 February 1993, UNILEX; CLOUT case No. 95, Switzerland, 1992; Amtsgericht Zweibrücken, Germany, 14 October 1992, published on the Internet at <http://www.jura.uni-freiburg.de/ipr1/Convention/>; CLOUT case No. 227, Germany, 1992; Landgericht Heidelberg, Germany, 3 July 1992, UNILEX; CLOUT case No. 55, Switzerland, 1991; CLOUT case No. 1, Germany, 1991; CLOUT case No. 5, Germany, 1990; CLOUT case No. 7, Germany, 1990.

⁴²Several court decisions referred to the domestic law of the creditor as the law applicable, independently of whether the rules of private international law made that law applicable; see Bezirksgericht Arbon, Switzerland, 9 December 1994, UNILEX; CLOUT case No. 6, Germany, 1991; CLOUT case No. 4, Germany, 1989. For a criticism of the latter decision by a court, see Landgericht Kassel, Germany, 22 June 1995, UNILEX.

⁴³See CLOUT case No. 164, Arbitration; Arbitration Court attached to the Hungarian Chamber of Commerce and Industry, Hungary, 17 November 1995, UNILEX.

⁴⁴See Rechtbank Almelo, the Netherlands, 9 August 1995, *Nederlands Internationaal Privaatrecht*, 1995, p. 686.

³⁷For a similar solution, that is, for an arbitral award basing its decision on the argument that the interest rate of the country has to apply in which the damage occurred, that is the country in which the creditor has its place of business, see also ICC International Court of Arbitration, France, award No. 7331, *Journal du droit international*, 1995, pp. 1001 ff.

³⁸See *Official Records of the United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March-11 April 1980* (United Nations publication, Sales No. E.81.IV.3), pp. 137-138.

³⁹For decisions which expressly refer to the distinction drawn between the interests which can be claimed on the basis of article 78 and the damages which can be claimed on the basis of articles 74-77, see CLOUT case No. 195, Switzerland, 1995; Landgericht München, Germany, 29 May 1995, *Neue Juristische Wochenschrift*, 1996, pp. 401 ff.; CLOUT case No. 79, Germany, 1994; CLOUT case No. 5, Germany, 1990; CLOUT case No. 46, Germany, 1990.

⁴⁰Note that some courts did not decide which law was applicable; this was possible, since all the countries involved in the particular dispute provided for either the same rate of interest (see, for example, CLOUT case No. 84, Germany, 1994; CLOUT case No. 56, Switzerland, 1992) or an interest rate higher than the one claimed by the plaintiff (see Oberlandesgericht Dresden, Germany, 27 December 1999, *Transportrecht-Internationales Handelsrecht*, 2000, pp. 20 ff.).

9. A few courts resorted to the interest rate specified by the Unidroit Principles of International Commercial Contracts (art. 7.4.9),⁴⁵ as they considered these Principles as laying down general principles upon which the Convention was based.⁴⁶

10. Despite the variety of solutions mentioned above, there is a clear tendency to apply the rate provided for by the law applicable to the contract,⁴⁷ that is, the law that would be applicable to the sales contract if it were not subject to the Convention.⁴⁸

⁴⁵See ICC International Court of Arbitration, France, award No. 8128, *Journal du droit international*, 1996, pp. 1024 ff. For a case where the London interbank offered rate (LIBOR) was applied, see CLOUT case No. 103, Arbitration; note that this arbitral award was later annulled on the grounds that international trade usages do not provide appropriate rules to determine the applicable interest rate; see Cour d'appel de Paris, France, 6 April 1995, *Journal du droit international*, 1995, pp. 971 ff.

⁴⁶See article 7(2) of the Convention: "Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law."

⁴⁷Some courts referred to this solution as a unanimous one; see CLOUT case No. 132, Germany, 1995; CLOUT case No. 97, Switzerland, 1993. In the light of the remarks in the text, it is apparent that, although this solution is the prevailing one, it has not been unanimously accepted.

⁴⁸For case law stating the same, see Landgericht Aachen, Germany, 20 July 1995, UNILEX; Amtsgericht Riedlingen, Germany, 21 October 1994, UNILEX; Amtsgericht Nordhorn, Germany, 14 June 1994, UNILEX.

VII. STATUS OF UNCITRAL TEXTS

Status of Conventions and Model Laws

(A/CN.9/501) [Original: English]

Not reproduced. The updated list may be obtained from the UNCITRAL secretariat or found on the Internet home page (<http://www.uncitral.org>).

VIII. TRAINING AND ASSISTANCE

Training and technical assistance: note by the secretariat (A/CN.9/494) [Original: English]

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INTRODUCTION

1. Pursuant to a decision taken at the twentieth session of the United Nations Commission on International Trade Law (UNCITRAL),¹ held in 1987, training and assistance activities count among the high priorities of UNCITRAL. The training and technical assistance programme carried out by the secretariat under the mandate given by the Commission, in particular in developing countries and in countries with economies in transition, encompasses two main lines of activity: (a) information activities aimed at promoting understanding of international commercial law conventions, model laws and other legal texts; and (b) assistance to member States with commercial law reform and adoption of UNCITRAL texts.

2. The present note lists the activities of the secretariat subsequent to the issuance of the previous note submitted to the Commission at its thirty-third session, in 2000 (A/CN.9/473), and indicates possible future training and technical assistance activities in the light of the requests for such services from the secretariat.

¹Official Records of the General Assembly, Forty-second Session, Supplement No. 17 (A/42/17), para. 335.

I. IMPORTANCE OF TEXTS OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

3. Increasing importance is being attributed by Governments, domestic and international business communities and multilateral and bilateral aid agencies to the improvement of the legal framework for international trade and investment. UNCITRAL has an important function to play in that process because it has produced and promotes the use of legal instruments in a number of key areas of commercial law that represent internationally agreed standards and solutions acceptable to different legal systems. Those instruments include:

(a) In the area of sales, the United Nations Convention on Contracts for the International Sale of Goods² and the United Nations Convention on the Limitation Period in the International Sale of Goods;³

²Official Records of the United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March-11 April 1980 (United Nations publication, Sales No. E.82.V.5), part I.

³Official Records of the United Nations Conference on Prescription (Limitation) in the International Sale of Goods, New York, 20 May-14 June 1974 (United Nations publication, Sales No. E.74.V.8), part I.

(b) In the area of dispute resolution, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards⁴ (a United Nations convention adopted prior to the establishment of the Commission, but actively promoted by it), the UNCITRAL Arbitration Rules,⁵ the UNCITRAL Conciliation Rules,⁶ the UNCITRAL Model Law on International Commercial Arbitration⁷ and the UNCITRAL Notes on Organizing Arbitral Proceedings;⁸

(c) In the area of government contracting, the UNCITRAL Model Law on Procurement of Goods, Construction and Services⁹ and the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects;¹⁰

(d) In the area of banking, payments and insolvency, the United Nations Convention on Independent Guarantees and Standby Letters of Credit (General Assembly resolution 50/48, annex), the UNCITRAL Model Law on International Credit Transfers,¹¹ the United Nations Convention on International Bills of Exchange and International Promissory Notes (resolution 43/165, annex) and the UNCITRAL Model Law on Cross-Border Insolvency;¹²

(e) In the area of transport, the United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg Rules),¹³ and the United Nations Convention on the Liability of Operators of Transport Terminals in International Trade;¹⁴

(f) In the area of electronic commerce and data interchange, the UNCITRAL Model Law on Electronic Commerce.¹⁵

II. TECHNICAL ASSISTANCE IN THE PREPARATION AND IMPLEMENTATION OF LEGISLATION

4. Technical assistance is provided to States preparing legislation based on UNCITRAL texts. Such assistance is provided in various forms, including review of preparatory drafts of legislation from the viewpoint of UNCITRAL texts, technical consultancy services and assistance in the preparation of legislation based on UNCITRAL texts, preparation of regulations implementing such legislation and comments on reports of law reform commissions, as well as briefings for legislators, judges, arbitrators, procurement officials and other users of UNCITRAL texts

embodied in national legislation. Another form of technical assistance provided by the secretariat consists of advising on the establishment of institutional arrangements for international commercial arbitration, including training seminars for arbitrators, judges and practitioners in the area. Training and technical assistance promote awareness and wider adoption of the legal texts produced by the Commission and are particularly useful for developing countries lacking expertise in the areas of trade and commercial law covered by the work of UNCITRAL. The training and technical assistance activities of the secretariat could thus play an important role in the economic integration efforts being undertaken by many countries.

5. In its resolution 55/151 of 12 December 2000, the General Assembly reaffirmed the importance, in particular for developing countries, of the work of the Commission concerned with training and technical assistance in the field of international trade law, such as assistance in the preparation of national legislation based on legal texts of the Commission; expressed the desirability for increased efforts by the Commission, in sponsoring seminars and symposia, to provide such training and technical assistance; and appealed to the United Nations Development Programme and other bodies responsible for development assistance, such as the International Bank for Reconstruction and Development and the European Bank for Reconstruction and Development, as well as to Governments in their bilateral aid programmes, to support the training and technical assistance programme of the Commission and to cooperate and coordinate their activities with those of the Commission.

6. The secretariat of the Commission has taken steps to increase cooperation and coordination with development assistance agencies, with a view to ensuring that the legal texts prepared by the Commission and recommended by the General Assembly for consideration are in fact so considered and used. From the standpoint of recipient States, UNCITRAL technical assistance is beneficial because of the secretariat's accumulated experience in the preparation of UNCITRAL texts.

7. States that are in the process of revising their trade legislation may wish to request the UNCITRAL secretariat to provide technical assistance and advice.

III. SEMINARS AND BRIEFING MISSIONS

8. The information activities of UNCITRAL are typically carried out through seminars and briefing missions for government officials from interested ministries (such as trade, foreign affairs, justice and transport), judges, arbitrators, practising lawyers, the commercial and trading community, scholars and other interested individuals. Seminars and briefing missions are designed to explain the salient features and utility of international trade law instruments of UNCITRAL. Information is also provided on certain important legal texts of other organizations, for example, Uniform Customs and Practice for Documentary Credits and Incoterms of the International Chamber of Commerce and the Convention on International Factoring of the International Institute for the Unification of Private Law (Unidroit).

⁴United Nations, *Treaty Series*, vol. 330, No. 4739.

⁵*Official Records of the General Assembly, Thirty-first Session, Supplement No. 17 (A/31/17)*, para. 57.

⁶*Ibid.*, *Thirty-fifth Session, Supplement No. 17 (A/35/17)*, para. 106.

⁷*Ibid.*, *Fortieth Session, Supplement No. 17 (A/40/17)*, annex I.

⁸*Ibid.*, *Fifty-first Session, Supplement No. 17 (A/51/17)*, chap. II.

⁹*Ibid.*, *Forty-ninth Session, Supplement No. 17* and corrigendum (A/49/17 and Corr.1), annex I.

¹⁰United Nations publication, Sales No. E.01.V.4.

¹¹*Official Records of the General Assembly, Forty-seventh Session, Supplement No. 17 (A/47/17)*, annex I.

¹²*Ibid.*, *Fifty-second Session, Supplement No. 17 (A/52/17)*, annex I.

¹³*Official Records of the United Nations Conference on the Carriage of Goods by Sea, Hamburg, 6-31 March 1978* (United Nations publication, Sales No. E.80.VIII.1), document A/CONF.89/13, annex I.

¹⁴A/CONF.152/13, annex.

¹⁵*Official Records of the General Assembly, Fifty-first Session, Supplement No. 17 (A/51/17)*, annex I.

9. In its resolution 55/151, the General Assembly expressed the desirability for increased efforts by the Commission, in sponsoring seminars and symposia, to provide training and technical assistance.

10. Lectures at UNCITRAL seminars are generally conducted by one or two members of the UNCITRAL secretariat, experts from the host countries and, occasionally, external consultants. After the seminars, the secretariat maintains contact with seminar participants in order to provide the host countries with the maximum possible support during the process leading up to the adoption and use of UNCITRAL texts.

11. Since the previous session, the secretariat of the Commission has organized seminars in a number of States, which have typically included briefing missions. The following seminars were financed with resources from the UNCITRAL trust fund for symposia:

(a) Havana (22-26 May 2000), seminar held in cooperation with the Government of Cuba (approx. 30 participants);

(b) Tashkent (16-19 October 2000), seminar held in cooperation with the Ministry of Foreign Economic Relations (approx. 60 participants);

(c) Seoul (6-9 November 2000), seminar held in cooperation with the Ministry of Foreign Affairs (approx. 40 participants);

(d) Beijing (13-16 November 2000), seminar held in cooperation with the Ministry of Foreign Trade and Economic Relations (approx. 70 participants);

(e) Cairo (20-23 November 2000), seminar held in cooperation with the League of Arab States and the Cairo Regional Centre for International Commercial Arbitration (approx. 100 participants);

(f) Bologna, Italy (2 and 3 April 2001), symposium held in cooperation with the Organization for the Unification of Business Law in Africa (OHADA) (approx. 180 participants).

IV. PARTICIPATION IN OTHER ACTIVITIES

12. Members of the UNCITRAL secretariat have participated as speakers in various seminars, conferences and courses where UNCITRAL texts were presented for examination and possible adoption or use. The participation of members of the secretariat in the seminars, conferences and courses listed below was financed by the institution organizing the events or by another organization:

(a) Inter-Pacific Bar Association Cyber Arbitration Working Group, International Trade Committee and Insolvency Committee (Vancouver, Canada, 28 April-2 May 2000);

(b) Regional Meeting on Electronic Commerce and Intellectual Property for Development for Caribbean Countries, sponsored by the World Intellectual Property Organization (WIPO) (Kingston, 15-17 May 2000);

(c) Conference on Public and Private Law, sponsored by the Canadian Bar Association (Ottawa, 16-21 May 2000);

(d) Middle East IT for Energy Forum, sponsored by the Middle East Global Advisors (Manama, 27-29 May 2000);

(e) Expert Group Meeting on Concession Agreements, sponsored by the Centre for Private Sector Development of the Organisation for Economic Cooperation and Development (OECD) (Istanbul, Turkey, 30 May-1 June 2000);

(f) Schmithoff Symposium 2000, sponsored by the Centre for Commercial Law Studies of the University of London (London, 1-3 June 2000);

(g) Baltic Region Spring Meeting, sponsored by the Chartered Institute of Arbitrators (Vilnius, 2-4 June 2000);

(h) IBC Global Conferences Ltd., Electronic Cross-Border Trade Finance Conference (London, 15 and 16 June 2000);

(i) Forum on Legal Aspects of Electronic Commerce, sponsored by the Ministry of Cabinet Affairs and Information of Bahrain (Manama, 20 and 21 June 2000);

(j) Electronic Commerce Seminar, sponsored by the Jamaican Institute of Bankers (Kingston, 23 June 2000);

(k) IBC Global Conferences Ltd., Electronic Cross-Border Trade Finance Conference (New York, 10 July 2000);

(l) Global Jurisdictional Issues Created by the Internet Event, sponsored by the American Bar Association (London, 17 July 2000);

(m) Meeting on International Secured Transactions, sponsored by the American Law Institute (London, 18 July 2000);

(n) Seminar on Electronic Commerce, sponsored by the Mexican Chapter of the International Chamber of Commerce (Mexico City, 3 and 4 August 2000);

(o) London Court of International Arbitration Symposium (Scheveningen, the Netherlands, 15-17 September 2000);

(p) International Bar Association Biennial Conference (Amsterdam, the Netherlands, 18-23 September 2000);

(q) Regional Seminar on Electronic Commerce and Intellectual Property, sponsored by WIPO (Amman, 18-20 September 2000);

(r) Lectures on the unification of international law and the sale of goods at the Ferienakademie der Studienstiftung (Île de Ré, France, 18-29 September 2000);

(s) Development Lawyers Course on Legal and Regulatory Aspects of e-Commerce, sponsored by the International Development Law Institute (Rome, 27 September 2000);

(t) Lecture on removing legal obstacles to e-commerce at the Stetson University College of Law (Tampa, Florida, United States of America, 13 October 2000);

(u) World e-Commerce Forum (London, 17-20 October 2000);

(v) Conference on Globalization and the Evolution of Legal Systems, sponsored by the University of Ottawa, the Canadian Department of Justice and Heritage, Canada, (Ottawa, 20 and 21 October 2000);

(w) Electronic Commerce Colloquium, sponsored by the École des hautes études commerciales (Nice, France, 23-25 October 2000);

(x) Regional Seminar on Electronic Commerce and Intellectual Property, sponsored by WIPO (Krakow, Poland, 25 and 26 October 2000);

(y) Regional Conference on Private Investment in Infrastructure, sponsored by the Cairo Regional Centre for Commercial Arbitration (Cairo, 28 and 29 October 2000);

(z) Conference on Internet and Electronic Commerce, sponsored by the Government of Tunisia and the Tunisian Internet Agency (Tunis, 9 and 10 November 2000);

(aa) Seminar on International Contracts and Arbitration, sponsored by the University of Bologna (Buenos Aires, 27 November-1 December 2000);

(bb) Seminar on Legal Aspects of International e-Commerce, sponsored by Hawksmere (Paris, 11 and 12 December 2000);

(cc) IBC Global Conferences Ltd., Structured Commodity and Trade Finance Conference (Geneva, 25 and 26 January 2001);

(dd) Meeting of the International Committee of the Chartered Institute of Arbitrators (London, 26 January 2001);

(ee) University of Georgia Course on the United Nations Sales Convention (Atlanta, Georgia, United States of America, 12-17 March 2001);

(ff) University of Padua Seminar on International Commercial Law (Padua, Italy, 30 and 31 March 2001);

(gg) Lecture on electronic commerce at the University of Verona (Verona, Italy, 2-4 April 2001);

(hh) International Trade Law Postgraduate Course, sponsored by the International Training Centre of the International Labour Organization (ILO) and the University Institute of European Studies (Turin, Italy, 18 April 2001).

13. The participation of members of the secretariat in the seminars, conferences and courses listed below was financed, partially or totally, with resources from the United Nations regular travel budget:

(a) The Economic Commission for Europe (ECE) Forum on Electronic Commerce for Transition Economies in the Digital Age (Geneva, 19 and 20 June 2000);

(b) American Bar Association Annual Meeting (New York, 10 and 11 July 2000);

(c) Tenth Meeting of the International Academy of Commercial and Consumer Law (Carlisle, Pennsylvania, United States of America, 9-13 August 2000);

(d) 2000 Conference of the Chartered Institute of Arbitrators (Dublin, 28-30 September 2000);

(e) ECE Bureau of the WP.5's Advisory Group on Commercial Arbitration (Geneva, 5 and 6 October 2000);

(f) Balkan Legal Forum 2000, sponsored by the International Bar Association (Sofia, 9 and 10 November 2000);

(g) Association of South East Asian Nations Government Legal Officers Seminar (Singapore, 17 November 2000);

(h) Secure Electronic Commerce Partnership Conference, sponsored by the International Telecommunication Union and Keywise (Geneva, 27-29 November 2000);

(i) Global Finance Conference, sponsored by the Factors and Discounters Association and the Commercial Finance Association (Dublin, 5-7 December 2000);

(j) Eighth International Zagreb Arbitration Conference, sponsored by the Permanent Arbitration Court, Croatian Chamber of Commerce (Zagreb, 7 and 8 December 2000);

(k) Building Trust in the Online Environment: Business-to-Consumer Dispute Resolution Conference, sponsored by OECD, The Hague Conference on Private International Law and the International Chamber of Commerce (The Hague, 11 and 12 December 2000);

(l) Conference on OHADA Uniform Commercial Laws, sponsored by the Italian Institute of Foreign Trade, the African Development Bank and Baker & McKenzie (Milan, Italy, 14 December 2000);

(m) Meeting of the Advisory Group on the World Bank Project on Strengthening National Insolvency Regimes (London, 15 and 16 January 2001);

(n) e-Business and Development Conference, sponsored by the Information and Decision Support Centre of the Egyptian Cabinet (Cairo, 13-15 February 2001);

(o) e-Commerce and the Law Conference, sponsored by the Abu Dhabi Chamber of Commerce and Industry (Abu Dhabi, 20 and 21 February 2001).

V. INTERNSHIP PROGRAMME

14. The internship programme is designed to give young lawyers the opportunity to become familiar with the work of UNCITRAL and to increase their knowledge of specific areas in the field of international trade law. During the past year, the secretariat has hosted 11 interns from Australia, Austria, Brazil, Germany, Italy, Malaysia and Spain. Interns are assigned tasks such as basic or advanced research, collection and systematization of information and materials or assistance in preparing background papers. The experience of UNCITRAL with the internship programme has been positive. As no funds are available to the secretariat to assist interns to cover their travel or other expenses, interns are often sponsored by an organization, university or government agency or they meet their expenses from their own means. In that connection, the Commission may wish to invite member States, universities and other organizations, in addition to those which already do so, to consider sponsoring the participation of young lawyers in the United Nations internship programme with UNCITRAL.

15. The secretariat also occasionally accommodates requests by scholars and legal practitioners who wish to conduct research in the Branch and in the UNCITRAL law library for a limited period of time.

VI. FUTURE ACTIVITIES

16. For the remainder of 2001, seminars and legal assistance briefing missions are being planned in Africa, Asia,

countries with economies in transition in eastern Europe and Latin America. Since the cost of training and technical assistance activities is not covered by the regular budget, the ability of the secretariat to implement those plans is contingent upon the receipt of sufficient funds in the form of contributions to the UNCITRAL trust fund for symposia.

17. As it has done in recent years, the secretariat has agreed to co-sponsor the next three-month international trade law postgraduate course to be organized by the University Institute of European Studies and the International Training Centre of ILO in Turin. Typically, approximately half the participants are from Italy, with many of the remainder coming from developing countries. The contribution from the UNCITRAL secretariat to the next course will focus on issues of harmonization of laws on international trade law from the perspective of UNCITRAL, including past and current work.

18. Also, as it has done for the past seven years, the secretariat co-sponsored the eighth Willem C. Vis International Commercial Arbitration Moot in Vienna from 6 to 12 April 2001. The Moot is principally organized by the Institute of International Commercial Law at Pace University School of Law. With its broad international participation, involving teams from 31 countries in 2001, it is seen as an excellent way to disseminate information about uniform law texts and teaching international trade law.

VII. FINANCIAL RESOURCES

19. The secretariat continues its efforts to devise a more extensive training and technical assistance programme to meet the considerably greater demand from States for training and assistance, in keeping with the call of the Commission at its twentieth session for an increased emphasis both on training and assistance and on the promotion of the legal texts prepared by the Commission. However, as no funds for UNCITRAL seminars are provided for in the regular budget, expenses for UNCITRAL training and technical assistance activities (except for those which are supported by funding agencies such as the World Bank) have to be met from voluntary contributions to the UNCITRAL trust fund for symposia.

20. Given the importance of extrabudgetary funding for the implementation of the training and technical assistance

component of the UNCITRAL work programme, the Commission may again wish to appeal to all States, international organizations and other interested entities to consider making contributions to the UNCITRAL trust fund for symposia, in particular in the form of multi-year contributions, so as to facilitate planning and to enable the secretariat to meet the increasing demands from developing countries and States with economies in transition for training and assistance. Information on how to make contributions may be obtained from the secretariat.

21. In the period under review, contributions were received from Canada, Finland, France, Mexico and Switzerland. The Commission may wish to express its appreciation to those States and organizations which have contributed to the Commission's programme of training and assistance by providing funds or staff or by hosting seminars.

22. In that connection, the Commission may wish to recall that, in accordance with General Assembly resolution 48/32 of 9 December 1993, the Secretary-General was requested to establish a 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.

23. At its thirty-first session, the Commission noted with appreciation that the General Assembly, in its resolution 52/157 of 15 December 1997, had appealed to Governments, the relevant United Nations organs, organizations, institutions and individuals, in order to ensure full participation by all member States in the sessions of the Commission and its working groups, to make voluntary contributions to the trust fund for granting travel assistance to developing countries that are members of the Commission, at their request and in consultation with the Secretary-General.

24. Since the establishment of the trust fund, contributions have been received from Austria, Cambodia, Cyprus, Kenya and Singapore.

25. It is recalled that in its resolution 51/161 of 16 December 1996, the General Assembly decided to include the trust funds for symposia and travel assistance in the list of funds and programmes that are dealt with at the United Nations Pledging Conference for Development Activities.

IX. STRUCTURE AND WORKING METHODS OF THE COMMISSION

A. Increase of the membership of the Commission: note by the secretariat

(A/CN.9/500) [Original: English]

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INTRODUCTION

1. At its fifty-fifth session in 2000, the General Assembly requested the Secretary-General to submit a report on the implications of increasing the membership of the Commission and invited States to submit their views on this issue.¹ By note verbale of 25 January 2001, the Secretary-General requested States to submit their views by 15 March 2001. So far, comments from twenty-two States have been received. The purpose of the present note is to provide relevant information with a view to assisting the Commission in formulating an opinion or recommendation for the General Assembly. After the Commission's session, the Secretary-General will submit to the General Assembly a report in line with the above-mentioned request.

I. INCREASE OF THE MEMBERSHIP OF THE COMMISSION AND OF OTHER RELEVANT ORGANS

2. When established in 1966, the Commission had twenty-nine member States.² That number was determined with a view to ensuring that the Commission would be small enough to be efficient but large enough to be representative of the principal economic and legal systems, as well as of the developing and the developed world.³ In

²Fourteen members were elected for a period of three years and fifteen members were elected for a period of six years. The selection of the members elected within each of the five groups of States that would serve for three or six years was made by the President of the General Assembly by drawing lots. In subsequent elections, all members were to be elected for a period of six years (see operative paras. 1 to 3 of General Assembly resolution 2205 (XXI) of 17 December 1966). By resolution 31/99 of 15 December 1976, the General Assembly decided that membership would expire on the last day prior to the opening of the seventh annual session of the Commission following the date of election.

³*Official Records of the General Assembly, Twenty-first Session, A/6954, para. 26* (Report of the Sixth Committee on agenda item 88; *UNCITRAL Yearbook*, vol. I: 1968-1970) and A/6396, paras. 225-229 (not reproduced in *UNCITRAL Yearbook*).

¹See operative paragraph 13 of resolution 55/151 of 12 December 2000.

order to ensure equitable representation, seats were distributed as follows: eight to Western European and other States; seven to African States; five each to Asian and Latin American States; and four to Eastern European States.⁴

3. In 1973, the General Assembly considered the question of increasing the membership of the Commission. At that time, the General Assembly confirmed the principle of adequate representation of the various legal and economic systems and of the developing and the developed world, as well as the principle of equitable geographical distribution of seats. After discussion in the Sixth Committee,⁵ the General Assembly decided to increase the number of members to thirty-six. The seven additional seats were distributed as follows: two each to African and Asian States; and one each to Eastern European, Latin American States and Western European and other States.⁶ As a result, the current distribution of seats in the Commission is as follows: nine each to African and Western European and other States (9/36, i.e. 25 per cent); seven to Asian States (7/36, i.e. 19.4 per cent); six to Latin American States (6/36, i.e. 16.6 per cent); and five to Eastern European States (5/36, i.e. 13.8 per cent).

4. At its twentieth session in 1987, the Commission decided to reconsider the matter and requested the secretariat to prepare a report.⁷ The report was before the Commission at its twenty-first session in 1988 (A/CN.9/299).⁸ The report recalled the decisions of the General Assembly with respect to the original membership in 1966 and the increased membership in 1973. Taking into account that, since 1977,⁹ all States that were not members of the Commission were invited to participate in sessions of the Commission and its working groups as observers on an equal footing with members, the note described the issue of the increase of the membership of the Commission as follows: "... the primary consequence of membership in the Commission may be that a member State will be more likely than a non-member State to be represented at meetings of the Commission and its working groups. ... Membership may affect both the ministry officials charged with substantive responsibility for international trade law and the financial authorities. In the former case membership may stimulate interest in the subject and better justify the expenditure of human resources to prepare for and to attend meetings. In the latter case membership may better justify the spending of the necessary funds." (A/CN.9/299, para. 11.)

5. The note confirmed that "change in the number of member States would have no financial implications for the

United Nations" and went on to discuss the historical development of the size of working groups and the advantages that the increase in the size of working groups had. The main advantages cited were that broad participation increased the likelihood that a text would be properly balanced and acceptable to States (A/CN.9/299, para. 26).

6. In the discussion of the note by the Commission, divergent views were expressed. One view was that the membership should be increased substantially. In support, it was stated that such an increase of the membership would enhance awareness of the work of the Commission and interest in its achievements. It was also observed that such an increase would further the objectives of the Commission, since member States tended to take a favourable attitude towards acceptance of legal texts emanating from the work of the Commission. It was also pointed out that an increase of the membership could have a beneficial impact on participation since States were more likely to be represented at sessions of the Commission as members than as observers. Moreover, it was observed that "the large number of States that had participated as observers and had made valuable contributions indicated that there existed a considerable interest beyond the thirty-six States that were currently members ... The proponents of the increase in membership of the Commission did not propose any definite number since it was for the General Assembly to agree on an equitable and politically acceptable number". Another view was that it was not advisable for the Commission to recommend an increase of its membership. The valuable participation and contributions of non-member States had shown that States with an interest in the work of the Commission had full opportunity for active involvement and appeared to have used that opportunity. The remaining difference between a member State and a non-member State was the domestic question of the likelihood of its being represented at sessions. Moreover, it had not been established that the desire or need for an increase was felt in all regional groups alike and whether an increase would in fact increase active participation by States ... Finally, it was felt that it was inopportune to recommend an increase of the membership at a time when the Organization was undergoing a process of review about a possible restructuring.¹⁰ After deliberation, the Commission decided to defer its decision until 1990. However, in 1990, the Commission decided to further postpone consideration of the matter.¹¹ At its fifty-fifth session in 2000, the General Assembly declared its intention to consider the matter again at its fifty-sixth session in 2001 (see para. 1 above).

7. The membership of the International Law Commission (ILC) has been increased three times so far. In 1956, from fifteen to twenty-one members, in 1961, from twenty-one to twenty-five members and, in 1981, from twenty-five to the present thirty-four members. Reasons cited for those increases of the membership of the ILC include: "securing in the Commission an adequate representation of the main forms of civilization and of the principal legal systems of

⁴Ibid., A/6954, paras. 28-29.

⁵Official Records of the General Assembly, Twenty-eighth Session, Annexes, agenda item 92, A/9408 (Report of the Sixth Committee; UNCITRAL Yearbook, vol. V: 1974).

⁶See para. 8 of resolution 3108 (XXVIII) of 12 December 1973 (UNCITRAL Yearbook, vol. V: 1974).

⁷Official Records of the General Assembly, Thirty-second Session, Supplement No. 17 (A/42/17), para. 344 (UNCITRAL Yearbook, vol. XVIII: 1987).

⁸UNCITRAL Yearbook, vol. XIX: 1988.

⁹See A/31/17, para. 74 (UNCITRAL Yearbook, vol. VII: 1976) and resolution 31/99, para. 10 (b) of 15 December 1976; see also para. 7 (c) of resolution 38/134 of 19 December 1983. (UNCITRAL Yearbook, vol. XIV: 1983).

¹⁰Ibid., A/43/17, paras. 112-115.

¹¹Official Records of the General Assembly, Forty-fifth Session, Supplement No. 17 (A/42/17), para. 65 (UNCITRAL Yearbook, vol. XVIII: 1987).

the world"¹²; and the substantial increase in the membership of the United Nations.¹³

8. The Committee on the Peaceful Uses of Outer Space (COPUOS) was established in 1958 with eighteen members. In 1959, when the Committee became a permanent body of the General Assembly, it had twenty-four member States. The membership of the Committee was last increased in 1994 from fifty-three to sixty-one members.¹⁴ Reasons cited for that increase included the need to take into account the significant increase in the membership of the United Nations, the importance of the subjects under consideration and the actual extent of participation in the Committee.¹⁵ From the additional eight seats, at the suggestion of COPUOS, the General Assembly gave two each to the four regional groups that had indicated an interest.¹⁶ At its next session in June 2001, COPUOS will consider a further increase of its membership.¹⁷

II. IMPLICATIONS

9. All States are invited to attend the meetings of the Commission and its working groups. Documents relating to the work of the Commission and its working groups are issued for and distributed to all States. Statistically, an average of fifty to sixty-five States attend the meetings of the Commission and its working groups and, as a matter of time-honoured practice, all States are invited to participate in the discussion and decision process which is based on the principle of consensus.

10. In view of "the relatively low incidence of expert representation from developing countries at sessions of the Commission and particularly of its working groups during recent years, owing in part to inadequate resources to finance the travel of such experts",¹⁸ a Trust Fund was established for providing travel assistance to developing countries that are members of the Commission. At its forty-eighth session in 1993, the General Assembly welcomed "the completion of the setting up of the trust fund for the United Nations Commission on International Trade Law to grant travel assistance to developing countries that are members of the Commission, at their request and in consultation with the Secretary-General." It also appealed

¹²General Assembly resolution 1103 (XI) of 18 December 1956.

¹³General Assembly resolutions 1647 (XVI) of 6 November 1961 and 36/39 of 18 November 1981.

¹⁴General Assembly resolution 49/33 of 9 December 1994.

¹⁵Report of the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization, *Official Records of the General Assembly, Forty-ninth Session, Supplement No. 33 (A/49/33)*, paras. 47 and 48.

¹⁶General Assembly resolution 49/33 and *Official Records of the General Assembly, Forty-ninth Session, Supplement No. 20 (A/49/20)*, para. 156.

¹⁷*Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 33 (A/55/20)*, paras. 179-191; General Assembly resolution 55/122 of 8 December 2000 and A/CC.105/L.230: Informal consultations on the enlargement of COPUOS.

¹⁸Report of the Sixth Committee, A/49/739, of 1 December 1994 on the Report of the United Nations Commission on International Trade Law on the work of its twenty-seventh session (*UNCITRAL Yearbook*, vol. XXV: 1994).

"to Governments, the relevant United Nations organs, organizations, institutions and individuals, in order to ensure full participation by all Member States in the sessions of the Commission and its working groups, to make voluntary contributions to the trust fund".¹⁹ This appeal is repeated every year in the General Assembly resolution on the annual report of the Commission. However, contributions to the Trust Fund are very limited and, as a result, little assistance is provided to developing countries. Increase of the Commission's membership in itself would not result in any change in this respect, at least, to the extent that contributions to the Trust Fund are voluntary.

11. According to the Finance and Budget Section of the Division of Administrative and Common Services of the United Nations Office at Vienna, as far as servicing of conferences is concerned, there is little impact of an increase in membership to quantify. No impact is foreseen in interpretation, translation of pre- and after-session documents, and meetings servicing as cost of these services is fixed irrespective of the numbers of members. As to in-session document reproduction, the impact is not expected to be material enough to be presented as a financial implication. There are no financial implications on the work of the secretariat of the Commission.

III. BRIEF SUMMARY OF COMMENTS BY STATES

12. The secretariat has received so far comments from twenty-two States (eight from the Asian Group, six from the Latin American Group, three from the Eastern European Group, two from the African Group and three from the Western European and other States Group). All twenty-two States support an increase in the membership of the Commission. Reasons cited include: the need to align the membership of the Commission with the increased membership of the Organization, so as to preserve the representative character of the Commission; the need to allow States that cannot justify the cost of participating in the work of the Commission, unless they are members, to participate; and the need to enhance the work of the Commission and to promote the acceptability of the work of the Commission by broadening the spectrum of representation.

13. At the size of the increase, several suggestions were made, ranging from fifty to, at least, sixty seats. In this regard, all States are mindful of the need to preserve the efficiency of the Commission. As to the allocation of the additional seats, several suggestions were also made. In their comments, some States emphasized that consideration should be given to establishing an effective mechanism for providing financial assistance to developing countries that are members of the Commission with respect to the travel costs required for them to attend meetings of the Commission and its working groups.

¹⁹See paras. 5 and 7 of resolution 48/32 of 9 December 1993.

IV. CONCLUSION

14. The Commission may wish to formulate a recommendation to the General Assembly as to whether the Commission's membership should be increased and, if so, what should be the size of the increase.²⁰ The recommendation

²⁰If the Commission wishes to preserve exactly the current percentage of participation in the Commission of the various geographic groups, the membership would have to be doubled and each group would have to be allocated as many seats as it currently has (see para. 3 above). If, however, a lower membership, such as sixty, were to be preferable, maintaining the current proportions would require minor adjustments: the 25 per cent that the African and the Western European and other States currently have would result in exactly fifteen members for each group; the 19.4 per cent that the Asian States currently have would mathematically result in 11.6 members; the 16.6 per cent that the Latin American States currently have would result in ten members; and the 13.8 per cent that the Eastern European States currently have would result in 8.3 members.

may also deal with other matters to be addressed in the relevant General Assembly resolution (for a list of such matters, see footnote 2). Such issues include how the seats should be allocated among the various geographic groups of States and the term of the new members in order to preserve the pattern of electing half the membership every three years. This recommendation could give the necessary guidance to the drafters of the relevant draft resolution and thus assist the Sixth Committee in its deliberations. It could also serve as a notice to member States of each geographic group to conduct informal consultations so as to be prepared to submit concrete suggestions to the Sixth Committee in the fall of 2001. Such a notice may be particularly useful if States wish the new member States to be elected by the General Assembly at its fifty-sixth session in 2001.

B. Working methods of the Commission: note by the secretariat (A/CN.9/499) [Original: English]

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INTRODUCTION

1. In its resolution 55/151 of 12 December 2000, the General Assembly requested the Secretary-General to submit to it, at its fifty-sixth session, a report on the implications of increasing the membership of the United Nations Commission on International Trade Law. That report is contained in document A/CN.9/500.

2. The considerations relating to a possible expansion of its membership offer an opportunity for the Commission to review its current working methods with a view to exploring ways to make the best possible use of the resources available to it. The review of the working methods of the Commission would seem to be particularly useful at the present stage, in view of the consistent and significant increase in the Commission's work programme in recent years and the various proposals for future work currently on its agenda.

I. OVERVIEW OF CURRENT WORK OF THE COMMISSION AND POSSIBLE FUTURE WORK

A. International commercial arbitration

3. Pursuant to the mandate given to it by the Commission,¹ the Working Group on International Commercial Arbitration (previously called the Working Group on International Contract Practices) is currently considering harmonized texts on the written form for arbitration agreements, interim measures of protection and conciliation.

4. The number of further issues on the agenda of the Working Group, including possible future work on online dispute resolution, jointly with the Working Group on Electronic Commerce, suggests that the Working Group would still require a number of sessions to complete its task.

B. Insolvency law

5. At its thirty-third session, in 2000, the Commission gave the Working Group on Insolvency Law a mandate to prepare a comprehensive statement of key objectives and core features for a strong insolvency, debtor-creditor regime, including consideration of out-of-court restructuring. For that purpose, the Working Group received the mandate to prepare a legislative guide containing flexible approaches to the implementation of such objectives and features, including a discussion of the alternative approaches possible and the perceived benefits and detriments of such approaches.²

6. The nature of the work with which the Commission entrusted the Working Group and the complexity of the subject suggest that the Working Group would still require a number of sessions to complete its task.

C. Electronic commerce

7. At its thirty-second session, in 1999, the Commission took note of a recommendation adopted on 15 March 1999 by the Centre for the Facilitation of Procedures and Practices for Administration, Commerce and Transport (CEFACT) of the Economic Commission for Europe that the Commission should consider the actions necessary to ensure that references to “writing”, “signature” and “document” in conventions and agreements relating to international trade allowed for electronic equivalents.³ Further proposals for future work in the field of electronic commerce were considered by the Commission at its thirty-third session, in 2000.⁴ They included electronic contracting, considered from the perspective of the United Nations Convention on Contracts for the Sale of Goods

(“the United Nations Sales Convention”), dispute settlement and de-materialization of documents of title, in particular in the transport industry.

8. At its thirty-eighth session, held in New York from 12 to 23 March 2001, the Working Group on Electronic Commerce examined the above-mentioned topics. The Working Group agreed to recommend to the Commission that work towards the preparation of an international instrument dealing with certain issues in electronic contracting should be begun on a priority basis. At the same time, it was agreed to recommend to the Commission that the secretariat should be entrusted with the preparation of the necessary studies concerning three other topics considered by the Working Group, namely: (a) a comprehensive survey of possible legal barriers to the development of electronic commerce in international instruments, including, but not limited to, those instruments already mentioned in the CEFACT survey; (b) a further study of the issues related to transfer of rights, in particular, rights in tangible goods, by electronic means and mechanisms for publicizing and keeping records of acts of transfer or the creation of security interests in such goods; and (c) a study discussing the UNCITRAL Model Law on International Commercial Arbitration, as well as the UNCITRAL Arbitration Rules, to assess their appropriateness for meeting the specific needs of online arbitration.

9. Should the Commission endorse the recommendations made by the Working Group, it is expected that the Working Group would be occupied for a number of sessions, with work on the area of electronic contracting being commenced immediately.

D. Privately financed infrastructure projects

10. At its thirty-third session, in 2000, the Commission adopted the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects and considered a proposal for future work in that area. After consideration of the various views expressed, the Commission decided that it should consider at its thirty-fourth session the question of the desirability and feasibility of preparing a model law or model legislative provisions on selected issues covered by the Legislative Guide.⁵ In order to assist the Commission in making an informed decision on the matter, the secretariat was requested to organize a colloquium, in cooperation with other interested international organizations or international financial institutions, to disseminate knowledge about the Legislative Guide. The participants in the colloquium should be invited to make recommendations on the desirability and, in particular, the feasibility of a model law or model legislative provisions in the area of privately financed infrastructure projects for consideration by the Commission at its thirty-fourth session. The colloquium will be held at the Vienna International Centre during the second week of the thirty-fourth session of the Commission, from 2 to 4 July 2001. The conclusions reached at the colloquium will be submitted by the secretariat for consideration by the Commission at the latest during the last week of its thirty-fourth session.

¹Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 17 (A/54/17), paras. 340-343.

²Ibid., Fifty-fifth Session, Supplement No. 17 (A/55/17), para. 409.

³Ibid., Fifty-fourth Session, Supplement No. 17 (A/54/17), para. 316.

⁴Ibid., Fifty-fifth Session, Supplement No. 17 (A/55/17), paras. 384-388.

⁵Ibid., para. 379.

11. Should the Commission decide to prepare a model law or model legislative provisions on selected issues covered by the Legislative Guide, such work would most probably need to be assigned to a working group.

E. Transport law

12. Following a mandate renewed by the Commission at its thirty-third session,⁶ the secretariat, in cooperation with the International Maritime Committee (CMI), is currently reviewing a broad range of issues in international transport law with a view to presenting, at the next session of the Commission, a report identifying issues in transport law in respect of which the Commission might undertake future work and, to the extent possible, also presenting possible solutions. The results of the work thus far undertaken by the secretariat are summarized in document A/CN.9/497.

13. Should the Commission decide to prepare an international instrument, such as a convention on transport law, such work would most probably need to be assigned to a working group.

F. Security rights

14. Following a request by the Commission,⁷ the secretariat has prepared a study discussing in detail selected problems in the field of secured credit law and the possible solutions for consideration by the Commission at its thirty-fourth session (A/CN.9/496). At the thirty-third session of the Commission, it was agreed that, after considering the study, the Commission could decide whether further work could be undertaken, on which topic and in which context.

15. Should the Commission decide to prepare a model law or a similar instrument, such work would most probably need to be assigned to a working group.

II. REVIEW OF THE WORKING METHODS OF THE COMMISSION

A. Current working methods

16. In accordance with established practice, the Commission is entitled to hold one annual session of up to 40 meetings (a total of 20 working days) and its working groups have at their disposal a combined total allotment of up to 120 meetings (a total of 60 working days). With few exceptions, the Commission's entitlement to conference services for its working groups has traditionally been used for one annual session of the Commission, normally lasting two or three weeks (occasionally four), and two annual sessions of each of its three working groups.

17. Each session of a working group normally lasts two weeks, with two meetings per day. In order for the report to be adopted during the session, portions of the draft

report are usually prepared by the secretariat of the Commission and sent for translation as the deliberations of the working group evolve. The last day of the session has traditionally been devoted to the adoption of the report. With a view to ensuring that the entire draft report is available in all official languages of the United Nations on the last day of the session, no meetings have been held on the penultimate day, which has been traditionally used only for the preparation of the draft report.

18. The experience with the working groups shows that, although two meetings are scheduled for the last day, in most cases the working groups are able to adopt the report during the morning meeting. In practice, therefore, most working groups have held only 17 meetings per session, instead of the 20 meetings to which they would normally be entitled.

B. Possible alternative arrangements for the duration and number of sessions of working groups

19. The nature of the instruments prepared by the Commission and the inherent difficulties of legal unification and harmonization at a universal scale require careful preparatory work by the working groups. The length and number of the sessions of the working groups were originally conceived so as to give the working groups sufficient time for the preparation of texts for adoption by the Commission.

20. With a total entitlement of only six working group sessions every year, an increase in the number of projects handled by the Commission would mean that normally only one annual session of a working group could be devoted to each project. Given the overall limitation on the conference time to which each subsidiary body of the General Assembly is entitled, it is unlikely that more meeting time could be allocated to the Commission. Therefore, the inclusion of additional topics in the Commission's work programme would only seem possible under one of the following options: (a) if the Commission were to increase the number of working groups to a total of six, each of them holding two annual sessions of one week only; or (b) if each working group would take up two different topics (i.e. one per week) during their sessions or if two working groups would share the same two-week meeting period, one session being held in the first week and the other during the second week (i.e. two sessions back-to-back).

21. The practical implications of these options could be felt in four areas: (a) travel costs for delegations and members of the secretariat; (b) pace and quality of work; (c) preparation and adoption of session reports; and (d) conference costs. These implications are discussed below.

1. Travel and related costs for delegations and members of the secretariat

22. An increase in the number of working groups, each holding two one-week sessions per year, as mentioned above under the first option in paragraph 20, would result

⁶Ibid., para. 427.

⁷Ibid., para. 463.

in additional travel costs both for delegations and the secretariat, the latter as a result of the alternating pattern of meetings of the Commission and its working groups. No provision for such an increase has been made in the budget of the secretariat for the current biennium.

23. The second option (i.e. that either a working group would take up two different topics (one per week) during a given session, or two working groups would hold consecutive (back-to-back) meetings) might not have such negative financial implications, although the situation may vary from delegation to delegation. For member States and observers that are usually represented by the same delegates at all, or at least at more than one, of the sessions of the working groups, the financial implications of either option might be negligible. For member States and observers that send delegations of varying composition to each working group session, depending on the topic under consideration, the financial implications might be the same as under the first option, to the extent that those member States and observers might prefer to change the composition of their delegations during the second week. As regards the travel costs of members of the secretariat of the Commission, this option might result in an increase of travel costs compared with the current situation, to the extent that the different topics would require a change of staff servicing the period of meetings; however, every effort would be made to have the same staff members service the entire period of meetings.

2. *Implications for pace and quality of work*

24. Both options would result in a reduction of the time available for the consideration of each topic to a maximum of 10 meetings (i.e. five days) per working group session. The total conference time would thus be approximately one half of the time currently devoted by a working group to a project entrusted to it. The apparent disadvantage of those options would be that, all other factors remaining equal, a working group would need, in a purely arithmetical calculation, twice as many sessions as it currently has in order to finalize a draft text for adoption by the Commission.

25. A review of the practice of other subsidiary bodies of the General Assembly dealing with legal matters shows that, despite the generalized trend towards reducing the duration of sessions of working groups and ad hoc committees, neither the pace nor the quality of the output of such bodies has been adversely affected. A recent example is the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996 to elaborate an international convention for the suppression of terrorist bombings and, subsequently, an international convention for the suppression of acts of nuclear terrorism, to supplement related existing international instruments and, thereafter, to address means of further developing a comprehensive legal framework of conventions dealing with international terrorism.⁸ The Ad Hoc Committee has adopted the pattern of holding

⁸This mandate continued to be renewed and revised on an annual basis by the General Assembly in its resolutions on measures to eliminate international terrorism.

one session per year over a one- or two-week period, usually early in the year. The work is then continued in the framework of a working group of the Sixth Committee, which meets later in the year. Despite the short duration of its sessions, within less than five years the Ad Hoc Committee has negotiated several texts resulting in the adoption of two treaties.⁹ The Ad Hoc Committee prepared a draft international convention for the suppression of acts of nuclear terrorism and, by the end of 2000, it had begun work on a draft comprehensive convention on international terrorism. The fourth session of the Ad Hoc Committee lasted one week.¹⁰

26. Shortening the duration of sessions of intergovernmental bodies usually requires some adaptation of their proceedings to avoid reducing the pace at which their work is accomplished. The practice of some other bodies, such as the Working Group established by the Sixth Committee of the General Assembly for the purpose of considering measures to eliminate international terrorism or the Ad Hoc Committee established by General Assembly resolution 51/210, suggests that shorter sessions may induce delegations to resort to informal consultations prior or parallel to the actual meeting, thus reserving conference time only for those issues that require deliberation at a formal meeting.¹¹ The effective combination of plenary deliberations and inter-sessional consultations has led to optimal utilization of conference time. This, in turn, has enabled the bodies concerned to achieve their objectives in a timely manner without loss of quality.

27. In the case of the Commission, shortening the duration of working group sessions may have the additional advantage of facilitating the task of composing delegations of member States and observers. In informal meetings between the secretariat, member States and observers, it has been pointed out that it is becoming increasingly difficult to secure the participation of experts in working group sessions, in particular experts from Governments, industry or private practice, who often are not in a position to relinquish their ordinary professional duties for two consecutive weeks.

3. *Implications for the preparation and adoption of reports on sessions of the working groups*

28. The reduction of the conference time available for each working group session, if accepted by the Commission, would also require a revision of the manner in which

⁹The International Convention for the Suppression of Terrorist Bombings, adopted by the General Assembly in its resolution 52/164 of 15 December 1997, and the International Convention for the Suppression of the Financing of Terrorism, adopted by the General Assembly in its resolution 54/109 of 9 December 1999.

¹⁰See the report of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996 (*Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 37 (A/55/37)*, para. 1).

¹¹The Working Group held extensive consultations between sessions. The same procedure is being used by the Ad Hoc Committee established by General Assembly resolution 51/210 (see *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 37 (A/55/37)*, para. 9).

the reports of the working groups are prepared and adopted. Currently, one full day, usually the penultimate day, is reserved exclusively for the preparation of the report, with no meeting being held on that day. If the total conference time were reduced to a maximum of 10 meetings (i.e. five days), the current practice would have to be discontinued, in order to use as much conference time as possible for substantive deliberations. Given the time needed for translation and distribution of the draft report, it would seem unfeasible to have a report covering the entire period of deliberations ready for adoption by the working group at its last meeting, as is currently the case. The Commission might thus wish to consider the following options:

(a) *Partial report with adoption at the same session.* Under this option, a working group could hold substantive deliberations during the first eight meetings (for example, from Monday to Thursday), with a draft report on the entire period being prepared by the secretariat. Although there might be a need for securing night shifts of translation staff, it would appear *prima facie* feasible to have the last portions of the draft report (i.e. those relating to the deliberations during the eighth meeting, on Thursday afternoon) available at the tenth meeting (on Friday afternoon). However, under this option no report would be prepared on deliberations held during the ninth meeting (Friday morning). The apparent disadvantage of this option might be countered in various ways. For example, a working group preparing a draft instrument might wish to use the first eight meetings for a discussion of individual provisions, while reserving the ninth meeting for discussion of open issues or an exchange of views of a more general nature, which might not need to be reflected in the report. Alternatively, its main conclusions might be summarily read out for the record by the Chairman at the tenth meeting and subsequently incorporated in the report, or information on those deliberations could be included by the secretariat in the working paper prepared for the subsequent session of the working group;

(b) *Full report with adoption at a later stage.* Under this option, a working group could hold substantive deliberations during the entire conference time available, with a draft report on the entire period being prepared by the secretariat. However, the working group would not adopt the report at the same session. It might be adopted by the working group at the beginning of its next session, as is the practice in some organizations, or it might be published later by the secretariat as its own account of the proceedings. Under the first option, delegations would have an opportunity, at the later session, to request corrections or amendments to the draft report. Until then, however, the report would have the status of a draft. Another potential disadvantage might be that delegates might not be the same at two consecutive sessions, or their memory of the proceedings might not be as vivid as it would have been during the same session. In the second case, if the report

would be prepared by the secretariat, it would not normally be submitted to the working group for approval.

4. *Implications for conference costs*

29. In principle, neither of the options proposed in paragraph 20 would have a significant financial impact on most conference costs (e.g. the costs of conference rooms, document clerks and conference officers, sound recording and engineering), with the possible exception of costs related to interpretation services. Possible impact on costs related to interpretation services would depend upon a number of factors, such as the length of contracts of the interpreters or whether out-of-area interpreters would be needed to service the meetings, in which case additional travel costs would be incurred by the Organization. The extent to which either option would entail additional cost cannot be anticipated, as it would also depend on how working group meetings would fit within the overall schedule of meetings at each duty station (i.e. New York and Vienna) in any given period.

III. CONCLUSIONS AND RECOMMENDATIONS

30. It is clear from the review of the Commission's work programme that, under the current working methods, it would not be possible for the Commission to continue its current work programme and to take up work simultaneously in all the areas currently under consideration for future work. Should the length and periodicity of working group sessions remain unchanged, the Commission would need either to decline taking up work on certain topics or to postpone such work until such time as one of its working groups completes its current tasks. That, however, would cause the Commission to forego the favourable opportunity for trade law unification that is presented by globalization and trade liberalization. Furthermore, delaying unification efforts or declining to take up future work needed by business might frustrate the expectations of member States and other organizations that have submitted proposals for future work by the Commission in those areas.

31. The proposals formulated by the secretariat for a revision of the working methods of the Commission are intended to avoid disruption in the Commission's work programme and negative impact on its overall unification efforts. In formulating such alternatives, the secretariat was mindful of the need to ensure the best possible use of the resources available to the Commission. The secretariat has therefore attempted to formulate proposals that, if accepted by the Commission, could address the expected increase in the Commission's work programme without lowering the high standards of professional care that have distinguished the work of the Commission and contributed so much to its high reputation.

Part Three

ANNEXES

I. DRAFT CONVENTION ON THE ASSIGNMENT OF RECEIVABLES IN INTERNATIONAL TRADE

Preamble

The Contracting States,

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

Considering that problems created by uncertainties as to the content and the choice of legal regime applicable to the assignment of receivables constitute an obstacle to international trade,

Desiring to establish principles and to adopt rules relating to the assignment of receivables that would create certainty and transparency and promote the modernization of the law relating to assignments of receivables, while protecting existing assignment practices and facilitating the development of new practices,

Desiring also to ensure adequate protection of the interests of debtors in assignments of receivables,

Being of the opinion that the adoption of uniform rules governing the assignment of receivables would promote the availability of capital and credit at more affordable rates and thus facilitate the development of international trade,

Have agreed as follows:

CHAPTER I

Scope of application

Article 1

Scope of application

1. This Convention applies to:

(a) Assignments of international receivables and to international assignments of receivables as defined in this chapter, if, at the time of conclusion of the contract of assignment, the assignor is located in a Contracting State; and

(b) Subsequent assignments, provided that any prior assignment is governed by this Convention.

2. This Convention applies to subsequent assignments that satisfy the criteria set forth in paragraph 1 (a) of this article, even if it did not apply to any prior assignment of the same receivable.

3. This Convention does not affect the rights and obligations of the debtor unless, at the time of conclusion of the original contract, the debtor is located in a Contracting State or the law governing the original contract is the law of a Contracting State.

4. The provisions of chapter V apply to assignments of international receivables and to international assignments of receivables as defined in this chapter independently of paragraphs 1 to 3 of this article. However, those provisions do not apply if a State makes a declaration under article 39.

5. The provisions of the annex to this Convention apply as provided in article 42.

Article 2

Assignment of receivables

For the purposes of this Convention:

(a) "Assignment" means the transfer by agreement from one person ("assignor") to another person ("assignee") of all or part of or an undivided interest in the assignor's contractual right to payment of a monetary sum ("receivable") from a third person ("the debtor"). The creation of rights in receivables as security for indebtedness or other obligation is deemed to be a transfer;

(b) In the case of an assignment by the initial or any other assignee ("subsequent assignment"), the person who makes that assignment is the assignor and the person to whom that assignment is made is the assignee.

Article 3

Internationality

A receivable is international if, at the time of conclusion of the original contract, the assignor and the debtor are located in different States. An assignment is international if, at the time of conclusion of the contract of assignment, the assignor and the assignee are located in different States.

Article 4

Exclusions and other limitations

1. This Convention does not apply to assignments made:

(a) To an individual for his or her personal, family or household purposes;

(b) As part of the sale or change in the ownership or legal status of the business out of which the assigned receivables arose.

2. This Convention does not apply to assignments of receivables arising under or from:

(a) Transactions on a regulated exchange;

(b) Financial contracts governed by netting agreements, except a receivable owed on the termination of all outstanding transactions;

(c) Foreign exchange transactions;

(d) Inter-bank payment systems, inter-bank payment agreements or clearance and settlement systems relating to securities or other financial assets or instruments;

(e) The transfer of security rights in, sale, loan or holding of or agreement to repurchase securities or other financial assets or instruments held with an intermediary;

- (f) Bank deposits;
- (g) A letter of credit or independent guarantee.

3. Nothing in this Convention affects the rights and obligations of any person under the law governing negotiable instruments.

4. Nothing in this Convention affects the rights and obligations of the assignor and the debtor under special laws governing the protection of parties to transactions made for personal, family or household purposes.

5. Nothing in this Convention:

(a) Affects the application of the law of a State in which real property is situated to either:

- (i) An interest in that real property to the extent that under that law the assignment of a receivable confers such an interest; or
- (ii) The priority of a right in a receivable to the extent that under that law an interest in the real property confers such a right; or

(b) Makes lawful the acquisition of an interest in real property not permitted under the law of the State in which the real property is situated.

CHAPTER II

General provisions

Article 5

Definitions and rules of interpretation

For the purposes of this Convention:

(a) "Original contract" means the contract between the assignor and the debtor from which the assigned receivable arises;

(b) "Existing receivable" means a receivable that arises upon or before conclusion of the contract of assignment and "future receivable" means a receivable that arises after conclusion of the contract of assignment;

(c) "Writing" means any form of information that is accessible so as to be usable for subsequent reference. Where this Convention requires a writing to be signed, that requirement is met if, by generally accepted means or a procedure agreed to by the person whose signature is required, the writing identifies that person and indicates that person's approval of the information contained in the writing;

(d) "Notification of the assignment" means a communication in writing that reasonably identifies the assigned receivables and the assignee;

(e) "Insolvency administrator" means a person or body, including one appointed on an interim basis, authorized in an insolvency proceeding to administer the reorganization or liquidation of the assignor's assets or affairs;

(f) "Insolvency proceeding" means a collective judicial or administrative proceeding, including an interim proceeding, in which the assets and affairs of the assignor are subject to control or supervision by a court or other competent authority for the purpose of reorganization or liquidation;

(g) "Priority" means the right of a person in preference to the right of another person and, to the extent relevant for such purpose, includes the determination whether the right is a personal or a property right, whether or not it is a security right

for indebtedness or other obligation and whether any requirements necessary to render the right effective against a competing claimant have been satisfied;

(h) A person is located in the State in which it has its place of business. If the assignor or the assignee has a place of business in more than one State, the place of business is that place where the central administration of the assignor or the assignee is exercised. If the debtor has a place of business in more than one State, the place of business is that which has the closest relationship to the original contract. If a person does not have a place of business, reference is to be made to the habitual residence of that person;

(i) "Law" means the law in force in a State other than its rules of private international law;

(j) "Proceeds" means whatever is received in respect of an assigned receivable, whether in total or partial payment or other satisfaction of the receivable. The term includes whatever is received in respect of proceeds. The term does not include returned goods;

(k) "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 any transaction referred to above entered into in financial markets and any combination of the transactions mentioned above;

(l) "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 (l) (ii) of this article under two or more netting agreements;

(m) "Competing claimant" means:

- (i) Another assignee of the same receivable from the same assignor, including a person who, by operation of law, claims a right in the assigned receivable as a result of its right in other property of the assignor, even if that receivable is not an international receivable and the assignment to that assignee is not an international assignment;
- (ii) A creditor of the assignor; or
- (iii) The insolvency administrator.

Article 6

Party autonomy

Subject to article 19, the assignor, the assignee and the debtor may derogate from or vary by agreement provisions of this Convention relating to their respective rights and obligations. Such an agreement does not affect the rights of any person who is not a party to the agreement.

Article 7

Principles of interpretation

1. In the interpretation of this Convention, regard is to be had to its object and purpose as set forth in the preamble, to its

international character and to the need to promote uniformity in its application and the observance of good faith in international trade.

2. Questions concerning matters governed by this Convention that are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

CHAPTER III

Effects of assignment

Article 8

Effectiveness of assignments

1. An assignment is not ineffective as between the assignor and the assignee or as against the debtor or as against a competing claimant, and the right of an assignee may not be denied priority, on the ground that it is an assignment of more than one receivable, future receivables or parts of or undivided interests in receivables, provided that the receivables are described:

(a) Individually as receivables to which the assignment relates; or

(b) In any other manner, provided that they can, at the time of the assignment or, in the case of future receivables, at the time of conclusion of the original contract, be identified as receivables to which the assignment relates.

2. Unless otherwise agreed, an assignment of one or more future receivables is effective without a new act of transfer being required to assign each receivable.

3. Except as provided in paragraph 1 of this article, article 9 and article 10, paragraphs 2 and 3, this Convention does not affect any limitations on assignments arising from law.

Article 9

Contractual limitations on assignments

1. An assignment of a receivable is effective notwithstanding any agreement between the initial or any subsequent assignor and the debtor or any subsequent assignee limiting in any way the assignor's right to assign its receivables.

2. Nothing in this article affects any obligation or liability of the assignor for breach of such an agreement, but the other party to such agreement may not avoid the original contract or the assignment contract on the sole ground of that breach. A person who is not party to such an agreement is not liable on the sole ground that it had knowledge of the agreement.

3. This article applies only to assignments of receivables:

(a) Arising from an original contract that is a contract for the supply or lease of goods or services other than financial services, a construction contract or a contract for the sale or lease of real property;

(b) Arising from an original contract for the sale, lease or licence of industrial or other intellectual property or of proprietary information;

(c) Representing the payment obligation for a credit card transaction; or

(d) Owed to the assignor upon net settlement of payments due pursuant to a netting agreement involving more than two parties.

Article 10

Transfer of security rights

1. A personal or property right securing payment of the assigned receivable is transferred to the assignee without a new act of transfer. If such a right, under the law governing it, is transferable only with a new act of transfer, the assignor is obliged to transfer such right and any proceeds to the assignee.

2. A right securing payment of the assigned receivable is transferred under paragraph 1 of this article notwithstanding any agreement between the assignor and the debtor or other person granting that right, limiting in any way the assignor's right to assign the receivable or the right securing payment of the assigned receivable.

3. Nothing in this article affects any obligation or liability of the assignor for breach of any agreement under paragraph 2 of this article, but the other party to that agreement may not avoid the original contract or the assignment contract on the sole ground of that breach. A person who is not a party to such an agreement is not liable on the sole ground that it had knowledge of the agreement.

4. Paragraphs 2 and 3 of this article apply only to assignments of receivables:

(a) Arising from an original contract that is a contract for the supply or lease of goods or services other than financial services, a construction contract or a contract for the sale or lease of real property;

(b) Arising from an original contract for the sale, lease or licence of industrial or other intellectual property or of proprietary information;

(c) Representing the payment obligation for a credit card transaction; or

(d) Owed to the assignor upon net settlement of payments due pursuant to a netting agreement involving more than two parties.

5. The transfer of a possessory property right under paragraph 1 of this article does not affect any obligations of the assignor to the debtor or the person granting the property right with respect to the property transferred existing under the law governing that property right.

6. Paragraph 1 of this article does not affect any requirement under rules of law other than this Convention relating to the form or registration of the transfer of any rights securing payment of the assigned receivable.

CHAPTER IV

Rights, obligations and defences

Section I. Assignor and assignee

Article 11

Rights and obligations of the assignor and the assignee

1. The mutual rights and obligations of the assignor and the assignee arising from their agreement are determined by the terms and conditions set forth in that agreement, including any rules or general conditions referred to therein.

2. The assignor and the assignee are bound by any usage to which they have agreed and, unless otherwise agreed, by any practices they have established between themselves.

3. In an international assignment, the assignor and the assignee are considered, unless otherwise agreed, implicitly to have made applicable to the assignment a usage that in international trade is widely known to, and regularly observed by, parties to the particular type of assignment or to the assignment of the particular category of receivables.

Article 12

Representations of the assignor

1. Unless otherwise agreed between the assignor and the assignee, the assignor represents at the time of conclusion of the contract of assignment that:

- (a) The assignor has the right to assign the receivable;
- (b) The assignor has not previously assigned the receivable to another assignee; and
- (c) The debtor does not and will not have any defences or rights of set-off.

2. Unless otherwise agreed between the assignor and the assignee, the assignor does not represent that the debtor has, or will have, the ability to pay.

Article 13

Right to notify the debtor

1. Unless otherwise agreed between the assignor and the assignee, the assignor or the assignee or both may send the debtor notification of the assignment and a payment instruction, but after notification has been sent only the assignee may send such an instruction.

2. Notification of the assignment or a payment instruction sent in breach of any agreement referred to in paragraph 1 of this article is not ineffective for the purposes of article 17 by reason of such breach. However, nothing in this article affects any obligation or liability of the party in breach of such an agreement for any damages arising as a result of the breach.

Article 14

Right to payment

1. As between the assignor and the assignee, unless otherwise agreed and whether or not notification of the assignment has been sent:

- (a) If payment in respect of the assigned receivable is made to the assignee, the assignee is entitled to retain the proceeds and goods returned in respect of the assigned receivable;
- (b) If payment in respect of the assigned receivable is made to the assignor, the assignee is entitled to payment of the proceeds and also to goods returned to the assignor in respect of the assigned receivable; and
- (c) If payment in respect of the assigned receivable is made to another person over whom the assignee has priority, the assignee is entitled to payment of the proceeds and also to goods returned to such person in respect of the assigned receivable.

2. The assignee may not retain more than the value of its right in the receivable.

Section II. Debtor

Article 15

Principle of debtor protection

1. Except as otherwise provided in this Convention, an assignment does not, without the consent of the debtor, affect the rights and obligations of the debtor, including the payment terms contained in the original contract.

2. A payment instruction may change the person, address or account to which the debtor 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 is located.

Article 16

Notification of the debtor

1. Notification of the assignment or a payment instruction is effective when received by the debtor if it is in a language that is reasonably expected to inform the debtor about its contents. It is sufficient if notification of the assignment or a payment instruction is in the language of the original contract.

2. Notification of the assignment or a payment instruction may relate to receivables arising after notification.

3. Notification of a subsequent assignment constitutes notification of all prior assignments.

Article 17

Debtor's discharge by payment

1. Until the debtor receives notification of the assignment, the debtor is entitled to be discharged by paying in accordance with the original contract.

2. After the debtor receives notification of the assignment, subject to paragraphs 3 to 8 of this article, the debtor is discharged only by paying the assignee or, if otherwise instructed in the notification of the assignment or subsequently by the assignee in a writing received by the debtor, in accordance with such payment instruction.

3. If the debtor receives more than one payment instruction relating to a single assignment of the same receivable by the same assignor, the debtor is discharged by paying in accordance with the last payment instruction received from the assignee before payment.

4. If the debtor receives notification of more than one assignment of the same receivable made by the same assignor, the debtor is discharged by paying in accordance with the first notification received.

5. If the debtor receives notification of one or more subsequent assignments, the debtor is discharged by paying in accordance with the notification of the last of such subsequent assignments.

6. If the debtor receives notification of the assignment of a part of or an undivided interest in one or more receivables, the debtor is discharged by paying in accordance with the notification or in accordance with this article as if the debtor had not received the notification. If the debtor pays in accordance with the notification, the debtor is discharged only to the extent of the part or undivided interest paid.

7. If the debtor receives notification of the assignment from the assignee, the debtor is entitled to request the assignee to provide within a reasonable period of time adequate proof that the assignment from the initial assignor to the initial assignee and any intermediate assignment have been made and, unless the assignee does so, the debtor is discharged by paying in accordance with this article as if the notification from the assignee had not been received. Adequate proof of an assignment includes but is not limited to any writing emanating from the assignor and indicating that the assignment has taken place.

8. This article does not affect any other ground on which payment by the debtor to the person entitled to payment, to a competent judicial or other authority, or to a public deposit fund discharges the debtor.

Article 18

Defences and rights of set-off of the debtor

1. In a claim by the assignee against the debtor for payment of the assigned receivable, the debtor may raise against the assignee all defences and rights of set-off arising from the original contract, or any other contract that was part of the same transaction, of which the debtor could avail itself as if the assignment had not been made and such claim were made by the assignor.

2. The debtor may raise against the assignee any other right of set-off, provided that it was available to the debtor at the time notification of the assignment was received by the debtor.

3. Notwithstanding paragraphs 1 and 2 of this article, defences and rights of set-off that the debtor may raise pursuant to article 9 or 10 against the assignor for breach of an agreement limiting in any way the assignor's right to make the assignment are not available to the debtor against the assignee.

Article 19

Agreement not to raise defences or rights of set-off

1. The debtor may agree with the assignor in a writing signed by the debtor not to raise against the assignee the defences and rights of set-off that it could raise pursuant to article 18. Such an agreement precludes the debtor from raising against the assignee those defences and rights of set-off.

2. The debtor may not waive defences:

- (a) Arising from fraudulent acts on the part of the assignee; or
- (b) Based on the debtor's incapacity.

3. Such an agreement may be modified only by an agreement in a writing signed by the debtor. The effect of such a modification as against the assignee is determined by article 20, paragraph 2.

Article 20

Modification of the original contract

1. An agreement concluded before notification of the assignment between the assignor and the debtor that affects the assignee's rights is effective as against the assignee, and the assignee acquires corresponding rights.

2. An agreement concluded after notification of the assignment between the assignor and the debtor that affects the assignee's rights is ineffective as against the assignee unless:

- (a) The assignee consents to it; or
- (b) The receivable is not fully earned by performance and either the modification is provided for in the original contract or, in the context of the original contract, a reasonable assignee would consent to the modification.

3. Paragraphs 1 and 2 of this article do not affect any right of the assignor or the assignee arising from breach of an agreement between them.

Article 21

Recovery of payments

Failure of the assignor to perform the original contract does not entitle the debtor to recover from the assignee a sum paid by the debtor to the assignor or the assignee.

Section III. Third parties

Article 22

Law applicable to competing rights

With the exception of matters that are settled elsewhere in this Convention and subject to articles 23 and 24, the law of the State in which the assignor is located governs the priority of the right of an assignee in the assigned receivable over the right of a competing claimant.

Article 23

Public policy and mandatory rules

1. The application of a provision of the law of the State in which the assignor is located may be refused only if the application of that provision is manifestly contrary to the public policy of the forum State.

2. The rules of the law of either the forum State or any other State that are mandatory irrespective of the law otherwise applicable may not prevent the application of a provision of the law of the State in which the assignor is located.

3. Notwithstanding paragraph 2 of this article, in an insolvency proceeding commenced in a State other than the State in which the assignor is located, any preferential right that arises, by operation of law, under the law of the forum State and is given priority over the rights of an assignee in insolvency proceedings under the law of that State may be given priority notwithstanding article 22. A State may deposit at any time a declaration identifying any such preferential right.

*Article 24***Special rules on proceeds**

1. If proceeds are received by the assignee, the assignee is entitled to retain those proceeds to the extent that the assignee's right in the assigned receivable had priority over the right of a competing claimant in the assigned receivable.

2. If proceeds are received by the assignor, the right of the assignee in those proceeds has priority over the right of a competing claimant in those proceeds to the same extent as the assignee's right had priority over the right in the assigned receivable of that claimant if:

(a) The assignor has received the proceeds under instructions from the assignee to hold the proceeds for the benefit of the assignee; and

(b) The proceeds are held by the assignor for the benefit of the assignee separately and are reasonably identifiable from the assets of the assignor, such as in the case of a separate deposit or securities account containing only proceeds consisting of cash or securities.

3. Nothing in paragraph 2 of this article affects the priority of a person having against the proceeds a right of set-off or a right created by agreement and not derived from a right in the receivable.

*Article 25***Subordination**

An assignee entitled to priority may at any time subordinate its priority unilaterally or by agreement in favour of any existing or future assignees.

CHAPTER V

Autonomous conflict-of-laws rules*Article 26***Application of chapter V**

The provisions of this chapter apply to matters that are:

(a) Within the scope of this Convention as provided in article 1, paragraph 4; and

(b) Otherwise within the scope of this Convention but not settled elsewhere in it.

*Article 27***Form of a contract of assignment**

1. A contract of assignment concluded between persons who are located in the same State is formally valid as between them if it satisfies the requirements of either the law which governs it or the law of the State in which it is concluded.

2. A contract of assignment concluded between persons who are located in different States is formally valid as between them if it satisfies the requirements of either the law which governs it or the law of one of those States.

*Article 28***Law applicable to the mutual rights and obligations of the assignor and the assignee**

1. The mutual rights and obligations of the assignor and the assignee arising from their agreement are governed by the law chosen by them.

2. In the absence of a choice of law by the assignor and the assignee, their mutual rights and obligations arising from their agreement are governed by the law of the State with which the contract of assignment is most closely connected.

*Article 29***Law applicable to the rights and obligations of the assignee and the debtor**

The law governing the original contract determines the effectiveness of contractual limitations on assignment as between the assignee and the debtor, the relationship between the assignee and the debtor, the conditions under which the assignment can be invoked against the debtor and whether the debtor's obligations have been discharged.

*Article 30***Law applicable to priority**

1. The law of the State in which the assignor is located governs the priority of the right of an assignee in the assigned receivable over the right of a competing claimant.

2. The rules of the law of either the forum State or any other State that are mandatory irrespective of the law otherwise applicable may not prevent the application of a provision of the law of the State in which the assignor is located.

3. Notwithstanding paragraph 2 of this article, in an insolvency proceeding commenced in a State other than the State in which the assignor is located, any preferential right that arises, by operation of law, under the law of the forum State and is given priority over the rights of an assignee in insolvency proceedings under the law of that State may be given priority notwithstanding paragraph 1 of this article.

*Article 31***Mandatory rules**

1. Nothing in articles 27 to 29 restricts the application of the rules of the law of the forum State in a situation where they are mandatory irrespective of the law otherwise applicable.

2. Nothing in articles 27 to 29 restricts the application of the mandatory rules of the law of another State with which the matters settled in those articles have a close connection if and in so far as, under the law of that other State, those rules must be applied irrespective of the law otherwise applicable.

*Article 32***Public policy**

With regard to matters settled in this chapter, the application of a provision of the law specified in this chapter may be refused only if the application of that provision is manifestly contrary to the public policy of the forum State.

CHAPTER VI

Article 36

Final provisions***Location in a territorial unit****Article 33****Depositary***

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

*Article 34****Signature, ratification, acceptance, approval, accession***

1. This Convention is open for signature by all States at the Headquarters of the United Nations in New York until [...].*

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

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

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

*Two years after the date of the adoption of the Convention by the General Assembly.

*Article 35****Application to territorial units***

1. If a State has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention, it may at any time declare that this Convention is to extend to all its territorial units or only one or more of them, and may at any time substitute another declaration for its earlier declaration.

2. Such declarations are to state expressly the territorial units to which this Convention extends.

3. If, by virtue of a declaration under this article, this Convention does not extend to all territorial units of a State and the assignor or the debtor is located in a territorial unit to which this Convention does not extend, this location is considered not to be in a Contracting State.

4. If, by virtue of a declaration under this article, this Convention does not extend to all territorial units of a State and the law governing the original contract is the law in force in a territorial unit to which this Convention does not extend, the law governing the original contract is considered not to be the law of a Contracting State.

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

If a person is located in a State which has two or more territorial units, that person is located in the territorial unit in which it has its place of business. If the assignor or the assignee has a place of business in more than one territorial unit, the place of business is that place where the central administration of the assignor or the assignee is exercised. If the debtor has a place of business in more than one territorial unit, the place of business is that which has the closest relationship to the original contract. If a person does not have a place of business, reference is to be made to the habitual residence of that person. A State with two or more territorial units may specify by declaration at any time other rules for determining the location of a person within that State.

*Article 37****Applicable law in territorial units***

Any reference in this Convention to the law of a State means, in the case of a State which has two or more territorial units, the law in force in the territorial unit. Such a State may specify by declaration at any time other rules for determining the applicable law, including rules that render applicable the law of another territorial unit of that State.

*Article 38****Conflicts with other international agreements***

1. This Convention does not prevail over any international agreement that has already been or may be entered into and that specifically governs a transaction otherwise governed by this Convention.

2. Notwithstanding paragraph 1 of this article, this Convention prevails over the Unidroit Convention on International Factoring ("the Ottawa Convention"). To the extent that this Convention does not apply to the rights and obligations of a debtor, it does not preclude the application of the Ottawa Convention with respect to the rights and obligations of that debtor.

*Article 39****Declaration on application of chapter V***

A State may declare at any time that it will not be bound by chapter V.

*Article 40****Limitations relating to Governments and other public entities***

A State may declare at any time that it will not be bound or the extent to which it will not be bound by articles 9 and 10 if the debtor or any person granting a personal or property right securing payment of the assigned receivable is located in that State at the time of conclusion of the original contract and is a Government, central or local, any subdivision thereof, or an entity constituted for a public purpose. If a State has made such a declaration, articles 9 and 10 do not affect the rights and

obligations of that debtor or person. A State may list in a declaration the types of entity that are the subject of a declaration.

Article 41

Other exclusions

1. A State may declare at any time that it will not apply this Convention to specific types of assignment or to the assignment of specific categories of receivables clearly described in a declaration.

2. After a declaration under paragraph 1 of this article takes effect:

(a) This Convention does not apply to such types of assignment or to the assignment of such categories of receivables if the assignor is located at the time of conclusion of the contract of assignment in such a State; and

(b) The provisions of this Convention that affect the rights and obligations of the debtor do not apply if, at the time of conclusion of the original contract, the debtor is located in such a State or the law governing the original contract is the law of such a State.

3. This article does not apply to assignments of receivables listed in article 9, paragraph 3.

Article 42

Application of the annex

1. A State may at any time declare that it will be bound by:

(a) The priority rules set forth in section I of the annex and will participate in the international registration system established pursuant to section II of the annex;

(b) The priority rules set forth in section I of the annex and will effectuate such rules by use of a registration system that fulfils the purposes of such rules, in which case, for the purposes of section I of the annex, registration pursuant to such a system has the same effect as registration pursuant to section II of the annex;

(c) The priority rules set forth in section III of the annex;

(d) The priority rules set forth in section IV of the annex; or

(e) The priority rules set forth in articles 7 and 9 of the annex.

2. For the purposes of article 22:

(a) The law of a State that has made a declaration pursuant to paragraph 1 (a) or (b) of this article is the set of rules set forth in section I of the annex, as affected by any declaration made pursuant to paragraph 5 of this article;

(b) The law of a State that has made a declaration pursuant to paragraph 1 (c) of this article is the set of rules set forth in section III of the annex, as affected by any declaration made pursuant to paragraph 5 of this article;

(c) The law of a State that has made a declaration pursuant to paragraph 1 (d) of this article is the set of rules set forth in section IV of the annex, as affected by any declaration made pursuant to paragraph 5 of this article; and

(d) The law of a State that has made a declaration pursuant to paragraph 1 (e) of this article is the set of rules set forth in

articles 7 and 9 of the annex, as affected by any declaration made pursuant to paragraph 5 of this article.

3. A State that has made a declaration pursuant to paragraph 1 of this article may establish rules pursuant to which contracts of assignment concluded before the declaration takes effect become subject to those rules within a reasonable time.

4. A State that has not made a declaration pursuant to paragraph 1 of this article may, in accordance with priority rules in force in that State, utilize the registration system established pursuant to section II of the annex.

5. At the time a State makes a declaration pursuant to paragraph 1 of this article or thereafter, it may declare that:

(a) It will not apply the priority rules chosen under paragraph 1 of this article to certain types of assignment or to the assignment of certain categories of receivables; or

(b) It will apply those priority rules with modifications specified in that declaration.

6. At the request of Contracting or Signatory States to this Convention comprising not less than one third of the Contracting and Signatory States, the depositary shall convene a conference of the Contracting and Signatory States to designate the supervising authority and the first registrar and to prepare or revise the regulations referred to in section II of the annex.

Article 43

Effect of declaration

1. Declarations made under articles 35, paragraphs 1, 36, 37 or 39 to 42 at the time of signature are subject to confirmation upon ratification, acceptance or approval.

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

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

4. A State that makes a declaration under articles 35, paragraphs 1, 36, 37 or 39 to 42 may withdraw it at any time by a formal notification in writing addressed to the depositary. Such withdrawal takes effect on the first day of the month following the expiration of six months after the date of the receipt of the notification by the depositary.

5. In the case of a declaration under articles 35, paragraphs 1, 36, 37 or 39 to 42 that takes effect after the entry into force of this Convention in respect of the State concerned or in the case of a withdrawal of any such declaration, the effect of which in either case is to cause a rule in this Convention, including any annex, to become applicable:

(a) Except as provided in paragraph 5 (b) of this article, that rule is applicable only to assignments for which the contract of assignment is concluded on or after the date when the declaration or withdrawal takes effect in respect of the Contracting State referred to in article 1, paragraph 1 (a);

(b) A rule that deals with the rights and obligations of the debtor applies only in respect of original contracts concluded on or after the date when the declaration or withdrawal takes effect in respect of the Contracting State referred to in article 1, paragraph 3.

6. In the case of a declaration under articles 35, paragraphs 1, 36, 37 or 39 to 42 that takes effect after the entry into force of this Convention in respect of the State concerned or in the case of a withdrawal of any such declaration, the effect of which in either case is to cause a rule in this Convention, including any annex, to become inapplicable:

(a) Except as provided in paragraph 6 (b) of this article, that rule is inapplicable to assignments for which the contract of assignment is concluded on or after the date when the declaration or withdrawal takes effect in respect of the Contracting State referred to in article 1, paragraph 1 (a);

(b) A rule that deals with the rights and obligations of the debtor is inapplicable in respect of original contracts concluded on or after the date when the declaration or withdrawal takes effect in respect of the Contracting State referred to in article 1, paragraph 3.

7. If a rule rendered applicable or inapplicable as a result of a declaration or withdrawal referred to in paragraphs 5 or 6 of this article is relevant to the determination of priority with respect to a receivable for which the contract of assignment is concluded before such declaration or withdrawal takes effect or with respect to its proceeds, the right of the assignee has priority over the right of a competing claimant to the extent that, under the law that would determine priority before such declaration or withdrawal takes effect, the right of the assignee would have priority.

Article 44

Reservations

No reservations are permitted except those expressly authorized in this Convention.

Article 45

Entry into force

1. This Convention enters into force on the first day of the month following the expiration of six months from the date of deposit of the fifth instrument of ratification, acceptance, approval or accession with the depositary.

2. For each State that becomes a Contracting State to this Convention after the date of deposit of the fifth instrument of ratification, acceptance, approval or accession, this Convention enters into force on the first day of the month following the expiration of six months after the date of deposit of the appropriate instrument on behalf of that State.

3. This Convention applies only to assignments if the contract of assignment is concluded on or after the date when this Convention enters into force in respect of the Contracting State referred to in article 1, paragraph 1 (a), provided that the provisions of this Convention that deal with the rights and obligations of the debtor apply only to assignments of receivables arising from original contracts concluded on or after the date when this Convention enters into force in respect of the Contracting State referred to in article 1, paragraph 3.

4. If a receivable is assigned pursuant to a contract of assignment concluded before the date when this Convention enters into force in respect of the Contracting State referred to in article 1, paragraph 1 (a), the right of the assignee has priority over the right of a competing claimant with respect to the receivable to the extent that, under the law that would determine priority in the absence of this Convention, the right of the assignee would have priority.

Article 46

Denunciation

1. A Contracting State may denounce this Convention at any time by written notification addressed to the depositary.

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

3. This Convention remains applicable to assignments if the contract of assignment is concluded before the date when the denunciation takes effect in respect of the Contracting State referred to in article 1, paragraph 1 (a), provided that the provisions of this Convention that deal with the rights and obligations of the debtor remain applicable only to assignments of receivables arising from original contracts concluded before the date when the denunciation takes effect in respect of the Contracting State referred to in article 1, paragraph 3.

4. If a receivable is assigned pursuant to a contract of assignment concluded before the date when the denunciation takes effect in respect of the Contracting State referred to in article 1, paragraph 1 (a), the right of the assignee has priority over the right of a competing claimant with respect to the receivable to the extent that, under the law that would determine priority under this Convention, the right of the assignee would have priority.

Article 47

Revision and amendment

1. At the request of not less than one third of the Contracting States to this Convention, the depositary shall convene a conference of the Contracting States to revise or amend it.

2. Any instrument of ratification, acceptance, approval or accession deposited after the entry into force of an amendment to this Convention is deemed to apply to the Convention as amended.

Annex to the draft Convention

Section I. Priority rules based on registration

Article 1

Priority among several assignees

As between assignees of the same receivable from the same assignor, the priority of the right of an assignee in the assigned receivable is determined by the order in which data about the assignment are registered under section II of this annex, regardless of the time of transfer of the receivable. If no such data are registered, priority is determined by the order of conclusion of the respective contracts of assignment.

*Article 2****Priority between the assignee and the insolvency administrator or creditors of the assignor***

The right of an assignee in an assigned receivable has priority over the right of an insolvency administrator and creditors who obtain a right in the assigned receivable by attachment, judicial act or similar act of a competent authority that gives rise to such right, if the receivable was assigned, and data about the assignment were registered under section II of this annex, before the commencement of such insolvency proceeding, attachment, judicial act or similar act.

*Section II. Registration**Article 3****Establishment of a registration system***

A registration system will be established for the registration of data about assignments, even if the relevant assignment or receivable is not international, pursuant to the regulations to be promulgated by the registrar and the supervising authority. Regulations promulgated by the registrar and the supervising authority under this annex shall be consistent with this annex. The regulations will prescribe in detail the manner in which the registration system will operate, as well as the procedure for resolving disputes relating to that operation.

*Article 4****Registration***

1. Any person may register data with regard to an assignment at the registry in accordance with this annex and the regulations. As provided in the regulations, the data registered shall be the identification of the assignor and the assignee and a brief description of the assigned receivables.

2. A single registration may cover one or more assignments by the assignor to the assignee of one or more existing or future receivables, irrespective of whether the receivables exist at the time of registration.

3. A registration may be made in advance of the assignment to which it relates. The regulations will establish the procedure for the cancellation of a registration in the event that the assignment is not made.

4. Registration or its amendment is effective from the time when the data set forth in paragraph 1 of this article are available to searchers. The registering party may specify, from options set forth in the regulations, a period of effectiveness for the registration. In the absence of such a specification, a registration is effective for a period of five years.

5. Regulations will specify the manner in which registration may be renewed, amended or cancelled and regulate such other matters as are necessary for the operation of the registration system.

6. Any defect, irregularity, omission or error with regard to the identification of the assignor that would result in data registered not being found upon a search based on a proper identification of the assignor renders the registration ineffective.

*Article 5****Registry searches***

1. Any person may search the records of the registry according to identification of the assignor, as set forth in the regulations, and obtain a search result in writing.

2. A search result in writing that purports to be issued by the registry is admissible as evidence and is, in the absence of evidence to the contrary, proof of the registration of the data to which the search relates, including the date and hour of registration.

*Section III. Priority rules based on the time of the contract of assignment**Article 6****Priority among several assignees***

As between assignees of the same receivable from the same assignor, the priority of the right of an assignee in the assigned receivable is determined by the order of conclusion of the respective contracts of assignment.

*Article 7****Priority between the assignee and the insolvency administrator or creditors of the assignor***

The right of an assignee in an assigned receivable has priority over the right of an insolvency administrator and creditors who obtain a right in the assigned receivable by attachment, judicial act or similar act of a competent authority that gives rise to such right, if the receivable was assigned before the commencement of such insolvency proceeding, attachment, judicial act or similar act.

*Article 8****Proof of time of contract of assignment***

The time of conclusion of a contract of assignment in respect of articles 6 and 7 of this annex may be proved by any means, including witnesses.

*Section IV. Priority rules based on the time of notification of assignment**Article 9****Priority among several assignees***

As between assignees of the same receivable from the same assignor, the priority of the right of an assignee in the assigned receivable is determined by the order in which notification of the respective assignments is received by the debtor. However, an assignee may not obtain priority over a prior assignment of which the assignee had knowledge at the time of conclusion of the contract of assignment to that assignee by notifying the debtor.

*Article 10****Priority between the assignee and the insolvency administrator or creditors of the assignor***

The right of an assignee in an assigned receivable has priority over the right of an insolvency administrator and

creditors who obtain a right in the assigned receivable by attachment, judicial act or similar act of a competent authority that gives rise to such right, if the receivable was assigned and notification was received by the debtor before the commencement of such insolvency proceeding, attachment, judicial act or similar act.

Appendix**RENUMBERING OF ARTICLES*****1. Draft Convention***

<i>Current article number (annex I to the present document)</i>	<i>Former article number (A/CN.9/486, annex I)</i>
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19	21
20	22
21	23
22	24
23	25
24	26
25	27
26	28
27	New article
28	29
29	30
30	31
31	32

32	33
33	34
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36	37
37	New article
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2. Annex to the draft Convention

<i>Current article number (annex I to the present document)</i>	<i>Former article number (A/CN.9/486, annex I)</i>
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2	2
3	3
4	4
5	5
6	6
7	7
8	New article
9	8
10	9

II. UNCITRAL MODEL LAW ON ELECTRONIC SIGNATURES (2001)

Article 1

Sphere of application

This Law applies where electronic signatures are used in the context* of commercial** activities. It does not override any rule of law intended for the protection of consumers.

Article 2

Definitions

For the purposes of this Law:

(a) “Electronic signature” means data in electronic form in, affixed to or logically associated with, a data message, which may be used to identify the signatory in relation to the data message and to indicate the signatory’s approval of the information contained in the data message;

(b) “Certificate” means a data message or other record confirming the link between a signatory and signature creation data;

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

(d) “Signatory” means a person that holds signature creation data and acts either on its own behalf or on behalf of the person it represents;

(e) “Certification service provider” means a person that issues certificates and may provide other services related to electronic signatures;

(f) “Relying party” means a person that may act on the basis of a certificate or an electronic signature.

Article 3

Equal treatment of signature technologies

Nothing in this Law, except article 5, shall be applied so as to exclude, restrict or deprive of legal effect any method of creating an electronic signature that satisfies the requirements referred to in article 6, paragraph 1, or otherwise meets the requirements of applicable law.

*The Commission suggests the following text for States that might wish to extend the applicability of this Law:

“This Law applies where electronic signatures are used, except in the following situations: [...]”

**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.

Article 4

Interpretation

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

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

Article 5

Variation by agreement

The provisions of this Law may be derogated from or their effect may be varied by agreement, unless that agreement would not be valid or effective under applicable law.

Article 6

Compliance with a requirement for a signature

1. Where the law requires a signature of a person, that requirement is met in relation to a data message if an electronic signature is used that is as reliable as was appropriate for the purpose for which the data message was generated or communicated, in the light of all the circumstances, including any relevant agreement.

2. Paragraph 1 applies whether the requirement referred to therein is in the form of an obligation or whether the law simply provides consequences for the absence of a signature.

3. An electronic signature is considered to be reliable for the purpose of satisfying the requirement referred to in paragraph 1 if:

(a) The signature creation data are, within the context in which they are used, linked to the signatory and to no other person;

(b) The signature creation data were, at the time of signing, under the control of the signatory and of no other person;

(c) Any alteration to the electronic signature, made after the time of signing, is detectable; and

(d) Where a purpose of the legal requirement for a signature is to provide assurance as to the integrity of the information to which it relates, any alteration made to that information after the time of signing is detectable.

4. Paragraph 3 does not limit the ability of any person:

(a) To establish in any other way, for the purpose of satisfying the requirement referred to in paragraph 1, the reliability of an electronic signature; or

(b) To adduce evidence of the non-reliability of an electronic signature.

5. The provisions of this article do not apply to the following: [...].

Article 7

Satisfaction of article 6

1. [Any person, organ or authority, whether public or private, specified by the enacting State as competent] may determine which electronic signatures satisfy the provisions of article 6 of this Law.

2. Any determination made under paragraph 1 shall be consistent with recognized international standards.

3. Nothing in this article affects the operation of the rules of private international law.

Article 8

Conduct of the signatory

1. Where signature creation data can be used to create a signature that has legal effect, each signatory shall:

(a) Exercise reasonable care to avoid unauthorized use of its signature creation data;

(b) Without undue delay, utilize means made available by the certification service provider pursuant to article 9 of this Law, or otherwise use reasonable efforts, to notify any person that may reasonably be expected by the signatory to rely on or to provide services in support of the electronic signature if:

- (i) The signatory knows that the signature creation data have been compromised; or
- (ii) The circumstances known to the signatory give rise to a substantial risk that the signature creation data may have been compromised;

(c) Where a certificate is used to support the electronic signature, exercise reasonable care to ensure the accuracy and completeness of all material representations made by the signatory that are relevant to the certificate throughout its life cycle or that are to be included in the certificate.

2. A signatory shall bear the legal consequences of its failure to satisfy the requirements of paragraph 1.

Article 9

Conduct of the certification service provider

1. Where a certification service provider provides services to support an electronic signature that may be used for legal effect as a signature, that certification service provider shall:

(a) Act in accordance with representations made by it with respect to its policies and practices;

(b) Exercise reasonable care to ensure the accuracy and completeness of all material representations made by it that are relevant to the certificate throughout its life cycle or that are included in the certificate;

(c) Provide reasonably accessible means that enable a relying party to ascertain from the certificate:

- (i) The identity of the certification service provider;
- (ii) That the signatory that is identified in the certificate had control of the signature creation data at the time when the certificate was issued;
- (iii) That signature creation data were valid at or before the time when the certificate was issued;

(d) Provide reasonably accessible means that enable a relying party to ascertain, where relevant, from the certificate or otherwise:

- (i) The method used to identify the signatory;
- (ii) Any limitation on the purpose or value for which the signature creation data or the certificate may be used;
- (iii) That the signature creation data are valid and have not been compromised;
- (iv) Any limitation on the scope or extent of liability stipulated by the certification service provider;
- (v) Whether means exist for the signatory to give notice pursuant to article 8, paragraph 1 (b), of this Law;
- (vi) Whether a timely revocation service is offered;

(e) Where services under subparagraph (d) (v) are offered, provide a means for a signatory to give notice pursuant to article 8, paragraph 1 (b), of this Law and, where services under subparagraph (d) (vi) are offered, ensure the availability of a timely revocation service;

(f) Utilize trustworthy systems, procedures and human resources in performing its services.

2. A certification service provider shall bear the legal consequences of its failure to satisfy the requirements of paragraph 1.

Article 10

Trustworthiness

For the purposes of article 9, paragraph 1 (f), of this Law in determining whether, or to what extent, any systems, procedures and human resources utilized by a certification service provider are trustworthy, regard may be had to the following factors:

(a) Financial and human resources, including existence of assets;

(b) Quality of hardware and software systems;

(c) Procedures for processing of certificates and applications for certificates and retention of records;

(d) Availability of information to signatories identified in certificates and to potential relying parties;

(e) Regularity and extent of audit by an independent body;

(f) The existence of a declaration by the State, an accreditation body or the certification service provider regarding compliance with or existence of the foregoing; or

(g) Any other relevant factor.

Article 11

Conduct of the relying party

A relying party shall bear the legal consequences of its failure:

(a) To take reasonable steps to verify the reliability of an electronic signature; or

(b) Where an electronic signature is supported by a certificate, to take reasonable steps:

- (i) To verify the validity, suspension or revocation of the certificate; and
- (ii) To observe any limitation with respect to the certificate.

*Article 12****Recognition of foreign certificates and electronic signatures***

1. In determining whether, or to what extent, a certificate or an electronic signature is legally effective, no regard shall be had:

(a) To the geographic location where the certificate is issued or the electronic signature created or used; or

(b) To the geographic location of the place of business of the issuer or signatory.

2. A certificate issued outside [*the enacting State*] shall have the same legal effect in [*the enacting State*] as a certificate issued in [*the enacting State*] if it offers a substantially equivalent level of reliability.

3. An electronic signature created or used outside [*the enacting State*] shall have the same legal effect in [*the enacting State*] as an electronic signature created or used in [*the enacting State*] if it offers a substantially equivalent level of reliability.

4. In determining whether a certificate or an electronic signature offers a substantially equivalent level of reliability for the purposes of paragraphs 2 or 3, regard shall be had to recognized international standards and to any other relevant factors.

5. Where, notwithstanding paragraphs 2, 3 and 4, parties agree, as between themselves, to the use of certain types of electronic signatures or certificates, that agreement shall be recognized as sufficient for the purposes of cross-border recognition, unless that agreement would not be valid or effective under applicable law.

III. SUMMARY RECORDS OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW FOR MEETINGS DEVOTED TO THE PREPARATION OF THE DRAFT CONVENTION ON THE ASSIGNMENT OF RECEIVABLES IN INTERNATIONAL TRADE AND UNCITRAL MODEL LAW ON ELECTRONIC SIGNATURES

Summary record of the 711th meeting

Monday, 25 June 2001, at 10.30 a.m.

[A/CN.9/SR.711]

Temporary Chairman: Mr. Jeffrey CHAN (Singapore)

Chairman: Mr. Pérez-Nieto CASTRO (Mexico)

The meeting was called to order at 10.30 a.m.

OPENING OF THE SESSION

1. The TEMPORARY CHAIRMAN, opening the thirty-fourth session as outgoing chairman of the thirty-third session, paid tribute to the secretariat and others who had helped him during his term of office and expressed particular satisfaction at having presided over the completion of the work on the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects. He gave the floor to the Secretary of the Commission to outline the work of the session.

2. Mr. SEKOLEC (Secretary of the Commission) said that the main tasks before the Commission were to complete the consideration of the draft Convention on Assignment of Receivables in International Trade and the draft UNCITRAL Model Law on Electronic Signatures. During the third week of the session, the Commission would consider a number of other items listed in the provisional agenda (A/CN.9/482).

3. In accordance with the wishes of the General Assembly, he informed the Commission of the costs involved in covering the session. There would be 28 meetings—two a day—for which simultaneous interpretation would be provided. Over 500 pages of documentation had already been prepared, about 100 more would be generated during the session, and the report would run to another 70 pages, at a total cost of just over US\$ 1,000 per page in the six official languages. In addition, summary records would be provided for the first two weeks. The hourly cost of servicing the meetings, including interpretation and summary records, would be US\$ 4,400.

4. Thursday, 12 July had been reserved for an informal meeting, conducted in English only, of national correspondents for the system for the collection of case law on UNCITRAL texts (CLOUT). From 2 to 4 July, a colloquium would be held on public-private partnerships, sponsored jointly by the Commission and the Public-Private Infrastructure Advisory Facility of the World Bank. Through the generosity of a private donor, interpretation would be provided into and from English and French, and

also from Spanish. On 27 June a forum would be held, organized jointly with the University of Vienna, at which Professor Catherine Walsh would speak on “Secured transactions as a future work topic for UNCITRAL”. Lastly, he drew attention to the UNCITRAL web site, which had become an increasingly useful tool for participants, particularly with regard to the status of conventions and model laws.

ELECTION OF OFFICERS

5. The TEMPORARY CHAIRMAN said that the work of the Commission would be conducted by two Committees of the Whole.

6. Mr. CACHAPUZ DE MEDEIROS (Brazil), speaking on behalf of the Group of Latin American and Caribbean States, nominated Mr. Ogarrio REYES-ESPAÑA (Mexico) for the office of Chairman of the Commission and Mr. Pérez-Nieto CASTRO (Mexico) for the office of Chairman of the Committee of the Whole on the draft Convention on Assignment of Receivables in International Trade.

7. Mr. OLIVENCIA RUIZ (Spain) and Mr. ALVAREZ GOYOAGA (Uruguay) seconded the nominations.

8. *Mr. Ogarrio Reyes-España (Mexico) was elected Chairman by acclamation.*

9. *Mr. Pérez-Nieto Castro was elected Chairman of the Committee of the Whole on the draft Convention on Assignment of Receivables in International Trade by acclamation.*

10. *In the absence of Mr. Ogarrio Reyes-España (Mexico), Mr. Pérez-Nieto Castro (Mexico) took the Chair.*

11. The CHAIRMAN said that the other regional groups should, after consultations, propose nominations for the posts of vice-chairmen and rapporteur.

ADOPTION OF THE AGENDA (A/CN.9/482)

12. *The agenda was adopted.*

DRAFT CONVENTION ON ASSIGNMENT OF RECEIVABLES IN INTERNATIONAL TRADE (A/CN.9/486, A/CN.9/489 and Add.1, A/CN.9/490 and Add.1-4 and A/CN.9/491 and Add.1)

13. The CHAIRMAN, after stressing the need for dispatch if the Commission was to complete its work on articles 18 to 47 and the draft Convention as a whole in the next week, said that only substantive issues would be considered in plenary; any editorial amendments would be considered later by the drafting group.

Article 18

14. Mr. BAZINAS (Secretariat) recalled that the relevant documents before the Commission were A/CN.9/486, comprising the report of the Working Group on International Contract Practices, which contained the consolidated text of the draft Convention; A/CN.9/491, which contained suggestions by the secretariat on issues referred to the Commission by the Working Group, relating to draft articles 18 to 47 and the annex, and on issues left pending by the Commission or referred to it by the Working Group on draft articles 1 to 17; A/CN.9/491/Add.1, which contained a note by the secretariat on the cost estimate for a diplomatic conference at Vienna; A/CN.9/489 and Add.1, which contained an article-by-article commentary by the secretariat; and A/CN.9/490 and Add.1-4, which contained comments by Governments and international organizations on the draft Convention. There were no issues pending in relation to draft article 18. It had been suggested at the previous session that the reference to the language of notification in paragraph 1 of that article was inappropriate and should be included among the definitions. The Working Group had, however, left the provision unchanged.

15. Mr. AL-NASSER (Observer for Saudi Arabia) expressed the hope that, in order to avoid subsequent difficulties, notification would be only in the language of the original contract.

16. Mr. MORÁN BOVIO (Spain) said that the merit of the existing text, which had been extensively debated by the Working Group and at the thirty-third session, was that, while not precluding the use of the language of the original contract, it kept open the options for a broader range of possibilities. The draft text should therefore remain unchanged.

17. On a procedural matter, he proposed that, as at previous sessions, the Commission should infer from the absence of any expression of support for an amendment proposed by a single delegation that the proposal had been rejected.

18. The CHAIRMAN, stressing the desirability of such a procedure in the light of the time constraints at the current session, said he took it that the Commission wished to adopt the proposal made by the representative of Spain.

19. *It was so decided.*

20. Mr. MEENA (India) said he had reservations about the provision in article 18, paragraph 1, to the effect that notification of the assignment or payment instruction was effective when received by the debtor. It was unclear what should be done in a case where a debtor was deliberately avoiding receipt of the notification. He suggested amending the text to ensure that the debtor was deemed to have received the notification or payment instruction.

21. The CHAIRMAN, noting that there were no further comments, said he took it that the Commission wished to adopt article 18 as it stood.

22. *Draft article 18 was approved.*

Article 19

23. Mr. KOBORI (Japan), referring to article 19, paragraph 2, drew attention to the need for clarification of the extent to which a debtor was required to confirm that the assignee was the true assignee. What happened if there was no assignment or the assignment was null and void?

24. On paragraph 7, he expressed the view that the assignee should be required to provide adequate proof of all prior assignments, including duplicate assignments.

25. Mr. DUCAROIR (Observer for the European Banking Federation) said that paragraph 6, as currently worded, would impede the partial assignment of a receivable because the debtor could either act on the notification or disregard it and continue paying the assignor. In seeking to protect the debtor, the Working Group had clearly overlooked the implications. The reference in paragraph 12 of the commentary to the case of several notifications relating to partial assignments was misleading since article 19 mentioned only one partial assignment. In practice, where a very large receivable was assigned only in part, the financial institutions concerned would have an interest in ensuring that notification of the partial assignment was treated in exactly the same way as notification of the full assignment.

26. Mr. STOUFFLET (France) supported the previous speaker. While conceding that a debtor required protection in the case of incompatibility between the notification of a full assignment and the notification of a partial assignment, he saw no reason why in other cases the notification of a partial assignment should not be fully honoured by the debtor.

27. Mr. BRITO DA SILVA CORREIA (Observer for Portugal) expressed support for the point made by the previous two speakers.

28. Mr. MORÁN BOVIO (Spain) said he had no problem with paragraph 6 as currently worded. The last sentence should be interpreted in the light of the preceding sentence. If the debtor paid in accordance with the notification in the case of a partial assignment, the debtor was discharged only to the extent of the part or undivided interest paid.

29. Mr. BAZINAS (Secretariat) said that article 19 did not deal with the effectiveness of a partial assignment, which was covered by article 9. The main thrust of article 19 was to provide debtors with a clear procedure for discharging their obligations. In the case covered by paragraph 6, that of one or more notifications of partial assignments, a debtor who was required to pay several different assignees would possibly incur additional costs in the process. The main purpose of paragraph 6 was to ensure that provision was made for the coverage of any additional costs incurred in fulfilling such an obligation. Rightly or wrongly, the Working Group had taken the view that, in the case of a valid partial assignment, the debtor should have a choice between paying in accordance with the notification or disregarding the notification and paying the assignor, in which case the assignees would have to recover the receivables from the assignor and incur the risk of the latter's insolvency.

30. It was his understanding that the representative of Japan wished to include a reference in paragraph 7 to duplicate assignments. But that case was already covered by paragraph 4.

31. With regard to paragraph 2 and the question whether the debtor had to confirm that the assignee was the true assignee, the Working Group had decided that the issue did not arise sufficiently frequently to merit a reference in the Convention. If an assignment was null and void, the debtor was not, of course, discharged by paying the assignee.

32. Mr. KOBORI (Japan) said that paragraph 4 did not cover all cases relating to duplicate assignments, for example those involving both subsequent and duplicate assignments.
33. Mr. DOYLE (Observer for Ireland) said he felt that the difficulties some delegations were experiencing with paragraph 6 were matters of drafting rather than of substance, and might be resolved by deleting the words “in accordance with the notification or” from the first sentence.
34. Mr. SCHNEIDER (Germany), referring to paragraph 7, said that his delegation was concerned at the watering down of debtor protection. Debtors would not be discharged if, as a result of one invalid notification in a chain of assignments, they inadvertently paid to a non-creditor. Debtors should not be placed in that situation.
35. There was also a lacuna in the same paragraph, concerning the debtor’s entitlement to request the assignee to provide proof of the assignment. Where payment of a receivable became due before the reasonable period of time to establish proof had elapsed, it was unclear who would then be liable to pay interest. It should not fall to the debtor to bear that risk.
36. Mr. BAZINAS (Secretariat), replying to the first point made by the representative of Germany, said that the Working Group had decided that the nullity of one assignment in a chain of assignments was not an issue that needed to be covered by the draft Convention, since it raised no problems in practice.
37. With regard to the second point, it was recalled that a notification did not in itself necessarily trigger a payment obligation, or alter the payment terms of the original contract. The Working Group had considered a suggestion by the secretariat that paragraph 7 should state expressly that the obligation would be suspended if it became payable during the period allowed for the establishment of proof. However, it had decided to reject that suggestion, because, with respect to countries where a mechanism existed enabling debtors to make payments to a deposit fund or similar institution pending establishment of proof, the matter was covered by the provisions of paragraph 8. However, where no such mechanism existed under national law, the Working Group was of the view that the provisions of paragraph 7 implicitly freed the debtor from the obligation to pay interest during the period allowed for provision of adequate proof. Otherwise, the entitlement to such a period would be meaningless. The Commission must now decide whether to accept the conclusions of the Working Group in that regard.
38. The CHAIRMAN reminded the Commission that before the discussion continued on paragraph 7 the issue raised by the representative of the European Banking Federation with regard to paragraph 6 needed to be resolved.
39. Mr. WHITELEY (United Kingdom) said that the substantive rule in paragraph 6 should not be changed. It should be read in conjunction with article 26, paragraph 2, so that if an assignor received payment in relation to a partial assignment, the assignee would be able to claim those proceeds. While acknowledging that that created some risks for the assignee, in his view, the rule was an appropriate compromise between the interests of all those involved.
40. Mr. MEENA (India) said that the first sentence of paragraph 6 referred to full discharge “in accordance with the notification”, whereas the second referred to partial discharge, also “in accordance with the notification”. In his view, there was some doubt whether the same notification was being referred to in both cases, in which case there appeared to be a contradiction. If different notifications were being referred to, that should be stated more clearly.
41. Mr. DUCAROIR (Observer for the European Banking Federation) said he was not entirely convinced by the arguments put forward by the secretariat and supported by, among others, Spain. While he was aware that article 19 did not deal specifically with the legal effectiveness of assignment, it certainly dealt with its practical financial effectiveness, which was at least as important. It established the conditions for a debtor’s discharge by payment. However, article 19, paragraph 2, did not extend to cases of partial assignment of a receivable. As currently drafted, paragraph 6 could therefore lead to a situation in which an assignor with a receivable of, say, US\$ 1 billion, seeking a bank loan of US\$ 500 million, could be asked to transfer the entire receivable as security for the loan, simply because only then could the prospective lender be certain of receiving payment; for the lending bank would be aware that if it notified the original debtor of the assignment of only part of the receivable, the debtor could ignore the notification, and continue to pay the assignor. Without any certainty, given the ever-present threat of insolvency, that the assignor would be in a position to transfer the proceeds to the assignee, the prospective lender would be reluctant to enter into such an agreement.
42. Mr. BAZINAS (Secretariat) said that the first question was whether a partial assignment was possible under the Convention, to which the reply was in the affirmative, pursuant to article 9. The second question was whether an assignee could obtain payment in the case of a partial assignment; and article 19 implied that that might not be possible if notification was given of the partial assignment; for the debtor could then choose whether to pay in accordance with the notification, or according to the other provisions of the article, namely, paragraphs 2, 3 and 4. The representative of the United Kingdom had drawn attention to the possibility of an assignee structuring a transaction in such a way as to ensure payment, by arranging payment to an account held by the assignor on behalf of the assignee, segregated from the assignor’s other assets. The assignee could also ensure payment by coming to an agreement with the debtor that a partial assignment would be honoured. Hence, paragraph 6 allowed the debtor the choice of paying in accordance with the other provisions of the article, if it considered partial assignment to be a significant problem; and, in that knowledge, the assignee would tend to structure the transaction in such a way as to avoid making a notification of a partial assignment. The real question was whether the Commission believed that the solution provided in article 26, paragraph 2, was the best available solution.
43. Mr. AL-NASSER (Observer for Saudi Arabia) supported the proposal by the observer for Ireland with regard to paragraph 6. He also sought clarification of the basis on which an agreement could be reached between assignee and debtor to ensure payment.
44. Mr. BAZINAS (Secretariat), referring to paragraph 19 of the report of the Working Group (A/CN.9/486), said that paragraph 6 had been designed to protect the debtor in a sufficient but flexible way, without prescribing in a regulatory manner what the assignor, the debtor or the assignee ought to do and without creating liability.
45. Mr. MACHETTA (Italy) said he shared the concerns expressed by the observer for Saudi Arabia and the representative of the European Banking Federation, and supported the formulation proposed by the observer for Ireland. The question of the suspension of a payment obligation had still to be resolved and, in his view, could be a source of controversy. One possibility might be to limit the period allowed for the establishment of adequate proof by the debtor.
46. Mr. IKEDA (Japan) said that his delegation agreed with the comments made by the representative of France concerning assignment in part. When the debtor received notification of a

partial assignment, the debtor had to pay in accordance with that notification. The provision that the debtor was obliged to pay even in cases where it did not receive notification was unfair and somewhat contradictory. The wording of paragraph 6 should therefore be improved.

*The meeting was suspended at 12.20 p.m.
and resumed at 12.40 p.m.*

47. The CHAIRMAN inquired whether the European Banking Federation wished to make a proposal on paragraph 6.

48. Mr. DUCAROIR (Observer for the European Banking Federation) said that it would present its proposal at the beginning of the next meeting.

49. The CHAIRMAN invited the Commission to consider the comments of the representative of Germany concerning paragraph 7.

50. Mr. SCHNEIDER (Germany) reiterated his delegation's concerns regarding the provisions of paragraph 7. His delegation did not agree with the view that the nullity of one assignment in a chain of assignments was not a situation that arose in practice. As to the problem of determining who would pay the interest, the secretariat had put forward a good proposal in that regard. However, the rule was subject to misinterpretation and it was necessary to deal with the issue in so far as payment to a depository or a court would give rise to costs.

51. Mr. MACHETTA (Italy) said that his delegation agreed with the remarks made by the representative of Germany. Under Italian law, payments by deposit did not discharge the debtor. That situation might lead to a conflict between the provisions of the Convention and national legislation.

52. Mr. STOUFFLET (France) said that, while his delegation shared Germany's concerns, it failed to see how the problem could be solved, since the Commission had agreed that notification could also be given by the assignee. One possible solution would be for the assignor to make the notification. While such a solution might remove some of the difficulties, he was not sure that the Commission would be willing to accept it.

53. Mr. BAZINAS (Secretariat) said that the representative of France had hit the nail on the head. In its discussion of paragraph 7, the Working Group had recognized the issues raised by the representative of Germany but had decided not to address them. The introduction of a new provision stating that only the assignor could give notification would radically alter the text agreed over a five-year period. The Working Group had decided that the assignee should notify the debtor independently of the assignor because, when notification was required, the relationship between the assignor and the assignee was often not good enough to permit cooperation between the two, particularly in cases of insolvency.

54. Mr. WINSHIP (United States of America) said that the question raised by the representative of Germany had been debated by the Working Group on no fewer than three separate occasions. The Working Group had come up with a text that sought to strike a balance among the parties. Any belated attempt to redraft the text of paragraph 7 would upset the balance not only of that paragraph but perhaps also of other paragraphs.

55. Mr. BRINK (Observer for the European Federation of Factoring Associations—EUROPAFACTORING) said that he failed to see the practical relevance of the first issue raised by the representative of Germany. For the purposes of a notification, the assignee must have certain information concerning the receivable because the receivable had to be described in the notification. It would be strange to expect a third party to give a notification to a debtor requesting payment without that third party's having any information about the receivable.

56. The second issue, concerning the suspension of payment and the question of who would be liable for costs and interest, could be addressed in the commentary in such a way as to make clear that, during the period needed to establish the evidence and check the evidence presented to it by the assignee, the debtor would be entitled to withhold payment for a reasonable length of time.

57. The CHAIRMAN said that the issues raised by the representative of Germany had been sufficiently discussed and resolved to the satisfaction of all.

58. Mr. AL-NASSER (Observer for Saudi Arabia) said that, in the discussion of paragraph 6, the secretariat had provided information on the period of time during which the debtor would be checking proof of payment. In its explanation, the secretariat had referred to the person who would have to bear the costs. It would be unfair to expect the debtor to pay interest during that period, since the debtor would have no way of knowing how long it would take to establish the proof.

59. The CHAIRMAN said that the Commission had taken note of the concern expressed by the representative of Saudi Arabia, and would consider the European Banking Federation's proposal on the wording of paragraph 6 at its next meeting. If there were no further comments on article 19, the Commission could begin its consideration of article 20.

Article 20

60. Mr. BAZINAS (Secretariat) said that article 20 dealt with the debtor's defences and rights of set-off. The purpose of paragraph 1 was to ensure that the debtor had all the defences and rights of set-off that it could raise against the assignor even after notification but only in cases where those rights arose from the original contract or a related contract.

61. Paragraph 2 provided that the debtor could raise rights of set-off from contracts not related to the original contract against the assignee only if such contracts had been available at the time of notification. After notification, the rights of set-off from unrelated contracts were not available to the debtor, on the grounds that the assignee should not be held responsible for any rights of set-off that the debtor might accumulate on the basis of transactions with the assignor.

62. Paragraph 3 provided that the debtor could not raise against the assignee by way of defence or set-off the breach of a contractual limitation by the assignor, since that would defeat the purpose of article 11. At its last session, the Working Group had considered the issue of whether the essence of the rule contained in article 30 could be included in article 20. Inclusion of the rule would mean that, for issues not covered by article 20, the law applicable would be the law governing the receivable or the law governing the original contract. The Working Group had received that proposal at a late stage in its proceedings and had pointed out that the inclusion of article 30 in article 20 might raise concerns for those countries that wanted to see chapter V in its entirety subject to an opt-out. Moreover, if article 30 was included in article 20, it would be necessary to incorporate the public policy and mandatory law exceptions into article 20, just as those exceptions had been incorporated into articles 24 and 25. Comments by Governments and international organizations on that issue were contained in document A/CN.9/490 and Add.1-4.

63. Mr. STOUFFLET (France) said that his delegation could accept article 20 as it stood, but would object to the inclusion of the substance of article 30 in article 20.

64. Mr. SMITH (United States of America) said that, in paragraph 3, there should be a reference to article 12 as well as to article 11.

The meeting rose at 1.20 p.m.

Summary record of the 712th meeting

Monday, 25 June 2001, at 2.30 p.m.

[A/CN.9/SR.712]

Chairman: Mr. Pérez-Nieto CASTRO (Mexico)

The meeting was called to order at 2.50 p.m.

DRAFT CONVENTION ON ASSIGNMENT OF RECEIVABLES IN INTERNATIONAL TRADE (*continued*) (A/CN.9/486, A/CN.9/489 and Add.1, A/CN.9/490 and /Add.1-4, and A/CN.9/491 and Add.1)

Article 19 (continued)

1. Mr. DUCAROIR (Observer for the European Banking Federation) said that he had been unable to reconcile his views with those of the Irish and United Kingdom representatives and still considered that article 19, paragraph 6, should be deleted altogether.

2. Mr. MEENA (India) proposed that, to remove any ambiguity, the last sentence of paragraph 6 should be amended to read: "If the debtor does not pay in accordance with the notification ...".

3. The CHAIRMAN suggested that since there appeared to be no support for those two proposals the Commission should merely take note of them and consider article 19 as approved.

4. *Draft article 19 was approved.*

Article 20 (continued)

5. Mr. SALINGER (Observer for Factors Chain International), on the relationship between articles 20 and 24, said that since the purpose of the Convention was to encourage the provision of finance for receivables internationally at a reasonable and fair price, those who provided that finance had to have certainty and reasonable confidence. The question of set-off and the counter-claiming rights of the debtor was thus a very important matter to them. Under article 20 as presently worded the debtor could raise against the assignee any other right of set-off, provided it was available to the debtor at the time of notification; and it had been explained that that was what was available under the national law. It should, however, be made clear which national law was involved. While it was claimed that a conflict-of-law rule was contrary to the normal principles of private international law and that its inclusion might limit the number of States wishing to ratify the Convention, there was little point in having a widely ratified instrument that did not achieve its purpose by providing certainty.

6. He therefore suggested that it should be provided that the rights of the debtor were those available under the law of the original contract or, if that was not possible, that article 24 should not be subject to an opt-out by States.

7. The CHAIRMAN, noting the absence of comments, took it that the Commission had taken note of the proposal of the observer for Factors Chain International.

8. He called for comments on the United States proposal that article 20, paragraph 3, should contain a reference to article 12.

9. Mr. BAZINAS (Secretariat) said that such a reference seemed necessary since article 11 included a rule validating an assignment of a receivable despite an anti-assignment clause, and article 12 contained a rule validating the assignment of a right securing a receivable despite an anti-assignment clause. Any consequential amendments to paragraph 3 could be left to the drafting group.

10. Mr. WHITELEY (United Kingdom) said that the drafting of paragraph 3 referred to defences and rights of set-off that might arise when the assignment took place in spite of the contractual clause prohibiting it. Since article 11 had been redrafted, there might be circumstances in which a breach-of-agreement clause was effective, and paragraph 3 should perhaps cover that situation as well.

11. Mr. MORÁN BOVIO (Spain) said that the United Kingdom suggestion should be referred to the drafting group, as should the reference to article 12 proposed by the United States.

12. Mr. DESCHAMPS (Canada) said that under article 20, paragraph 2, the debtor could raise any right of set-off available to him at the time when notification of the assignment was received. Article 19, paragraph 6, which was apparently going to be retained, allowed the debtor to continue paying the assignor after having received notification of a partial assignment. Logically he should also be able to continue to raise a right of set-off even if that right arose subsequent to notification. Article 19, paragraph 6, and article 20, paragraph 2, were therefore inconsistent and should be aligned. Alternatively, paragraph 6 of article 19 could be deleted.

13. The CHAIRMAN asked whether the United Kingdom and Canadian proposals, which seemed to be drafting matters, could be considered by the drafting group.

14. Mr. DESCHAMPS (Canada) said that the issue he had raised was not just a drafting matter. There had to be consistency in terms of substance. Set-off was a way of making payment and article 19, paragraph 6, allowed the debtor in the case of a partial assignment to make payment to the assignor after having received notification. However, article 20, paragraph 2, provided for a freezing of set-off rights. The two paragraphs were therefore inconsistent, set-off being by definition a way of making payment. Was it intended that, on the one hand, the account debtor was entitled to continue paying the assignor after having received notification of a partial assignment, and, on the other, that the account debtor in the same situation was not entitled to set off?

15. Mr. SALINGER (Observer for Factors Chain International) said that from the practical point of view there was no need for compatibility between article 19, paragraph 6, and article 20, paragraph 2. There were many cases where a notification was given to the debtor purely to intervene in his rights of set-off and

where payment continued to be made to the assignor. That happened in certain discounting arrangements. The reason for giving the debtor the alternative of paying in disregard of the notice of assignment was to avoid his having to incur additional costs. Article 20, paragraph 2, had nothing to do with additional costs but was merely a security advantage for the assignee which should be included even in the case of a partial assignment. In such a case the debtor could use his right of set-off against the unassigned part of the debt. If allowed to continue to raise set-off after the notice he could seriously detract from the assignee's security.

16. Mr. DESCHAMPS (Canada) said that the problem was that the present text was not clear as to the effects of the notification of a partial assignment on the debtor's right to claim set-off against the assignor, which might arise after notification. The issue was one of interpretation. His own reading was that the courts would probably construe article 19, paragraph 6, as an implied exception to article 20, paragraph 2.

17. Mr. ZANKER (Observer for Australia) said that he had difficulty understanding the point raised by the representative of Canada, since he had thought that articles 19 and 20 dealt with two completely separate subjects. He wondered if the suggestion that the courts might construe article 19, paragraph 6, as an implied exception to article 20, paragraph 2, could be amplified.

18. Mr. BAZINAS (Secretariat) drew attention to paragraph 19 of the report of the Working Group on International Contract Practices on the work of its twenty-third session (A/CN.9/486), which referred to the Working Group's discussion as to whether the effectiveness of notification of a partial assignment should be treated differently for different purposes. The view had been expressed that it should be treated in the same way. However, the report continued, "that suggestion was objected to, since it would inadvertently result in disrupting useful practices. It was also stated that draft articles 9 and 18 respectively validated partial assignments and notifications of partial assignments, and that draft article 17 did nothing to invalidate such assignments or notifications. On that understanding, the Working Group decided that only the issue of the debtor's discharge in the case of a partial assignment needed to be addressed and that draft article 19, dealing with the debtor's discharge, was the appropriate place in the text of the draft Convention in which that matter should be addressed."

19. It was now for the Commission to decide whether to confirm the decision of the Working Group, or to change it in the light of the point raised by the representative of Canada.

20. Mr. STOUFFLET (France) said that he, too, considered that the two articles dealt with two different situations and should not be linked. The texts should stand, but the commentary should reflect the views of the Working Group.

21. The CHAIRMAN said that the general view seemed to be that the two texts dealt with two different issues and that, following the secretariat's comments, the point raised by the representative of Canada had been covered.

22. Mr. BAZINAS (Secretariat) drew attention to a suggested amendment to be found in paragraph 41 of the Note by the secretariat (A/CN.9/491). In some jurisdictions, if the assignment was effective, the debtor might lose any right of set-off. As article 20 did not grant to the debtor a right of set-off if, under law applicable outside the draft Convention, the debtor did not have such a right, the debtor might not have any right of set-off

in such jurisdictions. In order to avoid that result, the words "as if the assignment had never been made" could be inserted at the end of article 20, paragraph 1. That suggestion was now before the Commission.

23. Mr. MORÁN BOVIO (Spain) said he was in favour of that addition.

24. The CHAIRMAN said he took it that the Commission wished to accept the addition suggested by the secretariat.

25. *It was so decided.*

26. *Draft article 20, as amended, was approved.*

Articles 21, 22 and 23

27. *Draft articles 21, 22 and 23 were approved.*

Article 24

28. Mr. BAZINAS (Secretariat) said that draft article 24 on the law applicable to competing rights had often been called the key to the Convention because it dealt with problems of priority in the case of competing claims. Paragraph 1 (a) provided that, with respect to the right of a competing claimant, the law of the State in which the assignor was located governed the characteristics and priority of the right of an assignee in the assigned receivable; and of the right of the assignee in proceeds that were receivables whose assignment was governed by the Convention. Paragraph 1 (b) dealt with priority with respect to certain proceeds of receivables such as negotiable instruments, securities and deposit accounts. Paragraph 1 (c) dealt with the characteristics of the right of a competing claimant in proceeds.

29. The Working Group had been unable to agree on the text of subparagraphs (b) and (c) and had decided to retain them in square brackets. With the possible exception of the law applicable to priority in the case of negotiable securities, a uniform solution had not been found. With respect to bank deposits, the Working Group had heard arguments in favour of the location of the account and of the location of the assignor. In the case of priority with respect to securities, there seemed to be an emerging consensus in favour of the location of the account (the so-called PRIMA approach). Following the meeting of the Working Group, members had discussed the issue with experts from the Hague Conference on Private International Law working on the law applicable to dispositions of securities held with an intermediary. Those discussions were reflected in document A/CN.9/491, paragraphs 3 to 19. However, a problem of coordination arose: if the Convention were to include a rule, it would have to be compatible with the text eventually adopted by the Hague Conference. One possibility would be to make article 24 a general text, but it might not be interpreted in the light of the Hague Conference text, leading to two different results. It was therefore suggested in document A/CN.9/491 that paragraphs 1 (b) and (c) should be deleted, leaving article 26 as the main text on proceeds. The secretariat had also suggested that, for clarity's sake, the essence of paragraph 2 should be included in the definition of priority in article 5.

30. Other issues raised in the Working Group, including the definition of priority with respect to proceeds, were set out in document A/CN.9/491.

31. The text of the Convention would undoubtedly be enriched if the Commission could agree on what would be the laws applicable to priority with respect to proceeds that were securities or deposit accounts, but that might prove impossible because of difficulties of substance and coordination.

32. Mr. WINSHIP (United States of America) said that, although his delegation had been very anxious to have a broad proceeds rule in article 24 dealing with negotiable instruments, bank accounts and securities accounts, it now reluctantly agreed that the best course would be to eliminate paragraph 1 (b) and (c) both for the reasons given by the secretariat and because it wished to see the Convention completed as soon as possible.

33. Mr. MORÁN BOVIO (Spain) was also in favour of deleting paragraphs 1 (b) and (c). The secretariat's other suggestions on the rewording of draft article 24 were also useful.

34. Mr. KOBORI (Japan) also agreed with the suggestion of the secretariat but considered that the characteristics of the right of an assignee should not be referred to in article 24 since they should not be governed by the law of the State in which the assignor was located. He therefore proposed that the language suggested in paragraph 18 of document A/CN.9/491 for a revised article 5 (g) should be amended to read: "Priority means the right of a person in preference to the right of a competing claimant", with the rest of the suggested text deleted.

35. Mr. BAZINAS (Secretariat) said that the secretariat would certainly not insist on its suggestion for incorporating paragraph 2 of article 24 into the definition of priorities. That was merely a drafting proposal to simplify the wording of article 24. But it wished to ensure that the characteristics of the rights of the assignee in the case of a priority conflict were subject to the law of the assignor's location. He understood, however, that there was an objection to that approach.

36. At the request of the Chairman, he clarified the secretariat's suggestions in document A/CN.9/491, which were to delete article 24, paragraph 1 (b) and (c), as a consequence of which 1 (a) (ii) might also need to be deleted. Article 24 would then read simply: "With the exception of matters that are settled elsewhere in this Convention and subject to articles 25 and 26, the law of the State in which the assignor is located governs the priority of the right of an assignee in the assigned receivable with respect to the right of a competing claimant."

37. Moreover, the secretariat now wished to suggest that its drafting proposal set out in paragraph 18 of document A/CN.9/491, to include paragraph 2 of article 24 in the definition of priority in article 5 (g), should be amended by the deletion of the words "and any steps necessary to render a right effective against a competing claimant". Those words had been intended to address the issue of form as against third parties, an issue that the Commission might take up in the context of a discussion on form.

38. Mr. STOUFFLET (France) thought it worthwhile to retain article 24 (b) in the wording suggested by the secretariat in paragraph 19 of document A/CN.9/491, namely: "The priority of the right of the assignee in proceeds that are receivables whose assignment is governed by this Convention with respect to the right of a competing claimant", even if it was decided to delete paragraph 1 (b) and (c) of the current draft article 24, since it was useful to have a conflict-of-law rule on proceeds of whatever kind.

39. Mr. WHITELEY (United Kingdom) endorsed that view. He also noted that article 24, paragraph 2 (a), stated that the assignor's location would determine whether a right was a personal right or a property right. In his delegation's view, the assignor's location could decide whether the assignor had transferred a right but not whether the assignor had a personal or a property right in the first place. The word "is" was a little too broad in scope. He therefore supported the proposal by the representative of Japan in that respect.

40. Mr. BAZINAS (Secretariat) said that the objection was not to moving the essence of paragraph 2 into the definition of priority, but to the substance of paragraph 2 (a) as it stood.

41. Ms. WALSH (Canada) supported the language suggested by the secretariat in paragraph 19 of document A/CN.9/491 and agreed with the secretariat's suggested deletion of paragraph (b) from that proposal, since once paragraphs 1 (b) and (c) were eliminated from article 24, retaining it seemed to complicate matters without adding much value.

42. She was also in favour of deleting the reference to the law governing the "characteristics" of the right of an assignee in article 24, paragraph 1 (a) (ii). She construed the current drafting, which spoke of the choice of law for "the characteristics and priority of the right", as raising two separate issues of choice of law. Her delegation had always assumed that the definition of characteristics of a right in current paragraph 2 applied only where the characteristics of the right were part of the priority analysis, and that the court would have to decide whether an assignee's right had priority. To do so it would have to decide whether the right was a personal or a property right. Her delegation thus supported the removal of the term "characteristics". It should also be made clear that characteristics were involved only as an element in the priority analysis and not for some other independent purpose.

43. Mr. BAZINAS (Secretariat), responding to a request by the CHAIRMAN for clarification, said that, thanks to the flexible attitude of delegations, particularly that of the United States, the Commission had made great strides towards reaching agreement on article 24. The remaining issues, including the decision on whether to include the provision in paragraph 1 (b), on characteristics and priority of the right of the assignee in proceeds that were receivables, were of secondary importance. Two delegations had supported the inclusion of that provision, arguing that it would be helpful because the proceeds might be receivables governed by the Convention. The secretariat's initial view had been that the most problematical proceeds were bank accounts, securities and negotiable instruments. In the absence of the rule in paragraph 1 (b), only the rule in article 26 would be left.

44. The representative of Canada had seen no value in paragraph 1 (a) (ii). The issue of priority in proceeds which were receivables whose assignment was governed by the Convention was perhaps a matter for article 26, and one on which a decision could be taken when the Commission came to discuss that article.

45. The secretariat considered its suggestion for paragraph 2 to be a drafting proposal, on which it would not insist. In any case it was a separate issue. The representative of Canada had argued that the characteristics of a right of an assignee in a priority conflict should be subject to the law of the location of the assignor. That was stated in article 24, paragraph 2, as currently drafted, and was also reflected in the secretariat's suggestion to include paragraph 2 in the definition of priority. In that sense the substance would not be changed; however, at least two

delegations had objected to the substance of article 24, paragraph 2 (a), as it stood, and that was something on which the Commission might wish to decide.

46. Mr. MORÁN BOVIO (Spain) agreed with some of the points made by the secretariat. It would be better to incorporate the rule on proceeds in article 26. It also seemed appropriate to relocate article 24, paragraph 2, in the definition of priority. The wording proposed in paragraph 19 of document A/CN.9/491 could, in his delegation's view, be retained but placed in article 26. However, he was not sure if that was essential and would like to hear the views of others in that regard.

*The meeting was suspended at 4.20 p.m.
and resumed at 4.40 p.m.*

47. Mr. WHITELEY (United Kingdom) said his delegation considered that the text of draft article 24 (b), as proposed in paragraph 19 of document A/CN.9/491, should be included somewhere in the Convention.

48. The CHAIRMAN called for comments on the secretariat's suggestion that paragraph 2 of article 24 should be relocated in article 5 and redrafted.

49. Mr. WINSHIP (United States of America) supported the secretariat's suggestion. It would largely address the concern of the Canadian delegation since it would then be clear that the matters currently referred to under "characteristics" would be considered only for the purpose of determining priority over a competing claimant. Article 5 (g) should be modified as proposed in paragraph 18 of document A/CN.9/491. Paragraph 2 of article 24 could then be deleted.

50. Mr. ZANKER (Observer for Australia) requested clarification. He recalled that the view had been expressed that the characteristics of the right of an assignee should not fall to be determined by the law of the place of the assignor, and wondered whether article 24, paragraph 2, which did not seem to be a definition, would fit into article 5.

51. Mr. BAZINAS (Secretariat) confirmed that the suggestion was that the text of article 24 should be the text in paragraph 19 of document A/CN.9/491, with subparagraph (b) of that text to be considered in the context of article 26.

52. There remained the question of paragraph 2 of article 24 on which two issues had to be decided. The placing was a drafting matter, but the Commission had first to decide whether to confirm the rule in paragraph 2 as it stood or, as suggested by the representative of Japan, to delete that paragraph because the question of whether the right was a personal right or property right or whether it was security for indebtedness or another obligation had nothing to do with priority.

53. He recalled the reasons for the inclusion of paragraph 2 in article 24 and all the references in that article to the characteristics of a right. If the priority rule under which a person had to be paid first was applied in a jurisdiction where that priority was not known, it might well mean that priority was worth nothing, since the issue of having a property right was not addressed in that jurisdiction. If under that law an assignee had a personal right, then in a case of insolvency the assignee with priority might end up with nothing. That was why the Working Group had considered it necessary to strengthen the essence of priority. It had not been able to agree on whether the right of the assignee was

a property right or a personal right but it had agreed that the law of the assignor's jurisdiction should govern it.

54. At the last session of the Working Group the drafting group had spent much time trying to address the point raised by the representative of Canada. It was necessary to limit the issue of whether the right was a personal right or a property right to the context of a priority conflict, when it was essential to determine priority. That was why in article 24, paragraph 1 (a) (i), the issue of characteristics was addressed only with respect to the right of a competing claimant.

55. The Commission still had to decide whether to confirm that article 24 was right in submitting both the priority and the character of a right in a priority conflict to the law of the assignor's location. If that policy decision of the Working Group was confirmed by the Commission it could then consider the secretariat's drafting point as to the placement of that rule. While the secretariat considered that to be a secondary issue article 24 would read better if the suggestion were adopted, and the point raised by the representative of Canada would be better understood if that legal nature of the right was part of the definition of priority. Moreover, a similar approach had been adopted in the Hague Conference text.

56. Ms. WALSH (Canada) said that, while supporting the simplification of article 24, she did not think that article 5 was necessarily the best place for the wording of it.

57. The Commission had decided that the question of the characteristics of a right, where they were relevant to the determination of priority, should also be governed by the law of the assignor's location. Her delegation preferred to see the idea expressed in that way, rather than indirectly through the definition of priority, and suggested an approach similar to that of the Hague Conference text, which stated that the law governing priority extended to the characteristics and extent of the right where they were relevant to the determination of priority, with a list of the issues involved.

58. The CHAIRMAN suggested that the delegations of the United States, Canada, the United Kingdom, Australia and any other interested delegations should meet to come up with a text.

59. Mr. BAZINAS (Secretariat) said that if the Commission did not wish to adopt the secretariat's suggestion, the alternative would be to omit paragraph 2 and include in article 24 a text reading: "With respect to the right of a competing claimant, the law of the State in which the assignor is located governs whether that right is a personal or property right, whether or not it is security for indebtedness or another obligation, and the priority of the right of the assignee in proceeds"—an enumeration of the separate issues, as in the Hague Conference text.

60. Ms. WALSH (Canada) said that her delegation's proposal was not precisely as summarized by the secretariat. Her delegation was concerned not to treat the governing law for the character of the right as a separate issue. Those issues were relevant only in the context of a priority conflict and the suggestion that they should all be listed separately would not meet her delegation's concerns. If there was no interest in trying to find a clearer form of drafting, her delegation would prefer the drafting proposed in paragraph 18 of document A/CN.9/491, rather than the secretariat's most recent suggestion.

61. Mr. BAZINAS (Secretariat) pointed out that article 24, paragraph 1 (a), and paragraph 2 were not enclosed in square

brackets. The Working Group had considered the Canadian concerns and agreed on those texts. Article 24, paragraph (a), and paragraph 2 had been adopted by the Working Group, with the support of Canada. The substance of the text was thus settled. It now appeared, however, that the substance of article 24, paragraphs 1 (a) and 2 was not acceptable.

62. Mr. MORÁN BOVIO (Spain) suggested that the drafting group could adopt in final form the secretariat's text as proposed in paragraph 18 of document A/CN.9/491 with any proposals for drafting changes, together with a reference to draft article 5.

63. Mr. WHITELEY (United Kingdom) said that a suggestion had been made that his delegation's standpoint differed from that of Canada, but that was not the case. He also concurred with the representative of Spain that the matter was primarily one of drafting and that the Commission had agreed on the substantive point.

64. He noted that, although paragraph 2 of article 24 was not in square brackets, it had been adopted rather speedily on the last day of the Commission's session and therefore might merit further consideration, subject to the comments of the Canadian representative. Alternatively, the drafting group could look at the text in paragraph 18 of document A/CN.9/491 and reword it as necessary for the consideration of the Commission at its next meeting.

65. Mr. FRANKEN (Germany) said that the Commission's solution for the definition of location was not very satisfactory. Banks in many countries did business through branches which were not independent, and the definition of location, which referred to the central administration, would be insufficient in such cases. In the case of an assignor who used the proceeds of a receivable to buy shares which were put into a bank account with a branch of a United States bank and then pledged to the bank for extending a loan, United States law would have to apply even if the branch were in Germany. Under the United States law, the assignee would have a property right in the proceeds stemming from the payment, whereas a German bank handling the same case would not give the assignee any rights to the proceeds. While he did not intend to make a proposal at that stage, he wished to know whether the definition of location had been settled, or whether it would be reconsidered.

66. Mr. MORÁN BOVIO (Spain), speaking on the point raised by the representative of Germany, said that the Commission should not reopen issues that had been settled in the Working Group at the last session. The Commission should not reconsider the question of location in the absence of a compelling alternative proposal.

67. The CHAIRMAN said he did not consider that the point raised by the German representative could be taken up at the present stage.

68. Mr. BAZINAS (Secretariat) said that the Commission must decide whether any proposals for changes were drafting changes or policy changes, as the task of the drafting group was simply to make minor editorial changes and adjust the text in the other languages, not to start again from scratch. Accordingly, the secretariat would be happy to withdraw its drafting proposal for article 24, retaining the text in article 24, paragraph 1 (a) (i) and (ii).

69. The CHAIRMAN said that the drafting group would meet that afternoon to prepare a proposal on the drafting and

relocation of the paragraph. The criteria had been established and the Commission would return to matters of substance only if it so decided.

70. Mr. STOUFFLET (France) said that the point raised by the German representative was not a minor one. The Working Group should revisit the question at some stage.

71. Mr. DESCHAMPS (Canada) pointed out that the problem raised by the German representative would not arise since the Commission had decided to delete the provision on the law of the State of the assignor governing the priority of the rights of proceeds.

72. His delegation did not object to the substance of the text suggested by the secretariat in paragraph 18 of document A/CN.9/491, but merely felt that the issues that the secretariat was suggesting be added to the definition of priority should be governed by the law of the assignor only to the extent that they were relevant to the definition of priority. If that were to involve too lengthy an editorial discussion, his delegation would much prefer to go along with the secretariat's proposal rather than retaining article 24, paragraph 2.

73. Ms. McMILLAN (United Kingdom) said that her delegation would prefer not to discuss location at the present juncture. Its understanding was that the Commission wished to delete paragraph 2 of article 24 and to accept the secretariat's suggestion in paragraph 18 of document A/CN.9/491 as the basis for a definition of priority. Its understanding was that the Commission wished to delete the word "characteristics" when it reproduced the short form of article 24, which would simply include the text at present in article 24, paragraph 1 (a) (i).

74. Mr. DOYLE (Observer for Ireland) said he shared the United Kingdom's perception of what had been decided with regard to article 24. On the question of location, however, he agreed with the representative of Spain: the question had been settled at the last session of the Commission and should not be reopened at any stage.

75. Mr. DUCAROIR (Observer for the European Banking Federation) said he could not share the views of the representatives of Spain and Ireland. Location was a very important point and did not concern proceeds alone but was of a more general scope. It was of concern both to central and to commercial banks. The present meeting might not be the right time to examine it, but he very much hoped that there could be a new discussion of that important issue before the end of the session.

76. The CHAIRMAN said that at its next meeting the Commission would continue to examine the text of the Convention through to article 47, before reverting to any points left in abeyance.

77. If he heard no objection, he would take it that paragraphs 1 (a) (ii), (b), and (c), were to be deleted; that paragraph 1 (a) (ii) was to be considered for inclusion in draft article 26; and that the thrust of paragraph 2 was to be included in draft article 5 (g).

78. *On that understanding, draft article 24 and draft article 5 (g) were approved.*

The meeting rose at 5.45 p.m.

Summary record of the 713th meeting

Tuesday, 26 June 2001, at 9.30 a.m.

[A/CN.9/SR.713]

Chairman: Mr. Pérez-Nieto CASTRO (Mexico)

The meeting was called to order at 9.45 a.m.

DRAFT CONVENTION ON ASSIGNMENT OF RECEIVABLES IN INTERNATIONAL TRADE (*continued*) (A/CN.9/486, A/CN.9/489 and Add.1, A/CN.9/490 and Add.1-4, A/CN.9/491 and Add.1)

Article 25

1. Mr. MORÁN BOVIO (Spain) proposed that article 25, which seemed to enjoy broad support, should be adopted as it stood.

2. Mr. SCHNEIDER (Germany) said that the acceptability of paragraph 2 depended on the way in which the term “priority status” was defined.

3. Mr. BAZINAS (Secretariat) said that, following its adoption of article 24, the drafting group had assumed on the previous day that the definition of “priority” contained in article 5 (*g*) had also been approved for referral to the group. It had therefore prepared the following version of the definition based on that set forth in paragraph 18 of document A/CN.9/491: “Priority means the right of a person in preference to the right of a competing claimant and, to the extent relevant for such purpose, includes the determination whether the right is a property right or not and whether it is a security right for indebtedness or other obligation or not.” That definition should, in principle, be applicable to the Convention as a whole, including article 25.

4. In the light of consultations with experts who had participated in the Hague Conference proceedings, it was suggested that the words “the application of” should be inserted after “only if” in article 25, paragraph 1, and the following sentence should be added at the beginning of paragraph 2: “The mandatory rules of law of the forum should not displace the priority rules of the applicable law.”

5. Mr. SCHNEIDER (Germany) expressed reservations about the proposed rewording of the definition of “priority” in article 5 (*g*), in the light of the need for a new definition of the notion of location, a matter raised at the previous meeting in connection with article 24.

6. Ms. WALSH (Canada) expressed support for the proposed amendments to paragraphs 1 and 2. They clarified and confirmed the Commission’s policy and brought the wording into line with that of other private international law instruments.

7. Mr. HUANG FENG (China) expressed reservations about the word “manifestly” in paragraph 1. The courts and competent authorities in individual countries were concerned to ensure that public policy was not jeopardized by the application of a provision of foreign law. It was immaterial whether the effect on public policy was manifest or implicit. He proposed rewording the latter part of the sentence to read “only if there are sufficient grounds to think that the provision is contrary to the public policy of the forum State”.

8. He proposed using the term “jurisdiction” instead of “State”, especially in paragraph 2, because the courts usually took the law

prevailing in a particular jurisdiction as their standard. In the case of China, for example, the four different jurisdictions—mainland China, Hong Kong, Macao and Taiwan province—applied different standards in the area of public policy.

9. The CHAIRMAN said that the word “manifestly” had formed part of European legal terminology since the late nineteenth century and was used to indicate that the court of the forum State should not declare a foreign law contrary to its public policy unless there were manifest grounds for so doing. Although the concept of “jurisdiction” was broadly accepted, the reference in paragraph 2 to the internal law of the forum State covered the entire legal system, including all jurisdictions.

10. Mr. SEKOLEC (Secretary of the Commission) noted that the word “manifestly” had been used in the same sense in the UNCITRAL Model Law on Cross-Border Insolvency. As to the second point, the word “State” was used in the UNCITRAL Model Law on International Commercial Arbitration, which had been adopted in individual jurisdictions within States, such as Scotland in the United Kingdom. The scope of the term “State” was considered to be broader and to encompass the notion of jurisdiction.

11. The CHAIRMAN said he took it that the Commission wished to approve article 25, having regard to the suggestions made by the secretariat.

12. *It was so decided.*

13. *Article 25, as amended, was approved.*

Article 26

14. Mr. BAZINAS (Secretariat) said that article 26 was viewed as one of the most important provisions of the Convention, especially since the deletion of the rules on proceeds in article 24. Paragraph 1 stipulated that where a payment was made to the assignee and the assignee had a priority right in the receivable, it also had a priority right in the proceeds and could therefore retain them.

15. Paragraph 2 addressed the special situation in which a transaction was structured in such a way that the rights of the assignee or financier were secured, while the flow of payment continued as before the assignment. Payment was made to the assignor but the latter received the payment on behalf of the assignee and held it in a separate account for the assignee. If the assignee had a priority right in the receivables, it also had a priority right in the proceeds thereof. Paragraphs 13 to 16 of document A/CN.9/491 discussed the relationship between article 26 and the text being prepared by the Hague Conference. In addition to a number of drafting suggestions, a more substantive proposal was made in paragraph 15 to ensure that the rights of a depository institution or a securities intermediary which had a right in a deposit or securities account as original collateral were not affected by article 26, paragraph 2. It had emerged from

subsequent discussions with experts from the banking and securities industry that the matter in question might not be a major concern because payments covered by netting arrangements or in the context of securities accounts were not structured in the way envisaged in paragraph 2. If it was clear to the depository institution that the deposit account did not belong to the client of the bank but to a third party, the bank would not extend credit on the basis of that account. If the Commission so wished, the issue could be addressed in article 26 or in the commentary. On balance, the Working Group and the secretariat considered that the article should be retained and strengthened if possible.

16. Mr. KOBORI (Japan), while recognizing the importance of the article, said that the notion of proceeds was unfamiliar in his jurisdiction so that there was a serious problem of consistency between the article and Japanese domestic legislation. For that reason, a reservation clause should be included in the Convention.

17. Mr. SMITH (United States of America) said he shared the secretariat's view of the critical importance of article 26 to the operation of the Convention. Indeed, it was so important that those countries that might not have a concept of proceeds should, in his view, be able to accept such a precise and substantive Convention rule without fearing that it introduced an unfamiliar concept into their commercial law. The secretariat had made it quite clear that paragraph 2 involved transactions that were specially structured to take advantage of the safe harbour offered. However, he shared the secretariat's concern about the conflict of priorities that arose where an assignee claimed an interest in proceeds in the form of a negotiable instrument, deposited in a deposit account or credited to a securities account, where some other party—whether the depository bank or securities intermediary or the holder of the instrument—would normally have superior rights in relying on the instrument, the deposit account or the securities account. The approach suggested by the secretariat in paragraph 15 of document A/CN.9/491 therefore merited serious consideration, since it would preserve the usefulness of article 26 while protecting the interests of other parties that were not claiming an interest in the receivable as proceeds but as its original collateral or purchase. The wording proposed by his delegation in its general comments contained in document A/CN.9/490 differed slightly from that of the secretariat, but the policy choice was exactly the same.

18. Mr. KOHN (Observer for the Commercial Finance Association) said that article 26 was of crucial importance to the lending industry and would encourage lenders to extend financing in reliance on the provisions of the Convention. He urged that it be adopted with the amendment proposed by the United States, which was consistent with the policy underlying the amendment suggested in paragraph 15 of document A/CN.9/491.

19. Mr. STOUFFLET (France) associated himself with the speakers who proposed retaining article 26 unchanged. He agreed with the representative of the United States that it was not related, despite its title, to the question of proceeds, which had been eliminated from article 24. The problem it addressed arose basically in connection with securitization operations. The regulations in force in France required the assignor to continue to collect the assigned receivables. Should the assignor be declared bankrupt, the assignee could exercise its rights in respect of the amounts collected.

20. Mr. DESCHAMPS (Canada), expressing support for the retention of article 26, asked the representative of the United States to explain the difference between the wording he proposed and that suggested by the secretariat.

21. Mr. CHAN (Singapore) said he would also appreciate an explanation of the difference. He noted that paragraph 2 (*b*) raised evidentiary issues in practice and asked the representative of Japan to clarify his reservation with respect to the article.

22. Mr. BAZINAS (Secretariat) said he would also welcome a clarification of the difference, especially in the light of the statement by the representative of France, who had confirmed the Working Group's view that the notion of proceeds could be replaced by that of payments or some other similar term. The fiduciary arrangements referred to in paragraph 2 were certainly not alien to jurisdictions that were unfamiliar with the notion of proceeds. It had been understood when the paragraph was approved that it would in no way undermine the fundamental concepts that existed in any legal system.

23. A clarification of the difference between the United States wording and that proposed by the secretariat would prove helpful to the drafting group.

24. Mr. KOBORI (Japan) said he was concerned not just about the term "proceeds" but also about the fact that in Japan payments by cash and by other means were dealt with in very different ways. That created difficulties in connection with paragraph 2 (*b*).

25. Mr. BAZINAS (Secretariat) said it was his understanding that Japan would prefer paragraph 2 to be limited to cash proceeds. He assumed that securitization structures in which payments flowed to the assignor but financiers had to ensure that they enjoyed effective rights in cases of insolvency provision also operated in Japan. A provision along those lines would therefore be useful to the legal systems in Japan and throughout Asia where securitization was becoming a common practice.

26. Mr. SUK KWANG-HYUN (Observer for the Republic of Korea) said that, while recognizing the importance of article 26, he shared the concern expressed by the representative of Japan. Countries that did not apply the concept of a trust would have difficulty in accepting it. Once the cash proceeds had been received by the assignor, even on the instructions of the assignee, they would constitute part of the general assets of the assignor. It would seem, therefore, that if the assignor was declared bankrupt, the cash proceeds would form part of the bankrupt's estate. If that was the case, the Republic of Korea would have difficulty in accepting the provision.

27. Mr. SMITH (United States of America) said, with reference to the wording of draft article 26, paragraph 2 (*b*), that the text proposed by his delegation was simply more precise than the existing text. The proposed changes were very slight—a matter of drafting rather than policy—and could safely be left to the drafting group. As for the question of limiting the scope of the article to cash proceeds, it had become increasingly difficult to define what the term meant. It had come to include money in a bank account or a securities account, or even mutual funds that invested in such assets. It would therefore be unwise to adopt a definition that could prove inflexible in practice.

28. His delegation was sensitive to the point raised by the representative of the Republic of Korea: the provision introduced a novel concept that needed explaining. It had been narrowly drafted, so as to address a specific commercial practice and, in effect, contained instructions on how transactions could be structured so as to benefit the parties in ways that might not be available under domestic law. Countries that had set up statutory regimes to permit certain types of securitization transactions because of the perceived benefits of making more credit available

at a lower cost had faced a similar situation. Overall, the benefits of the provision far outweighed the inconvenience of having to make exceptions to any given country's domestic law.

29. Mr. SEKOLEC (Secretary of the Commission) said that the secretariat had conducted, in the context of counter-trade transactions, an extensive study of contractual arrangements entered into for the purpose of holding the proceeds of one transaction to be used for another. The laws of both common-law and civil-law countries—including those of Malaysia, Indonesia and a number of Latin American countries—had been examined, and the distinct impression had been formed that such arrangements were recognized in civil-law countries throughout the world.

30. Mr. CHAN (Singapore) said that, as the representative of a common-law country, he found the provision perfectly acceptable. It was not, however, right to ask countries for which the provision was problematic to accept new rules if they were not ready to do so. He could countenance persuasion but not the imposition of laws. The provision introduced a substantive, not a procedural, rule of law; nor could it be described as being narrowly defined. It applied in all circumstances, even where the parties had not structured their transaction to take advantage of the rule covered by the provision. If, on the other hand, the provision were to be limited to banks and borrowers that deliberately structured their transaction into what effectively became a trust, then it could be acceptable to all countries. But it was not for the Commission to force the pace and he feared that, if it did, the draft convention would not achieve the degree of success it deserved.

31. Mr. MEENA (India) sought clarification as to the title of draft article 26, which was entitled "Special proceeds rules". He wondered whether the definition in draft article 5 (j) covered such proceeds.

32. Mr. BAZINAS (Secretariat) said that the word "special" applied to the rules, not to the proceeds, so that the definition in draft article 5 (j) applied. Over a number of years, the Working Group had come to the conclusion that the rules in draft article 26 were special in that they clearly related to proceeds not belonging to the assignor, who held them under instructions from the assignee (para. 2 (a)) or for the benefit of the assignee separately, and reasonably identifiable from the assets of the assignor (para. 2 (b)). If the Commission felt that the wording could be improved so as to show clearly that the provision applied only to special but widespread circumstances involving practices such as securitization and undisclosed invoice discounting, where the parties had agreed to structure their transaction in that way, such a clarification might go a long way to meeting the concerns expressed regarding the provision.

33. Mr. SALINGER (Observer for Factors Chain International) expressed support for the United States position. The provisions of article 26, paragraph 2, were of crucial importance to those who financed trade credit by way of confidential invoice discounting, a practice that was growing fast throughout the world and particularly in the countries whose representatives had spoken against the provision. It was meaningless to suggest that the ownership of proceeds could be separated from the ownership of receivables: if a receivable was not the right to receive proceeds, it was nothing. The aim of the provision was to regulate situations—whether covered by the draft convention or not—in which proceeds could be taken away from the assignee because certain jurisdictions could not accept an assignor's having a trust for those proceeds. It was therefore important that the provision—narrow in concept but widespread in its use—should be retained.

34. Mr. MORÁN BOVIO (Spain) expressed support for the text of draft article 26 as it stood, incorporating the amendments suggested by the secretariat and subject to the possibility that the drafting group might decide that the text proposed by the United States constituted a better expression of the desired end result. In Spain as in France, funds assigned were seldom administered and managed by the assignee, but remained with the assignor for administration and management. Draft article 26 (b) was therefore a useful provision for regulating such situations and, as such, should be adopted. As for the definition of proceeds in draft article 5 (j), while the concept was unknown in Spanish law, it was clear and in common use in both national and international markets.

35. Mr. DOYLE (Observer for Ireland) endorsed that view. It was regrettable that the provision caused difficulties for some delegations, but for the Commission as a whole the text, with the amendments suggested by the secretariat, was not just acceptable but essential.

36. Mr. BERNER (Observer for the Association of the Bar of the City of New York) wondered whether the difficulty experienced by some delegations concerned the provision itself or the word "proceeds". It was clear that, in order to apply, the transaction had to be structured so that the parties went into it with their eyes open. On the other hand, proceeds were what gave value to the receivable, which on its own was merely a piece of paper. It was surely a fundamental principle that a debt was money owed.

37. The CHAIRMAN said that, while there were some differences, most delegations were in favour of the draft article, which filled a gap in international law.

38. *Draft article 26 was approved, with the amendments suggested by the secretariat and subject to any decision by the drafting group to adopt the text proposed by the United States.*

Article 27

39. Mr. BAZINAS (Secretariat) said that no problems had been identified with regard to draft article 27, which allowed financiers to agree on the order of priorities or to subordinate certain rights unilaterally.

40. *Draft article 27 was approved.*

Chapter V

41. Mr. BAZINAS (Secretariat) said that chapter V, which contained a set of basic provisions of private international law on key assignment issues, was included in the draft Convention for the benefit of countries whose own legislation did not contain such provisions. Draft article 31, in particular, established a new rule on the law applicable to priority conflicts, which had already gained worldwide acceptance. The chapter had two functions. First, it applied to transactions which fell within the scope of other provisions of the draft Convention, namely the transactions specified in chapter I, relating to international assignments or assignments of international receivables, where the assignor was located in a Contracting State. In that case, chapter V filled the gaps left in the Convention by addressing the problem of what law applied to issues that were not otherwise fully addressed in the draft Convention. For example, in draft article 20 the rights and defences of the debtor as against those of the assignee and

the conditions for raising a set-off were inadequately covered. Draft article 30 went some way towards redressing the situation. Secondly, chapter V applied to transactions that might not fall under other provisions of the draft convention, on the basis of the provision in article 1, paragraph 4, under which chapter V could apply even if the assignor was not located in a Contracting State. That was in line with generally applicable conflict-of-laws rules.

42. The chapter was subject to an opt-out by States that had other rules and might not need its provisions. The Working Group had rejected the suggestion to make it subject to an opt-in, an approach that would give the erroneous impression that it was not an integral part of the draft Convention. The Working Group had tried to make chapter V consistent with other international law texts. The new rule contained in draft article 31 would, however, need to be aligned with draft articles 24 and 25, since it might apply to cases where an assignor was not located in a Contracting State.

Article 28

43. Mr. ZANKER (Observer for Australia) suggested that the Commission should consider draft article 28 only after discussing draft articles 29 to 33, in order to understand the implications of chapter V as a whole before considering its scope of application.

44. Mr. MARKUS (Observer for Switzerland) said that the conflict-of-law rules in chapter V immediately raised the issue of the parallel nature of the draft convention of the Hague Conference on the law applicable to dispositions of securities held with an intermediary. The provisions of chapter V were—unsurprisingly, since there was close cooperation between the Hague Conference and UNCITRAL—not very different. Complete harmony between the two texts, however, would not be possible, unless the Hague draft was changed. He was concerned about a possible conflict between the two international instruments. The only way to avoid that was to delimit the substantive scope of the draft Convention. He thus wished to know what action had been taken to avoid conflicting provisions.

45. Mr. BAZINAS (Secretariat) did not think there was any conflict between the Hague Conference text and chapter V. The intention was that the Convention as a whole should avoid addressing issues relating to dispositions of securities. The question was not whether chapter V was inconsistent with the Hague Conference text, but whether the exclusion in draft article 4 as to securities was sufficient to ensure that the Convention as a whole did not overlap with the Hague Conference text. The question whether article 4 achieved that result could be decided when the Commission came to consider that article.

46. As for the matter raised by the observer for Australia, draft article 28 not only delimited the scope of the chapter but also illustrated its relationship with the rest of the draft Convention. That was why it had been placed first.

47. *Draft article 28 was approved.*

Article 29

48. Mr. STOUFFLET (France) said that he seemed to recall that the secretariat had suggested including the provision contained in article 29 in chapter IV.

49. Mr. BAZINAS (Secretariat) said that the Working Group had discussed the question of whether a new rule on form should be included in chapter V, although not necessarily in article 29. He had intended to present the secretariat's suggestion after the Commission had considered chapter V as a whole.

50. After a procedural discussion in which Mr. WINSHIP (United States of America), the CHAIRMAN and Mr. MORÁN BOVIO (Spain) took part, the CHAIRMAN said he would take it that the Commission wished to deal with the question of the form of the contract of assignment only after it had completed its consideration of chapter V.

51. *It was so decided.*

52. *On that understanding, draft article 29 was approved.*

Article 30

53. *Draft article 30 was approved.*

Article 31

54. The CHAIRMAN said that the changes that the Commission had made in article 24 should also be reflected in article 31.

55. Mr. BAZINAS (Secretariat) confirmed that, since article 31 had always been the mirror image of article 24, it would have to reflect the changes that had been made in article 24.

56. Mr. DESCHAMPS (Canada) said that, that being the case, the Commission should limit its discussion to deciding whether or not article 31 should be retained.

57. Mr. MORÁN BOVIO (Spain), supported by Mr. DESCHAMPS (Canada), said that the Commission needed to hold informal consultations on article 31 in order to facilitate its adoption.

*The meeting was suspended at 11.35 a.m.
and resumed at 12 noon.*

58. Mr. HUANG FENG (China) said that, according to the current wording of articles 24 and 31, the location of the assignor could be interpreted as meaning any place where the assignor was to be found. However, in articles 24 and 31, location had implications for the applicable law. The Commission should come up with a definition of "location" making it clear whether the term referred to the place of operation or to the place of business.

59. Ms. McMILLAN (United Kingdom) said that article 31, paragraph 2, reflected the wording of article 25, paragraph 2, and hence was not the mirror image of article 24. Her delegation assumed that paragraph 2 of that article would be retained and not replaced by text from article 24.

60. Mr. BAZINAS (Secretariat) said that article 31, paragraph 2, would be brought into alignment with article 25,

paragraph 2, as revised by the Commission. As to China's question, the answer could perhaps be found in article 5 (h), which referred to location as the place of business of the assignor or, if there was more than one place of business, to the place of central administration.

61. Mr. HUANG FENG (China) said that article 5 provided a traditional definition of "location" as the place of business. If the two concepts were the same, it was difficult to understand why the same term could not be used.

62. Mr. BAZINAS (Secretariat) said that the definition of "location" had a long history in the Working Group. The Group had originally opted for a definition similar to that contained in the Vienna Sales Convention. Location had been defined as the place of business or, when there was more than one place of business, the place most closely connected with a particular transaction. The Working Group had subsequently decided to move away from that rule because it had recognized the need for flexibility in defining "location" for the purposes of the Convention, and also the need for greater certainty in defining what law was applicable to a priority context. The current location rule had been adopted by the Working Group and the Commission on the understanding that it would not interfere with the practices of either commercial banks or central banks. There had also been the need to come up with a system where the problem of a potential conflict between the rule applicable to priority and the rule applicable to insolvency would be the law of the same jurisdiction. The Working Group had decided that the so-called "rule of location", which referred to the place of central administration in cases where the assignor had more than one place of business, was a good way of avoiding conflict in cases of insolvency since "location" would generally be the jurisdiction in which insolvency arose. When insolvency arose in another jurisdiction, the public policy of that jurisdiction would be preserved.

63. Mr. WINSHIP (United States of America) said that, when the chapeau of article 24 was reproduced in article 31, paragraph 1, reference to articles 25 and 26 should be omitted. The reference to article 25 was not relevant because the Working Group had reproduced article 25, paragraph 2, in article 31, paragraph 2. The reference to article 26 was unnecessary because the Commission would preserve the idea of the special proceeds rule by virtue of article 28, paragraph (b), without having to make specific reference to article 26 in article 31.

64. With regard to the question raised by the representative of China, he said that, since article 37 dealt with a matter to which the representative of China had referred, China's concerns could perhaps be addressed when the Commission considered article 37.

65. Mr. HUANG FENG (China) thanked the secretariat for its explanation, and proposed that the word "location" should be defined in an appropriate place. Since the English meaning of the term "location" was clear, perhaps another Chinese term could be found to translate that word.

66. *Draft article 31 was approved.*

Article 32

67. Mr. BAZINAS (Secretariat) said that article 32 reproduced a rule that was typical of private international law to the extent

that it permitted the setting aside of the rules of the applicable law in a situation where there were mandatory rules of law of the forum or of another State. However, article 32 took a slightly different approach, since it limited the setting aside of rules of the applicable law to articles 29 and 30, namely, to the law applicable to the contractual relationship between the assignor and the assignee and to the relationship between the assignee and the debtor. The Working Group had considered that the priority rules of the applicable law would themselves be mandatory and that setting them aside where there were mandatory rules of law of the forum would create uncertainty that would undermine the very purpose of the priority rules of the Convention. Article 32, paragraph 2, contained a rule that allowed the forum to apply the mandatory rules of law of another State, with which the matters settled in articles 29 and 30 had a close connection.

68. Mr. HUANG FENG (China) said that, in article 32, the word "State" should be replaced by the word "jurisdiction", as in articles 30 and 31.

69. *Draft article 32 was approved.*

Article 33

70. Mr. BAZINAS (Secretariat) said that, in its monitoring of the work of the Hague Conference over the past few years, it had come to the attention of the Working Group that there was a slight divergence between the formulation contained in article 33 and the relevant article in the more recent Hague Conference texts. Article 33 contained the general formulation that the application of a provision of the law specified could be refused without specific reference by a court or other competent authority. The Working Group had questioned whether the words "by a court or other competent authority" were necessary in article 33. The Commission might wish to consider deleting those words.

71. Ms. LOMNICKA (United Kingdom) wished to know whether, in the event that the Commission decided to delete the words "by a court or other competent authority", the same amendment would be made to article 25, paragraph 1. The Commission had also agreed to amend article 25, paragraph 1, by replacing "only if that provision is" by "only if the application of that provision is".

72. The CHAIRMAN confirmed that article 25, paragraph 1, would be amended as proposed by the representative of the United Kingdom. If he heard no objection, he would take it that the Commission wished to adopt draft article 33 with the amendment suggested by the secretariat.

73. *It was so decided.*

74. *Draft article 33 as amended, was approved.*

75. *Chapter V as a whole was approved.*

The meeting rose at 12.35 p.m.

Summary record of the 714th meeting

Tuesday, 26 June 2001, at 2 p.m.

[A/CN.9/SR.714]

Chairman: Mr. Pérez-Nieto CASTRO (Mexico)

The meeting was called to order at 2.10 p.m.

DRAFT CONVENTION ON ASSIGNMENT OF RECEIVABLES IN INTERNATIONAL TRADE (*continued*) (A/CN.9/486, A/CN.9/489 and Add.1, A/CN.9/490 and Add.1-4 and A/CN.9/491 and Add.1)

1. The CHAIRMAN informed the Commission that it would return to the question of form in chapter V in conjunction with its discussion of draft article 8.

Articles 34 and 35

2. *Draft articles 34 and 35 were approved.*

Article 36

3. Ms. BRELIER (France) said that her delegation had difficulties with article 36. Article 36 was an opt-in clause of a very general nature, which allowed a State to declare to which territorial unit or units the Convention would apply. Furthermore, as currently drafted, it allowed a State to specify by declaration at any time, even after accession, how it would implement that article. Such legal uncertainty was unacceptable. Those concerns also applied to draft article 37.

4. Mr. BURMAN (United States of America) observed that the provisions in question were very traditional ones and were intended to create certainty by providing a baseline rule that could be varied by contracting States to meet changing circumstances. The question of the timing of such declarations could be dealt with when the Commission considered draft article 43.

5. The CHAIRMAN asked whether the concern of the French delegation was in connection with its Overseas Departments and Territories. Similar provisions were included in many international instruments, including inter-American conventions.

6. Ms. BRELIER (France) agreed that the text of article 36 was a federal clause found in a number of international conventions, although generally the older ones. Her delegation's difficulty was with the legal uncertainty that arose thereby. Her delegation also had difficulty with the term "territorial units" and considered that the term *collectivité territoriale* would be preferable in the French text, since it applied both to the federated communities of a federal State and to the territorial communities of a unitary State. She thought it unlikely that France would apply those provisions with respect to its Overseas Departments and Territories.

7. The CHAIRMAN observed that the term "territorial unit" had been widely used for many years.

8. Mr. HUANG FENG (China) said that his delegation understood "territorial units" to mean areas that were part of a sovereign State, with autonomous legislative, legal and judicial systems but no diplomatic powers, which therefore needed the approval of the sovereign State for their accession to international conventions. He suggested replacing the term "territorial

units" with "jurisdictions", which would better reflect the legal status of such areas.

9. The CHAIRMAN said that the provision did not refer to the possibility for the territorial units to carry out international activities but to the fact that once the treaty was ratified by the federal State, its constituent states would ratify it and the Convention would enter into force for them. Inter-American conventions ratified by Canada normally contained a declaration by Canada as to the dates on which they would enter into force in the various Canadian provinces. He saw no need to change "territorial units" to "jurisdictions".

10. Mr. HUANG FENG (China) pointed out that in his country there were special administrative regions with autonomous legislative powers, such as Hong Kong and Macao, that differed from the participating units of a federal State. He hoped that the secretariat would take such new developments into account in the drafting.

11. The CHAIRMAN said that he had been informed by the secretariat that the first sentence of article 36 covered the concepts referred to by China.

12. Ms. WALSH (Canada) endorsed that view. The clause was essential in the case of Canada, under whose constitution the federal Government did not have the authority to impose a convention on the individual provinces in areas over which they had exclusive legislative authority. To implement an international convention the provinces had to pass legislation to that effect, and they had the final authority as to whether it should be passed. She could thus assure the representative of China that the reference to territorial units would include any jurisdiction within the boundaries of China that had legislative authority.

13. Mr. ZANKER (Observer for Australia) thought that if the Commission was so minded the concern of China could be accommodated by adopting language on the following lines: "Where a State has two or more jurisdictions in relation to matters dealt with by the Convention, it may at any time declare that the Convention shall extend to one or more of those jurisdictions."

14. The CHAIRMAN recalled that the format proposed was the one that had been used in previous UNCITRAL conventions and in other international instruments.

15. Ms. BRELIER (France) said the point raised by the representative of China corresponded to a certain extent to her own delegation's concern with respect to the term "territorial unit".

16. With respect to paragraph 3 of article 36, she pointed out that if the assignor or the debtor was located in a territorial unit to which the Convention did not extend, they would in any case be considered as not being located in a contracting State. Her delegation did not see the point of paragraph 3 and thus proposed its deletion.

17. In the interests of legal certainty her delegation insisted that the time of declaration should be at the latest that of ratification,

acceptance, accession, or approval and that it should not be changed thereafter. If that was incompatible with the federal system, perhaps the question could be revisited or explained further.

18. Mr. CHAN (Singapore) said that the concern raised by the representative of China should be addressed, since "territorial unit" obviously carried a connotation with which China was not comfortable. Although the language might have been used in many international texts, a new and unique situation had arisen with the creation of the special administrative regions of Hong Kong and Macao, which had separate jurisdictions. Some thought should be given to finding language that would meet the concerns of all.

19. The CHAIRMAN suggested that the representative of China might consult with other delegations to find a solution to his problem.

20. Ms. WALSH (Canada) said that her delegation would have serious difficulties in replacing the term "territorial unit" with "jurisdiction". The expression "territorial unit" was contained in many UNCITRAL texts and in those of the Hague Conference on Private International Law, and it worked well in Canada, both for its ten provinces and for its three territories. Those territories had legislative autonomy derived from the federal Government and probably resembled the special administrative regions of China in their status. If the term "jurisdictions" were adopted, her delegation would be concerned not only at its lack of consistency with other international texts but also with the fact that it might not cover the three Canadian territories. The term "territorial unit" clearly covered a variety of jurisdictional arrangements.

21. The suggested deletion of article 36, paragraph 3, would cause her delegation severe difficulties. Under the Canadian Constitution each province had the autonomy to decide whether or not to accept an international convention. If paragraph 3 were to be deleted, Canada would not be able to bring into force an international convention unless every one of its provinces was prepared to endorse it. The deletion of paragraph 3 would therefore impede Canada's participation in the Convention.

22. For the same reason, her delegation could not accept the suggestion to require a State to declare once and for all which of its territorial units was to have the Convention in force within its borders. Canada needed the flexibility of enabling provinces to decide on an ongoing basis whether or not the Convention was to come into force within their borders, and there were good internal reasons why that might take longer for some provinces than for others.

23. Mr. SEKOLEC (Secretary of the Commission) said that the text of article 36 had been taken virtually unchanged from previous conventions, including the United Nations Convention on Contracts for the International Sale of Goods, to which China was a party. The secretariat would verify whether the Chinese translation of the term "territorial unit" in that Convention was in line with the text of the draft Convention. The expression "territorial unit" was a non-technical term intended to cover different types of entity that existed within sovereign States. It was true, however, that 15 years previously the special administrative regions of China had not existed.

24. Mr. BURMAN (United States of America) recalled that the term "territorial unit" was used in many conventions other than UNCITRAL and Hague Conference texts. His Department had experienced no problem with that term, and there had been no cases or disputes requiring a specific delineation of its meaning. The United States, too, had territories and possessions that enjoyed differing relationships with the United States; to try to add

language to cover every situation would result in a page-long description which would benefit no one.

25. The replacement of the term "territorial unit" by "jurisdiction" would not be acceptable to his delegation because the United States had a federal jurisdiction and other jurisdictions which were not territorial. The Commission must not seek to change the language without a compelling reason. No speaker had offered such a reason.

26. Like Canada, the United States could not accept a limitation on the time at which a State could make a declaration under article 36. Such a limitation would radically affect countries' willingness to join the Convention because they would have to make a permanently binding decision on the territories to which the Convention applied, something that was in no country's interest. He therefore suggested that the traditional language be adopted.

27. Mr. WHITELEY (United Kingdom) said that the term "territorial units" was acceptable to his delegation. There were situations similar to those of Hong Kong and Macao in the United Kingdom, which had a number of entities with varying degrees of autonomy, such as the Channel Islands, which had legislative powers and were to all intents and purposes autonomous except with regard to their international relations. The word "jurisdiction" would therefore pose problems for his own as well as for other delegations. He was also in favour of retaining paragraph 3 of article 36, it being his understanding that the objection of the French delegation was based on purity of language.

28. Mr. FRANKEN (Germany) supported the view expressed by the representative of Singapore. A simple solution to meet the concern of the Chinese delegation might be to insert after the words "territorial units" the words "or jurisdictions". As to the point raised by the United States representative, article 36 was not mandatory: it merely gave a State the option of declaring that the Convention was to extend to all or only to one or more of its territorial units.

29. The CHAIRMAN suggested that the representative of China should make contact with the delegations of Canada, Mexico and the United States, which had been involved in the drafting of previous conventions, and formulate a proposal.

30. Mr. DOYLE (Observer for Ireland) strongly endorsed the view of the United States representative. Not only was the language of article 36 common to other UNCITRAL conventions, but it had also been present in many drafts of the present instrument. It was therefore surprising that the Commission was now debating it again at the eleventh hour. To try to accommodate the concerns of the representative of China would only create problems for other countries. The only solution was to keep the language as it stood.

31. Mr. MORÁN BOVIO (Spain) endorsed that view. He suggested that a reference to the present discussion should be included in the commentary. He also pointed out that the text was supported by the delegations of those countries that were most affected by the Convention.

32. Mr. HUANG FENG (China) said that the German proposal was flexible and could solve all the problems that had been voiced.

33. Ms. WALSH (Canada) asked the representative of China whether there were jurisdictions in China relevant under article 36 that were not territorially defined. If not, how did the addition of the word "jurisdiction" change anything?

34. The CHAIRMAN said he understood that the proposed amendment would not enjoy the support of the representatives of Canada and the United States, and, speaking as the representative of Mexico, he said that his delegation could not accept it either.

35. He suggested that, since the discussion on draft article 36 had already been a lengthy one, the text should be approved as currently drafted.

36. *It was so agreed.*

37. *Draft article 36 was approved.*

Article 37

38. Mr. BAZINAS (Secretariat) said that article 37 dealt with the meaning of the term “law” in the case of federal States and appeared within square brackets since the Working Group had not finalized the text. Under article 37 “law” meant the law of a territorial unit in which a particular personal property was located and included private national law rules.

39. Mr. WINSHIP (United States of America) said that article 37 appeared in square brackets because it had been thought that the delegations interested in the topic would present a text after having had an opportunity to consult among themselves. After consultation with the delegations of Canada, China, France and others, his delegation had now prepared the following text: “If a State has two or more territorial units, the location of a person within that State shall be the territorial unit in which the central administration of the person is exercised or, if the person has no place of business, its habitual residence, unless such a State specifies by declaration other rules for determining the location of a person within that State.”

40. Article 24 spoke of the location of the assignor, but the definition of location did not at present indicate where within a State with more than one territorial unit that assignor was located. In jurisdictions such as the United States it would be helpful if, in the interests of certainty, it were possible to make a declaration once and for all to indicate which state within the United States would be the relevant location of the assignor, so that that law would govern priority issues. The proposed text extended the definition of location that appeared in article 5. An appropriate title might be “The location of a person in a State with two or more territorial units”.

41. Mr. STOUFFLET (France) said that his delegation had listened with sympathy to the United States proposal. Since the problem was a complicated one, his delegation would like some time to consider it before giving an opinion.

42. The CHAIRMAN said that the Commission would leave the new proposal for article 37 pending until the text had been circulated in writing.

Article 38

43. Mr. BAZINAS (Secretariat) said that paragraph 1 of article 38 contained language typical of international agreements. It gave precedence to other international agreements that applied in matters covered by the Convention. The second part of the paragraph provided for the territorial connection between the draft Convention and a State party to both agreements.

44. Paragraph 2 contained a provision dealing with the Unidroit Convention on International Factoring (“the Ottawa Convention”). The Working Group had considered that in a case where both Conventions applied, the UNCITRAL Convention should

prevail on the grounds that it had wider scope and covered matters not dealt with by the Ottawa Convention. The second sentence of paragraph 2 was intended to ensure that the UNCITRAL Convention did not preclude the application of the Ottawa Convention in a case where the former did not apply. Although the wording of the second sentence might not fully reflect that intention, the matter was addressed in comments by Governments and international organizations, in particular the European Federation of Factoring Associations (EUROPAFACTORING) and Factors Chain International, which had brought the issue to the Working Group’s attention.

45. Mr. KOHN (Observer for the Commercial Finance Association) proposed amending paragraph 1 of article 38 by deleting the words “concerning the matters” in the second line and including the words “specifically governing a transaction otherwise”. The text would then read: “This Convention does not prevail over any international agreement that has already been or may be entered into and that contains provisions specifically governing a transaction otherwise governed by this Convention, ...”. The present wording of paragraph 1 was too broad and vague, and the proposed amendment would make it much easier for attorneys and credit analysts to give opinions on whether the draft Convention governed a particular transaction, and would greatly encourage lenders to make financing available on the basis of the draft Convention.

46. Ms. McMILLAN (United Kingdom) said that her delegation had always supported a specific exclusion for Unidroit-governed receivables in the interests of clarity and certainty, but was now prepared to accept that the general wording of paragraph 1 of article 38 achieved the same result. In the hypothetical situation in which Unidroit-governed receivables were part of a bundle of receivables due to X that was then assigned to Z, the rest of the bundle would appear to be governed by the UNCITRAL Convention. If a State had signed up to both Conventions, which instrument would govern the assignment? Or was that hypothesis so unlikely as not to be worth consideration?

47. Mr. MUTZ (Observer for Organisation intergouvernementale pour les transports internationaux ferroviaires—OTIF) said that his organization was concerned with the special protocol on matters specific to railway rolling stock. At a meeting in Bern in March 2001 jointly organized by Unidroit and OTIF, the governmental experts had discussed the relationship between the draft Unidroit Convention on international interests in mobile equipment and the draft Convention with which the Commission was at present concerned. It was felt that the value of assets covered by the Unidroit Convention lay to a large extent in the income that might be realized from the sale or lease of mobile equipment, since the operational proceeds were part of the securities offered. His organization therefore strongly urged that the very general text of article 38 be refined, and had drafted an appropriate wording which he would submit in writing to the secretariat.

48. Mr. MEDIN (Sweden) drew attention to paragraph 61 of document A/CN.9/489/Add.1, which dealt with the European Council regulation on insolvency proceedings. It stated that: “In any case, if a conflict arises, it should be resolved in favour of the regulation by virtue of article 38, paragraph 1 (the scope of which may need to be expanded)”. The possible need for that expansion was an important issue that should be discussed by the Commission.

49. The European Union had recently adopted two new regulations, on the reorganization and winding up of insurance undertakings and the reorganization and winding up of credit institutions, which he believed contained provisions dealing with rules of private international law applicable to competing rights. He wondered whether there might be a conflict between the draft Convention and those regulations.

50. There had also been a recent proposal by the European Commission for a new directive on financial collateral arrangements. He assumed that there was no conflict between that proposal and the draft Convention, but would be grateful if the secretariat could provide some explanation.

*The meeting was suspended at 3.35 p.m.
and resumed at 4.05 p.m.*

51. Mr. BURMAN (United States of America) said that his delegation would now be prepared to accept the amendment proposed by the Commercial Finance Association, subject to drafting changes. That amendment might also resolve the concerns expressed by the observer for OTIF.

52. Mr. MORÁN BOVIO (Spain) and Mr. BERNER (Observer for the Association of the Bar of the City of New York) supported the proposed amendment.

53. Ms. BRELIER (France) said the commentary should indicate that article 38, paragraph 1, took account of European Community undertakings entered into or to be entered into in the future.

54. Mr. BURMAN (United States of America) said that the issue was more complicated than it appeared. The United States could not agree to the inclusion of such a wording either in the text of the Convention or in the commentary, since, in addition to European Community regulations, reference would have to be made to all the other intergovernmental and regional group obligations such as those under MERCOSUR and the North American Free Trade Agreement (NAFTA). That was an enormous task and would result in a very long list. The Commission had examined the relationships between the draft Convention and a number of other multilateral agreements, but it was impossible to state that all parties to the UNCITRAL Convention should be bound by the same obligations as were the parties to a given regional agreement.

55. Mr. MORÁN BOVIO (Spain) suggested that the secretariat should be entrusted with the task of making an appropriate reference to the issue in the commentary.

56. Ms. McMILLAN (United Kingdom) said that the question addressed by article 38, paragraph 1, would be one for a court, which would have to consider whether a set of European regulations was an international agreement that had already been or might be entered into and that contained provisions concerning the matters governed by the Convention. She doubted if the court would be influenced by a statement in a commentary; it would make its own judgement. The commentary should say nothing about whether a regulation, treaty or directive or anything that might be called an international agreement might be relevant. It would be for a court to consider whether, for instance, the European regulation on insolvency proceedings was covered by the words in article 38, paragraph 1, and it might not come to the same conclusion as the secretariat. In short, the less said about such regulations, the better. Her delegation therefore supported the view of the United States representative.

57. The CHAIRMAN asked whether there was agreement on the course suggested by the representative of Spain.

58. Mr. BURMAN (United States of America) said his delegation could agree to that course, on the understanding that the reference in the commentary confined itself to describing the issue and did not purport to conclude on an important treaty issue that had not been resolved by the Commission.

59. Mr. BRINK (Observer for the European Federation of Factoring Associations—EUROPAFACTORING) said that the

intention was that the draft Convention should take precedence over the Ottawa Convention whenever both Conventions were applicable, but that it should not preclude the application of the Ottawa Convention if the draft Convention did not apply to a particular debtor. The second sentence of paragraph 2 of article 38 was insufficiently clear on that point, and he therefore proposed a rewording on the following lines: "... to the extent that this Convention does not apply to the rights and obligations of a debtor, it does not preclude the application of the Ottawa Convention with respect to that debtor."

60. The CHAIRMAN noted that there were no objections to that proposal, which would be considered by the drafting group.

61. *Subject to further deliberations on the relationship between the draft Convention and the draft Unidroit Convention, draft article 38, as amended, was approved.*

Articles 39 and 40

62. *Draft articles 39 and 40 were approved.*

Article 41

63. Mr. BAZINAS (Secretariat) said that draft article 41 appeared within square brackets, as did its twin provision, article 4, paragraph 4, since the Working Group had not reached agreement on whether the Convention should provide for the possibility for further exclusions. The matter had been left open pending finalization of the scope of the draft Convention, the assumption being that if everything to be excluded was excluded and the scope of the draft Convention was defined in the appropriate way, there might be no need to provide for the possibility of further exclusions. However, the Working Group had been informed at the last session that allowing a State to exclude further practices might make the Convention more acceptable to States that might have problems in the future with new and at present unforeseeable practices. The Working Group had been anxious to create an instrument that could be adjusted in the future, should the need arise. The Working Group had also heard arguments in favour of deleting both article 4, paragraph 4, and article 41 on the grounds that allowing for a definition of the scope of the Convention by declaration could reduce certainty as to the scope of application and might result in the scope differing from State to State. The Working Group had not reached a conclusion on the matter and had therefore retained the square brackets around article 41.

64. The text of article 41 had been sent to the drafting group for refinement and was before the Commission in its present form with a minor change to paragraph 2 (b), where the reference at the end to the law governing the receivable should be a reference to the law governing the original contract, to bring it into line with other provisions of the Convention.

65. Mr. BURMAN (United States of America) said that his delegation strongly supported article 41. It was a crucial article since the objective to persuade as many States as possible to sign up to a modern, efficient set of rules that would enhance trade and commerce through commercial finance. The Commission had to be very specific about which types of practices were governed by the Convention and which were not. Comments received from industry and specialized commercial practice groups showed that the Convention did not yet cover all existing or emerging practices. Provision had to be made for countries to adjust to new commercial practices to be developed in the future. Article 41 provided a critical safety valve. Although it might involve some lessening of uniformity, that would not result in uncertainty in the

marketplace. The alternative was a Convention that would be too rigid and would not survive changes in the marketplace. He therefore recommended that article 41 be retained regardless of the Commission's eventual decision on article 4.

66. Ms. MANGKLATANAKUL (Thailand) said that her delegation considered article 41 essential. It would lead to wider recognition of the Convention since it provided flexibility for a State to declare at any time that it would not apply the Convention to receivables it wished to exclude from its scope. She proposed, however, that the drafting group should review the language of the article to make it more readily comprehensible.

67. Mr. MORÁN BOVIO (Spain) said that article 41 would allow any country to decide at any time that it would not apply the Convention to a particular type of transaction. There was a drawback to that freedom, since each country could then gradually reduce the scope of application of the Convention. The provision should therefore be considered very carefully because of its possibly damaging effect, and the Commission should not adopt it too hastily. It might be better to leave draft article 41 pending until a decision had been taken on draft article 4. It might well be that article 4 contained a set of exclusions broad and detailed enough to make article 41 unnecessary.

The meeting rose at 5 p.m.

Summary record of the 715th meeting

Wednesday, 27 June 2001, at 9.30 a.m.

[A/CN.9/SR.715]

Chairman: Mr. Pérez-Nieto CASTRO (Mexico)

The meeting was called to order at 9.45 a.m.

DRAFT CONVENTION ON ASSIGNMENT OF RECEIVABLES IN INTERNATIONAL TRADE (*continued*) (A/CN.9/486, A/CN.9/489 and Add.1, A/CN.9/490 and Add.1-4 and A/CN.9/491 and Add.1)

Article 41 (continued)

1. Mr. BERNER (Observer for the Association of the Bar of the City of New York) said that, if adopted, draft article 41 would enable Contracting States to adjust to future changes in the financial markets. The draft Convention would become a moving picture rather than a snapshot, reflecting and capturing the dynamics of a fast-moving world financial system, other areas of which, such as electronic financing, derivatives and securitization, had benefited from the Commission's work. The deletion of article 41 would achieve the opposite effect, and hinder innovation. The draft Convention should be sufficiently flexible to accommodate future developments.

2. Ms. LADOVÁ (Observer for the Czech Republic) expressed her delegation's support for the retention of draft article 41, and also of draft article 4, paragraph 4.

3. Mr. DOYLE (Observer for Ireland) shared the concern expressed by the representative of Spain at the previous meeting regarding the draft article. Representatives had argued for flexibility and adaptability; but the fact was that draft article 41 had the potential to unravel the entire draft Convention. In view of the importance of the provision, its consideration should be postponed until after the Commission had considered draft article 4.

4. Mr. STOUFFLET (France) said that his delegation, too, attached great importance to flexibility. The original intention had been for the scope of the Convention to be as broad as possible; but, over time, a number of exclusions had been proposed, sometimes for sound technical reasons, sometimes on more questionable grounds. Given that different practices existed in different countries, the best way forward would be to allow each State to declare its own preferences. He thus proposed that, in addition to the opt-out facility, there should also be an opt-in

facility, enabling States to add to the list of types of assignment and categories of receivables to which the Convention applied.

5. Ms. GAVRILESCU (Romania) said she was in favour of retaining draft article 41. To be accessible to as many States as possible, the Convention should be effective, dynamic and open to change in a fast-moving financial market. The argument concerning the link with draft article 4, paragraph 4, was not valid: draft article 41 could exist independently, since it contained extremely clear provisions concerning declarations by States that certain types of assignment and categories of receivables were not acceptable. She also supported the proposal by the representative of France for an opt-in as well as an opt-out clause.

6. Draft article 41 must be addressed—and, she hoped, retained—before any consideration of draft article 4, paragraph 4, because without the former, the latter—which existed only for the purposes of comprehensiveness and harmony—would no longer apply.

7. Mr. MARKUS (Observer for Switzerland), while understanding the desire for flexibility, foresaw that problems might arise over the lists of types and categories declared by Contracting States. Would they be interpreted in the light of each State's domestic law? Like the representative of Spain and the observer for Ireland, he would prefer to postpone consideration of draft article 41 until the issues surrounding draft article 4 had been settled.

8. Mr. BURMAN (United States of America) said that he hoped there would be time for informal consultations on the interesting suggestion made by the representative of France. Opting-in was, after all, quite different from opting-out and the concept needed careful consideration. He assumed that the proposal would be confined to contractual receivables. It would be extremely difficult at such a late stage of drafting to rework existing provisions to deal with non-contractual receivables.

9. A considerable number of delegations had expressed support for draft article 41, while others wished to postpone consideration of that provision until draft article 4 had been discussed. The

latter provision was indeed crucial; and its complexity was evident from the difficulty experienced during the previous day's lengthy consultations on establishing a single definition of financial products to be included and excluded. A successful outcome was particularly important for the financial community. The draft Convention had to allow for constant change in the markets and, if it failed to do so, it would lose support among finance practitioners, who needed transparency rather than tidiness. They would find no difficulty in working with a system of declarations by States. Even if the exclusions in draft article 4 were satisfactorily settled, which in itself was doubtful, they might be obsolete within six months, as financial products changed. The retention of draft article 41 was therefore all the more important.

10. Ms. McMILLAN (United Kingdom) associated her delegation with those speakers who had expressed reservations about removing the square brackets from draft article 41. Those in favour of the provision had made a number of dangerous assumptions: they assumed that the provision would be used to allow special financing practices to be exempted—with the underlying assumption that it would be easy to do so—and that States would use a precise form of words which would be recognizable and which could be applied by other States to a distinct financing practice. Language, however, was rarely that simple. Moreover, there was a mechanism under draft article 47 for revising and amending the Convention, which might be cumbersome but would achieve the necessary clarity. It had been suggested that a possible weakness of the draft Convention was that it tried to be all things to all men. The Commission must decide between comprehensiveness and a greater degree of certainty.

11. Mr. ADENSAMER (Austria) said that his delegation shared the view of those speakers who pleaded for caution on such a crucial provision. Austria had considerable problems with the draft Convention as a whole, particularly draft article 11. If the draft Convention were ratified, changes would need to be made to its domestic law. The advantage would be the acquisition of a unified international regime, but the changes would undoubtedly lead to complications. For example, it would be hard to know whether a given receivable fell within the scope of the draft Convention. Looking through lists to identify declarations by States would be extremely difficult. The scope of the draft Convention should be clear, otherwise it would fail in its purpose. With draft article 41, on the other hand, the Commission was moving too far away from a convention and towards a model law. Austria could, for example, exclude all receivables where there was a contractual clause not to assign receivables; while that might make the draft Convention easier to ratify, by the same token it rendered it meaningless. He questioned whether draft article 41 did indeed constitute a good solution.

12. Mr. SALINGER (Observer for Factors Chain International), speaking as a practitioner, supported the position of the United Kingdom and Austria. It was assumed by those in favour of the provision that it would be used to exclude new financial practices, but the terms of the article as it stood were far too broad. A State might suddenly decide to exclude all trade receivables. Those who provided finance needed certainty so that they could do so with confidence. With draft article 41 in place, however, they would need to be constantly checking on declarations by States.

13. Mr. ZANKER (Observer for Australia) associated his delegation with the views expressed by the representatives of the United Kingdom and Austria and the observer for Factors Chain International.

14. The CHAIRMAN said that there seemed to be agreement on the concept contained in draft article 41, but that there was also a proposal that it should be discussed in tandem with draft

article 4. He suggested that the Commission should consider the substance of the provision in order to decide how, if at all, it should eventually be included in the draft Convention.

15. Mr. MORÁN BOVIO (Spain) said that, while one group of delegations wished to retain article 41 as it stood, another group of delegations was seeking to exclude that article altogether. The representative of Austria and the observer for Factors Chain International had pointed out that that approach could give rise to significant practical problems. The proposal put forward by the representative of France also merited consideration. If the purpose of article 41 was to adapt the Convention to future practices, such adaptation could not be brought about through the unilateral exclusion of certain practices by States through a declaration. If it was a question of adapting the Convention to new situations, the Commission should seek a mechanism for inclusion, otherwise the Convention would be meaningless for some States. The Commission should postpone its consideration of article 41 until delegations had had an opportunity to exchange views on the subject.

16. Mr. BURMAN (United States of America) said that the Commission should resume its discussion of article 41 after it had completed its consideration of article 4. The Commission should explore ways in which it could modify article 41 in order to make it clear that further exclusions might have to be made within the broad categories already reflected in article 4. His delegation was aware of the concerns that some delegations had expressed about the effect of article 41. Some States might have difficulties in adopting the Convention in its current wording because they foresaw certain practical problems. The inclusion of article 41 might enable such States to adopt the Convention in order to make use of the advantages it offered for their markets, at least in part. By retaining article 41, the Commission would substantially improve the credit capacity of many countries through the Convention but would not create greater complexity or less certainty in the financial markets.

17. Mr. BAZINAS (Secretariat) said that, in order to resolve differences, the Commission might wish to consider limiting the scope of article 41 by ensuring that the exclusions were patterned something along the lines of those listed in article 4. Another approach that would help to strike a balance between the need for flexibility and certainty would be to adjust the scope of the Convention as a whole by allowing both exclusions and inclusions. If the exclusions had to be narrow, the inclusions should also be defined narrowly.

18. The CHAIRMAN suggested that delegations should be given sufficient time to hold discussions on article 41 with a view to reaching basic agreement on principles. Article 41 could then be discussed when the Commission took up its consideration of article 4.

19. Mr. ZANKER (Observer for Australia) said that his delegation had no objection to considering article 41 together with article 4. He was not convinced that the policy behind article 41 in its current wording was sound.

20. Mr. CHAN (Singapore) asked for clarification of the proposal to discuss article 41 in the context of article 4. Did the Commission intend to reconsider all the exclusions contained in article 4? If that was the case, the Commission might not have enough time to complete its work on the Convention at the current session. His delegation had no objection to the Commission's examining the concept included in square brackets in article 4, paragraph 4, together with article 41. However, the Commission should not reopen issues that had already been settled.

21. Ms. GAVRILESCU (Romania) said that her delegation agreed with the representative of Singapore that the Commission should not take up article 4 in its entirety, since it had already agreed on the first three paragraphs of that article. The Commission should take up article 41 in conjunction with article 4, paragraph 4, only after it had completed its consideration of the Convention as a whole.

22. Ms. BRELIER (France) said she feared that, if the Commission delayed its discussion of article 41 until after it had considered article 4, it would never complete its work.

23. The CHAIRMAN said that if he heard no objection he would take it that the Commission wished to defer consideration of article 41 and proceed to article 42.

24. *It was so decided.*

Article 42

25. Mr. BAZINAS (Secretariat) said that article 42 offered States a number of options with respect to the priority rules set forth in section I of the annex. A State could adopt one of the priority systems in the annex and then combine it with a registration system contained in section II of the annex or with its own registration system, or use one of the registration systems in the annex in combination with the national priority rules. If a State opted for one of the priority systems in the annex, that system should serve as the law of the assignor's location as the priority system provided for in article 24. The whole purpose of the annex and article 42 was to allow States that did not have priority rules or wished to modernize their priority system to consider one of the options offered in the annex. If a State had a priority system that was compatible with the Convention, it might not be necessary to adopt any of the options in the annex. If a State did not have priority rules or wished to modernize its priority system, the annex could serve as a useful basis.

26. Mr. COHEN (United States of America) said that his delegation strongly supported article 42. It proposed that the words "or that it will apply those priority rules with modifications specified in that declaration" should be added at the end of paragraph 5, in order to enable a State to indicate in its declaration that it would apply the priority rules of the designated annex with modifications specified in that declaration.

27. Mr. IKEDA (Japan) said that his delegation believed that article 42 was too complicated because it offered too many options with regard to the priority rules contained in the annex. In order to simplify the rules of international trade, Japan was in favour of reducing the number of options in the annex as much as possible. He inquired whether the annex was to be examined in conjunction with article 42 or at a later stage. If the annex was examined at a later stage, his delegation reserved the right to return to article 42 in order to make possible amendments. Another possibility would be for the Commission to defer adoption of article 42 until it had completed its consideration of the annex.

28. Mr. DUCAROIR (Observer for the European Banking Federation) said that he was very concerned by the comments made by the representative of Japan. There had originally been a majority in favour of a single priority system, and his delegation had had great difficulty in securing recognition of its view that there were alternatives to the registration-based priority regime. In Europe, priority rules in Germany, France, Spain and Italy were based on the time of assignment, while the registration-based system was common in other countries. With regard

to the third set of rules, based on the time of notification of assignment, which had been proposed at the twenty-third session of the Working Group, there was no reason why it should be more complex to operate three systems rather than two. The real danger, in his view, lay in an attempt to limit rules of priority to a single system, which would inevitably be the one based on registration.

29. Mr. COHEN (United States of America) said that article 42, paragraph 5, referred to the right of States to make declarations, but did not explain the effect of such declarations. In order to clarify the article, he suggested that the following words be added to subparagraphs (a), (b), (c) and (d) of paragraph 2: "as affected by any declaration made pursuant to paragraph 5 of this article". Thus, paragraph 2 (a), for instance, would read: "The law of a State that has made a declaration pursuant to paragraph 1 (a) or (b) of this article is the set of rules set forth in section I of the annex, as affected by any declaration made pursuant to paragraph 5 of this article".

30. Mr. MORÁN BOVIO (Spain) endorsed the proposal made by the representative of the United States of America.

31. The CHAIRMAN suggested that the Commission should return to the discussion of article 42 in conjunction with its consideration of the annex.

32. *It was so decided.*

Article 43

33. *Draft article 43 was approved.*

Article 44

34. Mr. BURMAN (United States of America) said that at a previous meeting his delegation had proposed either to add the words "or declarations" after the words "no reservations", or else to remove the exception clause, so that the article would read simply: "No reservations are permitted in this Convention". Although his delegation now accepted that the wording of the article should remain unchanged, it would like those concerns to be reflected in the commentary.

35. The CHAIRMAN confirmed that the concerns of the United States delegation would be reflected in the commentary.

36. *Draft article 44 was approved.*

Articles 45 and 46

37. *Draft articles 45 and 46 were approved.*

Article 47

38. Mr. COHEN (United States of America) proposed that the discussion on article 47 should be deferred until such time as the Commission resumed its consideration of article 41, in conjunction with article 4.

39. *It was so decided.*

*The meeting was suspended at 11.15 a.m.
and resumed at 11.45 a.m.*

Annex to the draft convention

40. Mr. BAZINAS (Secretariat) said that the annex contained a number of options for States to adopt in order secure a more efficient application of article 24 concerning the law of the assignor's location. Five years of discussion within the Working Group had not enabled a consensus to be reached on which priority system was most appropriate. Therefore the four sections of the annex contained three different priority regimes. Sections I and II dealt with a registration-based system and the key characteristics thereof, section III provided for priority rules based on the time of the contract of assignment, and section IV for rules based on the time of notification of assignment.

Section I: Priority rules based on registration

41. Mr. DESCHAMPS (Canada) said that since the annex was deemed to be applicable for the purposes of article 24, and since article 24 no longer referred to "proceeds", the references to "proceeds" in the various sections of the annex should also be deleted. The same applied to articles 45 and 46.

42. *Section I of the annex, as amended, was approved.*

Section II: Registration

43. Mr. KOBORI (Japan) said that article 3 in section II provided for the registrar and the supervising authority not only to promulgate regulations but also to operate the registration process. Given that those entities had yet to be established, it seemed too early to give them such wide responsibilities. He proposed that the provision should be couched in more abstract terms, leaving the details of the registration system to be determined by a future international instrument.

44. Article 4, paragraph 3, needed clarification as to the legal effect of registration made in advance of an assignment. He asked whether such a registration would have the effect of preserving the order of priority and, if so, whether that effect should be specifically mentioned in the draft.

45. Mr. BAZINAS (Secretariat), referring to article 3, said that at its last session the Working Group had entrusted an ad hoc group of delegates with the task of preparing a provision covering the procedure for appointing the supervising authority and the registrar, and had made general recommendations on the subject in paragraph 174 of document A/CN.9/486. Paragraph 26 of document A/CN.9/491 suggested how a corresponding provision for inclusion in the annex might be worded. Alternatively, article 3 could be couched in more general terms, as proposed by the representative of Japan, or left as it stood if the Commission so wished.

46. The CHAIRMAN, noting that the articles in section II were the product of a lengthy drafting process, said that, if he heard no objection, he would take it that the Commission wished to adopt them as they stood.

47. *Section II of the annex was approved.*

Section III: Priority rules based on the time of the contract of assignment

48. Mr. SCHNEIDER (Germany) proposed that the words "and its proceeds" in article 6 should be deleted in keeping with the decision taken regarding section I.

49. He further proposed the insertion of an article 7bis containing the following important rule of evidence: "The time of the

conclusion of the contract of assignment in respect of articles 6 and 7 may be evidenced by all means of proof."

50. Mr. STOUFFLET (France), Mr. DUCAROIR (Observer for the European Banking Federation), Ms. GAVRILESCU (Romania) and Ms. STRAGANZ (Austria) expressed support for the proposal.

51. *Article 7bis was approved.*

52. *Section III of the annex, as amended, was approved.*

Section IV: Priority rules based on the time of notification of assignment

53. Mr. IKEDA (Japan) said that priority rules should be made as uniform as possible in order to enhance the effectiveness of the Convention. Uniformity could be achieved by basing them on registration, but some States clearly wished to retain other systems. He was not convinced of the validity of the system of basing priority rules on the time of notification of the assignment, which had been rejected at the first session of the Working Group five years previously because of the irrelevance of notification in the context of the assignment of a number of receivables. Japan had recently enacted legislation that was compatible with the system based on registration and was unable, for the time being, to support section IV.

54. Ms. LOMNICKA (United Kingdom) said that, as a matter of principle, the annex should contain a number of options for priority rules, so as to make the Convention as acceptable as possible. Section IV reflected English law, under which the order of priority was normally determined by the time of notification, and she urged that it be retained. However, under the rule in *Dearle v. Hall*, which was applied in common-law countries, a subsequent assignee with knowledge of a prior assignment could not obtain priority over the prior assignee by giving notification before that assignee. If the Commission agreed to retain section IV, she would propose an amendment to article 8 along those lines.

55. Mr. MEDIN (Sweden) said that his country also applied priority rules based on the time of notification of assignment. The system worked efficiently and it would be helpful if section IV could be retained in the annex. He supported the proposal by the representative of the United Kingdom for an amendment to article 8.

56. Mr. DUCAROIR (Observer for the European Banking Federation) expressed support for the retention of section IV. The systems covered by sections III and IV were both applied in major countries. Five years previously, the Working Group had considered the possibility of the system based on registration ousting the other systems. That had not happened, however, and was unlikely to happen in the foreseeable future.

57. Mr. DOYLE (Observer for Ireland) said he favoured the retention of section IV as a useful alternative and supported the proposal by the representative of the United Kingdom for an amendment to article 8. As the English law in question was also applied in Ireland and other countries, the underlying rule and the exception thereto should be accurately reflected.

58. Ms. STRAGANZ (Austria) endorsed the proposal to retain section IV.

59. Mr. SUK KWANG-HYUN (Observer for the Republic of Korea) expressed support for section IV but proposed, for the sake of consistency, the insertion of a rule of evidence similar to that adopted in the case of section III.

60. Mr. DESCHAMPS (Canada) pointed out that, according to the definition in article 5 (d), notification of an assignment meant

a notification in writing. If “notification” had the same meaning in the annex as in the Convention, it could not be evidenced “by all means of proof”.

61. The CHAIRMAN, noting that a majority of members wished to retain section IV, invited the representative of the United Kingdom to submit her proposed amendment to article 8.

62. Ms. LOMNICKA (United Kingdom) expressed support for the point made by the representative of Canada, but proposed replacing “is effected” in article 8 by “is received”, an amendment which also reflected a common-law rule.

63. The proposed addition to article 8 which she had announced earlier would read: “However, an assignee with knowledge of a prior assignment at the time of his assignment may not obtain priority over the prior assignment.”

64. Mr. BAZINAS (Secretariat), responding to the comment by the representative of Canada, said that notification might be effected either in accordance with the Convention or in accordance with national law. As he saw it, the annex called for application of the law of the assignor’s location, which was, by defi-

inition, the law of a Contracting State because otherwise article 24 would not be applicable. The rules of notification were applicable only to transactions falling within the scope of the Convention. In the case of a domestic assignment of a domestic receivable, which was outside the scope of the Convention, notification could be given under national law.

65. A conflict might arise between a domestic assignee of domestic receivables and a foreign assignee of domestic receivables where the former had given notification only under domestic law. That eventuality might be addressed in the commentary.

66. Mr. MARKUS (Observer for Switzerland) expressed support for the proposal to include a rule of evidence in section IV, referring in that connection to the definition of “writing” in article 5 (c), which, in his view, was a substantive rule rather than a rule of evidence. If a notification had to be made in writing, could it not, for example, be evidenced by a witness? there had been valid grounds for inserting a reference to rules of evidence in section III. Omission of such a reference from section IV might suggest that the means of evidence were restricted in the latter case.

The meeting rose at 12.30 p.m.

Summary record of the 716th meeting

Wednesday, 27 June 2001, at 2 p.m.

[A/CN.9/SR.716]

Chairman: Mr. Pérez-Nieto CASTRO (Mexico)

The meeting was called to order at 2.20 p.m.

DRAFT CONVENTION ON ASSIGNMENT OF RECEIVABLES IN INTERNATIONAL TRADE (*continued*) (A/CN.9/486, A/CN.9/489 and Add.1, A/CN.9/490 and Add.1-4 and A/CN.9/491 and Add.1)

Annex to the draft Convention (continued)

Section IV: Priority rules based on the time of notification of assignment (continued)

1. Mr. BAZINAS (Secretariat) confirmed that the proposal made by the observer for the Republic of Korea at the previous meeting was not necessarily to reproduce article 7bis in section IV. It had been made for the sake of the balance of the text: if a rule of evidence concerning the time of the conclusion of a contract was included in section III, it might be necessary to include in section IV a similar rule of evidence concerning the time of notification. It might also be preferable to state that the time at which a contract of assignment was made could be evidenced by any means, not necessarily in writing, on the assumption that for countries with rules along the lines of those in section III, the contract of assignment itself did not have to be in a writing. The situation regarding notification might be different, since even under the draft Convention, notification required a writing. Under other law, a notification had not only to be made in writing, but also formally, in an authorized document. It might therefore not be appropriate simply to indicate in section IV that the time of notification could be established by any means.

2. Mr. HUANG FENG (China) said that his delegation wished to retain the criteria governing the priority rules set out in section

IV, and requested clarification as to whether or not notification of the debtor was implied.

3. Mr. BAZINAS (Secretariat) confirmed that notification of the debtor was implied, although no reference was made to the debtor in the definition of a notification of assignment in article 5 (d). That omission might perhaps be rectified by replacing the words “is effected”, in article 8 of the annex, by “is received by the debtor”.

4. Mr. DESCHAMPS (Canada) noted that the form of a notification was not only a matter for States that would adopt the priority regime based on notification contained in the annex, but also for those States that would not adopt the annex, but whose national law contained a priority regime based on notification. In many instances, the notification required under national law was more formal than that provided for in the draft Convention, in which case the latter would not be sufficient to give priority to an assignee. Although the draft Convention should not seek to resolve that problem, the issue should be highlighted in the commentary in order to assist the reader.

5. Mr. STOUFFLET (France) pointed out that the systems outlined in the annex to the draft Convention were optional. A State that had difficulty in reconciling the notification regime set out in section IV with its national notification regime could either choose not to adopt section IV and to retain its national system, or could modify its national system in the light of that section. It was a decision to be taken at the national level, not by the Commission.

6. Mr. BAZINAS (Secretariat) said that the secretariat would make a suggestion concerning the matter raised by the representative of Canada when the issue of form was discussed. The amendment proposed by the representative of the United Kingdom at the previous meeting, namely, to replace "is effected" in article 8 by "is received", might be expanded so as to read "is received by the debtor", in order to take account of the comment by the representative of China. For consistency, article 9 should perhaps be similarly amended.

7. The CHAIRMAN, noting that the concept of the amendment proposed by the United Kingdom seemed already to have been approved, requested the representative of the United Kingdom to submit her proposal to the secretariat in writing with a view to its discussion in the drafting group.

8. *Section IV of the annex, as amended, was approved.*

9. *The annex to the draft Convention as a whole, as amended, was approved.*

Article 42 (continued)

10. The CHAIRMAN invited the Committee to resume its consideration of article 42, on application of the annex.

11. Noting that no speakers wished to take the floor, he said he took it that article 42, as amended by the United States delegation, could be approved.

12. *It was so agreed.*

13. *Draft article 42, as amended, was approved.*

14. Mr. BURMAN (United States of America) recalled that during the discussion of section II of the annex at the previous meeting the secretariat had drawn attention to paragraph 26 of document A/CN.9/491, which suggested language covering the procedure for appointing the supervising authority and the registrar. He would have no objection to the incorporation of such language somewhere in the draft Convention, perhaps in the annex. In his delegation's view, reference should be made both to Contracting and to Signatory States, in order to ensure the widest possible participation of States.

15. Mr. SEKOLEC (Secretary of the Commission) said the inclusion of both Contracting and Signatory States would, in the secretariat's view, present no technical difficulties.

16. Ms. SABO (Canada) supported the suggestion made by the representative of the United States.

17. Mr. MORÁN BOVIO (Spain) also supported the suggestion, adding that the precise wording and location of the provision could be decided by the drafting group.

18. The CHAIRMAN suggested that the drafting group should consider the matter further with a view to formulating the language of the provision and deciding on its precise location in the draft Convention.

19. *It was so decided.*

20. The CHAIRMAN invited the Commission to embark on a full review of the text of the draft Convention adopted by the Working Group, focusing in particular on the issues pending.

Title

21. The CHAIRMAN recalled that a suggestion had been made to delete the words "in International Trade" from the title.

22. Mr. MORÁN BOVIO (Spain), supported by Ms. McMILLAN (United Kingdom), said that the words "in International Trade" should be retained, since they were a traditional formula that helped the reader to understand clearly the sphere of activity concerned. Of course, the official title of the Convention would not be used on all occasions: a shortened version would be used in ordinary practice.

23. Ms. SABO (Canada) expressed satisfaction with the title, but suggested inserting the definite article before the word "Assignment"; that matter might be taken up by the drafting group.

24. The CHAIRMAN said he would take it that the Commission wished to retain the existing title of the Convention.

25. *It was so decided.*

26. *The title was approved.*

Preamble

27. Mr. MORÁN BOVIO (Spain) said that he had no objection to the preamble as currently worded. However, it would not be appropriate to include in the preamble a clause indicating that it had built on the achievements of the Unidroit Convention on International Factoring as proposed in document A/CN.9/490. While the two conventions were linked, the inclusion of such a clause might create difficulties for the interpretation of the draft Convention in the light of the reference to the preamble in article 7. It would be more appropriate to include a reference in the commentary to the useful preliminary work that had been carried out.

28. The CHAIRMAN said that, in the absence of any objection, he would take it that the preamble to the draft Convention could be approved as currently worded.

29. *It was so decided.*

Article 1

30. *Draft article 1 was approved.*

Article 2

31. *Draft article 2 was approved.*

Article 3

32. *Draft article 3 was approved.*

Article 4

33. The CHAIRMAN reminded the Commission that draft article 4 was to be discussed in conjunction with draft article 41.

34. Mr. BAZINAS (Secretariat) said that article 4, on exclusions, had been adopted by the Commission the previous year with the exception of its paragraph 4, which was linked to article 41. Like that article, paragraph 4 had been placed in square brackets. However, the Working Group had identified three issues requiring further discussion. The first was whether a negotiable instrument transferred by possession but not by negotiation should also be excluded. In order to avoid interfering with the rights of persons under negotiable instrument law, paragraph 1 (b) focused not on the type of instrument, but on the negotiation. At the last session of the Working Group the

question had been raised whether documents which were transferred by delivery with an endorsement and were delivered as security to a third party should also be excluded. The rationale behind that suggestion was that the person in possession of the instrument would need to be protected in the case of a priority conflict with an assignee. The normal expectation of the person in possession would be that the law of the country where the instrument was located, rather than the law of the assignor's location, would govern such a conflict of priority. Paragraph 27 of document A/CN.9/491 contained a suggestion to exclude such possession on the assumption that the exception for negotiable instruments focused on negotiation, in order to protect the expectations of the holder of an instrument. It was assumed that where there was a receivable and also a negotiable instrument incorporating the receivable, the assignment of the receivable itself would not be excluded, but that the transfer of the negotiable instrument would be excluded by virtue of article 4, paragraph 1 (b). The text of article 4, paragraph 1 (b), did not clearly reflect that intention, and new text had been suggested in paragraph 28 of document A/CN.9/491 reading as follows: "that this Convention does not affect the rights and obligations of any person under negotiable instrument law".

35. The second issue related to the definition of securities. The Commission might wish to consider whether the reference to "investment securities" in paragraph 2 (f) was sufficient to achieve the intended goal, or whether, to take account of the text on the law applicable to dispositions of securities held with an intermediary, currently being prepared by the Hague Conference on Private International Law, that definition needed to be amended.

36. The third issue concerned the possible reformulation of article 4, paragraph 3, which had raised a number of concerns at the previous session of the Commission. In paragraph 32 of document A/CN.9/491, the secretariat had put forward revised wording in that regard to ensure that the limitations governing the acquisition of property rights in real estate under the law of the State in which the real estate was located were not to be affected. If the concerns persisted, the secretariat would prefer to withdraw its suggestion rather than provoke another protracted debate on the matter.

Paragraph 1 (b)

37. Mr. DESCHAMPS (Canada) said that, on the issue of negotiable instruments, his delegation fully supported the new wording suggested by the secretariat in paragraph 28 of document A/CN.9/491, which should replace the existing wording of article 4, paragraph 1 (b). A similar proposal had been made by the United States in document A/CN.9/490. He also expressed support for the suggestion made by France in document A/CN.9/490/Add.1, to replace "effets de commerce" with "instruments négociables" in the French version of the text.

38. Ms. PIAGGI DE VANOSI (Observer for Argentina), Ms. GAVRILESCU (Romania) and Mr. MORÁN BOVIO (Spain) supported the remarks of the representative of Canada concerning the secretariat's suggested rewording of paragraph 1 (b).

39. Mr. DUCAROIR (Observer for the European Banking Federation) said that, as he understood it, the representative of Canada had supported the new wording of paragraph 1 (b) suggested by the secretariat, but had also supported the suggestion by France to amend two words in the French version of the existing text. It was important to be clear about what was being undertaken. At all events, great caution should be exercised in the use of terminology.

40. Mr. BAZINAS (Secretariat) said that in view of the difficulty of arriving at a uniform definition of the term "negotiable

instruments", the Commission might wish to arrive at a general understanding of the term, which could then be further developed in the commentary.

41. Mr. CHAN (Singapore) questioned the procedure being followed. The new wording suggested by the secretariat referred to "negotiable instrument law". However, he doubted that such a term could safely be used when there was no agreement as to what constituted a negotiable instrument.

42. Mr. BAZINAS (Secretariat) said that the wording suggested by the secretariat had not created the problem; the term "negotiable instrument" already appeared in the current text of article 4, paragraph 1 (b), as approved by the Commission. The wording suggested by the secretariat was tentative, and had merely been put forward for consideration.

43. Mr. ZANKER (Observer for Australia) endorsed the comments made by the representative of Canada. The wording suggested by the secretariat might perhaps be incorporated in a new paragraph 3 (c). The existing paragraph 1 (b) should then be deleted.

44. Mr. DOYLE (Observer for Ireland) said that the language of the existing text was not particularly satisfactory and that the wording suggested by the secretariat had initially seemed very attractive. However, he had been struck by the comments of the representative of Singapore: negotiable instrument law being a very broad and ill-defined subject, he would, on balance, prefer the text to remain as it stood.

45. Mr. MORÁN BOVIO (Spain) said that the concerns expressed by the representative of Singapore and the observer for Ireland were unjustified. The wording suggested by the secretariat, although general, clearly stated that the draft Convention would not affect the rights and obligations of any person under negotiable instrument law. However, when a transaction was not covered by negotiable instrument law, the draft Convention would be applicable. At first sight, the language suggested might appear to create difficulties. On closer examination, however, it was far preferable to the text of article 4, paragraph 1 (b), as currently worded.

46. Mr. BAZINAS (Secretariat) said that the main issue was the two questions referred to the Commission by the Working Group: first, whether to exclude instruments transferred by possession; and second, if such instruments were not to be excluded, the need to include a different priority rule to protect the rights of persons in possession of such instruments. The secretariat's suggestion was one way of addressing those questions.

47. Mr. FRANKEN (Germany) said that while his delegation supported the comments made by the representative of Canada, it had some difficulty with the wording suggested by the secretariat. The term "does not affect" was ambiguous, and not used elsewhere in the article. Furthermore, as was stated in paragraph 28 of document A/CN.9/491, the wording suggested by the secretariat would also result in avoiding excluding the assignment of a contractual receivable just because the receivable was incorporated into a negotiable instrument—something which was not the intended objective. The wording to be adopted should therefore be considered further, given that most participants would agree, as a matter of policy, that something should be done to address the questions referred to the Commission by the Working Group.

48. The CHAIRMAN suggested that the meeting should be suspended to allow delegations to discuss their concerns directly with the secretariat.

*The meeting was suspended at 3.40 p.m.
and resumed at 4.10 p.m.*

49. Mr. BAZINAS (Secretariat) said that the wording suggested in paragraph 28 of document A/CN.9/491 was one possible solution to the question put forward by the Working Group, and was consistent with the policy of the Working Group and the Commission. The intended aim was to avoid affecting the rights and obligations of persons holding instruments under negotiable instrument law. However, where, under national law, a receivable incorporated into a negotiable instrument might be assigned separately, such assignments would not be excluded from the Convention. The draft Convention would not interfere with those systems which did not permit an assignment of the receivable in the case where it was incorporated in a negotiable instrument.

50. The term “does not affect” was used in several articles of the draft Convention to imply that the matter was not excluded but that the Convention did not affect rights conferred under law other than the Convention. Thus, the priority of a person holding an instrument would be governed by the law of the country where the instrument was located.

51. The Commission had three options if it wished to address the question referred to it by the Working Group: the text suggested by the secretariat; the inclusion in the draft Convention of a different priority rule to deal with those transfers of negotiable instruments that would not be excluded under article 4, paragraph 1 (*b*); and lastly, exclusion by way of declaration under article 41. The key issue was which, if any, of those three options the Commission would prefer to adopt, rather than whether or not the wording of a particular proposal was appropriate.

52. The CHAIRMAN suggested that, in order to expedite matters, representatives who wished to take the floor should focus on the options available.

53. Mr. STOUFFLET (France) recalled that in the course of a series of meetings the Working Group had taken the view that it could deal with the question of negotiable instruments by excluding completely from the Convention certain types of receivables. It had then come round to the view that that would not be a sound method, and that what was significant was rather the technique used to transmit a given receivable, namely, the various forms of negotiation. France’s proposal had therefore been that whenever the parties used techniques of negotiation the Convention would not apply, because such techniques were subject to an entirely different legal regime from that set out in the Convention. As he understood it, that was exactly the spirit of the text proposed by the secretariat in paragraph 28. His delegation was therefore prepared to accept that text, the consequence of which would be that if a receivable was incorporated in a negotiable instrument and the parties transferred that receivable using the traditional forms of assignment, there was no reason why the Convention should not apply.

54. However, he had certain reservations as to the latest proposal by the secretariat which, if he had understood correctly, would include in the Convention priority rules that would be specifically applicable in the case of negotiable instruments. He feared that that would go beyond the Commission’s mandate, and might result in conflict with existing instruments.

55. Mr. WHITELEY (United Kingdom) joined in supporting the secretariat’s argument that the Commission should seek to exclude transfer by possession. It would be better not to omit any mention of that issue in the Convention, since the debate it had so far generated showed that the question was not uncontroversial, and some guidance should be given as to how such transfers should be treated.

56. While agreeing with the representative of Germany that the provision should be drafted in clearer language, he nevertheless

considered that the language in paragraph 28 was eminently preferable to the current wording. As to how the language might be improved, he concurred that it might be difficult to arrive at a definition of “negotiable instrument”. The crucial point was that such instruments, whatever they were, could be and in fact were transferred easily on a daily basis outside the scope of the Convention, and that the Commission would not wish to take any step which might impede that practice.

57. Mr. SMITH (United States of America) said that many members of the Commission appeared to be in favour of the proposal made by the secretariat, but that others had concerns, relating chiefly to definitional issues. Perhaps the approach taken could be along the lines of that suggested by the secretariat earlier, namely, to focus not on definitions, but rather on practical questions such as whether what was being transferred was in fact an instrument, whether the person concerned was in possession of that instrument, and if so what would be the legal effect of such possession under the law of the State in which the instrument was situated. Answering those questions would provide an answer as to what rights that person had, and whether the Convention would affect those rights.

58. If that approach was taken, the language used could be quite simple and still address all the concerns expressed. He suggested the formulation: “This Convention does not affect the rights of an assignee in possession of an instrument under the law of the State in which the instrument is situated”.

59. Mr. FRANKEN (Germany) said it was clear that a receivable originating under the original contract had to be distinguished from a receivable generated by issuing a cheque: it was the latter that the Commission sought to exclude from the scope of the Convention. He suggested that the sentence proposed should be amended to read: “This Convention is not applicable to the assignment of a receivable incorporated in a negotiable instrument” (or “... in an instrument governed by negotiable instrument law”).

60. Mr. ZANKER (Observer for Australia) said that although his preference was still for the secretariat’s suggested wording, he could accept the proposal by the representative of Germany if there was majority support for it.

61. Mr. WHITELEY (United Kingdom) noted that the terms “assignment” and “assignee”, used in the German and United States proposals respectively, were both defined in article 2 of the Convention. It would therefore be better to change the wording of that provision so as to make clear that the proposed exclusion concerned practices involving negotiation rather than assignment or assignees as defined in the Convention.

62. Mr. DESCHAMPS (Canada) said that although the new United States proposal was not a bad one, his delegation was not prepared to endorse it, because it suspected that it differed in substance from the secretariat’s suggestion, for which it had expressed support. As had been explained by the representative of France, one of the reasons for providing for exclusions in the Convention was in order to exclude transfers by negotiation. If a transfer was effected by assignment under the rules of common law, without the assignee being able to claim any rights under the law governing negotiable instruments, then it would be in the same position as any other assignee. The United States proposal suggested that an assignee who was in possession of an instrument would not be subject to the Convention even if negotiable instrument law was not applicable.

63. The United States representative had rightly pointed out that a number of speakers had raised questions concerning the meaning of the term “negotiable instrument law”, and it was true that problems of definition could not be entirely avoided. Similar

problems had arisen with regard to the term “consumer protection law”, and it had eventually been agreed to refer to that law only in general terms in order to avoid the Convention becoming unduly lengthy.

64. The problem of defining “negotiable instrument law” was probably less acute than the problem of defining “securities”, which were referred to later in the text of article 4. The Working Group’s conclusion had been that any attempt to define that term would create more problems than it solved. He submitted that difficulties over the meaning of negotiable instrument law ought not to deter the Commission from adopting the proposal of the secretariat if it considered it to be sound in substance.

65. Nor could he support the German proposal, which, under a number of legal systems, would have the effect of removing a large number of receivables from the scope of the Convention on the grounds that they were also represented by a negotiable instrument. The moment the debtor issued a cheque in settlement of an account receivable and the beneficiary deposited that cheque in his bank, the transaction would be excluded because that deposit would constitute a transfer within the meaning of the Convention.

66. Mr. MORÁN BOVIO (Spain) said the German proposal posed a serious risk of excluding from the Convention any possible assignment of a receivable incorporated in a negotiable instrument. That proposal should not be pursued, since it would run counter to the approach adopted by the Working Group over the past years.

67. The United States proposal in fact barely differed from that of the secretariat, merely substituting the word “assignee” for the words “any person”. He agreed with the United Kingdom representative that it would be preferable not to make reference to the assignee in the context of exclusions. He thus continued to prefer the secretariat’s proposal, which could perhaps be modified by the addition of the phrase “under the law of the State in which the instrument is situated”, taken from the United States formulation.

68. Mr. BAZINAS (Secretariat), on a point of clarification for the purposes of the commentary, asked whether the Commission was in a position to agree that “negotiable instrument”, a term not defined in the Convention, basically meant bills of exchange, promissory notes, and cheques. It bore noting that a provision making an exclusion from the Convention need not lay down a conflict-of-laws rule, but could simply refer to the law governing the instrument.

69. Mr. DOYLE (Observer for Ireland) said he could not support the German proposal, which was the precise opposite of what the Commission was trying to achieve. He was not opposed to the United States proposal, which was basically a refinement of the secretariat’s formulation, and could accept either proposal depending on the wish of the majority.

70. Ms. STRAGANZ (Austria) said that her delegation would have favoured the German proposal, but that since the latter had not commanded much support, it could endorse the secretariat’s suggested formulation, though not the proposal made by the United States.

71. The CHAIRMAN noted that there was general support for the secretariat’s proposal. He suggested that it should be forwarded to the drafting group, modified so as to take into account the points raised during the discussion.

72. Ms. McMILLAN (United Kingdom) said that her delegation, while supporting the secretariat proposal, considered that as now drafted it was too wide in scope.

73. Mr. BAZINAS (Secretariat), in reply to questions from Mr. STOUFFLET (France) and Ms. GAVRILESCU (Romania), said his understanding was that the drafting group would be taking as a basis for its work the text in paragraph 28 of document A/CN.9/491, perhaps replacing the term “negotiable instrument law” by “law governing the negotiable instrument”. The text would reflect points raised in the course of the discussion, and might involve a restructuring of the article as a whole.

The meeting rose at 5.05 p.m.

Summary record of the 717th meeting

Thursday, 28 June 2001, at 9.30 a.m.

[A/CN.9/SR.717]

Chairman: Mr. Pérez-Nieto CASTRO (Mexico)

The meeting was called to order at 9.50 a.m.

DRAFT CONVENTION ON ASSIGNMENT OF RECEIVABLES IN INTERNATIONAL TRADE (*continued*) (A/CN.9/486, A/CN.9/489 and Add.1, A/CN.9/490 and Add.1-4 and A/CN.9/491 and Add.1)

Article 4 (continued)

Paragraph 1 (b) (continued)

1. Mr. SMITH (United States of America) said that, while his delegation had no objection to the proposal put forward at the previous meeting concerning negotiable instruments, there were three areas that that proposal did not cover. The first area

concerned situations in which a negotiable instrument was delivered in pledge to a lender. Such a situation might arise not through negotiation but through the mere physical delivery of the instrument under the law of pledge. Under the draft Convention, the priority of the pledge would be governed by the law of the assignor’s jurisdiction, whereas the lender might naturally assume that, owing to its physical possession of the instrument, it had priority.

2. The second area of concern dealt with instruments that might not be technically negotiable instruments but which were treated under applicable law much like negotiable instruments. Such

instruments normally represented a right to payment, and that right to payment was normally transferred through the physical delivery of the instrument, often with an endorsement or assignment. Once again, the transferee might have every reason to believe that, by taking physical possession of an instrument with an endorsement or assignment, it had priority and would normally not be aware that priority would be governed by the law of the assignor's jurisdiction.

3. The third area concerned electronic instruments. Many countries were developing laws where instruments could be evidenced in electronic form and where the electronic instrument was treated under the law as if it was a negotiable instrument. However, since the electronic instrument was not evidenced by a writing, it did not technically qualify as a negotiable instrument.

4. Although some delegations might object that his delegation was introducing new issues that should not be raised, the three areas of concern were merely amplifications of the policy underlying the discussion of negotiable instruments that had taken place at the previous meeting. A discussion of those issues in the context of article 4 would facilitate the Commission's consideration of article 41.

5. Mr. MORÁN BOVIO (Spain) said that the representative of the United States should explain why the secretariat's proposal on article 4, paragraph 1 (b), contained in paragraph 28 of document A/CN.9/491, did not resolve the three areas of concern that he had raised, as well as how the United States proposal resolved those issues.

6. Mr. SMITH (United States of America) said that the secretariat's proposal did not address all of the issues that he had raised. First, under the law of pledge, if an instrument was merely pledged but not negotiated, the lender might believe that it had priority, not realizing that its rights would still be affected by the Convention since no negotiation had taken place. Secondly, if an instrument was not a negotiable instrument, the rights of the holder of the instrument would be affected by the Convention. The secretariat's proposal dealt only with negotiable instruments. There were several types of instruments that were not negotiable and which were normally pledged or transferred with endorsement or assignment. Electronic instruments were often not covered because in many countries the negotiable instrument law required that a negotiable instrument should be evidenced by a writing. In the negotiable instrument law of such countries, "writing" meant a physical writing, whereas that term was construed much more broadly in the draft Convention and could include electronic records.

7. Mr. DESCHAMPS (Canada) said that, while a significant number of delegations had been in favour of the secretariat's proposal, some delegations had expressed concern about the meaning of the term "negotiable instrument law". The United States delegation had attempted to solve that problem by proposing another text that was also intended to solve other issues. His delegation believed that the United States proposal would give rise to problems of interpretation, in so far as the term "negotiable instrument" was viewed by some delegations as being not entirely clear. The use of the term "instrument" instead of "negotiable instrument" would require a definition of "instrument", and he wondered whether the Commission would be able to reach consensus in that regard. In a situation where someone wished to take as a pledge an instrument that was not a negotiable instrument and which nevertheless was capable of being pledged, his delegation would prefer the pledgee to have to comply with the Convention, as the lesser of two evils. It was extremely difficult to distinguish between a mere piece of paper and an instrument. For that reason, Canada supported the secretariat's proposal.

8. Mr. STOUFFLET (France) said that, at the previous meeting, the United States delegation had proposed that a list should be made of situations involving negotiable instruments. That approach was not entirely acceptable because lists were never complete and it was not always easy to interpret descriptions of specific practices. Perhaps the secretariat's proposal could include wording to the effect that the same solution would apply to all transfers of instruments made in the same manner—namely by endorsement or delivery—as the negotiation. If an instrument was not negotiable by nature but was transferred in the same manner, the principle set forth in the secretariat's proposal should apply. He wondered whether that formulation would be acceptable to the United States delegation.

9. Mr. MORÁN BOVIO (Spain) said that the secretariat's proposal was to be supplemented by an explanation in the commentary to the effect that "negotiable instrument legislation" would refer to cheques, promissory notes and bills of exchange as the main criteria. Thus, the draft Convention would exclude three instruments that had their own clear, applicable law. The United States proposal did not deal with cheques, promissory notes or bills of exchange but rather with any type of receivable that was covered by a writing. His delegation wished to know what type of assignment would remain under the Convention if the United States proposal was accepted.

10. Mr. DOYLE (Observer for Ireland) said that, if a decision was to be taken, his delegation would favour adopting the secretariat's proposal, since there seemed to be no better solution.

11. Mr. SMITH (United States of America) said that his delegation could go along with the proposal made by the representative of France. That proposal would modestly expand the secretariat's proposed language to include the delivery of instruments which, under applicable law, were transferred in much the same way as negotiable instruments.

12. Mr. WHITELEY (United Kingdom) said that his delegation supported the solution proposed by the representative of France.

13. Mr. CHAN (Singapore) expressed concern that the discussion was creating more difficulties than it was resolving. The longer a text was examined, the more problems would be identified, some of which were more real than others. While appreciating the concerns of the United States delegation, he did not understand why it had raised them at such a late stage. Even its written comments had failed to mention the fundamental point now raised. The United States representative argued that the inclusion of his concerns in the earlier subparagraphs of article 4 would help to determine the scope of article 4, paragraph 4, and article 41, which dealt with the exclusion of practices from the Convention. However, since there was no end to the number of current or as yet unknown practices that could be excluded, a more useful approach would be to determine the limits of exclusions, and to allow States to make the relevant declarations to exclude established practices that did not accord with the scope of the Convention. If the United States proposal to include additional exclusions in article 4, paragraph 4, was adopted, should any additional practices be identified at any subsequent time before the Convention entered into force, some States might refuse to become signatories, on the grounds that those practices were not excluded. It would thus be unwise to attempt to come up with a comprehensive list of excluded practices. Article 4, paragraph 4, and article 41 should be formulated first, with a view to determining what kind of exclusions could be made, and no further language should be added to the other subparagraphs in article 4. However, if that approach was not acceptable to the Commission, in its capacity as the Committee of the Whole, the proposal made by the representative of France would be an acceptable alternative.

14. Mr. DESCHAMPS (Canada) said that, while he appreciated the United States concern and was sympathetic to the proposal by France, the Commission was venturing into uncharted territory. If the exclusions were extended to apply not only to negotiable instruments, but also to any instrument transferable by delivery in the ordinary course of business, the applicable law would have to be determined, and the term “instrument” defined. For instance, an instrument called a chattel paper existed in the United States and Canada, which could be pledged and was unknown as a concept in most other legal systems. Would such a document be covered by the term “instrument”? If the Commission agreed that the solution proposed in the Convention—namely, that the law of the assignor’s location should determine issues of priority—was appropriate, then the same solution could apply to so-called “instruments” which were not in fact negotiable instruments.

15. Mr. MORÁN BOVIO (Spain) said that the representative of Canada had pinpointed the problem posed by the otherwise attractive proposal by France.

16. Mr. DOYLE (Observer for Ireland) agreed with the representative of Singapore that the longer the discussion went on, the more difficulties would be encountered. Instead, the Commission should be looking to resolve problems by consensus. He would be happy to support the proposal by France if that would lead to a generally acceptable agreement.

17. Mr. WHITELEY (United Kingdom) said that, as he understood it, France’s proposal was not as wide in scope as the representative of Canada had suggested. The wording suggested by the secretariat would be the basis for the proposal. Consequently, it would allow the Convention to apply, without displacing rules that would otherwise apply to determine priority. An instrument known as a bill of sale existed in the United Kingdom, for which a registration regime was in place. If France’s proposal was adopted, that regime would continue to apply, while bills of sale assigned under the Convention would be covered by the Convention.

18. Mr. STOUFFLET (France) said that his proposal had been an improvised solution, made with a view to building a consensus which responded to the concerns of the United States delegation. As the representative of the United Kingdom had indicated, it was not very ambitious in scope. It was simply a way of taking into account the fact that in some countries there were some types of receivables which were not negotiable instruments, but which served as such for some purposes. All he proposed was that, under the Convention, those types of receivables should be dealt with as if they were negotiable instruments.

19. Mr. DESCHAMPS (Canada) said that, while his delegation would not oppose any text that enjoyed a broad consensus, it needed to see a written version of the text proposed by the French delegation. A number of difficulties of interpretation would be created by replacing the words “negotiable instrument” with “instrument”. He failed to understand how that could be reconciled with the text proposed by the secretariat in paragraph 28 of document A/CN.9/491, namely, “This Convention does not affect the rights and obligations of any person under negotiable instrument law”. Although the wording could be amended to read “the rights and obligations of the holder of a negotiable instrument or any similar instrument”, the problem remained how to amend the words “under negotiable instrument law”. Under what law could those similar instruments be considered? Careful thought needed to be given to the legal implications of the French proposal before any decision was taken.

20. The CHAIRMAN suggested that the delegations of France, Canada, Spain, the United States of America, the United Kingdom and any other interested delegations should meet with

the secretariat in the interval before the afternoon meeting, with a view to developing an acceptable text capturing the notion of instruments transferred in a similar way to negotiable instruments. The resulting text would be referred to the Commission the following day.

21. *It was so agreed.*

22. Ms. SABO (Canada) said that her delegation reserved the right to comment further on the drafting once a new formulation had been agreed, since it raised a policy issue.

Paragraph 2

23. Mr. SMITH (United States of America) said that at a previous meeting the secretariat had pointed out that the Hague Conference text on the law applicable to dispositions of securities held with an intermediary favoured a choice-of-law rule based on the place of the relevant intermediary approach (PRIMA), whereas the draft Convention gave priority to the location of the assignor. That situation might result in an overlap between the proposed Hague instrument and the draft Convention. He asked whether that issue had been addressed.

24. Mr. BAZINAS (Secretariat) said that the previous day a proposal had been received from the Hague Conference on how to avoid an overlap between its proposed text and the draft Convention. There appeared to be an emerging consensus in the securities industry in favour of PRIMA. The suggestion of the Hague Conference experts was that article 4, paragraph 2 (d), of the draft Convention should refer to “all securities held with an intermediary” rather than to “securities settlement systems”, on the grounds that the reference to settlement systems would not be sufficient to exclude all indirectly held securities covered by the Hague Conference text.

25. Mr. MARKUS (Observer for Switzerland) supported the Hague Conference experts’ proposal. Another solution would be to address the problem in paragraph 2 (f), but either approach would be acceptable. With regard to paragraph 2 (d), he asked whether the proposed formula would retain the adjective “investment”, which, in his view, was redundant.

26. Mr. WHITELEY (United Kingdom) said he fully agreed that there should be no overlap between the Convention and the Hague Conference text. As he saw it, paragraph 2 (d) referred to settlements of transactions that had taken place: inter-bank payment systems were used to transfer money once a transaction had been agreed and investment securities settlement systems were used to transfer securities. The securities excluded from the Convention under paragraph 2 (d) were therefore “in-flight” securities that were being transferred from a seller to a purchaser. Paragraph 2 (f) seemed to be the securities equivalent of paragraph 2 (c) inasmuch as it referred to the holding of securities. The reference in the chapeau to receivables “arising under or from” the holding of securities might be another way of saying “arising directly or indirectly from” securities held by an intermediary. The drafting group might wish to consider moving the relevant subparagraphs closer together to establish a clearer link between them.

27. Mr. SMITH (United States of America), endorsing the points made by the representative of the United Kingdom, said that the drafting group should review the wording not only of paragraph 2 (f) but also of paragraph 2 (d). The term “investment securities” might not fully cover the types of financial assets that were subject to a settlement system and to which paragraph 2 (d) would be applicable. Clearance systems might exist for other kinds of financial assets that would normally also be held by

intermediaries. With regard to paragraph 2 (f), the Commission seemed to intend that it should apply not only to the sale, loan or holding of, or agreement to repurchase, investment securities but also to a transfer of security rights in the securities or other financial assets credited to a securities account.

28. Mr. BAZINAS (Secretariat) said that the drafting group would appreciate some guidance as to the type of amendment that the representative of the United States wished to make to paragraph 2 (d). He took it that paragraph 2 (f) should refer to all indirectly held securities and to security rights in such securities.

29. Mr. SMITH (United States of America) proposed inserting a reference in paragraph 2 (d) to settlement systems relating to investment securities or other financial instruments or assets. The idea was that the exclusionary provision in paragraph 2 (d) should be applicable in cases where a financial instrument or asset was normally held in a securities account and a clearance or settlement system existed for that type of asset.

30. The categories of transaction to which paragraph 2 (f) was applicable should include a transfer of security rights in investment securities and a transfer of security rights in any type of financial instrument or asset that was to be credited to or held in a securities account.

31. Mr. MARKUS (Observer for Switzerland) suggested that the concern of the United States representative to cover all kinds of transactions in paragraph 2 (f) might be addressed by replacing the existing enumeration by the words "all transactions relating to investment securities".

32. Mr. DUCAROIR (Observer for the European Banking Federation) said he preferred the term "investment securities" to "securities", as being more restrictive.

33. He pointed out that certain negotiable instruments were not payment instruments but financial assets: for example, assets called "commercial paper" in the United States of America were viewed as securities. Yet equivalent instruments in countries such as France, e.g. certificats de dépôt or billets de trésorerie, were not regarded as financial assets. He thus wondered whether they were covered by the exclusionary provisions. If not, a decision should be taken regarding the gap in coverage affecting countries that did not classify commercial paper as securities. The matter should at least be clarified in the commentary to the article.

34. Mr. DESCHAMPS (Canada) proposed using the wording of the Hague Conference text, article 3 of which provided that "dealings in securities credited to a securities account are governed by the law of the place of the relevant securities intermediary". The expression "dealings in securities" was used throughout the text. He proposed that article 4, paragraph 2 (f), of the draft Convention should be amended to read "Dealings in securities held with an intermediary".

35. The proposal by the representative of the United States to expand the exclusionary provisions to apply to financial assets that were not securities and to security rights in securities needed further exploration. It would be difficult to incorporate the latter addition under the chapeau of paragraph 2 and in his proposed new version of paragraph 2 (f). Perhaps security rights in securities were already implicitly covered by the term "dealings". He also drew attention to a possible narrowing of the exclusionary

provision in paragraph 2 (f). As it stood, it would probably cover both directly and indirectly held securities. But the new version would be applicable only to securities held with an intermediary. He wondered whether the Commission wished to restrict the exclusionary provision to indirectly held securities.

36. Ms. SUMME (Observer for the International Swaps and Derivatives Association Inc.—ISDA) said that ISDA was a global trade organization with over 530 members operating in 42 countries, who engaged in privately negotiated swaps and derivatives transactions. Her organization supported the place of the relevant intermediary approach (PRIMA) adopted in the Hague Conference text and was in favour of using the wording of that text, as suggested by the representative of Canada.

37. The inclusion of foreign exchange contracts, representing over a trillion United States dollars a day in value, in article 4, paragraph 2, would create great uncertainty and distort market practices in the 42 jurisdictions in which ISDA members operated. Moreover, the existing body of law on the subject might be difficult to harmonize with the Convention. She therefore suggested that foreign exchange contracts be excluded from the Convention.

*The meeting was suspended at 11.20 a.m.
and resumed at 11.55 a.m.*

38. Mr. BAZINAS (Secretariat) requested confirmation for the drafting group that the Commission wished to amend paragraph 2 (f) to include a reference to transfers of security rights and to expand the reference to securities by inserting a phrase such as "or other financial assets or instruments held with an intermediary".

39. With regard to paragraph 2 (d), he requested further guidance for the drafting group as to how it should be amended.

40. Mr. SMITH (United States of America) reiterated that paragraph 2 (d) currently covered settlement systems that related only to what were called investment securities, a term not defined in the Convention. His understanding was that the receivables arising from clearance or settlement systems for financial assets that were normally transferred among financial intermediaries should also be excluded from the Convention. He was therefore concerned at the limitation of the exclusionary provision to settlement systems involving investment securities. It should also cover settlement systems involving financial assets and financial instruments that were generally held in a securities account. As some countries might not be familiar with the term "settlement systems", he proposed amending the text to read "clearance and settlement systems" to make it clear that the system was entitled to settle not only payments but also deliveries or other transfers of title to parties in the system.

41. Mr. BAZINAS (Secretariat) said, with regard to the proposal by the observer for ISDA, that when the Convention had been drafted foreign exchange transactions had been assumed to be excluded under either paragraph 2 (a) or 2 (b). In response to concern within the financing industry over transactions that occurred outside a regulated exchange and were not covered by a netting agreement, the Commission might however wish to add a specific reference to foreign exchange transactions in an additional subparagraph of paragraph 2.

42. Mr. FRANKEN (Germany) expressed support for the proposal by ISDA, as outlined by the secretariat.

43. Mr. DUCAROIR (Observer for the European Banking Federation), after also supporting the ISDA proposal, suggested reversing the order of subparagraphs (e) and (f): whereas all the other subparagraphs were homogeneous and even overlapping, and therefore belonged together, subparagraph (e) related to a completely separate issue.

44. Mr. SMITH (United States of America) supported the ISDA proposal, and also the drafting proposal made by the observer for the European Banking Federation.

45. *Paragraph 2 was approved.*

Paragraph 3

46. Mr. WINSHIP (United States of America) said that at the thirty-third session of the Commission a decision had been taken, after considerable debate, to include within the scope of the draft Convention receivables in the form of rental payments arising from real property, in recognition of the difficulty experienced in some jurisdictions such as his own, where a variety of laws obtained with regard to what was considered a receivable. Rental payments were considered personal property in some states of the United States but real property in others. Practitioners in real property finance in the United States had since pointed out that the hurriedly drafted provision contained in paragraph 3 (a) could cause problems with regard to not only rental payments but also hotel room rentals or even seats in a football stadium. Would they be regarded as real or personal property under the draft Convention? In order to avoid the need for the United States and other countries with a similar problem to issue a declaration under article 4, paragraph 4, or article 41, existing paragraph 3 (a) could be replaced by a provision along the following lines: ["This Convention does not] (a) Apply to the assignment of a receivable related to land situated in a State in which a property right in land confers a right to such a receivable." Alternatively, a new subparagraph could be added, stating that a State could declare otherwise; and such a declaration could be accompanied by greater detail.

47. Ms. GAVRILESCU (Romania) said that, in the interests of making the Convention as flexible and durable as possible, her delegation could accept the replacement of existing paragraph 3 (a) by the text proposed by the United States. In that case, the word "or", which appeared between subparagraphs (a) and (b) in document A/CN.9/486, annex I, but not in A/CN.9/489, paragraph 41, should be deleted. Subparagraph (b) should be retained.

48. Mr. STOUFFLET (France) said he had no objection to the United States proposal. However, he requested confirmation, for the purposes of translation into French, that the word "land" included the constructions on such land.

49. Mr. WINSHIP (United States of America) confirmed that "land" included the constructions on the land. He added that other jurisdictions with similar problems had objected to the terms "real estate" and "immovable". The term "real property" might be preferable.

50. Mr. WHITELEY (United Kingdom) said that, if the United States proposal involved the total exclusion of receivables arising from land, it constituted a substantive difference from the current provisions of the draft Convention, which stated that the priority

rules of the Convention would not apply where they would conflict with the priority rules relating to the land in question. Under English law, "land" included the constructions on that land, if they were permanent. Whichever term was ultimately chosen, the terminology in subparagraph (b) should be aligned with that in subparagraph (a), in order to avoid giving the impression that two different issues were involved.

51. Mr. DOYLE (Observer for Ireland) said that, unlike the United Kingdom representative, he had always understood the provision to concern an exclusionary rather than a priority rule. The debate on the topic had been rather whether it should concern total or partial exclusion or the total inclusion of real property. Given that his delegation had always supported the widest possible exclusion, he was in favour of the United States proposal. He also found the term "land" acceptable: in Ireland, "land" included everything on that land.

52. Mr. MORÁN BOVIO (Spain) expressed a preference for the existing text. He endorsed the view of the United Kingdom representative that the United States proposal involved a broad exclusion. Its adoption would mean that, for example, building companies would not be able to assign rights in receivables against people who had rented offices. The draft Convention as it stood covered that situation. At first sight, without benefit of a text in Spanish, the United States proposal seemed unduly broad.

53. Mr. DESCHAMPS (Canada) said that the problem of whether receivables which were rental payments should be excluded was a problem that arose in most countries, because under civil-law systems the principle was that property conferred the right to the proceeds of that property, including rent. His delegation believed that rents for real estate should therefore be excluded.

54. Mr. ZANKER (Observer for Australia) associated his delegation with the view expressed by the observer for Ireland. In Australia, too, "land" included the land itself and everything built on it. He suggested that, for jurisdictions for which the provision caused difficulty, the phrase "property rights in real estate" could be replaced by the phrase "interest in real property".

55. Mr. KOBORI (Japan) requested a clarification of the meaning of paragraph 3 (b) in view of the commentary contained in paragraph 56 of document A/CN.9/489. He would prefer to strengthen the term "make lawful" by replacing it with "give legal effect to" or "make legally effective".

ELECTION OF OFFICERS (*continued*)

Ms. OCHIENG (Kenya), speaking on behalf of the African Group, nominated Mr. ENOUGA (Cameroon) for one of the posts of Vice-Chairman.

56. Mr. JOKO SMART (Sierra Leone) seconded the nomination.

57. *Mr. Enouga (Cameroon) was elected Vice-Chairman by acclamation.*

The meeting rose at 12.35 p.m.

Summary record of the 719th meeting

Friday, 29 June 2001, at 9.30 a.m.

[A/CN.9/SR.719]

Chairman: Mr. Pérez-Nieto CASTRO (Mexico)

The meeting was called to order at 9.50 a.m.

DRAFT CONVENTION ON ASSIGNMENT OF RECEIVABLES IN INTERNATIONAL TRADE (*continued*) (A/CN.9/486, A/CN.9/489 and Add.1, A/CN.9/490 and Add.1-5 and A/CN.9/491 and Add.1)

Article 5 (h) (continued)

1. The CHAIRMAN asked whether the delegations of the United Kingdom and Germany had resolved their differences with regard to the proposal made by the representative of Germany at the previous meeting.

2. Mr. FRANKEN (Germany) said that their differences had not been resolved. The key problem was that, as a matter of public policy, the United Kingdom system required registration for the validation of all assignments, wherever they were located.

3. Mr. STOUFFLET (France) said that the delegation of the United Kingdom seemed to be overestimating the scope of the German proposal. As he understood it, the proposal was simply to consider branches of banks as being autonomous for the purposes of resolving issues of priority. In other respects, they should not be considered as separate legal entities.

4. Mr. SMITH (United States of America) asked for clarification of whether the proposal was to apply the branch location rule to banks only, or whether it would extend to other financial institutions such as insurance companies and investment banks. It was unclear whether the scope of the proposal was indeed as limited as the representative of France had suggested.

5. Mr. BAZINAS (Secretariat) said that, as he understood it, France's interpretation of the proposal was more limited in scope than the original proposal for another reason. The representative of France had suggested that the branch location rule would apply only for the purposes of priority issues, in other words solely in relation to article 24. Had he intended to make that restriction, or did he mean that that would simply be the most significant effect?

6. Mr. CHAN (Singapore) said that all of the issues currently being raised had already been dealt with before. Identical discussions had taken place two years earlier in a session of the Working Group. In view of the short time remaining, he doubted the usefulness of going back over old ground.

7. He also expressed serious doubts about the wisdom of the German proposal. Foreign banks in Singapore could choose whether to become wholly-owned subsidiaries, thereby constituting a separate corporate entity under the laws of Singapore, or to remain branches and retain the legal personality of the bank of their home country. His delegation would not support a proposal which treated branches separately from the main legal entity, whatever the purpose; for to do so would confuse the internal workings of the corporate entity in the eyes of the public, allowing it to shift assets, obligations or receivables between branches in order to avoid liabilities or enhance profitability,

without any transparency and to the detriment of business partners and shareholders.

8. The CHAIRMAN said that under article 1, paragraph 3, of the UNCITRAL Model Law on International Credit Transfers, branches and separate offices of a bank in different States were regarded as separate banks for the purposes of determining the sphere of application of the Model Law.

9. Mr. DESCHAMPS (Canada) said that lengthy discussions had taken place at previous sessions of the Commission in an attempt to find a solution to the problem of a bank's location. It had proved impossible to define a branch as being a separate entity without at the same time identifying the precise location of a receivable. Since the provisions concerning priority constituted one of the most important parts of the draft Convention, it was essential that only one law should apply in the event of a conflict between two assignees. If a loan granted by a bank was assigned, the assignee had to be able to ensure that he had priority, and must therefore be able to identify in which branch the loan was located. Many fruitless attempts had been made to find criteria with which to determine the branch in which a loan was located. Thus, for example, loans were often managed by a different branch from that in which they were registered—not necessarily one located in the same country. Furthermore, during the lifetime of the loan, its location might even be changed; a standard clause in some loan agreements required the bank to relocate the loan in a different country if its remaining in the original location would result in higher costs for the borrower, for instance because of changes in tax regulations.

10. Mr. DOYLE (Observer for Ireland) agreed with the representative of Singapore that article 5 (*h*) should not be up for discussion at all, since it had already been agreed on. The definition of location must therefore remain unchanged.

11. Mr. MORÁN BOVIO (Spain) agreed with the delegations of Ireland, Singapore and Canada that unless some radical and innovative proposal were to be made, the debate should not be taken any further. The right to place loans with the branch of their choice was an internal matter for banks, and one with which the Commission was not in a position to interfere, except to specify that, once it had been established, the location of a loan should not be changed.

12. Mr. FRANKEN (Germany) said that it was not true that banks were entirely free to decide whether branches should become independent legal entities. The rules of the banking supervisory authorities recognized that banks needed to increase their equity capital in order to support business activities. Consequently, many banks had switched operations in foreign countries from subsidiaries to dependent branches, so that they could rely on the equity capital of the parent company. In Canada, for instance, national regulations had formerly only allowed foreign banks to operate if they were separate entities, but had begun to permit branch activity in view of the increased need for equity capital. A similar situation was arising in Singapore for precisely

the same reason. It had to be recognized that operations abroad would increasingly be based on the overall capital position of the parent company. Furthermore, the situation was not as simple as the representative of Spain had suggested: banks were not free to make accounting entries in whatever branch they pleased, for they were bound to comply with the banking supervisory regulations and tax regulations of the country in which the branch was located. Consequently, he urged the Commission to attempt to resolve the issues he had raised.

13. Mr. BERNER (Observer for the Association of the Bar of the City of New York), endorsing the comments made by the representatives of Germany, France and China, said that it was commonly accepted by the financial markets that banks followed the rules of the country in which they conducted their business. Therefore a branch of a United States bank based in Germany had to follow German rules, and vice versa. Since third parties were involved, that was not simply an internal matter for banks.

14. Mr. AL-NASSER (Observer for Saudi Arabia) supported the comments made by the representatives of France and Germany and the Observer for the Association of the Bar of the City of New York. The representative of Germany was an expert in banking matters and was familiar with the workings of the supervisory authorities. Account should also be taken of the new rules established by the World Trade Organization governing the opening of branches.

15. Mr. MARKUS (Observer for Switzerland) supported the proposal made by the representative of Germany.

16. Mr. CHAN (Singapore) said that while there were strong arguments on both sides, the location rule remained fundamental for the establishment of certainty. While it was true that, in order to remain competitive and in the context of market opening measures, banks were tending to operate through branches rather than subsidiaries, that was all the more reason to maintain the location rule as it stood in the text. Banks should not be allowed to have things both ways, by retaining branches for certain purposes but not for others.

17. Mr. DUCAROIR (Observer for the European Banking Federation) said that he fully supported the German proposal and was not at all convinced by the arguments put forward by the representatives of the United Kingdom and Canada. As a practitioner, he found it difficult to understand that the draft Convention should establish a rule on location that did not apply to bank branches, whether acting as assignees or as assignors.

18. Mr. WHITELEY (United Kingdom), summarizing his delegation's position, said that the key point was not where the branch was located but where the affairs of the bank would be wound up in the event of insolvency. In most cases, that would be the place of incorporation.

19. Ms. STRAGANZ (Austria), Mr. MEDIN (Sweden) and Ms. GAVRILESCU (Romania) expressed support for the proposal by the representative of Germany.

20. Mr. SMITH (United States of America) asked whether he was correct in interpreting the proposal by the representative of Germany as applying only to banks and their branches and not to other financial institutions, and as applying only to the definition of location, so that the question of whether a bank or the branch of a bank was located in a particular country was important not only for the issue of priority but also for the issue of nationality and the scope of the Convention as a whole. He also wished to

know whether he was correct in assuming that the issue was relevant only when the bank was the assignor or the assignee, since a rule already existed in the case of debtors, as noted by the representative of the European Banking Federation.

21. Mr. FRANKEN (Germany) said that all three assumptions regarding his proposal were correct.

22. The CHAIRMAN noted that a majority of members were in favour of the concept underlying the German proposal, which was consistent with the wording of article 1, paragraph 3, of the UNCITRAL Model Law on International Credit Transfers.

23. Ms. SABO (Canada) said that such a radical change concerning a fundamental point could not be adopted until a text in writing was available for consideration.

24. Mr. CHAN (Singapore) said that the term "bank" would take on a new meaning if the proposed amended version of article 5 (*h*) was adopted. He wondered whether it was used consistently in that sense throughout the Convention.

25. Mr. DESCHAMPS (Canada) said that adoption of the proposed new wording would call for a review of the definition not only of a bank but also of a branch of a bank. It would also be necessary to develop criteria for establishing a link between a receivable and the branch in question.

26. Mr. ADENSAMER (Austria) said that his delegation's support for the proposed amendment had not been subject to the understanding that it was restricted to banks. It had been interpreted as applying to all debtors. The Commission should not establish special legislation for banks and there was no need to redefine either a bank or a branch.

27. Mr. AL-NASSER (Observer for Saudi Arabia) proposed using the definition of a bank and a branch contained in the UNCITRAL Model Law on International Credit Transfers.

28. Mr. SEKOLEC (Secretary of the Commission) said that in the context of the Model Law the term "bank" meant different things in different countries. In an attempt to clarify matters, article 1, paragraph 2, of the Model Law stated that the law also applied to other entities "that as an ordinary part of their business" engaged in executing payment orders.

29. The CHAIRMAN said that the debate on article 5 (*h*) would not be closed until the proposed amendment had been circulated in writing. He took it, however, that a majority in the Commission supported the underlying concept.

Article 5 (g)

30. Mr. SMITH (United States of America) said that the version of article 5 (*g*) contained in document A/CN.9/XXXIV/CRP.2 addressed priority only with respect to a competing claimant. But a competing claimant was narrowly defined and would not include a competitor who was not a competing claimant within the meaning of the definition of priority. By virtue of the operation of new paragraph 3 of article 26 (A/CN.9/XXXIV/CRP.2/Add.1), parties who were not competing claimants but who were entitled to priority could enjoy protection. The definition of priority should therefore be extended to include other persons. His proposal was to add the words "or other person" after the words "the right of a competing claimant", in article 5 (*g*).

31. Mr. KOBORI (Japan) said he had some difficulty in understanding the phrase “to the extent relevant for such purpose” since no purpose had previously been specified. He also failed to see how a right could “include the determination”. He therefore suggested an amendment along the following lines: “to the extent relevant for the purpose of the determination of such preference”. He further suggested that the opening phrase should be amended to read: “‘Priority’ means preference of the right of a person over the right of a competing claimant”.

32. Mr. ZANKER (Observer for Australia) said he would welcome some clarification of the point regarding competing claimants made by the representative of the United States. By definition, where different claims existed for a particular sum of money, the priority rule determined which claim prevailed, but those involved were necessarily both competitors and claimants.

33. Mr. SMITH (United States of America) said that article 26, new paragraph 3, preserved certain priority rights for particular parties. One such party could be a transferee for value of a deposit or securities account or of funds in the account. But the definition of a competing claimant would not necessarily cover all the parties protected under new paragraph 3. As the definition of priority referred only to “the right of a person in preference to the right of a competing claimant”, it would not include other protected parties that fell outside the scope of the definition of a competing claimant. His proposed amendment would give full effect to the Commission’s policy decision without altering the substance of the meaning of priority elsewhere.

34. Ms. WALSH (Canada) requested time to consider the implications of the amendment proposed by the United States.

35. During the discussion of article 24, the secretariat had stated that the question of whether the definition of priority should include a reference to any steps that had to be taken to render an assignee’s right effective against third parties would be taken up in connection with draft article 8. Any decision on the wording of article 5 (g) should therefore be made subject to the outcome of the subsequent discussion of article 8.

36. Mr. BAZINAS (Secretariat) confirmed that it was the secretariat’s understanding that the point would be taken up in connection with article 8. The definition of a competing claimant in article 5 (m) did not include a securities intermediary who had a right in the receivable as original collateral. Article 26 covered a conflict between, for example, an assignee with an interest in a securities account as proceeds and a securities intermediary with an interest in the securities account as original collateral, who was not a competing claimant within the meaning of article 5 (m). That, as he saw it, was the reason for the proposal to insert the words “or other person” in article 5 (g). It would not change the substance of the definition of priority, but would bring it into line with article 26.

37. Mr. DESCHAMPS (Canada) asked whether the United States proposal implied that article 26, paragraph 3, protected persons who did not come within the scope of paragraph 2. With regard to the example cited by the secretariat, he submitted that a securities intermediary would be a competing claimant by virtue of asserting a claim to a right in the proceeds; the securities intermediary would be a creditor of the assignor. Article 26, paragraph 2, referred to proceeds received by the assignor and the purpose of paragraph 3 was to protect persons dealing with the assignor. He was not necessarily opposed to the proposed amendment in principle but he wished to be sure of its implications. It might be wise to take another look at other provisions of the Convention that referred to “priority” or “competing claimant” and that might inadvertently be affected by the amendment.

38. The CHAIRMAN asked the representative of Canada whether he considered that the matter could be referred to the drafting group on the understanding that the Commission supported the principle underlying the proposed amendment.

39. Mr. DESCHAMPS (Canada) said that his delegation would need time to ascertain whether it was merely a drafting matter or whether it raised points of substance affecting other provisions of the Convention.

40. Mr. DOYLE (Observer for Ireland) said that while his delegation had no objection in principle to the United States proposal, the suggested definition was so broad as to be of little practical use. If the concern related to the persons referred to in article 26, new paragraph 3, it might be sufficient simply to refer directly to those persons.

41. Mr. SMITH (United States of America) said that no substantive change was proposed, nor was there any intention to open up the definition of priority. It was simply that elsewhere in the Convention—for example, in article 24, paragraph 1 (a)—the term “priority” was used in reference to a competing claimant. If it was felt that a substantive change was involved, his delegation would be happy to consider some other form of words. Otherwise, the matter could be left to the drafting group.

42. Mr. ZANKER (Observer for Australia) said that, on re-considering the original wording of article 5 (g), the drafting group had produced the text contained in document A/CN.9/XXXIV/CRP.2. Perhaps it would have sufficed if the group had merely added to the original text contained in document A/CN.9/489 the phrase “to the extent relevant for such purpose”. While recognizing that the Canadian delegation had reservations as to whether the proposal involved a substantive change, which would have a consequential effect on other provisions, his delegation was prepared to proceed on the basis that the United States delegation was correct in saying that no substantive change was involved.

43. The CHAIRMAN said he took it that the Commission wished to adopt the United States proposal, subject to scrutiny by the drafting group and a decision as to whether it would have an impact on other articles.

44. *It was so decided.*

Article 5 (k)

45. Mr. DUCAROIR (Observer for the European Banking Federation) said that the text of article 5 (k) was largely satisfactory, but contained the potential for divergences of interpretation, which could result in conflicts before the courts, regarding the respective risks borne by the counter-parties to a transaction. To reduce that risk, financial contracts were, in practice, often accompanied by a collateral or credit support arrangement, which formed an integral part of the contract. In order to avoid any ambiguity concerning such arrangements, the words “mentioned above” should be followed by the words “and any and all collateral and credit support related to any transaction mentioned above”. That form of words was the one suggested by the Financial Markets Lawyers Group in document A/CN.9/490/Add.4.

46. The CHAIRMAN recalled that a similar proposal had been discussed and rejected at the thirty-third session.

47. Mr. SMITH (United States of America) said that, if a derivatives contract obligation was secured by a receivable to which the Convention would normally apply, all the rules under the Convention as currently drafted would apply to that receivable. That outcome seemed correct to his delegation. However, under the European Banking Federation's proposal, a receivable that happened to secure a financial contract would not be governed by the Convention. That could give rise to numerous problems, subjecting assignments to different regimes depending on the nature of the obligation secured by the receivable. He saw no reason for the Commission to change its view simply to accommodate receivables that happened to secure a financial contract.

48. Mr. WHITELEY (United Kingdom) said that, while his delegation would be happy to retain the current text, it was true that anomalies existed. Collateral arrangements with regard to derivatives transactions might be complex but were an important part of the way the derivatives market functioned. A derivatives transaction differed from a secured loan in that the potential exposure of the counter-parties could change over time. For example, a party borrowing and repaying US\$ 100 created an exposure of US\$ 100 to the lender; if, however, he repaid €85, and the parties pledged that they would reverse the exchange in three years' time, the value of the contract would change depending on whether the euro depreciated or rose against the dollar. When a party took collateral for a derivatives contract, therefore, there must be a promise to provide collateral not just at the beginning of the contract but throughout the life of the transaction. As exposure changed, the parties adjusted the amount of collateral held, so that neither held too much collateral or had too much exposure. The current practice was either to use a security interest or to make an arrangement often called a "title transfer", involving the sale and buyback of the relevant assets. The party who had exposure had the right to demand the delivery and the absolute ownership of fungible financial assets in exchange for a promise to give back an equivalent asset either when the exposure dropped or if the counter-party defaulted. The current wording of the provision would cover collateral arrangements structured as a title transfer, because it would constitute the spot transfer of a security and a forward on the security, both of which would be part of the netting agreement; but it would not cover arrangements structured as a security interest, even though the economic effect was largely the same, the main difference being that the party receiving collateral under a security interest could not use that collateral as though it were his own assets (unless the relevant agreement was a New York law security interest). To create a distinction between the two arrangements unnecessarily distorted the financial markets, and it might be appropriate for the Commission to adjust the wording so as to enable current practice to continue.

49. The CHAIRMAN said that the Commission did not have time to reconsider a proposal that had already been rejected. Unless there was strong support for the proposal, the original draft should remain unchanged.

50. Mr. DESCHAMPS (Canada) said that, for the reasons given by the representative of the United States and for other reasons that he could cite if necessary, his delegation was opposed to the amendment proposed by the Observer for the European Banking Federation.

51. The CHAIRMAN said that the text of article 5 (k) would remain unchanged.

*The meeting was suspended at 11.15 a.m.
and resumed at 11.50 a.m.*

Article 5 (l)

52. Mr. DUCAROIR (Observer for the European Banking Federation) proposed that the first sentence should be amended to read: " 'Netting agreement' means an agreement between two or more parties that provides for one or more of the following: ". The reason was that netting agreements were sometimes multi-lateral, involving several parties. The suggested addition would serve to dispel any ambiguity.

53. *The proposal was approved.*

54. Mr. KOBORI (Japan) suggested that, when discussing draft article 9, the Commission should consider including a definition of the term "undivided interests" in draft article 5 (h).

Article 5 (h) (continued)

55. Mr. FRANKEN (Germany), reverting to article 5 (h), proposed the following addition, to follow the third sentence: "If the assignor or the assignee is engaged in the business of banking by making loans and accepting deposits, a branch of that assignee or assignor is a separate person".

56. Mr. BRITO DA SILVA CORREIA (Observer for Portugal) said that the formulation proposed by the representative of Germany should be amended to include the words "if the assignor has a place of business in more than one State or has a branch in another State, the place of business is that of the branch".

57. Mr. WHITELEY (United Kingdom) said that his delegation shared the concerns of the observer for Portugal. The German proposal should specify that the branch of the assignor or assignee was deemed to be a separate person only for the purposes of that definition. The proposal should refer not only to the business in which the relevant person was engaged, since some persons might not be legitimately engaged in such business, but also to authorization.

58. Mr. SALINGER (Observer for Factors Chain International) wished to know why it was necessary to refer to the location of the assignee, since the main purpose of the German proposal was to deal with priorities that required specification of the assignor's location. The inclusion in the proposal of a reference to the assignee would have peculiar results in the factoring business, since some factoring companies, particularly in Germany, were constituted as banks, while others were not.

59. Mr. FRANKEN (Germany) said that, since some delegations had expressed concern about the creation of a new legal term under the Convention, the second part of the proposal could read "... is deemed a separate person for the purpose of this definition". With regard to the issue raised by Factors Chain International, his delegation could accept the deletion of the words "or the assignee" from its proposal.

60. Ms. McMILLAN (United Kingdom) proposed that the words "If the assignor or the assignee is engaged in the business of banking ..." should be amended to read "If the assignor is authorized to engage in the business of banking ...". If the proposed text did not contain the idea of authorization, the Convention could be interpreted as including the activities of unauthorized entities, such as loan sharks.

61. Mr. FRANKEN (Germany) said that his delegation accepted the United Kingdom's proposal.

62. Mr. DESCHAMPS (Canada) inquired whether Germany's proposal implied that any branch within the same State was a separate legal entity. He also pointed out that in Canada foreign banks were allowed to carry on business through branches and that, like many other countries, Canada made a distinction between full-service branches and lending branches, which were not allowed to accept deposits. A number of foreign banks in Canada had decided to operate through lending branches, since the regulations governing such branches were less stringent. The proposal by Germany would cover only full-service branches.

63. Mr. FRANKEN (Germany), replying to the first question raised by the representative of Canada, said that the proposal referred to entities active in more than one State. In order to allay the concerns of some delegations, the second part of the proposal could be amended to read "... a branch of that assignor in another State is deemed a separate person for the purpose of this definition".

64. With regard to Canada's concern about bank branches that engaged only in lending activities, he said that the United Kingdom's proposal to include a reference to the authorization of a person to engage in banking in the broadest sense would resolve Canada's concerns. The proposal would thus read: "If the assignor is authorized to be engaged in the business of banking, a branch of that assignor in another State is deemed a separate person for the purpose of this definition."

65. Mr. MORÁN BOVIO (Spain) inquired whether the German proposal would make it easier for the assignee to determine which law was applicable to it, since that would save the assignee time and money. He also wished to know how a simple agency in another country could be distinguished from an entity that was fully operational and registered in that country. He would welcome an explanation of the economic impact of the German proposal.

66. Mr. FRANKEN (Germany), replying to the questions raised by the representative of Spain, said that the proposal would indeed make life easier for the assignee. In a transaction, it was usually necessary to check the law of the assignor and possibly the law of the assignee, as well as the law to be applied at the place of business. The proposed amendment provided that the assignee would need to know only the law of the place of business.

67. Mr. HUANG FENG (China) proposed that the words "for the purpose of this Convention" should be included in the German proposal. Reference to the assignee should be retained, since banks very often bought receivables and acted as assignees.

68. The CHAIRMAN pointed out that draft article 5 began with the words "For the purposes of this Convention", and wondered whether the representative of China would consider that

reference to be sufficient. Delegations should indicate whether or not they supported China's proposal to retain the reference to the assignee in the German proposal; if they did not wish to do so, the proposal would remain as it stood.

69. Mr. KOBORI (Japan) said that his delegation supported China's proposal to retain the reference to the assignee in the German proposal.

70. Mr. BRINK (Observer for the European Federation of Factoring Associations—EUROPAFACTORING) inquired whether receivables from the entities referred to in the proposed definition also had to relate to the relevant business, or if all receivables of such entities were affected by that rule, since a bank might have receivables from loans or credits or from other types of business. That might result in the conduct of an international transaction in a case where a bank changed administration of an account from the central office to a branch, or vice versa. If a branch was deemed to be a separate entity and it was assumed that the branch was located in another State, that might trigger the application of the Convention with respect to the transaction, which was in fact not a transaction at all but merely an administrative change within the bank. Furthermore, once the Convention had been applied, it would continue to govern any further assignment in accordance with the rules governing subsequent assignments. He wondered whether that effect was intentional.

71. Mr. SMITH (United States of America) said that, in order for the branch bank rule to apply, it was necessary to determine in what activity the assignor was engaged. If the assignor was authorized to engage in the business of banking but did not actually engage in that business, the assignor would be treated like any other assignor and would not be subject to the branch bank rule. It was unclear whether the authority to conduct business referred to the authority of the head office or to the authority of the branch in the country in which the branch engaged in the banking business. His delegation was strongly in favour of retaining the original language of the German proposal, which referred to the assignor as being in the business of banking and also indicated that banking meant making loans and accepting deposits.

72. Mr. ZANKER (Observer for Australia) said that perhaps article 5 (*h*) should be left as it stood. The introduction of new rules about banks having branches that were separate legal entities was unnecessary, since a prudent bank or other entity would specify the law applicable to contracts relating to assignments. It seemed as if the issue was being made far more complicated than it needed to be.

73. The CHAIRMAN urged delegations to attempt to resolve their differences regarding article 5 (*h*) in informal consultations with the delegation of Germany before the 720th meeting.

The meeting rose at 12.30 p.m.

Summary record of the 720th meeting

Friday, 29 June 2001, at 2 p.m.

[A/CN.9/SR.720]

Chairman: Mr. Pérez-Nieto CASTRO (Mexico)

The meeting was called to order at 2.10 p.m.

ELECTION OF OFFICERS (continued)

1. Ms. LADOVÁ (Observer for the Czech Republic), speaking on behalf of the Group of Eastern European States, nominated Ms. GAVRILESCU (Romania) for one of the posts of Vice-Chairman.

2. *Ms. Gavrilesco (Romania) was elected Vice-Chairman by acclamation.*

3. Mr. ISHII (Japan), speaking on behalf of the Asian Group, nominated Ms. ZHOU XIAOYAN (China) for one of the posts of Vice-Chairman.

4. Mr. MEENA (India) seconded the nomination.

5. *Ms. Zhou Xiaoyan (China) was elected Vice-Chairman by acclamation.*

DRAFT CONVENTION ON ASSIGNMENT OF RECEIVABLES IN INTERNATIONAL TRADE (*continued*) (A/CN.9/486, A/CN.9/489 and Add.1, A/CN.9/490 and Add.1-5 and A/CN.9/491 and Add.1)

Article 5 (h) (continued)

6. In response to a question from the CHAIRMAN, Mr. FRANKEN (Germany) said that the observer for Factors Chain International had withdrawn his objection to the German proposal. In accordance with the wishes of the representative of China and others, the reference to the assignee was to be retained in the proposal.

7. Mr. DESCHAMPS (Canada) said that his delegation was in favour of retaining the current definition of location. The German proposal would entail a fundamental change. Its purpose was to ensure that the assignor or the assignee would be located at the branch with the closest connection with the assignment, but he did not believe that that result could be achieved by deeming branches to be separate legal persons.

8. A branch in one country that lent money to a customer and took an assignment of receivables from him as security, would, if the German proposal were adopted, be a separate legal entity. If the bank then lent money to the same customer through a branch in another country, would the proposal mean that the loans made by the second branch would not be secured by the assignment? A borrower that was a multinational corporation frequently had places of business in many countries and borrowed from a branch of the bank in each country. If such a borrower granted an assignment of its receivables as security to a bank with branches in three different countries, would they be three different entities, and the assignment of receivables be deemed to be an assignment with three different assignees? Those were just a few illustrations of the many difficulties created by the proposal.

9. Mr. DOYLE (Observer for Ireland) said it had been his understanding that at its previous meeting the Commission had approved the German proposal in substance. He failed to understand why some delegations were debating its merits again, and he urged the Commission to close the debate.

10. The CHAIRMAN said that the Commission had indeed initially approved the concept of the German proposal but that once it had been formally tabled, questions had been raised on the substance because of the divergences between that proposal and the text of the Convention. He recalled that the German proposal had already been tabled and discussed twice before at previous sessions and had each time been rejected. It had now been resubmitted, and divergent opinions had again been expressed on important points. After five years, time had now run out for discussion, and he would therefore ask the German delegation to withdraw its proposal.

11. Mr. FRANKEN (Germany) said that all who were familiar with the banking business saw a need for his delegation's proposal; indeed, the European Central Bank had urged the German Government to raise the matter again. However, if there was no agreement in the Commission, his delegation was prepared to withdraw the proposal.

12. Ms. BRELIER (France) said she wished it to be recorded that the withdrawal of the German proposal would present France with a serious problem when it came to ratification of the Convention.

13. Mr. HUANG FENG (China) expressed his delegation's regret that the German proposal had been withdrawn.

14. *Draft article 5 (h) was approved.*

Article 6

15. *Draft article 6 was approved.*

Article 7

16. *Draft article 7 was approved.*

Article 8

17. Mr. KOBORI (Japan) said that the wording of draft article 8 was somewhat unclear. He therefore proposed the deletion of the words "if any form requirements exist", which were ambiguous.

18. The CHAIRMAN said that article 8 was a rule of conflict and determined the validity of the form of the assignment with respect to the law of the State in which the assignor was located. If that law established any form requirements, they had to be met for the assignment to be valid. However, the law of the State in which the assignor was located might in turn determine the application of some other law which might well be a different one by virtue of the rules of private international law.

19. Ms. WALSH (Canada) said her delegation considered that the language of article 8 was too broad. In its analytical commentary on article 8 in document A/CN.9/489 the secretariat had speculated that “form” in the context might mean, *inter alia*, notification of the debtor and registration in a public registry of notice of the assignment. Her delegation believed it was the Commission’s policy that when such form requirements existed, they related to the area of priority and would be covered by the choice-of-law rule in articles 24 and 31. Uncertainty would ensue if such matters were instead covered by article 8, with the result that the law governing those issues could be either the law of the assignor State or any other law that might be applicable by virtue of the rules of private international law. In its comments contained in document A/CN.9/490/Add.5 her delegation had therefore suggested that article 8 should be reworded to make it clear that “form” in that article referred only to the form of a contract of assignment and only to issues between the assignor and assignee and would not affect third parties. Any effects of the assignment against third parties were properly dealt with under articles 24 and 31, and it might therefore be preferable to delete draft article 8.

20. She asked the secretariat to amplify the proposal in its note on article 24 (A/CN.9/491, para. 18) that the definition of “priority” be expanded to include any requirements necessary to make an assignment effective as against third parties.

21. Mr. BAZINAS (Secretariat) recalled that the Commission had kept pending the issue of an additional provision on form for chapter V until it had considered article 8. The secretariat had proposals both for article 8 and for the new provision in chapter V.

22. As the representative of Canada had pointed out, there seemed to be an inconsistency between article 8 and article 24 since they both covered the form of assignment, but referred it to different laws. Article 8 provided for referral to the assignor’s law or to other laws by virtue of the applicable rules of private international law. Article 24 referred priority to the law of the assignor’s location. Priority normally included the steps to obtain priority which, as was clear from the draft Hague Conference text on the law applicable to securities held with an intermediary, should be referred to the same law. To address that problem the secretariat had suggested, in paragraph 34 of document A/CN.9/491, wording to the effect that no form was necessary as between the assignor and the assignee and as against the debtor. The Working Group had agreed that the requirement as to form was not an issue in the relationship between the assignor and the assignee and not an issue as against the debtor, who was sufficiently protected by the requirement for a written notification. The real need for notification was to protect third parties. The secretariat also suggested that, in the definition of priority, wording should be included to the effect that the steps to be taken for obtaining priority should be left to the law of the assignor’s location.

23. As to the proposed new provision on form in chapter V, paragraph 21 of document A/CN.9/491 contained a proposal to adopt language along the lines of article 11 of the Convention on the Law Applicable to the International Sale of Goods, which dealt with the form of the contract of assignment.

24. Mr. MORÁN BOVIO (Spain) thanked the secretariat for its proposals, both of which would improve the text of the Convention and should be referred to the drafting group.

25. Mr. COHEN (United States of America) said that the useful analyses provided by the delegation of Canada and the secretariat had convinced his delegation that article 8 as it stood was inadequate for its purposes. The secretariat’s proposal in

paragraph 34 of document A/CN.9/491 for a form-free assignment would have the effect of validating some assignments that might not be valid under the domestic law that would otherwise be applicable. He therefore endorsed the proposal of the representative of Canada to delete article 8.

26. Mr. STOUFFLET (France) said that his delegation did not feel that article 8 was essential. It could not, however, accept the secretariat’s proposal for a form-free assignment since some provisions of France’s internal legislation on the form of the assignment were stricter than the one proposed and a conflict of requirements would result.

27. The CHAIRMAN said that the secretariat had informed him that it agreed with the proposal by the representative of Canada and was withdrawing its support for a revised article 8.

28. *Draft article 8 was deleted.*

Article 5 (g) (continued)

29. The CHAIRMAN recalled that the secretariat’s suggestion to amend the definition of priority in article 5 (g) by the addition of the words “and any steps necessary to render a right effective against a competing claimant” was still pending. He asked for the views of delegations on that proposal.

30. Ms. McMILLAN (United Kingdom) wondered whether it was proposed that the definition of priority in article 5 (g) should include compliance with the requirements as to form.

31. Mr. BAZINAS (Secretariat) drew attention to paragraph 18 of document A/CN.9/491, which contained the suggestion by the secretariat for a definition of priority. In the discussion of that definition the secretariat had indicated that it would withhold the last few words of its proposal, namely, “and any steps necessary to render a right effective against a competing claimant”, until the Commission had had an opportunity to consider the issue of form in article 8. The suggestion was therefore now before the Commission for consideration.

32. Ms. WALSH (Canada) and Mr. STOUFFLET (France) said they were in favour of the addition of the proposed wording.

33. *Draft article 5 (g), as amended, was approved.*

34. *Draft article 5 as a whole, as amended, was approved.*

Form (new provision in Chapter V)

35. The CHAIRMAN drew attention to the secretariat’s proposal in paragraph 21 of document A/CN.9/491 for a new provision in chapter V. That proposal was now before the Commission.

36. Mr. MORÁN BOVIO (Spain) supported the inclusion of the proposed provision, which would clarify the text on points that would be important for States in ratifying the Convention.

37. *The text of the new provision on form in chapter V was approved.*

Article 9

38. Mr. IKEDA (Japan) sought clarification concerning the concept of undivided interests, which existed in Anglo-Saxon law, but did not figure in Japanese civil or commercial law. Article 9, paragraph 1, of the Convention merely stated that an

assignment of one or more existing or future receivables and parts of or undivided interests in receivables was effective, without specifying in what way it was effective, and paragraph 89 of document A/CN.9/489 cast no further light on the matter. Could the assignee of the undivided interest demand payment directly from the debtor? If the answer was in the affirmative, how much could the assignee claim? Was it the total amount of the original receivable, or just the percentage that the assignee had contracted with the assignor? If two assignees had undivided interests in the same receivable, would not a problem of competing claims arise? There should be some clarification as to the handling of such matters in the initial contract.

39. Mr. STOUFFLET (France) said that the concept of undivided interests existed in French civil law, and that when applied to goods that were by definition divisible, such as money, the assignment of an undivided interest would not raise any special problems, and would be governed by the provisions already approved by the Commission. In the case of a notification of a partial assignment, the debtor would be able to choose between making full payment to the assignor, thus acting as if it had not received notification of the partial assignment, or paying the assignor only the portion which had not been assigned, and paying the assignee the part which had been assigned.

40. Mr. BAZINAS (Secretariat) suggested it might be helpful if the delegation of Japan could identify the specific problems to which it believed article 9 could give rise and suggest possible solutions.

41. Mr. SUK KWANG-HYUN (Observer for the Republic of Korea) said it had initially been his understanding, on the basis of his previous experience of common-law countries, that in the case of an assignment of a contractual right to payment the assignee would have a direct claim or right against the debtor, whereas in the case of an assignment of undivided interests, the assignee might not have that right. The assignment of undivided interests in payment might thus be similar to the assignment of a beneficial interest, whereby the right as such was not transferred or assigned to the assignee. If that was the case, then the first question raised by the representative of Japan must be answered. The issue was related to article 12, which addressed the transfer of security rights. According to the current draft, a property right securing payment of the assigned receivable would be transferred by virtue of the assignment. It would be advisable to make a distinction between the assignment of a contractual right and the assignment of an undivided interest in payment. In the case of an assignment of a contractual right, the current provision would be correct. However, in the case of an assignment of undivided interests in receivables, the undivided interest in the security, rather than the security itself, should be transferred.

*The meeting was suspended at 3.20 p.m.
and resumed at 3.45 p.m.*

42. Mr. IKEDA (Japan) said that the concept of undivided interest was very special, and did not correspond to the French notion of “droits indivis”. He requested clarification of the effectiveness of an undivided interest, in terms of its results in the field of financial operations.

43. Mr. WHITELEY (United Kingdom) said that if two people married and decided to buy a house, they would normally do so using an undivided interest. They would probably borrow money, and would hold the house jointly, subject to the interest of the lending bank. If the lending bank had to foreclose, it would be taking an asset away from both, but it would be enforcing against only a single asset. If the two subsequently di-

vorced and separated their interests in the property, the house would then be held in parts. If the bank were to foreclose, it would have to enforce against each part separately. The language of draft article 9 was simply intended to convey the idea that in some situations two people could hold property as if it were a single asset and they were one person, and that in other situations they could hold property and their respective interests in that property could be clearly demarcated.

44. Mr. IKEDA (Japan) proposed that a definition of “undivided interest” should be added to article 5. If there was no support for his proposal, he would withdraw it.

45. The CHAIRMAN noted that there appeared to be no support for the proposal.

46. Mr. BAZINAS (Secretariat) said that paragraph 35 of document A/CN.9/491 contained a suggestion by the secretariat for a reformulation of article 9, paragraph 1, intended to ensure that the provision did not inadvertently result in the validation of an assignment of future receivables—including consumer receivables, pensions and wages—prohibited by law.

47. Mr. COHEN (United States of America) supported the reformulation suggested by the secretariat. However, he felt that the new wording should retain the concepts of “future receivables and parts of or undivided interests” and “one or more”, which had apparently been inadvertently omitted from the secretariat’s proposal.

48. Mr. BAZINAS (Secretariat) said it was his understanding that the proposal was to retain the original wording, replacing the words “is effective” with “is not ineffective ... on the sole ground that”.

49. Mr. COHEN (United States of America) said that his delegation was in complete agreement with that formulation, with the exception of the use of the word “sole”, which was no longer appropriate, as three different grounds would be described.

50. The CHAIRMAN, noting that the Commission agreed on the principle of the drafting change suggested by the secretariat as orally revised by the representative of the United States, said he took it that the Commission wished to refer article 9 to the drafting group.

51. *On that understanding, draft article 9 was approved.*

Article 10

52. Mr. BAZINAS (Secretariat) said that for the reasons set out in paragraph 36 of document A/CN.9/491, the secretariat suggested the deletion of the article.

53. Mr. DESCHAMPS (Canada) said that he concurred with the suggestion of the secretariat.

54. *Draft article 10 was deleted.*

Article 11

55. Mr. BAZINAS (Secretariat) said that paragraph 37 of document A/CN.9/491 contained a suggestion to recast

article 11, paragraph 3, to reflect more accurately the intentions of the Commission. The secretariat presented three options. The first would involve a statement to the effect that the article did not apply to the assignment of financial service receivables. While that term might be somewhat ambiguous, it already figured in article 11, paragraph 3 (a). Furthermore, it might be difficult to come up with a uniform definition.

56. A second possibility would be to identify the types of financial service contracts that must be excluded from the scope of article 11. Two such types of contracts were loan agreements and insurance policies.

57. The third option would be to limit the scope of article 11 to the assignment of future receivables or receivables that could not be individually identified, without recourse to a list. Article 11 would thus not apply to the assignment of a single, existing receivable. The reasoning behind that proposal was that it was easier for the assignee to know whether there was an anti-assignment clause where there was a single contract. Where there was a multiplicity of contracts, it was difficult or impossible for the assignee to check all of them to determine whether there was an anti-assignment clause.

58. Mr. WHITELEY (United Kingdom) pointed out that article 11, paragraph 1, in its current formulation would apply to credit card transactions. By excluding financial service contracts, the Convention might also exclude such transactions, as they involved an extension of credit and might be categorized as financial service contracts.

59. The exclusion of financial service contracts or the reference to a single, existing receivable would not cover the situation of swaps and annuities. Swaps were not financial service contracts, as the parties entered into them together as principal, each making payments and managing the risk independently of the payments it received. As for annuities, the Commission must consider whether annuity payments were to be considered as a single receivable or as multiple receivables. If one of the texts suggested by the secretariat were approved, there should be a reference not only to financial service contracts, but also to financial contracts generally.

60. The CHAIRMAN noted that there appeared to be no support for any of the secretariat's suggestions for amendment.

61. Ms. BRELIER (France) requested clarification about the use of the bracketed word "goods" in article 11, paragraph 3 (a).

62. Mr. BAZINAS (Secretariat) said that the wording in question was the subject of paragraph 30 of document A/CN.9/491. The term "goods" had been placed in square brackets because the French text, "biens meubles corporels", raised the question whether general intangible property (i.e. intellectual or industrial property or other information) was included. Since intangibles were apparently covered in subparagraph (b), the Commission might wish to remove the square brackets from subparagraph (a) and explain the matter further in the commentary. The same issue arose in article 12, paragraph 4 (a).

63. Ms. BRELIER (France) drew attention to her Government's comments on article 11, paragraph 3 (a), in document A/CN.9/490/Add.1. For the reasons set forth in that document, the word "goods", in subparagraph (a), should be understood as covering both tangible and intangible movable property. The list in subparagraph (b) was not sufficient. The words "or other information", at the end of subparagraph (b), should be replaced by "or other intangible property (ou d'autres biens incorporels)".

64. Mr. WHITELEY (United Kingdom) said that his delegation intended to propose some changes to article 4, paragraph 3, relating to the exclusion of land, and that if its proposal was accepted then the reference to "real estate" in article 11, paragraph 3 (a), should also be changed to "land".

65. Concerning the types of asset covered, a reference to "any other intangible property" might include financial contracts. Was it the Commission's intention to establish such a wide scope for article 11, paragraph 1? His delegation had certain reservations even with regard to the use of the word "goods": some financial contracts might involve the supply of commodities such as grain or oil. Bullion, too, could be considered as goods. While sympathizing with those delegations that considered the wording to be imprecise, he felt that it should not be reformulated.

66. Mr. SIGMAN (United States of America) said that while his delegation had no objection to the inclusion of certain intangibles such as goodwill, and would support the inclusion of a carefully circumscribed description of intangibles, it shared the concern of the representative of the United Kingdom that financial services might be considered as intangible property. The French proposal was too broad. Perhaps it could be left to the drafting group to find an acceptable wording.

67. The CHAIRMAN noted that the Commission accepted in principle the idea that intangible assets should be included, and that the exact wording should be referred to the drafting group. He took it that the Commission also wished to remove the brackets from around the word "goods".

68. *On that understanding, draft article 11 was approved.*

Article 12

69. Mr. BAZINAS (Secretariat) said that, as in the case of article 11, the brackets around the word "goods" in article 12, paragraph 4 (a), should be removed.

70. Ms. BRELIER (France), supported by Mr. AL-NASSER (Observer for Saudi Arabia), said that, as in the case of article 11, the words "or other information", in paragraph 4 (b), should be replaced by a reference to other intangible assets.

71. Mr. KOBORI (Japan) said that Japanese internal law provided for special types of mortgages that were not transferable. The words "if such right is transferable under the law governing it" should therefore be added at the end of the first sentence of paragraph 1, to cover such cases.

72. Mr. BAZINAS (Secretariat) said that if there was a statutory limitation on assignment under Japanese law, perhaps it would be preserved under the terms of article 9, paragraph 3.

73. Mr. KOBORI (Japan) said that his delegation's concern related, not to the limitation of assignment, but to the transferability of the special type of mortgage. That question was not addressed by article 9, paragraph 3.

74. The CHAIRMAN noted that there was no support for the Japanese proposal.

75. *Draft article 12 was approved.*

Article 13

76. *Draft article 13 was approved.*

Article 14

77. *Draft article 14 was approved.*

Article 15

78. *Draft article 15 was approved.*

Article 16

79. *Draft article 16 was approved.*

Article 17

80. Ms. BRELIER (France) introduced a proposal to add a third paragraph to draft article 17. The proposal superseded an earlier proposal circulated in writing, and would read: "This Convention does not authorize a debtor who is a consumer to enter into or modify an original contract in violation of the law of the location of the consumer".

81. Mr. WINSHIP (United States of America) said that his delegation supported the proposal put forward by the delegation of France. Perhaps it would be advisable, for purposes of clarification, to insert a cross-reference to article 17 in article 6, which addressed party autonomy.

82. Mr. FRANKEN (Germany) and Mr. MARKUS (Observer for Switzerland) endorsed the proposals made by the representatives of France and the United States.

83. Mr. CHAN (Singapore) questioned whether it was appropriate to place the proposed text, which imposed a restriction on the debtor, in article 17, which covered the principle of debtor protection. The policy underlying the proposed amendment related rather to the preservation of the regulatory laws of the State.

84. Mr. BAZINAS (Secretariat) said that, as he understood it, the intention was to ensure that if a debtor was not authorized by national consumer protection law to waive rights, then the Convention would not authorize it to do so. As that would seem to be a debtor protection issue, it would have its place in article 17.

85. Mr. CHAN (Singapore) reiterated that the text as formulated constituted a restriction on, rather than protection of, the debtor. Perhaps the drafting group could find wording that would confine its effect.

86. Ms. MANGKLATANAKUL (Thailand) said that the proposal put forward orally by France was somewhat difficult to follow. Perhaps it would be preferable to state in the chapeau of the article that the Convention was not intended to override national consumer protection legislation.

87. Mr. KOBORI (Japan) said that reference to the habitual residence of the consumer, as in article 5 (h), would be more appropriate than reference to the law of the location of the consumer.

88. Mr. DOYLE (Observer for Ireland) supported the view expressed by the representative of Singapore. The text proposed was not a principle of debtor protection.

89. Mr. BAZINAS (Secretariat) said that the Commission might wish to decide whether to refer directly to the habitual residence of the consumer, or to rely on the secondary rule in article 5 (h).

90. Mr. DESCHAMPS (Canada) noted that in paragraph 40 of document A/CN.9/491 the secretariat had suggested the possibility of doing away with references to consumer protection in articles 21 and 23, by including in the Convention a general article worded along the following lines: "This Convention does not override law governing the protection of parties in transactions made for personal, family or household purposes". The adoption of such an approach would also obviate the need for such a reference in article 17. A similar approach was proposed by the Government of Canada in document A/CN.9/490/Add.5.

91. The CHAIRMAN noted that the proposal put forward by the representative of Canada was similar in thrust to the proposal submitted by the delegation of France. If the Commission agreed with the principle behind the proposals, it must decide whether to include the provision in article 17 or to make it the subject of a separate provision.

92. Mr. MARKUS (Observer for Switzerland) supported the proposal by Canada. Article 17 was not the only article that would affect consumer protection. Accordingly, the issue should be covered by a separate provision.

93. Mr. MEENA (India) said that if the Commission believed that the Convention should not override original contracts in violation of the law of the location of the consumer, then clearly the modification was warranted.

94. Mr. CHAN (Singapore) said that if the text of article 17 were to refer to consumers, then the Convention must also define the term "consumer". The proposal by Canada simplified matters, as it did not use that term. His delegation thus supported that proposal. Economy of language could be achieved by incorporating the formulation in article 4, paragraph 1 (a).

95. Mr. JOKO SMART (Sierra Leone) said that article 17, which dealt with principles of debtor protection, was not the appropriate place for a provision on consumer protection.

96. Ms. BRELIER (France) said that her delegation could support the proposal made by the delegation of Canada.

97. The CHAIRMAN said that, on the understanding that the matter of consumer protection would be addressed in article 4, he would take it that the Commission wished to approve article 17.

98. *On that understanding, draft article 17 was approved.*

99. The CHAIRMAN said that the Commission had thus concluded its consideration of the Convention.

100. Mr. BURMAN (United States of America) paid tribute to the skill of the Chairman in guiding the Commission's deliberations to a successful conclusion.

The meeting rose at 5.05 p.m.

Summary record of the 721st meeting

Monday, 2 July 2001, at 9.30 a.m.

[A/CN.9/SR.721]

Chairman: Mr. MORÁN BOVIO (Spain)

In the absence of Mr. Pérez-Nieto Castro (Mexico), Mr. Morán Bovio (Spain), Vice-Chairman, took the Chair.

The meeting was called to order at 9.45 a.m.

DRAFT CONVENTION ON ASSIGNMENT OF RECEIVABLES IN INTERNATIONAL TRADE (*continued*) (A/CN.9/486, A/CN.9/489 and Add.1, A/CN.9/490 and Add.1-5 and A/CN.9/491 and Add.1; A/CN.9/XXXIV/CRP.1 and Add.1 and 2, CPR.2 and Add.1-3, and CRP.3-10)

1. The CHAIRMAN drew attention to the proposals contained in documents A/CN.9/XXXIV/CRP.4, 5, 6, 8, 9 and 10, which were to be considered in the order of importance of the issues they raised.

Article 4 (continued)

Paragraph 1 (b) (continued) (A/CN.9/XXXIV/CRP.6)

2. Mr. COHEN (United States of America), introducing a joint proposal by France and the United States regarding assignment of rights by instruments, contained in document A/CN.9/XXXIV/CRP.6, said that the wording of subparagraph (*b*) of the proposal was based on that suggested in the secretariat's note (A/CN.9/491). Subparagraph (*a*) addressed an issue raised by the Convention rules governing choice of law, which worked well provided that the right to collect the receivable was itself an intangible right. But as the definition of a receivable included rights embodied in instruments, there were times when the embodiment of such rights was tangible. Many of the Convention rules, especially those governing choice of law, would work less well where they pointed to a location other than the location of the tangible instrument, since in such cases they would affect the rights of the person in possession of the instrument. Subparagraph (*a*) sought to address that problem by providing that rights secured under the law of pledge of physical items were not affected. His delegation was in favour of retaining the bracketed words "[or similarly transferable]" after the term "negotiable" in each subparagraph because the issue raised by other instruments transferred by possession was the same: that of rights of a possessor by virtue of possession of the physical object.

3. Mr. DESCHAMPS (Canada) said he opposed the retention of the bracketed words on the grounds that they created uncertainty.

4. Mr. WHITELEY (United Kingdom) said he was in favour of retaining some form of additional wording, though not necessarily the current formulation in brackets. "Negotiable instrument" was a technical term defined under English law and perhaps also under private international law, and it should therefore be made clear that the term was being used in a commercial rather than in a technical legal sense.

5. The CHAIRMAN asked whether a reference to that point in the commentary would be sufficient.

6. Mr. WHITELEY (United Kingdom) said his delegation would prefer a reference in the text to "an instrument transferred by negotiation". Failing that, the point could be addressed in the commentary.

7. Ms. BRELIER (France) said she had no objection to the removal of the brackets, and was also prepared to accept the amendment proposed by the representative of the United Kingdom.

8. Mr. CHAN (Singapore) expressed support for the amendment proposed by the representative of the United Kingdom. If the joint proposal was intended to replace only paragraph 1 (*b*) of draft article 4, was it the sponsors' intention to exclude only assignments, or all rights in respect of instruments transferable by negotiation?

9. Mr. COHEN (United States of America) confirmed that the joint proposal was intended to replace only paragraph 1 (*b*) of draft article 4, as set forth in document A/CN.9/486. It would change the rule governing negotiable instruments from an exclusion rule to a "does not affect" rule.

10. Mr. DESCHAMPS (Canada) said that, on reflection, his delegation found that the terms of subparagraph (*a*) of the joint proposal were unduly broad and might have unintended results. It provided that nothing in the Convention affected the rights of a person in possession of an instrument, even if that person's rights were not derived from the instrument. That could give rise to problems. For example, if a debtor issued a cheque to an assignor and the assignor retained the cheque, the assignor's rights would not be affected and a claim by the assignee for the proceeds could be opposed under the laws of the State in which the instrument was located. Clearly, that was not the result desired. On balance, therefore, he preferred the wording suggested by the secretariat in paragraph 28 of document A/CN.9/491, namely: "This Convention does not affect the rights and obligations of any person under negotiable instrument law."

11. Mr. BAZINAS (Secretariat) said that the language proposed in paragraph 28 of document A/CN.9/491 might be amended to read: "This Convention does not affect the rights and obligations of any person under an instrument transferred by negotiation." The purpose of the reference to rights and obligations of any person was to cover the rights of an issuer who was a party to the instrument, the rights of a holder of the instrument and the rights of others who were not parties to the instrument, i.e. attaching creditors. A reference to the law of the State in which the instrument was located could be added if the Commission so wished; but it might not be appropriate to include a conflicts rule governing the law applicable to rights under negotiable instruments in a provision that stated an exception to the Convention.

12. Mr. COHEN (United States of America) said he was unable to support the suggested reference to instruments transferred by negotiation, because it was common practice in the United States and elsewhere to pledge instruments that were not endorsed. Such instruments would be excluded from the rule because they had not been transferred by negotiation. The problem might be solved by using the words “by delivery” instead of “by negotiation”.
13. The representative of Canada had made a valid point which should also be reflected, making it clear that the text referred only to rights deriving from delivery of the instrument.
14. The CHAIRMAN said he took it that the joint proposal by France and the United States raised fundamental problems and had been superseded by the secretariat’s suggestion based on paragraph 28 of document A/CN.9/491, as amended by the representatives of the United States and Canada.
15. Mr. BAZINAS (Secretariat) suggested the following amended version of the text to reflect the concern expressed by the representative of the United States: “This Convention does not affect the rights and obligations of any person under an instrument transferred by mere delivery or by delivery and endorsement.”
16. Mr. WHITELEY (United Kingdom) said that, while he agreed that the joint proposal contained in document A/CN.9/XXXIV/CRP.6 should be abandoned, he was not convinced that the new wording suggested by the secretariat was very different from the version of draft article 4, paragraph 1 (b), contained in document A/CN.9/486. He therefore proposed reverting to that version.
17. Mr. DESCHAMPS (Canada) said that the words “instrument transferred by mere delivery or by delivery and endorsement” did not allay the concern he had expressed earlier about the unduly broad wording of the joint proposal. The terms “instrument transferable by negotiation” or “negotiable instrument” referred to established concepts. But the words “transferred by delivery” raised not only the question of which law would be applicable to the transfer but also the issue of how to interpret the word “instrument”. A chattel paper—the term used in Canada and the United States to refer, for example, to a document evidencing a financial lease—was not a negotiable instrument but could qualify as an instrument if that term was construed in a certain way. Unless a more acceptable solution could be found, he would regretfully have no option but to endorse the proposal just made by the representative of the United Kingdom.
18. Mr. BAZINAS (Secretariat) suggested that the best course might be to use the formulation “instrument transferred by negotiation” proposed by the United Kingdom. The new paragraph could thus enjoy the support of those who advocated the joint proposal put forward by the delegations of France and the United States, with the proviso that article 41 would address any outstanding concerns in that regard.
19. Mr. JOKO SMART (Sierra Leone) endorsed the proposal of the United Kingdom to revert to the original wording of the text, from which the wording proposed by the United States differed in no significant regard.
20. Mr. COHEN (United States of America) said that, to accommodate the search for a consensus, his delegation would not insist on the proposed amendment. The crux of the matter was that many instruments were transferred without requiring an endorsement for their negotiation. The current language of paragraph 1 (b), which included the phrase “with an endorsement, if necessary”, excluded such instruments. As a result, the choice-of-law rules of the Convention would point to the location of the assignor, rather than to the location of the instrument. Article 41 could address that problem if amended as proposed by his delegation in document A/CN.9/XXXIV/CRP.8.
21. The CHAIRMAN suggested that the best course might be to attempt to improve on the wording put forward by the secretariat in paragraph 28 of document A/CN.9/491.
22. Mr. DESCHAMPS (Canada) endorsed that proposal. The Convention should not affect a person’s rights under negotiable instrument law. While his delegation had stated that it would support the proposal of the United Kingdom to revert to the original wording, it would much prefer to adopt the wording proposed by the secretariat.
23. Mr. HUANG FENG (China) agreed that if the Commission could not reach agreement on an entirely new text, it would be preferable to use the wording proposed by the secretariat. That text was compatible with the Chinese legislation.
24. Ms. BRELIER (France), Mr. ZANKER (Observer for Australia) and Ms. PIAGGI DE VANOSI (Observer for Argentina) supported the adoption of the text proposed by the secretariat in paragraph 28 of document A/CN.9/491.
25. Ms. MANGKLATANAKUL (Thailand) said that her delegation would prefer to retain the original wording contained in document A/CN.9/486, and to address exclusions further in article 41.
26. Mr. CHAN (Singapore) supported the use of the wording in paragraph 28 of document A/CN.9/491. However, he reiterated his concern about the use of the phrase “negotiable instrument law”. The previous week, the secretariat had suggested amending that phrase to read “law governing negotiable instruments”. Once the concept had been approved, the Commission could leave it to the drafting group to find the most appropriate wording.
27. Mr. COHEN (United States of America) said that his delegation could support the language contained in paragraph 28 of document A/CN.9/491, with certain amendments suggested by the secretariat. However, it would be very reluctant to support it if the wording was merely changed to recast “negotiable instrument law” into “the law governing negotiable instruments”. The rights of a person in possession of an instrument that had been negotiated did not derive from the law of negotiable instruments, but rather from the law of pledge.
28. Ms. LOMNICKA (United Kingdom) asked whether her delegation was correct in understanding that a consensus had emerged that the wording should be changed to read “This Convention does not affect the rights and obligations of any person under an instrument transferred by mere delivery or by delivery and endorsement”.
29. The CHAIRMAN said that a consensus was emerging, with almost all delegations supporting the wording in paragraph 28 of document A/CN.9/491, the last three words of which would be amended to read: “... The law governing negotiable instruments”. The problem relating to pledge law to which the delegation of the United States had drawn attention could be addressed in article 41.
30. Mr. MARKUS (Observer for Switzerland) said that the recasting of the phrase “negotiable instrument law” to read “law governing negotiable instruments” made the notion broader, and

should thus address the concerns voiced by the representative of the United States. Indeed, as amended, the provision could encompass pledge law in the specific context of negotiable instruments.

31. Mr. COHEN (United States of America) said that in the light of the comments of the two previous speakers, his delegation could accede to the emerging consensus.

32. The CHAIRMAN said he took it that the Commission wished to refer the wording contained in paragraph 28 of document A/CN.9/491 to the drafting group, with the final phrase amended to read "the law governing negotiable instruments".

33. *It was so decided.*

Paragraph 3 (continued) (A/CN.9/XXXIV/CRP.10)

34. Ms. LOMNICKA (United Kingdom) drew attention to the proposal submitted by the United Kingdom with regard to real-estate receivables, contained in document A/CN.9/XXXIV/CRP.10. The last line of the proposed amendment could be placed in article 5 if the drafting group saw fit, as it consisted of a definition of a term.

35. Mr. CHAN (Singapore) requested clarification of the full import and legal effect of subparagraphs 3 (a) (i) and (ii), as proposed by the delegation of the United Kingdom. While the current wording of article 4, paragraph 3 (a) and (b) was somewhat obscure, it seemed narrower in scope than the United Kingdom proposal.

36. Mr. WHITELEY (United Kingdom) said that the proposal for subparagraph 3 (a) (i) was based on wording that his delegation had read out to the Commission in response to a proposal previously put forward by the delegation of the United States. The proposal for subparagraph 3 (a) (ii) reproduced the content of paragraph 3 (a) in its current, denser, language.

37. The two important concepts in the provision were mortgages and rents, and they had been separated in the proposal. Subparagraph 3 (a) (ii) of the proposal effectively stated that a person who, as a right of land law, had an interest in or a priority over rent receivables would maintain that priority, notwithstanding any provision of the Convention regarding an assignment of that rent. That would be the case even if, under certain legal systems, rents were not treated as an interest in land, but rather as a mere personal right. In his own jurisdiction, rents had traditionally been considered an interest in land, but many people now categorized them as personal rights.

38. Mortgages were a concern because article 12 stated that a person who received an assignment of a receivable also automatically obtained any security that backed it. That meant that there was a substantive provision stating that assets that constituted security would be transferred with the assignment of the receivable, which would be governed in terms of priority rights by the law of the assignor's location. In his delegation's view, that would not be appropriate in cases where the security asset in question was land. In such cases, the law of the place in which the land was situated should be applicable. Subparagraph 3 (a) (i) thus acted as a limitation on article 12 of the Convention.

39. Mr. SMITH (United States of America) said that the proposal put forward by the delegation of the United Kingdom addressed an issue it had raised in the Commission the previous week. The language was sufficiently broad to solve many problems which might otherwise arise with respect to non-interference with land law.

40. Mr. CHAN (Singapore) suggested that the helpful explanation provided by the representative of the United Kingdom should be included in the commentary to the text.

41. *It was so decided.*

42. *The amendment to article 4, paragraph 3, was approved.*

Article 41 (continued) (A/CN.9/XXXIV/CRP.8)

43. Mr. COHEN (United States of America) said that the text proposed by his delegation for article 41 in document A/CN.9/XXXIV/CRP.8 was a more formal version of its earlier list of exclusions, already presented orally. In the light of the decision just taken to adopt the proposal by the United Kingdom for article 4, the paragraph (c) of his delegation's proposal now appeared redundant.

44. Ms. BRELIER (France) said that her delegation had misgivings about the United States proposal, which gave a somewhat rigid and categorical formulation of the possible exclusions to the Convention and might not bear the scrutiny of practitioners. Her delegation would be prepared to circulate its own text, worded so as to include rather than exclude certain categories of assignments.

45. Mr. SALINGER (Observer for Factors Chain International) said he was afraid that paragraph (d) of the United States text might have the effect of excluding most of the trade receivables potentially covered by the Convention, since it was common practice in international factoring to evidence assignments between distant parties solely by electronic records, controlled by one of those parties.

46. Mr. MARKUS (Observer for Switzerland) said that the chapeau of the version of article 41 proposed by the United States delegation should be formulated more clearly, so as to indicate that a State might at any time declare that it would not apply the Convention to one, several or all of the specified types of assignments.

47. Mr. BERNER (Observer for the Association of the Bar of the City of New York) said that, given the impossibility of predicting all differences between countries' practices that might prompt them in future to seek a limitation of the scope of the Convention, the United States proposal seemed a valid attempt to confine potential exclusions to the most troublesome areas. Concerns that a State might adopt the Convention and then proceed to exclude all receivables falling within its scope were unfounded, since such a State would have no incentive to become a party to the Convention in the first place. Allowing States to fine-tune the Convention to their interests would not cause problems for practitioners, since each State would produce a comprehensive list of exclusions, to which practitioners would refer. It was important for States to have the flexibility enabling them to adopt the Convention without their normal course of business being thereby impeded.

48. Mr. CHARASSANGSOMBOON (Thailand), stressing the importance his country attached to promoting international trade, said that the scope of the Convention reached far beyond trade-related receivables, to cover those with potential consequences for the stability of certain States' economies, such as receivables arising from portfolio investment or short-term capital flows. His delegation would like to see a clause in the Convention shielding States.

49. Mr. COHEN (United States of America) said that the drafting group could meet the concern expressed by the representative of Switzerland through careful rewording of the chapeau, as well as that of the observer for Factors Chain International, through an explanation of the term "control" clarifying the intended reference to the practice of electronically immobilizing electronic records—a practice that was gaining currency in many States, with the result that there was now a virtual equivalent of possession of physical records.

50. Regarding the point made by the observer for the Association of the Bar of the City of New York, his delegation considered that draft article 41 in its current form allowed for more wide-ranging exclusions than did the proposed amendment thereto. With respect to the point raised by the representative of Thailand, it would be helpful if that speaker were to offer further clarification, since he appeared to be proposing the inclusion of an additional item in the list of exclusions.

51. Mr. BAZINAS (Secretariat) said that, since the term "capital markets" in paragraph (a) of the United States proposal was the only area in the United States proposal not already covered in article 4, it would be useful to include a more detailed explanation of its meaning in the commentary.

52. Mr. COHEN (United States of America) said that, in view of the difficulty of describing future methods of raising capital that were as yet unknown, the intention of paragraph (a) of his delegation's proposal was to exclude application of the Convention in all situations in which public markets were used to raise funds for a company, through stock or bond markets or the like, "capital markets" being the generic term for such public fund-raising mechanisms as distinct from individual transaction-based mechanisms.

53. Ms. WALSH (Canada) said that, while she appreciated the efforts of the United States delegation to put forward a proposal narrowing the scope of potential declarations under article 41 and thus to preserve trade receivables, for instance, from the effects of such declarations, the wording of the proposed text was fairly technical and might fail to achieve even that limited objective, simply by virtue of not being widely understood. For example, the wording of paragraph (d) referring to control of electronic records might easily be misconstrued as covering trade receivables if the reader had no knowledge of that particular type of transaction, which was specific to no more than a few jurisdictions. Furthermore, the reference to "capital markets" in paragraph (a) might well, because of the commonly understood meaning of that term, serve to impede securitization transactions involving trade receivables. In some respects, the United States text actually reinforced the concern of her delegation that article 4 could become a vehicle for converting the Convention into a model law because of the danger that it might be used by a State to make a declaration resembling the list contained in that text. It would be difficult to know precisely what a State was excluding on the basis of that kind of description.

54. The CHAIRMAN suggested that delegations should engage in informal consultations with the United States delegation, so as to agree on a text of draft article 41 that would meet all concerns expressed.

*The meeting was suspended at 11.25 a.m.
and resumed at 11.50 a.m.*

55. Ms. WALSH (Canada) said that it had been concluded, after discussion with other delegations and observers, that the attempt in the United States proposal (A/CN.9/XXXIV/CRP.8) to narrow the scope of the declarations possible under article 41 might have too many unintended adverse consequences, such as that of inviting broader categories of exclusion than was desirable from the viewpoint of the Convention's aims. Her delegation's preference was to delete article 41 altogether. However, it would be willing to join any emerging consensus to retain some version of it, provided that two amendments were made to the text of that article as set forth in A/CN.9/486, namely: the addition of a new paragraph 3 stating that article 41 did not apply to the categories of assignments listed in article 11, paragraph 3; and the insertion of qualifying language in article 41, paragraph 1, to indicate that, in applying that article, States should make their exclusions as specific and limited as possible, and as transparent as possible to other States. That could be achieved by the wording: "A State may declare at any time that it will not apply this Convention to specific types of assignment or to the assignment of specific categories of receivables clearly described in a declaration."

56. Mr. KOHN (Observer for the Commercial Finance Association) said he was in favour of retaining article 41, with the amendments proposed by the representative of Canada. The United States proposal might inadvertently encourage States to make declarations which they would not otherwise have made.

57. Mr. MEDIN (Sweden) agreed that the United States proposal might encourage Contracting States to exclude everything which was mentioned in the article. He supported the retention of the previous version of article 41, which would encourage States to think very carefully before making declarations. With regard to the proposals made by the representative of Canada, he welcomed the idea of inserting the words "specific" and "clearly described", but was not entirely convinced that article 41 should not be applicable to trade receivables. It was unlikely that a Contracting State would exclude broad categories of trade receivables, since if it did not want the Convention to apply to trade receivables, it would be unlikely to become a signatory in the first place. It was better that as many States as possible ratified the Convention, even if some of them made specific declarations in some areas, including the exclusion of assignments of trade receivables.

58. Mr. BRINK (Observer for the European Federation of Factoring Associations—EUROPAFACTORING) said that he understood some delegations' reluctance to countenance the very idea of an exclusion rule, since it served as a reminder that the draft Convention was by no means perfect. Nevertheless, perfection was not a realistic goal: it had to be accepted that certain markets would require an exclusion rule. He therefore welcomed both of the proposals made by the Canadian delegation. It would be useful to remind States that declarations were required to be "specific" and "clearly described"; furthermore, it was essential

that the exclusion rule not be applied to trade receivables, since they were the core of the Convention.

59. Ms. LOMNICKA (United Kingdom) said that her delegation remained opposed to the inclusion of article 41, since the mechanism for amendment in article 47 was more likely than the declarations of individual States under article 41 to lead to clear amendments. In her delegation's view, the Convention would be weakened by the inclusion of article 41. Nevertheless, it could support article 41 with the amendments proposed by the representative of Canada.

60. Ms. PIAGGI DE VANOSI (Observer for Argentina) endorsed the view that trade receivables must not be subject to exclusion, and that article 41 should be deleted. The proposal by the United States delegation was also unacceptable. If there was no consensus to delete draft article 41, her delegation would support the two amendments proposed by the representative of Canada.

61. Ms. ZHOU XIAOYAN (China) said that article 41 should be retained, with the amendments proposed by the representative of Canada.

62. Mr. COHEN (United States of America) said that, following the Canadian proposal, consensus was within reach. However, the description given by the representative of Canada of the types of assignments which could be indicated in exclusions by individual States had not elucidated one technical issue, namely: which State's exclusion had the effect of not applying the Convention to a particular transaction. He would appreciate clarification of that key connecting factor.

63. Referring to the Chairman's concluding comments to the discussion on article 4, paragraph 1 (b), in which it had been suggested that article 41 could be used to resolve any remaining problems relating to pledge law, he said that an instrument could arise from a transaction involving a trade receivable of the type described in article 11, paragraph 3. In order to accommodate the Chairman's suggestion, it would therefore appear that another item would have to be added to the list given by the representative of Canada. Instruments, even if they arose in the context of a trade receivable, would have to be referred to, although not necessarily an exclusion. It would be enough to provide that there was no impairment of a State's right to exclude such instruments. With those provisos, his delegation would be prepared to support the proposal by the representative of Canada.

64. Ms. SABO (Canada) said that her delegation was still concerned at the need for transparency in the declarations made by individual States. To secure that end, the words "Following consultations with all signatory and Contracting States," could be inserted at the beginning of article 41. The resulting feedback would help States to make their declarations as clear, and as limited, as possible.

65. Ms. WALSH (Canada) said that her delegation's proposed additions to the proposed new paragraph 3 were designed not to overcomplicate the provisions of article 41. The two categories referred to by the representative of the United States were existing practices already covered by exclusions under article 4. To provide for declarations under article 41 which corresponded to those categories would be tantamount to an admission that the

Commission had failed to deal with them adequately under article 4.

66. The CHAIRMAN said that the discussion of proposals concerning draft article 41 would be resumed at the 722nd meeting.

Article 38 (continued)

Proposal submitted by Unidroit (A/CN.9/XXXIV/CRP.9)

67. Mr. KRONKE (Observer for the International Institute for the Unification of Private Law—Unidroit) said that the objective should be to draft provisions on the sphere of application and possible conflicts with other international agreements which were simple and had predictable effects for the commercial circles involved. Recourse to general principles of international law was no longer an appropriate approach. Furthermore, compromise solutions would be acceptable only if they did not undermine the policy objectives, underlying economics and predictability of the text.

68. Emphasizing the special financing techniques for aircraft objects, space property and railway rolling stock, sectors in which equipment was inextricably linked to the associated receivables, he drew the Commission's attention to the proposal contained in document A/CN.9/XXXIV/CRP.9, which went even further than the language proposed by Unidroit in the final paragraph of document A/CN.9/490, and which would be easier to apply. Any other solution, such as the exclusion only of transactions "governed" by the draft Unidroit Convention or a link to specified connecting factors at any particular point in time, would make it more difficult to ascertain what the position was at any particular moment within the lifetime of a secured transaction and with regard to any particular element or layer within a typically complex and multi-layered aircraft finance transaction.

69. Mr. WOOL (Observer for the International Institute for the Unification of Private Law—Unidroit) said that the question that needed to be asked in order to determine the treaty relationship was not whether a transaction was specifically "governed" by the Unidroit Convention, but whether it was of a type which fell within the scope of that Convention. Four reasons justified that approach. First, sophisticated asset-based equipment financing transactions involved multi-level assignments of receivables, which were themselves inextricably linked with the assets. Any attempt to identify one single connecting factor such as was to be found in draft article 38, would increase the complexity and costs of any given transaction, which was precisely what both Unidroit and the Commission sought to avoid. Second, while the Commission's draft Convention defined "receivable" as a payment undertaking, the Unidroit Convention was concerned more generally with both payment and performance obligations. In equipment financing, it was often true that the non-payment obligation was not only linked to the payment obligation, but that the two were intimately connected, so that any attempt to divide them would be impossible. Third, many legal systems already had public registries for aircraft receivables, and it would be difficult to convince States to adopt an untested system to replace the one already in place. Lastly, allowing an exception based on the scope of the Unidroit treaty, rather than on its specific provisions, would eliminate conflicts between the incentives to ratify the two Conventions. All those four considerations argued in favour of adoption of the language proposed in document A/CN.9/XXXIV/CRP.9.

The meeting rose at 12.35 p.m.

Summary record of the 722nd meeting

Monday, 2 July 2001, at 2 p.m.

[A/CN.9/SR.722]

Chairman: Mr. MORÁN BOVIO (Mexico)

In the absence of Mr. Pérez-Nieto Castro (Mexico), Mr. Morán Bovio (Spain), Vice-Chairman, took the Chair.

The meeting was called to order at 2.05 p.m.

DRAFT CONVENTION ON ASSIGNMENT OF RECEIVABLES IN INTERNATIONAL TRADE (*continued*) (A/CN.9/486, 489 and Add.1, 490 and Add.1-5 and 491 and Add.1; A/CN.9/XXXIV/CRP.1 and Add.1 and 2, CRP.2 and Add.1-3 and CRP.3-10)

Article 4 (*continued*)

Paragraph 3 (*continued*) (A/CN.9/XXXIV/CRP.10)

1. The CHAIRMAN suggested that the question of avoiding doubt in references to land, which had been raised by the United Kingdom in the last sentence of its proposal (A/CN.9/XXXIV/CRP.10) should be dealt with in the commentary to the draft Convention.

2. *It was so decided.*

Articles 36 and 37 (*continued*) (A/CN.9/XXXIV/CRP.4)

3. Mr. WINSHIP (United States of America) said that article 37 assumed that the definition of "location" in article 5 (*h*) indicated where within a State with two or more territorial units a person was located. However, a closer examination of the definition revealed that "location" referred only to the State in which the person was located and not to the precise whereabouts of the person within that State. In the amendment to article 37 put forward by his delegation in document A/CN.9/XXXIV/CRP.4, the general definition of "location" as contained in article 5 (*h*) had been made applicable to territorial units within a State. The amendment also permitted States to specify by declaration other rules for determining the location of a person within that State.

4. The delegation of Canada had subsequently proposed an amendment to article 37 that repeated article 5 (*h*) in its entirety, except for slight modifications to the chapeau, replacing the word "State" by "territorial unit", where appropriate. The final sentence of the Canadian amendment incorporated the provision in the United States proposal that allowed States to specify other rules. While his delegation would have been satisfied with the inclusion of its proposed amendments to article 37, the Canadian delegation had expressed a number of concerns, which it sought to address by the inclusion of paragraph 3bis in article 36 and the addition of paragraph 37bis. His delegation concurred with Canada's proposals.

5. Ms. SABO (Canada) said that, in order to ensure that the rules of the Convention could be properly applied in cases where there was a division of power between a federal State and its territorial units, her delegation wished to make three proposals. The first involved the addition of paragraph 3bis in article 36, which read:

"3bis. If, by virtue of a declaration under this article, this Convention does not extend to all territorial units of a State,

and the law governing the original contract is the law in force in a territorial unit to which this Convention does not extend, the law governing the original contract is considered not to be the law of a Contracting State."

6. The second proposal was based on the United States proposal on article 37 as contained in document A/CN.9/XXXIV/CRP.4. The new text of article 37 would read:

"If a person is located in a State which has two or more territorial units, that person is located in the territorial unit in which it has its place of business. If the assignor or the assignee has a place of business in more than one territorial unit, the place of business is that place where the central administration of the assignor or the assignee is exercised. If the debtor has a place of business in more than one territorial unit, the place of business is that which has the closest relationship to the original contract. If a person does not have a place of business, reference is to be made to the habitual residence of that person. A State with two or more territorial units may specify by declaration at any time other rules for determining the location of a person within that State."

7. The third and last proposal was to include a new article 37 bis, which would read:

"Article 37bis. *Applicable law in territorial units*

"Any reference in this Convention to the law of a State means, in the case of a State which has two or more territorial units, the law in force in the territorial unit. Such a State may specify by declaration at any time other rules for determining the applicable law."

8. Mr. WINSHIP (United States of America) proposed that, for the purposes of clarity, the words "including rules that render applicable the law of another territorial unit of that State" should be added at the end of the second sentence of article 37bis.

9. Ms. BRELIER (France) supported the United States proposal to amend the second sentence of article 37bis. As it stood, that sentence would give rise to a great deal of legal uncertainty.

10. Mr. KOBORI (Japan) said that, while he supported the proposals put forward by the representative of Canada, it would be useful to qualify the words "territorial units" in articles 37 and 37bis by the phrase "in which different systems of law are applicable in relation to the matters dealt with in this Convention". That phrase has already been used in connection with the words "territorial units" in article 36, paragraph 1.

11. Mr. HUANG FENG (China) said that his delegation had some difficulty with the proposed new wording of article 37, particularly the second sentence. The word "person" should not include branches of a bank. In China, a bank had different branches in different jurisdictions, and each branch had a completely independent legal status. The United States and Canada

should consider redrafting the article in order to address China's concerns with respect to article 37bis. His delegation proposed the addition of the words "where this Convention is applicable" at the end of the first sentence. He hoped that the delegations that had drafted the proposals would take into account China's preference for the use of the term "jurisdiction" rather than "territorial units", although China could agree to the use of both terms.

12. Mr. WHITELEY (United Kingdom) supported the comments made by the representative of China regarding the new wording of article 37. It was important that nothing in the Convention should displace internal law. Perhaps the last sentence of article 37 could be amended to address China's concerns.

13. Mr. BAZINAS (Secretariat) said that, as he understood it, the last sentence of new article 37 would allow a State like China to specify by declaration a different location rule. Perhaps that sentence could somehow be strengthened in the interest of clarity.

14. Ms. SABO (Canada) said that her delegation had no objection to the proposal made by the representative of Japan to include in articles 37 and 37bis an explanation of the term "territorial units".

15. Mr. WINSHIP (United States of America) said that his delegation would have some difficulty with the Japanese proposal, since it was often difficult to determine whether or not a federal State and its component territorial units had different legal systems. The articles 37 and 37bis had been carefully worded to allow for jurisdictions where uniform laws were adopted on particular subjects, which might or might not reflect different systems of law. With regard to the points raised by the representative of China, he agreed with the secretariat that the wording of article 37 as amended was broad enough to deal with some, if not all, of China's concerns. The Commission had already held a very long discussion about the use of the terms "territorial units" and "jurisdiction", and he hoped that the debate would not be reopened at the current stage.

16. Mr. KOBORI (Japan), supported by Mr. HUANG FENG (China), said that it was important to explain the term "territorial units", particularly in the context of a federal State in order to indicate the unique legal status of such units.

17. Ms. BRELIER (France) said that the term "territorial community" was preferable to the term "territorial unit", since the former term was applicable both to federal States and to unitary States.

18. Ms. SABO (Canada) said that one formulation that had been used in some conventions of the Hague Conference on Private International Law referred to different systems of law or sets of rules of law. Perhaps that formulation would be useful in determining what kind of territorial units were being referred to.

19. Mr. BURMAN (United States of America) said that the language used in the Hague Conference was not a standard formulation. The wording of article 36 of the draft Convention had many political connotations, and it was not appropriate for the Commission to seek modifications to that text.

20. Mr. BAZINAS (Secretariat) said that it would not be advisable to refer to "territorial units in which different systems of law are applicable" in article 36 and to "territorial units" in articles 37 and 37bis, since lack of consistency could give rise to problems of interpretation. He wondered whether article 36 as it stood would not sufficiently cover the concerns raised by the representative of the United States.

21. Ms. SABO (Canada) said that she agreed with the representative of Japan that the term "territorial unit" should be defined the same way in articles 37 and 37bis as it was in article 36. She wished to point out to the representative of the United States that the term "territorial unit" had been qualified in many Hague Conference conventions. The use of terms should be consistent not only within the text of the draft Convention but also with other conventions.

22. Mr. BURMAN (United States of America) said that his delegation needed more time to consider all the implications of the proposed changes.

*The meeting was suspended at 3 p.m.
and resumed at 3.15 p.m.*

23. The CHAIRMAN said that it appeared that, following the informal consultations, there was relatively broad agreement to adopt the joint proposal by the United States and Canada, as amended by the addition of the words "including rules that render applicable the law of another territorial unit of that State" at the end of article 37bis.

24. *It was so decided.*

Article 41 (continued) (A/CN.9/XXXIV/CRP.8)

25. The CHAIRMAN said that, at the previous meeting, the Commission had discussed a proposal by the United States on article 41, which was contained in document A/CN.9/XXXIV/CRP.8. Canada had proposed that article 41 should either be deleted or retained with amendments that stipulated that exclusions should be as specific and limited as possible, and that article 41 did not apply to the categories of assignments listed in article 11, paragraph 3. The United States had requested the representative of Canada to explain which State's exclusion had the effect of not applying the Convention to a particular transaction.

26. Mr. CHAN (Singapore) said that Canada had made a second proposal to add the words "Following consultations with all signatory and Contracting States," at the beginning of article 41. That proposal had serious implications, since it would oblige all States seeking to make declarations to consult all signatory and Contracting States. Rather than including such wording in the text, perhaps the Commission could advise States in the commentary to consult with other States of their choice or, preferably, with the secretariat on whatever declarations they wished to make under draft article 41.

27. Ms. ZHOU XIAOYAN (China) said that her delegation did not support Canada's amendment to its initial proposal since the new formulation would place a serious obligation on Contracting States, even if it was included in the commentary.

28. Ms. MANGKLATANAKUL (Thailand) said that her delegation supported the views expressed by the representatives of Singapore and China. At the same time, she agreed with the representative of Canada that declarations made by individual States should be specific and transparent.

29. Ms. LOMNICKA (United Kingdom) said that there seemed to be no clear consensus in the Commission that article 41 should be retained.

30. Mr. SMITH (United States of America) said that, while his delegation could accept the Canadian proposal that declarations should be as specific as possible, it remained concerned about the transfer of non-negotiable instruments and the pledging of instruments without negotiation in situations where the Convention's choice-of-law rule might not always be appropriate. The proposed amendments to article 41 should be reworded in such a way as to ensure that a State could protect holders of instruments that had been taken not by negotiation but were held by possession in book-entry form, or otherwise transferred by delivery. Many States might want to give priority to those who held the paper in their own State rather than to those who had assigned the paper rights and were resident or located in a different State. His delegation proposed that the following text should be added to article 41:

“Following consultation with all signatory and contracting States, a State may declare at any time that this Convention will not affect the rights of a transferee of receivables evidenced by a writing whose rights are derived from the transfer to the transferee of the writing by book entry, control of electronic records or delivery, and whose rights under the law of the State in which the writing is located or the book entry or control is maintained are superior to those of a person who is not a transferee of the writing by book entry, control of electronic records or delivery. The declaration shall describe the nature of the writing and the types of assignment or categories of receivables evidenced by the writing and the circumstances in which the rights of the transferee will not be affected by this Convention.”

31. His delegation believed that there were appropriate limitations on that declaration; it was a no-impairment rule, not an exclusion rule. It would, however, be willing to withdraw the opening phrase “Following consultations with all signatory and contracting States”, if that was the wish of the majority.

32. The CHAIRMAN said that the Commission had already agreed that the opening phrase should be withdrawn. The text proposed by the United States was not intended to replace the Canadian proposal but to supplement it.

33. Mr. BAZINAS (Secretariat) said that, as he understood it, the United States proposal would constitute a new paragraph 3.

34. Mr. CHAN (Singapore) said his delegation shared the concern of the United States that the Convention should cover instruments where rights were transferred by delivery. However, the proposed text was very complex and would require careful consideration. He was not sure what was meant by “the rights of a transferee of receivables evidenced by a writing”. Moreover, the reference to transfer by control of electronic records might have the effect of excluding from the Convention a larger number of categories of receivables. That had not been the original intent of article 41.

35. Mr. HAHN (Observer for the Republic of Korea) agreed with the representative of Singapore that the United States proposal was much too complicated. It should be simplified and shortened.

36. Ms. WALSH (Canada) said that, while her delegation would have preferred to delete article 41 altogether, it had been able to go along with the amended text that had been under discussion because that text allowed for a considerable degree of certainty and predictability. However, as she understood the United States proposal, the limitation on the territorial effects of declarations as set out in article 41, paragraph 2, would be removed, which would pose serious problems for certainty and predictability. Her delegation shared the concerns expressed by the representative of Singapore and the observer for the Republic

of Korea that the proposal went beyond the original intent of article 41.

37. Mr. WHITELEY (United Kingdom) said he had understood that the purpose of the United States proposal had been to clarify article 41, not to broaden its scope. While his delegation had a number of comments on the drafting of the proposal, it would wait until the Commission decided whether or not to accept the text proposed by the United States.

38. Mr. ZANKER (Observer for Australia), supported by Mr. KINYANJUI-MUKIRI (Kenya), said that the United States proposal reopened issues that had been settled at the previous meeting. Since it would not be possible to reach a decision on such a complex proposal at the current stage of the Commission's work, the proposal should be withdrawn.

39. Ms. GAVRILESCU (Romania), supported by Mr. IKEDA (Japan), said that, since most delegations were in favour of retaining article 41 as originally amended by Canada, the Commission should conclude its discussion on that article.

40. Mr. SMITH (United States of America) said that, since his delegation's proposal had no support, it would be withdrawn. He regretted that the Commission was missing an opportunity to deal with modern forms of transfers of financial instruments in book entry and electronic form. The business community would cope with the situation by appointing custodians in the countries of the assignors or would make sure that such instruments were transferred through securities accounts with intermediaries, in which case the Convention would not apply. That would create extra costs for those who participated in such transactions. As he understood it, one of the aims of the Convention was to reduce costs.

41. The CHAIRMAN suggested that draft article 41 should be approved as originally amended by the representative of Canada. The wording that Canada had proposed for insertion at the beginning of article 41 would be included in the commentary.

42. *It was so decided.*

Article 47 (continued)

43. *Draft article 47 was adopted.*

Article 38 (continued) (A/CN.9/XXXIV/CRP.5 and A/CN.9/XXXIV/CRP.9)

44. Ms. PIAGGI DE VANOSI (Observer for Argentina), supported by Ms. LOMNICKA (United Kingdom), said that her delegation was in favour of the proposal submitted by the International Institute for the Unification of Private Law (Unidroit) in document A/CN.9/XXXIV/CRP.9.

45. Mr. KOHN (Observer for the Commercial Finance Association—CFA) suggested that article 38, paragraph 1, should be retained as approved by the Commission the previous week. The language of article 38 as it stood was fair and reasonable and deferred to the Unidroit Convention in cases where that Convention applied to a particular transaction. The Unidroit proposal provided that all receivables described in the Unidroit Convention would be excluded from the draft Convention, even if the Unidroit Convention did not apply to the transaction in question. Moreover, the Unidroit proposal was open-ended, since it could be expanded by future protocols adopted pursuant to the Unidroit Convention; that might result in an unwarranted reduction in the scope of the draft Convention. Furthermore, article 46 of the draft Unidroit Convention on International Interests in Mobile Equipment contained the provision that the Unidroit Convention

would supersede the draft Convention as it related to the assignment of receivables which were associated rights related to international interests in objects of the categories referred to in article 2, paragraph 3, of the Unidroit Convention.

46. Ms. BRELIER (France) said that she believed that article 38 had been approved by the Commission the previous week with an amendment that had been based on the proposal submitted by the Organisation Intergouvernementale pour les Transports Internationaux Ferroviaires in A/CN.9/XXIV/CRP.5. Her delegation preferred the proposal contained in A/CN.9/XXXIV/CRP.5 to the Unidroit proposal.

47. Ms. SABO (Canada) said that her delegation supported the comments of the observer for the Commercial Finance Association. It was difficult to understand how the Commission could adopt a proposal that referred to a convention that did not yet exist.

48. Mr. KRONKE (Observer for the International Institute for the Unification of Private Law—Unidroit), referring to the comments of the observer for the Commercial Finance Association, said that article 46 had been included in the draft Unidroit Convention because it was not known which convention—the Unidroit Convention or the Convention on Assignment of Receivables in International Trade—would be adopted first.

49. Mr. BURMAN (United States) said that his delegation wished to reserve its position with regard to paragraph 2 of the Unidroit proposal, which referred to the Unidroit Convention on International Factoring.

50. The CHAIRMAN said that, since very little support had been expressed for the UNIDROIT proposal, he took it that most delegations were in favour of retaining article 38 as it currently stood.

51. Mr. BURMAN (United States of America) proposed that the proviso clause should be deleted from article 38, paragraph 1.

52. Mr. KOHN (Observer for the Commercial Finance Association) said that his delegation would have no objection to the deletion of the proviso clause. However, if the clause was removed, the first three lines of article 38, paragraph 1, would have to be reworded for the sake of clarity. He proposed that the lines in question should be amended to read: “This Convention does not prevail over any international agreement that has already been or may be entered into and that specifically governs a transaction otherwise governed by this Convention.” the rest of paragraph 1 would be deleted.

53. Mr. BERNER (Observer for the Association of the Bar of the City of New York) supported the proposal made by the observer for the Commercial Finance Association. The proviso clause seemed redundant, and the new wording of paragraph 1 would eliminate ambiguity.

54. The CHAIRMAN said that there seemed to be support for the proposed amendment to article 38, paragraph 1. Paragraph 2 of that article would remain as it appeared in the report of the drafting group (A/CN.9/XXXIV/CRP.2/Add.2).

55. *Article 38, as amended, was adopted.*

Articles 11 and 13 (continued)

56. Ms. BRELIER (France), responding to a request from the drafting group to find a French equivalent of the term

“proprietary information”, said that her delegation proposed that the words “information protégée ayant une valeur commerciale” should replace the words “autres informations” in article 11, paragraph 3 (b), and article 13, paragraph 4 (b).

Decision of the Commission and recommendation to the General Assembly (A/CN.9/XXXIV/CRP.3)

57. Ms. SABO (Canada), supported by Ms. BRELIER (France), proposed that, in its decision and recommendation, the Commission should, provided that a State came forward and offered to host a diplomatic conference early in 2002, request the General Assembly to adopt the Convention and open it for signature.

58. Mr. BURMAN (United States of America) said that his delegation did not support the amendment proposed by the representative of Canada because it would imply that the members of the Commission had agreed that the Convention should be submitted to a diplomatic conference. However, it was not at all clear that such a consensus existed. Time was running short and, at the next session of the General Assembly, the Sixth Committee would have to take action on the draft Convention so that it could be submitted to the Assembly for adoption. If the Commission sent an unclear message to the Sixth Committee, which already had a very full agenda, the Committee might simply decide to shelve the issue.

59. Mr. SEKOLEC (Secretary of the Commission) said that, owing to time constraints, the Commission had not discussed the financial implications of a diplomatic conference. Moreover, the holding of such a conference should not depend exclusively on whether or not a State came forward with an offer to host it. The Commission must first decide whether or not the Convention was ready for submission to a diplomatic conference.

60. Ms. GAVRILESCU (Romania) said that her delegation supported the views expressed by the representative of the United States and the secretariat.

61. Mr. ZANKER (Observer for Australia) said that the Commission needed to send an unambiguous signal to the General Assembly that the Convention was sufficiently mature to justify its adoption. His delegation proposed that the Commission should adopt the decision as it stood.

62. The CHAIRMAN said that he took it that the Commission wished to adopt the decision and recommendation contained in document A/CN.9/XXXIV/CRP.3.

63. *It was so decided.*

Draft articles 18 to 24 and article 5 (g)
(A/CN.9/XXXIV/CRP.2)

64. *Draft articles 18 to 24 and article 5 (g) were adopted.*

Draft articles 25 to 36 (A/CN.9/XXXIV/CRP.2/Add.1)

65. Mr. WINSHIP (United States of America) said that, in article 35, paragraph 1, the drafting group had left a blank after the word “until”. His delegation had understood that the Convention would be open for signature for two years.

66. Mr. BAZINAS (Secretariat) said that, if it was the wish of the Commission, the words “two years after opening for signature by the General Assembly” could be inserted within square brackets after the word “until” in article 35, paragraph 1.

67. *Draft articles 25 to 36 were adopted.*

Draft articles 38 to 40 and 42 to 46 (A/CN.9/XXXIV/CRP.2/Add.2)

68. *Draft articles 38 to 40 and 42 to 46 were adopted.*

Draft articles 1 to 9 of the annex to the draft Convention (A/CN.9/XXXIV/CRP.2/Add.2)

69. Mr. WINSHIP (United States of America) said that article 8 of the annex referred to “the time of the contract of assignment” whereas the wording “the time of conclusion of the contract of assignment” had been used everywhere else in the Convention.

70. Mr. BAZINAS (Secretariat) said that, in article 8 of the annex, the drafting group had decided to refer to the time of the contract of assignment rather than to the time of conclusion of the contract of assignment in order to take into account the situation existing in countries with a notification-based priority system.

71. *Draft articles 1 to 9 of the annex to the Convention were adopted.*

Title, preamble and draft articles 1 to 3 of the draft Convention (A/CN.9/XXXIV/CRP.2/Add.2)

72. *The title, preamble and draft articles 1 to 3 of the draft Convention were adopted.*

Draft articles 4 to 7 (A/CN.9/XXXIV/CRP.2/Add.3)

73. Mr. DUCAROIR (Observer for the European Banking Federation) commended the drafting group and the secretariat on the excellent drafting of article 4, which fully met the concerns of financial and banking institutions.

74. Mr. DESCHAMPS (Canada) and Ms. BRELIER (France) said that their delegations had not received copies of document A/CN.9/XXXIV/CRP.2/Add.3.

75. The CHAIRMAN suggested that, since some delegations had not yet received document A/CN.9/XXXIV/CRP.2/Add.3, the Commission should defer its consideration of the report of the drafting group to a later stage.

76. *It was so decided.*

POSSIBLE FUTURE WORK ON SECURITY INTERESTS (A/CN.9/496)

77. The CHAIRMAN invited the observer for the International Institute for the Unification of Private Law (Unidroit), who would not be present when the Commission discussed possible future work on security interests to make a statement.

78. Mr. KRONKE (Observer for the International Institute for the Unification of Private Law—Unidroit) commended the secretariat of the Commission on its preparatory work to identify areas of the law of secured transactions where further useful contributions could be made once the draft Convention was adopted. Unidroit fully shared the concern that, given the extremely limited budget, time and staff resources in both Unidroit and the Commission, as well as in related units in the Governments of member States, every effort should be made to avoid duplication of work.

79. Unidroit had accomplished a considerable amount of preparatory work in the area of security rights in investment securities. The areas involved in secured transactions were too broad and too diverse to be subject to meaningful harmonization efforts, and all the private-sector and academic advisers consulted so far by States members of Unidroit and by the Unidroit secretariat had recommended that the item “Security interests and securities” should be transferred to the appropriate unit of the Unidroit capital markets programme. That programme dealt with rules on trading and securities in merged markets and in electronic communications networks, the development of standards for global share, and clearing settlement and netting in transnational transactions in securities.

80. In response to a note verbale sent out by the Unidroit secretariat, the Governments that had already completed their internal consultations had indicated without exception that the area of transnational transactions entered into and executed by intermediaries and, in particular, clearing and settlement institutions, and perhaps also central counter parties, should be given high priority. A working group established at the request of the Unidroit Governing Council had focused attention on that area, which represented a refined service product comprising not only completion of transactions in the sense of matching purchase and sales orders, but also a range of integrated services and connected activities, such as custody, creation of securities interests, liquidity control, order flow and inventory management.

81. In the light of those developments, it was logical that functional links should be identified and coordination actively pursued. Accordingly, the Unidroit secretariat had submitted an outline of work under way at Unidroit, which identified nine specific issues that could be efficiently addressed only by harmonized substantive law, to the Group of Experts of the Hague Conference on Private International Law that was currently engaged in drafting a convention on the law applicable to the dispositions of securities held through indirect holding systems. He had discussed the question of proper coordination and efficient integration of efforts with the Secretary of the Commission and the Secretary-General of the Hague Conference and it had been agreed that the division of labour would take into consideration functional links between problem areas and individual items, work already carried out in any given field, expertise available in working groups and study groups, and expertise already existing within the secretariat of an international organization. The previous week, he had discussed with the Hague Conference practical steps for coordinating its work on the conflict-of-laws aspects in the area of security interests in securities with the work being carried out by Unidroit on substantive aspects in the same field.

82. Mr. FERRARI (Secretariat) said that, when the Commission took up the item on possible future work on security interests, the secretariat’s proposal to the Commission would be consistent with the statement just made by the observer for Unidroit.

The meeting rose at 5.05 p.m.

Summary record of the 723rd meeting

Tuesday, 3 July 2001, at 9.30 a.m.

[A/CN.9/SR.723]

Temporary Chairman: Mr. SEKOLEC (Secretary of the Commission)

Chairman: Mr. Abascal ZAMORA (Mexico)

In the absence of the Chairman, Mr. Sekolec (Secretary of the Commission) took the Chair.

The meeting was called to order at 10 a.m.

ELECTION OF OFFICERS (*continued*)

1. Mr. PORTELLA (Brazil), speaking on behalf of the Group of Latin American and Caribbean States, nominated Mr. Abascal ZAMORA (Mexico) for the office of Chairman of the Committee of the Whole on the draft UNCITRAL Model Law on Electronic Signatures and draft Guide to Enactment and on possible future work on electronic commerce.
2. Mr. GAUTHIER (Canada) and Mr. OLIVENCIA RUIZ (Spain) seconded the nomination.
3. *Mr. Abascal Zamora (Mexico) was elected Chairman of the Committee of the Whole on the draft UNCITRAL Model Law on Electronic Signatures and draft Guide to Enactment and on possible future work on electronic commerce, by acclamation.*
4. *Mr. Abascal Zamora (Mexico) took the Chair.*

DRAFT UNCITRAL MODEL LAW ON ELECTRONIC SIGNATURES AND DRAFT GUIDE TO ENACTMENT (A/CN.9/492 and Add.1 and 2, A/CN.9/493)

5. Mr. SORIEUL (Secretariat) said that document A/CN.9/493 contained the text of the draft Model Law as it stood following the thirty-seventh (September 2000) session of the Working Group on Electronic Commerce, and of the Guide to Enactment, as revised by the secretariat following the Working Group's March 2001 session. Document A/CN.9/492 and its addenda 1 and 2 contained the comments that had been received from Governments and interested organizations.
6. Mr. BURMAN (United States of America) said that his delegation hoped the Commission would be able to conclude its work on electronic signatures and to hold a fruitful discussion on possible future work related to electronic commerce. Document A/CN.9/492/Add.2 contained proposals by the United States for changes to articles 8 to 11 of the draft Model Law, which were the provisions that had given rise to the most concern among commentators in various parts of the world. The field of electronic commerce was evolving more quickly than ever before, and the Commission would, as in the past, need to take careful account of recent changes in commercial applications of signature technologies when carrying out its work, so as to ensure its continued relevancy.
7. Mr. ARNOTT (United Kingdom) said that he understood the need expressed by the representative of the United States to scrutinize the draft Model Law so as to take account of recent changes in the marketplace. Document A/CN.9/492 and addenda contained a few uncontroversial proposals for amendments of a purely textual and technical nature. It might perhaps be advisable

to begin by considering those amendments, so as to have an up-to-date text on the basis of which the Commission could go on to discuss proposals for more substantive amendments as it considered the text article by article.

8. Ms. BRELIER (France) noted that the draft Model Law was the result of lengthy discussions over several years, which had made it possible to strike a balance and reach consensus on many points. In its work at the current session, the Commission should guard against calling those achievements into question.

9. The CHAIRMAN said that while the Commission's normal procedure would be to consider the text article by article, in the light of the proposal put forward by the delegation of the United Kingdom it might perhaps be preferable to begin by considering the purely technical amendments proposed in document A/CN.9/492 and Add.1 and 2, before turning to more substantive matters.

10. Mr. KURDI (Observer for Saudi Arabia) said that, in considering the draft Model Law article by article, the Commission should pay special attention to articles with respect to which proposals were contained in document A/CN.9/492 and Add.1 and 2.

11. His delegation was very interested in the Commission's work on electronic commerce. The Saudi Arabian working group that had been established to draft a model law on electronic commerce and electronic signatures relied heavily on the work of the Commission in those areas.

12. Mr. PÉREZ (Colombia) said that the general remarks contained in document A/CN.9/493 had allayed some of the concerns expressed by his Government in document A/CN.9/SR.492. Colombia had made considerable progress in enacting legislation on electronic commerce and had been the first country in Latin America to adopt almost the entire text of the 1996 UNCITRAL Model Law on Electronic Commerce. The Government of Colombia had appointed an intergovernmental commission, which was supported by the private sector, to revise Colombian law on electronic commerce in the light of the Commission's work on electronic signatures.

13. Ms. CHADHA (India) said that, pursuant to the Commission's adoption of the Model Law on Electronic Commerce, the Government of India had enacted the Information Technology Act. The Act provided for the legal recognition of electronic records and digital signatures, a regulatory regime to supervise the certifying authorities issuing digital signature certificates, and the use of electronic records and digital signatures in Government offices and agencies. The Act also introduced significant amendments to the Indian Penal Code and the Indian Evidence Act in order to deal with offences relating to documents and paper-based transactions. The Reserve Bank of India Act had been amended to facilitate electronic fund transfers between financial institutions and banks, and the Bankers' Books

Evidence Act recognized the legality of accounting in electronic form by banks. Her delegation hoped that the Commission's work on electronic signatures would help India to amend its laws and enact new ones in order to meet growing requirements.

14. Ms. ZHOU XIAOYAN (China) said that the 1996 UNCITRAL Model Law on Electronic Commerce had helped China improve its trade law. With regard to the United Kingdom's proposal, her delegation was in favour of discussing the text of the draft Model Law article by article, and taking up the amendments proposed in document A/CN.9/492 and Add.1 and 2 in conjunction with the relevant articles.

15. Mr. ENOUGA (Cameroon) said that his delegation supported the proposal by the representative of China. The Commission should adhere to its traditional working methods and proceed directly to document A/CN.9/493. The amendments proposed in document A/CN.9/492 and Add.1 and 2 could be taken up with the relevant article.

16. Many countries that had not yet enacted legislation on electronic commerce would have to deal with two texts, namely, the Model Law on Electronic Commerce and the future Model Law on Electronic Signatures. A significant number of developing countries still had to overcome the technological lag that existed between them and the developed countries, and there was also the problem of certification authorities and the recognition of certificates issued by different States. The Commission should consider combining the two model laws into a uniform text.

17. Mr. SORIEUL (Secretariat) said that, in the last version of the draft Guide, the Working Group had endeavoured to clarify the links between the 1996 Model Law on Electronic Commerce and the draft Model Law on Electronic Signatures. While those two instruments were complementary, the adoption of one did not necessarily entail the adoption of the other. States could choose to adopt only the 1996 Model Law or to adopt both texts.

18. The Commission must decide how to deal with the repetition of article 7 of the 1996 Model Law in article 6 of the draft Model Law on Electronic Signatures. At one of its recent sessions, the Working Group had considered whether or not it would be useful for a State that had chosen to adopt article 6 of the draft Model Law to adopt article 7 in the 1996 Model Law, since article 6 was more complete. The proposal that States that had not yet adopted article 7 of the 1996 Model Law should choose article 6 of the draft Model Law had been opposed by delegations that considered that the second rule was not needed. If the Commission wished to promote the draft Model Law, it would probably be a good idea to indicate clearly that countries choosing to adopt article 6 in the new instrument would be dispensed from adopting article 7 in the 1996 Model Law.

19. Mr. BURMAN (United States of America) said that his delegation supported the United Kingdom's proposal. There was no need to re-examine every article of the draft, particularly since many of the articles at the beginning of the text had been discussed at length and were not controversial. Perhaps when it began its discussion of article 6, the Commission could take up the issue just raised by the secretariat. Article 6 of the draft Model Law on Electronic Signatures should not supersede article 7 of the 1996 Model Law on Electronic Commerce, which contained many important provisions. Such an approach would discourage some States from adopting the appropriate provisions of the 1996 Model Law.

20. Ms. BRELIER (France), Mr. OKAY (Observer for Turkey), Mr. ZANKER (Observer for Australia) and Mr. BRITO DA SILVA CORREIA (Observer for Portugal) supported the proposal made by the representative of the United Kingdom.

21. The CHAIRMAN said that it was clear that the United Kingdom's proposal had a great deal of support. The Commission would therefore begin its work by taking up the proposals contained in document A/CN.9/492 and Add.1 and 2, following the order of the articles. He invited the Commission to consider the United Kingdom's proposal concerning article 2 (b), which was contained in document A/CN.9/492/Add.1.

Article 2 (b)

22. Mr. ARNOTT (United Kingdom) said that, at its previous sessions, the Commission had forgotten to refer to the public key in its definition of "certificate". At its recent session in New York in March, the Working Group had discussed that omission. The proposed amendment to article 2 (b) would help to ensure that, when there was a public key, the certificate confirmed the link between the signatory and that key and, in any case, the link between the signatory and the signature creation data.

23. The CHAIRMAN said that paragraph 97 of document A/CN.9/493 provided a detailed explanation of the Working Group's position on the issue raised by the representative of the United Kingdom.

24. Mr. SMEDINGHOFF (United States of America) said that the word "and" at the end of subparagraph (i) of the United Kingdom's proposal should read "or": while the intent of the proposal was to ensure that a certificate could include a PKI model, it was not intended that it should exclusively support a PKI model. It was very likely that certificates would take other forms for other technologies.

25. Mr. MADRID PARRA (Spain) said that, while his delegation basically supported the substance of the proposal made by the United Kingdom, it believed that all reference to "cryptography" and "public key" should be avoided, since the Commission had already decided that the text of article 2 would not refer to "private key" but to "signature creation data". If there was to be a reference to a public key, it would be preferable, for the sake of symmetry, to introduce the term "signature verification data" to be used in conjunction with the term "signature creation data". That would be in keeping with the principle of technological neutrality that informed the text. His delegation would even consider retaining the text as it stood and adding the words "and, where appropriate, signature verification data".

26. Ms. BRELIER (France) said that her delegation supported the United Kingdom's proposal, and that the word "and" should be retained.

27. Mr. GAUTHIER (Canada) said that his delegation did not support the United Kingdom's proposal, not because of the substance of the explanation, but because it believed that the matter of the public cryptographic key had already been adequately dealt with both in the Model Law and in the Guide to Enactment. If, however, the proposal was accepted, the word "and" should not be replaced by "or". Otherwise, the debate on the issue of neutrality might be reopened.

28. Ms. MANGKLATANAKUL (Thailand) agreed that the issue had been amply discussed in the Working Group, and that the current text should be retained.

29. Mr. BURMAN (United States of America) said that while his delegation could accept the bulk of the United Kingdom's proposal, it had serious reservations about retaining the word "and" at the end of subparagraph (i). Since article 2 (a) was currently a generic reference to certificates, and since new technologies were already in use which did not use asymmetric cryptography to support certificates, it was very important to use the word "or". However, the existing definition in article 2 (b) already covered the matter.

30. Mr. STOCCHI (Italy) said that, while he supported the United Kingdom's proposal, the word "cryptographic" should be deleted. Cryptographic keys were not necessarily related to digital signatures, and in many legislations were dealt with differently for different purposes. Therefore, the current drafting could lead to confusion in national legislations. He proposed the formulation: "In a case where a private and public key are used respectively to create and verify an electronic signature, the link between a signatory and a public key ...". He also supported the retention of the word "and".

31. Mr. ZANKER (Observer for Australia) said that the United Kingdom's proposal was probably unnecessary, and introduced a technology-specific element to the article which the Working Group assiduously attempted to avoid. The key aspect of the definition of certificate was confirming the link between the signatory and the signature creation data, and the United Kingdom's proposals did not help to resolve that question.

32. Ms. PIAGGI DE VANOSI (Observer for Argentina), referring to the United Kingdom's proposal for article 2 (b), said that an agreement had been reached to avoid reference to any specific technology. For the reasons given by the observer for Australia, the proposed amendment was unnecessary.

33. Ms. ZHOU XIAOYAN (China) said that the current wording already dealt with the United Kingdom's concerns.

34. The CHAIRMAN said it seemed clear that the proposal by the United Kingdom delegation implied more than minor drafting changes, and could not be accepted. He took it that, consequently, the United Kingdom's proposal for article 9, paragraph 1 (c) would also fall.

35. *It was so decided.*

*The meeting was suspended at 11.15 a.m.
and resumed at 11.45 a.m.*

Article 9, paragraph 1 (d) (iv)

36. Mr. SORIEUL (Secretariat) said that the French proposal for article 9, paragraph 1 (d) (iv), contained in document A/CN.9/492, was simply a drafting change, which could probably be resolved in the drafting group. It should be borne in mind that the prime considerations in drafting texts were comprehensibility and ease of translation, rather than elegance of style.

37. Ms. GAVRILESCU (Romania) supported the proposal.

38. Mr. ARNOTT (United Kingdom) also supported the proposal, as well as the proposals by France in document A/CN.9/492, concerning articles 8 and 11 (b).

39. The CHAIRMAN said that, if he heard no objection, the proposal would be addressed in the drafting group.

40. *It was so decided.*

Article 11 (b)

41. Mr. CAPRIOLI (France) said that the proposal in document A/CN.9/492 for article 11 (b) was to replace the words "where an electronic signature is supported by" with the words "where an electronic signature is based on".

42. Ms. REMSU (Canada) said that she could not support the proposal, which, in her view, would narrow down the notion of

a signature. An electronic signature existed in its own right, and could be supported by, but not based on, a certificate.

43. Mr. MADRID PARRA (Spain) drew attention to the fact that any amendment to article 11 (b) might call for consequential amendments to other articles, such as article 8, paragraph 1 (c), or to the draft Guide to Enactment.

44. Mr. CAPRIOLI (France) said that the representative of Spain had made a valid point. However, the amendment to article 11 (b) had been proposed in the light of the verification requirement contained in subparagraphs (b) (i) and (ii). The idea of verification of origin or authenticity was implicit in the phrase "where an electronic signature is based on a certificate". It was important to ensure that the terms used reflected the underlying technical and legal circumstances and to avoid ambiguity. However, he was prepared to defer to the wishes of the majority if it wished to leave the text unchanged.

45. Mr. ZANKER (Observer for Australia) expressed support for the points made by the representatives of Canada and Spain. The wording of article 11 (b) should be left unchanged.

46. Mr. BRITO DA SILVA CORREIA (Observer for Portugal) suggested that the issue raised by the representative of France was a matter of translation since the English version seemed to be acceptable.

47. Ms. ZHOU XIAOYAN (China) expressed support for the views expressed by the representative of Canada and the observer for Australia. The equivalent of "supported" in the Chinese version accurately reflected the idea of "evidencing" which the draft Model Law intended to convey.

48. The CHAIRMAN suggested that the drafting group be asked to address the French proposal without changing the substance of article 11.

49. *It was so decided.*

Article 5

50. Mr. BAKER (Observer for the International Chamber of Commerce—ICC), introducing the proposed amendment to article 5 contained in document A/CN.9/492/Add.2, said that ICC was concerned about the prospective adverse impact of the article on the use of electronic signatures and electronic commerce. It proposed two alternative amendments to the article: option 1 involved deleting the final clause of article 5, which read "unless that agreement would not be valid or effective under applicable law", and option 2 involved replacing the words "applicable law" by "mandatory principles of public policy". The reasons for the proposed amendment were: the risk of unduly broad interpretation of the term "applicable law" by national judges, especially in civil-law countries, who could take it to mean any law within the jurisdiction, even one that was not applicable to digital or electronic signatures; the fact that the parties that would apply the Model Law already understood that in certain circumstances the "applicable law" would restrict agreements made by parties; and the risk of giving national legislators and courts the mistaken impression that the Model Law sought to limit party autonomy to a greater extent than was already the case in certain jurisdictions.

51. Mr. KOBORI (Japan) said that, while he could support the proposal by ICC to delete the final clause, he wished to propose, as an alternative, rewording the clause to read "unless otherwise provided for under applicable law". Paragraph 111 of the draft Guide to Enactment made it clear that article 5 should not be misinterpreted as allowing the parties to derogate from mandatory rules of applicable law.

52. Mr. SMEDINGHOFF (United States of America) said he could support either of the two options proposed by ICC. Party autonomy was clearly viewed by the wide-ranging membership of ICC as an issue of great importance in commercial terms, a perception that was borne out by the recent comments of United States businesses that were concerned about the issue. ICC correctly noted the important distinction between “applicable law” and “mandatory principles of public policy”. If article 5 remained unchanged, the reference to applicable law might undermine the important principle of party autonomy.

53. Mr. BRITO DA SILVA CORREIA (Observer for Portugal) said he would prefer to retain the present wording of article 5. If it failed to mention any limitation by applicable law, the article could be interpreted by certain countries as an international treaty that prevailed over domestic law. Certain limits must be placed on party autonomy by means, for example, of mandatory rules and public policy principles. The term “applicable law” was very clear and there were no grounds for concern about its leading to confusion in the courts.

54. Mr. ZANKER (Observer for Australia) expressed support for the amendment proposed by ICC as option 1. Alternatively, he would be happy to leave the text unchanged.

55. The amendment proposed by the representative of Japan seemed to extend the scope of article 5 by enabling applicable law to specify other reasons apart from validity or effectiveness for derogating from or not permitting an agreement.

56. With regard to the comment by the observer for Portugal, the draft Model Law was not an international treaty and one of the main principles governing its implementation was that its provisions could be derogated from or their effect varied by agreement. While there might be circumstances in which such derogations or variations would be undesirable, they would rarely if ever arise in practice.

57. Mr. MARKUS (Observer for Switzerland) said he was in favour of retaining the wording of article 5 proposed by the Working Group. It should be borne in mind that certain provisions of the draft Model Law, which was not an international treaty, would be of a mandatory nature in some jurisdictions.

The proposed ICC amendment in option 2, which referred to mandatory principles of public policy, made no sense in a Model Law: it was self-evident that judges would take a country’s public policy principles into account.

58. Mr. JOZA (Observer for the Czech Republic) said that party autonomy should be limited if provision was made for such limitation in the law of the enacting State. Otherwise a conflict could arise between the Model Law and the provisions of national legislation. In his own country, such limitations would have to be incorporated in the relevant act of parliament, and there were similar constitutional requirements in other civil-law countries. Where the scope of the Model Law was extended by the enacting State in the manner described in paragraph 90 of the draft Guide to Enactment, provisions governing limitations were even more likely to be included in the law of the enacting State. Article 5 should therefore remain unchanged or be amended according to option 2.

59. Mr. CAPRIOLI (France) said his position was exactly the same as that of the observer for Switzerland. The issue of party autonomy had already been discussed at great length. Article 5 should therefore remain unchanged.

60. Mr. LEE SUNG-KYU (Observer for the Republic of Korea) expressed support for the amendment proposed by ICC in option 2. However, he could also go along with the proposal to leave article 5 unchanged.

61. Mr. GAUTHIER (Canada) said he would not support any amendment to article 5, which adequately reflected the discussions in the Working Group and the consensus reached in that context. The term “applicable law” was not confusing and had rallied considerable support. The suggestion that the final clause be deleted would lead to a discussion of whether article 5 itself was necessary and whether it was proper to assert party autonomy in a Model Law. The Working Group had decided that the concept should be reflected but needed to be qualified. The present wording was, in his view, fair and adequate, particularly in the light of the description of its scope contained in the draft Guide to Enactment.

The meeting rose at 12.35 p.m.

Summary record of the 724th meeting

Tuesday, 3 July 2001, at 2 p.m.

[A/CN.9/SR.724]

Chairman: Mr. Abascal ZAMORA (Mexico)

The meeting was called to order at 2.05 p.m.

DRAFT UNCITRAL MODEL LAW ON ELECTRONIC SIGNATURES AND DRAFT GUIDE TO ENACTMENT (continued) (A/CN.9/492 and Add.1-3 and A/CN.9/493)

Article 5 (continued)

1. The CHAIRMAN invited the Commission to continue its consideration of the proposal put forward by the observer for the International Chamber of Commerce (ICC) at the previous meeting, which involved two options: either the deletion of the final clause of article 5, which read “unless that agreement would not

be valid or effective under applicable law”, or the replacement of the words “applicable law” with the words “mandatory principles of public policy”.

2. Mr. JOKO SMART (Sierra Leone) said that his delegation was not in favour of adopting either option. The term “applicable law” should be retained since it included not only mandatory principles of public policy but also mandatory provisions of national legislation, such as the constitution and specific relevant statute law. Moreover, the existing wording of article 5 was in

line with article 6 of the United Nations Convention on Contracts for the International Sale of Goods. For the sake of consistency, his delegation preferred to keep the text unchanged.

3. Mr. ENOUGA (Cameroon) said that his delegation agreed that article 5 should be retained in its current wording. That wording was the result of arduous negotiations and struck a balance that should not be disturbed. Absolute contractual freedom did not exist in any legal system, and the courts, when settling disputes, would ascertain whether or not an agreement was contrary to public policy.

4. Mr. BAKER (Observer for the International Chamber of Commerce—ICC) said that, in proposing the deletion of the final clause of article 5, ICC had wanted to emphasize that party autonomy was of prime concern and thus avoid sending the wrong message to the public. If the clause was to be retained, perhaps it could be amended to read “unless that agreement would be unlawful”.

5. Mr. ALHWEIJ (Observer for the Libyan Arab Jamahiriya) said that his delegation supported the ICC proposal.

6. Ms. ZHOU XIAOYAN (China) said that, while her delegation appreciated the concerns expressed by the observer for the International Chamber of Commerce, it was in favour of retaining the original text. The document under discussion was a model law, not a convention. A model law should uphold the principle of party autonomy while respecting national law. Her delegation felt that the text struck the right balance. A compromise solution might be to replace the final clause of article 5 with the words “unless that agreement would not be in accordance with mandatory provisions of the applicable law”.

7. Mr. BURMAN (United States of America) said that his delegation had no objection either to the language proposed by the delegation of China or to the new wording proposed by ICC. His delegation had not intended to comment on article 5 but had been persuaded by the arguments put forward by ICC. Given that the Model Law was intended to serve the international business community, it was important to consider how its provisions would be received by that community.

8. Mr. KURDI (Observer for Saudi Arabia) said that, in the interests of clarity, his delegation supported the proposal made by ICC to replace the words “applicable law” with “mandatory principles of public policy”.

9. Mr. KOTTUT (Kenya) said that his delegation preferred to keep the text as it stood.

10. Ms. LAHELMA (Observer for Finland) said that, while her delegation would prefer to retain article 5 as it stood, it could accept the amendment proposed by the delegation of China.

11. Mr. BAKER (Observer for the International Chamber of Commerce) said that the language used by ICC in its proposed amendment to article 5 had been taken from the draft Guide to Enactment, paragraph 111 of which stated that article 5 “should not be misinterpreted as allowing the parties to derogate from mandatory rules, e.g. rules adopted for reasons of public policy”. Consistency between the text of article 5 and the draft Guide would reduce the likelihood of confusion.

12. Mr. MADRID PARRA (Spain) said that his delegation was in favour of retaining the words “applicable law”. However, the drafting group might wish to consider alternative wording for the expression “derogated from”.

13. The CHAIRMAN said that it seemed that most delegations were in favour of leaving the text of article 5 unchanged.

14. *It was so decided.*

Article 7, paragraph 1

15. Mr. PÉREZ (Colombia), introducing his delegation’s proposed amendment to article 7, paragraph 1, as contained in document A/CN.9/492, said that, in its present formulation, paragraph 1 seemed to imply that the reliability requirements for an electronic signature, as set forth in article 6, would be satisfied only in the circumstances described in article 7. That would restrict the application of the principles of technology neutrality, non-discrimination and party autonomy, which the Model Law recognized. His delegation proposed that the phrase “without prejudice to the possibility for the parties to agree on the use of any method for creating an electronic signature” should be added at the end of paragraph 1.

16. Mr. SMEDINGHOFF (United States of America) said that, while the parties would be free to establish by agreement or subsequent proof in a court that a particular electronic signature met the requirements of article 6, the current wording of article 7 might be interpreted to mean that a State, or a public or private entity designated by it, could preclude a party from so doing. One solution might be to limit the applicability of article 7, paragraph 1, to article 6, paragraph 3.

17. Mr. CAPRIOLI (France), supported by Mr. GAUTHIER (Canada), said that his delegation considered the proposed amendment to article 7, paragraph 1, to be redundant since the possibility sought by Colombia was already provided for in article 6, paragraph 1, which contained the phrase “including any relevant agreement”. His delegation could not support the United States proposal, which related only to paragraph 3 of article 6, since the representative of Colombia had referred to article 6 as a whole.

18. Mr. ZANKER (Observer for Australia), supported by Mr. ENOUGA (Cameroon), said that he shared the view expressed by the representatives of France and Canada. If the issue in question was not already sufficiently covered by article 6, it would be covered by article 5.

19. Mr. ARNOTT (United Kingdom) said that his delegation appreciated the thinking behind the Colombian proposal but felt that the point was adequately covered by article 6 and that no change to article 7 was required.

20. Mr. PÉREZ (Colombia) said that his Government’s comments in document A/CN.9/492 included a proposal that international standards for electronic signatures should be determined by an international organ designated by the Commission. If that proposal was not taken up, article 7 should be amended in a way that did not restrict the parties’ freedom to use signature techniques that satisfied the requirements of article 6.

21. Mr. JOZA (Observer for the Czech Republic) said that article 7 empowered competent persons or authorities to determine which electronic signatures should be considered reliable. An electronic signature agreed upon by the parties must at least be supported by an agreement, whether verbal, written or concluded electronically. In the event of a dispute, any such signature had to pass the reliability test set out in article 6. His delegation therefore considered the proposed amendment to be unnecessary.

22. Mr. CAPRIOLI (France) said that the phrase “may determine” in article 7, paragraph 1, allowed the enacting State to take steps to determine reliability but did not place it under any obligation to do so. France, for example, would leave it to the parties to determine which electronic signature they considered appropriate.

23. Mr. SMEDINGHOFF (United States of America) said that the representative of Colombia had raised an important issue that might have implications in two distinct situations. In the first situation, where the parties agreed on a form of electronic

signature different from those determined by the designated entity as being reliable, he wondered whether such an agreement would be enforceable. While article 6, paragraph 1, stipulated that any relevant agreement should be taken into account, that agreement might be rendered invalid under applicable law by virtue of article 5. In the second situation, where the parties used a method of signature other than those determined by the designated entity but had not entered into any agreement, he questioned whether article 7 would deny the parties the opportunity of seeking to prove in a dispute that the method of signature used was as reliable as appropriate in the light of the circumstances.

24. Ms. ZHOU XIAOYAN (China) said that there appeared to be inconsistency between article 7, paragraph 1, and article 6, paragraph 1, with regard to the requirements for establishing reliability of electronic signatures. The relationship between the two provisions should perhaps be examined more closely.

25. Mr. MADRID PARRA (Spain) said that, while all delegations agreed on the need to respect the principle of party autonomy, some considered that article 5, which allowed for variation by agreement, was sufficient to meet Colombia's concerns while others felt that more explicit wording was necessary. He wished to point out to the delegations in favour of amending article 7 that several paragraphs of the draft Guide to Enactment, including paragraphs 127 and 133, stated that the Model Law did not intend to limit the application of the principle of party autonomy. To have that principle specified throughout the text of the Model Law would not be good drafting. If further clarification was considered necessary, perhaps the point could be explained more fully in the Guide.

26. Mr. GAUTHIER (Canada) agreed with the representative of Spain that no amendment to article 7 was required. The Commission was discussing a model law, not a convention. Party autonomy had been established as a guiding principle in article 5 of the draft Model Law and was referred to in several instances in the draft Guide. Article 6 described how the reliability requirements for an electronic signature would be satisfied and article 7 added that States that wished to do could designate a body, either public or private, to determine whether or not a signature satisfied those requirements. There had been no intention to override party autonomy. It would be excessive from a drafting point of view to begin every paragraph with the proviso that it was subject to article 5.

27. Mr. SMEDINGHOFF (United States of America) said that the issue involved not only the question of party autonomy but also the question of whether the parties were able to prove that the electronic signature chosen by them was sufficiently reliable even though it might not be on the list of signatures selected by the designated entity.

28. Mr. CAPRIOLI (France) said that his delegation endorsed the remarks of the representative of Canada. While an enacting State could choose to determine the electronic signatures that it considered most appropriate, the principle of party autonomy allowed the parties to reach an agreement regarding the use of a signature technique. There was therefore no contradiction.

29. Mr. ZANKER (Observer for Australia) said that his delegation agreed with the statements made by the representatives of Canada and France. It could not support the United States proposal to make article 7 applicable solely to article 6, paragraph 3, since article 6, paragraph 4, stipulated that paragraph 3 did not limit the ability of any person to establish the reliability of an electronic signature or adduce evidence of its non-reliability.

30. Mr. PÉREZ (Colombia) said that, having listened to the remarks made by delegations and having noted the explanation in paragraph 133 of the draft Guide concerning the scope of agreements entered into by parties on the use of signature techniques,

he could accept the discretionary nature of article 7, paragraph 1. Perhaps the title of article 7 could be amended to read "Determination of the reliability of a signature" in order to reflect the relationship between that article and article 6.

31. The CHAIRMAN said that titles of articles in UNCITRAL texts were purely indicative but the drafting group could consider Colombia's suggestion. He took it that the proposed amendment to article 7, paragraph 1, had not received sufficient support and that the text would remain unchanged.

32. *It was so decided.*

Article 10 (f)

33. Mr. PÉREZ (Colombia), introducing the proposed amendment to article 10 (f) contained in document A/CN.9/492, said that the proposal was based on his Government's experience in implementing legislation on electronic commerce. In Colombia, the task of determining whether certification authorities had the technical, financial and legal capability to discharge their mandate was performed by independent auditing bodies. It was not considered appropriate for the certification service provider itself to make a declaration as to the trustworthiness of its own systems, procedures or human resources. His delegation proposed that the words "the certification service provider" should be replaced with the words "an independent auditing body" so that paragraph 10 (f) would read: "The existence of a declaration by the State, an accreditation body or an independent auditing body regarding compliance with or existence of the foregoing; or."

34. Mr. MADRID PARRA (Spain) said that his delegation could agree to an additional reference in paragraph 10 (f) to an independent auditing body, since article 10 contained a non-exhaustive list of factors for assessing the trustworthiness of systems, procedures and human resources used by certification service providers. However, it could not agree to the deletion of the reference to the certification service provider, whose declarations were important in the development of electronic commerce.

35. Mr. GAUTHIER (Canada) said that his delegation supported the comments made by the representative of Spain. While the addition of a reference to an independent auditing body was acceptable, it would be regrettable to omit the reference to other bodies mentioned in paragraph 10 (f).

36. Mr. CAPRIOLI (France) said that his delegation supported the view expressed by the representatives of Spain and Canada. It was important for the certification service provider to be able to make a declaration as to its compliance with requirements. Such declarations were in fact mandatory in France.

37. Mr. ARNOTT (United Kingdom) said that his delegation was also in favour of retaining the reference to the certification service provider. The ability of the certification service provider to make self-declarations was important. While his delegation could go along with the inclusion in paragraph 10 (f) of a reference to an independent auditing body, it felt that there was already provision for that in paragraph 10 (g), which referred to "any other relevant factor".

*The meeting was suspended at 3.30 p.m.
and resumed at 4 p.m.*

38. Mr. KURDI (Observer for Saudi Arabia) said that his delegation had no objection to the inclusion of a reference to an independent body in paragraph 10 (f).

39. The CHAIRMAN said that he took it that the Commission considered that it was not necessary to amend article 10 (f).

40. *It was so decided.*

Article 8, paragraph 1 (a)

41. Mr. BURMAN (United States of America) said that, from comments received over the past year from lawyers and industry, it had become clear that amendments to articles 8 to 11 were necessary since, if they were adopted without change, they would have negative effects on States' economies and pose obstacles to the development of electronic commerce. Without those changes to the draft Model Law, it would not be possible to secure the support of the business community that was necessary for the adoption of laws, and the end product would not do justice to the Commission's work on its Model Law on Electronic Commerce.

42. Mr. SMEDINGHOFF (United States of America), referring to his delegation's proposal contained in document A/CN.9/492/Add.2, said that it had been found that the implementation of article 8, paragraph 1 (a) could lead to problems, especially where liability could be imposed for the signatory's failure to exercise reasonable care to avoid unauthorized use of its signature creation data. Such problems would arise in the context of the public key infrastructure system, where a signatory was obliged to keep its private key confidential. Signatories frequently did not have the technical skills to know what to do with the keys and often did not understand how or where those keys were stored on their computer systems. It was therefore not practical simply to impose an unqualified obligation on the signatory to exercise reasonable care to protect the key. His delegation proposed that the phrase "in accordance with accepted commercial practices" should be inserted before the words "reasonable care" in article 8, paragraph 1 (a). An obligation couched in such terms might be more acceptable to signatories and might encourage the use of electronic commerce.

43. Mr. ARNOTT (United Kingdom) said that, while not every part of the draft Model Law was suitable for every jurisdiction, the Commission had over the past two years been sensitive to movements in the market and had modified some articles accordingly. Nevertheless, some of the United States proposals were worthy of consideration, since they represented the final fine-tuning that could make all the difference. With regard to the proposed amendment to article 8 1 (a), his delegation did not object to the phrase "in accordance with accepted commercial practices" but believed that it might prompt users of the Model Law to question by whom such practices were accepted. He believed that the phrase "in accordance with relevant commercial practice" would be preferable to the wording proposed by the United States.

44. Mr. MADRID PARRA (Spain) said that, while his delegation shared the views expressed by the United States delegation regarding the Commission's role in promoting electronic commerce, it did not consider that the proposed amendment was necessary for the Spanish legal system. However, Spain would have no objection to the amendment if other delegations felt that it was useful. His delegation appreciated the United Kingdom's misgivings about the use of the word "accepted" and proposed that a term such as "customary" might help to avoid confusion.

45. Ms. MANGKLATANAKUL (Thailand) said that her delegation was not opposed to the United States proposal unless the additional text had the effect of placing signatories under the obligation to prove compliance with accepted commercial practices in addition to the obligation to prove to the courts that they had acted with reasonable care. Further clarification from the United States delegation would be appreciated.

46. Mr. BAKER (Observer for the International Chamber of Commerce) said that ICC, which represented businesses in over 140 countries, fully supported the general statement made by the United States concerning articles 8 to 11 and hoped that the

Commission would remain committed to ensuring that the provisions of the Model Law duly reflected the concerns of the international business community. With regard to article 8, paragraph 1 (a), ICC supported both the United States proposal and the United Kingdom's proposed amendment.

47. Mr. JOZA (Observer for the Czech Republic) said that his delegation would also welcome clarification concerning the expression "accepted commercial practices", since the protection of signature creation data was related more closely to internal security practices than to commercial practices. If the United States amendment was adopted, it might be necessary to include an explanation in the draft Guide to Enactment.

48. Mr. CAPRIOLI (France) said that his delegation could not support either the proposal made by the United States or the amendment proposed by the United Kingdom. The electronic signature market was an emerging market in which there was currently no established commercial practice. Accepted practices and relevant practice were vague terms that were best avoided.

49. Mr. BRITO DA SILVA CORREIA (Observer for Portugal) said that his delegation endorsed the remarks made by the representative of France. A signatory would understand what the notion of reasonable care meant in practice in relation to protection of the private key but would have difficulty understanding what constituted accepted commercial practices. The United States proposal raised more problems than it solved.

50. Mr. SMEDINGHOFF (United States of America), referring to the comments made by the representative of Thailand, said that the proposed amendment was intended to ease the burden on the signatory, especially in a technology-oriented market where what might appear as reasonable care to protect signature creation data from unauthorized use might involve a situation where the signatory did not have the technical capability to implement the protective mechanism. While his delegation acknowledged that there were currently no established commercial practices with respect to electronic signatures, it questioned how, without the yardstick of actual practice, an obligation to exercise reasonable care could be imposed on signatories. The United Kingdom's proposal to replace the word "accepted" with the word "relevant" could help solve the problem.

51. Mr. ZANKER (Observer for Australia) said that, since there were as yet no accepted commercial practices in the burgeoning industry of electronic signatures, his delegation could not agree to the application of a standard of reasonable care that had no meaning. The observer for the Czech Republic had currently pointed out that the matter had more to do with internal security practices than with commercial practices. All that article 8 required of a signatory that had generated signature creation data, whether alone or with the assistance of a certification authority or by agreement with another party to a commercial transaction, was that it undertook to keep such data confidential.

52. Mr. GAUTHIER (Canada) said that his delegation did not share the pessimism expressed by the United States delegation concerning articles 8 to 11, and did not believe that the term "reasonable care" would cause any difficulty from a common-law or civil-law point of view. If it was felt that additional language was necessary in article 8, paragraph 1 (a), the United Kingdom's proposal pointed in the right direction. Perhaps the problem could be solved by the addition of a paragraph or sentence which read: "In determining reasonable care, regard may be had to a relevant commercial practice, if any." Another solution might be to deal with the matter in the draft Guide to Enactment.

53. Mr. BAKER (Observer for the International Chamber of Commerce) said that, while ICC had difficulty in recognizing the existence of accepted commercial practices, it found it easier to

accept that there were relevant commercial practices. The Canadian proposal was acceptable to ICC.

54. Mr. CAPRIOLI (France) said that the text proposed by the United States delegation would not produce the desired effect but would add to the confusion in a market where technical information about the systems employed was, both for security and for economic reasons, not accessible to all to the same degree. While users should not necessarily be expected to possess technical knowledge, they should be expected to be aware of the extent of

their responsibility. The electronic signature market was a competitive market where both highly secure storage systems and commercially cheaper but less secure hard-disk storage systems were available. If, for example, a signatory's private key was stored on a hard-disk system and the server was compromised because it was insufficiently protected, it would be difficult for a judge to assess the standard of reasonable care by reference to commercial practice.

The meeting rose at 5.05 p.m.

Summary record of the 725th meeting

Wednesday, 4 July 2001, at 9.30 a.m.

[A/CN.9/SR.725]

Chairman: Mr. Abascal ZAMORA (Mexico)

The meeting was called to order at 9.40 a.m.

DRAFT UNCITRAL MODEL LAW ON ELECTRONIC SIGNATURES AND DRAFT GUIDE TO ENACTMENT (continued) (A/CN.9/492 and Add.1 and 2 and A/CN.9/493)

Article 8, paragraph 1 (a) (continued)

1. The CHAIRMAN said that, at the previous meeting, the Commission had considered a proposal by the United States of America to amend article 8, paragraph 1 (a), to read: "exercise, in accordance with accepted commercial practices, reasonable care to avoid unauthorized use of its signature creation data". The United Kingdom had subsequently proposed that the words "accepted commercial practices" should be replaced by "relevant commercial practice". However, many delegations had insisted on retaining the original text. The representative of Canada had suggested that the problem could be resolved by including additional text not only in article 8, paragraph 1 (a), but also in the other paragraphs.

2. Mr. LEE SUNG-KYU (Observer for the Republic of Korea) said that his delegation was reluctant to include any additional words before the words "reasonable care". The "reasonable care" standard would be decided by a judge, and a wise judge would take accepted commercial practices into consideration in each particular case. His delegation did not agree that it was necessary to lower the standard of care since, although a lower standard might attract more users of e-business, it would lower the liability from the point of view of the user at the other end. Some users might avoid using e-signatures precisely because of that lowered standard.

3. Mr. GAUTHIER (Canada) said that perhaps the words "in determining reasonable care, regard may be had to a relevant commercial practice, if any." could be inserted after article 8, paragraph 1 (a), or could become a subparagraph (a) (ii) of that paragraph. That was very much in line with what the Commission had done in article 10.

4. Mr. LEBEDEV (Russian Federation) said that his delegation supported the general idea put forward by the representative of the United States concerning the importance of having the draft Model Law serve as a stimulus for the broader use of new

technological methods. Technological innovations, particularly those in the field of international commercial operations, initially gave rise to serious misgivings, and it was very important for users of new technologies to be sure that they were reliable.

5. With regard to the proposed amendments and the reference to practice, whether accepted or relevant, his delegation wondered how it would be possible to understand what sort of practice was being referred to. In the future, when the Model Law was actually applied, the word "practice" might well be interpreted to mean international practice and not the practice of a given State or a given sector in a given State. If the Commission decided to incorporate a reference to practice in the draft Model Law, it should ensure that such practice was interpreted not as localized practice but as international practice.

6. Ms. ZHOU XIAOYAN (China) said that her delegation could accept either the proposal put forward by the United Kingdom or the compromise proposal made by the representative of Canada.

7. Mr. MARKUS (Observer for Switzerland) said that his delegation understood the concern expressed by the United States that it was dangerous to set standards that were too high for the user. On the other hand, he wondered whether reference to "relevant commercial practice" would have the desired results. By referring to such commercial practice, the Commission would raise rather than lower the standard. It was necessary to consider what could reasonably be expected of a person with only average commercial or technical knowledge; in that regard "reasonable care" seemed to be the correct choice of words and should be retained. If the Commission decided not to retain those words, his delegation could accept Canada's compromise proposal.

8. Mr. SMEDINGHOFF (United States of America) and Mr. BRITO DA SILVA CORREIA (Observer for Portugal) supported the proposal made by the representative of Canada.

9. Mr. CAPRIOLI (France) said that his delegation remained convinced that the word "reasonable" was sufficient. Perhaps, for the sake of clarity, accepted or relevant commercial practice could be discussed in the draft Guide to Enactment.

10. Mr. MAZZONI (Italy) said that the remarks made by the representative of the Russian Federation were very appropriate, since the real danger was that national standards might be used to determine what was “reasonable”, which might create the problem that article 4 sought to avoid. If the Commission wished to ensure that the standard contained in article 8, paragraph 1 (a), was the correct one, emphasis should be placed on the international character of the standard. He proposed that the text of article 8 should include the words “in determining reasonable care, regard is to be had to well-established and widely recognized international practices, if any.” That wording would ensure that judges applied international standards, and would allow for practices that had not yet evolved.

11. Mr. ARNOTT (United Kingdom) said that the Commission should take care not to qualify the simple phrase “reasonable care” in such a way as to single out one particular thing to which regard should be had, to the exclusion or derogation of others. That point should be made clear in the Guide.

12. Ms. MANGKLATANAKUL (Thailand) said that her delegation believed there was no need to add anything more to the reasonable care standard that was being set in article 8, paragraph 1 (a). However, if the Commission wished to qualify “reasonable care”, the proposal by the representative of Canada would be acceptable. The proposal made by Italy was very rigid and would pose problems.

13. Mr. PÉREZ (Colombia) said that reference to accepted or relevant commercial practice would restrict the application of article 8, paragraph 1 (a). The text should be left as it stood. It would, however, be useful if the draft Guide referred to accepted or relevant commercial practice.

14. Mr. MARADIAGA (Honduras) said that the wording of article 8, paragraph 1 (a), was perfectly clear. His delegation agreed with the representatives of France and Colombia that the use of the words “reasonable care” was sufficient.

15. Mr. MOHAN (Singapore) said he was surprised that it should be the representatives of those very countries in which the concept of reasonable care was well developed who had proposed amendments to article 8, paragraph 1 (a). His delegation supported the delegations that were in favour of retaining the current wording of article 8, paragraph 1 (a). The concept of reasonable care introduced flexibility and would allow judges to import new commercial practices as they developed.

16. Mr. MARKUS (Observer for Switzerland) said that his delegation continued to oppose any reference to commercial practices. If it was forced to choose between the Canadian and Italian proposals, it would prefer the latter, because it referred to international commercial practice, thereby providing guarantees of uniformity.

17. Mr. JOKO SMART (Sierra Leone) said that his delegation supported the views expressed by the delegations of Singapore, Colombia, the Republic of Korea and Thailand. Any qualification of “reasonable care” would lead to a narrow interpretation of that term, which was well known in all judicial systems.

18. Mr. ZANKER (Observer for Australia) said that, for the reasons given by the representative of Singapore, he could not support either of the two proposals for amendment.

19. Mr. SMEDINGHOFF (United States of America) said that it was precisely because of his country’s experience of the concept of reasonable care that his delegation had made its proposal. Much of United States case law had required parties under the reasonable care standard to undertake activities that had not necessarily been accepted commercial practices at the time. One

particular case had ruled that the use of radio transmission technology which was not in common commercial use was nevertheless necessary to comply with the reasonable care standard. Consequently, his delegation was concerned that the right type of reasonable care standard should apply.

20. Mr. UCHIDA (Japan), supported by Ms. GAVRILESCU (Romania), said that the text should remain unchanged, and that the factors to be taken into account when assessing the exercise of reasonable care should be explained in the Guide to Enactment.

21. Mr. ADENSAMER (Austria) also favoured leaving the text unchanged.

22. The CHAIRMAN said that a clear consensus had emerged that the text produced by the Working Group should be retained, but that reference to international commercial practices, if any, should be made in the Guide to Enactment.

23. *It was so agreed.*

Article 8, paragraph 1 (b)

24. Mr. FIELD (United States of America) said that his delegation was concerned that the requirements imposed on the signatory by article 8, paragraph 1 (b), would in some cases be impossible to fulfil. In what was traditionally called a closed system, signatories could trace all the relying parties and therefore had the capacity to notify them. However, in open systems, as was the case with credit cards, there could be any number of parties relying on the signature who might not be immediately traceable by the signatory. Technically, the signatory was rarely the person who had set up the system for notification of parties, and therefore had little control over it. The proposal contained in document A/CN.9/492/Add.2 was designed to take into account the fact that signatories could do only as much to notify relying parties as was made possible by the procedures available to them. Under that proposal, the subparagraph should be restated so as to read: “(b) without undue delay, use reasonable efforts to initiate any procedures made available to the signatory to notify relying parties if”.

25. Mr. ENOUGA (Cameroon) said that the proposal by the representative of the United States diluted the requirement so as to render it virtually meaningless. Consequently, the proposal should be rejected.

26. Mr. MARKUS (Observer for Switzerland) said that his delegation supported the general thrust of the United States proposal, but that it seemed to err on the side of leniency. Accordingly, the words “reasonable efforts” should be strengthened. He did not support the proposal to replace the words “any person that may reasonably be expected by the signatory to rely on ...” with the words “relying parties”, since the signatory could not be expected to know the identities of all relying parties.

27. Mr. ARNOTT (United Kingdom) agreed with the observer for Switzerland that the wording “any person that may reasonably be expected ...” was preferable to the words “relying parties”. The reference in the original text to persons who “provide services in support of the electronic signature”, which had been deleted in the United States proposal, should also remain, for the certification service provider deserved to be notified if possible, particularly as he might also be the keeper of the revocation list. However, his delegation could support the proposed references to “reasonable efforts” and to “procedures made available”.

28. Mr. BAKER (Observer for the International Chamber of Commerce) said that while article 8 dealt specifically with the issue of security, the most important consideration was a well-balanced assignment of responsibilities. His delegation was in

favour of adding the idea of “reasonable efforts” to the text, for the reasons given by the representative of the United States, and in the interests of consistency with other parts of article 8. However, like the observer for Switzerland and the representative of the United Kingdom, he favoured retaining the original text after the word “notify”.

29. Mr. CAPRIOLI (France) said that the Commission was going back over old ground. Furthermore, as the representative of Cameroon had noted, the proposal was so vague as to virtually strip the provision of any substance. The current text should be retained.

30. Mr. TATOUT (France) said that his delegation shared the United States concern that the signatory would not necessarily be aware of the technical workings of the system he was using. However, that was no reason for diluting the responsibility of the signatory. The text should establish clearly the responsibilities of each party, including those of the signatory, because the success of electronic signatures depended on it. The development of electronic signatures and information technology security was a highly competitive market, which exacerbated the information imbalance between providers and users. It was therefore all the more important that responsibilities should be clearly defined. An emphasis on the signatory’s responsibility would send a clear message that providers had a duty to keep users well informed.

*The meeting was suspended at 10.40 a.m.
and resumed at 11.15 a.m.*

31. Mr. MADRID PARRA (Spain) said that his delegation shared the concerns raised by the United States representative over article 8, paragraph 1 (b). Paragraph 139 of the Guide to Enactment did not fully reflect the discussions on that provision, one which could be seen as imposing an excessive responsibility on the signatory to ensure that every person relying on the signature was traced and notified when there was a risk that the signature creation data had been compromised. However, the intention had simply been to ensure that in such cases the signatory should inform, for example, the party responsible for the certificate revocation list, and should exercise good faith in notifying any other parties that might reasonably be expected to know, such as business partners who relied on the signature. Paragraph 139 of the Guide to Enactment should emphasize those considerations. It should also refer to article 15 of the UNCITRAL Model Law on Electronic Commerce, which defined the dispatch and receipt of messages, making it clear that the requirement to notify did not necessarily imply that the third party had to receive the message, merely that the message should be dispatched. Reference to those matters in the Guide would be a more effective way of dealing with the issue than insertion in the Model Law of a potentially misleading phrase such as that proposed by the United States delegation.

32. Mr. JOKO SMART (Sierra Leone) said that, as he understood it, the intention of article 8, paragraph 1 (b), was to impose an obligation on the signatory to notify any relying party or party providing services in support of the electronic signature without undue delay. That notification could be made through any means available under national law. In his view, the United States proposal was inconsistent with that intention, since it spoke merely of the initiation of a procedure through which a notification could be made. The text produced by the Working Group should therefore be retained.

33. Mr. MARADIAGA (Honduras) said he was in favour of leaving article 8, paragraph 1 (b), unchanged. Subparagraphs (b) (i) and (ii) clearly specified the circumstances in which notification was required. A signatory acting in good faith who knew that the signature creation data had been compromised was duty bound to notify any person who was placed at risk as a result.

34. Mr. JOZA (Observer for the Czech Republic) said he was inclined to support the proposal by the United Kingdom to combine some aspects of the United States proposal and of the existing text. But article 8, paragraph 1 (b), was not to be understood solely as an obligation but also as a necessity for a signatory who wished to avoid incurring liability. It might prove impossible for a signatory to notify “any person” that might reasonably be expected to rely on a signature produced by compromised signature creation data. But that was not so in the case of a certification service provider. In such a relationship, the signatory was under a strict obligation to notify unauthorized use if it wished to avoid incurring liability.

35. Mr. ZANKER (Observer for Australia) said that he had not been convinced by the case made for amendment of article 8, paragraph 1 (b). Electronic signatures would presumably be used by persons who entered into contracts or dealt with customers or others on a reasonably frequent basis. A fully automated business that maintained a database of persons with whom regular transactions were conducted should have no great difficulty in notifying those persons if the signature creation data became corrupt or unreliable. The authentication provider should, of course, be notified immediately. He was in favour of leaving the text unchanged.

36. Mr. GAUTHIER (Canada) said his delegation found the text proposed by the Working Group entirely acceptable and the proposed amendment using the words “to initiate any procedures made available” basically unacceptable. Any policy debate would tend to focus on whether paragraph 1 (b) should be couched in terms of a result-oriented or a means-oriented obligation. That seemed to be the issue underlying the amendments currently on the table. If it was decided to amend the text, the most acceptable change, in his view, would consist in toning down the opening phrase so as to read “without undue delay, use reasonable efforts to notify any person”.

37. Mr. MAZZONI (Italy) said he broadly shared the view expressed by the representative of Canada that the existing text was acceptable. Canada’s suggested amendment would also be acceptable, provided that the words “reasonable efforts” were replaced by “best efforts”.

38. Ms. MANGKLATANAKUL (Thailand) said she supported the United States proposal, with the amendment thereto suggested by the representative of the United Kingdom. The reference to “procedures made available” should be retained, as it would help the signatory to identify what steps should be taken to notify the relevant parties.

39. Mr. KOTTUT (Kenya) said that the text as it stood was acceptable, but set a very high standard of notification for the signatory which in some circumstances it might not be possible to meet. On the other hand, the wording of the United States proposal was extremely weak and failed to state clearly the signatory’s obligation to notify where the signature creation data had been compromised. He was therefore inclined to support the amendment suggested by the representative of Canada.

40. Mr. ALHWEIJ (Observer for the Libyan Arab Jamahiriya) said he was in favour of retaining the original wording of article 8, paragraph 1 (b).

41. Mr. BRITO DA SILVA CORREIA (Observer for Portugal) expressed a preference for the text proposed by the Working Group and endorsed the points made by the representatives of France and Canada. On the one hand, the wording “without undue delay” was sufficiently flexible to meet practical needs; on the other, it was important to express a result-oriented obligation to notify.

42. Mr. MARKUS (Observer for Switzerland) suggested a compromise that would combine several different proposed amendments. The proposal by the representative of Canada as modified by the representative of Italy met his concern that the wording of the United States proposal was too vague. At the same time, the reference in the United States proposal to “procedures made available to the signatory” could be incorporated in the original text. It was the certification service provider’s duty to place such procedures at the disposal of the signatory, who might be unfamiliar with electronic procedures.

43. Mr. ARNDT (Observer for Poland) expressed support for the proposal by the observer for Switzerland.

44. Mr. PÉREZ (Colombia) endorsed the proposal by the observer for Switzerland, which retained the spirit of the original version of article 8, paragraph 1 (*b*), but improved its overall balance.

45. Mr. ARNOTT (United Kingdom) also expressed support for the proposal by the observer for Switzerland. However, he preferred the wording “reasonable efforts” to “best efforts”, because compliance with the latter requirement would be somewhat burdensome.

46. Mr. FIELD (United States of America) said he could support the compromise proposed by the observer for Switzerland.

47. Mr. MADRID PARRA (Spain) said that any alleviation of the risk incurred by the signatory would result in a proportionately greater risk for third parties who relied on the signature, thereby reducing the incentive for them to accept electronic signatures. If the signatory made a reasonable effort and yet failed to notify a regular customer of the fact that data had been compromised, the customer might suffer damage as a result. It was important to strike a fair balance in the allocation of risk.

48. Mr. CAPRIOLI (France) said that, while recognizing that it raised problems of interpretation for some delegations, he was still in favour of leaving the text of paragraph 1 (*b*) unchanged. The main point was the dichotomy that existed between, on the one hand, the relying parties and, on the other, the certification service provider. He proposed replacing the words “use reasonable efforts to notify” by a notion of “due care” to notify (“de manière diligente”). That clarified the relationship between the contracting parties, who relied on the signatures and must be notified, and the certification service provider, whose task it was to compile a list of certificates that had been revoked. In the absence of notification, the service provider was relieved of that obligation, which was the counterpart of the obligation incurred by the signatory.

49. Mr. BAKER (Observer for the International Chamber of Commerce) expressed support for the compromise proposed by the observer for Switzerland, preferably as amended by the representative of the United Kingdom.

50. Ms. ZHOU XIAOYAN (China) endorsed the point made by the representative of Spain regarding the possible adverse impact on the relying party of any reduction in the risk incurred by the signatory, which would undermine confidence in electronic commerce. The rights and duties of the different parties should be evenly balanced. She supported the amendment proposed by the representative of France.

51. The CHAIRMAN suggested that the representatives of the United States, Canada, France and Italy, the observer for Switzerland and any other interested parties should meet for informal consultations to produce a joint text of article 8, paragraph 1 (*b*), for consideration by the Commission at its next meeting.

52. *It was so decided.*

Article 8, paragraph 2

53. Mr. SMEDINGHOFF (United States of America) said that the issue his delegation addressed in document A/CN.9/492/Add.2, that of liability, pertained also to article 9, paragraph 2, and was among the most important matters that the meeting would have to discuss. It had also been the most frequent subject of concern raised by industry groups and businesses.

54. The Model Law must not inhibit entities from engaging in electronic commerce, and must not improperly allocate risk between the parties. The current language of article 8, paragraph 2, did not offer the flexibility that was required if electronic commerce was to flourish. In particular, the words “shall be liable” went too far in allocating risk and determining liability. That wording ignored the fact that some legal systems provided for the comparative fault of the parties rather than the absolute liability of just one party. There were also variations between national laws. For example, it appeared that in Australia credit card holders were liable for improper use of their credit cards, while in the United States and other countries such liability did not necessarily arise. Furthermore, the wording ignored the possibility that failure to perform obligations might not result in damage.

55. The current text of the draft Model Law contained two different standards for risk allocation and liability. In draft articles 8 and 9, referring respectively to the signatory and the certified service provider, the text read “shall be liable for its failure”, while in draft article 11, in respect of the relying party, it read “shall bear the legal consequences of its failure”. The wording of article 8, paragraph 2, should be revised so as to reflect the standard used in article 11, leaving it to the courts and the law itself to impose different degrees of liability in different circumstances. The text would thus read: “A signatory shall bear the legal consequences of its failure to ...”.

56. Mr. SORIEUL (Secretariat) said that at its previous session the Working Group had discussed the matter raised by the representative of the United States at some length, and had noted that the wording of articles 8 and 9 might be interpreted as creating a regime of absolute liability for the signatory and the certification service provider—something that had never been the intention of the Working Group. The proposal put forward by the United States delegation appeared to be consistent with the wishes of the Working Group.

57. Mr. MAZZONI (Italy) said that the relying party could not have an obligation and could only suffer the consequences of the risk assumed, whereas the signatory and certification service provider were under an obligation to take certain measures. Provided the text maintained that important distinction, his delegation was not averse to the idea of finding some alternative language for articles 8 and 9 that would soften the phrase “shall be liable”. However, to reproduce the wording of draft article 11 would convey the wrong message.

58. Mr. GAUTHIER (Canada) said that his delegation could accept the amendment proposed by the representative of the United States, in so far as it would clarify the Commission’s intention. In his delegation’s view, the proposed change in wording in no way modified the substance of the provision.

59. Mr. MADRID PARRA (Spain) fully supported the position of the representative of Italy: there was a fundamental difference between the signatory and the certification service provider on the one hand and the relying party on the other, and the Model Law must reflect that difference. The signatory was bound by a contract and the certification service provider made public declarations and received payment, so that both incurred liability. The relying party, on the other hand, assumed risks only to the

extent that it placed excessive trust in the certification service provider or the signatory.

60. The CHAIRMAN, speaking in his capacity as a member of the Commission, noted that the Model Law would automatically establish liability, as determined by the national legislation. In the United States and other common-law countries, that would give rise to strict liability. In the Mexican legal system, however, there were many cases in which liability would not be absolute. If the Model Law referred to liability in such absolute terms, those cases would be excluded.

61. Mr. LEE SUNG-KYU (Observer for the Republic of Korea) said that his delegation fully supported the amendment proposed by the United States delegation.

62. Mr. BAKER (Observer for the International Chamber of Commerce) said that while it might be necessary to draw a distinction between signatory, service provider and relying party, the key point was to avoid confusing the concepts of liability. He was confident that the confusion could be eliminated while maintaining that distinction. He supported the United States proposal to amend paragraph 2, on the understanding that it might be necessary to identify and communicate the distinction to which the Italian delegation had drawn attention.

63. Mr. ZANKER (Observer for Australia) supported the United States proposal. There was no need to draw a distinction between signatories, certification service providers and relying parties for the purpose in question. They could all potentially be actors in a situation where data was corrupted, and could all face liability or legal consequences stemming from such an incident.

64. Mr. CAPRIOLI (France) endorsed the views expressed by the representatives of Spain and Italy concerning the need to distinguish between signatories, certification service providers and relying parties. The current wording, which established that distinction, should be maintained. The text merely referred to the question of liability, and it would be for national legislation to determine the extent of that liability.

65. Mr. SORIEUL (Secretariat) said that the Working Group had attempted, to no avail, to establish a regime of liability which recognized all the distinctions that could be drawn between the three parties. It had therefore decided to refer to the applicable local law. That reference was explicit and clear in article 11, but the current wording of articles 8 and 9 could be interpreted as imposing a change in local law that would establish a strict or absolute liability on the part of the signatory or the certification service provider. That had not been the intention of the Working Group, and it could adversely affect the acceptability of the Model Law. The Commission should try to clarify the text so as to eliminate the risk of its being misinterpreted in that way. The intention was not to do away with the distinction between the various parties' degree of liability, which was of course governed by the local law.

66. Mr. ARNOTT (United Kingdom) expressed concern about the phrase, "shall be liable". In his country, there was a danger that the phrase could be interpreted as implying strict liability. While that was apparently not at all the intention, the comments of practitioners considering electronic commerce indicated that they considered that wording frighteningly strong. The proposal put forward by the delegation of the United States was thus worthy of firm support. As for the distinction between the three parties, national law would in any event take care of such distinctions. However, it might be possible to amend draft article 11 so as to reflect that distinction.

67. Mr. LEBEDEV (Russian Federation) said that the crux of the matter was not so much the wording of the provision, but rather the underlying substance. If the Commission wished to establish strict liability, it should do so. On the other hand, if it considered that issues of liability should be decided on the basis of national law, then the matter of the wording would be mainly cosmetic in nature. The Commission must decide on its stance in that regard. In his view, liability should be governed by local law. As adopted, the provision should reflect the views of the Commission, not just of the Working Group.

The meeting rose at 12.30 p.m.

Summary record of the 726th meeting

Wednesday, 4 July 2001, at 2 p.m.

[A/CN.9/SR.726]

Chairman: Mr. Abascal ZAMORA (Mexico)

The meeting was called to order at 2.10 p.m.

DRAFT UNCITRAL MODEL LAW ON ELECTRONIC SIGNATURES AND DRAFT GUIDE TO ENACTMENT (*continued*) (A/CN.9/492 and Add.1-3 AND 493)

Articles 8, 9 and 11

1. Mr. MAZZONI (Italy) said that, since there was a need to find language other than "a signatory shall be liable", not only with respect to the signatory in article 8 but also to the certification service provider in article 9, his delegation proposed that article 8, paragraph 2, should read: "A signatory shall be exposed to liability or to any other applicable legal consequences for its failure to satisfy the requirements of paragraph 1." That would make it clear that such conduct would lead not only to liability

but also to other consequences; for example, the signatory would be prevented from denying reference of the signature to him, which was not a liability but a contractual obligation. That language might, at least in part, meet the concern of the United States delegation, and could also be used in article 9, paragraph 2. For the sake of consistency, the chapeau of article 11 could be amended to read "A relying party shall bear the applicable legal consequences of its failure to:".

2. Mr. MARKUS (Observer for Switzerland) said that the real problem lay in the use of the word "liability", which was a very technical term in some legal systems and implied not only specific legal consequences but also the conditions that had to be

met in order for such consequences to take effect. For that reason, his delegation preferred the use of “shall bear the legal consequences” in article 8, paragraph 2, article 9, paragraph 2, and article 11. If a distinction had to be made between all those cases it would be made by the applicable law of the country concerned. In order to clarify that point, he proposed the use of the words “bear the legal consequences according to applicable law”.

3. Ms. GAVRILESCU (Romania), supported by Mr. ENOUGA (Cameroon), said that, in the interests of consensus, her delegation could accept the United States proposal. She could not envisage a situation in which liability would not also entail legal consequences. The formulation proposed by the representative of Italy, namely “exposed to liability or to any other applicable legal consequences”, might make it difficult to determine when a given situation involved liability and when it involved legal consequences. It was therefore better to adopt the United States proposal or, if no consensus could be reached, retain the original wording.

4. Mr. ARNOTT (United Kingdom) said he appreciated the effort by the representative of Italy to make a distinction between article 11 and articles 8 and 9, but pointed out that national law would make that distinction in any event. The Commission should not introduce language in articles 8 and 9 that differed from that in article 11. His delegation was in favour of using the expression proposed by the United States representative in all three articles.

5. Mr. CAPRIOLI (France) said that the wording proposed by the representative of the United States was the most neutral and also the clearest. If the Commission agreed that there was no full liability, it would then be up to the judge or legislator in a particular legal system to determine the distinction to be made between the signatory, the certification service provider and the relying party. The discussion that had taken place had shown that any differences of opinion were more of form than of substance, and that there was general support for the United States proposal.

6. Mr. JOKO SMART (Sierra Leone) said that, in Sierra Leone’s legal system, the legal consequences of an act included liability. His delegation supported the language proposed by the United States.

7. The CHAIRMAN said he took it that the Commission wished to adopt the United States proposal.

8. *It was so decided.*

9. The CHAIRMAN said that, in document A/CN.9/492, France had proposed the addition of a paragraph at the end of article 8.

10. Mr. CAPRIOLI (France) said that it might be useful to make a distinction between the parties covered by articles 8, 9 and 10—the signatories and providers— and those covered by article 11—the relying parties. For the sake of consistency with article 9, his delegation proposed the addition of a new paragraph at the end of article 8, which would read: “It shall provide to the certification service provider for any party relying on the certificate reasonably accessible means to ascertain, where relevant, from the certificate referred to in article 9 or otherwise, any limitation on its responsibility.”

11. Mr. ZANKER (Observer for Australia) said that, although the amendment proposed by France dealt with an issue which

had not been covered by the Model Law, he wondered whether the amendment belonged in article 8. Perhaps the same objective could be achieved by adding the words “or the signatory” at the end of article 9, paragraph 1 (d) (iv), since that would oblige the signatory to indicate to the certification service provider any limitation on the scope or extent of its liability.

12. Mr. FIELD (United States of America) said that, while his delegation appreciated the issue raised by the representative of France, it considered that the wording of article 8, paragraph 1 (c), sufficiently covered the issue.

13. Mr. GAUTHIER (Canada) said that his delegation was not quite sure what kind of limitation on responsibility was implied in the amendment proposed by France. It would therefore reserve its comments until it received further clarification.

14. Mr. ARNOTT (United Kingdom) said that the proposal by the representative of Australia to add the words “or the signatory” at the end of article 9, paragraph 1 (d) (iv) presupposed that the amendment proposed by France was based on the assumption that a certificate, or at least a certification service provider, would be involved. If that was the case, the Australian solution was excellent. If, however, France was proposing a means of limiting liability under article 8, where the signatory, with or without a certification service provider, could declare a limitation on its liability, the Australian solution would not work.

15. Mr. CAPRIOLI (France) said that his proposal would be applicable only in cases where there was a certification service provider and a certificate. The proposal made by the representative of Australia was constructive, and his delegation could support it. Replying to the comments of the representative of Canada, he said that the intention of his delegation’s proposal had been not to limit or restrict the signature made by the signatory but to provide the signatory with an opportunity to update the certificate.

16. Mr. ARNOTT (United Kingdom), supported by Mr. SMEDINGHOFF (United States of America), Mr. GAUTHIER (Canada) and Mr. MADRID PARRA (Spain), said that his delegation was in favour of the amendment proposed by the representative of Australia.

17. The CHAIRMAN said that he took it that it was the wish of the Committee to adopt Australia’s amendment to article 9, paragraph 1 (d) (iv).

18. *It was so decided.*

Article 9, paragraph 1 (f)

19. Mr. SMEDINGHOFF (United States of America), introducing his delegation’s proposed amendment to article 9, paragraph 1 (f), contained in document A/CN.9/492/Add.2, said that the issue in question was whether or not the certification service provider should be able to limit the scope of the services that it offered. That question arose because article 9, paragraph 1 (f), appeared to require the certification service provider to utilize trustworthy systems. His delegation proposed that article 9, paragraph 1 (f), should become subparagraph (vii) of article 9, paragraph 1 (d), so that, rather than requiring the provider to utilize trustworthy systems, the Model Law would require it to provide a means to enable the relying party to ascertain whether or not it provided a trustworthy system. In other words, the focus would be on an obligation of disclosure rather than on an obligation always to use a trustworthy system.

20. Many entities that were beginning to operate as certification service providers were doing so not as a principal aspect of their business but rather to facilitate other aspects of their business. His delegation was concerned that the imposition of an absolute obligation to provide a trustworthy system was nebulous, since it was not always clear whether the standards set out in article 10 had been met. His delegation proposed that the certification service provider should simply be required under article 9, paragraph 1 (*d*), to disclose to relying parties information that would help them to make a determination of trust, so that they could decide whether or not to use certificates issued by that particular provider.

21. Mr. MADRID PARRA (Spain) supported the proposal made by the representative of the United States. However, it might be appropriate to add a reference to the purpose for which a trustworthy system would be required. The disadvantage of moving the text of article 9, paragraph 1 (*f*), to paragraph 1 (*d*) would be that article 10 would become unnecessary, since the obligation of trustworthiness would be lost. He recalled that after a long debate the Commission had decided that it was important to retain article 10.

22. Mr. ZANKER (Observer for Australia) said that his delegation could accept the proposal put forward by the United States. Adoption of the amendment would not require the elimination of article 10. However, it might be simpler to introduce the formulation used in article 9, paragraph 1 (*d*), into paragraph 1 (*f*), so that article 9, paragraph 1 (*f*), would read “provide reasonably accessible means which enable a relying party to ascertain, where relevant, that the certificate provider utilizes trustworthy systems, procedures and human resources in performing its services”. There would then be no need to amend article 10.

23. Mr. ARNOTT (United Kingdom) said that the simplest solution would be to accept the United States proposal and retain article 10.

24. Mr. CAPRIOLI (France) said that to require the certification service provider to furnish the relying party with means for determining that the provider was utilizing trustworthy systems was not the same as saying that that provider was using trustworthy means. Means could be provided in various ways: the provider could publish its certification policy, issue a declaration on its certification practice or publish an audit with voluntary accreditation by an authority designated by the State. On the other hand, the requirement that the provider utilize trustworthy systems would have stronger legal consequences, since utilization was an act that could be verified whereas, in the case of a declaration, it would have to be proved that what had been declared was not in conformity with what was being asserted. In addition, the transfer of article 9, paragraph 1 (*f*) to paragraph 1 (*d*) (vii) implied the elimination of the indicative criteria contained in article 10, and hence the basis for determining what was trustworthy. His delegation was therefore in favour of retaining article 9, paragraph 1 (*f*).

25. Mr. OLAVO BAPTISTA (Brazil) said that the amendment proposed by the United States would bring about an imbalance in the relations between the certification service provider and the user by making the user responsible for ascertaining whether or not trustworthy systems were being utilized, whereas that was the provider’s obligation. The adoption of the amendment could have serious consequences, since it might make the Model Law more favourable to the provider than to other parties. National consumer protection laws could then bar the international use of the provider’s services. If the Commission wished to promote the international use of such signatures, the law should strike a better balance between the obligations of users and the obligations of providers.

26. Mr. BAKER (Observer for the International Chamber of Commerce—ICC) said that a simpler solution might be to remove the reference to article 9, paragraph 1 (*f*), in the opening sentence of article 10, so that that sentence would read: “For the purposes of determining whether, or to what extent, any systems, procedures and human resources utilized by a certification service provider are trustworthy, regard may be had to the following factors:”. The proposal to move article 9, paragraph 1 (*f*), to paragraph 1 (*d*) made sense from an organizational perspective, and ICC could support it.

27. Mr. JOZA (Observer for the Czech Republic) said his delegation had some problems with the United States proposal, since changing the obligation of trustworthiness to an obligation to provide relying parties with relevant information under article 9 (1) (*d*) would diminish the importance of article 10.

28. Mr. FIELD (United States of America) said that his delegation was not proposing the deletion of article 10. The proposed amendment worked well with article 10, since its basic requirement was one of disclosure.

29. Mr. PÉREZ (Colombia), referring to the comments made by the representative of Spain, said that, under Colombian law, trustworthiness was a necessary obligation for the certification service provider. That meant that, before it could begin operations, a potential provider had to receive authorization from the State, and the provider’s trustworthiness was established by an independent auditor. Since the United States proposal could create an imbalance in relations between providers and users, his delegation preferred to retain the text of article 9 as it stood.

30. Mr. MARKUS (Observer for Switzerland) said that the amendment proposed by the United States would considerably change the rules of conduct for providers. The transfer of article 9, paragraph 1 (*f*), to paragraph 1 (*d*), would mean that the provider would not be obliged to utilize trustworthy systems but simply to inform the user as to whether or not the system that it used could be expected to be trustworthy. If that was the aim of the United States amendment, his delegation could not support it.

31. Ms. MANGKLATANAKUL (Thailand) said that the United States proposal would create an imbalance between the conduct required of providers and that required of users, and would weaken the thrust of article 10. Her delegation preferred to retain the text as it stood.

32. Mr. GAUTHIER (Canada), supported by Ms. CHADHA (India), said his delegation was not in favour of the United States proposal for the reasons advanced by previous speakers. Article 10 as it stood was not a standard in itself but rather provided guidelines for ascertaining trustworthiness. The United States proposal represented a fundamental shift in the policies developed by the Working Group, since it would make the relying party responsible for determining trustworthiness, and would exonerate the provider from that obligation.

33. Ms. XIAOYAN ZHOU (China) said that the removal of paragraph 1 (*f*) in article 9 would greatly reduce the obligation of the service provider, and thus affect the security of the transaction. There would then be no need for article 10, since the relying party, and not the service provider, would be responsible for determining trustworthiness.

34. Mr. ADENSAMER (Austria) said that his delegation could not support the United States proposal, since the service provider should, in addition to its obligation to utilize trustworthy systems, also be obliged to furnish information about those systems.

35. Mr. FIELD (United States of America) said that his delegation was willing to make a compromise that might meet the concerns raised by some delegations. He proposed that article 9, paragraph 1 (*f*), should be amended to read “utilize systems, procedures and human resources in performing its services that are suitably trustworthy for the purposes for which the certificate is intended to be used”. That new wording would preserve the relevance of article 10.

*The meeting was suspended at 3.25 p.m.
and resumed at 4 p.m.*

Article 8, paragraph 1 (b)

36. Mr. GAUTHIER (Canada) said that the Working Group had proposed that article 8, paragraph 1 (*b*), should read “without undue delay, use reasonable efforts to notify, such as by using means made available by the certification service provider pursuant to article 9, to any person that may reasonably be expected by the signatory to rely on or to provide services in support of the electronic signature if:”.

37. Mr. MADRID PARRA (Spain) said that his delegation had serious difficulties with the concept of “reasonable efforts”, which would be difficult to incorporate into Spain’s legal system. A situation might arise in which a signatory had made reasonable efforts to communicate the fact that the signature creation data had been compromised but, despite such efforts, the third party had not received that information. The third party would then have to bear the burden of the damage while the signatory would be discharged, since it had used “reasonable efforts”.

38. The CHAIRMAN said that, since he heard no other objection to the text proposed by the Working Group, he took it that the Commission wished to adopt the amendment to article 8, paragraph 1 (*b*). The comments made by Spain would be reflected in the Commission’s report.

39. *It was so decided.*

Article 9, paragraph 1 (f) (continued)

40. THE CHAIRMAN invited the Commission to comment on the compromise proposal made earlier by the United States regarding article 9, paragraph 1 (*f*).

41. Mr. KOBORI (Japan) said that the opening phrase of article 9 made it clear that the scope of article 9 was more limited than that of article 6. That opening phrase should sufficiently meet the concerns raised by the representative of the United States.

42. Mr. CAPRIOLI (France) said that his delegation could not support the compromise proposal put forward by the United States. The signature was the responsibility of the certification service provider and had nothing to do with the trustworthiness of the system. The text of article 9, paragraph 1 (*f*) should be retained as it stood.

43. Mr. STOCCHI (Italy) said that, having heard the arguments put forward by the representatives of Japan and France, his delegation had decided not to support the amendment proposed by the representative of the United States.

44. Mr. ARNOTT (United Kingdom) said that, while he appreciated the concerns raised by the representatives of Japan and France, he supported the text proposed by the United States, which in practice would be entirely satisfactory.

45. Mr. GAUTHIER (Canada) said that his delegation was in favour of the text as it stood. Paragraph 144 of the draft Guide to Enactment amply dealt with the matter raised by the representative of the United States.

46. Mr. JOZA (Observer for the Czech Republic) said that the United States proposal clarified article 10 (*g*), which was directly related to article 9, paragraph 1 (*b*). Although article 10 did not define trustworthiness, it included important aspects of it, including sufficiency.

47. Mr. BAKER (Observer for the International Chamber of Commerce) said that his delegation supported the amendment proposed by the representative of the United States.

48. Mr. MARADIAGA (Honduras) said that his delegation was in favour of the text submitted by the secretariat.

49. The CHAIRMAN said that he took it that the Commission wished to retain the text of article 9, paragraph 1 (*f*), as it stood.

50. *It was so decided.*

Article 9, paragraph 2

51. Mr. SMEDINGHOFF (United States of America) said that the text of article 9, paragraph 2, should be made consistent with the amendment that had been made to article 8, paragraph 2, which replaced “shall be liable” with “shall bear the legal consequences of”. An introductory clause that recognized the limitations on liability set forth in article 9, paragraph 1 (*d*) (ii) and (iv), should also be added. His delegation therefore proposed that article 9, paragraph 2, should read: “Subject to any limitations ascertainable under paragraph 1 (*d*), the certification service provider shall bear the legal consequences of its failure to comply with paragraph 1.”

52. Mr. MAZZONI (Italy), supported by Mr. ENOUGA (Cameroon) and Mr. KOBORI (Japan), said that liability should not be stated expressly in article 9, paragraph 2, since it would be governed entirely by applicable national law. For the sake of consistency, no reference to limitations on liability should be included in paragraph 2.

53. Mr. GAUTHIER (Canada) said that his delegation could accept the United States proposal to align article 9, paragraph 2, with article 8, paragraph 2. However, there was no need to refer explicitly at the beginning of the paragraph to “limitations ascertainable under paragraph 1 (*d*)”.

54. Mr. CAPRIOLI (France) said that article 9, paragraph 2, should be worded along the same lines as article 8, paragraph 2. It was not necessary to refer to the limitations on purpose or value or on the scope or extent of liability, since European Union legislation already provided for such limitations.

55. Mr. MADRID PARRA (Spain) said that the encouragement of international electronic commerce should not necessarily entail the elimination of all references to the term “liability”.

since that could have negative effects. While national legal systems would determine legal consequences, the text of the Model Law should nevertheless indicate that some form of liability existed. The reference to liability under article 9, paragraph 2, should therefore be retained.

56. Mr. JOKO SMART (Sierra Leone) said that his delegation supported the views of the representatives of Canada and France regarding the United States proposal. There was no need to depart from the language that had been approved for article 8, paragraph 2.

57. Ms. ZHOU XIAOYAN (China) said that her delegation supported the views expressed by the representatives of Canada, France and Sierra Leone that the wording of article 9, paragraph 2, should be aligned with that of article 8, paragraph 2. The introductory clause suggested by the representative of the United States was unnecessary.

58. Mr. MARKUS (Observer for Switzerland) said that the language of article 9, paragraph 2, should be consistent with that of article 8, paragraph 2. Limitations on liability should be set by national law. Article 5, which dealt with variation by agreement, would sufficiently cover limitations on liability in so far as they were in keeping with applicable national law.

59. Mr. BAKER (Observer for the International Chamber of Commerce) said that his delegation supported the first part of the proposal made by the representative of the United States. While a reference in article 9, paragraph 2, to the limitations set out in paragraph 9, paragraph 1 (*d*), might be useful, it was not absolutely necessary. His delegation could accept the amendment to the United States proposal that had been made by the representative of Canada and supported by France and China.

60. Mr. PÉREZ (Colombia) said that his delegation supported the views expressed by the representative of Spain. It was important to protect the user of certification services, and the Model Law should send a clear message that the party that owned the technology was liable. Sufficient guarantees should be put in place to ensure that the technology continued to operate properly and did not become obsolete with the passage of time.

61. The CHAIRMAN said that he took it that the Commission was in favour of aligning the wording of article 9, paragraph 2, with that of article 8, paragraph 2.

62. *It was so decided.*

63. Mr. LEBEDEV (Russian Federation) said that it would be useful to countries that would subsequently be adopting national legislation on the basis of the Model Law if the Commission explained in its report that the amendments to article 8, paragraph 2, and article 9, paragraph 2, had been made in order to indicate that the question of legal consequences would be determined by national legislation.

64. The CHAIRMAN said that such an explanation would be included not only in the report but also in the draft Guide to Enactment.

Article 10

65. Mr. SMEDINGHOFF (United States of America) said that article 10 should be amended in order to address the concern that

that article did not necessarily recognize that certification service providers might offer different levels of service, and that different levels of reliability might be necessary for a legally binding signature, depending on the particular circumstances. It would also be helpful if article 10 referred to general commercial practice. His delegation proposed that the words “if and to the extent generally applied in commercial practice for the level of service provided” should be added after the word “factors” in the first sentence of article 10.

66. Mr. MAZZONI (Italy), supported by Mr. ARNOTT (United Kingdom), Mr. TATOUT (France), Mr. MOHAN (Singapore) and Mr. BRITO DA SILVA CORREIA (Observer for Portugal), said that the amendment proposed by the representative of the United States was redundant, since the words “regard may be had” would sufficiently deal with the concerns raised by the United States.

67. Mr. BURMAN (United States of America) said that, while members of the Commission might agree that the words “regard may be had” could cover a wide variety of circumstances, it was important to know how the user community would interpret those words. Although his delegation could accept the text of article 10 as it stood, it believed that the proposed amendment would provide greater certainty to the business community.

68. Mr. SORIEUL (Secretariat) said that the last sentence of paragraph 147 of the draft Guide to Enactment, which read: “That list is intended to provide a flexible notion of trustworthiness, which could vary in content depending upon what is expected of the certificate in the context in which it is created.”, adequately addressed the concerns raised by the representative of the United States.

69. Mr. MAZZONI (Italy) said that, if the United States insisted on including in article 10 language that gave assurances to the business community, reference to the level of service provided could be included in a new subparagraph (*g*), which would be inserted between subparagraph (*f*) and current subparagraph (*g*).

70. Mr. BURMAN (United States of America) said that his delegation could accept the proposal made by the representative of Italy.

71. Mr. JOZA (Observer for the Czech Republic) said that his delegation wished to know how the phrase “generally applied in commercial practice” related to financial and human resources. The United States proposal could create many problems for smaller electronic commerce markets.

72. Mr. BAKER (Observer for the International Chamber of Commerce) said that the more than 140 members of ICC considered that their concerns were not sufficiently dealt with in certain provisions of the Model Law. His delegation therefore supported the amendment proposed by the representative of the United States.

73. Mr. ALHWEIJ (Observer for the Libyan Arab Jamahiriya) said that the text of article 10 should remain as it stood.

74. The CHAIRMAN said that he took it that the Commission wished to retain article 10 as it stood. The concerns expressed by the United States would be reflected in the draft Guide to Enactment.

75. *It was so decided.*

The meeting rose at 5 p.m.

Summary record of the 727th meeting

Thursday, 5 July 2001, at 9.30 a.m.

[A/CN.9/SR.727]

Chairman: Mr. Abascal ZAMORA (Mexico)

The meeting was called to order at 9.35 a.m.

DRAFT UNCITRAL MODEL LAW ON ELECTRONIC SIGNATURES AND DRAFT GUIDE TO ENACTMENT (continued) (A/CN.9/492 and Add.1 and 2 and A/CN.9/493)

Article 11 (continued)

1. Mr. BURMAN (United States of America) said that, following the discussion of its earlier proposals contained in document A/CN.9/492/Add.2, during which the balance of responsibilities between the parties had been adjusted, his delegation had reconsidered its position on article 11. It was therefore withdrawing its proposal on that article.

Article 12

2. Mr. PÉREZ (Colombia) said that his country's concerns set forth in document A/CN.9/492 with regard to the definition of "a substantially equivalent level of reliability" had been expressed before the publication of the draft Guide to Enactment in document A/CN.9/493. The draft Guide had since provided a satisfactory explanation of the criteria for determining such a concept. Nevertheless, since his delegation had not been present at the relevant discussions in the Working Group, he would welcome some elucidation, by the secretariat or delegations of countries with legal systems similar to his own, of how article 12 would be applied in countries which relied on statutory law.

3. The CHAIRMAN, speaking in his capacity as a member of the delegation of Mexico, said that application of the article in his country would not pose any particular difficulties, primarily because, pursuant to article 4, paragraph 1, interpretation of the Model Law was required to take into account its international origin and the need to promote uniformity in its application. Consequently, rather than relying on national legal interpretations, judges would be required to refer to international case law, to the travaux préparatoires and the Guide to Enactment, and to the decisions reached by courts in other enacting States.

4. Mr. SORIEUL (Secretariat) said that a delicate balance had been struck in article 12 and in the relevant sections of the Guide. Paragraph 154 of the Guide explained that the level of reliability of a foreign certificate did not need to be exactly identical with that of a domestic certificate. That meant that there could be no general standard, either for certification service providers or users, for obtaining authorization in every country in which they wished a signature to apply. It was acknowledged that reliability criteria or administrative requirements might be expressed differently from one place to another, both within a single jurisdiction and between different countries, and that it was important to refer to the functions of such criteria in order to establish equivalence. Those considerations, together with the general requirements of the Model Law, such as the principle of non-discrimination, and the provisions of article 4 concerning its international origin and the need to promote uniformity, should provide guidance for national authorities in determining equivalence.

5. Mr. MADRID PARRA (Spain) said that he fully agreed with the analysis provided by the two previous speakers. The criterion for equivalence established by article 12 did not constitute a

problem for his delegation. Moreover, it was entirely consistent with article 7 of European Union Directive 1999/93/EC and subsequent Spanish legislation on electronic signatures. The general principle set forth in article 12 would facilitate greater flexibility in the recognition of foreign certificates and encourage the development of international electronic commerce. He particularly welcomed the fact that there had been no attempt to establish a definitive standard for the reliability of certificates, but that instead criteria had been established for determining equivalence.

6. Mr. BURMAN (United States of America) said that it would be useful to preface the section of the Guide concerning article 12 with a reminder that the purpose of the Model Law was to promote international trade. Efforts to determine equivalence with a view to recognizing foreign certificates should be made not only in the context of article 4 but also with regard to the general objective of the promotion of trade.

7. Mr. SORIEUL (Secretariat) said that every article should of course be read in the context of the main objectives of the Model Law, and that those objectives, which included fostering international trade, were already referred to in paragraph 5 of the Guide. Nonetheless, it might be wise to refer the reader of the section of the Guide concerning article 12 back to the section concerning paragraph 5.

8. The CHAIRMAN asked whether there were any further general comments on the draft Model Law and draft Guide to Enactment.

9. Mr. MADRID PARRA (Spain) asked whether the drafting group could find a different word to replace "derogated from" in article 5, which was potentially misleading. The real meaning of the term was clearly stated in the title of the article, "variation by agreement": enacting States could agree not to apply certain provisions, but they could not, as his delegation understood the situation, derogate from those provisions. In Spanish, the term "derogar" could apply only to a decision by the government authorities with regard to domestic legislation.

10. Mr. SORIEUL (Secretariat) said that article 5 had been drafted on the basis of article 6 of the Convention on Contracts for the International Sale of Goods (Vienna, 1980), as well as with regard to the corresponding article in the UNCITRAL Model Law on Electronic Commerce, and that there was a need for consistency with those texts. Since the term "derogate" had been used in the 1980 Convention, the use of any other term could give rise to problems of interpretation. That was true at least for the French and English versions, though he could not confirm immediately whether the same term had been used in Spanish.

11. The CHAIRMAN said he seemed to recollect that the term used in the Spanish version of the 1980 Convention was "excluir", not "derogar".

12. Mr. OLAVO BAPTISTA (Brazil) said that the issue seemed to be one of terminology, and could perhaps be explained in the Guide.

13. The CHAIRMAN said that the matter would be resolved in the drafting group, possibly with the incorporation of a note in the Guide. He invited the Commission to consider the draft Model Law article by article, beginning with the title.

Title

14. *The title was approved.*

Article 1

15. *Article 1 was approved.*

Article 2 (continued)

Article 2 (a)

16. Mr. MARKUS (Observer for Switzerland), referring to article 2 (a), said he was aware that the phrase “indicate the signatory’s approval of the information contained in the data message” had been debated at length by the Working Group and that he regretted having to raise the point again. In his view, however, it made no sense to refer to approval by a signatory, because the signatory’s intention when producing the message was immaterial. What mattered was whether the signatory was the originator of the message. He proposed that the phrase be deleted.

17. Mr. SORIEUL (Secretariat) said that the phrase as it stood was the product of some 10 years of discussion. The wording was almost identical to that of article 7 of the UNCITRAL Model Law on Electronic Commerce, the idea being that the signature could be used not only to identify the signatory but also to indicate the signatory’s approval of the data message to which its signature was affixed. The present definition, however, contained the words “may be used”, which implied that it was simply a matter of recognizing that a number of effects, including the consent of the signatory, could ensue from such an electronic signature. It would be unwise to engage in a substantive discussion of whether the act of signature implied approval of the content of the message or simply constituted a conscious and informed decision to associate one’s name with certain information.

18. Mr. ENOUGA (Cameroon) said he was satisfied with the secretariat’s explanation. The words “read and approved” were usually appended to a message by the recipient, not by the originator. He therefore understood the concern expressed by the observer for Switzerland.

19. Ms. ZHOU XIAOYAN (China) said that there were two ways of translating the concept of “approval” into Chinese, depending on whether approval took place before or after transmission of the data message. She would appreciate clarification of that point.

20. Mr. SORIEUL (Secretariat) said it was his understanding that approval was expressed when the signature was affixed to the data message, not necessarily at the time when the electronic signature was created.

21. Mr. SMEDINGHOFF (United States of America) said that the requirement for a signatory to approve a data message was also a source of concern to the United States, since under United States legislation signatures could be used for a variety of purposes, only one of which was approval of information.

22. Mr. KOBORI (Japan) and Mr. UCHIDA (Japan), supported by Mr. KURDI (Observer for Saudi Arabia), proposed that the words “may be used”, in article 2 (a), should be replaced by an expression such as “is technically capable”.

23. Mr. SMEDINGHOFF (United States of America) said that the amendment proposed by Japan was not an appropriate way of addressing the issue of signatory approval, since it imposed a more rigid approval requirement than the words “may be used”.

24. Mr. GAUTHIER (Canada) said he shared the view expressed by the representative of the United States. An expression such as “technically capable” was inappropriate in a legislative text since it would limit the scope of the definition and make it less comprehensible.

25. With regard to the use of signatures for other purposes, the definition did not seek to exclude such purposes but to set a baseline. He cautioned against tampering with the definitions since any amendments might have unforeseen implications for the draft Model Law as a whole.

26. Mr. MAZZONI (Italy) said that, while he was aware of the risks involved in tampering with the definitions, he sympathized with the proposal made by the representative of Japan. Technical capability referred to the characteristics of the signature as opposed to the use that a person might wish to make of it. In his view, the words “may be used” had subjective connotations. However, in view of the desirability of closing the debate, he was prepared to accept the definition as it stood and suggested that the concerns expressed by the representative of Japan and the observer for Switzerland should be addressed in the Guide.

27. Mr. CAPRIOLI (France) endorsed the views expressed by the representatives of the United States and Canada. Any reopening of the discussion of definitions would risk upsetting the balance of the draft Model Law as a whole.

28. Mr. MARADIAGA (Honduras) said that when a signature was appended to a paper document, it implied that the signatory approved of its content. The same applied to an electronic signature. The words “may be used” could be replaced by “have been used” to eliminate any element of conditionality, but the underlying idea was, in his view, perfectly clear and he was in favour of leaving the definition as it stood.

29. Mr. MARKUS (Observer for Switzerland) said he was aware of the risks of tampering with definitions at such a late stage. However, the amendment he wished to propose was very modest. The definition mentioned two purposes for which electronic signatures could be used, namely, electronic identification and indication of the signatory’s approval, implying that they were equally important. But identification was clearly the main purpose of the exercise, whereas approval was just one of a number of subsidiary purposes. One way of demonstrating the distinction might be to insert the word “may” before “indicate the signatory’s approval”.

30. Mr. SORIEUL (Secretariat) said that the idea of treating the two purposes differently had been discussed during the drafting process. One major objection was that no such distinction was made in article 7 of the UNCITRAL Model Law on Electronic Commerce, which was already being implemented in many countries. Inconsistency on such a basic issue as the definition of a signature might create problems not only for those countries but also for countries that were contemplating the adoption of either or both instruments.

31. Mr. ZANKER (Observer for Australia) said he was firmly opposed to any amendment of the definitions, including the slight modification proposed by the observer for Switzerland. A signature was affixed by hand to indicate that the signatory was associated with the document and approved of the information it contained. The two purposes were not on different planes.

32. Mr. SMEDINGHOFF (United States of America) pointed out that paragraph 29 of the Guide to Enactment addressed

several of the issues raised. It could perhaps be stated at the beginning of that paragraph that the definition did not imply that use of the signature to indicate the signatory's approval was mandatory, and that the words "may be used" were intended to accommodate the different ways in which signatures were used under different legal regimes.

33. Mr. GAUTHIER (Canada) said that the definition was further explained in paragraph 93 of the draft Guide to Enactment. It was very important that it should be consistent with the definition in article 7 of the Model Law on Electronic Commerce. Any modification, however innocuous it might seem, would introduce a shift of meaning. The definition recognized that signatures could be used for a variety of purposes but singled out two as being of special relevance in the context.

34. The CHAIRMAN noted that the representative of Canada, who currently chaired the Working Group on Electronic Commerce, counselled against tampering with the existing text. In his capacity as former chairman of the Working Group, he would endorse those remarks.

35. Mr. BRITO DA SILVA CORREIA (Observer for Portugal) said he was in favour of leaving the definition unchanged.

36. Mr. CAPRIOLI (France) supported the Chairman's remarks.

37. Mr. JOKO SMART (Sierra Leone) wholeheartedly supported the remarks of the representative of Canada. In the case of handwritten signatures, the signatories intrinsically accepted the signatures as their own. If a signatory used an electronic signature, it would also be assumed to have approved it. On a separate issue, he asked what was the grammatical subject of the phrase "indicate the signatory's approval".

38. Mr. SORIEUL (Secretariat) said that the subject of the phrase was the word "data".

39. Mr. MARKUS (Observer for Switzerland) said he would withdraw his proposal. Several delegations had mentioned the possibility of inserting language in paragraph 29 of the Guide to Enactment so as to differentiate the main functions of such a signature from its less important functions. Perhaps that would be a preferable course of action.

40. *Article 2 (a) was approved without amendment.*

*The meeting was suspended at 10.50 a.m.
and resumed at 11.25 a.m.*

Article 2 (b) (continued)

41. The CHAIRMAN reminded the Commission that article 2 (b) had been dealt with fully at the 723rd meeting, during the discussion of the United Kingdom's proposal contained in document A/CN.9/492/Add.1.

42. *Article 2 (b) was approved.*

Article 2 (c)

43. Mr. MADRID PARRA (Spain) pointed out that the definition of the term "data message" in subparagraph (c) was the only definition in article 2 that had been taken word for word from the UNCITRAL Model Law on Electronic Commerce. However, owing to an error, the Spanish versions differed. He requested the secretariat to bring the texts into line.

44. *Article 2 (c) was approved.*

Article 2 (d)

45. Mr. MADRID PARRA (Spain) noted a lack of alignment between the English, French and Spanish texts. The wording of the Spanish version could be interpreted as a restriction of the broad concept of representation which figured in the English and French texts. The Spanish version "en nombre propio o de la persona a la que representa" should be amended to read "por cuenta propia, o de la persona a la que representa".

46. The CHAIRMAN said that the problem to which the representative of Spain had drawn attention would be dealt with by the drafting group.

47. Mr. MAZZONI (Italy) asked whether the definition of the term "signatory" would raise doubts as to who, in article 8, paragraph 2, as amended, would bear the legal consequences for failure to satisfy the requirements of article 8, paragraph 1. Would the represented party or the representing party bear the consequences?

48. Mr. SORIEUL (Secretariat) said that the secretariat's interpretation would be that article 8, paragraph 2, merely referred to the applicable law. It was thus for the applicable law to decide who should bear the legal consequences.

49. Ms. PIAGGI DE VANOSI (Observer for Argentina) supported that interpretation. When article 8, paragraph 2, applied to a signatory acting on its own behalf, the problem would not arise. When it applied to a signatory acting on behalf of a represented party, then it seemed clear that the national law should apply.

50. Mr. FIELD (United States of America) said that the representative of Italy had raised a valid point. Article 8, paragraph 2, should make it clear that in such circumstances it was not the signatory that should bear the legal consequences of a failure to satisfy the requirements of paragraph 1, but the party represented by the signatory. For example, if an employee of a company was the signatory, then the company should bear the legal consequences.

51. Mr. JOKO SMART (Sierra Leone) said that he fully supported the point of view expressed by the observer for Argentina. The question of agency was clearly outside the scope of the Model Law.

52. Mr. FIELD (United States of America) said that, having reflected on the comment made by the representative of Sierra Leone, his delegation was withdrawing its proposal to revisit the wording of article 8, paragraph 2.

53. *Article 2 (d) was approved.*

Article 2 (e)

54. Mr. JOZA (Observer for the Czech Republic) said that article 8, paragraph 1 (b), referred to "any person that may reasonably be expected by the signatory to rely on or to provide services in support of the electronic signature", while article 12, paragraph 1 (b), used the word "issuer". In the light of the broad definition in article 2 (e), was that distinction needed? Furthermore, paragraph 139 of the Guide to Enactment drew a distinction between certification service providers and certificate revocation service providers. Clarification might be required as to whether certificate revocation service providers were covered by the definition in article 2 (e).

55. Mr. SORIEUL (Secretariat) said he believed that the reference to "issuer" in article 12, paragraph 1 (b), could be maintained without contradicting the definition in article 2 (e). On the other hand, it might perhaps be advisable to amend the wording of article 8, paragraph 1 (b), to read "services related to the

electronic signature”, to bring it into line with the definition in article 2 (e). In his view, the concept of certificate revocation service providers must be considered as a subset of certification service providers. That could be indicated more clearly in paragraph 139 of the Guide.

56. *Article 2 (e) was approved.*

Article 2 (f)

57. Mr. MADRID PARRA (Spain) said that, in its current form, the definition of “relying party” could apply to the signatory and to the certification service provider. The Guide to Enactment should make it clear that the relying party must be a third party.

58. Mr. SORIEUL (Secretariat) said that the omission of any reference to third parties had been intentional. The reasoning behind that decision was explained in paragraph 150 of the Guide to Enactment.

59. *Article 2 (f) was approved.*

60. *Article 2 as a whole was approved.*

Article 3

61. *Article 3 was approved.*

Article 4

62. *Article 4 was approved.*

Article 5 (continued)

63. *Article 5 was approved.*

Article 6

64. *Article 6 was approved.*

Article 7 (continued)

65. *Article 7 was approved.*

Article 8 (continued)

66. *Subject to the Commission’s earlier deliberations, article 8 was approved.*

Article 9 (continued)

67. Mr. CAPRIOLI (France) said that, the previous day, the representative of Australia had suggested that France should transpose its proposal on article 8 to article 9. However, his delegation had later realized that article 9, paragraph 1 (d) (ii), could be understood as comprising its proposed amendment. If the observer for Australia agreed, his delegation was prepared to withdraw its proposal.

68. Mr. SORIEUL (Secretariat) said that the simplest solution would be to retain articles 8 and 9 as they stood.

69. Mr. ZANKER (Observer for Australia) and Mr. FIELD (United States of America) expressed their support for the secretariat’s proposal that articles 8 and 9 should not be amended.

70. *Subject to the Commission’s earlier deliberations, article 9 was approved.*

Article 10

71. *Article 10 was approved.*

Article 11 (continued)

72. Mr. MADRID PARRA (Spain) said that the title of article 11 was significantly different in the English, French and Spanish versions. While the English text referred only to “the relying party”, the French text referred to the party relying on the certificate and the party relying on the signature, and the Spanish text referred only to the party relying on the certificate. It was therefore necessary to align the title in all languages.

73. The CHAIRMAN said that the suggestion by the representative of Spain would be noted.

74. *On that understanding, article 11 was approved.*

Article 12

75. Mr. KUNER (Observer for the International Chamber of Commerce) said that, in paragraph 5, the phrase “certain types of electronic signatures” was too narrow and should be amended to read “certain electronic signatures”, which would be more in line with the term used in paragraph 160 of the draft Guide to Enactment.

76. Mr. MADRID PARRA (Spain) said that word “types” had been included in paragraph 5 in order to take into account different types, models or categories of signature. For example, in some countries, there might be standard types of signatures or certificates that did not exist in other countries.

77. Mr. ZANKER (Observer for Australia) said that his delegation was not in favour of the proposed amendment.

78. Mr. ENOUGA (Cameroon) said that perhaps reference to article 5 would solve the issue raised by the observer for the International Chamber of Commerce, since that article provided for derogations from the Model Law.

79. The CHAIRMAN said it appeared that the proposal by the observer for the International Chamber of Commerce had no support.

80. Mr. UCHIDA (Japan), supported by Mr. MAZZONI (Italy) and Mr. KUNER (Observer for the International Chamber of Commerce), proposed that paragraph 3 should be deleted in order to make the Model Law more understandable and attractive. His delegation could not imagine a situation in which the place where an electronic signature was created would have any legal meaning.

81. Mr. BURMAN (United States of America), supported by Mr. CAPRIOLI (France), said that his delegation did not support the proposal for deletion made by the representative of Japan. The existence of the type of language contained in paragraph 3 had elicited support for the Model Law from the user business community, which was a very important factor.

82. The CHAIRMAN said that the proposal made by the representative of Japan appeared not to have gained much support.

83. *Article 12 was approved.*

DRAFT GUIDE TO ENACTMENT OF THE UNCITRAL MODEL LAW ON ELECTRONIC SIGNATURES

84. Mr. BAKER (Observer for the International Chamber of Commerce) said that, pursuant to its suggestion in document A/CN.9/492/Add.2, paragraphs 135 and 159 of the draft Guide should be amended in order to reflect the changes that had been made to paragraph 69. His delegation was in the process of drafting proposals for amendments to those paragraphs.

The meeting rose at 12.25 p.m

Summary record of the 728th meeting

Thursday, 5 July 2001, at 2 p.m.

[A/CN.9/SR.728]

Chairman: Mr. Abascal ZAMORA (Mexico)

The meeting was called to order at 2.10 p.m.

DRAFT UNCITRAL MODEL LAW ON ELECTRONIC SIGNATURES AND DRAFT GUIDE TO ENACTMENT (continued) (A/CN.9/492 and Add.1-3 and A/CN.9/493)

Draft Guide to Enactment of the UNCITRAL Model Law on Electronic Signatures (continued)

1. Mr. SORIEUL (Secretariat) said that the draft Guide to Enactment of the UNCITRAL Model Law on Electronic Signatures contained in document A/CN.9/493 was very similar to the previous version. Since the Working Group had already considered the draft in detail at its thirty-eighth session, he did not expect that many changes would need to be made. The final text of the draft Guide would reflect the Commission's deliberations.
2. Mr. BAKER (Observer for the International Chamber of Commerce—ICC) said that, at the previous meeting, his delegation had suggested that paragraphs 135 and 159 of the draft Guide to Enactment should be amended in order to reflect changes that had been made to paragraph 69. In the second sentence of paragraph 135, the word "voluntary" should be added before the words "industry practices and trade usages", and the words "which may assure the flexibility upon which commercial practice relies, promote open standards with a view to facilitating interoperability and support the objective of cross-border recognition (as described in article 12)." should be inserted after "trade usages". The third sentence would read: "Example texts include those emanating from such international organizations as the International Chamber of Commerce, the regional accreditation bodies operating under the aegis of the ISO (see A/CN.9/484, para. 66), the World Wide Web Consortium (W3C), as well as the work of UNCITRAL itself (including this Model Law and the UNCITRAL Model Law on Electronic Commerce)." the rest of paragraph 135 would remain unchanged.
3. Mr. CAPRIOLI (France), supported by Ms. PROULX (Canada) and Mr. OLAVO BAPTISTA (Brazil), said that the text of paragraph 135 should simply refer to paragraph 69 rather than repeat the content of that paragraph.
4. Mr. TATOUT (France) said that the European Electronic Signature Standardization Initiative (EESSI) should be included among the standards listed in paragraph 135.
5. Mr. MAZZONI (Italy) said that the language proposed by ICC did not appear to introduce any new concept and might therefore be considered to be a clarification of information already contained in the Guide.
6. Mr. BRITO DA SILVA CORREIA (Observer for Portugal) said that his delegation supported the views expressed by the representatives of France and Canada. If the proposed text was introduced it might imply that the only standards or trade usages allowed were those referred to in the paragraph. The text as it currently stood was preferable, since it permitted all trade usages.
7. Mr. BAKER (Observer for the International Chamber of Commerce—ICC) said that the Working Group had already

considered the idea of amending the language of paragraphs 135 and 159 of the draft Guide to Enactment. A simple reference to paragraph 69 in paragraphs 135 and 159 would not be sufficient, since there would be no guarantee that the notion of standards as referred to in paragraphs 135 and 159 would be understood in the way that the Working Group had agreed that it should be understood in paragraph 69.

8. Mr. BURMAN (United States of America) said that it was his delegation's understanding that the descriptive information contained in paragraph 69 would be reflected in paragraphs 135 and 159. Since the way in which that might be done had not been discussed, perhaps the secretariat could deal with the matter.

9. Mr. SORIEUL (Secretariat) suggested that, in paragraph 135, the words "voluntary standards as described in paragraph 69 above," should be inserted after the words "industry practices and trade usages".

10. Mr. TATOUT (France) proposed that, in paragraph 135, the words "such as the European Electronic Signature Standard Initiative (EESSI)," should be inserted after the words "industry practices and trade usages".

11. Mr. BURMAN (United States of America) said that, while his delegation had no objection to the proposal made by the representative of France, the inclusion of a reference to EESSI, which was a regional organization, would make it necessary to take account of other regional bodies, such as the Organization of American States. While his delegation was prepared to compile a list of references for its region for inclusion in paragraph 135 in order to avoid any implication that all initiatives were being taken in one region, it would prefer that the paragraph was not encumbered by a long list of regional references.

12. Mr. CAPRIOLI (France), supported by Ms. GAVRILESCU (Romania), said that his delegation fully understood the concerns expressed by the representative of the United States. He proposed that, instead of referring specifically to EESSI, the words "including regional initiatives," should be inserted after the words "industry practices and trade usages" in paragraph 135.

13. Mr. LEBEDEV (Russian Federation) said that discussion on paragraph 135 should be suspended until the secretariat re-drafted the text to reflect the comments that had been made. His delegation was not in favour of the expression "voluntary industry practices", which would be difficult to translate into other languages. He agreed that it would be useful to include in paragraph 135 a general reference to regional initiatives.

14. Mr. BAKER (Observer for the International Chamber of Commerce—ICC) said that his delegation proposed that paragraph 159 should read:

"159. The notion of 'recognized international standard' should be interpreted broadly to cover both voluntary international technical and commercial standards (i.e. market-driven standards) and standards and norms adopted by governmental

- or intergovernmental bodies (*ibid.*, para. 49). ‘Recognized international standard’ may be statements of accepted technical, legal or commercial practices, whether developed by the public or private sector (or both), of a normative or interpretative nature, which are generally accepted or applicable internationally. Such standards may be in the form of requirements, recommendations, guidelines, codes of conduct, or statements of either best practices or norms (*ibid.*, paras. 101-104). Voluntary international, technical and commercial standards may form the basis of product specifications, of engineering and design criteria and of consensus for research and development of future products. To assure the flexibility upon which such commercial practice relies, to promote open standards with a view to facilitating interoperability and to support the objective of cross-border recognition, as described in article 12, States may wish to give due regard to the relationship between any specifications incorporated in or authorized by national regulations and the voluntary technical standards process.”
15. Mr. MAZZONI (Italy), supported by Mr. GAUTHIER (Canada), Mr. TATOUT (France) and Mr. ZANKER (Observer for Australia), said that his delegation did not see the connection between the final sentence of the new text proposed by ICC and the recognition of foreign certificates. He had understood that the additional text would be a general statement designed to promote international interoperability rather than means for interpreting article 12.
16. Mr. BAKER (Observer for the International Chamber of Commerce—ICC) said the reference to article 12 in his delegation’s amendment to paragraph 159 had been intended to clarify the requirement in article 12, paragraph 4, that regard should be had to recognized international standards in determining whether a certificate or an electronic signature offered a substantially equivalent level of reliability. Although that reference was not vital, ICC believed that the language describing standards was essential if paragraph 159 was to reflect the change made to paragraph 69.
17. Mr. MADRID PARRA (Spain) said that, for the sake of consistency, paragraph 159 should contain a reference to paragraph 135 if that paragraph was to contain a reference to paragraph 159. The Commission should request the secretariat to ensure that any paragraphs in the draft Guide that referred to particular articles should contain a broader explanation of the content of those articles, especially in cases where the articles were very concise. In addition, it would be easier for users if chapter II of the Guide, which contained article-by-article remarks, was cross-referenced with the information contained in chapter I.
18. Mr. SORIEUL (Secretariat) said that the secretariat was in no position to begin rewriting the Guide. Even without explicit instructions from the Commission, the secretariat intended to update the Guide in order to reflect discussions that had taken place at the thirty-fourth session, and make the necessary cross-references between paragraphs. At the current stage, it was up to the Commission to inform the secretariat of any changes that it wished to make to specific paragraphs.
19. The CHAIRMAN said that he took it that the Commission wished to retain paragraph 159 as it stood and to include the comments made by the representative of ICC in the Commission’s report.
20. *It was so decided.*
- The meeting was suspended at 3.15 p.m.
and resumed at 3.50 p.m.*
21. Mr. LINARES GIL (Spain), supported by Mr. PÉREZ (Colombia), Mr. CAPRIOLI (France) and Mr. MARADIAGA (Honduras), said that paragraph 54 of the Guide should contain a reference to the current situation with respect to the use of digital signatures. His delegation proposed that a new sentence should be added after the second sentence of paragraph 54, which would read: “The public key of the certification provider can be contained in a certificate issued by itself, and known as a root certificate.” The last sentence of paragraph 54 should be amended to read: “Under the laws of some States, a way of building trust in the digital signature of the certification service provider might be to publish certain data of the root certificate, such as the fingerprint, in an official bulletin.” That would not change the substance of the paragraph, but would give an indication of the practice currently followed in some countries.
22. Mr. LEBEDEV (Russian Federation) said that his delegation was in favour of the proposal made by the representative of Spain. He proposed that the new third sentence of paragraph 54 should be amended to indicate that there was currently a trend towards the use of root certificates.
23. Mr. BURMAN (United States of America) said that his delegation would have no objection to the proposal by Spain to include a reference to the root certificate. However, it could not accept the Russian Federation’s proposal that paragraph 54 should indicate that there was a trend towards the use of root certificates. Although such a trend might be observable in some regions, the United States was moving away from vertical concepts of root certification in favour of two-party certification systems, which worked more efficiently and cost a great deal less.
24. Ms. PROULX (Canada) said that, while her delegation was satisfied with the text of paragraph 54 as it stood, it was not opposed to the inclusion of examples. However, elsewhere in the Guide, reference was made only to certificates in general, and it would be inconsistent to move from the general to the specific in paragraph 54. Her delegation was in favour of retaining the reference to the public key in the last sentence, and simply adding the words proposed by the representative of Spain to the existing text.
25. Mr. CAPRIOLI (France) said that the amendments proposed by Spain would be of great assistance to users and user markets.
26. Mr. BURMAN (United States of America) said that the Commission’s task was to draft legal standards, not to engage in discussions of how certain systems might work in practice. While root certification might work well technologically, it was not correct to say that it was cost-efficient and was widely used in many countries.
27. Mr. LEBEDEV (Russian Federation) said that the purpose of his delegation’s proposal had been to make clear that the proposal by Spain was not universally accepted but referred rather to only one of a number of emerging trends. Perhaps the Guide could state that several alternative approaches existed.
28. The CHAIRMAN suggested that the Commission should adopt in principle the proposal made by the representative of Spain, subject to the clarifications made by the representatives of the Russian Federation and Canada. The secretariat would make the necessary adjustments to the text of paragraph 54.
29. *It was so decided.*
30. Mr. BURMAN (United States of America) said that the inclusion in paragraph 54 of a specific reference to root

certification would imply that the Commission supported that approach. For the sake of balance, the Guide should clearly state that there had been considerable objections in some countries to the use of root certificates on a number of grounds, including social cost and the extent of governmental regulation.

31. The CHAIRMAN said that the secretariat had taken note of the comments made by the representative of the United States and would ensure that the wording of paragraphs 54 was sufficiently balanced.

32. Mr. LINARES GIL (Spain) drew attention to the second sentence of subparagraph 3 of paragraph 62, which read: "Digital signature creation uses a hash result derived from and unique to both the signed message and a given private key". In some cases, at least in the technology used by government services in Spain, the hash result was in fact derived from the message and was unique only to the message, not to the private key. His delegation therefore proposed that the second sentence of subparagraph 3 should be reworded to indicate that the word "unique" applied only to the signed message. That would help to avoid confusion when the Guide was applied in different States.

33. Mr. KOBORI (Japan), Mr. CAPRIOLI (France) and Mr. BURMAN (United States of America) supported the amendment proposed by Spain.

34. The CHAIRMAN said that he took it that the Commission wished to adopt the amendment proposed by the representative of Spain.

35. *It was so decided.*

36. Mr. MARKUS (Observer for Switzerland) said that paragraph 29 listed a number of traditional, or core, functions of a signature, one of which was to associate a person with the content of a document. It then went on to list various additional functions, one of which was the intent of a party to be bound by the content of a signed contract. Paragraph 93 stated that the intent to sign was no more than the smallest common denominator to the various approaches to "signature" found in the various legal systems. Since, in paragraph 29, intent to sign was considered to be only an additional, but not mandatory, function of a signature, his delegation believed that it should not be dealt with in paragraph 93 as the smallest common denominator to the various approaches to "signature". Since intent to sign was purely subjective, reference to it should be deleted from paragraph 93 and replaced by the core function referred to in paragraph 29, namely, to associate a person with the content of a document.

37. The CHAIRMAN said that, if there were no objections, the secretariat would take the proposal made by the observer for Switzerland into account and make the necessary changes.

38. *It was so decided.*

39. Mr. LINARES GIL (Spain) said that his delegation had some difficulty in understanding the last sentence of paragraph 121, which stated that, where several employees shared the use of a corporate signature-creation data, that data must be capable of identifying one user unambiguously in the context of each electronic signature. It was not clear who that one user might be, since the signatory would not necessarily also be the user; if the user was one of the employees authorized to use the same data, he wished to know how the data could identify the individual user. His delegation also requested clarification on the meaning of "signature dynamics" in paragraph 82.

40. Mr. BURMAN (United States of America) said the problem to which the representative of Spain had referred was not the fault of the Guide, which correctly reflected the content of the Model Law. During the drafting process, some members of the Commission had expressed concern that many provisions of the Model Law were geared to an older application of digital technology and did not anticipate future developments. Article 6, paragraph 3, dealt with a very narrow area of practice, and more recent applications, particularly the new XHTML computer technology and signature applications, would probably not meet the standards it defined. That was the consequence of identifying criteria too early in the technology process.

41. Mr. SEKOLEC (Secretariat) suggested that perhaps the concern of the representative of Spain would be met if, in the last sentence of paragraph 121, the words "must be capable of identifying one user" were replaced by the words "must be capable of identifying one person". That would bring it into alignment with article 6, paragraph 3, and would make the necessary distinction between one user and multiple users.

42. Mr. ZANKER (Observer for Australia) supported the suggestion made by the secretariat. Perhaps the word "person" or "signatory" could be substituted for the word "user" in paragraph 121.

43. The CHAIRMAN suggested that the secretariat should redraft the last sentence of paragraph 121, taking into account the concerns that had been raised.

44. *It was so decided.*

45. Mr. BURMAN (United States of America), replying to the question raised by the representative of Spain, said that "signature dynamics" referred to a very complex British technology which, under appropriate circumstances, had a high rate of recognition of a manual signature. That technology, which was marketed under various corporate names, was very widely used, and he was sure that there would be a term for it in Spain.

46. The CHAIRMAN suggested that the secretariat should try to find the correct Spanish term for "signature dynamics", or it could put the English term in quotation marks or brackets in the Spanish text.

47. *It was so decided.*

48. Mr. KOBORI (Japan) said that the beginning of the first sentence of paragraph 153 should reflect the wording used in paragraph 31 of document A/CN.9/483, which dealt with the same issue. His delegation therefore proposed that the words: "The purpose of paragraph (2) is to provide the general criterion ..." should be amended to read "The purpose of paragraph (2) is not to place foreign suppliers of certification services in a better position than domestic ones but to provide the general criterion ...".

49. The CHAIRMAN said that, if he heard no objection, he would request the secretariat to ensure that comments of the representative of Japan were reflected in the final version of the Guide.

50. *It was so decided.*

51. *The Draft Guide to Enactment of the UNCITRAL Model Law on Electronic Signatures, as amended, was adopted.*

The meeting rose at 4.45 p.m.

Summary record (partial)* of the 730th meeting

Friday, 6 July 2001, at 2 p.m.

[A/CN.9/SR.730]

Chairman: Mr. MORÁN BOVIO (Spain)

In the absence of Mr. Abascal Zamora (Mexico), Mr. Morán Bovio (Spain), Vice-Chairman, took the Chair.

The meeting was called to order at 2.25 p.m.

DRAFT CONVENTION ON ASSIGNMENT OF RECEIVABLES IN INTERNATIONAL TRADE (*continued*) (A/CN.9/486, 489 and Add.1, 490 and Add.1-5 and 491 and Add.1; A/CN.9/XXXIV/CRP.1 and Add.1-13, CRP.2 and Add.1-4 and CRP.3-11)

Report of the drafting group (continued)
(A/CN.9/XXXIV/CRP.2 and Add.1-4)

Draft articles 4, 5, 6, 7, 9, 11, 12, 13, 14, 15, 16 and 17
(A/CN.9/XXXIV/CRP.2/Add.3)

1. Mr. HUANG FENG (China) said that his delegation wished to know why article 10 had been deleted.

2. Mr. BAZINAS (Secretariat) said that draft article 10 had been deleted because the opening words of the article deprived it of any meaning with regard to determining the time of the assignment.

3. *Draft articles 4, 5, 6, 7, 9, 11, 12, 13, 14, 15, 16 and 17 were adopted.*

Draft articles 4, 11, 12, 28bis, 35, 36, 37, 37 bis, 38, 41 and 47 and draft article 8 of the annex
(A/CN.9/XXXIV/CRP.2/Add.4)

4. Ms. BRELIER (France) said that, in the interest of clarity, the word “régie” should be replaced by “couverte” in the French version of article 38, paragraph 1.

5. Mr. MARADIAGA (Honduras) said that a similar drafting amendment could be made to the Spanish version in order to avoid the repetition of “regule” and “regulada”.

6. *Draft articles 4, 11, 12, 28bis, 35, 36, 37, 37bis, 38, 41 and 47 and draft article 8 of the annex, were adopted.*

DRAFT UNCITRAL MODEL LAW ON ELECTRONIC SIGNATURES AND DRAFT GUIDE TO ENACTMENT (*continued*) (A/CN.9/492 and Add.1-3 and 493; A/CN.9/XXXIV/CRP.2/Add.5 and 6)

Report of the drafting group (A/CN.9/XXXIV/CRP.2/ Add. 6)

7. Mr. SORIEUL (Secretariat) said that the report of the drafting group (A/CN.9/XXXIV/CRP.2/ Add.6) contained the latest version of the full text of the draft Model Law, which had undergone relatively few changes except in article 8, paragraph 2, and article 9, paragraphs 1 and 2.

8. The CHAIRMAN invited the Commission to consider the report of the drafting group article by article.

Draft article 1 (A/CN.9/XXXIV/CRP.2/Add.6)

9. *Draft article 1 was adopted.*

Draft article 2 (A/CN.9/XXXIV/CRP.2/Add.6)

10. Mr. JOKO SMART (Sierra Leone) wondered whether the word “which” should be inserted before “indicate” in article 2 (a).

11. Mr. GAUTHIER (Canada), supported by Mr. MARKUS (Observer for Switzerland), proposed that the word “to” be inserted before “indicate” in order to make the text clearer.

12. The CHAIRMAN said that he took it that the proposed wording was acceptable.

13. *It was so decided.*

14. *Draft article 2, as amended, was adopted.*

Draft articles 3 to 6 (A/CN.9/XXXIV/CRP.2/Add.6)

15. *Draft articles 3 to 6 were adopted.*

Draft article 7 (A/CN.9/XXXIV/CRP.2/Add.6)

16. Mr. SORIEUL (Secretariat), said that the text in square brackets in article 7, paragraph 1, should also be in italics.

17. *Draft article 7, as amended, was adopted.*

Draft articles 8 to 12 (A/CN.9/XXXIV/CRP.2/Add.6)

18. *Draft articles 8 to 12 were adopted.*

The discussion covered in the summary record ended at 4.15 p.m.

*No summary record was prepared for the rest of the meeting.

IV. BIBLIOGRAPHY OF RECENT WRITINGS RELATED TO THE WORK OF UNCITRAL¹

Note by the secretariat
(A/CN.9/517) [Original: English]

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I. General

Bergsten, E. E. Teaching about international commercial law and arbitration: the eighth annual Willem C. Vis International Commercial Arbitration Moot. *Journal of international arbitration* (The Hague), 18:4:481-486, 2001.

Bonell, M. J. Do we need a global commercial code? *Dickinson law review* (Carlisle, PA), 106:1:87-100, 2001.

Diesse, F. Travaux des organisation internationales: droit du commerce international. *Revue de droit des affaires internationales: Forum Européen de la Communication* (Paris), 6: 793-801, 2001.

Parallel title of journal: *International business law journal*.

Goode, R. Insularity or leadership? The role of the United Kingdom in the harmonisation of commercial law. *International and Comparative Law Quarterly* (London), 50:4:751-765, 2001.

Herrmann, G. The role of UNCITRAL. In *Foundations and perspectives of international trade law*. Eds.: I. Fletcher, L. Mistellis, M. Cremona. London, Sweet & Maxwell, 2001. ISBN=0-421-741-007. p. 28-36.

Kronke, H. The future of harmonisation and formulating agencies: the role of UNIDROIT. In *Foundations and perspectives of international trade law*. Eds.: I. Fletcher, L. Mistellis, M. Cremona. London, Sweet & Maxwell, 2001. ISBN=0-421-741-007. p. 59-66.

Levy, D. Private international law. In *ASIL Guide to electronic resources for international law: ASIL Bulletin 14*, The American Society of International Law, Washington, D.C., 2002. p. 135-140. 2nd rev. & exp. Ed.

¹Case-law on UNCITRAL texts (CLOUT) and bibliographical references thereto are contained in the document series A/CN.9/SER.C/...

- Mistellis, L. Is harmonisation a necessary evil? The future of harmonisation and new sources of international trade law. *In* Foundations and perspectives of international trade law. *Eds.*: I. Fletcher, L. Mistellis, M. Cremona. London, Sweet & Maxwell, 2001. ISBN=0-421-741-007. p. 3-27.
- Moran Bovio, D. 34.º periodo de sesiones del plenario de la Comisión de Naciones Unidas para el Derecho Mercantil Internacional (CNUDMI-UNCITRAL). *Revista de derecho bancario y bursátil* (Valladolid), 275-278, 2001.
- Piaggi, A. I. and Estoup. L. A. *Eds.* Derecho mercantil contemporáneo. La Ley, Buenos Aires, 2001. XX, 389 p. ISBN=950-527 461-0.
- Pereznieta Castro, L. and Silva Silva, J.A. La comisión de Naciones Unidas para el Derecho Mercantil Internacional (CNUDMI). *In* Derecho internacional privado, parte especial (Mexico). Oxford University Press, Mexico City, 2000. ISBN=970-613-230-9. p. 25-32.
- In Spanish. Also reproduces texts of:
United Nations Convention on Contracts for the International Sale of Goods: 581-601, 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: 601-608.
- Waincymer, J. International and comparative legal education through the Willem C Vis Moot program: a personal reflection. *The Vindobona journal of international commercial law and arbitration* (Wien), 5:2:251-283, 2001.
- ## II. International sale of goods
- Amissah, R. Revisiting the autonomous contract—transnational contract “law”, trends and supportive structures. *In* Foundations and perspectives of international trade law. *Eds.*: I. Fletcher, L. Mistellis, M. Cremona. London, Sweet & Maxwell, 2001. ISBN=0-421-741-007. p. 320-342.
- Andersen, C. B. Uniformity in the CISG in the first decade of its application. Foundations and perspectives of international trade law. *Eds.*: I. Fletcher, L. Mistellis, M. Cremona. London, Sweet & Maxwell, 2001. ISBN=0-421-741-007. p. 289-297.
- Blase, F. Negotiating payment in export trade. *In* Law and practice of export trade: Central practice and study guides no. 3. Center for transnational law, Münster, 2001. ISBN=3-934587-12-7. p. 155-174.
- Bonell, J. M. The UNIDROIT Principles of International Commercial Contracts and the harmonisation of international sales law. *In* Foundations and perspectives of international trade law. *Eds.*: I. Fletcher, L. Mistellis, M. Cremona. London, Sweet & Maxwell, 2001. ISBN=0-421-741-007. p. 298-309.
- Chen, F. The new era of Chinese contract law: history, development and a comparative analysis. *Brooklyn journal of international law* (Brooklyn, NY.), 27:153-190, 2001.
- Cox, T. Chaos versus uniformity: the divergent views of software in the international community. *The Vindobona journal of international commercial law and arbitration* (Wien), 4:1:3-29, 2000.
- Del Duca, L. F. and Del Duca, P. Selected topics under the Convention on International Sale of Goods (CISG). *Dickinson law review* (Carlisle, PA), 106:1:205-254, 2001.
- De Ly, F. La pratique de l’arbitrage commercial international et la vente internationale. *Revue de droit des affaires internationales*: Forum Européen de la communication (Paris), 3/4: 465-477, 2001.
- Parallel title of journal: *International business law journal*.
- Diesse, F. La bonne foi, la coopération et le raisonnable dans la Convention des Nations Unies relative à la vente internationale de marchandises (CVIM). *Journal du droit international* (Paris), 1:55-112, 2002.
- Ferrari, F. Applying the CISG in a truly uniform manner: tribunale di Vigevano (Italy), 12 July 2000. *Uniform law review: Revue de droit uniforme* (Roma), 1:203-215, 2001.
- Available on the Internet: <http://www.cisg.law.pace.edu/cisg/biblio/ferrari4.html>
- _____. Der Vertriebsvertrag als vom UN-Kaufrechtsübereinkommen (nicht) erfaßter Vertragstyp oder wie der italienische Kassationshof einen groben Fehler hätte vermeiden können; zu Corte di Cassazione (I)14.12.99. *The European legal forum* (München), 1:1:7-12, 2000.
- _____. Exclusion and opting-in of the CISG. *Revue de droit des affaires internationales*: Forum Européen de la communication (Paris), 3/4: 401-414, 2001.
- Parallel title of journal: *International business law journal*.
- _____. “Forum shopping” trotz internationaler Einheitsrechtskonventionen. *Recht der internationalen Wirtschaft* (Heidelberg), 3:169-178, 2002.
- _____. General principles and international uniform commercial law conventions: a study of the 1980 Vienna Sales Convention and the 1988 UNIDROIT Conventions on international factoring and leasing. *Pace international law review* (White Plains, N.Y.), X:1:157-185, 1998.
- _____. How to create one uniform contract law. *The Vindobona journal of international commercial law and arbitration* (Wien), 5:1:3-21, 2001.
- _____. International sales law in the light of the OHBLA Uniform Act relating to general commercial law and the 1980 Vienna Sales Convention. *Revue de droit des affaires internationales*: Forum Européen de la communication (Paris), 5:599-607, 2001.
- Parallel title of journal: *International business law journal*.
- _____. Italienische CISG-Rechtsprechung—Eine Übersicht. *Internationales Handelsrecht: Zeitschrift für die wirtschaftsrechtliche Praxis* (Hamburg), 5:179-186, 2001.
- _____. Overview on the sphere of application of the 1980 United Nations Convention on Contracts for the International Sale of Goods. *In* Law and practice of export trade: Central practice and study guides no. 3. Centre for transnational law, Münster, 2001. ISBN=3-934587-12-7. p. 53-95
- _____. Problematiche tipiche della Convenzione di Vienna sui contratti di vendita internazionale di beni mobili risolte in una prospettiva uniforme. *Giurisprudenza italiana* (Milano), 281-285, 2001.
- _____. Recent Italian court decisions on the CISG. *Revue de droit des affaires internationales*: Forum Européen de la communication (Paris), 2:224-230, 2001.
- Parallel title of journal: *International business law journal*.

- Fetze Kamdem, I. L'offre dans les conventions du commerce international: the notion of supply in international trade treaties. *Revue de droit des affaires internationales: Forum Européen de la communication* (Paris), 5: 527-541, 2001.
Parallel title of journal: *International business law journal*.
- Grace, D. L. Force majeure, china & the CISG: Is China's new contract law a step in the right direction? *San Diego international law journal* (San Diego, CA), 2:173-207, 2001.
- Grundmann, S. European sales law—reform and adoption of international models in German sales law. *European review of private law* (Dordrecht), 2 & 3:239-258, 2001.
- Gustin, M. Passing of risk and impossibility of performance under the CISG: Le transfert des risques et l'impossibilité d'exécution dans la CVIM. *Revue de droit des affaires internationales: Forum Européen de la communication* (Paris), 3/4: 379-401, 2001.
Parallel title of journal: *International business law journal*.
- Guyot, D. Russie: le contrat de vente international et les particularités du droit russe. *Cahiers juridiques et fiscaux de l'exportation* (Paris), 6:1325-1336, 2001.
In French.
- Herber, R. Mangelfolgeschäden nach dem CISG und nationales Deliktsrecht. *Internationales Handelsrecht: Zeitschrift für die wirtschaftsrechtliche Praxis* (Hamburg), 5:187-191, 2001.
- Heuze, V. The formation of contracts in accordance with the CISG: Some difficulties encountered: La formation du contrat selon la CVIM: quelques difficultés. *Revue de droit des affaires internationales: Forum Européen de la communication* (Paris), 3/4: 277-291, 2001.
Parallel title of journal: *International business law journal*.
- Keily, T. Good faith and the Vienna Convention on Contracts for the International Sale of Goods (CISG). *The Vindobona journal of international commercial law and arbitration*, (Wien) 3:1:15-40, 1999.
- Kilian, M. CISG and the problem with common law jurisdictions. *Journal of transnational law and policy* (Thallahassee, FL), 10:217-243, 2001.
- Krebs, M. Das UN-Kaufrecht ist nicht anwendbar auf Garantieverträge des Verkäufers mit Abnehmern des Käufers. *The European Legal Forum* (München), 1:16-18, 2001.
- Kritzer, A. H. and Mistelis, L. A. Taming the dragons of uniform law: sharing the reasoning of courts and arbitral tribunals—English case texts and translated case texts—. *The Vindobona journal of international commercial law and arbitration* (Wien), 5:2:285-312, 2001.
- Kruisinga, S. A. What do consumer and commercial sales law have in common? A comparison of the EC Directive on consumer sales law and the United Nations Convention on Contracts for the International Sale of Goods. *European review of private law* (Netherlands), 9:2-3:177-188, 2001.
- Ledić, D. Pravna vrela trgovačkog prava = Legal sources of trade law. *Zbornik pravnog fakulteta sveučilišta u rijeci, supplement* (Rijeka), Broj 1:455-479, 2001.
In Croatian with short synopsis in English, German and Italian.
- Les parties écartent tacitement la Convention de Vienne en s'abstenant de l'invoquer devant le juge français. *Recueil le Dalloz* (Paris), 31:2591-2593, 2001.
- Li-Kotovtchikhine, X.Y. Le nouveau droit chinois des contrats internationaux (1). *Journal du droit international* (Paris), 1:113-163, 2002.
- Loewe, R. The sphere of application of the United Nations Sales Convention. *Pace international law review* (White Plains, N.Y.), X:I:79-88, 1998.
- Magnus, U. Remarks on good faith: the United Nations Convention on Contracts for the International Sale of Goods and the International Institute for the Unification of Private Law, Principles of International Commercial Contracts. *Pace international law review* (White Plains, N.Y.), X:I:89-95, 1998.
- Majumdar, I. B. and Jha, S. The law relating to damages under international sales: a comparative overview between the CISG and Indian contract law. *The Vindobona journal of international commercial law and arbitration* (Wien), 5:2:185-211, 2001.
- Mastellone, C. H. Sales-related issues not covered by the CISG: assignment, set-off, statute of limitations, etc., under Italian law. *The Vindobona journal of international commercial law and arbitration* (Wien), 5:2:143-184, 2001.
- Nottage, L. Practical and theoretical implications of the Lex Mercatoria for Japan: CENTRAL's empirical study on the use of transnational law. *The Vindobona journal of international commercial law and arbitration* (Wien), 4:2:132-146, 2001.
- Osuna, A. Dictamen relativo a la queja promovida por Dulces Luisi, S.A. de C.V., en contra de Seoul International Co. Ltd., y Seoula Confectionary Co. *The journal of law and commerce* (Pittsburgh, PA), 19:2:265-281, 2000.
In English.
- Pauly, C. The concept of fundamental breach as an international principle to create uniformity of commercial law. *The journal of law and commerce* (Pittsburgh,PA), 19:2:221-243, 2000.
- Perales Viscasillas, M. P. "Battle of the forms" under the 1980 United Nations Convention on Contracts for the International Sale of Goods: a comparison with section 2-207 UCC and the UNDROIT Principles. *Pace international law review* (White Plains, N.Y.), X:I:97-156, 1998.
- _____. Formation of the contract under the CISG. *In Law and practice of export trade: Central practice and study guides no.3*. Center for transnational law, Münster, 2001.ISBN=3-934587-12-7.p. 97-113.
- Pignarre, G. Retirement: la délivrance, fait générateur de l'obligation de retirement de l'acheteur. *Recueil le dalloz* (Paris), 12:997-998, 2002.
- Piltz, B. Rights and obligations of the seller and of the buyer under the CISG. *In Law and practice of export trade: Central practice and study guides no.3*. Center for transnational law, Münster, 2001. ISBN=3-934587-12-7. p.115-130
- Rauda, C. and Etier, G. Warranty for intellectual property rights in the international sale of goods. *The Vindobona journal of international commercial law and arbitration* (Wien), 4:1:30-61, 2000.

- Retirement: la délivrance, fait générateur de l'obligation de retirement de l'acheteur. *Recueil le dalloz* (Paris), 12:997-998, 2002.
- Rogers, V. M. Beware of faux amis: the importance of uniform terminology in international sales law. In *Law and practice of export trade: Central practice and study guides no. 3*. Center for transnational law, Münster, 2001. ISBN=3-934587-12-7. p. 29-52.
- Romein, A. International sale of goods and the transfer of risk. *The Vindobona journal of international commercial law and arbitration* (Wien), 4:1:62-79, 2000.
- Rosch, W. and Spiegel, N. Consentement a la vente et interprétation de la volonté des parties tribunal fédéral suisse, 11 et 22 dec. 2000. *Recueil le dalloz* (Paris), 4:396, 2002.
- Sandberg, S. R. Globalized horse trade: a need for heightened sophistication in the equine industry. *University of Missouri at Kansas City law review* (Kansas City, Mo), 69:613-642, 2001.
- Sanders, P. The harmonising influence of the work of UNCITRAL on arbitration and conciliation. In *Understanding transnational commercial arbitration: Central practice and study guides no. 2*. Center for transnational law, Münster, 2001. ISBN=3-934587-11-9. p. 43-55
- Šarcevic, P. and Volken, P. The International Sale of Goods Revisited. Kluwer Law International, The Hague, 2001. ISBN 90-411-1615-X. 288 pp.
- Schroeter, U. Vienna Sales Convention: applicability to "mixed contracts" and interaction with the 1968 Brussels Convention. *The Vindobona journal of international commercial law and arbitration* (Wien), 5:1:74-83, 2001.
- _____. Oberlandesgericht München, 3 December 1999. Case note. *The Vindobona journal of international commercial law and arbitration* (Wien), 5:1:130-136, 2001.
- Schultz, R. Rolling contract formation under the United Nations Convention on Contracts for the International Sale of Goods. *Cornell international law journal* (Ithaca, N.Y.), 35:263-289, 2001.
- Seghers, N and Walschot, F. Model contracts with respect to the CISG: Les contrats type en rapport avec la CVIM. *Revue de droit des affaires internationales: Forum Européen de la communication* (Paris), 3/4: 415-465, 2001.
- Parallel title of journal: *International business law journal*.
- Senacq, S. International sales and electronic commerce: La vente internationale et le commerce électronique. *Revue de droit des affaires internationales: Forum Européen de la communication* (Paris), 3/4: 489-500, 2001.
- Parallel title of journal: *International business law journal*.
- Simons, T. BGH(D) 3.11.1999—VIII ZR 287/98 CISG Art. 39 Abs. 1. The European legal forum (München), 1:12-15, 2001.
- Commentary on CISG.
- Slipachuk, T. V. and Runeland, P. Kiev: From zero to 800 cases per year in less than 10 years. *The American review of international arbitration* (New York, N.Y.), 11:4:585-606, 2000.
- Sukurs, C. Harmonizing the battle of forms: a comparison of the United States, Canada, and the United Nations Convention on Contracts for the International Sale of Goods. *Vanderbilt journal of transnational law* (Nashville, Tenn.), 34:1481-1515, 2001.
- Thoma, I. Relations between conflict of laws rules and uniform law. *Revue hellénique de droit international* (Athens), 53:1, 169-188, 2000.
- Thompson, D. A. Translation of Oberlandesgericht Karlsruhe decision of 25-06-1997 including commentary—Buyer beware: German interpretation of the CISG has led to results unfavorable to buyers. *The journal of law and commerce* (Pittsburgh, PA), 19:2:245-264, 2000.
- Tournafond, O. Garantie des vices cachés: la distinction du vice caché et de l'erreur vice du consentement. *Recueil le dalloz* (Paris), 12:1002-1003, 2002.
- UN-Kaufrecht stellt strenge Anforderungen an Untersuchungspflicht. *Recht der internationalen Wirtschaft* (Heidelberg), 5:381-382, 2001.
- Text of a decision of the Higher Regional Court of Oldenburg., on 5 December 2000 (12 U40/00 Art. 38 Abs.1, 39 Abs.1 CISG). In German.
- UN-Kaufrecht: Voraussetzungen für einen Vertragsschluss. *Recht der internationalen Wirtschaft* (Heidelberg), 5:383-384, 2001.
- Text of a decision of the Higher Regional Court of Frankfurt/M., on 30 August 2000 (9 U13/00 Art. 8, 14, 18 CISG). In German.
- Van Houte, H. and Wautelet, P. The duties of parties and the sanctions for non-performance under the CISG: Obligations des parties et sanctions des obligations dans la CVIM. *Revue de droit des affaires internationales: Forum Européen de la communication* (Paris), 3/4: 293-353, 2001.
- Parallel title of journal: *International business law journal*.
- Vanwijck-Alexandre, M. Anticipatory breach and instalment contracts in the CISG: Contravention anticipée et contrats à livraisons successives dans la CVIM.
- Revue de droit des affaires internationales: Forum Européen de la communication* (Paris), 3/4:353-378, 2001.
- Parallel title of journal: *International business law journal*.
- Veneziano, A. The application of UNIDROIT principles in international sales: L'Application des principes d'UNIDROIT dans la Vente Internationale. *Revue de droit des affaires internationales: Forum Européen de la communication* (Paris), 3/4:477-488, 2001.
- Parallel title of journal: *International business law journal*.
- Vente internationale: application de la garantie contre les réclamations fondées sur les droits de propriété intellectuelle. *Recueil le dalloz* (Paris), 16:1348, 2002.
- Vida, A. Differenzierte Rechtsanwendung beim internationalen Kaufvertrag (zu Hauptstadtgericht Budapest, AZ 12 G 75 546/1998). *IPRax* (Bielefeld), 2:146-147, 2002.
- Weizhong, Y. and Fisanich, F. N. Translation arbitration award of the China International Economic and Trade Arbitration Commission for dispute concerning delivery and quality of roll aluminium and aluminium parts for the manufacture of cans, October 30, 1991 Beijing, People's Republic of China. *The journal of law and commerce* (Pittsburgh, PA), 19:2:283-293, 2000.
- Originally published in Mandarin Chinese in Compilation of selected awards of the China International Economic and Trade Arbitration Commission, 1989-1995, at 429 (1997), by China Foreign Economic and Trade Publisher, Beijing, P.R.C.

- Witz, C. Conflit de juridictions dans le cadre d'une vente internationale de marchandises. *Recueil le dalloz* (Paris), 44:3607, 2001.
- _____. CISG: Interpretation and Non Covered Issues: CVIM: Interprétation et questions non couvertes. *Revue de droit des affaires internationales: Forum Européen de la communication* (Paris), 3/4: 253—277, 2001.
- Parallel title of journal: *International business law journal*.
- Zur Frage der Einbeziehung von allgemeinen Geschäftsbedingungen in dem UN-Kaufrecht unterliegende Verträge. *Wertpapiermitteilungen* (Frankfurt a. M.), 9:442-444, 2002.
- Rechtsprechung Bürgerliches Recht und Handelsrecht, Bundesgerichtshof, am 31.10.2001. Nr. VIII ZR 60/01.
- Zeller, B. Downs investment Pty Ltd v Perwaja Steel SDN BHD [2000] QSC 421 (17 November 2000). *The Vindobona journal of international commercial law and arbitration* (Wien), 5:1:124-129, 2001.
- ### III. International commercial arbitration and conciliation
- Abdelghader, N. Ittifak al-tahkim woufken likanoun al-tahkim fi al-maouad al-madaniya va al-tijariah 27 Isanet 1994 = Arbitration agreement according to arbitration law in civil and commercial code no. 27 of 1994. Dar'alnahzate alarabiате (Alghahara), 1996. ISBN=977 04 1617 7. 542 p.
- In Arabic. Refers to New York Convention (1958), and UNCITRAL Model Law on International Commercial Arbitration (1985).
- Arbitration and alternative dispute resolution: how to settle international business disputes. *International trade center, Trade law series* (Geneva), 2001. ISBN=92-9137-172-6. ITC/P74.E/TSS/FASS/01-III.
- Bachand, F. Arbitrage commercial: assujettissement d'un tribunal arbitral conventionnel au pouvoir de surveillance et de contrôle de la Cour supérieure et contrôle judiciaire d'ordonnances de procédure rendues par les arbitres. *Revue juridique Thémis* (Montreal), 35:465-483, 2001.
- Berger, K. P. Power of arbitrators to fill gaps and revise contracts to make sense. *In Foundations and perspectives of international trade law. Eds.: I. Fletcher, L. Mistellis, M. Cremona*. London, Sweet & Maxwell, 2001. ISBN=0-421-741-007. p. 269-285.
- Bezen, S. Turkey adopts UNCITRAL Model Law. *Mealey's international arbitration report* (King of Prussia, PA), 16:8: 42-43, 2001.
- Blackaby, N. Arbitration and Brazil: a foreign perspective. *Arbitration international* (The Hague), 17:2:129-142, 2001.
- Bowman, J.P. Dispute resolution planning for the gas and oil industry. *ICSID Review = Foreign investment law journal* (Washington, D.C.), 16:2:332-407, 2001.
- Cairns, D. J. A. and Stampa, G. Arbitration law in Spain: taking-off . . . at last? *International arbitration law review* (London), 3:84-89, 2001.
- Chao, C. and Schurz, J. International arbitration: selecting the proper forum. *Mealey's international arbitration report* (King of Prussia, PA), 17:2:41-54, 2002.
- Chibueze, R. O. The adoption and application of the Model Law in Canada: post-arbitration challenge. *Journal of international arbitration* (Dordrecht), 18:2:191-210, 2001.
- Cobb, M. B. Article 16(1) of the UNCITRAL Model Law: the related doctrines of kompetenz-kompetenz and separability. *Mealey's international arbitration report* (King of Prussia, PA), 16:6:32-40, 2001.
- Cook, J. M. International arbitration in the Latin American context—a comparative look at arbitration in Mexico and the United States. *The Vindobona journal of international commercial law and arbitration* (Wien), 3:1:41-60, 1999.
- Cordero Moss, G. National rules on arbitrability and the validity of an international arbitral award: the example of disputes regarding petroleum investments in Russia. *Stockholm arbitration report* (Stockholm), 1:7-24, 2001.
- Cram-Martos, V. The United Nations Economic Commission for Europe and the 1961 Convention on International Commercial Arbitration. *Journal of international arbitration* (Dordrecht), 17:6:137-153, 2000.
- Daly, J. L. International commercial negotiation and arbitration. *Hamline journal of public law & policy* (St. Paul, Minn.), 22:217-251, 2001.
- Davis, K. R. Unconventional wisdom: a new look at Articles V and VII of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. *Texas international law journal* (Austin, TX), 37:43-87, 2001.
- Dimolitsa, A. Les points de divergence entre la nouvelle loi grecque sur l'arbitrage et la loi-type CNUDCI. *Revue de l'arbitrage* (Paris), 2:227-266, 2000.
- Dulic, A. First Options of Chicago, Inc. v. Kaplan and the kompetenz-kompetenz principle. *Pepperdine dispute resolution law journal* (Malibu, CA), 2:77-97, 2002.
- Ebeid, N. A. Roh'yat jadida: Litatvir al-tahkim al-tijari al-douali. = Two new visions in the development of international commercial arbitration. *Altahkim* (Yemen), 8:13-14, 2000.
- In Arabic.
- _____. Al-UNCITRAL tabda' morajaat kawa'ed al-tahkim al-tijari al-douali. = UNCITRAL starts reviewing the rules on international commercial arbitration. *Altahkim* (Yemen), 15:14-18, 2001.
- In Arabic.
- Edwards, A. Confidentiality in arbitration: fact or fiction? *International arbitration law review* (London), 3:94-95, 2001.
- Gotanda, J. Y. An efficient method for determining jurisdiction in international arbitrations. *Columbia journal of transnational law* (New York, N.Y.), 40:11-42, 2001.
- Gusy, M. The history and significance of the New York Convention. *The Vindobona journal of international commercial law and arbitration* (Wien), 4:2:147-154, 2000.
- Herrmann, G. 13 years experience with the UNCITRAL Model Law on International Commercial Arbitration. *In Derecho mercantil contemporaneo. Eds.: A. Piaggi, L.A. Estoup*. La Ley, Buenos Aires, 2001. ISBN=950 527 461 0. P.67-80.

- _____. Some Legal E-flections on online arbitration ("cybitration©"). In *Law of international business and dispute settlement in the 21st century: Recht der internationalen Wirtschaft und Streiterledigung im 21. Jahrhundert. Liber Amicorum Karl-Heinz Boeckstiegel*. p. 267-276. Eds. R. Birner, L.Y. Fortier, K.P. Berger and J. Bredow. Carl Heymanns Verlag KG, Koeln, 2001. ISBN=3-452-24909-3. XII, 824 p.
- Howell, D. *et al.* International arbitration in Singapore—opting out of the UNCITRAL Model Law. *Journal of international arbitration* (Dordrecht), 19:1:39-50, 2002.
- Huber, S. K. and Trachte-Huber, E.W. International ADR in the 1990's: the top ten developments. *Houston business & tax law journal* (Houston, TX), 1:184-223, 2001.
- International arbitration: selecting the proper forum. *Mealey's international arbitration report* (King of Prussia, PA), 17:2:41, 2002.
- Ireland: Appointment of arbitrators by the courts under the Arbitration (International Commercial) Act 1998. *Euro Petroleum Trading Limited v. Transpetroleum International Limited. International arbitration law review* (London), 5:1:N-1-N-2, 2002.
- Kantor, M. International project finance and arbitration with public sector entities: when is arbitrability a fiction? *Fordham international law journal* (New York, N.Y.), 24:4:1122-1183, 2001.
- Karamanian, S. L. The road to the tribunal and beyond: international commercial arbitration and United States courts. *George Washington international law review* (Washington, D.C.), 34:1:17-100, 2002.
- Kerameus, K. D. Modern perspectives of international jurisdiction. In *Foundations and perspectives of international trade law*. Eds.: I. Fletcher, L. Mistellis, M. Cremona. London, Sweet & Maxwell, 2001. ISBN=0-421-741-007. p. 237-257.
- Khalilian, S. K. A survey of the Iranian legislation on international commercial arbitration. *Mealey's international arbitration report* (King of Prussia, PA), 16:10:46-54, 2001.
- Kojovic, T. Court enforcement of arbitral decisions on provisional relief: how final is provisional? *Journal of international arbitration* (Dordrecht), 18:5:511-532, 2001.
- Krishan, R. Appointment of an arbitrator in arbitration proceedings under the Indian arbitration and conciliation act 1996. *International arbitration law review* (London), 3:90-93, 2001.
- Kroell, S. and Hoßdorf, M. Determining of the place of arbitration. *International arbitration law review* (London), 4:N-25, 2001.
Decision of the Higher Regional Court of Düsseldorf: 6 Sch.2/99, March 23, 2000.
- Kroell, S. and Hennecke, R. Setting aside an award. *International arbitration law review* (London), 4:N-26-N-27, 2001.
Decision of the Higher Regional Court of Bremen: 2 Sch.4/99, September 30, 1999.
- Liescher, C. Reform of Austrian Arbitration Law. *Journal of international arbitration* (Dordrecht), 18:2:211-222, 2001.
- Malloy, M. P. Symposium: Transnational business law in the twenty-first century: current issues in international arbitration. *The transnational lawyer* (Sacramento, CA), 15:43-54, 2002.
- Minh Dang, K. and Murugaiyan, S. Singapore court confuses over arbitration. *International Financial Law Review* (London), 9:87-90, 2001.
- Mody, Z. and Mandal, S. Marriott International Inc. v. Ansal Hotels Ltd. *International arbitration law review* (London), 3:N-19-N20, 2001.
- Murray, L.M. Domestic court implementation of coordinative treaties: formulating rules for determining the seat of arbitration under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. *Virginia journal of international law association* (Charlottesville, Virginia), 41:859-921, 2001.
- NAFTA chapter 11 proceedings. Methanex Corporation v. United States. *International arbitration law review* (London), 2:N3-N4, 2001.
- Nakamura, T. Arbitrability and the Lex Arbitri. *Mealey's international arbitration report* (King of Prussia, PA), 17:3:1-8, 2002.
- Narayanan, P. and Menon, R. Presentation of evidence in international commercial arbitration: a comparative study. *The Vindobona journal of international commercial law and arbitration* (Wien), 4:2:105-121, 2000.
- Newcombe, A. and Lemaire, A. Should *Amici Curae* participate in investment treaty arbitrations? *The Vindobona journal of international commercial law and arbitration* (Wien), 5:1:22-40, 2001.
- New federal arbitration bill proposed for Argentina. *Mealey's international arbitration report* (King of Prussia, PA), 16:8:21-22, 2001.
- Obuljen, S. Arbitration and the UNCITRAL Model Law on Electronic Commerce. *Croatian arbitration yearbook* (Zagreb), 8:45-56, 2001.
- Okekeifere, A. I. Enhancing the implementation of economic projects in the third world through arbitration. *Arbitration: an international journal* (London), 67:3:240-253, 2001.
- Onorato, W. T. and Park, J. J. World petroleum legislation: frameworks that foster oil and gas development. *Alberta law review* (Edmonton, Alberta), 39:70-126, 2001.
- Pongracic-Speier, M. Confidentiality and the public interest exception: considerations for mixed international arbitration. *The journal of world investment* (Geneva), 3:2:231-265, 2002.
- Pryles, M. Exclusion of the Model Law. *International arbitration law review* (London), 4:6:175-177, 2001.
Article first published in the *CAA Journal*, Taiwan.
- Reddy, V. and Nagaraj, V. Arbitrability: the Indian perspective. *Journal of international arbitration* (Dordrecht), 19:2:117-149, 2002.
- Reichert, K. Ireland's new international commercial arbitration law. *International arbitration law review* (London), 4:6:202-205, 2001.
- Ryssdal, A. Interim and conservatory measures: theory, strategies & a practical experience in Lithuania. *Stockholm arbitration report* (Stockholm), 1:25-40, 2001.
- Sanders, P. The harmonising influence of the work of UNCITRAL on arbitration and conciliation. In *Understanding transnational commercial arbitration: Central practice and study guides no. 2*. Center for transnational law, Münster, 2001. ISBN=3-934587-11-9. p. 43-55.

- Secomb, M. Suspension of the enforcement of awards under Article VI of the New York Convention—proof and LSAs. *The Vindobona journal of international commercial law and arbitration* (Wien), 5:1:99-116, 2001.
- Shackleton, S. R. Annual review of English judicial decisions on arbitration—2000. *International arbitration law review* (London), 4:6:178-201, 2001.
- Shelkopyas, N. The Belarusian law on international arbitration court: the spirit or the letter of the Model Law? *Journal of international arbitration* (Dordrecht), 17:6:155-162, 2001.
- Slipachuk, T. V. and Runeland, P. Kiev: from zero to 800 cases per year in less than 10 years. *The American review of international arbitration* (New York, N.Y.), 11:4:585-606, 2000.
- Smit, R. H and Turner, A. Enforcement by U.S. courts of international arbitration interim orders and awards under the New York Convention: Publicis Communication v. True North Communications Inc. *Stockholm arbitration report* (Stockholm), 1:47-56, 2001.
- Szurski, T. Introducing the UNCITRAL Model Law to Poland—some remarks on the Polish law on international commercial arbitration. *Journal of international arbitration* (Dordrecht), 18:2:227-238, 2001.
- Teitz, L. E. The promise and challenge of on-line dispute resolution. *Fordham law review* (New York, NY), 70:985-1016, 2001.
- Triva, S. Recognition and enforcement of domestic arbitral awards. *Croatian arbitration yearbook* (Zagreb), 8:67-81, 2001.
- UNCITRAL Commission says draft Model Law on conciliation “a priority”: arbitration working group asked to ready proposal for Commission’s 2002 session. *Mealey’s international arbitration report* (King of Prussia, PA), 16:8:21, 2001.
- Uzelac, A. The form of the arbitration agreement and the fiction of written orality: how far should we go? *Croatian arbitration yearbook* (Zagreb), 8:83-107, 2001.
- Walker, M. Observations: Final arbitral award rendered in 2000 in case 108/1997. *Stockholm arbitration report* (Stockholm), 1:57-72, 2001.
- Webster, T. H. Obtaining evidence from third parties in international arbitration. *Arbitration international* (Dordrecht), 17:2:143-162, 2001.
- Weigand, F. B. ed. Practitioner’s handbook on international arbitration. C. H. Beck. DJOF, München, 2002. 1420 p. ISBN=3-406-47109-9.
The introduction (p. 1-102) is about the work of UNCITRAL in international commercial arbitration.
- Williams, D. Recent developments in arbitration and dispute resolution in New Zealand. *International arbitration law review* (London), 2:41-49, 2001.
- Williams, D. and Buchanan, A. Correction and interpretation of awards under article 33 of the Model Law. *International arbitration law review* (London), 2:119-127, 2001.
- Xu, X. and Wilson, G.D. One country, two-international commercial arbitration-systems. *Journal of international arbitration* (Netherlands), 17:6:47-105, 2000.

IV. International transport

- Commission des Nations Unies pour le droit commercial international (CNUDCI). *Bulletin des transports internationaux ferroviaires: Zeitschrift fuer den internationalen Eisenbahnverkehr: Bulletin of international carriage by rail* (Bern), 3:63, 2001.
- Gehring, A. After Carnival Cruise and Sky Reefer: an analysis of forum selection clauses in maritime and aviation transactions. *Journal of air law and commerce* (Dallas, TX), 66:633-688, 2001.
- Girvin, S. The 37th Comité Maritime International conference: a report. *Lloyd’s maritime and commercial law quarterly* (London), 3:406-427, 2001.
- Putzeys, J. Transport law and the United Nations. *Uniform law review: revue de droit uniforme* (Roma), VI:2:326-335, 2001.

V. International payments

VI. Electronic commerce

- Aschauer, C. Arbitration and new technologies: basic features of Austrian legislation in the field of e-commerce. *Croatian arbitration yearbook* (Zagreb), 8:31-43, 2001.
- Balloon, A. M. From was seals to hypertext: electronic signatures, contract formation, and a new model for consumer protection in internet transaction. *Emory law journal* (Atlanta, Georgia), 50:905-937, 2001.
- Boss, A. H. The Uniform Electronic Transactions Act in a global environment. *Idaho law review* (Moscow, ID), 37:275-351, 2001.
- Conradie, P. et al. Why South Africa doesn’t need the UNCITRAL Model Law. *International technology law review* (Hong Kong), 16:17-19, 2001.
- Gobert, D. and Montero, É. La signature dans les contrats et les paiements électroniques: l’approche fonctionnelle. In *Commerce électronique: le temps des certitudes*. p. 53-97. Eds. Cavanillas Mugica, S. et al. Bruylant, Bruxelles, 2000. ISBN=2-8027-1381-7. 225 p.
- Gregory, J. The UETA and the UECA—Canadian reflections. *Idaho law review* (Moscow, ID), 37:441-476, 2001.
Is the electronic signature a dead letter? *FIATA review* (Zürich), 38:6-7, 2001.
- Kossick, R. The internet in Latin America: new opportunities, developments and challenges. *American University international law review* (Washington, D.C.), 16:1309-1341, 2001.
- Lacoursiere, M. La responsabilité bancaire a l’ère du commerce électronique: impact des autorités de certification. *Les cahiers de droit* (Québec), 42:961-1012, 2201.
- Madrid Parra, A. La ley modelo de la CNUDMI para las firmas electronicas. *Revista de la contratacion electrónica* (Cadiz), 22:23-28, 2001.

_____. Ley modelo de la CNUDMI/UNCITRAL para las firmas electronicas. *In* Regimen juridico de Internet . Eds. J. Cremades, Fernández-Ornóñez, M. A., Illescas, R., La Ley, Madrid, 2002. ISBN=84-9725-147-4. p. 817-873.

_____. Proyecto de ley modelo de la CNUDMI/UNCITRAL para las firmas electronicas. *Derecho de los negocios* (Madrid), 128:1-32, 2001.

_____. Seguridad, pago y entrega en el comercio electronico. *Revista de derecho mercantil* (Madrid), 241:1189-1263, 2001.

Mazzotta, F. G. A guide to e-commerce: some legal issues posed by e-commerce for American businesses engaged in domestic and international transactions. *Suffolk transnational law review* (Boston, Mass.), 24:249-278, 2001.

Poulet, Y. La conclusion du contrat par un agent électronique. *In* Commerce électronique: le temps des certitudes. p. 129-146. Eds. Cavanillas Mugica, S. et al. Bruylant, Bruxelles, 2000. ISBN=2-8027-1381-7. 225 p.

Sandoval Lopez, R. The Chilean draft of electronic documents in relation with the UNCITRAL Model Law of Electronic Commerce. *Dickinson law review* (Carlisle, PA), 106:1:139-143, 2001.

Senacq, S. International sales and electronic commerce: La vente internationale et le commerce électronique.

Revue de droit des affaires internationales: Forum Européen de la communication (Paris), 3/4: 489-500, 2001.

Parallel title of journal: *International business law journal*.

Schlosser, P. Arbitral tribunals or state courts who must defer to whom? *ASA special series*, (Basel)15:15-34, 2001.

Thibaut, M. Digital signatures and certification authorities for a Central American high-tech powerhouse: the need for e-commerce legislation in Costa Rica. *ISLA journal of international & comparative law* (Fort Lauderdale, FL), 7:711-730, 2001.

_____. Firmas digitales y autoridades certificantes para un pais centroamericano lider en el area de alta tecnologia: la necesidad de legislacion sobre el comercio electronico en Costa Rica. *ISLA journal of international & comparative law* (Fort Lauderdale, FL), 7:853-874, 2001.

Van den Berg, A. J. The 1958 New York Arbitration Convention revisited. *ASA special series*, (Basel)15:125-146, 2001.

Van Houtte, H. Parallel proceedings before state courts and arbitration tribunals: is there a Transnational *lis alibi pendens*—exception in Arbitration or Jurisdiction Conventions? *ASA special series*, (Basel)15:35-54, 2001.

Webb, D. Commercial law. *New Zealand law review* (Auckland, NZ), II:171-188, 2001

Werner, J. E-commerce.co.uk—local rules in a global net: online business transactions and the applicability of traditional English contract law rules. *International journal of communications law and policy* (Münster), 6:1-9, 2000-2001.

VII. Independent guarantees and stand-by letters of credit

Stoufflet, J. Fraud in documentary credit, letter of credit and demand guaranty. *Dickinson law review* (Carlisle, PA), 106:1:21-28, 2001.

VIII. Procurement

IX. Cross-border insolvency

Dargan, S. The emergence of mechanisms for cross-border insolvencies in Canadian law. *Connecticut journal of international law* (Hartford, CT), 17:107-126, 2001.

Diesse, F. Travaux des organisation internationales: droit du commerce international. *Revue de droit des affaires internationales: Forum Européen de la communication* (Paris), 5: 640-643, 2001.

Parallel title of journal: *International business law journal*.

Furth, D. L. et al. What institutional lenders can expect from the business aspects of the pending bankruptcy legislation. *The banking law journal* (Arlington, VA), 118:6:520-540, 2001.

Gitlin, R. A. Symposium—international insolvency: introduction. *Connecticut journal of international law* (Hartford, CT), 17:1-4, 2001.

Harmer, R. W. UNCITRAL Projects; INSOL International. *In* Foundations and perspectives of international trade law. Eds.: I. Fletcher, L. Mistellis, M. Cremona. London, Sweet & Maxwell, 2001. ISBN=0-421-741-007. p. 480-495

Isham, S. UNCITRAL's Model Law on Cross-Border Insolvency: a workable protection for transnational investment at last. *Brooklyn journal of international law* (Brooklyn, NY), 26:1177-1205, 2001.

Martinez, E. Global development: the new environment of insolvency in Mexico. *Connecticut journal of international law* (Hartford, CT), 17:75-78, 2001.

Moran Bovio, D. UNCITRAL comeinza la elaboración de una guia legislativa sobre insolvencia. *Revista de derecho bancario y bursatil* (Valladolid), 264-273, 2001.

Rouillon, A. A. N. Concursos con repercusion transnacional. La Ley Modelo de la CNUDMI (UNCITRAL) sobre Insolvencia Tranfronteriza. *Anticipio de "Anales" de l'academia nacional de derecho y ciencias sociales de Buenos Aires* (Buenos Aires), XLV, segunda epoca, no. 38: 1-22, 2000.

Sheppard, H. E. The new Mexican insolvency law: policy justifications for U.S. assistance. *UCLA journal of international law and foreign affairs* (Los Angeles, CA), 6:45-87-2001.

Westbrook, J. L. Global development: the transnational insolvency project of the American Law Institute. *Connecticut journal of international law* (Hartford, CT), 17:99-106, 2001.

_____. Managing defaulting multinationals within NAFTA. *In* Foundations and perspectives of international trade law. Eds.: I. Fletcher, L. Mistellis, M. Cremona. London, Sweet & Maxwell, 2001. ISBN=0-421-741-007. p. 465-479.

X. Receivables financing

Bazinas, S. B. Lowering the cost of credit: the promise in the future UNCITRAL convention on assignment of receivables in international trade. *Tulane journal of international and comparative law* (New Orleans, Louisiana), 9:259-294, 2001.

Annex reproduces the UNCITRAL Draft Convention on Assignment of Receivables in International Trade (2001), p. 295-323.

Böhm, C. Die Sicherungsabtretung im UNCITRAL-Konventionsentwurf: "Draft Convention on Assignment in Receivables Financing": Ein Vergleich der Sicherungsabtretung im UNCITRAL-Konventionsentwurf mit den Regelungen im deutschen Recht. Shaker Verlag, Aachen, 2000. ISBN=3-8265-5920-7. xxiv, 282 p.

Lukas, M. Die Stellung des Schuldners in der geplanten UNCITRAL-Zessionskonvention. *Bankarchiv* (Wien), 49:6:453-460, 2001.

Sigman, H. C. and Smith, E. E. Toward facilitating cross-border secured financing and securitization: an analysis of the United Nations Convention on the Assignment of Receivables in International Trade. *The business lawyer* (Baltimore, MD), 57:2:727-766, 2002.

Walsh, C. Receivables financing and the conflict of laws: The UNCITRAL Draft Convention on the Assignment of Receivables in International Trade. *Dickinson law review* (Carlisle, PA), 106:1:159-204, 2001.

XI. International construction contracts

XII. Privately-financed infrastructure projects

Estrella Faria, J. A. International efforts to promote and harmonise concession law: UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects. *Law in transition: European bank for reconstruction and development* (London), Spring 2001: 29-34, 2001.

_____. La Guia legislativa de la CNUDMI sobre proyectos de Infraestructura con financiacion privada: The UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects. *Mercado asegurador* (Buenos Aires, Argentina), 263:48-55, 2001.

_____. The UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects. *The journal of world investment* (Geneva), 3:2:211-229, 2002.

De Cazalet, B. and Crothers, J. D. Presentation of the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects. *Revue de droit des affaires internationales*, Forum Européen de la communication (Paris), 6: 699-710, 2001.

Parallel title of journal: *International business law journal*.

XIII. Security interests

Meetings of OAS-CIDIP-VI drafting committee on secured transactions: conference transcript: day one: I. The Background and significance of this meeting. *Arizona journal of international and comparative law* (Tucson, AZ), 18:334-342, 2001.

Annex**UNCITRAL legal texts**

<i>Short title</i>	<i>Full title</i>
Hamburg Rules (1978)	United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg) ^a
Limitation Convention (1974/1980)	Convention on the Limitation Period in the International Sale of Goods, 1974 (New York) ^b and Protocol amending the Convention on the Limitation Period in the International Sale of Goods, 1980 (Vienna) ^c
UNCITRAL Arbitral Proceedings Notes (1996)	UNCITRAL Notes on Organizing Arbitral Proceedings (1996) ^d
UNCITRAL Arbitration Rules (1976)	UNCITRAL Arbitration Rules (1976) ^e
UNCITRAL Conciliation Rules (1980)	UNCITRAL Conciliation Rules (1980) ^f
UNCITRAL Credit Transfer Law (1992)	UNCITRAL Model Law on International Credit Transfers (1992) ^g
UNCITRAL Electronic Commerce Law (1996)	Model Law on Electronic Commerce of the United Nations Commission on International Trade Law (1996) ^h
UNCITRAL International Countertrade Guide (1992)	UNCITRAL Legal Guide on International Countertrade Transactions (1992) ⁱ
UNCITRAL Electronic Funds Guide (1986)	UNCITRAL Legal Guide on Electronic Funds Transfers (1986) ^j

<i>Short title</i>	<i>Full title</i>
UNCITRAL Construction Contracts Guide (1987)	UNCITRAL Legal Guide on Drawing Up International Contracts for the Construction of Industrial Works (1987) ^k
UNCITRAL Infrastructure Projects Guide (2001)	UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects (2001) ^l
UNCITRAL Model Arbitration Law (1985)	UNCITRAL Model Law on International Commercial Arbitration (1985) ^m
UNCITRAL Model Insolvency Law (1997)	UNCITRAL Model Law on Cross-Border Insolvency (1997) ⁿ
UNCITRAL Model Procurement Law (1994)	UNCITRAL Model Law on Procurement of Goods, Construction and Services (1994) ^o
UNCITRAL Bills and Notes Convention (1988)	United Nations Convention on International Bills of Exchange and International Promissory Notes (1988) ^p
United Nations Guarantee and Stand-by Convention (1995)	United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (1995) ^q
United Nations Sales Convention (1980)	United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) ^r
United Nations Terminal Operators Convention (1991)	United Nations Convention on the Liability of Operators of Transport Terminals in International Trade (1991) ^s
United Nations Assignment Convention (2001)	United Nations Convention on the Assignment of Receivables in International Trade (2001) ^t
United Nations Model Law on Electronic Signatures (2001)	United Nations Model Law on Electronic Signatures (2001) ^u

Notes

^a*Official Records of the United Nations Conference on the Carriage of Goods by Sea, Hamburg, 6-31 March 1978* (United Nations publication, Sales No. E.80.VIII.I), document A/CONF.89/13, annex I.

^b*Official Records of the United Nations Conference on Prescription (Limitation) in the International Sale of Goods, New York, 20 May-14 June 1974* (United Nations publication, Sales No. E.74.V.8), part I.

^c*Official Records of the United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March-11 April 1980* (United Nations publication, Sales No. E.81.IV.3), part I.

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

^e*Ibid.*, Thirty-first Session, Supplement No. 17 (A/31/17), para. 57.

^f*Ibid.*, Thirty-fifth Session, Supplement No. 17 (A/35/17), para. 106.

^g*Ibid.*, Forty-seventh Session, Supplement No. 17 (A/47/17), annex I.

^h*Ibid.*, Fifty-first Session, Supplement No. 17 (A/51/17), annex I; see also General Assembly resolution 51/162, annex, of 16 December 1996.

ⁱUnited Nations publication, Sales No. E.93.V.7.

^j*Ibid.*, Sales No. E.87.V.9.

^k*Ibid.*, Sales No. E.87.V.10.

^l*Ibid.*, Sales No. E. 01.V.4.

^m*Official Records of the General Assembly, Fortieth Session, Supplement No. 17 (A/40/17)*, annex I.

ⁿ*Ibid.*, Fifty-second Session, Supplement No. 17 (A/52/17), annex I.

^o*Ibid.*, Forty-ninth Session, Supplement No. 17 and corrigendum (A/49/17 and Corr.1), annex I.

^p*Ibid.*, Forty-second Session, Supplement No. 17 (A/42/17), annex I; see also General Assembly resolution 43/165, annex, of 9 December 1988.

^qGeneral Assembly resolution 50/48, annex, of 11 December 1995.

^r*Official Records of the United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March-11 April 1980* (United Nations publication, Sales No. E.81.IV.3), part I.

^s*Official Records of the United Nations Conference on the Liability of Operators of Transport Terminals in International Trade, Vienna, 2-19 April 1991* (United Nations publication, Sales No. E.93.XI.3), part I, document A/CONF.152/13, annex.

^tGeneral Assembly resolution 56/81, annex, of 12 December 2001.

^u*Ibid.*, 56/80, annex of 12 December 2001.

V. CHECK-LIST OF DOCUMENTS

<i>Document symbol</i>	<i>Title or description</i>	<i>Location in present volume</i>
A. List of documents before the Commission at its thirty-fourth session		
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A/CN.9/484	Report of the Working Group on Electronic Commerce on its thirty-eighth session	Part two, II, C
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A/CN.9/XXXIV/CRP.5	Proposal of the "Organisation Intergouvernementale Pour Les Transports Internationaux Ferroviaires"	Not reproduced
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A/CN.9/XXXIV/CRP.11	Decision regarding the UNCITRAL Model Law on Electronic Signatures	Not reproduced
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2. Restricted series

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A/CN.9/WG.IV/XXXVII/CRP.2 and Add.1-2	Report of the Drafting Group	Not reproduced

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A/CN.9/WG.IV/WP.88	Working paper submitted to the Working Group on Electronic Commerce at its thirty-eighth session: Draft Guide to Enactment of the UNCITRAL Model Law on Electronic Signatures	Part two, II, D
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A/CN.9/WG.IV/WP.89	Working paper submitted to the Working Group on Electronic Commerce at its thirty-eighth session: Legal aspects of electronic commerce: Legal barriers to the development of electronic commerce in international instruments relating to international trade: ways of overcoming them	Part two, II, E
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A/CN.9/WG.IV/WP.90	Working paper submitted to the Working Group on Electronic Commerce at its thirty-eighth session: Possible future work on electronic commerce: Transfer of rights in tangible goods and other rights	Part two, II, F
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A/CN.9/WG.IV/WP.91	Working paper submitted to the Working Group on Electronic Commerce at its thirty-eighth session: Legal aspects of electronic commerce: possible future work in the field of electronic contracting: an analysis of the United Nations Convention on Contracts for the International Sale of Goods	Part two, II, G
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A/CN.9/WG.II/WP.110	Working paper submitted to the Working Group on Arbitration at its thirty-third session: Settlement of Commercial Disputes: Possible uniform rules on certain issues concerning settlement of commercial disputes: written form for arbitration agreement, interim measures of protection, and conciliation	Part two, III, B
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<i>Document symbol</i>	<i>Title or description</i>	<i>Location in present volume</i>
A/CN.9/WG.II/WP.111	Working paper submitted to the Working Group on Arbitration at its thirty-third session: Possible future work: court-ordered interim measures that may be issued by arbitral tribunals, validity of agreement to arbitrate	Part two, III, C
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VI. LIST OF UNCITRAL DOCUMENTS REPRODUCED IN THE PREVIOUS VOLUMES OF THE YEARBOOK

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*For the thirty-third session (Vienna, 11-22 December 2000), this Working Group was named: Working Group on International Contract Practices (see A/55/17, para. 186).

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