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## United Nations Commission on International Trade Law Forty-fourth session

### Summary record of the 936th meeting

Held at the Vienna International Centre, Vienna, on Monday, 4 July 2011, at 2 p.m.

*Chairperson:* Mr. Moollan .....(Mauritius)

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*The meeting was called to order at 2.20 p.m.*

**Online dispute resolution: progress reports of Working Group III** (A/CN.9/716 and A/CN.9/721)  
(continued)

1. **The Chairperson** said that, on the question of whether the mandate of Working Group III should include consumer-to-consumer transactions, it was important to avoid procedural arguments about the precise scope of the Working Group's mandate. He therefore suggested that the Group be instructed to discuss consumer-to-consumer transactions on a non-priority basis while continuing to focus primarily on the two topics already within its mandate. The Working Group should be requested to report on the issue of consumer-to-consumer transactions separately. Also, the Working Group should be requested to consider carefully how the regime that it was developing would interact with existing consumer protection regimes and with public policy, so as to address the concerns expressed by some delegations in that regard. In addition, the Commission might wish to express its appreciation for the Group's work.

2. **Mr. Loken** (United States of America) said that his delegation supported the solution just suggested by the Chairperson. Consumer-to-consumer transactions should not be the main focus of the Working Group's efforts; however, it would not be desirable to allow controversy regarding the Working Group's mandate to detract from the consideration of business-to-consumer issues.

3. **Mr. Bellenger** (France) said that his delegation also supported the solution suggested by the Chairperson. However, the instructions to the Working Group should specify that consumer protection was to be taken into account not only in the context of consumer-to-consumer transactions but also in that of business-to-consumer transactions. In addition, the Secretariat should, in the interests of transparency, ensure proper follow-up to the Working Group's activities.

4. **The Chairperson** took it that the Commission wished to instruct the Working Group to proceed along the lines he had suggested, with account taken of what had just been said by the representative of France regarding consumer protection.

5. *It was so decided.*

**Security interests: progress reports of Working Group VI** (A/CN.9/714 and A/CN.9/719)

6. **Mr. Bazinas** (Secretariat), introducing the reports of Working Group VI on the work done at its eighteenth and nineteenth sessions (A/CN.9/714 and A/CN.9/719), said that, at its eighteenth session, the Group had considered the first draft of a text, prepared by the Secretariat, on the registration of security rights in moveable assets. It had made the working assumption that the final text would be a guide, with commentary and possibly with recommendations for model regulations. It had been agreed that the guide should be consistent with the UNCITRAL Legislative Guide on Secured Transactions.

7. The Working Group had also considered issues relating to electronic registries, in order to ensure that the guide would be consistent with the UNCITRAL texts on electronic communications.

8. At its nineteenth session, some delegations had expressed the view that the guide should be a stand-alone document, and that it should include material from the Legislative Guide on Secured Transactions so as to explain how a security rights registry would fit in with the secured transactions law recommended in the Legislative Guide. Others had felt that the emphasis in the guide should be on model regulations with commentary. Further discussion of that issue had been deferred.

9. Differing views had also been expressed as to whether the text currently formulated as model regulations should instead take the form of recommendations, since model regulations might presuppose the existence of a model law on secured transactions.

10. The Working Group had completed the first reading of the draft security rights registry guide and the draft model regulations and had requested the Secretariat to prepare a new version for the next session.

11. Some delegations had expressed the view that the Working Group would be able to complete its work within two further sessions, while others had expressed the view that more time would be needed. In the latter case, the text would not be ready for submission to the Commission until 2013.

12. After the provisional agenda for the Commission's current session (A/CN.9/711) had been issued, two further topics had been suggested for Working Group VI's consideration; the Commission might wish to take them into account in its consideration of the reports of the Working Group.

13. The first topic, proposed by the World Bank, was the development of a set of secured transactions principles based on the UNCITRAL Legislative Guide on Secured Transactions, along the lines of the work previously done to incorporate the UNCITRAL Legislative Guide on Insolvency Law into the World Bank's set of principles on insolvency and creditor rights. The Commission, which could be justly proud that the Legislative Guide on Secured Transactions had become the common reference tool for many countries that were currently reviewing their secured transaction legislation, might wish to mandate the Secretariat to conduct consultations with the World Bank with a view to preparing a first draft of a set of principles for the Commission's consideration.

14. The second topic was the law applicable to third-party effectiveness and the priority of competing claims in assigned receivables, which was addressed in the United Nations Convention on the Assignment of Receivables in International Trade (the United Nations Assignment Convention) and the UNCITRAL Legislative Guide on Secured Transactions, but not in the European Union's Rome I Regulation on the law applicable to contractual obligations. The European Commission had tasked the British Institute of International and Comparative Law with preparing a study on the issue and would conduct consultations on it once it had been published.

15. UNCITRAL might wish to take note of those developments and renew the mandate that it had given the Secretariat to coordinate with the European Commission with a view to ensuring a consistent approach to the issue.

16. UNCITRAL might also wish to note that it would make sense for a single law to apply to disputes relating to international receivables financing, irrespective of whether or not the court hearing the case was in a European Union member State.

17. The European Commission had expressed its willingness to coordinate with UNCITRAL on the issue. UNCITRAL might therefore wish to call on the

European Commission not only to engage in such coordination but also to consider issuing a statement to the effect that European Union member States were free to ratify the United Nations Assignment Convention for matters relating to international receivables that were not covered by European Union regulations, particularly disputes brought before a court outside the European Union in which the applicable law might be either the Convention or the national law of the country in question.

18. In the interests of harmonious relations, the Commission might wish to note that the United Nations Assignment Convention could not hamper the application of a European Union instrument and that a European Union instrument could not stand in the way of a United Nations convention.

19. **Mr. Sorieul** (Secretary of the Commission) said that the Secretariat would do its best to ensure that Working Group VI had a text to be submitted to the Commission for adoption in 2012. The envisaged cooperation with the World Bank and the European Commission did not appear to require the involvement of the Working Group at the present stage. When the UNCITRAL Legislative Guide on Insolvency Law had been incorporated into the World Bank's documentation, detailed follow-up by the Secretariat — but no Working Group meetings — had been needed. He hoped that that precedent could be followed in the present case, especially as no additional resources had been requested by the Secretariat for its work with the World Bank on insolvency.

20. **The Chairperson** asked whether the issue of promoting ratification of the United Nations Assignment Convention had been discussed with the European Commission.

21. **Mr. Bazinas** (Secretariat) said that in the report on the fortieth session of UNCITRAL (A/62/17) it was stated that the European Commission shared the Secretariat's concerns regarding the need for a coordinated approach and took the view that a lack of coordination would undermine the certainty achieved at the international level on the law applicable to third-party effects of assignments. It was also stated that UNCITRAL had noted with appreciation the European Commission's willingness to cooperate closely with the UNCITRAL Secretariat in order to ensure coherence between the United Nations Assignment

Convention and any instrument developed by the European Union and to facilitate ratification of the Convention by European Union member States.

22. Recent consultations had made it clear that the European Commission could not take a more specific position on the issue until a first draft of an instrument had been prepared and consultations had been conducted with member States.

23. **Mr. Lara Cabrera** (Mexico) said that security rights registries should be established in electronic form, although paper versions ought not to be ruled out, and care should be taken to ensure consistency with the UNCITRAL Legislative Guide on Secured Transactions. The Model Inter-American Law on Secured Transactions could provide useful guidance.

24. The success of the electronic security rights registry recently launched in Mexico underlined the relevance of the Commission's work in that area.

25. His delegation was in favour of the Secretariat's cooperating with the World Bank and the European Commission on the two topics mentioned.

26. **Ms. Sabo** (Canada) said that, since the UNCITRAL Legislative Guide on Secured Transactions had proved to be so successful, the content of the security rights registry guide should be similar — namely, commentary and recommendations. Drafting model regulations with commentary thereon was premature and possibly unwise: model regulations would be too rigid and would entail the risk of departures from the Legislative Guide.

27. She expressed support for further cooperation with the Bank on the topic of secured transactions. She also expressed support for coordination with the European Commission with regard to the law applicable to third-party effects of assignments, since that issue required a global solution, and urged the Secretariat to encourage the European Commission to ensure that European Union member States could ratify the United Nations Assignment Convention if they so wished.

28. Consideration of the future work of the Working Group should be deferred until work on the draft registry guide had been completed.

29. **Mr. Loken** (United States of America) expressed support for the Secretariat's cooperating with the

European Commission and the World Bank without the Working Group's involvement at the current stage.

30. He hoped that the Working Group would have a text ready for adoption at the Commission's next session; in the meantime, it would be premature to assign further work to the Group. However, at an appropriate time the Working Group might begin to consider converting the Legislative Guide into a model law.

31. **Ms. Nesdam** (Norway), expressing support for the comments made by the representative of Canada regarding the content of the draft security rights registry guide, said that the Commission should provide some guidance to the Working Group in that connection.

32. **Ms. Sabo** (Canada) said she hoped that the comments made in the Commission, which would be reflected in the report on the current session, would be taken as guidance by the Working Group.

33. **The Chairperson** said that it might be difficult for the Commission to give guidance to the Working Group without the benefit of input from the relevant experts.

34. **Mr. Bellenger** (France) said that the Working Group should not pre-empt a decision on the content of the draft registry guide; one of the documents considered by the Working Group already resembled model regulations. The draft registry guide should rather take the form of recommendations, in line with the Legislative Guide on Secured Transactions, on which it was based.

35. His delegation, which considered that the Secretariat should cooperate with the World Bank and the European Commission on the issues mentioned, agreed that it would be premature to debate the future activities of the Working Group before its current work was complete.

36. **Mr. Loken** (United States of America), supported by **Mr. Lara Cabrera** (Mexico), said it was his understanding that the existing mandate of the Working Group permitted it to determine the type of instrument that would ultimately result from its deliberations. His delegation saw no need to alter that mandate at the present stage. The Group should continue its work in the normal way and request guidance from the Commission at a later stage if necessary.

37. **The Chairperson** took it that the Commission did not wish to instruct the Working Group as to the content of the draft security rights registry guide at the present stage and that it wished the Working Group to continue its work in line with its existing mandate. The Working Group would report back to the Commission, which would, of course, take the final decision on any text proposed by the Working Group.

38. He also took it that the Commission wished the Secretariat to cooperate with the World Bank and the European Union along the lines discussed.

39. *It was so decided.*

40. **Mr. Bazinas** (Secretariat), referring to the concern that the decision on the final form of the draft security rights registry guide had been pre-empted, said that, in the next version of the text, the draft model regulations would be set out both as model regulations and as recommendations, so that both options remained open for a decision by the Working Group.

41. Two hard-copy editions of the UNCITRAL Legislative Guide had been published; one was available in all six official languages and the other in all except French.

42. **Mr. Sorieul** (Secretary of the Commission) said that, in future, most UNCITRAL texts would be published in electronic form only, owing to budgetary constraints. However, the Secretariat was considering the possibility of printing small numbers of copies on demand in exceptional cases.

43. **Mr. Olivencia Ruiz** (Spain) said it was regrettable that one of the hard-copy editions of the Legislative Guide was not available in all six official languages.

#### **Current and possible future work in the area of electronic commerce (A/CN.9/728 and Add.1)**

44. **Mr. Castellani** (Secretariat), introducing the report on present and possible future work on electronic commerce (A/CN.9/728 and Add.1), said that the document reported on the colloquium held on that subject in February 2011.

45. The Working Group on Electronic Commerce (Working Group IV) had not been active for some time, but the Secretariat had been working on a number of issues, in particular electronic single window facilities, with various partners, including the World

Customs Organization (WCO). Since electronic commerce was relevant to the work of other working groups, the Secretariat had made efforts to ensure coordination among them and consistency with the standards existing in that field. Also, the Secretariat regularly received requests for expert input on electronic commerce from bodies such as the United Nations Centre for Trade Facilitation and Electronic Business (UN/CEFACT); some of those requests might be more appropriately addressed to the Commission.

46. At the colloquium, concern had been expressed that, if the Working Group on Electronic Commerce continued not to meet for a prolonged period, the Commission's position as the core legal body for the establishment of global standards for electronic commerce might be at risk.

47. **Mr. Loken** (United States of America) called for the reconvening of Working Group IV, which should focus in particular on electronic transferable records and associated issues relating to single window facilities, identity management and mobile payments, in cooperation with WCO and UN/CEFACT.

48. If the Working Group were reconvened, it should consider the recent UN/CEFACT recommendation on digital evidence certification, which raised issues directly linked to the UNCITRAL model laws on electronic commerce.

49. **Mr. Olivencia Ruiz** (Spain) called for the reconvening of the Working Group on Electronic Commerce. His delegation had already submitted a proposal for the future work of the Group (A/CN.9/682) at the Commission's forty-second session.

50. For centuries, legal regimes for the exercise of various rights had been paper-based. A fundamental link had long been established between ownership of a right and the physical document attesting that ownership; the right was transferred by transferring ownership of the document. Although the paper-based transfer of rights had long been governed by uniform rules, no such legal framework applied to the electronic equivalent, despite its growing importance. Many countries were developing laws in that area, with a particular emphasis on registries. In the interests of harmonization, the Commission should develop new standards in that area, focusing in particular on electronic transferable records.

51. **Mr. Maradiaga Maradiaga** (Honduras), expressing support for the comments made by the representatives of the United States of America and Spain, said that many of the participants in the colloquium held in February 2011 had agreed on the need for Working Group IV to reconvene with a view to developing a legal instrument that would address all the changes in trade arising from technological development. For its part, his delegation was particularly interested in the proposal to use electronic single windows.

52. **Ms. Aigner** (Observer for the World Customs Organization) said that UNCITRAL texts were widely used by WCO member States. However, many of those States were struggling to implement electronic single windows and required legal guidance in that regard. Many of the instruments currently available were not specific enough for the needs of customs administrations.

53. Working Group IV should be reconvened as soon as possible so that it could begin deliberating the matters raised at the recent colloquium, in particular dematerialization, identity management and mobile devices.

54. **Mr. Chong** (Singapore) said that his delegation was in favour of reconvening Working Group IV, as there had been important developments in the field of electronic commerce since the Group had last met, in 2004.

55. He expressed support for the Commission's work on online dispute resolution, which was linked to electronic commerce. Of the topics proposed for referral to Working Group IV, his delegation was particularly interested in electronic transferable records and identity management.

56. Singapore had been the first country to enact legislation based on the UNCITRAL Model Law on Electronic Commerce and the first to incorporate the United Nations Convention on the Use of Electronic Communications in International Contracts into its legislation. It had participated in the work of Working Group IV in the past and would be happy to participate again if the Group were reconvened.

57. **Ms. Sabo** (Canada), said that, although UNCITRAL had a long history of work on electronic commerce and had prepared important instruments in that area, her delegation did not support the

reconvening of the Working Group at the present stage, since none of the envisaged topics was yet ripe for referral to a working group.

58. Her delegation welcomed the cooperation between the Secretariat and WCO on the issue of single window facilities, which should continue outside the context of a working group for the time being.

59. The topic of identity management raised a number of interesting issues, but none of them was sufficiently well defined for a working group to address. Also, her delegation was not convinced that the existing legal framework for mobile commerce was inadequate. Moreover, many of the envisaged topics raised privacy and data protection issues that fell outside the Commission's remit. In addition, it would not be advisable to give the Working Group an open mandate, as experience had shown that to be an inefficient approach.

60. Lastly, it was not appropriate to reconvene the Working Group at a time of budget cuts. She proposed that the Commission wait a year before reconsidering the issue.

61. **Mr. Bellenger** (France) said that his delegation agreed with the views expressed by the representative of Canada. Among the many envisaged topics, it was difficult to identify one that was sufficiently well defined and important to justify reconvening of the Working Group. The topic of electronic transferable records had already been addressed unsuccessfully on a number of occasions in the past. The topic of electronic single windows was an important one, but it was more relevant to the remit of WCO than to that of UNCITRAL. There were some specific questions relating to that topic that could be put to a working group, but they were of secondary importance. The use of mobile devices in electronic commerce was a worthwhile topic for discussion but should be approached with great care, as it was directly linked to consumer rights. Identity management was a topic already being addressed in a number of countries, and his delegation would not be opposed to its being considered by a working group. However, since it related to personal data and the protection of privacy, it was politically sensitive. It should therefore be addressed only within strictly defined boundaries.

*The meeting was suspended at 3.55 p.m. and resumed at 4.30 p.m.*

62. **The Chairperson** said that there seemed to be broad support in principle for reconvening the Working Group provided that it was given a sufficiently specific mandate. Further discussion was required in order to identify a suitable topic for the Group to consider and to determine the allocation of resources for its work.
63. **Mr. Sorieul** (Secretary of the Commission) said that the Working Group on Electronic Commerce would need to be given clear priorities and goals; bearing in mind the shortage of resources in the Secretariat, an open mandate could not be justified. At the February 2011 colloquium, progress had been made in identifying suitable topics for discussion.
64. The strongest support had been expressed for the topic of electronic transferable records, which had been discussed in the past — most recently in the context of the Rotterdam Rules — but without a conclusive outcome. Unsuccessful attempts had been made in the maritime transport sector to establish a system of electronic bills of lading. Some States had enacted new legislation or were attempting to address the issue in other ways; those efforts could be a starting point for discussing the establishment of a global regime for electronic transferable records.
65. Discussion of such a regime would touch on other issues, including identity management, which was perhaps the most relevant in the context of establishing a legal regime for electronic commerce. In its existing texts on electronic commerce, the Commission had attempted to establish the equivalence of electronic and paper documents but had taken a cautious approach to all issues relating to data protection. Identity management was therefore one element that could be considered in the establishment of a regime for electronic transferable records.
66. The issue of mobile commerce was not directly linked to that of electronic transferable records, but some aspects of the latter might be relevant in connection with mobile commerce. Generally speaking, the issues associated with mobile commerce were not fundamentally different from those associated with traditional electronic commerce. The Commission might need to reflect on the legal regime provided for in the UNCITRAL Model Law on International Credit Transfers, which could be applied in a number of new ways in the context of electronic transferable records and mobile commerce.
67. The Secretariat was currently working on the cross-cutting subject of electronic single windows in response to a request from WCO. If the Working Group on Electronic Commerce were reconvened, it would be better placed to respond to that request, once WCO had determined more precisely the subjects on which it required the Commission's expertise.
68. One option for the Working Group would be to consider all the topics envisaged but to focus on seeking definitive solutions to the problems of electronic transferable records. An effective and widely applied regime for the latter could be a useful complement to the Rotterdam Rules.
69. In the past, UNCITRAL had led the way in establishing legal regimes for new technologies. However, it might cease to lead the way if the Working Group remained inactive any longer.
70. **The Chairperson** said it was his understanding that the topic of electronic single windows was not yet ripe for consideration by the Working Group, although the Group could address the issues raised in that regard by WCO.
71. Regarding the concerns expressed about giving the Group an overly broad mandate, electronic transferable records seemed to have been identified as a key topic that was sufficiently well defined to be referred to the Group. If, in a year's time, the Group felt that it had made enough progress on that topic to request a broader mandate, the Commission could decide to refer to it the topic of identity management or that of mobile commerce.
72. **Mr. Loken** (United States of America), **Mr. Chong** (Singapore) and **Mr. Maradiaga Maradiaga** (Honduras) expressed support for the course of action suggested by the Chairperson.
73. **Mr. Tornero** (Observer for the International Air Transport Association) said that his delegation was in favour of reconvening the Working Group on Electronic Commerce even if its mandate was limited to electronic transferable records. The aviation industry would particularly appreciate guidance as to how the Rotterdam Rules might apply to air waybills and other transportation documents. Also, his delegation would welcome the inclusion of the topic of electronic single windows in the Working Group's mandate.

74. **Ms. Escobar** (El Salvador) said that her delegation was happy to proceed along the lines suggested by the Chairperson. Work on electronic transferable records could be beneficial in terms of legal certainty.

75. **Mr. Olivencia Ruiz** (Spain) said that his delegation was in favour of reconvening the Working Group. Work on the topic of electronic single windows was well advanced and could be completed by the Group within a short period of time.

76. The transfer of electronic records implied the transfer of the rights referred to in such records. Previous attempts to address the issue had produced only partial solutions, although the Rotterdam Rules could be a good starting point for discussions. A more comprehensive approach to the issue within the Working Group would be welcome.

77. **The Chairperson** took it that the Commission wished to reconvene the Working Group on Electronic Commerce and to mandate it to consider the topic of electronic transferable records. If the consideration of that topic raised other issues, such as identity management or mobile commerce, the Group would have to seek the Commission's guidance as to how to proceed.

78. *It was so decided.*

*The meeting rose at 4.55 p.m.*